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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2016**

Nor-Son, Inc., et al.,
Appellants,

vs.

Western National Mutual Insurance Company,
Respondent,

Select Carpenters & Components, Inc., et al.,
Defendants.

**Filed May 14, 2012
Reversed and remanded
Klaphake, Judge**

Hennepin County District Court
File No. 27-CV-11-1331

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Considered and decided by Cleary, Presiding Judge; Klaphake, Judge; and Harten,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellants Nor-Son, Inc., and Cincinnati Insurance Companies, Nor-Son's insurer (collectively, appellant), challenge the district court's summary judgment granted to respondent Western National Mutual Insurance Company, arguing that the district court erred by concluding that respondent had no duty to defend or indemnify Nor-Son as an additional insured under a commercial general liability (CGL) policy respondent issued to defendants Select Carpenters & Components, Inc. and SCC Carpenters, LLC (collectively, SCC).

Because the CGL policy provides coverage for liability incurred by Nor-Son as the result of SCC's or an SCC employee's acts, and the underlying complaint and third-party complaint together set forth a claim arguably within the policy coverage, the district court erred by granting summary judgment. We therefore reverse and remand for further proceedings consistent with this opinion.

DECISION

We review the district court's summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). Because the parties here agree on the material facts, our review is limited to the district court's application of the law. "[T]he interpretation of insurance-policy language based on undisputed underlying facts, as well as statutory construction, are questions of law,"

reviewed de novo by this court. *Mitsch v. Am. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007).

The issue before us is whether the district court erred by determining that respondent had neither a duty to defend nor to indemnify appellant under its CGL policy. An insurer's duty to defend an insured is based on contract and is broader than the duty to indemnify. *Cargill, Inc. v. Ace Am. Ins. Co.*, 784 N.W.2d 341, 349 (Minn. 2010). An insurer's duty to defend is triggered when a claim "arguably" falls within the policy coverage. *Fluoroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 681 (Minn. App. 1996) (citing *Johnson v. AID Ins. Co.*, 287 N.W.2d 663, 665 (Minn. 1980)). Ordinarily, the insurer can rely on a complaint's allegations to determine whether the subject of the complaint falls within the policy coverage. *Garvis v. Emp'rs Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993). The insurer does not have a duty to investigate further to "determine whether there are other facts present which trigger [the] duty." *Id.*

[But] if the insurer is aware of facts indicating that there may be a claim, either from what is said directly or inferentially in the complaint, or if the insured tells the insurer of such facts, or if the insurer has some independent knowledge of such facts, then the insurer must either accept tender of the defense or further investigate the potential claim.

Id. "Doubts as to coverage must be resolved against the insurer issuing the policy in favor of coverage, and the burden rests on the insurer to prove the claim is not covered." *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 183 (Minn. App. 2001).

Nor-Son, a general contractor, subcontracted with defendant SCC to roof certain commercial buildings. As part of the contract, Nor-Son was named as an additional insured under the CGL policy respondent provided to SCC. SCC's employee, Matthew Scherber, who had a preexisting seizure disorder, apparently suffered a seizure while working on a roof, fell off the roof, and was gravely injured. Scherber was working without the safety equipment recommended by the physician who released him for work. Scherber received workers' compensation benefits from SCC and sued Nor-Son, alleging negligence, breach of contract, and failure to warn, based on Nor-Son's retention of control over the worksite. In the complaint, Scherber pleaded that he was an employee of SCC and was injured while performing work for SCC. Scherber, who could not sue SCC because of the exclusivity of the workers' compensation remedy, did not plead negligent acts by SCC in the underlying complaint. Nor-Son tendered defense to respondent, who refused the tender because SCC, its insured, was not named in the complaint. Nor-Son then sued out a third-party complaint against SCC, alleging that SCC had failed to provide Scherber with a safe work environment because it had not provided "reasonable safety training, safety equipment, supervision, and warnings about the alleged unsafe conditions at the worksite." Nor-Son provided respondent with a copy of the third-party complaint.

