STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2222

Tony Eiden Company, et al.,
Plaintiffs,

Auto-Owners Insurance Company,
Appellant,

vs.

State Auto Property and Casualty Insurance Company,
Respondent.

Filed January 26, 2009
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-06-17411

R. Stephen Tillitt, Lynn Schmidt Walters, Gislason & Hunter, LLP, 701 Xenia Avenue South, Suite 500, Minneapolis, MN 55416 (for appellant)

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Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

In September 2002, Peter and Laurie Bacig discovered that water was entering the exterior walls of their house, which was built in 1994. They sued the contractor, Tony

Eiden Company, which tendered the claim to four insurance companies. Three of those insurance companies participated in the defense of the Bacigs' claim, which was settled. One insurance company, State Auto Insurance Company, refused to defend Tony Eiden Company and refused to pay any part of the settlement.

Tony Eiden Company and the three participating insurers brought this lawsuit to require State Auto to contribute to the defense and indemnification of Tony Eiden Company. After a court trial, the district court entered judgment for State Auto. On appeal, Auto-Owners Insurance Company argues that the district court erred in its conclusions of law by incorrectly applying the governing caselaw. For the reasons explained below, we affirm.

FACTS

In 1994, Tony Eiden Company built a house in the city of Plymouth. Construction was completed in the fall of 1994, and a certificate of occupancy was issued in March 1995. Peter and Laurie Bacig purchased the house in 1997.

In September 2002, the Bacigs noticed that water was leaking through an electrical outlet on an exterior wall of the house. After further investigation, they discovered moisture in the wall cavity behind the outlet. The Bacigs hired an inspector, who examined the house on October 13, 2002. As a result of the inspection, the Bacigs notified Tony Eiden Company of their claim on October 17, 2002. An engineer later inspected the house on behalf of Tony Eiden Company on three separate occasions. The Bacigs' inspector conducted tests to determine the locations of the water intrusion. These inspections and

tests revealed numerous defects in the construction of the exterior of the house, which allowed water to enter through a variety of channels.

In September 2003, the Bacigs filed a lawsuit against Tony Eiden Company, which tendered the defense of the lawsuit to four insurance companies that had, in a serial manner, issued commercial general liability policies to Tony Eiden Company during the potentially relevant time periods: American Family Insurance Company (October 15, 1993, through October 15, 1998), Transportation Insurance Company (October 15, 1998, through October 15, 2000), Auto-Owners (October 15, 1990, through October 14, 1993, and October 15, 2000, through August 15, 2002), and State Auto (October 15, 2002, through October 15, 2003). American Family, Auto-Owners, and Transportation (hereinafter "participating insurers") defended Tony Eiden Company, incurring fees and costs of approximately $18,000. The participating insurers eventually funded a settlement payment of $50,000. State Auto denied any obligation to defend Tony Eiden Company and did not participate.

Following the settlement with the Bacigs, Tony Eiden Company and the participating insurers commenced a declaratory judgment action against State Auto to establish State Auto's obligation to provide reimbursement, in whole or in part, for the defense and indemnification of Tony Eiden Company. The district court denied State Auto's motion for summary judgment and conducted a two-day court trial. In August 2007, the district court issued its findings of fact, conclusions of law, and order for judgment, with an accompanying memorandum of law, and judgment was entered. The district court held that State Auto had no obligation to indemnify Tony Eiden Company because Tony Eiden Company performed the faulty construction work before State Auto insured Tony Eiden

Company. Thus, the district court concluded that State Auto has no liability to Tony Eiden Company or to the participating insurers. Auto-Owners appeals.

D E C I S I O N

Auto-Owners argues that the district court erred in its analysis of Minnesota caselaw and, consequently, erroneously concluded that State Auto did not breach a duty to indemnify Tony Eiden Company. This case comes to us following a bench trial.

> In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous. However, we are not bound by and need not give deference to the district court's decision on a purely legal issue. When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Porch v. General Motors Acceptance Corp., 642 N.W.2d 473, 477 (Minn. App. 2002) (quotations and citations omitted), *review denied* (Minn. June 26, 2002). Questions of insurance coverage are questions of law that this court reviews de novo. *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992).

