STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2065

Industrial Door Company, Inc.,
d/b/a Industrial Spring Company,
Respondent,

vs.

The Builders Group, et al.,
Appellants,

Team Personnel Services, Inc., et al.,
Defendants.

Filed July 27, 2010
Affirmed in part, reversed in part, and remanded
Lansing, Judge

Hennepin County District Court
File No. 27-CV-08-4399

Richard P. Mahoney, Victor Lund, Mahoney, Dougherty and Mahoney, P.A. (for respondent)

Robyn N. Moschet, Cheryl Hood Langel, McCollum, Crowley, Moschet & Miller, Ltd., Minneapolis, Minnesota (for appellants)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

LANSING, Judge

Following the resolution of an employee's lawsuit arising from personal injury in the operation of a spring-winding machine, Industrial Door Company, Inc. brought this declaratory judgment action against, among others, its insurer, The Builders Group, and the insurer's administrator. The district court granted summary judgment declaring that Builders Group breached its duty to defend Industrial Door in the underlying lawsuit and was also liable for costs and attorneys' fees incurred to enforce the coverage provisions in the declaratory action. Because the district court properly applied the law on the duty to defend based on the policy language, we affirm that determination. But because we conclude that Builders Group's liability for costs and attorneys' fees does not extend to the amounts Industrial Door incurred to bring this action against three of Builders Group's codefendants, we affirm in part, reverse in part, and remand.

F A C T S

This litigation is essentially a coverage dispute between Industrial Door Company, Inc. and The Builders Group over Builders Group's duty to defend Industrial Door in a lawsuit brought by David Peterson against Industrial Door. Peterson was employed by Team Personnel Services, Inc., a labor broker, and assigned to work at Industrial Door in May 2005. On June 24, 2005, Peterson was severely injured while operating a spring-winding machine. Peterson received workers' compensation benefits through Team Personnel.

Peterson sued Industrial Door in February 2006 for negligence in the design and manufacture of the spring-winding machine, negligence in training and failing to warn him, strict liability, and breach of express warranty. In his complaint, Peterson alleged that he was an employee of Team Personnel, but not Industrial Door, and that Industrial Door designed and manufactured the spring-winding machine. Both of these allegations were incorrect.

At the time of the accident, Industrial Door had commercial general-liability coverage from Scottsdale Insurance Company, and workers' compensation insurance and employer's liability insurance from The Builders Group. Industrial Door tendered its defense to Scottsdale and Builders Group. Scottsdale accepted the tender and defended Industrial Door against Peterson. Builders Group did not participate.

Industrial Door moved to dismiss Peterson's claims, arguing that Peterson was an employee of Industrial Door and therefore, the Workers' Compensation Act provided Peterson's exclusive remedy. The district court granted the motion for Peterson's claims against Industrial Door in its capacity as his employer, but it denied the motion for his claims against Industrial Door in its alleged role as designer or manufacturer of the spring-winding machine. The district court also granted Peterson's motion to add defendants that were designers or manufacturers of the machine or successors of those companies.

Industrial Door brought an interlocutory, jurisdictional appeal, challenging the district court's order retaining it as a defendant in Peterson's action. We affirmed, noting that although the record showed that Industrial Door did not design or manufacture the

spring-winding machine, it could still be liable in a tort action by an employee if it were the corporate successor to the manufacturer or designer. *Peterson v. Indus. Door Co.*, No. A07-180, 2008 WL 131916, *2-3 (Minn. App. Jan. 15, 2008). We stated that a material factual dispute existed on whether Industrial Door acquired the spring-winding machine through an asset transfer or a corporate merger. *Id.* at *2.

While that appeal was pending, Peterson amended his complaint to include Nordpal Corp., the company that designed and manufactured the machine and sold it to Industrial Door. Nordpal filed a cross-claim against Industrial Door for contribution.

