**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-669**

Frank Kuntz,
Respondent,

vs.

Park Construction Company,
Respondent,

Hayden-Murphy Equipment Company,
Respondent,

and

Park Construction Company, defendant and third party plaintiff,
Respondent,

vs.

J & L Steel Erectors, Inc., et al., third party defendants,
Appellants.

**Filed February 2, 2010**
**Affirmed in part, reversed in part, and remanded**
**Wright, Judge**

Hennepin County District Court
File No. 27-CV-06-20544

Daniel E. Phillips, Solberg, Stewart, Miller & Tjon, Fargo, North Dakota (for respondent Kuntz)

Scott P. Drawe, Drawe & Maland, Edina, Minnesota (for respondent Park Construction Co.)

Timothy J. Leer, Johnson & Condon, Minneapolis, Minnesota (for respondent Hayden-Murphy Equipment Co.)

Lauris A. Heyerdahl, Foley & Mansfield, Minneapolis, Minnesota (for appellants J & L Steel Erectors, Transportation Insurance Co.)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Johnson, Judge.

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

**WRIGHT**, Judge

A subcontractor and its insurer challenge the summary judgment under which the insurer is required to pay the claim of respondent-general contractor for insurance coverage and indemnity arising from injuries sustained by an employee of the subcontractor. Appellants argue that (1) under the subcontract's indemnification rider, the subcontractor had no obligation to insure respondent for claims arising from respondent's negligence; (2) the injuries sustained by the employee were not sufficiently related to the "work" of the subcontractor; and (3) any coverage for respondent as an additional insured of the subcontractor is secondary to respondent's own insurance coverage. By notice of review, respondent challenges the district court's denial of its request for costs and attorney fees. We conclude that the indemnification rider to the subcontract did not modify the scope of insurance required by the subcontract, the employee's injuries arose from the subcontractor's work, and the subcontractor's insurance policy provides primary coverage for respondent. But a genuine issue of material fact exists as to respondent's request for costs and attorney fees. Accordingly, we affirm in part, reverse in part, and remand.

## FACTS

This insurance-coverage dispute arose from an accident at a construction site. Respondent Park Construction Company (Park) was the general contractor for a project that involved improvements to a dam. Appellant J & L Steel Erectors Inc. (J&L) contracted with Park to perform rebar[1] work on the project.

On the morning of August 10, 2001, respondent Frank Kuntz and several other J&L ironworkers were assigned to move rebar cages from high ground to a spillway. A crane, owned by Park and operated by a Park employee, was used to move the cages. J&L ironworkers rigged the rebar to the crane, used hand signals to direct the crane operator, and detached the rebar from the crane after the rebar was moved. At noon, the workers broke for lunch. They planned to return to the task of moving the rebar cages after an on-site meal. The crane operator set the hoist brake and exited the crane's cab. Less than one minute later, as Kuntz walked under the crane's boom, the crane's "headache ball" and chains fell from a height of approximately 40 feet and struck Kuntz on his head.

Kuntz sued Park,[2] and Park filed a third-party complaint against J&L and its insurer, appellant Transportation Insurance Company (TIC).[3] The basis for the third-party complaint was the subcontract between Park and J&L. Park alleged that J&L had

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[1] "Rebar" refers to steel rods used to reinforce concrete. *The Compact Oxford English Dictionary* 1522 (2d ed. 2007).

[2] Kuntz also sued Hayden-Murphy Equipment Company, which is not a party to this appeal.

[3] The original caption named CNA Insurance Company as J&L's insurer. The parties later stipulated that J&L's insurer is TIC.

agreed to insure, indemnify, and defend Park against all claims for bodily injury arising from J&L's work on the project.

