STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1539

Mark Christenson, et al.,
Respondents,

vs.

Egan Companies, Inc, a/k/a Egan Sheetmetal, et al., defendants and third party plaintiffs,
Respondents,

vs.

Mavo Systems, Inc., et al., third party defendants,
Appellants.

Filed June 1, 2010
Affirmed; motion denied
Lansing, Judge

Hennepin County District Court
File No. 27-CV-07-26578

Gary L. Manka, Katz, Manka, Teplinksy, Graves & Sobol, Ltd., Minneapolis, Minnesota (for respondents Mark Christenson, et al.)

Julie A. Doherty, Jesse R. Orman, Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota (for respondents Egan Companies, et al.)

Patrick D. Reilly, Leon R. Erstad, Nicholas H. Jakobe, Erstad & Riemer, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Connolly, Judge.

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

LANSING, Judge

In litigation that grew out of a construction worker's jobsite injuries, the district court entered summary judgment enforcing Mavo Systems, Inc.'s contractual duty to defend and indemnify Egan Companies, Inc. On appeal, Mavo Systems challenges the enforcement of the indemnification provision under Minn. Stat. § 337.02 (2008), the imposition of the duty to defend, and the provision for attorneys' fees. Because the subcontract's indemnification provision is within the specific-coverage exemption created by Minn. Stat. § 337.05 (2008) and the contract imposes a duty to defend the claims at issue, we affirm. We also affirm the district court's determination on attorneys' fees.

F A C T S

Mark Christenson, an employee of Mavo Systems, Inc., was injured on a jobsite at Mystic Lake Casino during the installation of a spiral overhead pipe. Egan Companies, Inc., was the mechanical subcontractor for the construction project. Egan Companies hired Mavo Systems as a sub-subcontractor to insulate the ducts installed by Egan Companies. Mavo Systems and Egan Companies executed a standard subcontract agreement available from Associated General Contractors of Minnesota, Inc. The subcontract incorporates a number of riders and exhibits, including Rider B, which sets forth the indemnification language and agreement to provide insurance.

Rider B contains two provisions that directly relate to the indemnification dispute. The first addresses Mavo Systems' obligation to assume responsibility and liability for damages or injuries connected with the work:

> *Subcontractor agrees to assume entire responsibility and liability* for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of, resulting from, or in any manner connected with the work provided for in this Standard Subcontract Agreement or occurring or resulting from the use by Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by Contractor, Owner, Others, Subcontractor or third parties, and *Subcontractor agrees to defend, indemnify and hold harmless* Contractor, Owner, Others and their agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which Contractor, Owner or Others may be or claimed to be liable, and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph, and *Subcontractor further agrees to obtain, maintain, and pay for such Commercial General Liability insurance*, including contractual liability and completed operations coverage, as will insure the provisions of this paragraph, to the fullest extent available.

(Emphasis added.) The second provision recognizes an express understanding between Mavo systems and Egan Companies on the effect of the indemnity agreement under Minn. Stat. §§ 337.01-.05 (2008):

> Minnesota Statutes 337.05 provides that Minn. Stat. 337.01 to 337.05 does not affect the validity of agreements whereby a subcontractor agrees to provide specific insurance coverage for the benefit of a general contractor. *It is the express understanding and intent of the parties hereto that the insurance protection provided by Subcontractor to Contractor, Owner and Others is intended to cover personal injuries or property damages which arises in whole or part out of the acts, omissions or negligence of Contractor, Owner, or Others*. It is the express understanding and intent

> of the parties that the Contractor, Owner, and Others shall have indemnification from Subcontractor as more fully described above.

(Emphasis added.)

In connection with the construction project, Mavo Systems obtained a commercial insurance policy from appellant American International Specialty Lines Insurance Company (American). The policy included Egan Companies as an additional insured, but excluded from coverage "bodily injury or property damage arising out of the sole negligence or willful misconduct of" Egan Companies.

After Christenson's injury at the Mystic Lake construction site, he and his wife sued Egan Companies and two of its employees, who were involved in the incident that caused his injuries. Egan Companies tendered defense of the claim to American, but American denied coverage, taking the position that Christenson's injuries were caused solely by Egan Companies' negligence. Egan Companies went forward with its own defense, which included the assertion of a third-party complaint against Mavo Systems and American, alleging that, under the terms of the subcontract and insurance policy, Mavo Systems and American had duties to defend and indemnify Egan Companies.