Industrial Door moved for summary judgment again, but the district court denied the motion based on the appellate ruling and the fact that the record was still insufficient to show that Industrial Door received the machine in an asset transfer, not a merger. After additional discovery, on April 2, 2008, the district court dismissed Industrial Door as a defendant in Peterson's action and realigned the parties to make Industrial Door a third-party defendant in Nordpal's contribution claim. Nordpal and Peterson settled and the underlying case was closed. Industrial Door did not contribute to the settlement.

Industrial Door brought this declaratory action against Builders Group; Builders Group's administrator, Meadowbrook Insurance Group; Team Personnel; Team Personnel's insurer, Minnesota Workers' Compensation Assigned Risk Plan (MWCARP); and MWCARP's administrator, Berkley Risk Administrators Company. Industrial Door alleged that Builders Group breached its duty to defend Industrial Door against Peterson's action. And Industrial Door alleged that Team Personnel breached its contract to provide employers' liability insurance to Industrial Door and that Team

Personnel, MWCARP, and Berkley were negligent or breached a contract in not providing employer's liability insurance to Industrial Door. The district court granted Team Personnel's, MWCARP's, and Berkley's motions for summary judgment, concluding that MWCARP and Berkley had no contractual relationship with Industrial Door from which a duty to defend could arise and that, because the record contained no evidence that Industrial Door ever asked Team Personnel to add it to its insurance policies, Team Personnel did not breach an agreement to make that addition.

The district court determined that Builders Group breached its duty to defend based on the policy language and its failure to respond to Industrial Door's tender. It concluded that Builders Group was liable for the cost of defense in Peterson's suit and for Industrial Door's costs and attorneys' fees to bring the declaratory action. Builders Group appeals, arguing that the district court erred in three of its conclusions: that coverage under the employer's liability policy was arguable, that failure to provide a written response to a tender of defense is sufficient to give rise to a duty to defend, and that Builders Group is liable for the attorneys' fees and costs incurred by Industrial Door to bring this action against the other defendants.

D E C I S I O N

I

We first address whether Builders Group had a duty to defend Industrial Door based on its employer's liability policy. An insurer's duty to defend its insured is broader than its duty to indemnify. *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997). The duty to defend "extends to every claim that 'arguably' falls within the

scope of coverage"; a duty to defend one claim creates a duty to defend all claims; and the duty to defend exists "regardless of the merits of the underlying claims." *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006). To support a declaration that the insurer has no duty to defend, the insurer has the burden to show that all parts of the cause of the action fall clearly outside the scope of coverage. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165-66 (Minn. 1986).

The question of duty to defend is generally 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). But the complaint is not controlling if extrinsic facts clearly establish the existence or nonexistence of the duty to defend. *Meadowbrook*, 559 N.W.2d at 418 n.19 (citing *Bituminous Cas. Corp. v. Bartlett*, 307 Minn. 72, 75, 240 N.W.2d 310, 312 (1976), *overruled on other grounds by Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 391 (Minn. 1979)). 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, Iowa*, 287 N.W.2d 663, 665 (Minn. 1980). The duty to defend is determined as of the time the insured tendered the defense to the insurer. *Jostens, Inc.*, 387 N.W.2d at 166.

On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). Coverage issues

and the interpretation of policy language are questions of law, reviewed de novo. *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). If the policy language is unambiguous, we apply its plain and ordinary meaning. *Thommes*, 641 N.W.2d at 880.

