IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NAVIGATORS INSURANCE COMPANY, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. H-19-461
	§	
RIO MARINE, INC., *et al.*,	§	Rule 9(h) Admiralty
	§	
Defendants.	§	

MEMORANDUM AND OPINION

A contractor's employee injured at work often sues the worksite owner and other contractors or subcontractors working at the same area of the worksite. If one or more insurer refuses to defend, pay defense costs, or indemnify, the owner often sues the insurer, or the insurer sues the owner, for a judgment declaring the parties' obligations and rights. This case, and a sister case, raise those issues—who pays, and for what, and when? As is sometimes the case, the issue turns on the want of a comma and the omission of a simple word—"or," or "and." This case, and its sister case, remind us that the smallest of word and punctuation choices may matter the most.

Victor Martinez was an employee working for Performance Personnel, LLC, at a shipyard owned by John Bludworth, when he was injured in 2018. Performance Personnel was a third-party subcontractor of Bludworth, as was Rio Marine, Inc. Martinez sued Bludworth and Rio Marine, asserting that their negligent work on electrical equipment and their other safety failures caused his accident and injuries.

Performance and Bludworth had a Master Service Agreement that required Performance to defend and indemnify Bludworth. Performance's insurer, Argonaut Insurance Company, rejected Bludworth's coverage demand and filed a declaratory judgment action to establish that its policy does not cover Bludworth's claim. *Argonaut Ins. Co. v. Rio Marine, Inc.*, No. 19-cv-2296 (S.D. Tex. filed Jun. 26, 2019). A separate opinion is issued in that sister case.

Rio Marine and Bludworth also had a Master Service Agreement that required Bludworth to defend and indemnify Rio Marine. Rio Marine demanded a defense and indemnity from Bludworth, which demanded coverage by its insurer, Navigators Insurance Company. Navigators, like Argonaut, rejected the demand. Navigators sued Performance and Rio Marine, seeking a declaratory judgment that it does not owe indemnity to Rio Marine and that Bludworth must indemnify Rio Marine. Navigators and Rio Marine have both filed cross-motions for summary judgment based on the initial disclosures. Navigators's and Rio Marine's motions for summary judgment are addressed in this Memorandum and Opinion.

Based on the pleadings, the motions and responses, the Master Service Agreements, the record, and the applicable law, this court grants Navigators's motion for summary judgment against Performance but denies its motion against Rio Marine, and grants Rio Marine's cross-motion for summary judgment. Bludworth, and by extension Navigators, is entitled to defense costs and indemnity from Performance for costs and damages arising from the *Martinez* suit. Conversely, Bludworth, and by extension Navigators, have a duty to defend and indemnify Rio Marine for the costs and damages it incurs in that suit. The reasons for these rulings are explained below.

I. Background

In July 2018, Victor Martinez was badly injured while working in a shipyard owned by John Bludworth Shipyard, LLC. (Docket Entry No. 13-1 at 2). Martinez was an employee of Performance Personnel, LLC, a third-party subcontractor of Bludworth. Martinez sued Bludworth and Rio Marine, Inc., another third-party subcontractor of Bludworth, in Nueces County, Texas. *Martinez v. Rio Marine, Inc.*, No. 2018CCV-61604-3 (Co. Ct. at Law No. 3, Nueces County, Tex. filed Sep. 4, 2018). Martinez's first amended petition alleged that he was hurt because Bludworth and Rio Marine did faulty work on electrical equipment before the accident. (Docket Entry No. 13-1 at 4–5). Martinez asserts that Bludworth and Rio Marine were negligent, negligent per se, and grossly negligent in their many work-safety failures. (*Id.* at 4).

The Master Service Agreement between Performance and Bludworth had the following clause:

