STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1785

Engineering & Construction Innovations, Inc.,
Appellant,

vs.

Western National Mutual Insurance Co.,
Respondent.

Filed June 10, 2013
Reversed and remanded
Smith, Judge

Ramsey County District Court
File No. 62-CV-11-6841

Adina R. Bergstrom, Sauro & Bergstrom, PLLC, Woodbury, Minnesota; and

David D. Hammargren, Hammargren & Meyer, P.A., Bloomington, Minnesota (for appellant)

Anthony J. Kane, Terhaar, Archibald, Pfefferle & Griebel, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Presiding Judge; Cleary, Judge; and Huspeni, Judge.*

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

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

SMITH, Judge

Appellant brought a declaratory judgment action against its insurance provider seeking insurance proceeds due to a loss that occurred while it was acting as a subcontractor on a major construction project. The district court granted respondent's motion for summary judgment after it determined that: (1) appellant's suit was barred by the doctrine of res judicata, (2) that its claim was blocked by a two-year time limitation in its insurance policy, and (3) that appellant's claim was vitiated by a policy exclusion regarding losses caused by errors in workmanship. Because respondent failed to fulfill its statutory duty to inform appellant of its available coverage options, we reverse the district court's conclusion that res judicata and the two-year time limitation barred appellant's suit. On the merits, because respondent failed to meet its burden establishing that the workmanship policy exclusion applies, we reverse the summary judgment determination and remand for further proceedings.

FACTS

In January 2006, Frontier Pipeline LLC hired appellant Engineering & Construction Innovations, Inc. (ECI) as a subcontractor to install and connect below-ground, forcemain-access structures (FAS) to connect segments of sewer piping in the White Bear Lake/Hugo area. The deadline for Frontier to complete the project was May 7, 2007. Prior to commencing its work on the Frontier piping project, ECI renewed two insurance policies with respondent Western National Mutual Insurance Company

(Western National). The policies were for general liability and inland-marine coverage. The policies' effective periods ran from January 31, 2007 through January 31, 2008.

To prevent groundwater from accessing the excavation area and piping, ECI injected cementious grout underground through tubing designed to form a collar around the subterraneous piping. While there were multiple FAS connections, this dispute focuses on ECI's work at the FAS 1 location. On August 30, 2007, ECI injected 16 cubic yards of cementious grout into the ground at the FAS 1 connection. Normally, ECI measures underground pressure buildup to ensure that the injected grout has the desired effect. On this occasion ECI did not receive the normal pressure indicators. ECI commenced testing to determine whether the grout had seeped into undesirable areas, but it was unable to determine exactly what occurred underground. Because ECI discovered no apparent problem, it continued its work.

Approximately two months later it was discovered that the previously unaccounted for grout had entered the open end of one of the sewer pipe segments. The grout had hardened inside 120 linear feet of piping and filled approximately 18 inches of the pipe's 22-inch internal diameter. The hardened grout rendered the piping unfit for use. ECI acknowledged its contractual duty to remove the grout and commenced operations to repair the damage. Removal proved difficult and costly, taking two months' time at a cost of $705,000 for labor and materials. It is undisputed that no lasting physical damage occurred to the piping from either the entry or removal of the grout.

Following ECI's remedial actions it informed Western National of the situation and suggested that its common liability (CGL) policy covered the loss. Western National investigated the claim for over one month but concluded that the definitive cause of the loss was unknown. Western National denied coverage. ECI brought a declaratory judgment action in district court seeking a declaration that the costs related to cleaning out the grout were covered by its CGL policy. The district court granted ECI's motion and Western National appealed the entry of judgment in favor of ECI. On appeal, we determined that the CGL policy contained a relevant exclusion that applied to the loss and reversed the district court's determination in favor of ECI. *See Eng'g & Constr. Innovations, Inc. v. W. Nat. Mut. Ins. Co.*, No. A10-150, 2010 WL 3220139, at *3 (Minn. App. Aug. 17, 2010), *review denied* (Minn. Oct. 27, 2010).