The subcontract at issue is a standard-form contract published by the Associated General Contractors of Minnesota (AGC). Paragraph 4 of the subcontract provides:

> [J&L] agrees to assume entire responsibility and liability for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of, resulting from or in any manner connected with, the execution of the work provided for in this Sub-Contract or occurring or resulting from the use by [J&L], [its] agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by [Park], [J&L,] or third parties, and [J&L] agrees to indemnify and save harmless [Park], [its] agents and employees, the owner, the engineer, and other Sub-Contractors from all such claims including, without the generality of the foregoing, claims for which [Park] may be, or may be claimed to be, liable, and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph, and [J&L] further agrees to obtain, maintain and pay for such general liability insurance coverage as will insure the provisions of this paragraph.

Attached to the subcontract is an "INDEMNIFICATION RIDER," which provides in part:

> To the fullest extent permitted by law, [J&L] shall indemnify and hold harmless [Park], the Owner, the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, <u>provided that any such claim, damage, loss or expense</u> (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and is caused in whole or in part by any negligent act or omission of [J&L], anyone directly or indirectly employed by [J&L] for whose acts any of them may be liable, regardless of whether or not it is

> caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person.

Park moved for summary judgment. The district court granted Park's motion in part, holding that the subcontract requires J&L to maintain liability insurance for Park's benefit, including claims for which Park may be liable. The district court declined to decide the remaining issues until they had been briefed and argued. Kuntz reached a $525,000 settlement with Park.

After Park entered the settlement with Kuntz, the district court issued its second summary judgment order. The district court held, in relevant part: (1) J&L's insurance policy provided Park with coverage against Kuntz's claims; (2) the insurance coverage obtained by J&L on Park's behalf is primary; and (3) Park is not entitled to reimbursement for costs and attorney fees. The district court ordered judgment in favor of Park and against TIC in the amount of $525,000 and dismissed Park's claims for costs and attorney fees against J&L and TIC with prejudice. This appeal followed.

## D E C I S I O N

### I.

When summary judgment is granted based on application of the law to undisputed facts, the result is a legal conclusion, which we review de novo. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). When interpreting a contract, we construe the language according to its plain and ordinary meaning. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). "When the intent of

the parties can be determined from the writing of the contract, the construction of the instrument is a question of law for the [appellate] court to resolve, and this court need not defer to the district court's findings." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213, 221 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Jan. 20, 2004).

Appellants contend that J&L is not required to insure Park for claims arising from Park's own negligence[4] because the indemnification rider modified the scope of insurance required by Paragraph 4 of the subcontract. An agreement in a construction contract to indemnify the general contractor for liability attributable to its own negligence generally is no longer enforceable in Minnesota. *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 241 (Minn. App. 1996), *review denied* (Minn. Mar. 18, 1997); *see also* Minn. Stat. § 337.02 (2008) (providing in part that indemnification agreements in construction contracts are unenforceable if not limited to injury or damage attributable to promisor's negligent or wrongful act or omission). But the legislature has created a narrow exception to this general prohibition by allowing subcontractors to agree to indemnify a general contractor's negligence when the subcontractor agrees to provide specific insurance coverage for the benefit of others. *Van Vickle*, 556 N.W.2d at 241; *see also* Minn. Stat. § 337.05, subd. 1 (2008) (allowing indemnification agreements "whereby a promisor agrees to provide specific insurance coverage for the benefit of others").

[4] No findings have been made as to the negligence of any party.

In *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473 (Minn. 1992), the Minnesota Supreme Court addressed whether an agreement for the provision of insurance in an industry-accepted construction subcontract was enforceable. Crucial to the decision in *Holmes* was "provision 7" of the subcontract, which appellants acknowledge "mirrors the language" of Paragraph 4 at issue here. *See Holmes*, 488 N.W.2d at 474-75. The *Holmes* court approved the language of provision 7, reasoning that

> the legislature both anticipated and approved a long-standing practice in the construction industry by which the parties to a subcontract could agree that one party would purchase insurance that would protect "others" involved in the performance of the construction project. Such a risk allocation method is a practical response to problems inherent in the performance of a subcontract and, in instances where the risk of loss is one directly related to and arising out of the work performed under the subcontract, the parties are free to place the risk of loss upon an insurer by requiring one of the parties to insure against that risk.

*Id.* at 475.