> 6.1 HOLD HARMLESS & INDEMNIFICATION: THE SUBCONTRACTOR [Performance] AGREES TO INDMENIFY AND HOLD HARMLESS BLUDWORTH, ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS AND OTHER SUBCONTRACTORS FROM AND AGAINST ALL DAMAGE, LIABILITY OR COST, INCLUDING ATTORNEYS' FEES AND DEFENSE COSTS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE PERFORMANCE OF THE SERVICES BY SUBCONTRACTOR UNDER THIS AGREEMENT, WITHOUT LIMIT AND WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF, INCLUDING ILLNESS, BODILY INJURY OR DEATH TO ANY OFFICER, EMPLOYEE, AGENT, REPRESENTATIVE OR INVITEE OF SUBCONTRACTOR, ILLNESS, BODILY INJURY OR DEATH TO ANY THIRD PARTY OR ILLNESS, BODILY INJURY OR DEATH OF ANY EMPLOYEE, OFFICER OR DIRECTOR OF CONTRACTOR, AND ANY PROPERTY DAMAGE TO THE PROPERTY OF BLUDWORTH, SUBCONTRACTOR OR THIRD PARTY WHETHER SUCH ILLNESS, BODILY INJURY OR PROPERTY DAMAGE IS CAUSED BY THE SOLE, JOINT OR CONCURRENT NEGLIGENCE OF BLUDWORTH, EXCEPTING ONLY SUCH DAMAGE, LIABILITY OR COST ARISING OUT OF THE WILFUL MISCONDUCT OF BLUDWORTH.

(Docket Entry No. 13-5 at 6) (emphasis in original).

Bludworth sent Performance a letter demanding defense and indemnity from Martinez's injury under the Bludworth-Performance Master Service Agreement indemnification clause. (Docket Entry No. 51-3 at 1–2). Performance's insurer, Argonaut Insurance Company, rejected Bludworth's demand and filed a declaratory judgment action, arguing that its policy does not cover Bludworth's claim. *See generally Argonaut Ins. Co. v. Rio Marine, Inc.*, No. 4:19-cv-2296 (S.D. Tex. filed Jun. 26, 2019).

The Rio Marine-Bludworth Master Service Agreement had two indemnification provisions. The first required Rio Marine to indemnify Bludworth. This provision stated:

> 6.1 Except as expressly provided in this Article 6, Rio hereby releases Customer [Bludworth] from any liability for, and shall protect, defend, indemnify, and hold harmless Customer, its partners, its affiliates, and their respective officers, directors, employees, agents, shareholders, and joint owners ("Customer Group") from and against all losses, claims, demands, liabilities, expenses, and causes of action of every kind and character, WITHOUT LIMIT AND WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF OR THE NEGLIGENCE OF ANY PARTY OR PARTIES, arising in connection herewith in favor of Rio, Rio's employees, officers, directors, servants, agents, invitees, contractors, and subcontractors of any tier and the employees of all of the foregoing on account of bodily injury, illness, death, or damage to property belonging to or in the possession of any party in the Customer Group. Rio's indemnity under this Agreement shall be without regard to and without any right to contribution from any insurance maintained by Customer. If it is judicially determined that the monetary limits of insurance required hereunder or of the indemnities assumed under this Agreement (which Rio and Customer hereby agree with be supported either by available liability insurance, or voluntarily self-insured, in part or in whole) exceed the maximum limits permitted under applicable law, it is agreed that said insurance requirements or indemnities shall automatically be amended to conform to the maximum monetary limits permitted under such law.

(Docket Entry No. 13-4 at 5–6) (emphasis in original).

The second provision addressed Bludworth's obligations to indemnify Rio Marine. It stated:

> 6.2 Except as expressly provided in this Article 6, Customer [Bludworth] hereby releases Rio from any liability for, and shall protect, defend, indemnify, and hold

> harmless Rio, its partners, its affiliates, and their respective officers, directors, employees, agents, shareholders, and joint owners ("Rio Group") from and against all losses, claims, demands, liabilities, expenses, and causes of action of every kind and character, WITHOUT LIMIT AND WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF OR THE NEGLIGENCE OF ANY PARTY OR PARTIES, arising in connection herewith in favor of Customer, Customer's employees, officers, directors, servants, agents, invitees, contractors and subcontractors of any tier (other than Rio and its subcontractors of any tier) and the employees of all of the foregoing on account of bodily injury, illness death or damage to property belonging to or in the possession of any member of the Rio Group. Customer's indemnity under this Agreement shall be without regard to and without any right to contribution from any insurance maintained by Rio. If it is judicially determined that the monetary limits of insurance required hereunder or of the indemnities assumed under this Agreement (which Rio and Customer hereby agree with be supported either by available liability insurance, or voluntarily self-insured, in part or in whole) exceed the maximum limits permitted under applicable law, it is agreed that said insurance requirements or indemnities shall automatically be amended to conform to the maximum monetary limits permitted under such law.