To determine whether Builders Group's employer's liability policy provided arguable coverage of Peterson's claim, we compare the allegations in the complaint and the extrinsic facts known at the time that defense was tendered with the coverage provisions in Builders Group's policy. Peterson's initial complaint alleged that he was an employee of Team Personnel, assigned to Industrial Door, and that Industrial Door designed and manufactured the spring-winding machine on which he was injured. An attorney for Industrial Door sent Builders Group a letter tendering its defense on August 14, 2006. The letter included an analysis of the case prepared for Scottsdale by the attorney and confirmed that Industrial Door had already sent Peterson's complaint to Builders Group. The enclosed analysis stated that Peterson had likely been an employee of Industrial Door under the loaned-servant doctrine and that he was therefore limited to workers' compensation benefits. But it also noted that Peterson's suit may have been invoking a doctrine that would provide an exception to the workers' compensation exclusivity provision. The attorney concluded that the doctrine that created an exception had not been adopted in Minnesota and that, because Industrial Door bought the spring-winding machine from another company and was not in the business of distributing these machines, the facts would not support adoption of the doctrine in this case.

Builders Group's policy states that "[w]e will pay all sums [Industrial Door] legally must pay as damages because of bodily injury to [Industrial Door's] employees,

provided the bodily injury is covered by this [e]mployer[']s [l]iability [c]overage." It states that the injury must arise out of employment and that the employment must be necessary to Industrial Door's work in Minnesota; it is undisputed that Peterson's bodily injury met these requirements. The policy also specifies that "[t]he damages we will pay, where recovery is permitted by law, include damages: . . . because of bodily injury to your employee . . . claimed against you in a capacity other than as employer." The policy excludes coverage for "any obligation imposed by workers['] compensation."

Builders Group argues that the phrase "where recovery is permitted by law" precludes its duty to defend Industrial Door because of the state of the law in Minnesota when Peterson filed his claim and when Industrial Door tendered its defense. It reasons that two doctrines creating exceptions to the exclusive-remedy provision of the Workers' Compensation Act, dual capacity and dual persona, had not been adopted in Minnesota and that, therefore, recovery from an employer by an employee in a tort action was not permitted by law.

We disagree. This argument confuses arguable *coverage* under its policy with arguable *recovery* under its policy. The phrase "where recovery is permitted by law" is not common, but it cannot function as a test of the merits of the claim. *See Wooddale Builders*, 722 N.W.2d at 302 (stating that "the duty to defend exists regardless of the merits of the underlying claims"). Builders Group was expressly advised that Peterson appeared to be pursuing recovery based on the first of the available doctrines: dual capacity. Dual capacity is an exception to the exclusive-remedy principle of workers' compensation in which the employer "may become liable in tort to his own employee if

he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer." *Kaess v. Armstrong Cork Co.*, 403 N.W.2d 643, 645 (Minn. 1987) (quoting 2A A. Larson, *The Law of Workmen's Compensation* § 72.80 (1976 & Cum. Supp. 1980)). The doctrine is not widely accepted and the workers' compensation treatise describing it abandoned it in subsequent editions. *Kaess*, 403 N.W.2d at 645 (citing 2A A. Larson, *The Law of Worker's Compensation* § 72.81 at 14-230 (1983)).

We cannot conclude that coverage was not arguable simply because Peterson appeared to be invoking a theory that few jurisdictions have adopted as an exception to workers' compensation's exclusivity. Peterson's case could have presented the courts with an opportunity to adopt the theory in Minnesota. Even if a claim would fall within the scope of coverage only through a development in the law, the insurer still has the obligation to develop the facts and argue against adoption of the proposed doctrine. To conclude otherwise would premise the duty to defend on the insurer's reasonable prediction of the decisions of the courts. Under Builders Group's interpretation, the phrase "permitted by law" allows the insurer to prejudge the merits of the claim and determine its duty to defend accordingly. This method of determining the duty to defend is counter to Minnesota law. *Wooddale Builders*, 722 N.W.2d at 302.

Builders Group's misapprehension of the duty to defend is further illustrated by the developments in the underlying case. In that case we recognized the second possible exception to workers' compensation's exclusivity, the dual-persona doctrine. The dual-persona exception provides for employer tort liability "if—and only if—he possesses a

second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." *Kaess*, 403 N.W.2d at 645 (quoting 2A A. Larson, *The Law of Workmen's Compensation* § 72.81 at 14-229 (1983)). On appeal in the underlying action, we affirmed the district court's decision to allow Peterson to try to recover from Industrial Door in a nonemployer capacity. *Peterson*, 2008 WL 31916 at *3.

