STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1598

Western National Mutual Insurance Company,
Respondent,

vs.

Structural Restoration, Inc.,
Appellant,

Nationwide Agribusiness Insurance Company, a foreign insurance corporation,
Defendant.

Filed May 4, 2010
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-08-31042

James T. Martin, Gislason, Martin, Varpness & Janes, P.A., Edina, Minnesota (for respondent)

Peter A. Koller, Curtis D. Smith, Moss & Barnett, Minneapolis, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's grant of judgment on the pleadings in favor of respondent, appellant's insurer. The district court entered a declaratory judgment that respondent had no duty to defend appellant in the underlying litigation due to the operation of the insurance policies' exclusions for professional services. Because the underlying litigation is based on professional services provided by appellant, the district court did not err in concluding that respondent did not owe a duty to defend appellant. We affirm.

FACTS

Defendant Nationwide Agribusiness Insurance Company (Nationwide), as subrogee of Tri Oak Foods, sued appellant Structural Restoration, Inc., in the U.S. District Court for the Southern District of Iowa. Nationwide's complaint alleged that Nationwide paid Tri Oak Foods approximately $1.6 million for damages sustained as the result of a collapsed silo. The complaint stated that Structural Restoration is a corporation "dedicated to the maintenance and modifications of agricultural and commercial facilities, specializing in concrete repairs, masonry repairs, silo linings, bin bottoms, coatings, crack repairs, pressure injections, water proofing, silo inspection doors and roof repairs." The complaint alleged that Structural Restoration was retained by Tri Oak Foods to, and in fact did, conduct an inspection of four silos and that Structural Restoration then prepared a written report finding all of the silos acceptable for grain storage and recommending subsequent visual inspections every three to five years.

The record contains a copy of a letter written by estimator and field manager Charles Threet on behalf of Structural Restoration. The letter to Tri Oak Foods states that Structural Restoration inspected four silos in March 1997, observing "minor cracks" and "delaminations." It further states that in December 2003, Structural Restoration's repairs to one of the silos showed no identifiable failures or new delaminations and that the other silos and surface conditions appeared to be unchanged. Threet's letter notes that surface cracks are normal and stated, "I find the silos acceptable for grain storage service" and "I recommend a visual inspection being made every 3 to 5 years."

In its complaint in the underlying litigation, Nationwide asserted claims for negligence, breach of warranty, and breach of contract. The gravamen of the claims underlying every count in the complaint is that Structural Restoration inspected the silos and that this inspection was deficient and lacking in quality and that Tri Oak Foods was injured by relying upon the recommendation arising out of Structural Restoration's inspection of the silos.

Structural Restoration tendered the defense of the underlying litigation to its insurer, respondent Western National Mutual Insurance Company (Western National), which denied having a duty to defend Structural Restoration. Western National brought suit in Hennepin County, seeking a declaratory judgment that it had no duty to defend or indemnify Structural Restoration in the underlying litigation. At all times relevant to this appeal, Structural Restoration was insured by Western National. Western National issued commercial-general-liability (CGL) and umbrella policies to Structural Restoration, both of which contained coverage exclusions for professional services.

The relevant exclusion to the CGL policy provides that, "[w]ith respect to any professional services shown in the Schedule," the policy "does not apply to 'bodily injury', 'property damage' or 'personal and advertising injury' due to the rendering or failure to render any professional service." Although otherwise blank, the schedule provides, "If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement." The renewal declaration lists the following exclusion for professional services: "EXCLUSION—DESIGNATED PROFESSIONAL SERVICES: ALL SERVICES." The umbrella coverage also has a professional-services exclusion, which contains a nonexclusive list of enumerated professional services, including "[p]reparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications" and "[e]ngineering services, including related supervisory or inspection services."

Western National moved for judgment on the pleadings pursuant to Minnesota Rule of Civil Procedure 12.03, requesting that the district court enter judgment declaring that Western National did not have a duty to defend Structural Restoration in the underlying litigation. The district court granted the motion, entering judgment in favor of Western National. In its opinion, the district court concluded that the professional-services exclusions barred coverage of the claims stated against Structural Restoration in the underlying litigation. It reasoned that viewing and providing an opinion as to the need for repair or maintenance work on a silo is a professional service. Structural Restoration now appeals.

