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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0628**

Hugh Alan Kantrud,
Respondent,

vs.

Minnesota Lawyers Mutual Insurance Company,
Appellant.

**Filed November 25, 2019
Affirmed
Klaphake, Judge***

Washington County District Court
File No. 82-CV-18-1246

Kris E. Palmer, Jansen & Palmer, LLC, Minneapolis, Minnesota; and

Scott Wilson, Scott Wilson Law Firm, PLLC, Minneapolis, Minnesota (for respondent)

Richard J. Thomas, Chad J. Hintz, Burke & Thomas, PLLP, Arden Hills, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and
Klaphake, Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Minnesota Lawyers Mutual Insurance Company (MLM) challenges the district court's grant of partial summary judgment in favor of respondent Hugh Alan Kantrud, which requires MLM to defend Kantrud against a malpractice claim under a professional-liability insurance policy. MLM argues that the policy excludes coverage because the claim was "deemed made" in a prior policy period. Because the record does not conclusively establish that MLM does not have a duty to defend, we affirm.

DECISION

I. Standard of review.

Summary judgment is only granted when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. This court reviews a district court's summary-judgment decision de novo to "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

Because the parties agreed to a stipulated record on summary judgment, the facts are undisputed, and the only issue on appeal is whether the district court erred in its determination that MLM had a legal duty to defend Kantrud.

II. The district court did not err in granting partial summary judgment in favor of Kantrud.

Since 2010, MLM has insured Kantrud under a policy for lawyer's professional-liability insurance. A new policy period begins each year. To obtain coverage, the policy requires Kantrud to report claims "deemed made" in a given policy period before the policy period ends or within 60 days after the policy period. The relevant policy language for coverage provides that a "claim" is "deemed made" when:

- (1) a demand is communicated to an INSURED for DAMAGES resulting from the rendering of or failure to render PROFESSIONAL SERVICES; or
- (2) an INSURED first becomes aware of any actual or alleged act, error or omission by any INSURED which could reasonably support or lead to a CLAIM.

Kantrud renewed his insurance policy with MLM in July 2016, triggering a new policy period. In November 2016, more than 60 days after the prior policy period ended, Kantrud's former clients sued him for legal malpractice; Kantrud reported the malpractice lawsuit to MLM several days later. The clients alleged that Kantrud, as their attorney in a collection case in 2014 and 2015, had negligently missed discovery deadlines and ignored court orders, resulting in the district court entering a default judgment against them. Kantrud's clients, a business owner and his business, were defendants in the collection case. A third defendant, who was an attorney, was separately represented.

MLM denied coverage to Kantrud because he did not report the claim until after the clients formally sued him despite being aware of acts or errors that could "reasonably support" the malpractice claim before his policy renewed in July 2016 or within 60 days after the prior policy period ended.

Kantrud sued MLM for breach of contract after it denied coverage. Kantrud and MLM filed cross-motions for summary judgment. MLM argued that it had neither a duty to defend nor indemnify Kantrud. Kantrud moved for partial summary judgment on the duty to defend only. After the district court granted Kantrud's motion, MLM agreed to waive all remaining defenses "other than those asserted in the district court" in the parties' stipulation to amend the order, which the district court subsequently signed.

On appeal, MLM argues that it has no duty to defend Kantrud because the clients' malpractice claim was "deemed made" well before Kantrud's prior policy period ended. MLM contends that Kantrud was aware that the district court entered a default judgment against his clients because of his "inaction in 2015." Given this knowledge, MLM argues that "a reasonable lawyer would conclude that . . . facts existed beginning in the year 2014 which would reasonably support [the] malpractice claim." Kantrud argues that the district court correctly determined that MLM had a duty to defend because the policy language is ambiguous, does not meet an insured's reasonable expectations, and that the undisputed facts do not establish that all reasonable attorneys would have anticipated the malpractice lawsuit.

We first review the policy language. Parties to insurance contracts are generally "free to contract as they see fit, and the extent of liability of an insurer is governed by the contract they enter into." *Lang v. Gen. Ins. Co. of Am.*, 127 N.W.2d 541, 544 (Minn. 1964). When the language of an insurance policy is clear and unambiguous, appellate courts "effectuate the intent of the parties by interpret[ing] the policy according to plain, ordinary sense." *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn.