Under the CGL policy issued to SCC, coverage is extended to appellant

only with respect to liability for "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf, in the

performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

The terms “you” and “your” refer to SCC. Respondent argues that the unambiguous language of this clause limits its duty to defend and indemnify to incidents in which appellant is vicariously liable because of SCC’s negligent acts or omissions; respondent asserts that it has no duty under this clause for liability arising out of Nor-Son’s own negligent acts or omissions. In support of this argument, respondent at oral argument cited the opinion *MacArthur v. O’Connor Corp.*, 635 F. Supp. 2d 112 (D. R.I. 2009), in which the district court concluded that a similar clause limited the insurer’s duty to defend and indemnify solely to claims based on the vicarious liability of the additional insured; because there was no policy coverage for joint and several liability, negligent acts or omissions by the additional insured were not covered. *Id.* at 116-117. Respondent maintains that because SCC is not charged with negligence in the underlying complaint, it has no duty to defend because the complaint only alleges negligent conduct by Nor-Son.

We note that the general contractor’s liability in *MacArthur* was premised on a negligent act of the general contractor, a defective set of stairs that the general contractor had built. *Id.* at 115. Here, the allegations of the underlying complaint point to no specific negligent act or omission by Nor-Son, but rather assert that because Nor-Son retained control of the work site, it was responsible for unsafe conditions on the site. These pleadings are consistent with a claim of vicarious liability. *See Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997) (defining “vicarious liability” as “the imposition of liability on

one person for the actionable conduct of another, based solely on a relationship between the two persons”). While the underlying complaint does not identify SCC as the negligent actor, neither does it identify actions by Nor-Son; liability is premised on Nor-Son’s retained control over the site. In *Sutherland*, the supreme court commented that “we have only been willing to apply vicarious liability to a hiring company [for injuries to an employee of a subcontractor] when the company retains detailed control over the specific project on which the employees are working.” *Id.* at 6. The underlying complaint here sets forth a claim for vicarious liability.

Further, there is a significant difference between the policy language in *MacArthur* and the language of the policy before us. The policy in *MacArthur* limited coverage to liability incurred because of the named insured’s acts or omissions or because of the additional insured’s acts or omissions in connection with the general supervision of the operations, but not the additional insured’s other negligent acts. 635 F. Supp. 2d at 115. Respondent’s policy extends coverage for liability incurred by Nor-Son if “caused . . . in whole *or in part* by [SCC’s acts or omissions].” (Emphasis added.) This language indicates that policy coverage is not limited solely to vicarious liability, but that coverage extends to situations in which liability is shared by SCC and another. Thus, if SCC’s negligent safety practices were at least in part the cause of the liability, the policy may extend coverage for Nor-Son’s negligent acts.

We also observe that a third-party tortfeasor is responsible for paying a liability award to an injured party who cannot sue his employer because of the exclusivity of remedy under the workers’ compensation act, for any award in excess of the workers’

compensation benefits paid by the employer. *See Lambertson v. Cincinnati Welding Corp.*, 312 Minn. 114, 127-28, 257 N.W.2d 679, 688 (1977); *Decker v. Brunkow*, 557 N.W.2d 360, 361-62 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997). The allegations of the underlying complaint raise the specter of this well-known rule. The standard for invoking the duty to defend is a low one, requiring only that a claim “arguably” fall within policy coverage. *Fluoroware*, 545 N.W.2d at 681.

Taken together, the policy language extending coverage for liability caused even partially by SCC and the complaint pleading a factual basis for a workers’ compensation claim, should have been enough to apprise respondent that the claim “arguably” fell within policy coverage. These considerations, taken in conjunction with the third-party complaint provided by appellants to respondent, are sufficient to trigger the duty to defend.