I. Duty to Indemnify

The commercial general liability insurance policy that State Auto issued to Tony Eiden Company provides insurance coverage for, among other things, "property damage," which is defined in State Auto's policy, in relevant part, as "[p]hysical injury to tangible property." The policy confines insurance coverage to property damage that "occurs during the policy period." The policy also confines insurance coverage to property damage that "is

caused by an 'occurrence,'" which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

A. The Applicable Caselaw

Under Minnesota law, when a commercial general liability insurance policy provides occurrence-based coverage for property damage, courts apply the "actual-injury" or "injury-in-fact" trigger rule to determine whether property damage occurred during the policy period. *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 415 (Minn. 2003); *Northern States Power Co. v. Fidelity & Cas. Co.*, 523 N.W.2d 657, 662 (Minn. 1994) (*NSP*); *Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co.*, ___ N.W.2d ___, No. A08-0457, slip op. at 8-10 (Minn. App. Jan. 26, 2009). The threshold question is whether "some damage occurred during the policy period." *NSP*, 523 N.W.2d at 663 (emphasis omitted). Under the actual-injury rule, an insurance policy cannot be triggered unless it was in effect at a time when property damage occurred. *Id.* at 662. "For purposes of the actual-injury trigger theory, an injury can occur even though the injury is not diagnosable, compensable, or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period." *In re Silicone*, 667 N.W.2d at 415 (quotation omitted). Furthermore, "'the time of the occurrence is not the time the wrongful act was committed but the time the complaining party was actually damaged.'" *Id.* (quoting *Singsaas v. Diederich*, 307 Minn. 153, 156, 238 N.W.2d 878, 880 (1976)); *cf. Parr v. Gonzalez*, 669 N.W.2d 401, 406-07 (Minn. App. 2003) (holding that coverage was triggered at time of insured's damage to vent cap on roof, which caused subsequent water intrusion).

If the threshold inquiry results in the triggering of multiple insurance policies, a court then must determine which policy or policies should provide coverage. The analytical framework for this determination was described succinctly in *In re Silicone*. First, a court should "determine whether the plaintiffs' injuries are continuous." *In re Silicone*, 667 N.W.2d at 421. If the injuries are not continuous, the policy or policies "on the risk at the time of the injury would pay all losses arising from that injury." *Id.* But if the injuries are continuous, then a court should proceed to the second step of the analysis, where the relevant question is "whether the continuous injury arose from some discrete and identifiable event," *id.*, or "series of events," *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 296 (Minn. 2006). If a court can identify a discrete and identifiable event or series of events, then the policy or policies that are "on the risk at the time of that event [or series of events] are liable for all sums arising from the event" or series of events. *In re Silicone*, 667 N.W.2d at 421; *see also Wooddale Builders*, 722 N.W.2d at 295; *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 733 (Minn. 1997). But if there is no discrete and identifiable event or series of events, then a court should proceed to the third step of the analysis, where the court in some manner allocates damages among the policies that are on the risk during the period of the continuous injury. *In re Silicone*, 667 N.W.2d at 421; *see also Domtar*, 563 N.W.2d at 732-33.

B. Application of Law to this Case

In this case, the district court found that the Bacig house was damaged by "wood rot or deterioration which had been on-going for an extensive period prior to" its discovery on October 13, 2002. The district court also found that "the deterioration process would have

started almost immediately" after water came "into contact with the sheathing and studs" inside the walls of the house. The district court further found that the "rotting process began, at least to some degree, within the first year or two after construction and then proceeded during the summer months up until October 13, 2002." The district court made a finding that "property damage continued to occur to the building materials at the Bacig residence through at least November 15, 2003," but the district court also made a finding that "no appreciable new damage to the home could be identified as occurring after October 13, 2002." Based on its findings of fact, the district court concluded that "State Auto has no legal liability for damages which took place before its policy commenced, because these damages stemmed from a single, discrete and identifiable event," which the district court identified as "Eiden's construction" of the house.

Auto-Owners does not argue that the district court's findings of fact are clearly erroneous. Rather, Auto-Owners argues that the district court erred in its analysis by improperly focusing on Tony Eiden Company's construction of the house rather than on later events.

As a threshold matter, State Auto's policy is triggered because the district court found that property damage occurred "through at least November 15, 2003." As stated above, State Auto's policy was in effect from October 15, 2002, through October 15, 2003.

At the first step of the analysis, it is clear that the injuries are continuous. The district court found that the property damage to the Bacigs' house was "continuous" and "ongoing." Neither party to this appeal argues that the property damage is not continuous in nature.

The second step of the analysis is the crux of the case. The key question is "whether the continuous injury arose from some discrete and identifiable event," *In re Silicone*, 667 N.W.2d at 421, or "series of events," *Wooddale Builders*, 722 N.W.2d at 296. Auto-Owners contends that the district court erred at the second step by reasoning that Tony Eiden Company's construction of the house is the legally significant discrete and identifiable event. We agree with Auto-Owners on this point. The analysis at the second step focuses not on the timing of the insured's conduct but, rather, on the timing of the consequences of the insured's conduct. In a case such as this one, when seeking to ascertain the discrete and identifiable event or series of events that gave rise to the continuous injury, a court should focus on the timing of either the intrusion of water or moisture into the house or the resulting damage to the house that is caused by the water intrusion. *See Donnelly Bros. Constr. Co.*, ___ N.W.2d at ___, No. A08-0457, slip op. at 10.