In *Van Vickle*, we addressed "Paragraph 7" of an AGC subcontract, wherein the subcontractor agreed

> to indemnify and save harmless the [general contractor], . . . from all such claims including . . . claims for which the [general contractor] may be[,] or may be claimed to be, liable[,] and . . . the subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage . . . as will insure the provisions of this paragraph.

556 N.W.2d at 240.[5] We held that the agreement to provide insurance "converted Paragraph 7 from an unenforceable indemnification agreement to an enforceable insurance agreement allowed under [Minn. Stat. § 337.05]." *Id.* Based on Minnesota caselaw, it is clear that Paragraph 4 of the subcontract at issue here is an enforceable insurance agreement of the type contemplated by Minn. Stat. § 337.05. Paragraph 4 requires J&L to insure and indemnify Park.

Citing *Hurlburt v. N. States Power Co.*, 549 N.W.2d 919 (Minn. 1996), appellants contend that the indemnification rider modified the scope of insurance required by Paragraph 4. We disagree. *Hurlburt* involved an AGC subcontract that contained a "paragraph 7" similar to the one in *Van Vickle*. 549 N.W.2d at 920; *Van Vickle*, 556 N.W.2d at 241. But an indemnification rider to the *Hurlburt* subcontract stated:

> Notwithstanding the provisions of Paragraph 7 of this Subcontract Agreement, the indemnity set forth therein shall apply only to the extent that the underlying injury or damage is attributable to the negligence or otherwise wrongful act or omission . . . of Subcontractor . . . . Subcontractor further agrees to indemnify, defend and save harmless Contractor . . . from and against all claims arising within the scope and types and limits of insurance Subcontractor has agreed to obtain, maintain and pay for pursuant to this Subcontract . . . .

549 N.W.2d at 921. The *Hurlburt* court concluded that the parties had modified paragraph 7 by attaching this rider, resulting in an agreement that the subcontractor would indemnify the subcontractor "*only* to the extent that injury or damage is caused

[5] Provision 7 in *Holmes* and Paragraph 4 at issue here also contain this language. *See Holmes*, 488 N.W.2d at 474–75.

by" the subcontractor. *Id.* at 921–22. Thus, the scope of the general-liability insurance required by the subcontract had been altered by the rider. *Id.* at 924.

Appellants contend that the indemnification rider here, like the rider in *Hurlburt*, limited the scope of indemnification to injuries or damages caused by the subcontractor (here, J & L), thereby limiting the insurance requirement as well. This argument is unavailing. The indemnification rider here is distinguishable from the *Hurlburt* rider because the indemnification rider here does not mention insurance and does not specifically reference Paragraph 4. The indemnification rider here also provides that it "shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person." This provision is in stark contrast to the *Hurlburt* rider, which expressly overrode the provisions of paragraph 7. We agree with the district court's conclusion that the indemnification rider here does not modify the insurance obligation established in Paragraph 4.

Appellants also argue that the indemnification rider is meaningless if it does not modify Paragraph 4. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn. 1990) (stating that courts must avoid interpretation of contract that would render a provision meaningless and must attempt to harmonize all clauses). But under Minnesota law, an indemnification agreement (here, the rider) and an agreement to insure (here, Paragraph 4) are two complementary protections. *See Hurlburt*, 549 N.W.2d at 923 (explaining that agreements to indemnify and agreements to insure are separate but related forms of protection for a general contractor); *Holmes*, 488 N.W.2d at 475

(distinguishing an agreement to insure from an agreement to indemnify). *Compare* Minn. Stat. § 337.02 (limiting the scope of indemnification agreements to injury or damage caused by the promisor), *with* Minn. Stat. § 337.04 (providing that section 337.02 does not apply to agreements to provide insurance coverage). Contrary to appellants' argument, the indemnification rider is not meaningless. The indemnification rider establishes a form of protection for Park that is separate from J&L's obligation to procure insurance.

Accordingly, the district court correctly held that the subcontract requires J&L to maintain liability insurance for Park's benefit.