Following our determination, ECI submitted a claim under its inland-marine policy (IM policy). ECI alleged that it was previously unaware of its potential coverage under the IM policy. Western National denied coverage under the IM policy because the policy contained an exclusion relating to workmanship errors. "[Y]our policy excludes coverage for errors in workmanship (negligent or not) and the removal of the grout, which was injected inside the pipe in error; [i]nstead of around the pipe is a removal of workmanship error and not covered under the policy." The policy language at issue provided, in relevant part:

> 3. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss. But if loss by a covered peril results "we" will pay for the resulting loss. . . .

> b. Defects, Errors, and Omissions – "We" do not pay for loss caused by an act, defect, error, or omission (negligent or not) relating to:
>
> 1) design or specifications;
> 2) workmanship or construction;
> 3) repair, renovation, or remodeling; or
> 4) materials.

ECI sought a declaratory judgment of coverage in district court. The parties cross-motioned for summary judgment. Western National asserted three arguments that allegedly prevented ECI's claim for coverage. First, Western National argued that res judicata barred ECI's suit because it should have asserted the potential IM policy coverage in its first action. Second, Western National claimed that the IM policy contained a provision requiring that suit be filed within two years of a known loss and that ECI's suit was therefore untimely. Finally, Western National contended that the defective workmanship provision of the IM policy prevented ECI's claim. The district court granted summary judgment in favor of Western National on all three grounds. This appeal followed.

D E C I S I O N

ECI argues on appeal that Western National was under a statutory obligation to inform it of its available coverage options, including the possible applicability of the IM Policy, at the time it filed its claim under the CGL policy. Because of its failure to inform ECI of its potential coverage, ECI argues that res judicata should not bar its present action and that Western National should be estopped from asserting the two-year suit provision contained in the IM policy. On the merits, ECI contends that it is Western

National's burden to prove the applicability of any relevant policy exclusion and, because the cause of the grout infiltration remains unknown, that Western National failed to carry its burden, thereby precluding summary judgment. We analyze the issues in turn, addressing the asserted procedural bars before the merits.

I.

Whether res judicata precludes a claim is a question of law that we review de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). "Res judicata is a finality doctrine that mandates that there be an end to litigation." *Id.* The doctrine precludes a party from raising a claim that was, or could have been, raised in an earlier action. *Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 239 (Minn. 2007). Res judicata applies if four factors are met: (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Brown-Wilpert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007). All four prongs must be met for res judicata to bar an action. *Hauschildt*, 686 N.W.2d at 840. We focus our analysis solely on the fourth prong because we conclude that ECI did not have a full and fair opportunity to litigate this matter.

The parties dispute whether ECI knew, or should have known, of its potential coverage under the IM Policy. ECI contends that it did not have the opportunity to raise the IM Policy in the first suit due to Western National's "misrepresentations and silence

regarding [the policy]." We agree. While Western National effectively argues that ECI should have known of its coverage options, because they paid their premium and received binders with the policy details, it never explains its failure to sustain its statutory duty to inform its insured of all available coverage options.

It is a violation of the standards for filing and handling a claim when an insurer "fail[s] to notify an insured who has made a notification of claim of all available benefits or coverages which the insured may be eligible to receive under the terms of a policy and of the documentation which the insured must supply in order to ascertain eligibility." Minn. Stat. § 72A.201, subd. 4(5) (2012). It is undisputed that ECI submitted a request for coverage following the grout loss. However, this notice-of-claim letter clearly indicated that ECI was submitting a claim under the CGL policy.[1] We must resolve whether the statutory duty imposed by Minn. Stat. § 72A.201, subd. 4(5) required Western National to inform ECI of all potential coverage, or just of its eligibility under the terms of the specific policy ECI requested.