In its detailed and comprehensive findings of fact, the district court found that property damage occurred when the house became affected by "wood rot" and "deterioration," which the district court found was caused by "repeated water intrusion and continued exposure to moisture and temperature conditions conducive to fungi growth." The district court found that it is "not possible to determine the extent of property damage occurring at any particular time, or in any particular year" but that "it is more likely than not that th[e] rotting process began, at least to some degree, within the first year or two after construction." Thus, the district court's findings imply that property damage began to occur between approximately 1994 and approximately 1995 or 1996.

Because it is impossible to ascertain a specific date when property damage began to occur, there is no single discrete and identifiable event. The district court's findings, however, support the conclusion that the continuous injury to the Bacigs' house arose from a series of discrete and identifiable events. This conclusion is consistent with the most recent statement from the supreme court that "there is no reason for the insured's coverage, or the insurers' obligations, to be diminished simply because the damages arise from a series of events rather than a single discrete occurrence." *Wooddale Builders*, 722 N.W.2d at 296. Our conclusion also is consistent with *In re Silicone*, in which the supreme court stated that "allocation is meant to be the exception and not the rule" and that if it is possible to "identify a discrete originating event that allows us to avoid allocation, we should do so." 667 N.W.2d at 421-22.

In addition, it is appropriate in this case to rely on a series of discrete and identifiable events, rather than to allocate, because the origins of the underlying injury in this case are quite unlike those in *Domtar*, where the property damage arose from the operation of a tar refining plant over a period of decades, 563 N.W.2d at 728-29, and quite unlike those in *NSP*, where the property damage arose from the operation of a coal-tar gasification site that also spanned several decades, 523 N.W.2d at 659. In each of those cases, the property damage arose from events occurring over a longer period of time, and the parties were unable to present evidence that specifically identified any events that caused the ensuing property damage. *Domtar*, 563 N.W.2d at 730; *NSP*, 523 N.W.2d at 663 n.7. Here, the district court's findings are more particular in describing the origins of the property damage and the timing of relevant events.

Furthermore, our conclusion is consistent with the supreme court's suggestions that lower courts "be flexible in responding to new fact situations," *NSP*, 523 N.W.2d at 665, and that its caselaw "be viewed through the lens of the facts presented" in each case, *Wooddale Builders*, 722 N.W.2d at 301. In this case, the series of incidents of water intrusion at the Bacig house is the functional equivalent of a single discrete and identifiable event. Thus, in light of the district court's findings of facts, we conclude that the continuous injury to the Bacigs' house arose from a series of discrete and identifiable events that occurred wholly outside State Auto's policy period.[1]

Therefore, State Auto did not breach a duty to indemnify Tony Eiden Company, and the district court properly entered judgment in favor of State Auto on that claim.

II. Duty to Defend

Auto-Owners also argues that State Auto breached a duty to defend Tony Eiden Company and, thus, is liable to the participating insurers for a portion of the costs of

[1]Even if we were to conclude that the continuous injury to the Bacigs' house did *not* arise from a discrete and identifiable event or series of events, we nonetheless would reach the same ultimate conclusion that State Auto does not have a duty to indemnify Tony Eiden Company. State Auto proved an exception to allocation at the third step of the analysis. "Insurers that provided coverage to the insured during the liability allocation period are liable for a proportionate share of damages, *unless the insurer can show that no appreciable damage occurred during its triggered policy period*." *Wooddale Builders*, 722 N.W.2d at 294-95 (emphasis added) (citing *NSP*, 523 N.W.2d at 664). In most cases, the operative clause of this sentence governs. In this case, however, the exception would apply because the district court made an explicit finding that "no appreciable new damage to the home could be identified as occurring after October 13, 2002," which was the date on which the Bacigs' inspector discovered property damage inside the exterior walls of the house. State Auto's policy did not become effective until October 15, 2002. In light of the district court's unchallenged finding of fact, which speaks directly to the exception recognized in *Wooddale Builders*, we would conclude, if we were to reach the issue, that none of the liability for the indemnification of Tony Eiden Company should be allocated to State Auto.

defense. Tony Eiden Company and the participating insurers alleged this claim in the complaint and asserted it in their trial memorandum, but the district court did not expressly discuss the issue. On appeal, State Auto does not respond to Auto-Owners's argument.