**II.**

Appellants next argue that insurance coverage is not available to Park because the accident and Kuntz's injuries were not sufficiently related to J&L's work on the project. Whether insurance coverage exists based on the interpretation of insurance-contract language presents a question of law, which we review de novo. *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). When construing the language of an insurance policy, we give terms and phrases their ordinary meaning so as to give effect to the intention of the parties as it appears from the contract. *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 183 (Minn. App. 2001).

The subcontract provides that J&L is liable for "all damages or injury to all persons, . . . arising out of, resulting from or in any manner connected with, the execution of the work provided for in this Sub-Contract." J&L's insurance policy limits the insurance provided to Park as follows:

> [Park] is only an additional insured with respect to liability arising out of:
>
> a. Your premises;
> b. "Your work" for that additional insured; or
> c. Acts or omissions of the additional insured in connection with the general supervision of "your work."

The policy defines "your work" as (1) work or operations performed by J&L or on J&L's behalf and (2) materials, parts, or equipment furnished in connection with such work or operations. Thus, the issue for our consideration is whether the accident and Kuntz's injuries arose from J&L's work under the subcontract.

For a claim to arise from the performance of a construction project, there must be a "temporal, geographical, or causal nexus between the [indemnitor's] work and the injury which gives rise to liability." *Nat'l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 693 (Minn. 1995) (alteration in original) (quotation omitted). A "but-for" causal connection must exist between the indemnitor's work and the injury. *Id.* at 693.

Appellants assert that the accident did not "arise out of" J&L's work because Kuntz, the other J&L employees, and the crane operator had stopped for their lunch break when the accident occurred. We analyze appellants' argument using caselaw addressing in what circumstances an injury-causing accident satisfies the requisite nexus to the insured's work.

In *Oster v. Medtronic, Inc.*, the plaintiff (an employee of a subcontractor) was injured while using the general contractor's on-site shelter to change his clothes immediately after arriving at work. 428 N.W.2d 116, 118 (Minn. App. 1988). The *Oster* court concluded that the plaintiff's injuries were "temporally related to his work

performance," observing that, although the injuries had been sustained before the employee "actually began" his duties on the construction site, the accident occurred in a shelter where he was "preparing for work, just minutes before [he] began his plastering work." *Id.* at 120. In addition, a but-for causal connection existed between the employee's injuries and the work because he "entered the shelter to prepare for his work duties contemplated by the contract." *Id.*

In *Oster*, we distinguished the facts of that case from those of *Fossum v. Kraus-Anderson Constr. Co.*, 372 N.W.2d 415 (Minn. App. 1985). In *Fossum*, the plaintiff (a foreman for a subcontractor) was injured as he crossed the street after leaving the jobsite for the day. 372 N.W.2d at 416-17. Because the *Fossum* plaintiff "had completed his work and left the job site to go home, there was no temporal and geographical relationship between performance of the subcontractor's work and [the] plaintiff's injury." *Id.* at 418. As such, there was no causal relationship between the performance of the work and the plaintiff's injuries because he "had finished his employer's work for the day." *Id.*

When considering the temporal circumstances in which Kuntz sustained his injuries, we conclude that the requisite temporal link exists between J&L's work under the subcontract and Kuntz's injuries. The *Oster* plaintiff was injured minutes before he was to begin work for the day; Kuntz was injured less than one minute after the crane operator had exited the crane's cab for lunch. Unlike the *Fossum* plaintiff, Kuntz had not finished his work for the day and had not left the job site when he was injured.

We also conclude that the requisite geographical relationship exists between J&L's work and Kuntz's injuries. In *Oster*, we observed that the Minnesota Supreme Court has found the nexus between the injury and the execution of the work to be present only when an employee of the subcontractor has sustained injuries *while on the job site*. 428 N.W.2d at 120. Here, it is undisputed that the accident occurred on the job site. Indeed, the location of the accident here also was closer to the location where the construction work was being performed (the crane was located on the high ground near the spillway) than the location of the accident in *Oster*, which occurred between 500 and 1,000 feet from where the work was being performed. *See id.*

Finally, a but-for causal relationship exists between J&L's work and Kuntz's injuries. Kuntz, a J&L employee, was injured on the job site by a machine that, minutes earlier, had been used to perform work agreed to in the subcontract.