D E C I S I O N

I. The district court did not err in granting judgment on the pleadings in favor of Western National.

We review de novo a district court's grant of judgment on the pleadings. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "Judgment on the pleadings is proper where the defendant relies on an affirmative defense or counterclaim which does not raise material issues of fact." *Jacobson v. Rauenhorst Corp.*, 301 Minn. 202, 206, 221 N.W.2d 703, 706 (1974), *overruled on other grounds by Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838, 842 n.4 (Minn. 1979). Judgment on the pleadings is proper when the dispute centers on the meaning of a contract and the contract language unambiguously entitles the moving party to judgment. *McReavy v. Zeimes*, 215 Minn. 239, 243-45, 9 N.W.2d 924, 926-27 (1943). The pleadings must be construed in favor of the nonmoving party, and a motion for judgment on the pleadings may only be granted if the pleadings create no fact issues. *Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. App. 1986).

If "matters outside the pleadings are presented to and not excluded by the [district] court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material" relevant to a summary-judgment motion. Minn. R. Civ. P. 12.03. But a district court is allowed to consider additional documents and statements incorporated by reference into the pleadings, such as copies of the underlying complaint and insurance

policies. *Piper Jaffray Cos. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 967 F. Supp. 1148, 1152 (D. Minn. 1997) (applying parallel Fed. R. Civ. P. 12(b)(6) standard).

The application and interpretation of an insurance policy presents a question of law, which we review de novo. *Marchio v. W. Nat'l Mut. Ins. Co.*, 747 N.W.2d 376, 379 (Minn. App. 2008). "When interpreting an insurance contract, words are to be given their natural and ordinary meaning and any ambiguity regarding coverage is construed in favor of the insured." *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). Whether a contract is ambiguous is a question of law, which we review de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). "Where an insurer asserts that coverage is precluded by an exclusion, the burden is upon the insurer to establish that the exclusion is applicable." *Ministers Life v. St. Paul Fire & Marine Ins. Co.*, 483 N.W.2d 88, 90 (Minn. App. 1992).

An insurer's duty to defend is broader than its duty to indemnify its insured. *Rechtzigel v. Fidelity Nat'l Title Ins. Co. of N.Y.*, 748 N.W.2d 312, 320 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Whether a duty to defend exists is a question of law. *Id.* The duty to defend is contractual. *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 303 (Minn. 2006).

> The duty to defend is broader than the duty to indemnify in three ways: (1) the duty to defend extends to every claim that "arguably" falls within the scope of coverage; (2) the duty to defend one claim creates a duty to defend all claims; and (3) the duty to defend exists regardless of the merits of the underlying claims.

Id. at 302. Because the insurer's duty to defend arises if any part of the claim against the insured is arguably within the scope of the protection afforded by the policy, the insurer "bears the burden of establishing that all parts of a cause of action clearly fall outside the scope of coverage." *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 407 (Minn. 1998).

Western National contends that its duty to defend must be determined solely by comparing the allegations contained within the four corners of the underlying complaint with the insurance policy. We disagree. "*Generally*, the insurer's obligation to defend is determined by comparing the allegations of the complaint with the relevant policy language." *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 256 (Minn. 1993) (emphasis added). "The complaint is not controlling, however, where extrinsic facts establish the existence or nonexistence of the duty to defend." *Pedro Cos. v. Sentry Ins.*, 518 N.W.2d 49, 51 (Minn. App. 1994). Thus, "an insurer may not safely assume that the limits of its duties to defend are fixed by the allegations a third party chooses to put in his complaint." *Ia. Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 370, 150 N.W.2d 233, 238 (1967). An insurance company may not rely on the allegations of the underlying complaint "without investigating the facts, once the insured has come forward and made some factual showing that the suit is actually one for damages resulting from events which do fall into policy terms." *Johnson v. Aid Ins. Co. of Des Moines, Ia.*, 287 N.W.2d 663, 665 (Minn. 1980). As New York's high court has aptly explained:

> [T]o say that the duty to defend is *at least* broad enough to apply to actions in which the complaint alleges a covered occurrence is a far cry from saying that the complaint allegations are the *sole* criteria for measuring the scope of that duty. Indeed, in these circumstances, where the insurer is attempting to shield itself from the responsibility to defend despite its actual knowledge that the lawsuit involves a covered event, wooden application of the "four corners of the complaint" rule would render the duty to defend narrower than the duty to indemnify—clearly an unacceptable result.