We have previously interpreted section 72A.201, subdivision 4(5), as standing for the proposition that it is an unfair claims practice when an insurer "*fail*[s] to notify an insured of all available benefits which the insured may be eligible to receive." *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995), *review denied* (Minn. Jun. 29, 1995) (emphasis in original). In this case, not only did

[1] The notice-of-claim letter has a handwritten notation indicating "Builders Risk" in the upper right-hand corner. The record is unclear as to who made the notation or what the notation was intended to convey.

Western National fail to inform ECI of its potential coverage under the IM Policy, but it also argued to this court in the first appeal that ECI did not have the type of coverage provided under the IM Policy.[2] When specifically asked about this omission, Western National could provide no adequate explanation for the oversight, other than to argue that ECI should have known of its available coverage. It is evident that Western National failed to fulfill its duty to notify ECI under section 72A.201, subdivision 4(5).

Res judicata is not rigidly applied and may be qualified or rejected when its application would contravene public policy. *AFSCME Council 96 v. Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295, 299 (Minn. 1984). The focus of a res judicata inquiry is "whether [its] application would work an injustice on the party against whom the [doctrine is] urged." *Hauschildt*, 686 N.W.2d at 837. The United States Supreme Court has cautioned that res judicata should be invoked only after careful inquiry because it "may govern grounds and defenses not previously litigated" and therefore "blockades unexplored paths that may lead to truth." *Brown v. Felsen*, 442 U.S. 127, 132, 99 S. Ct. 2205, 2210 (1979). On these facts, it would contravene public policy to allow Western National to assert a res judicata shield when its own violation of a statutory duty prevented ECI from asserting its claim under the IM Policy in the first instance. We therefore reverse the district court's res judicata determination.

[2] Western National represented to this court and to the district court that ECI had never purchased the type of coverage provided under an IM policy.

II.

Western National contends, and the district court agreed, that even if res judicata did not bar ECI's suit, the provision in the IM Policy requiring an insured to bring suit within two years of a known loss effectively prevents the current claim. The relevant policy provision states:

> 10. Suit Against Us -- No one may bring a legal action against "us" under this coverage unless: . . .
>
> b. the suit has been brought within two years after "you" first have knowledge of the loss.
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> If any applicable law makes this limitation invalid, then suit must begin within the shortest period permitted by law.

ECI asserts that Western National be estopped from utilizing the provision given its silence and misrepresentations regarding ECI's available coverage options. Western National argues that it never made any promises or inducements to ECI and that ECI cannot demonstrate detrimental reliance. The Minnesota Supreme Court recently determined that a district court's conclusion on equitable estoppel is reviewed under an abuse of discretion standard. *See City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).[3] "[T]o claim estoppel as a matter of law the proof must be conclusive." *Grant Cnty. State Bank v. Schultz*, 178 Minn. 556, 560, 228 N.W. 150, 152 (1929).

[3] The *Sarpal* case concerned a district court determination following a bench trial. However, the language was given broader context when the supreme court noted that it reviews "equitable determinations for [an] abuse of discretion." *Sarpal*, 797 N.W.2d at 23.

A party asserting equitable estoppel must demonstrate that (1) representations were made; (2) the party reasonably relied on such representations; and (3) the party will be harmed if estoppel is not applied. *Eide v. State Farm Mut. Auto. Ins. Co.*, 492 N.W.2d 549, 556 (Minn. App. 1992). A party is eligible to assert estoppel only if the other party's conduct led it to change its position. *Cont'l Cas. Co. v. Knowlton*, 305 Minn. 201, 214-15, 232 N.W.2d 789, 797 (1975). Representations do not require affirmative promises but may consist of silence or negative omissions given a party's duty to speak or act. *Pollard v. Southdale Gardens of Edina Condo. Ass'n*, 698 N.W.2d 449, 454 (Minn. App. 2005). Fraudulent intent is unnecessary. *Stevens v. Ludlum*, 46 Minn. 160, 161, 48 N.W. 771, 771 (1891). "[N]egligence takes the place of intent to deceive, where there is a duty to disclose." *Alwes v. Hartford Life & Accident Ins. Co.*, 372 N.W.2d 376, 379 (Minn. App. 1985).