Because there is a temporal, geographical, and but-for causal nexus between J&L's work and Kuntz's injuries, we conclude that his injuries arose out of the work within the meaning of the subcontract and the meaning of the TIC insurance policy.

**III.**

Appellants argue that Park's coverage under J&L's insurance policy is secondary to Park's coverage under its own commercial general-liability policy. Because the parties do not dispute the material facts, our analysis is limited to a de novo review of the district court's interpretation of the insurance contract. *Youngquist*, 625 N.W.2d at 183. When determining priority coverage among insurers, we first consider the "other insurance"

clauses of the insurance policies at issue to determine whether they are in conflict. *Ill. Farmers Ins. Co. v. Depositors Ins. Co.*, 480 N.W.2d 657, 659 (Minn. App. 1992).

Park's commercial general-liability policy contains the following other-insurance clause:

> **a. Primary Insurance**
>
> This insurance is primary except when **b.** below applies. . . .
>
> **b. Excess Insurance**
>
> This insurance is excess over:
> . . . .
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement. . . .

It is undisputed that Park is an additional insured under J&L's policy. J&L's policy contains the following other-insurance clause:

> **a. Primary Insurance**
>
> This insurance is primary except when **b.** below applies. . . .
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> Any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis *unless a contract specifically requires that this insurance be either primary or primary and noncontributing*. Where required by a contract, we will consider any other insurance maintained by the additional

> insured for injury or damage covered by this endorsement to be excess and noncontributing with this insurance.

(Emphasis added.) If the subcontract specifically requires J&L to procure primary insurance, then these two clauses do not conflict. Paragraph 4 of the subcontract provides, in relevant part:

> [J&L] agrees *to assume entire responsibility and liability* for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of, resulting from or in any manner connected with, the execution of the work . . . and [J&L] further agrees to obtain, maintain and pay for such *general liability insurance coverage* as will insure the provisions of this paragraph.

(Emphases added.)

Appellants are correct that the subcontract does not explicitly require J&L to obtain "primary" insurance. But primary coverage, not excess coverage, is clearly anticipated by Paragraph 4. The paragraph requires J&L to procure "general liability insurance coverage" so that J&L can assume the "entire responsibility and liability" for damages arising from J&L's work. To accept appellants' argument that J&L was not required to procure primary insurance, we would have to conclude that J&L's obligation was only to procure an umbrella policy such that Park and its insurer would be primarily liable and J&L's insurance policy would apply only as excess insurance. An umbrella policy covers infrequent, catastrophic losses, with most claims being absorbed by the underlying insurer. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986). But nothing in the subcontract indicates that Park and J&L intended J&L to procure umbrella coverage for Park. Rather, the purpose of Paragraph 4 is to require J&L to

assume all liability arising from J&L's work on the project; it is not to protect J&L from liability in all but the most catastrophic situations. Because umbrella coverage would not fulfill the requirements of the subcontract under which J&L was required to obtain general-liability insurance coverage to protect Park, we conclude that the other-insurance policies here do not conflict. Accordingly, J&L's insurance is primary, and Park's insurance is secondary.

**IV.**

By notice of review, Park argues that the district court erred by denying its request for costs and attorney fees incurred in enforcing TIC's duty to defend and in defending the lawsuit brought by Kuntz.[6] This issue requires us to determine whether a genuine issue of material fact exists with regard to Park's attempt to recover costs and attorney fees, which we review de novo. *See STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002) (stating that on appeal from summary judgment, we review de novo whether a genuine issue of material fact exists). The district court denied Park's request for costs and attorney fees, applying the following rationale:

> [T]here was a bona fide dispute between TIC and Zurich (the insurance carrier that has assumed the defense) as to TIC's insurance obligations: whether it was, in the first instance, required to procure insurance for the benefit of Park; whether the insurance procured was limited by [statute]; whether the insurance applied to the facts at hand; and whether that insurance was primary or secondary. There was no contractual agreement between TIC and Zurich. Zurich was

[6] As an initial matter, we observe that the subcontract allows Park to recover costs and attorney fees from appellants. *See Van Vickle*, 556 N.W.2d at 240–42 (concluding that language similar to Paragraph 4 entitled general contractor to recovery of costs and attorney fees). But this is not the focus of our analysis.