Fitzpatrick v. Am. Honda Motor. Co., 575 N.E.2d 90, 92 (N.Y. 1991). The court went on to hold that an insurer must defend its insured "when it has actual knowledge of facts establishing a reasonable possibility of coverage." *Id.* at 93. This is consistent with Minnesota Supreme Court precedent, which makes clear that determination of whether a duty to defend exists must at least consider both parties' pleadings in the underlying action. *See Franklin*, 574 N.W.2d at 407 (determining factual basis of dispute by looking at underlying complaint and answer and counterclaim).

Ultimately, Western National takes issue with what it construes as Structural Restoration's reliance on "possibly meritorious defenses" to the underlying claims, namely, that Structural Restoration "wasn't paid for and didn't furnish professional services to Tri Oak [Foods]." While it is true that Western National's duty to defend Structural Restoration does not depend on whether the underlying action has merit, Structural Restoration's defense to the underlying action coincides with its argument for insurance coverage to the extent that it maintains that it did not and was not asked to inspect the grain silo. Western National, of course, premises its claim that it owed no duty to defend on the argument that the alleged inspection constituted a professional

service. Determining the existence of a duty to defend without regard to Structural Restoration's contention that it was never called upon to perform the alleged professional service of doing an inspection would defy common sense. Structural Restoration's answer and counterclaim in the underlying action denied that it inspected or certified the condition of any of the silos. It denied that it provided any "inspection or engineering services." Its counterclaim asserted that it "specializes in making concrete repairs, masonry repairs, silo linings, bin bottoms, coatings, crack repairs, pressure injections, waterproofing, silo inspection doors, and roof repairs," and that its employee was merely asked to "stop by" to see if he would recommend "any preventative maintenance or crack repair to those silos." Structural Restoration asserted that Threet did not and was not asked to perform a detailed inspection of the silos and that he was not asked to and did not "render any professional opinion as to the condition or adequacy of the silos."

The relevant exclusion to the CGL policy provides that, "[w]ith respect to any professional services shown in the Schedule," the policy "does not apply to 'bodily injury', 'property damage' or 'personal and advertising injury' due to the rendering of or failure to render any professional service." The schedule is blank, but provides, "If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement." The renewal declaration lists the following exclusion for professional services: "EXCLUSION—DESIGNATED PROFESSIONAL SERVICES: ALL SERVICES." Because insurance contracts are construed in favor of coverage, and exclusions are construed narrowly against the insurer, this exclusion may only operate to preclude Western National's duty to defend Structural

Restoration if the actions around which the underlying litigation revolves are clearly and unambiguously within the meaning of "professional services" despite the lack of a definition in the policy—that is, if the actions fall within the core definition of professional services in insurance policies of this kind.

Like the CGL coverage, the umbrella coverage contains a professional-services exclusion. This contains a non-exclusive list of enumerated professional services, which include "[p]reparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications" and "[e]ngineering services, including related supervisory or inspection services." An umbrella policy provides an "umbrella" over the amount of liability insured by the underlying coverage. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986). In this case, the underlying (or primary) coverage and the umbrella (or excess) coverage were both supplied to Structural Restoration by Western National. Because the definition of professional services in the umbrella policy's exclusion "includes but is not limited to" the enumerated examples, the only fair reading of this is that the umbrella exclusion is arguably broader—and certainly not narrower—than the CGL exclusion. Western National was required to defend the entire lawsuit if any part of it was arguably covered by the insurance it issued to Structural Restoration. In other words, Western National had to defend Structural Restoration if it owed a duty to defend Structural Restoration under *either* policy. Thus, the umbrella coverage's professional-services exclusion is not relevant to this appeal, and the parties' arguments pertaining to the broader exclusion contained in the umbrella policy are misplaced.

"Insurance contracts and policies are assumed to have been made in reference to trade usages and customs of the place where the business is transacted." *Quinlivan v. EMCASCO Ins. Co.*, 414 N.W.2d 494, 497 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). "Words not defined in an insurance policy must be given their plain and ordinary meaning." *Mork Clinic v. Fireman's Fund Ins. Co.*, 575 N.W.2d 598, 602 (Minn. App. 1998).