An insurer's duty to defend an insured "is distinct from and broader than the duty to indemnify." *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995). "An insurer's duty to defend arises when the insurance policy 'arguably' provides coverage for claims made against the insured." *Donnelly Bros. Constr. Co.*, ___ N.W.2d at ___, No. A08-0457, slip op. at 5-6 (quoting *Franklin v. Western Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406-07 (Minn. 1998)). "Generally where questions of fact need to be discovered to determine if an insurer has a duty to indemnify, a duty to defend exists." *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102, 106 (Minn. App. 2005), *review denied* (Minn. June 28, 2005). Whether an insurer has a duty to defend an insured is a question of law that we review de novo. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002).

"An insured may recover from its insurer attorney fees that the insured has incurred defending itself against claims by a third party when the insurer has a contractual duty to defend the insured, but has refused to do so." *SCSC*, 536 N.W.2d at 316. Auto-Owners acknowledges that, under what is known in the Minnesota caselaw as the *Iowa National* rule, each insurer's duty to defend is independent of the duty of another insurer such that "an insurer that provides a defense is not entitled to recovery of costs from the insurers that did not provide a defense." *Wooddale Builders*, 722 N.W.2d at 302 (citing *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 367-68, 150 N.W.2d 233, 236-37 (1967)). Although the parties in *Wooddale Builders* had waived the *Iowa National* rule,

id. at 302 n.15, the court explained that, "*absent a loan receipt agreement*, an insurer that undertakes the defense of its insured may not seek recovery of defense costs from the insured's other insurers who also owed a duty to defend but failed to provide a defense," *id.* (emphasis added).

Auto-Owners emphasizes that there is a loan receipt agreement in this case. For that reason, Auto-Owners argues, the exception to the *Iowa National* rule should apply, and it should be permitted to obtain reimbursement directly from State Auto of a portion of the costs incurred in defending Tony Eiden Company. The loan receipt agreement in this case was entered into by Tony Eiden Company and the participating insurers. Pursuant to the agreement, the participating insurers lent money to Tony Eiden Company "to pay for reasonable attorneys' fees and costs to defend . . . against the Bacig claim." Tony Eiden Company agreed to assert and pursue a coverage claim against State Auto. Tony Eiden Company agreed to repay the loan "only in the event and to the extent that [Tony] Eiden [Company] shall recover money from State Auto."

Auto-Owners's reliance on the loan receipt agreement is misplaced. In the loan receipt agreement, the parties agreed that Tony Eiden Company would repay the loan if *Tony Eiden Company* were successful in its own action against State Auto. But Tony Eiden Company was unsuccessful in its action against State Auto. Tony Eiden Company was one of four plaintiffs in the district court but did not join in this appeal. "It is axiomatic that a judgment or appealable order becomes final if a timely appeal is not taken." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005). Thus, the district court's judgment in favor of State Auto with respect to Tony Eiden Company is final.

As stated above, the caselaw permits a coverage claim against an insurer "in the name of the insured." *Jerry Mathison Constr., Inc. v. Binsfield*, 615 N.W.2d 378, 381 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). In the cases that apply the loan-receipt-agreement exception to the *Iowa National* rule, the insured is a party to the coverage action. *See, e.g.*, *Home Ins. Co. v. National Union Fire Ins.*, 658 N.W.2d 522, 527 (Minn. 2003); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 162-63 (Minn. 1986); *Jerry Mathison Constr., Inc.*, 615 N.W.2d at 380; *Redeemer Covenant Church*, 567 N.W.2d at 74. In contrast, Tony Eiden Company is not a party to this appeal. Furthermore, the parties did not agree to an assignment of Tony Eiden Company's cause of action against State Auto. *See, e.g.*, *B.M.B. v. State Farm Fire & Cas. Co.*, 664 N.W.2d 817, 820 (Minn. 2003) (noting that insured tortfeasor had assigned to injured party the right to seek insurance coverage from insurer). Thus, Auto-Owners may not, in its own name, seek to recover from State Auto a portion of the costs incurred in defending Tony Eiden Company. *See Wooddale Builders*, 722 N.W.2d at 302; *Iowa Nat'l Mut. Ins. Co.*, 276 Minn. at 367-68, 150 N.W.2d at 236-37; *see also Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 274 (Minn. App. 2001) (holding that insurer may not maintain declaratory judgment action against injured party if insured is not party).[2]

Affirmed.

[2]Neither party questioned Auto-Owners's right to allege the claim discussed in part I, that State Auto breached a duty to indemnify Tony Eiden Company. Auto-Owners is entitled to pursue that claim because the claim is properly based on the doctrine of equitable subrogation, *see Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 76-77 (Minn. 1997), and because the so-called *Iowa National* rule is confined to claims alleging a breach of a duty to defend.