(*Id.* at 6) (emphasis in original).

After the *Martinez* suit was filed in state court, Rio Marine also sent Bludworth a demand letter. (Docket Entry No. 13-3). Rio Marine's letter demanded that Bludworth defend and indemnify Rio Marine for costs or damages in the *Martinez* suit. (*Id.*). The letter cites the Master Service Agreement between Bludworth and Rio Marine. (*Id.*).

After receiving Rio Marine's letter, Navigators, Bludworth's insurer, rejected Rio Marine's coverage demand. (Docket Entry No. 52-3). Navigators interpreted Section 6.2 of the Rio Marine-Bludworth Master Service Agreement to apply only to bodily injuries incurred by the Rio Group's own employees. (*Id.* at 2). According to Navigators, because Martinez was not employed by the Rio Group, Bludworth, and by extension Navigators, did not owe Rio Marine any obligation to defend or indemnify. (*Id.*).

Navigators also denied that Rio Marine was covered as an additional assured under the Navigators policy's blanket additional assured endorsement. (*Id.* at 5). This endorsement

reiterated that parties not listed as insureds within the policy could receive coverage as an "additional assured" only if Bludworth, or another "named assured," "is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy or who is added by endorsement." (Docket Entry No. 13-2 at 57). Because Navigators took the position that the Rio Marine-Bludworth Master Service Agreement was not a "written agreement to provide insurance," it also took the position that Rio Marine was not an additional assured under the policy and therefore had no right to claim benefits. (Docket Entry No. 52–3 at 5).

Navigators filed this declaratory judgment action to solidify its position that it is owed defense costs and indemnity by Performance but it does not owe either to Rio Marine. (Docket Entry No. 1). After initial disclosures, Navigators moved for summary judgment against both Performance and Rio Marine, arguing that the language of the Master Service Agreements and its own policy support its interpretation. (Docket Entry Nos. 51, 52). Rio Marine responded, and then moved for leave to treat its response as a cross-motion for summary judgment, arguing that the Rio Marine-Bludworth Master Service Agreement and the Navigators policy require Navigators to provide a defense and indemnify Rio Marine in the *Martinez* suit. (Docket Entry Nos. 61, 68). Rio Marine also requested oral argument on the motions. (Docket Entry No. 69).

Each argument and response is analyzed below under the applicable legal standards.

II. The Legal Standards

A. Summary Judgment

"Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Vann v. City of Southaven*, 884 F.3d 307, 309 (5th Cir. 2018) (per curiam) (quoting *Griggs v. Brewer*, 841 F.3d 308, 311–12 (5th Cir. 2016)). "A genuine dispute of material fact exists when the 'evidence is such that a

reasonable jury could return a verdict for the nonmoving party.'" *Burrell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Brandon v. Sage Corp.*, 808 F.3d 266, 269–70 (5th Cir. 2015) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

B. Choosing the Law that Applies

1. The Performance-Bludworth Master Service Agreement

The Performance-Bludworth Master Service Agreement contains a choice of law provision designating Texas law. (Docket Entry No. 13-5 at 8). "Under federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable." *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 242 (5th Cir. 2009). The parties agree that Texas law controls the interpretation of the Performance-Bludworth Master Service Agreement.

"The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *E. Concrete Materials, Inc. v. ACE Am. Ins. Co.*, 948 F.3d 289, 300 (5th Cir. 2020) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W. 2d 517, 520 (Tex. 1995)). "Under Texas law, contract terms are given their plain, ordinary meaning considered in light of the contract as a whole." *Lyda Swinerton Builders, Inc. v. Okla. Sur. Co.*, 903 F.3d 435, 445 (5th Cir. 2018) (citing *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158–59 (Tex. 2003)). "An unambiguous contract will be enforced as written." *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (citing *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)).

2. The Rio Marine-Bludworth Master Service Agreement

The Rio Marine-Bludworth Master Service Agreement, on the other hand, has a choice of law provision designating maritime law. (Docket Entry No. 13-4 at 8). The parties agree that the provision is valid and enforceable. *See Great Lakes Reinsurance*, 585 F.3d at 242. "A maritime contract containing an indemnity agreement . . . should be read as a whole and its words given their plain meaning unless the provision is ambiguous." *Grogan v. W & T Offshore, Inc.*, 812 F.3d 376, 379 (5th Cir. 2016) (quoting *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 (5th Cir. 1992)).

