STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1152

Western National Mutual Insurance Company,
Appellant,

vs.

Flag Builders of Minnesota Inc.,
Respondent,

Semper Development Ltd.,
Defendant,

Wilkus Architects Inc.,
Defendant,

Moore Engineering Inc.,
Defendant.

Filed March 31, 2014
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-11-19196

Rolf E. Sonnesyn, Aaron M. Simon, Tomsche, Sonnesyn & Tomsche, P.A., Golden Valley, Minnesota (for appellant)

John J. Steffenhagen, M. Chapin Hall, Brian R. Christiansen, Hellmuth & Johnson, PLLC, Edina, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Kirk, Judge.

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

LARKIN, Judge

Appellant-insurer challenges the district court's partial award of summary judgment to respondent-insured and the district court's denial of its motion for summary judgment, arguing that it had no duty to defend respondent under its commercial general liability insurance policy. Respondent, in a related appeal, challenges the district court's partial denial of its motion for summary judgment, arguing that appellant had a duty to indemnify respondent. Because the district court properly denied respondent's summary-judgment motion regarding appellant's duty to indemnify, we affirm in part. But because the district court erred by partially awarding respondent summary judgment based on appellant's duty to defend and by denying appellant's motion for summary judgment, we reverse in part and remand for entry of summary judgment for appellant.

FACTS

Appellant Western National Mutual Insurance Company provided a commercial general liability insurance policy insuring respondent Flag Builders of Minnesota Inc. from September 27, 2007, to September 27, 2008. In early 2008, Semper Development Ltd. hired Flag as the general contractor to construct a Walgreens in Fargo, North Dakota. Semper was the developer for the project. Semper retained Wilkus Architects Inc. to provide architectural services and Ulteig Engineers to provide engineering services. In February 2008, Ulteig Engineers issued a set of civil engineering plans for the project (February site plan).

Flag solicited bids for a contractor to provide surveyor services for the project. Flag provided a copy of the February site plan to Moore Engineering Inc., so Moore could bid for the project. On or about April 7, 2008, Moore submitted a bid to Flag to furnish staking for the project, including the building corners. Flag sent Moore a letter of intent dated April 11, which stated that Flag "intends to enter into a contract with Moore Engineering" to complete the work on the Walgreens store. The letter described the scope of Moore's work as including the staking of the building corners. Lastly, the letter stated that questions regarding scheduling should be directed to Flag's representative, Mike Terry, and that a complete schedule and contract would be sent in the mail.

Ulteig issued a revised set of civil engineering plans in June 2008 (June site plan). The revised plans altered the location of the building by approximately five feet. Flag claims that it never received the revised June site plan. Flag contacted Moore to stake the building corners and provided Moore with the February site plan. Flag met with Moore at the project site on or about September 10, and Moore completed the staking over the next two days, relying on the outdated February 2008 site plan.

Flag poured the foundation footings, relying on Moore's staking. As a result, the footings were placed in the wrong location. On October 9, Flag learned of the staking error and that it had constructed the foundation in the wrong location. The building had to be in the correct location to accommodate Walgreen's drive-thru pharmacy, an essential component of the project. Semper therefore required Flag to relocate the foundation footings to the correct location. Flag excavated the foundation footings, re-

dug the site in the correct location, and poured a new foundation. Flag claims that it incurred costs of $315,100.03 in doing so.

Flag sued Semper, Wilkus, and Moore for breach of contract, quantum meriut, and negligence related to the staking error. Semper, Wilkus, and Moore counterclaimed. In response, Flag timely tendered its defense to Western National. Western National refused to defend or indemnify Flag. Flag, Semper, Wilkus, and Moore settled their claims, and Flag received approximately $140,000 under the settlement agreement.

Later, Western National brought a declaratory judgment action, seeking a declaration that it was not required to defend or indemnify Flag. Flag counterclaimed, seeking reimbursement of its defense costs and indemnification for monies that Flag was unable to recover from Semper, Wilkus, and Moore. Western National and Flag each moved for summary judgment. The district court denied Western National's motion for summary judgment and granted Flag's motion in part, concluding that Western National "breached its duty to defend [Flag] in the underlying action, and [Flag] is thus entitled to a hearing to determine reasonable attorneys' fees and costs associated with the underlying action." But the district court denied Flag's motion "with respect to its claim for indemnification damages." The district court awarded Flag $150,559.29 in attorney fees, prejudgment interest, and costs and disbursements.

In this appeal, Western National challenges the district court's partial award of summary judgment to Flag, arguing that the district court erred by concluding that it had a duty to defend. Western National also challenges the district court's attorney-fees award, as well as its calculation of prejudgment interest. Flag challenges the district

court's partial denial of its motion for summary judgment, arguing that it was entitled to indemnification by Western National.

D E C I S I O N

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

"[A]n insurer's duty to defend arises when any part of the claim against the insured is arguably within the scope of protection afforded by the policy." *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406-07 (Minn. 1998). The duty to defend "is contractual in nature and is determined by examining the complaint and the policy coverage." *Farmers Union Oil Co. v. Mut. Serv. Ins. Co.*, 422 N.W.2d 530, 532 (Minn. App. 1988).

"This court must construe an insurance policy as a whole and must give unambiguous language its plain and ordinary meaning. But when language in an

insurance contract is ambiguous, such that it is reasonably subject to more than one interpretation, we will construe it in favor of the insured." *Mitsch v. Am. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. App. 2007) (citation omitted), *review denied* (Minn. Oct. 24, 2007). The interpretation of an insurance policy, including whether an insurer has a legal duty to defend or indemnify its insured, is a question of law, which this court reviews de novo. *Auto-Owners Ins. Co. v. Todd*, 547 N.W.2d 696, 698 (Minn. 1996).

"It is well-established that the burden of proof rests upon the party claiming coverage under an insurance policy." *Engineering & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 705 (Minn. 2013) (quotation omitted). "Therefore, in an action to determine coverage, the insured must establish a prima facie case of coverage." *Id*. (quotation omitted). An insurer then bears the burden of establishing that "all parts of the cause of action fall clearly outside the scope of coverage" if it wishes to avoid its duty to defend. *Auto-Owners*, 547 N.W.2d at 698. "An insurer may ordinarily determine whether a cause of action includes an 'arguably covered' claim by comparing the wording of the policy to the allegations of the underlying complaint." *Franklin*, 574 N.W.2d at 407. "However, the words of the complaint need not precisely match the words of the policy, they must simply put the insurance company on notice of a claim within the policy coverage." *Id*. "Any ambiguity regarding coverage is resolved in favor of the insured." *Id*.

"Where there is no coverage by reason of an exclusionary clause, there is no obligation to defend." *Bobich v. Oja*, 258 Minn. 287, 293, 104 N.W.2d 19, 24 (1960).

An insurance policy's exclusions are construed strictly against the insurer. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). The insurer bears the burden of proving that policy exclusions apply to bar coverage. *Indep. Sch. Dist. No. 197 v. Accident and Cas. Ins. of Winterthur*, 525 N.W.2d 600, 608 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995).

The insuring clause of Western National's policy states:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.
>
> . . . .
>
> This insurance applies to "bodily injury" and "property damage" only if . . . [t]he "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

Thus, Western National's policy provides coverage to Flag for "property damage" caused by an "occurrence," as those terms are defined by the policy, and Western National has a "duty to defend [Flag] against any 'suit' seeking those damages," unless an exclusion applies.

In ruling on the parties' cross-motions for summary judgment, the district court reasoned that Flag established a prima facie case of coverage because the staking mistake

was an "accident" and thus an occurrence under the policy.[1] *See Hauenstein v. St. Paul-Mercury Indem. Co.*, 242 Minn. 354, 355, 65 N.W.2d 122, 124 (1954) (defining "accident" in the insurance context as "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause"). The district court further reasoned that the Semper counterclaim alleged "loss of use," which is covered property damage under the policy. Lastly, the district court rejected Western National's argument that policy exclusions j(5), j(6), and m applied, concluding that there was a genuine issue of material fact "because of the conflicting evidence with respect to whether Moore performed its work on behalf of Flag Builders."

The parties' arguments on appeal address several of the legal issues attendant to the district court's reasoning. But because one issue is dispositive—the application of policy exclusion j(5)—we limit our analysis to that issue.

The policy states that "[t]his insurance does not apply to"

> j. Damage to Property
>
> 'Property damage' to:
> . . . .
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations[.]

The district court concluded that there was a genuine issue of material fact regarding whether "Moore performed its work on behalf of Flag Builders," reasoning that

> [there is] conflicting evidence regarding who Moore worked for. There is no contract evidencing an agreement, and Flag

[1] The policy states: "'Occurrence' means an accident . . . ."

> Builders claims that Moore was working on behalf of Semper. Scott Cooper, President of Flag Builders, indicated in his deposition that although Flag Builders chose Moore's bid and contracted with Moore, Moore was not a subcontractor of Flag Builders. Rather, Flag Builders arranged for Moore to be at the site and perform work, but Semper was paying Moore. Additionally, Moore's Counterclaim indicates that it submitted a quote to Flag Builders and contracted with Flag Builders to do the staking. Because there is a fact issue as to whether Moore performed its work on behalf of Flag Builders, the Court concludes that summary judgment is inappropriate with respect to [exclusion] j(5) . . . .

However, the district court noted that "[i]f Moore did the work on behalf of Flag Builders, then exclusion . . . j(5) . . . would clearly preclude coverage." For the reasons that follow, we conclude that there is no genuine issue of material fact regarding whether Moore worked directly or indirectly on Flag's behalf and that exclusion j(5) applies as a matter of law.

"[T]here is no genuine issue of material fact" when the evidence "merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the . . . case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A party "must do more than rest on mere averments" to create a genuine issue of material fact. *Id*. The "existence of a scintilla of evidence" is insufficient. *Id*. (quotation omitted).

During Flag's deposition testimony in the litigation between Flag and Moore, Flag's designee, Scott Cooper, testified that Flag "sought bids from various engineering/surveying companies, and chose Moore." Cooper testified that Flag "hired" Moore because Moore was in the area and "[its] price was competitive." Cooper

confirmed that Flag had a contract with Moore and that the contract set forth the "items" that Moore was going to perform. When asked to describe Flag's expectation regarding Moore's performance, Cooper testified that Flag expected Moore to "do [its] work professionally in accordance with standard practices, efficiently and correctly."

Even though the summary-judgment record does not contain a written contract memorializing Moore's obligations, it is undisputed that Flag contracted with Moore to do the staking. The undisputed fact that Flag contracted with Moore was the basis for Flag's breach-of-contract claim against Moore. Flag's complaint states that "Flag Builders of Minnesota contracted with Moore Engineering to, among other things, locate and properly stake the foundation" and alleges that "Moore Engineering breached its contract with Flag Builders" by failing to "properly locate and stake the foundation." And Moore's counterclaim states that Flag "accepted Moore Engineering's quote and Moore Engineering entered into a contract with [Flag] pursuant to which Moore Engineering furnished staking for utilities, curbs, gutters, sidewalks, and building corners for the Walgreens Project, for which [Flag] agreed to pay" and alleges that "[Flag] has failed and refused to pay Moore Engineering the amounts due under the contract despite demand."

During the litigation of Western National's declaratory-judgment action, Cooper once again testified at a deposition for Flag. Cooper acknowledged that Flag was the entity that arranged for Moore to be at the site and to do the staking. But Cooper testified that Flag "brought [Moore] in for the developer." Cooper explained that

> [Flag] brought them in as engineer to stake the foundation basically as representing the development arm of Semper, because we wouldn't have paid them. They were being paid by Semper. But we're acting as the project management team, construction management. We brought them in to stake the developer's property.

Cooper's testimony suggesting that Moore was not working on Flag's behalf is inconsistent with his earlier deposition testimony in the litigation between Flag and Moore regarding Flag's contractual relationship with Moore. And the testimony was provided at a time when the existence of Moore's contractual obligation to Flag no longer benefited Flag. For those reasons, we conclude that the testimony is insufficient to create a genuine issue of material fact. *See Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995) (stating that self-serving affidavit contradicting earlier damaging deposition testimony is insufficient to create material factual issue).

In sum, when the entire record is considered, no reasonable person could conclude that Moore was not working directly or indirectly on Flag's behalf, and the record does not establish a genuine issue of material fact regarding application of policy exclusion j(5). *See DLH*, 566 N.W.2d at 71. The undisputed facts show that Flag contracted with Moore to stake the building corners and that Moore worked directly or indirectly on Flag's behalf in doing so. Thus, exclusion j(5) applies as a matter of law, there is no coverage under Western National's policy, and Western National had no duty to defend or indemnify Flag. We therefore reverse the district court's partial award of summary judgment to Flag (awarding attorney fees, prejudgment interest, and costs and disbursements) and affirm the district court's partial denial of Flag's summary-judgment

motion (denying indemnification damages). We also reverse the district court's denial of Western National's motion for summary judgment and remand for entry of summary judgment for Western National consistent with this opinion.

Affirmed in part, reversed in part, and remanded.