Mavo Systems, American, and Egan Companies brought cross-motions for summary judgment on the issues of indemnification and insurance coverage. The motions essentially disputed the enforceability of the indemnification provision of the subcontract under Minn. Stat. § 337.02. American also challenged its duty to defend Egan Companies under the terms of the insurance policy. The district court denied Mavo Systems' and American's summary-judgment motions and granted Egan Companies'

motion. The combined order and memorandum stated that the indemnification provision of the subcontract is enforceable under sections 337.02 and 357.05; that Mavo Systems had a duty to defend and indemnify Egan Companies in the action; that American had a duty to defend; and that American had a duty to indemnify unless the jury found Egan Companies solely liable for the injuries. In response to a request for clarification, the district court issued an amended summary-judgment order, emphasizing that Mavo Systems' duty to indemnify was contractual and thus did not depend on a determination of comparative fault.

Before trial, all of the litigants reached a settlement of the underlying personal-injury claims and stipulated, for purposes of the settlement, that Christenson was five percent at fault for his injuries. Mavo Systems' and Egan Companies' insurers each agreed to pay part of the agreed settlement, reserving their rights to recover the stipulated amounts from each other. Egan Companies then moved for summary judgment, and Mavo Systems and American filed a memorandum "opposing Egan [Companies'] claims for indemnification." The district court issued an order directing entry of judgment in favor of Egan Companies, explaining that Mavo Systems and American's memorandum sought no more than reconsideration of "the same arguments that [had] already been considered and ruled upon twice."

Egan Companies moved for its costs and attorneys' fees. Mavo Systems and American resisted on two grounds: first, that Egan Companies was not entitled to recover fees incurred after it rejected American's post-summary judgment, pretrial offer to defend; and, second, that Egan Companies was not entitled to recoup fees and costs

that had been paid by its own insurance company because loan-receipt agreements had not timely been executed. The district court rejected these arguments and directed entry of judgment against Mavo Systems and American for Egan Companies' costs and attorneys' fees.

This appeal follows.

D E C I S I O N

On appeal from summary judgment we consider 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). Issues of statutory construction are also reviewed de novo. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

I

The primary dispute in this appeal arises from the interplay of two sections of the Minnesota Statutes governing indemnity agreements in building and construction contracts. Minn. Stat. § 337.02 provides that a subcontractor's agreement to indemnify a contractor is generally unenforceable if it is for indemnification of a liability arising solely from the negligence of the contractor:

> An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific

> contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegatees. . . .

Minn. Stat. § 337.02. But an exception to this general rule provides that section 337.02 does "not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others." Minn. Stat. § 337.05.

These provisions have been interpreted by the supreme court to make construction agreements enforceable if a subcontractor agrees both to indemnify for another's negligence and to insure that risk. *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992). The court in *Holmes* reasoned that "the legislature both anticipated and approved a long-standing practice in the construction industry by which the parties to a subcontract could agree that one party would purchase insurance that would protect 'others' involved in the performance of the construction project." *Id.*

The cases decided since *Holmes* make clear that the specific language employed will determine whether there is an enforceable agreement to indemnify and insure against another's negligence. In *Holmes*, the court found enforceable the contractual language requiring indemnification and insurance for claims including those "for which the [c]ontractor may be or may be claimed to be, liable." *Id.* at 474. In two later cases, however, the supreme court held that the contractual language at issue did not impose enforceable duties to insure and indemnify. In *Hurlburt*, a rider to the contract expressly limited the indemnification obligation to injuries or damages "attributable to the negligence or otherwise wrongful act or omission" of the subcontractor or its sub-subcontractors. *Hurlburt v. N. States Power Co.*, 549 N.W.2d 919, 922 (Minn. 1996).

And in *Katzner*, the court held ambiguous the language requiring indemnification and insurance for claims "regardless of whether or not it is caused in part by a party indemnified," explaining that it could be

> read in two ways: *either* as an agreement to indemnify [the contractor] from all claims regardless of who is at fault, *or* as an agreement to only indemnify [the contractor] from claims caused 'in whole or in part by any negligent act or omission of the [subcontractor],' its [sub-]subcontractors and its employees.

Katzner v. Kelleher Constr., 545 N.W.2d 378, 379, 382 (Minn. 1996).

In this case, the subcontract employs language almost identical to that found enforceable by the supreme court in *Holmes*. The subcontract extends the indemnification obligation to claims for which Egan Companies "may be or claimed to be liable" and requires Mavo Systems to purchase insurance sufficient to cover the indemnification obligation. Furthermore, the subcontract specifically refers to the interplay between sections 337.02 and 337.05 and provides that it is the

> express understanding and intent of the parties . . . that the insurance protection provided . . . is intended to cover personal injuries or property damage which arises in whole or part out of the acts, omissions or negligence of [Egan Companies]. It is the express understanding and intent of the parties that [Egan Companies] shall have indemnification from [Mavo Systems] . . . .

