

Nos. A04-1442 and A04-1612

State of Minnesota
In Supreme Court

Wooddale Builders, Inc.,

Appellant,

vs.

Maryland Casualty Company, d/b/a Zurich North America,

Appellant,

vs.

American Family Insurance, and
Western National Insurance Group,

Appellants,

and

West Bend Mutual Insurance Company, and
American Economy Insurance Co. (SafeCo),

Respondents.

BRIEF AND APPENDIX OF APPELLANT WESTERN NATIONAL

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STATEMENT OF ISSUES

(1) When several insurers each have duties of defense in respect to claims being asserted against the same insured and where such insurers have agreed to waive enforcement of the Minnesota rule which bars actions between insurers for the recovery of defense costs incurred in defending a mutual insured, should defense costs be apportioned on an equal basis regardless of each insurer's time on the risk?

Court of Appeals held: In the negative.

Apposite Authority:

Jostens, Inc. v. Mission Insurance Company, 387 N.W.2d 161 (Minn. 1986).

(2) Where a claim against a home builder is that the home has experienced property damage over a period spanning multiple liability insurance policy periods, should the end date for the allocation of triggered insurance coverage be the date on which the builder received notice of the claimed damage?

Court of Appeals held: In the negative.

Apposite Authorities:

Northern States Power Company v. Fidelity and Casualty Company of New York, 523 N.W.2d 657 (Minn. 1994)

Westling Manufacturing Company v. Western National Mutual Insurance Company, 581 N.W.2d 39 (Minn. App. 1998)

Jostens, Inc. v. Mission Insurance Company, 387 N.W.2d 161 (Minn. 1986)

STATEMENT OF CASE

This is a declaratory judgment action to determine the duties and rights of an insured home builder and several of its insurers in connection with claims against the builder that the homes that it built have experienced water intrusion and resulting property damage. The only unresolved questions involve (1) the method for determining how to apportion defense costs in connection with such claims and (2) the end date to use in determining the scope of each insurer's indemnification obligations.

On June 15, 2004, following cross motions for summary judgment, the trial court, Honorable Robert A. Blaeser presiding, held on undisputed facts that (1) the costs of defense should be borne equally by each insurer and (2) the end date for allocation of indemnity cost purposes is the date on which the insured builder was put on notice of the homeowner's claim. As to the defense costs issue, the insurers had previously agreed to waive the right to enforce the rule in Minnesota banning actions for recovery of defense costs between insurers. Respondent West Bend Mutual Insurance Company appealed from the judgment.¹

On May 3, 2005, the Minnesota Court of Appeals filed its decision reversing the lower court judgment on both issues. *Wooddale Builders, Inc. v. Maryland Casualty Company, et al*, 695 N.W.2d 399 (Minn. App. 2005). It held that defense costs should be apportioned pro rata by time on the risk and that the proper end date for purposes of apportioning indemnification obligations is the date of remediation and not the date of notice to the builder. *Id.*, at 406, 407. Western National, American Family, and Maryland Casualty Company, along

¹ American Economy Insurance Company also appealed but on an issue not presently before this Court. It argued in support of the trial court's rulings as set forth here.

with the insured, Wooddale Builders, Inc., petitioned this Court for further review. Review was granted by this Court's Order dated July 19, 2005.

STATEMENT OF FACTS

Only the most abbreviated of facts need be set forth here in order for the Court to come to grips with the two questions presented on appeal.

Wooddale Builders, Inc. (hereinafter "Wooddale") has been involved in the business of constructing single family homes since at least 1990. Sometime in late 2000, it began receiving complaints from homeowners about water intrusion problems in homes that it built and sold from 1990 to 1996. Am. Fam. App. 16.²

As the claims were presented to Wooddale, it furnished notice to its various insurers who furnished liability insurance policies for one or more policy periods spanning November 13, 1990 through November 13, 2002. The insurers on the risk during that period, *seriatim*, were American Family (five years), West Bend (one year), Safeco (one year), Maryland Casualty (three years), and Western National (two years).