> merely doing what it agreed and was paid a premium to do; as such, [appellants are] not required to reimburse Park/Zurich for defense costs.

The general rule is that an insurer, having provided the defense of an insured, cannot recover defense costs from another insurer that also had a duty to defend because both insurers are "obligated to defend under separate contractual undertakings." *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 368, 150 N.W.2d 233, 237 (1967). The cases establishing and following the *Iowa National* rule involve "reluctant insurers" that eventually accept tender of their respective insureds' defenses and later attempt to recover their defense costs from the other insurer. *Jostens*, 387 N.W.2d at 166. But in *Jostens*, the insured defended itself, *id.* at 167, having entered into a loan-receipt agreement[7] with the insurer, *id.* at 164-65. Under the loan-receipt agreement, the insurer paid the insured's defense costs, making the dispute "primarily between the two insurers." *Id.* The *Jostens* court held that, notwithstanding the loan-receipt agreement, the insured was the real party in interest and could maintain a claim for the underlying defense costs against its insurer. *Id.*

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> [7] A loan receipt agreement is a device commonly used to resolve insurance disputes. Under such an arrangement, an insurer with a duty to defend agrees to loan the insured the amounts necessary to defend against a lawsuit in exchange for the insured's promise to pursue an action in its own name to recover the costs of defense from other duty-to-defend insurers. The insured then repays the loan with funds recovered in the subsequent action.

*Cargill, Inc. v. Ace Am. Ins. Co.*, 766 N.W.2d 58, 60 n.1 (Minn. App. 2009) (citing *Jostens*, 387 N.W.2d at 163-64), *review granted* (Minn. Aug. 11, 2009).

Since *Jostens*, appellate courts have consistently held that an insured that defends itself may maintain an action for defense costs against one insurer even when a loan-receipt agreement provides that another insurer ultimately will receive those costs. *See, e.g., Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 302–03 (Minn. 2006); *Drake v. Ryan*, 514 N.W.2d 785, 788 (Minn. 1994); *Jerry Mathison Constr., Inc. v. Binsfield*, 615 N.W.2d 378, 382 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). But if an insurer has provided the defense of the insured and seeks to maintain its own action against a nonparticipating insurer, the *Iowa National* rule applies. *See Wooddale*, 722 N.W.2d at 302-03; *Jostens*, 387 N.W.2d at 167.

For Park to recover costs and attorney fees, Zurich must not have provided Park's defense. Park asserts that Zurich did not defend Park but rather advanced defense costs to Park under a loan-receipt agreement. On December 10, 2007, after the summary-judgment hearing but before the record was closed, Park submitted a document that purports to be a loan-receipt agreement between Park and Zurich. It is not clear when the document was signed, but it appears to have been drafted after November 13, 2006. The document states that Zurich "has been providing a defense for Park." The district court did not address this document in its summary-judgment orders.

A genuine issue of material fact exists as to whether Zurich provided Park's defense or whether Zurich merely loaned Park the funds necessary to defend against the lawsuit brought by Kuntz. We, therefore, reverse and remand to the district court for a determination of whether the loan-receipt agreement is valid and, if so, for a determination of the costs and attorney fees to which Park is entitled. In doing so, we

observe that, if Park is entitled to costs and attorney fees, it is not entitled to amounts incurred before Park tendered its defense. *See Seifert v. Regents of Univ. of Minn.*, 505 N.W.2d 83, 87 (Minn. App. 1993) (stating that insured was required to make tender of defense before any indemnity obligation could be created), *review denied* (Minn. Oct. 28, 1993).

**Affirmed in part, reversed in part, and remanded.**