One prominent legal dictionary defines "profession" as "[a] vocation requiring advanced education and training; esp., one of the three traditional learned professions—law, medicine, and the ministry." *Black's Law Dictionary* 1329 (9th ed. 2009). "Professional" is defined as "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." *Id.* One standard English dictionary defines "profession" as "[a]n occupation requiring considerable training and specialized study." *The American Heritage Dictionary* 1446 (3d ed. 1992).

This court has stated, "A professional service is one calling for specialized skill and knowledge in an occupation or vocation. The skill required to perform a professional service is predominantly intellectual or mental rather than physical." *Ministers Life*, 483 N.W.2d at 91. Consistent with our statement in *Ministers Life*, cases from other jurisdictions make clear that the core, widely accepted definition of "professional" as pertaining to a professional-services clause has to do with the exercise of advanced or specialized knowledge. *See, e.g.*, *Cochran v. B.J. Servs. Co. USA*, 302 F.3d 499, 505 (5th Cir. 2002) (considering special knowledge, technical expertise, discretion acquired by training, and ability of unskilled or untrained employee to perform the task); *Chapman v.*

Mut. Serv. Cas. Ins. Co., 35 F. Supp. 2d 693, 698 (E.D. Wis. 1999) ("The realtor's duty of care here simply did not involve the exercise of advanced knowledge or training."); *Aerothrust Corp. v. Granada Ins. Co.*, 904 So. 2d 470, 472 (Fla. Dist. Ct. App. 2005) (specialized training); *Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co.*, 678 S.E.2d 196, 201 (Ga. Ct. App. 2009) (requiring "specialized knowledge or training"); *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870, 872 (Neb. 1968) (intellectual skill arising out of specialized knowledge).

Despite the presumptions in favor of coverage and the standard for granting judgment on the pleadings, we conclude as a matter of law that Western National did not have a duty to defend Structural Restoration in the underlying litigation. As a concrete-restoration company, Structural Restoration was asked by Tri Oak Foods to look at grain silos and render an opinion as to whether they needed concrete restoration. If this were the sort of judgment that a person with no concrete-restoration experience could make, there would have been no need to consult Structural Restoration. The parties dispute whether the service provided should be termed an "inspection." Whether or not that is the most apt description of the service provided, Structural Restoration was called upon to perform a service using mental rather than physical skill, which required it to use its advanced or specialized knowledge of the need for it to perform concrete-restoration work. Under any plausible definition in the absence of a contrary contractual provision, this constitutes a professional service. Western National therefore did not owe a duty to defend Structural Restoration in the underlying litigation.

II. Structural Restoration's argument that the policies were ambiguous is not waived.

Western National contends that Structural Restoration impermissibly argues for the first time on appeal that the professional-services exclusions are ambiguous (and therefore must be construed in favor of coverage). It is true that an appellate court may not consider a question never litigated in district court. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 522 (Minn. 2007) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). However, the supreme court explained in *Jacobson* that refining an argument made to the district court is not the same thing as raising a new argument on appeal. *Id.* at 523. Thus, when an appellate court can evaluate a refined version of the same argument made to the district court on facts already present in the record, the argument is properly before the appellate court. *Id.*

In its memorandum in opposition to Western National's motion for judgment on the pleadings, Structural Restoration argued that the legal standard for the duty to defend depends on whether any part of the cause of action arguably falls within the scope of the coverage, and that any ambiguity must be resolved in favor of the insured. Structural Restoration argued that the professional-services exclusions did not apply because the services it provided were not professional services. It referenced ambiguity multiple times, contending that "Western National fails to meet its burden to establish that [Structural Restoration] is unambiguously excluded from coverage under the terms of the Policy." Consideration of whether the professional-services exclusions are ambiguous is intertwined with consideration of whether Structural Restoration's actions were

professional services within the meaning of the exclusions. Given that the legal standard includes determination of nonambiguity and clear applicability, we do not believe that the parts of Structural Restoration's argument based on alleged ambiguity are waived. However, this does not affect our disposition of the case, because even considering the alleged ambiguity of the exclusions, we conclude that Structural Restoration clearly provided professional services within the meaning of the policies' professional-services exclusions.

Affirmed.