This lawsuit was brought in August 2002 in order to clarify the respective rights and duties of Wooddale and its various insurers. Meanwhile, the insurers and Wooddale have been investigating and responding to the claims and the insurers have entered into a cost-sharing agreement while reserving all rights *inter se*. *Id.*, at 17. The insurers have specifically agreed to waive the rule in Minnesota which bars actions for contribution towards defense costs

² "Am. Fam. App." refers to the Appendix to the Brief of Appellant American Family Insurance Company dated August 12, 2005.

between insurers. *Id.* See, *Iowa National Mutual Insurance Company v. Universal Underwriters Insurance Company*, 276 Minn. 362, 150 N.W.2d 233 (1967).

In support of their summary judgment motions, Maryland Casualty and American Family submitted affidavits attesting to the fact that the damages to the homes were the product of a continuous process that started during or after construction and continued up until the defects in the homes were corrected. No evidence was offered to contradict these affidavits. *Id.*, at 17. Accordingly, the parties agreed that each insurer's pro rata indemnification obligation would be based upon the number of years that each insurer insured Wooddale. The parties further agreed that the starting point for the allocation of damages would be the date on which the closing of the particular home occurred. The parties, however, have not agreed on the proper end date for the apportionment of damages. *Id.*, at 18.

LAW AND ARGUMENT

A. STANDARD OF REVIEW.

In insurance coverage disputes, a trial court's decision concerning how to allocate or apportion indemnification obligations over multiple policy periods and periods when the insured is without insurance are reviewed under an abuse of discretion standard. *In Re: Silicone Implant Litigation*, 667 N.W.2d 405, 417 (Minn. 2003).³ On the other hand, a trial

³ The Court of Appeals, below, acknowledged this holding from *In Re: Silicone Implant Litigation, supra*, but somehow found a distinction between a district court's decision to apply such a method versus the manner of its application. It viewed Judge Blaeser's decision as falling into the second rather than the first category and, thus, improperly applied a *de novo* standard of review. See *Wooddale Builders, supra*, 695 N.W.2d, at 403, n. 1.

court's decision concerning the scope of an insurer's defense obligations presents a purely legal question which is reviewed *de novo*. *The Home Insurance Company v. National Union Fire Insurance Company*, 658 N.W.2d 522 (Minn. 2003).

B. TRIAL COURT PROPERLY DETERMINED THAT WOODDALE'S INSURERS SHOULD SHARE EQUALLY IN PAYMENT OF DEFENSE COSTS, REGARDLESS OF TIME ON THE RISK.

Approximately sixty homeowners have brought claims against Wooddale alleging that its defective work has led to water intrusion problems. Most of the claims against Wooddale had surfaced prior to the commencement of this action in August 2002. The first of these homes was built in 1990.

In the twelve year interval just described, Wooddale was insured by five different insurers. Each of the policies that were issued contained a standard insuring agreement which obligated the insurer to defend any and all claims to which the insurance might apply ... policy conditions, definitions, and exclusions taken into account. Most of the insurers agreed, at an early date, to participate in the investigation, defense, and settlement of the numerous claims being asserted against Wooddale but with the understanding that all rights respecting the recovery of defense costs and indemnity payments would be reserved for resolution at a later date. The insurer defendants specifically agreed amongst themselves that they would not assert the *Iowa National* rule as a bar against recovery of defense costs.

The first of the questions, then, before the trial court was simply whether defense costs should be shared equally or whether they should be apportioned based upon each insurer's time on the risk. Judge Blaeser decided that the only fair outcome was one leaving each insurer with

an equal share of the defense costs. He was right.

The only party aggrieved by Judge Blaeser's decision is Respondent West Bend which insured Wooddale for just one year. It is not necessarily surprising, therefore, that it should have sought relief from the trial court's decision. What is surprising is the misguided decision of the Court of Appeals which adopted West Bend's position that defense obligations should be apportioned in exactly the same way that indemnification obligations would be apportioned under a time on the risk approach.

The appellate court's decision ignores longstanding case law which obligates an insurer to defend all claims against an insured even if only one of the claims is arguably covered. *Bituminous Casualty Corporation v. Bartlett*, 307 Minn. 72, 76, 240 N.W.2d 310, 312 (1976). The defend all claims rule reflects the fact that the insurer's duty to defend is separate from its duty to indemnify and is broader than any indemnification obligations. *Brown v. State Auto and Casualty Underwriters*, 283 N.W.2d 822, 825 (Minn. 1980). But for the agreement of the insurers in this case, therefore, Wooddale had a right to look to West Bend, alone, for a defense and West Bend would then have become obligated to defend the entire claim against Wooddale so long as any part of the claim was arguably within the scope of its coverage under its policy.