"Disagreement as to the meaning of a contract does not make it ambiguous, nor does uncertainty or lack of clarity in the language chosen by the parties." *Certain Underwriters at Lloyd's London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 261 (5th Cir. 2020) (quoting *Breaux v. Halliburton Energy Servs.*, 562 F.3d 358, 364 (5th Cir. 2009)).

3. Bludworth's Insurance Policy from Navigators

Unlike the Master Service Agreements, Navigators's insurance policy does not contain a choice of law provision. "Absent a specific and controlling federal rule, cases involving marine insurance contracts are governed by state law." *N. Am. Specialty Ins. Co. v. Debis Fin. Servs. Inc.*, 513 F.3d 466, 470 (5th Cir. 2007). Bludworth and Navigators entered into the policy in Texas and agree that Texas law controls the policy interpretation.

Under Texas law, "[i]nsurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally." *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 497 (Tex. 2020) (quoting *Nat'l Union Fire*, 907 S.W.2d at 520). "The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *E. Concrete*, 948 F.3d at 300 (quoting *Nat'l Union Fire*, 907 S.W.

2d at 520). "When terms are defined in an insurance policy, those definitions control the interpretation of the policy." *Id.* (quoting *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 219 (Tex. 2003)). "When interpreting contract language, courts must strive to give meaning to 'every sentence, clause, and word to avoid rendering any portion inoperative.'" *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 271 (5th Cir. 2011) (quoting *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998)).

III. Analysis

A. The Performance-Bludworth Master Service Agreement

Navigators argues that the Performance-Bludworth Master Service Agreement requires Performance to defend and indemnify Bludworth in the *Martinez* suit. The Agreement requires Performance to indemnify Bludworth for defense costs and damages "arising out of or in any way connected" with Performance's services on the subcontract, even if the costs or damages arise from Bludworth's own negligence so long as it is not due to Bludworth's willful misconduct. (Docket Entry No. 13-5 at 6). The express intent to require indemnification for the insured's own negligence, conspicuously set out in a bolded, all-caps provision, makes this clause enforceable under Texas law. *See XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 149 (5th Cir. 2008) ("[C]ontracting parties seeking to indemnify one party from the consequences of its own negligence must express that intent in specific terms, within the four corners of the document.") (internal quotations omitted); *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 179 (5th Cir. 2016) (clauses in boldface and all caps are conspicuous under Texas law); *see also* TEX. BUS. & COMM. CODE § 1.201(b)(10) (defining "conspicuous" as "language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size").

Performance points out that the indemnity provision does not cover liability for Bludworth's gross negligence or willful misconduct. Performance argues that as a result, it is not liable for any defense costs or liability related to Martinez's gross negligence claims against Bludworth. But, under Texas law, once a party agrees to defend another party, it must defend that party unless no theories of liability give rise to the duty to defend. Or, put another way, as long as one claim is within the policy's coverage, all defense costs are covered. *English v. BGP Int'l, Inc.*, 174 S.W.3d 366, 373–74 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also Lyda Swinerton Builders*, 903 F.3d at 446 ("[T]he general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy.") (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997)).

The fact that Martinez's underlying state court amended petition asserts a gross negligence claim does not excuse Performance's duty to defend Bludworth. Martinez also asserts claims for negligence and negligence per se, which are clearly covered by the Performance-Bludworth Master Service Agreement. Performance has a duty to defend Bludworth in the *Martinez* suit and to indemnify Bludworth and Navigators for defense costs already incurred.[1]

[1] Performance also objects to Bludworth's use of Gasper C. D'Anna's affidavit as part of its summary judgment evidence because the affidavit does not comply with 28 U.S.C. § 1746. *See* 28 U.S.C. § 1746 (requiring affidavits executed within the United States to be sworn under penalty of perjury). D'Anna is the president of Bludworth and supplied the affidavit containing both Master Service Agreements and the Navigators policy. After Performance objected, Bludworth resubmitted the affidavit in accordance with § 1746. (Docket Entry No. 60-1). The claims about the alleged deficiency of the original affidavit are now moot.