The facts that were eventually developed did not support this theory and, even if they had, the courts may not have adopted the doctrine. But our recognition of a plausible theory of recovery demonstrates that the duty to defend cannot be based on the state of the law at the time the defense is tendered, but instead must be based on whether the claim could come within coverage even if developments in the law are required. Additionally, it took two years of litigation to establish that the facts of this case did not fit with either the dual-persona or dual-capacity doctrines. Builders Group is not saved from its duty to defend because it believed the facts would ultimately turn out this way; it had the obligation to establish the facts that precluded Industrial Door's tort liability to Peterson.

Builders Group's policy provides coverage for employees' bodily injuries in claims against Industrial Door in a capacity other than as the employer. Because Builders Group knew Peterson was likely an employee of Industrial Door despite the allegations in his complaint, knew that he was pursuing products-liability claims against Industrial Door other than as an employer, and knew that there was at least one doctrine that could allow recovery if adopted, we conclude that coverage was arguable under Builders

Group's policy when Industrial Door tendered its defense. The district court did not err in determining that Builders Group breached its duty to defend Industrial Door. Consequently, we need not address Industrial Door's alternative argument that Builders Group had a duty to defend it based on Nordpal's cross-claim for indemnity and contribution.

II

We turn next to Builders Group's challenge to the district court's conclusion that Builders Group assumed the duty to defend by failing for one year to respond in writing to Industrial Door's tender of defense. Minnesota's Unfair Claims Practices Act establishes several standards for an insurer's response to an insured's request for coverage. *See* Minn. Stat. § 72A.201 (2008) (codifying current provisions on regulation of claims practices). The act provides that it is an unfair settlement practice for an insurer to fail to complete an investigation and inform the insured of its acceptance or denial of a claim within thirty days, unless an investigation cannot be reasonably completed in that time. *Id.*, subd. 4(3). And if the insurer denies a claim, it must inform the insured of the basis for denial, and include contact information to allow the insured to respond to the denial. *Id.*, subd. 8(5). A claim is defined as a "request or demand made with an insurer for the payment of funds or *the provision of services* under the terms of any policy." *Id.*, subd. 3(3) (emphasis added). Subdivision 4(11) makes it an unfair settlement practice to fail to advise an insured of the acceptance or denial of a claim within sixty days of receiving an executed proof of loss. *Id.*, subd. 4(11). Under this subdivision, if an insurer denies the claim, it must do so in writing and specify the policy provision that

supports the denial. *Id.* "Proof of loss" is defined as "the necessary documentation required from the insured to establish entitlement to payment under a policy." *Id.*, subd. 3(12). These provisions indicate that an insurer is expected to respond promptly to an insured's request for coverage.

Builders Group clearly failed to conform to these standards. But Minnesota's Unfair Claims Practices Act provides for administrative enforcement only. *Id.*, subd. 1; *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 238 (Minn. 1986) (holding that "a private person does not have a cause of action for a violation of the Unfair Claims Practices Act").

Industrial Door argues that it is not seeking a private cause of action but that Builders Group is barred from denying its duty to defend based on estoppel or waiver. Estoppel, however, cannot be used to expand coverage beyond the coverage provided in the contract. *Shannon v. Great Am. Ins. Co.*, 276 N.W.2d 77, 78 (Minn. 1979); *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 76 (Minn. App. 1997), *review denied* (Minn. Oct. 2, 1997). Like coverage, the duty to defend arises from the policy, and cannot be based on estoppel. Although Builders Group's response fell well below statutory standards and it could be subject to administrative penalties, we decline Industrial Door's invitation to recognize an independent, equitable ground for an insurer's duty to defend. Builders Group's duty to defend arose from its policy statement and not its failure to timely respond to Industrial Door's tender of defense.