Because the subcontract plainly imposes indemnification and insurance obligations for injuries arising out of Egan Companies' negligence, the district court did not err by enforcing the indemnification provision of the subcontract.

Mavo Systems asserts that the indemnification provision is not enforceable under the insurance exception because there was no agreement to provide "*specific* insurance

coverage for the benefit of others." Minn. Stat. § 337.05 (emphasis added). In so arguing, Mavo Systems attempts to read "specific" to mean a single insurance policy covering the entire construction project. But nothing in the plain meaning of specific—"[e]xplicity set forth; definite"—requires a single insurance policy. *American Heritage Dictionary* 1668 (4th ed. 2000). *See* Minn. Stat. § 645.16 (2008) (requiring statutes to be construed according to their plain meaning). The legislature easily could have provided for identification of specific types of required policies if, as Mavo Systems suggests, that had been its intent. As written, however, the statute does not require a specific type of insurance, but rather that a subcontract set forth—or specify—the type of insurance required from the subcontractor.

Mavo Systems also challenges the district court's determination that its duty to indemnify was not contingent on apportionment of fault. Under the terms of the subcontract, Mavo Systems agreed to indemnify Egan Companies against claims arising out of the construction project, including "claims for which [Egan Companies] may be or claimed to be liable." In other words, Mavo Systems agreed to indemnify Egan Companies without regard to fault. We note that apportionment of fault would be relevant to an analysis, under section 337.02, of the permissible extent of an indemnification obligation without a coextensive agreement to insure. But when, as in this case, indemnification and insurance obligations coincide, section 337.05 exempts the subcontract from the application of section 337.02. Because section 337.02 does not prohibit the agreement, and because the subcontract requires indemnification without

regard to fault, the district court did not err by determining that Mavo Systems' duty to indemnify was not contingent on apportionment of fault.

II

In its second argument on appeal, Mavo Systems challenges the district court's determination that it had a duty to defend Egan Companies, asserting that the Christensons' claims did not arise out of Mavo Systems' work under the subcontract. Mavo Systems' duty to defend under the subcontract broadly extends to damages or injuries "arising out of, resulting from, or in any manner connected with the work" of the subcontract. We agree with the district court's determination that Christenson's injuries, sustained while he was engaged in completing Mavo Systems' work under the subcontract, fall within this broad language. *Cf. Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 419 (Minn. 1997) (stating that "typically, this court has defined the words 'arising out of' in an insurance policy to mean 'causally connected with' and not 'proximately caused by'").

III

Finally, Mavo Systems challenges the district court's provision for Egan Companies to recover attorneys' fees from Mavo Systems. Mavo Systems argues that Egan Companies was not entitled to recover fees incurred after it refused Mavo Systems' offer to take over the defense based on the district court's determination that Mavo Systems had a duty to defend; and that Egan Companies was not entitled to recover fees incurred before execution of a loan-receipt agreement with its own insurer.

The district court found that Egan Companies was justified in rejecting Mavo Systems' offer to take over the defense for three reasons. First, there was a conflict of interest between American and Mavo Systems, on the one hand, and Egan Companies, on the other. *See Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 391 (Minn. 1979) (holding that conflict of interest transforms duty to defend into duty to reimburse for reasonable attorneys' fees). Second, Mavo Systems' antecedent breach in refusing to accept tender of defense earlier in the litigation excused Egan Companies from its duty to tender the defense. And, third, Egan Companies would have been prejudiced by changing counsel so close to trial.

The district court also rejected Mavo Systems' arguments challenging the validity of the loan-receipt agreement. The district court reasoned that Mavo Systems cited no authority for the proposition that a loan-receipt agreement must be signed before fees are incurred and that at least one supreme court decision enforced a loan-receipt agreement that was signed years after resolution of the underlying claim and a declaratory-judgment action on coverage. *See Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 525 (Minn. 2003); *cf. Jostens Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 163-64 (Minn. 1986) (holding valid loan-receipt agreement executed after insured had incurred litigation costs).

Based on our review of the record and relevant authorities, we conclude that the district court did not err in determining that Egan Companies was entitled to recover attorneys' fees from Mavo Systems.

Also pending before this court is Egan Companies' motion to strike portions of Mavo Systems' appendix, which encompass documents that were not part of the record in the district court and references to those documents in Mavo Systems' briefs. Because we have not relied on these materials in reaching our decision, we deny this motion as moot. *See Drewitz v. Motorwerks Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying as moot motion to strike portions of briefs not relied upon by court).

Affirmed; motion denied.