B. The Rio Marine-Bludworth Master Service Agreement and the Performance-Navigators Insurance Policy

Navigators flips its argument in interpreting the Rio Marine-Bludworth Master Service Agreement. Navigators contends that the indemnification clause in this Agreement does not require Bludworth to defend or indemnify Rio Marine for the *Martinez* case, or is too ambiguous to allow a court to enforce that obligation. Navigators also argues that the Rio Marine Master Service Agreement is not an "assured contract" under the insurance policy Navigators issued to Bludworth, and Navigators need not cover Rio Marine's defense costs for, or indemnify Rio Marine from, the *Martinez* suit.

Each argument is addressed below.

1. The Rio Marine-Bludworth Master Service Agreement

The indemnity provision in the Rio Marine-Bludworth Master Service Agreement releases Rio Marine from "any liability," and requires Bludworth to "protect, defend, indemnify, and hold [Rio Marine] harmless," from and against "all . . . claims . . . of every kind and character," even if caused by a party's negligence. (Docket Entry No. 13-4 at 6). The duty to defend and indemnify applies to "losses, claims, demands, liabilities, expenses, and causes of action . . . arising in connection herewith in favor of . . . [Bludworth or its] contractors and subcontractors . . . (other than Rio and its subcontractors . . .) . . . on account of bodily injury, illness death or damage to property belonging to or in the possession of any member of the Rio Group." (*Id.*).

The provision releases Rio Marine from any liability for, and requires Bludworth to defend Rio Marine against, all claims "of every kind and character" brought on behalf of a subcontractor's employee, "on account of bodily injury." (*Id.*). The Master Service Agreement

states, in bold and all caps, that this obligation persists regardless of negligence and applies to all suits connected to Bludworth's "subcontractors." (*Id.*). So far, the Master Service Agreement indemnity provision applies to the *Martinez* suit's claims against Rio Marine. Martinez, an employee of one of Bludworth's subcontractors, sued Rio Marine for negligence.

Navigators contends that Bludworth is not required to defend Rio Marine in the *Martinez* suit because the indemnification provision applies only to causes of action arising from the bodily injury, death, or property damage to a member of the "Rio group." Because Martinez was a Performance employee, not a Rio Marine employee, Rio Marine cannot require Bludworth, and by extension Navigators, to cover Rio Marine's costs of defending against, or damages from, Martinez's claims in the underlying suit. In making this argument, Navigators acknowledges the "uncommon indemnity obligations" that result from this reading of the Master Service Agreement, but argues that it is a simple reading of the plain indemnity provision language. (Docket Entry No. 52-1 at 12).

The issue requires attention not only to the words, but to the punctuation in the clauses "arising in connection herewith in favor of [Bludworth]," "contractors and subcontractors . . . (other than Rio . . .)," and "employees of all of the foregoing on account of bodily injury, illness death or damage to property belonging to or in the possession of any member of the Rio Group." (Docket Entry No. 13-4 at 6). Notice the absence of a comma after the word "illness." Grammar would permit either another comma after "death," or the disjunctive word "or," or the conjunctive word "and." The choice would affect the meaning. So, too, does the absence of all these alternatives.

Navigators argues that the clause "of any member of the Rio Group" modifies not only "on account of bodily injury, illness death," but also modifies the final phrase in the list, "or

damage to property belonging to or in the possession of any member of the Rio Group." (Docket Entry No. 13-4 at 6). The clause does not support this interpretation. The prior exclusion of Rio Marine employees, the grouping of "bodily injury, illness death," and the interposed "or" before "damage to property belonging to or in the possession of any member of the Rio Group," make it clear that the indemnity obligation applies to any bodily injury claim by a subcontractor's employee, other than an employee of Rio Marine.

This is consistent with the rule of the last antecedent, which limits qualifying phrases to the phrase immediately preceding it without impairing the meaning of the sentence. *See Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 134 n.2 (Tex. App.—Corpus Christi 2006, pet. denied) ("Although the doctrine of last antecedent has generally applied as a cannon of statutory and constitutional interpretation, we see no reason why it should not be equally applicable to issues of contract construction."); *cf. Dall. Symphony Assoc., Inc. v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019) (applying the rule of the last antecedent to statutory interpretation). The phrase "of any member of the Rio Group" only modifies the immediately preceding phrase about property damage and does not apply to the entire list.