The only circumstance that impacts on the defense obligations of the insurers in this case is their agreement to waive the *Iowa National* rule so as to allow insurers who have paid more than their fair share to recover from those who have not. As a practical matter, the insurers have simply agreed that the absence of a Loan Receipt Agreement with Wooddale is

not a bar to a claim for contribution towards defense costs. The insurers have agreed that their rights *inter se* will be determined as if a proper Loan Receipt Agreement were in place. In such a scenario, any one of the paying insurers, standing in the shoes of Wooddale, has rights against the non-paying insurers identical to those possessed by Wooddale. *Jostens, Inc. v. Mission Insurance Company*, 387 N.W.2d 161, 164 (Minn. 1986) and *Blair v. Espeland*, 231 Minn. 444, 43 N.W.2d 274 (1950).⁴

Combining Minnesota case law concerning an insurer's duty to defend with the insurer's agreement to waive the *Iowa National* rule, it is clear that Judge Blaeser's decision to impose defense costs obligations equally upon all of the insurers was correct. The Court of Appeals erred in concluding otherwise.

C. DATE OF NOTICE OF CLAIM TO WOODDALE IS CORRECT END DATE FOR ALLOCATION OF COVERED DAMAGES.

All of the policies issued to Wooddale beginning November 13, 1990 through November 13, 2002 are "occurrence-based" liability policies under which the insurers have agreed to indemnify Wooddale for property damage resulting from an "occurrence" to which the policy applies and occurring during the policy period. Minnesota follows the "actual injury" rule in determining when an "occurrence" occurs. Under this rule, "the time of the

⁴ The insurers' rights to recoup defense costs have become the "law of the case" in the sense used by this Court in cases such as *Bakke v. Rainbow Club, Inc.*, 235 N.W.2d 375 (Minn. 1975) and *Stumne v. Village Sports and Gas*, 243 N.W.2d 329 (Minn. 1976). Western National recognizes, however, that that doctrine is most frequently applied where an appellate court has ruled on a legal issue and has remanded the case to a lower court for further proceedings. *Loo v. Loo*, 520 N.W.2d 740 (Minn. 1994) and *Cayse v. Foley Brothers*, 260 Minn. 248, 110 N.W.2d 201 (1961).

occurrence is not the time the wrongful act was committed but the time the complaining party was actually damaged.” *In Re: Silicone Implant Litigation*, 667 N.W.2d 405, 415 (Minn. 2003), quoting *Singsaas v. Diederich*, 307 Minn. 153, 156, 238 N.W.2d 878, 880 (1976).

After establishing that the “actual injury” rule applies, the next hurdle is in determining when such injury has occurred. When is coverage under a particular policy “triggered?” The answer is that coverage is “triggered” if covered damage has occurred while the policy was in effect. *NSP v. Fidelity and Casualty Company of New York*, 523 N.W.2d 657 (Minn. 1994).

The next step involves determining how coverage for damages occurring over multiple policy periods are to be allocated. Ordinarily, when damage has been caused by a discrete and identifiable event, then the policy in effect at the time of the “actual injury” is the only policy which affords coverage. *SCSC Corp. v. Allied Mutual Insurance Company*, 536 N.W.2d 305, 318 (Minn. 1995). In *SCSC*, the jury found that the contamination of the groundwater had occurred as a result of a single event. Even though there was a continuing leaching of contaminants over multiple policy periods, the Supreme Court held that only the policies in effect at the time of the initial contamination (coinciding with the chemical spill) provided coverage. In *Domtar, Inc. v. Niagara Fire Insurance Company*, 563 N.W.2d 724 (Minn. 1997), the Court made it clear that the result in *SCSC* is what should occur in most cases. The *Domtar* court, however, went on to say that when it is virtually impossible to say what the specific event may have been which has caused damage, then, employing equitable principles, the Court is to assume that damage has occurred continuously so as to justify an allocation of damages in the manner prescribed by the Supreme Court in *NSP*: pro rata based upon time on

the risk. The burden then is upon an insurer to rebut the presumption of continuing damage showing that no appreciable damage occurred while its policy was in effect.