Western National had a duty to disclose ECI's available policies when ECI notified it of the grout loss incident. Given the statutory duty to speak, the first element of estoppel is established. *See Pollard*, 698 N.W.2d at 454. ECI had the right to rely on Western National to inform it of its available coverage options. Regarding the second prong, whether ECI relied upon Western National's omission, the record contains an affidavit from ECI's president stating that ECI would have promptly asserted an IM Policy claim had Western National informed it of the coverage option.[4] That ECI would

[4] Western National contests whether ECI would have made such a claim, arguing that ECI specifically chose to pursue the CGL claim and argued during the pendency of the first district court action that a policy like the IM Policy was inapplicable. However,

be harmed if estoppel is not applied is undisputed as it has already incurred an unreimbursed loss in the amount of $705,000.

Given the record on appeal, and the weight of the evidence regarding estoppel, the district court erred by denying ECI the ability to claim the defense of estoppel and thereby allow Western National to claim the protection of its two-year provision. Western National was silent when it had the duty to speak. ECI had the right to rely on its insurance provider to make it aware of possible coverage options and, when its insurance provider was silent, to rely on that silence as an indication that coverage was unavailable. Western National should not benefit from its omission. The district court abused its discretion by determining that the two-year provision barred the present action.

III.

Because neither res judicata nor the two-year provision bars ECI's claimed coverage, we address the merits of their claim. The district court granted Western National's motion for summary judgment on the coverage issue by determining that a workmanship error exclusion contained in the IM Policy applied and vitiated coverage.

We review a district court's summary judgment determination de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In so doing, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment. *Id.* On appeal, we

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given Western National's failure to comply with its statutory duty and the sworn affidavit of ECI's president, we rely on the statements in the record over those represented by counsel in previous litigation.

view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists when reasonable people could draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). In this case, the district court's determination stemmed directly from its interpretation of an insurance policy exclusion. Interpretation of an insurance policy is a question of law, which we review de novo. *Nathe Bros., Inc. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000). When interpreting policy language, we resolve to "give effect to the intent of the parties" and avoid "an interpretation that will forfeit the rights of the insured under the policy, unless such an intent is manifest." *Id.*

The IM Policy exclusion at issue provides:

> 3. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss. But if loss by a covered peril results "we" will pay for the resulting loss. . . .
>
> b. Defects, Errors, and Omissions – "We" do not pay for loss caused by an act, defect, error, or omission (negligent or not) relating to:
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> 1) design or specifications;
> 2) workmanship or construction;
> 3) repair, renovation, or remodeling; or
> 4) materials

Applying this provision to the facts, the district court determined that,

> [w]hile it has not been established how the grout entered the pipe, the undisputed facts establish that ECI's August 30, 2007 grouting operations, part of ECI's workmanship and construction activities related to the FAS 1 installation, caused grout to enter the pipe. Consequently, the Court finds that ECI's claim for the cost to remove its grout from the pipe is excluded.

An insurance company bears the initial burden of establishing the applicability of a policy exclusion that would bar an insured's recovery. *Ill. Farmers Ins. Co. v. Duffy*, 618 N.W.2d 613, 615 (Minn. App. 2000). If the insurance company meets their initial burden, the insured must then establish an exception to the exclusion. *Amos v. Campbell*, 593 N.W.2d 263, 266 (Minn. App. 1999). ECI claims the district court erred by concluding that their operations caused the damage and that Western National cannot sustain its burden of establishing the applicability of the exclusion because the actual cause of the grout infiltration remains unknown.

Western National argues that ECI has admitted that their operation caused the grout infiltration and that, in light of this admission, Western National has met its burden. Western National relies on ECI's response to interrogatory questioning where ECI stated, "[i]t was ECI's grouting operation, which was needed to control groundwater and enable ECI to dig a pit in this area, that resulted in the grout being in the pipe and causing the damage; ECI promptly notified its insurer." ECI responds that this admission was insufficient to establish that ECI's workmanship *caused* the grout infiltration.