2013). An insurance policy is ambiguous, however, “if it is susceptible to two or more reasonable interpretations.” *Id.* at 705. Courts resolve ambiguous terms against the insurer. *Id.*

Here, the district court determined that “MLM’s [policy] language regarding when a claim is deemed made [was] confusing, ambiguous, and circular,” and that the language did not meet Kantrud’s reasonable expectations. We need not resolve these issues.¹ We assume without deciding that the policy language is unambiguous and excludes coverage when one of two elements is present: (1) the insured is subjectively aware of an actual demand for damages; or (2) the insured is subjectively aware of acts or omissions that could objectively support a future claim for damages.

We next consider whether the policy requires MLM to defend Kantrud. “The duty to defend is broader than the duty to indemnify,” because it extends to “claims that arguably fall within the scope of the policy.” *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997). “[I]n determining whether there is a duty to defend, a court must give the benefit of the doubt to the insured.” *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 929 F.2d 413, 418 (8th Cir. 1991) (applying Minnesota law). When an insurer “has no knowledge to the contrary, it may make an initial determination of whether or not it is obligated to defend from the facts alleged in the complaint against its insured.” *Garvis v. Emp’rs Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993). But “if the insurer is aware of

¹ If we were to decide that the policy’s definition of a claim “deemed made” was susceptible to two or more reasonable interpretations, we would construe the ambiguity in favor of coverage, and our decision would not change. *See id.* at 705. We also need not decide whether the policy meets the insured’s reasonable expectations.

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.*; see also *St. Paul Fire & Marine Ins. Co. v. Nat’l Comput. Sys., Inc.*, 490 N.W.2d 626, 632 (Minn. App. 1992) (“[I]f the insurer is aware of facts outside of the complaint which *conclusively establish* that the acts giving rise to the claim are not covered under the policy, the insurer is not obligated to defend.” (emphasis added)), *review denied* (Minn. Nov. 17, 1992). An insurer seeking to avoid the duty to defend “has the burden of showing that all parts of the cause of action fall clearly outside the scope of coverage.” *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102, 106-07 (Minn. App. 2005). “Generally where questions of fact need to be discovered to determine if an insurer has a duty to indemnify, a duty to defend exists.” *Id.*

Here, the complaint in the malpractice case alleged that Kantrud had committed malpractice by failing to notify his clients about discovery requests. Kantrud also allegedly failed to review draft documents in January 2015, failed to pay attorney fees to the opposing party, and failed to “request a hearing objecting to the default” as instructed by the district court. Attached to the complaint was an affidavit that Kantrud wrote in the collection case, and the complaint alleges that Kantrud admitted he “was responsible for all deficiencies in discovery production that eventually led to the default judgment.”

But MLM has access to information outside of the malpractice complaint that does not conclusively establish it has no duty to defend. MLM’s coverage denial letter specifically referenced this court’s opinion in the collection case. And in that opinion, this

court addressed whether Kantrud's former clients were "innocent client[s]" who were being punished with a default judgment for their attorneys' misconduct. *See First Am. Title Ins. Co. v. Nat'l Title Res. Corp.*, No. A15-0664, 2016 WL 363477, at *4 (Minn. App. Feb. 1, 2016), *review denied* (Minn. Apr. 19, 2016). Although we determined that this issue was not properly raised in district court, we stated:

the record does not conclusively establish that the [defendants] were innocent in failing to adequately and timely respond to First American's discovery requests. This is especially the case given that [one of the defendants] is an attorney, and the fact that [Kantrud's client] signed discovery responses that were deemed inadequate by the district court.

Id. This language does not suggest that anything was conclusive about Kantrud's negligence. Further, when the district court denied Kantrud's request to move for reconsideration in the collection case, it specifically detailed a "pattern of misconduct" that is at least partially attributable to the clients, such as "attempts to evade service."

Finally, Kantrud's affidavit, which MLM argues provides evidence of his misconduct, does not admit negligence. It provides that "to the extent discovery was properly served," Kantrud was responsible for ensuring proper responses. Kantrud also states that he and opposing counsel "resolved any outstanding discovery issues in February 2015." At the end of the affidavit, he states that his clients "are completely innocent of any deficiencies in the discovery responses filed on January 15, 2015."

We conclude that the facts outside the complaint do not "conclusively establish" that Kantrud was aware of acts or omissions that a reasonable attorney would conclude could support a claim for damages. *See St. Paul Fire*, 490 N.W.2d at 632. For the purpose

of the duty to defend, all that is needed is that the claim “arguably” falls within the scope of the policy. *Meadowbrook*, 559 N.W.2d at 415. On the limited record available in this case, this standard is met here, and we therefore must give “the benefit of the doubt to the insured.” *See John Deere*, 929 F.2d at 418.

Affirmed.