Under this interpretation, the indemnification clause applies to Martinez's claims against Rio Marine for the bodily injuries he received even though he was an employee of a subcontractor that was not part of the Rio Group. This straightforward reading avoids what Navigators recognized as the "uncommon indemnity obligations" its competing interpretation would impose.

The provision is not ambiguous. Read to require Bludworth and its insurer, Navigators, to provide coverage, the provision clearly states each party's obligations under the Master Service Agreement and is consistent with the entirety of Paragraph 6.2. "A court should

construe an indemnity clause to cover all losses which reasonably appear to have been within the parties' contemplation." *Breaux*, 562 F.3d at 364 (quoting *Foreman v. Exxon Corp.*, 770 F.2d 490, 496 (5th Cir. 1985)).

It would have been clearer, and could have been different, had the Paragraph 6.1 language on Rio Marine's obligations to indemnify Bludworth used an "oxford comma" after the word "death," or had put the word "or" or "and" before "damage to property." The Paragraph 6.2 language on Bludworth's obligations to indemnify Rio Marine is nearly a mirror image, with one difference that matters here. In this provision, the drafters inserted commas after "injury" and "death," and used the disjunctive "or" before "damage to property belonging to or in the possession of the [Bludworth Customer Group]." (Docket Entry No. 13-4 at 5–6).

The words and punctuation make it even clearer. The additions of the commas and the disjunctive in Paragraph 6.1 eliminate Navigator's argument for ambiguity in the mirror image provision, Paragraph 6.2. The phrase "of any member of the Rio Group" only applies to property damage claims. The release, defense, and indemnity obligations otherwise apply to all subcontractors' employees' claims for bodily injury, including Martinez's claims against Rio Marine.

When read together, Paragraphs 6.1 and 6.2 achieve their clear intent to have Rio Marine and Bludworth owe each other the same indemnification rights and obligations. Martinez's bodily injury claims are covered under the indemnity provision under the plain wording of the Rio Marine-Bludworth Master Service Agreement and Bludworth must defend Rio Marine from these claims.

2. The Navigators Policy

Navigators alternatively argues that its policy with Bludworth excludes Rio Marine's claim for defense and indemnification from Bludworth. The Navigators policy contains an exclusion for contractual liability, which states, "[t]his insurance does not apply to . . . "[b]odily injury" or "property damage" for which the assured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." (Docket Entry No. 13-2 at 8–9). This exclusion, however, also contains an exception for "assured contracts":

> This exclusion does not apply to liability for damages . . . [a]ssumed in a contract or agreement that is an "assured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the assumed in an "assured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an assured are deemed to be damages because of "bodily injury" or "property damage."

(*Id.* at 9).

The policy defines an "assured contract" as:

> That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(*Id.* at 31).

Navigators argues that the Rio Marine-Bludworth Master Service Agreement is not an "assured contract" because the Agreement does not expressly assume liability for Martinez's damages. The Agreement does not support this argument. Instead, it makes clear that Martinez's claims against Rio Marine are covered by Bludworth's obligations to defend against the costs and losses Rio Marine incurs in the underlying *Martinez* litigation. Bludworth has a

duty to defend and indemnify Rio Marine, and the Master Service Agreement is an "assured contract."

Whether Rio Marine can qualify as an "additional assured" under the plan or is covered directly under an additional endorsement is irrelevant. Navigators must step in to cover Bludworth's obligations to Rio Marine for the costs and losses Rio Marine incurs in the *Martinez* lawsuit.

IV. Conclusion

The two Master Service Agreements, the Navigators policy, and the claims in the *Martinez* lawsuit define the defense and indemnification responsibilities of each party. Performance must indemnify and defend Bludworth, and by extension Navigators, for the costs and losses incurred in the *Martinez* suit against Bludworth. Additionally, Bludworth, and by extension Navigators, have a duty to defend and indemnify Rio Marine for the costs and losses it incurs because of the claims against Rio Marine in the *Martinez* suit. Navigators's motion for summary judgment against Performance is granted, (Docket Entry No. 51), and its motion for summary judgment against Rio Marine, (Docket Entry No. 52), is denied. Rio Marine's cross-motion for summary judgment is granted. (Docket Entry No. 68). The request for oral argument is moot. (Docket Entry No. 69).

SIGNED on July 2, 2020, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge