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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2206**

Jerome Koskovich, et al.,
Appellants,

vs.

American Family Mutual Insurance
Company, a foreign corporation,
Respondent.

**Filed June 25, 2012
Affirmed
Hudson, Judge**

Olmsted County District Court
File No. 55-CV-10-6053

Mark G. Stephenson, Geraldine M. Sutcliffe, Stephenson & Sutcliffe, P.A., Rochester,
Minnesota; and

Peter C. Sandberg, Sandberg Law Firm, Rochester, Minnesota (for appellants)

Steven M. Sitek, Mark R. Bradford, Bassford Remele, Minneapolis, Minnesota (for
respondent)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUDSON, Judge

Appellants insurance policyholders challenge the district court's summary judgment declaring that their property losses related to mold, rot, and condensation were excluded from coverage under their all-risk policy with respondent insurance company. Because the district court did not err by concluding that appellant's losses were excluded from coverage; that the policy's ensuing-loss clause did not restore coverage; and that no genuine issue of material fact existed as to the application of supplementary coverage for collapse, we affirm.

FACTS

In 1978, appellants Jerome and Marlyce Koskovich purchased a home in Byron that was built in 1904. Beginning in 1983, appellants insured the home with an all-risk insurance policy issued by respondent American Family Mutual Insurance Company. From 1991–95, appellants undertook substantial remodeling, which included rotating the house 45 degrees, “cut[ing] [the house] in half,” removing a wing, and adding a new section. During the project, the exterior of the house was torn down to the studs and then re-sided. Because of new energy-code requirements, polypropylene vapor barriers were installed, with pinholes to assist with ventilation. Appellant Jerome Koskovich, a civil engineer and a former director of building and safety for the City of Rochester, acted as general contractor.

In 2008, Jerome Koskovich noticed water on an interior floor and determined that adhesive holding a rubber membrane to a roof had failed. In the course of investigating

the damage, he discovered that the sheathing underneath the siding, as well as the home's framing, was wet and rotten, requiring removal and replacement of the siding and studs. Roof boards and rafters were also damaged by high water content and insects. He believed that the water damage had been caused by the condensation of warm inside air, which migrated to the cooler exterior wall surface, where it was trapped by the vapor barrier.

Appellants undertook extensive repairs and submitted a property-damage claim under the policy with respondent. Respondent's structural engineer inspected the property and noted moisture stains and dampness, which indicated to him that water had been held between the vapor barrier and the wood siding, with a severe and widespread level of moisture in the walls. He believed that the moisture was likely caused by condensation of water vapor where the vapor barrier was held tight to the sheathing, and by inward water migration from wet siding during rainy periods by capillary action through the vapor-barrier perforations. He opined that, although the home's framing was deteriorated and structurally compromised, it was not apparent that the structure was in imminent danger of collapse.

Respondent denied coverage for appellants' loss, and appellants filed a complaint in district court seeking a determination that the policy covered the damage to their home. The parties filed cross motions for summary judgment. After a hearing, the district court issued summary judgment in favor of respondent. The district court concluded that the damage from mold, rot, and insect infestation, which was excluded under the policy, was not separate from damage resulting from moisture. The district

court also concluded that an ensuing-loss clause did not bring the damage within the policy coverage and that supplemental coverage for collapse did not apply because there was no evidence on which a jury could reasonably find that the home was in danger of imminent collapse. This appeal follows.

D E C I S I O N

When reviewing an appeal from summary judgment, this court determines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Because the facts are undisputed, we must decide only whether either party is entitled to judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I

The interpretation of an insurance policy presents a legal issue, which this court reviews de novo. *Auto-Owners Ins. Co. v. Todd*, 547 N.W.2d 696, 698 (Minn. 1996). We interpret insurance policies using general principles of contract law and give effect to the parties' intentions as expressed in the contract of insurance. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). An insurance policy "must be construed as a whole, and unambiguous language must be given its plain and ordinary meaning." *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). Ambiguities affecting coverage are resolved in favor of the insured, and exclusions are strictly construed against the insurer. *Progressive Specialty Ins. Co. v. Witness by Witness*, 635 N.W.2d 516, 518 (Minn. 2001); *Thommes*, 641 N.W.2d at 884.

Language in a policy is ambiguous if it is susceptible to two or more reasonable interpretations. *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997).

The insured bears the initial burden of demonstrating a prima facie case of coverage under the policy. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009). The burden then shifts to the insurer to prove the applicability of an exclusion. *Id.* at 313. If the insurer shows that an exclusion applies, the burden shifts back to the insured to demonstrate an exception to that exclusion, which then restores coverage. *Id.* at 314.

Appellants' policy is an all-risk policy, which covers all losses except those expressly excluded. *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 299 (Minn. App. 1997) (citation omitted). The district court concluded that the plain language of the policy unambiguously excluded coverage for the damage to appellants' home because the policy contained exclusions for property loss resulting directly or indirectly from "condensation, mold, wet or dry rot."

Appellants assert that the district court erred by concluding that an exclusion applied to preclude coverage and claim that the all-risk policy did not unambiguously state that the water damage in their home was excluded from coverage. They point out that a different water-related exclusion in the policy specifically excludes from coverage water damage that is a consequence of surface or flood waters, drain sewer backups, and sub-surface waters. They argue that, because their water-related damage did not result from one of those enumerated water-related events, but rather from the installation of the

vapor barriers, no water-related exclusion applies. And they maintain that, because their damages flowed from a covered event, coverage was established under the policy.¹

The Minnesota Federal District Court recently granted summary judgment to an insurer based in part on the application of policy language similar to that in appellants' policy. *Friedberg v. Chubb & Son, Inc.*, ___ F. Supp. 2d ___, 2011 WL 5078777 (D. Minn. Oct. 25, 2011). In *Friedberg*, the plaintiffs' home was constructed with an exterior insulation and finish system, which allegedly allowed water intrusion causing mold, rot, and damage to framing and insulation. *Id.* at *1–2. Their insurance policy contained an exclusion for losses “contributed to, made worse by, or in any way result[ing] from” construction defects. *Id.* at *5. The court concluded that coverage for appellants' losses was barred by the construction-defects exclusion, reasoning that the policy language “unambiguously includes both the faulty construction itself and the results of such faulty construction.” *Id.* at *6.

In this case, the plain language of the policy states:

We do not cover loss to the property . . . resulting *directly or indirectly* from or caused by one or more of the following. Such loss is excluded *regardless of any other cause or event contributing concurrently or in any sequence* to the loss. [The exclusions include] . . . deterioration . . . condensation, mold, wet or dry rot; . . . insects.

¹ We note that, although the policy also contains a construction-defect exclusion, the district court observed that neither party alleged that faulty products or workmanship caused appellants' losses. We therefore decline to consider respondent's argument, raised for the first time on appeal, that coverage is also precluded by the construction-defect exclusion. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will not generally address issues not raised before and considered by the district court).

(Emphases added.) We conclude that, as in *Friedberg*, the policy language in this case unambiguously excludes losses resulting from the named exclusions, regardless of whether other causes contributed concurrently to those losses. In other words, the only reasonable interpretation of appellants’ policy is that it excludes damage from mold, rot, insects, and deterioration, even if water damage caused or contributed to those damages. *Cf. Medica, Inc.*, 566 N.W.2d at 77 (stating that policy language is ambiguous if it is susceptible to more than one reasonable interpretation). Therefore, the district court did not err by concluding that the named exclusions apply to bar coverage for appellants’ losses.

Appellants argue that some of their damages resulting from water intrusion, such as damage to electrical membranes of the house, are not excluded because they do not relate to the exclusions for mold or insects. But the policy also contains exclusions for “deterioration” and “condensation,” and we cannot conclude that the district court erred by failing to distinguish appellants’ mold-and-rot damage from additional damage, such as damage to the home’s electrical membranes, which also was caused by leakage after installation of the vapor barrier.

II

Appellants argue that the district court erred by concluding that their damages were not covered by the ensuing-loss provision of the policy.² If a policy has an ensuing-loss clause, “[a]n ensuing loss is covered even if an excluded peril is a ‘but for’ cause of

² “[A]n ‘ensuing loss’ clause . . . brings within coverage a loss from a covered peril that follows as a consequence of an excluded peril.” *Sentinel Mgmt. Co.*, 563 N.W.2d at 301.

the loss.” *Sentinel Mgmt. Co.*, 563 N.W.2d at 301 (citations omitted). In *Sentinel*, this court concluded that the release of asbestos fibers in a policyholder’s buildings was a “distinct, separable, ensuing loss[.]” that was excepted from the policy’s wear-and-tear exclusion, reasoning that “[d]amage to the buildings arising from wear and tear, such as holes in the ceilings and abrasions on walls, is separable from the asbestos contamination. The two are not different classifications of a single phenomenon.” *Id.* at 301–02. In support of this analysis, we cited *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.*, 857 F.2d 286, 288–89 (5th Cir. 1988), which held that coverage existed under an ensuing-loss clause when a machinery breakdown, an excluded peril, directly caused a heavy object to fall and damage a shiploader. *See id.* at 301.

Appellants’ policy contains an ensuing-loss clause, which states that “we do cover any resulting loss to property . . . not excluded or excepted in this policy.” They argue that the water damage to their home is distinct from the excluded mold-and-rot related loss, and it is therefore brought within coverage under the ensuing-loss clause. But the district court correctly reasoned that to read the policy as appellants suggest would nullify the exclusion for mold or rot because no mold or wet rot would ever occur without moisture. *See Steele v. Great W. Cas. Co.*, 540 N.W.2d 886, 888 (Minn. App. 1995) (stating that, where possible, court should construe insurance policy to give effect to all provisions), *review denied* (Minn. Feb. 9, 1996). We agree and conclude that the water damage and resulting mold, rot, and deterioration did not operate as separable and distinct losses within the purview of the ensuing-loss clause. *Cf. Sentinel*, 563 N.W.2d at 301; *see also Friedberg*, 2011 WL 5078777, at *7 (concluding that ensuing-loss clause

did not bring losses within scope of policy following construction-defect exclusion because there was no “‘separable and distinct peril’ that led to deterioration, rot and warping other than time”).

Appellants argue that in this case, unlike *Friedberg*, “there is no excluded cause, like construction defects, to start the chain of causation.” We disagree. Appellants’ policy expressly excludes damage resulting from mold, rot, or deterioration; we cannot read the ensuing-loss clause to circumvent those exclusions. *See Friedberg*, 2011 WL 5078777, at *7 n.8 (stating that “[a]n ensuing loss provision cannot be used to circumvent other relevant policy exclusions”); *see also Ames Privilege Assocs. Ltd. P’ship v. Utica Mut. Ins. Co.*, 742 F. Supp. 704, 707 (D. Mass. 1990) (stating that an “‘ensuing loss’ clause provides coverage for losses caused by *other perils* which are not excluded in the policy endorsement”). The district court did not err by concluding that the ensuing-loss clause did not provide coverage for appellants’ losses.

Appellants also maintain that ambiguities in the policy must be construed in their favor and that they were entitled to coverage based on their reasonable expectations. *See Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 47–48 (Minn. 2008) (noting that, in certain circumstances, courts will apply doctrine of reasonable expectations to honor “objectively reasonable expectations” of policyholders) (quotation omitted). But this doctrine is limited to use “as a tool for resolving ambiguity and for correcting extreme situations,” such as when a policy contains a hidden exclusion. *Id.* at 49. But here, the policy’s exclusions do not create an ambiguity. And “[w]here a policy exclusion lies in the ‘exclusion’ section of a policy, . . . it is not hidden and . . . the insured should

therefore reasonably expect the clause to limit coverage.” *Frey v. United Servs. Auto. Ass’n*, 743 N.W.2d 337, 343 (Minn. App. 2008). The exclusions for mold and rot, which were listed in the policy-exclusion section, were not hidden or obscure, and we conclude that the doctrine of reasonable expectations does not apply to provide coverage for appellants’ losses.

III

Appellants argue that the district court erred by concluding that the policy’s supplemental coverage for collapse requires a threat of imminent collapse and that no genuine issue of material fact exists as to whether the home was in danger of imminent collapse. Minnesota appellate courts have not directly addressed the standard required to show collapse under such coverage. But the United States Court of Appeals for the Eighth Circuit has recently endorsed the majority view that “collapse” requires a showing of material impairment, which means “that actual collapse [must] be imminent before coverage exists.” *KAAPA Ethanol, LLC v. Affiliated FM Ins. Co.*, 660 F.3d 299, 306 (8th Cir. 2011) (quotation omitted). The imminence requirement “‘avoids both the absurdity of requiring an insured to wait for a seriously damaged building to fall and the improper extension of coverage’ that would convert the policy ‘into a maintenance agreement.’” *Id.* (quoting *Doheny W. Homeowners’ Ass’n v. Am. Guar. & Liab. Ins. Co.*, 70 Cal. Rptr. 2d 260, 264 (Cal. App. 1997)).

The court in *KAAPA* concluded that the district court erred when it instructed the jury to disregard the factor of imminence in determining whether ethanol storage tanks were materially impaired after they started to lean and their foundations started to sink.

Id. at 301, 306. Appellants argue that *KAAPA* supports their argument that the assessment of imminence is a multi-factor test, which always requires jury determination. But although *KAAPA* concluded that an imminence instruction was required under certain facts, it does not preclude the district court, under different facts, from deciding the issue of material impairment as a matter of law.

We conclude that this is such a case, and that the district court correctly applied the material-impairment standard and determined that no genuine issue of material fact existed on the issue of imminent collapse. Respondent's engineering expert stated that, based on a reasonable degree of engineering certainty, the home was not in danger of collapse when the damage was discovered. Jerome Koskovich, acting as his own expert, stated that, if the home had not been repaired, it would have been showing serious damage "probably within five to 10 years at the most" and that "at some point in time, if it's a bearing wall, you're going to get to the point where you're going to have a collapse." But he stated that when a collapse might occur was "speculative." On these facts, the district court did not err by concluding that no genuine issue of material fact precluded summary judgment on this issue.

Affirmed.