The fourth and pivotal question at least for purposes of this appeal, is the period of time over which damages (indemnification obligations) are to be apportioned. For lack of record evidence to suggest the contrary, the parties stipulated that damage to each home began during construction and that apportionment of indemnification obligations should start from the date on which the home was sold and the purchaser took possession.⁵ However, the parties could not agree on the proper end date for such apportionment. West Bend, alone, insisted upon the date of remediation of the home as the end date. All other parties, including Wooddale, argued for the date of notice of the claim to Wooddale as the proper end date. The trial court rejected West Bend's decision and it is West Bend, alone, that has challenged that ruling on appeal.⁶

There are good and sufficient reasons supporting the trial court's decision and undermining that of the Court of Appeals.

First, a notice of claim date as the end date avoids disputes and litigation concerning coverage for the insured under a policy issued subsequent to the notice of claim and prior to the final remediation of the home. Liability insurance is written and sold to provide protection to an insured for liability for damages brought about by an accident. Indeed, the term

⁵ If an earlier date were assumed, then a common exclusion for property damage to the insured's own property would be a bar to coverage.

⁶ Safeco supported the trial court's decision concerning the end date for allocation purposes but has not filed a Petition for Review of the decision of the Court of Appeals. It also appears that most, if not all of the amici are advocating the date of notice of claim as the proper end date.

“occurrence” is defined in precisely those terms:

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Martin Aff., Ex. A, at p. 12 (WN App-16).

Stated another way, liability insurance is procured to protect an insured against fortuitous losses which are beyond the insured’s effective control in contrast to an insured’s business risks over which it does exercise substantial control. *Bor-Son v. Commercial Union*, 323 N.W.2d 58 (Minn. 1983). If an insured has knowledge of a claim against it prior to the inception date of a new policy, then continuing damage resulting to a particular home is no longer an “accident” or a “fortuity” from the insured’s standpoint. Instead, such damage is known to the insured and gives rise to the application of the known risk doctrine as expounded in cases such as *Gopher Oil v. American Hardware Insurance Company*, 588 N.W.2d 756, 759 (Minn. App. 1999) and *Domtar, supra*, 563 N.W.2d, at 737. Many insurers, including Western National, now include “known risk” endorsements in their policy so as to clearly bar coverage for any claim of damage which was known to the insured before the inception date of the policy. See, e.g., Buckley Aff., Ex. C (WN App-25).

Apart from the known risk issue, setting the end date as the date of notice of claim to the insured provides an incentive to the insured and to the homeowner to take steps to mitigate the damages by undertaking repairs at an early date. There can be no legitimate objection to the notion that an insurance company ought not to be liable for additional property damage on account of conditions known both to the homeowner-claimant and the insured-contractor prior

to the inception date of a new policy.

In addition, this Court has suggested that the allocation period might properly end with the date of “discovery” which, in this case, would be tantamount to the date of notice of claim to the insured. *NSP, supra*, 523 N.W.2d, at 664.

The end date chosen by the trial court most clearly comports with the contractual undertakings of the insurer and promotes an early resolution of a claim and the remediation of the damage that has occurred. The trial court’s decision was correct and the Court of Appeals erred in accepting a remediation date as the end date for determining the allocation of coverage.

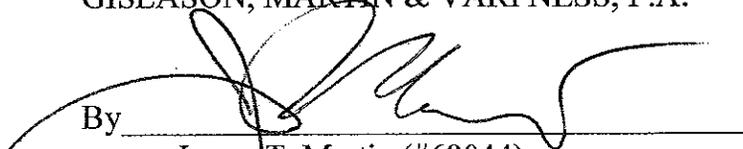
CONCLUSION

Western National respectfully submits that the decision of the Court of Appeals should, in all respects, be reversed with a remand to the trial court to permit enforcement of the parties’ rights under the trial court’s declaratory judgment.

Respectfully submitted,

Dated: 6-18-05

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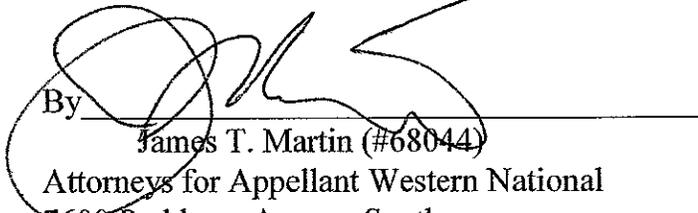
CERTIFICATION

I certify that this Brief conforms to RCAP 132.01 and was prepared as follows:

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).