III

Finally, we consider whether Builders Group is liable for the costs and attorneys' fees incurred by Industrial Door to bring this declaratory action against Team Personnel, MWCARP, and Berkley. A party may recover costs and attorneys' fees incurred in obtaining a declaratory judgment against an insurer for breach of its duty to defend. *Morrison v. Swenson*, 274 Minn. 127, 138, 142 N.W.2d 640, 647 (1966). An insured is not entitled to costs and attorneys' fees if the insurer did not have a duty to defend the underlying action. *See Wakefield Pork, Inc. v. RAM Mut. Ins. Co.*, 731 N.W.2d 154, 162 (Minn. App. 2007) (recognizing right to fees for underlying and declaratory actions but denying fees because insurer had no duty to defend), *review denied* (Minn. Aug. 7, 2007). Reviewing courts will not reverse the district court's order granting or denying costs and attorneys' fees absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co*., 401 N.W.2d 655, 661 (Minn. 1987).

Industrial Door argued primarily that Team Personnel and MWCARP were negligent in not providing this insurance and were liable for damages in the amount of the costs and attorneys' fees as a result. These defendants were dismissed from the declaratory action at the hearing on each party's summary judgment motions. The district court concluded that Industrial Door was not insured by MWCARP or Berkley, so they had no duty to defend that could have been breached. And there was no evidence that Team Personnel should have included Industrial Door in its insurance policy, so no negligence was established against Team Personnel, MWCARP, or Berkley.

A district court can award all costs and attorneys' fees incurred in a declaratory action against multiple insurers when only one insurer breached its duty to defend. *See Redeemer Church*, 567 N.W.2d at 83 (quoting district court's conclusion that arguments necessary to "address the interplay of coverage" among the insurers were "inextricably intertwined" and "necessary to address . . . only because of [the liable insurer's] refusal to defend"). But this case is distinct. Industrial Door was pursuing one theory of liability in its claim against Builders Group and a different theory of liability against Team Personnel, MWCARP, and Berkley. The district court did not state that the arguments against all defendants were intertwined. Instead, the district court dismissed the other defendants from the action at the hearing while taking the arguments on Builders Group's duty under advisement, suggesting that it found the arguments against Team Personnel and its associated codefendants independent from the arguments against Builders Group.

Industrial Door is not entitled to costs and attorneys' fees from Team Personnel, MWCARP, or Berkley because they had no duty to defend. *See Wakefield Pork*, 731 N.W.2d at 162 (stating that allowance of costs and attorneys' fees depends on existence of duty to defend). Even if Industrial Door prevailed on its negligence theory, it would not be entitled to costs and attorneys' fees for the declaratory action because they are not ordinarily recoverable without statutory authority, and the exception for actions against insurers who breach their duty to defend is a narrow one, justified only because they represent a "direct loss incident to the breach of contract." *Morrison*, 275 Minn. at 138, 142 N.W.2d at 647; *see also In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 425 (Minn. 2003) (discussing limited exception recognized in *Morrison* and stating

that "attorney fees are not recoverable in declaratory actions to establish that the insurer must pay the insured money").

Industrial Door submitted detailed records of the costs and attorneys' fees expended by date and activity. Because Industrial Door's claims against Team Personnel, MWCARP, and Berkley were not intertwined with its claims against Builders Group, because Industrial Door is not entitled to recover its costs and attorneys' fees for the declaratory action against Team Personnel, MWCARP, and Berkley, and because the record indicates that the costs and attorneys' fees are allocable among the defendants, we reverse the district court's order for $96,072.12 and remand for a recalculation of the amounts expended by Industrial Door in bringing the declaratory action that excludes the costs and attorneys' fees associated with Team Personnel, MWCARP, and Berkley.

Affirmed in part, reversed in part, and remanded.