ECI argues on appeal that its admission was closer to an "arising out of" admission than a "caused by" admission in that it admits that the damage arose from its workmanship but not that the work was the direct cause of the grout infiltration. Delineating and applying the definition of "arising out of" causation has been frequently discussed by our courts. *See SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 326 (Minn. App. 2008) (identifying three cases that defined and analyzed "arising out of"

exclusions), *review denied* (Minn. Nov. 18, 2008). However, we have previously declared that the terms "arising out of" and "results from" are the same "based on the plain and ordinary meaning of the words." *Id.*[5] ECI's admission is that its operation "resulted in" the grout being in the pipe. Consequently, it is fair to classify their admission as similar in effect to a statement that the damage "arose out of" their operations. We have previously determined that the term "arising out of" requires "only a causal connection; it does not require proximate cause." *Ross v. City of Minneapolis*, 408 N.W.2d 910, 912 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987). This is markedly different from the legal definition of "caused by" as it appears in the Western National policy. According to *Black's Law Dictionary*, proximate cause is defined as "[a] cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. 250 (9th ed. 2009). This language closely tracks the language in the Western National policy in that Western National alleges that ECI's operation, by act or omission, caused the damage in a way that is legally sufficient to exclude coverage. As a result, ECI's admission that its actions "resulted in" the damage is separate and distinct from Western National's suggestion that ECI admitted it "caused" the damage.[6] *See Nathe Bros., Inc.*,

[5] We recognize that *SECURA* was applying these definitions to criminal-act exclusions. 755 N.W.2d at 326. However, our definitional analysis was not tied to the type of exclusions being analyzed but was focused on the plain meaning of the words. As a result, we find *SECURA*'s analysis applicable.

[6] At oral argument, ECI referenced a case that the supreme court recently published differentiating between the terms "arising out of" and "caused by." However, we are unable to locate a case that effectively highlights that proposition.

615 N.W.2d at 344 (noting that when interpreting policy language we seek to effectuate the intent of the parties and avoid an interpretation that forfeits the rights of the insured). Also, for us to declare that ECI's statement constituted an admission that its actions *caused* the grout infiltration, despite the evidence in the record that the cause of the damage is unknown, would be to ignore the requirement that we view the evidence in the light most favorable to the nonmoving party. *See Fabio*, 504 N.W.2d at 761. ECI's argument that its admission is broader and not the same as a "caused by" admission is persuasive.

Without ECI's purported admission, Western National must carry its burden of proving that the exclusion applies. 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 as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. In this case, the record is replete with evidence that the actual cause of the grout's infiltration of the subterranean piping is unknown. ECI directs us to four different reports that all conclude that the actual cause of the pipe damage is unknown. Specifically relevant is the statement of John Buckley, an authorized representative of Western National, who stated during his deposition that

> the working *assumption* is that [the grout] went in the open end of the pipe. But there's *no direct evidence* because it was, I don't know, 20 feet underground when the grout went in there. And two months later when they dug the hole it was in, *I don't think anybody knows exactly how it got in*.

(Emphasis added). Despite the fact that the record contains multiple similar statements, the district court determined, as a matter of law, that ECI's operation that caused the relevant damage. The district court never stated what facts led it to its determination that this conclusion was so apparent that reasonable minds would not disagree at trial. At argument before this court, we inquired whether Western National was alleging some type of res ipsa loquitur causation. *See Hestbeck v. Hennepin Cnty.*, 297 Minn. 419, 425, 212 N.W.2d 361, 365 ("'The thing or situation speaks for itself' is usually abbreviated by the Latin phrase 'res ipsa loquitur.'"). Western National demurred. On this record, we conclude that reasonable people could reach different conclusions as to what caused the relevant damage. *See DLH, Inc.*, 566 N.W.2d at 69. Given the dearth of evidence regarding the unknown cause of the grout infiltration, we conclude that the district court erred in granting summary judgment and remand for trial the issue of whether the policy's workmanship exclusion bars coverage.

Reversed and remanded.