Respondent asserts that appellant cannot rely on its “own opportunistic claim of fault against SCC” set forth in the third-party complaint. Respondent cites two Illinois cases, *Nat’l Fire Ins. of Hartford v. Walsh Constr. Co.*, 909 N.E.2d 285 (Ill. App. Ct. 2009), and *Nat’l Union Fire Ins. Co. v. R. Olson Constr. Contractor., Inc.*, 769 N.E.2d 977 (Ill. App. Ct. 2002), for the proposition that the “only relevant pleading on the duty to defend issue is the complaint against the party seeking coverage and not that party’s own complaint against a third party.” But this is not settled law, even in Illinois. *See, e.g., Amer. Econ. Ins. Co. v. Holabird & Root*, 886 N.E.2d 1166, 1178-79 (Ill. App. Ct. 2008) (concluding that “consideration of a third-party complaint in determining a duty to defend is in line with the general rule that a trial court may consider evidence beyond the

underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action”).

The propriety of using a third-party complaint to establish a duty to defend has not been decided in Minnesota. But it is well-settled that, although an insurer may initially rely on a comparison of the four corners of the complaint to the policy language when determining whether it has a duty to defend, once the insurer is made aware of extrinsic evidence that places a claim within the policy language, it may not ignore the claim and must investigate further. *Johnson*, 287 N.W.2d at 665; *see also Garvis*, 497 N.W.2d at 258; *St. Paul Mercury Ins. v. Dahlberg, Inc.*, 596 N.W.2d 674, 677 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999); *Tschimperle v. Aetna Cas. & Sur. Co.*, 529 N.W.2d 421, 424 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). None of these cases involve extrinsic evidence submitted by means of a third-party complaint, but none of them limit the use of such evidence. One commentator states:

An insurer should not be able to escape its defense obligation by ignoring the true facts and relying on either erroneous allegations in the complaint or the absence of certain material allegations in the complaint. The insurer’s sole concern should be with whether the judgment that may ultimately be entered against the insured might, either in whole or in part, be encompassed by the policy. There is authority to the contrary, holding that the insurer’s defense obligation should be determined solely from the complaint, but such authority is unreasoned and consists merely of blind adherence to a general rule in a situation in which the general rule was never intended to apply.

Allan D. Windt, 1 *Insurance Claims & Disputes* 5th § 4.3 (2012). We agree.

The district court here concluded that the third-party complaint did not trigger coverage under the CGL policy because it either (1) allocated fault to Scherber, thus relieving appellant of liability or limiting appellant's liability because of comparative negligence; or (2) allocated fault to SCC for negligence, thus shifting liability from appellant to SCC. The district court reasoned that in either case, appellant would be relieved of liability and would therefore not be covered under the policy: "As it stands, [appellant] can be liable in the Underlying Action only by virtue of its [own] acts and omissions." This conclusion fails to take into account the possibility that Nor-Son would be found vicariously liable for SCC's negligent actions because of retained control over the construction site or that Nor-Son and SCC could both be found partially liable for Scherber's injuries.

The language of an insurance policy is interpreted in accordance with its ordinary and usual meaning, and in such a way as to give effect to the parties' intent. *Youngquist*, 625 N.W.2d at 183. The policy here provides coverage for appellant if appellant is liable because of injuries caused in whole or in part by SCC's acts or omissions. The underlying complaint alleges that appellant is liable because it retained control over the worksite and failed to maintain its safety; in the third-party complaint, Nor-Son alleges that its failure to maintain a safe worksite stems from SCC's failure to provide safety equipment and instructions. This should be sufficient to "arguably" fall within the scope of coverage, which requires respondent to defend appellant in the underlying action. *Johnson*, 287 N.W.2d at 665.

The district court erred by granting summary judgment based on a determination that respondent had no duty to defend Nor-Son. And, in light of our decision, the district court's conclusion that respondent has no duty to indemnify Nor-Son is premature. We therefore reverse the district court's summary judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.