

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1982**

USCC Services, LLC, et al.,
Appellants,

The Pep Boys - Manny, Moe & Jack,
Plaintiff,

vs.

Young America, LLC,
Defendant,

Endurance Risk Solutions Assurance Co.,
Respondent.

**Filed August 5, 2024
Affirmed
Wheelock, Judge**

Hennepin County District Court
File No. 27-CV-21-12627

Jeffrey D. Klobucar, Jeffrey R. Mulder, Aram V. Desteian, James C. Kovacs, Bassford Remele, P.A., Minneapolis, Minnesota (for appellants)

Paulette S. Sarp, Jessica Hutchinson, Hinshaw & Culbertson LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Wheelock, Presiding Judge; Connolly, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

WHEELLOCK, Judge

Appellants each obtained a judgment against an insured defendant in separate district court proceedings for breach of fiduciary duty based on the defendant mishandling funds that it held in trust for appellants. Appellants then initiated garnishment proceedings against respondent insurer to collect on the underlying judgments, and respondent asserted counterclaims for declaratory judgments that its insurance policy with the defendant did not cover appellants' claims. The garnishment claims were consolidated, and appellants and respondent filed cross-motions for summary judgment. The district court denied appellants' motions for summary judgment and granted respondent's motion for summary judgment because each of the insured defendant's breaches of its fiduciary duty to appellants fell within one or more of the policy's exclusions. We affirm.

FACTS

Prelitigation Events

Appellant USCC Services LLC, through its affiliate U.S. Cellular, provides cellular telephone and internet services. Appellant Motorola Mobility LLC provides mobile products and services. The defendant in the underlying actions, Young America LLC, was a marketing-services company that provided a wide variety of services to its clients, which included appellants. As relevant to this appeal, Young America administered programs and services, including rebates, refunds, incentives, and prepaid-product programs, that involved remitting payments to its clients' customers. Young America's clients funded the programs and services by advancing "program funds" to Young America that Young

America then used to make payments to its clients' customers. Young America's business relationships with its clients were governed by master services agreements (MSAs). Appellants' MSAs included terms governing Young America's use of the program funds and requiring its maintenance of certain types of insurance.

In 2020, Young America became insolvent and ceased business operations. When appellants learned of this, they contacted Young America for an update on the status of their program funds, but Young America notified appellants that it could not locate the program funds. At that time, Young America should have had \$493,757.19 in program funds from Motorola and \$1,020,669.25 in program funds from USCC.

Young America initiated insolvency proceedings in the form of an assignment for the benefit of its creditors. Appellants recovered nothing in those proceedings.

Appellants' Underlying Lawsuits Against Young America

Appellants then brought individual lawsuits against Young America.¹ Appellants alleged in their complaints that Young America breached its fiduciary duty based on three wrongful acts: (1) commingling program funds with other clients' funds and its own assets; (2) making preferential payments to its personnel while on the verge of insolvency rather than preserving assets for the benefit of appellants as its creditors; and (3) canceling its insurance policy with Lloyd's of London, which appellants contended likely would have provided coverage for their claims.

¹ Plaintiff The Pep Boys—Manny, Moe & Jack also sued Young America and joined appellants in the subsequent garnishment proceedings but has not participated in this appeal.

Young America did not answer the complaints, and appellants notified Young America's insurer, respondent Endurance Risk Solutions Assurance Co., of their claims and Young America's failure to respond. Appellants also warned Endurance that if Endurance failed to respond within 30 days, they intended to move for default judgments and would initiate garnishment proceedings against Endurance to collect on the judgments based on Endurance's insurance policy with Young America. Endurance did not defend Young America against appellants' lawsuits or respond to their communications, and appellants each moved for summary judgment against Young America.

The district court that presided over USCC's lawsuit granted summary judgment to USCC because it determined that Young America breached its fiduciary duty under express-trust and resulting-trust theories.² It ordered Young America to pay USCC \$1,020,669.25 to repay the funds that Young America failed to hold in trust for USCC. The district court that presided over Motorola's lawsuit granted summary judgment to Motorola pursuant to Minn. R. Gen. Prac. 115.06 because it concluded that, by failing to respond, Young America did not oppose Motorola's complaint or motion for summary judgment. It ordered Young America to pay Motorola \$493,757.19 to repay the funds that Young America failed to hold in trust for Motorola.

² An express trust is established by a trustee's "external expression [of] the intent to create a trust" and requires that the following elements are present: "(1) a designated trustee with enforceable duties; (2) a designated beneficiary vested with enforceable rights; and (3) a definite trust res in which the trustee has legal title and the beneficiary has the beneficial interest." *Bond v. Comm'r of Revenue*, 691 N.W.2d 831, 837 (Minn. 2005). A "resulting trust" arises when there is an implied, rather than express, intention to create a trust. *See Sieger v. Sieger*, 202 N.W. 742, 743 (Minn. 1925).

Appellants' Lawsuits Against Endurance

Appellants initiated garnishment proceedings against Endurance to collect on the judgments based on Endurance's insurance policy with Young America. Endurance asserted that the policy did not cover the judgments; appellants then supplemented their original complaints against Young America to add garnishment claims against Endurance. Endurance opposed appellants' garnishment claims and asserted counterclaims seeking declaratory judgments that the policy does not cover the judgments.

The proceedings were consolidated, and appellants and Endurance brought cross-motions for summary judgment. Endurance argued that its policy with Young America did not provide coverage for appellants' judgments because they were excluded by three separate provisions of the insurance policy: the contractual-liability exclusion, the conduct-and-illegal-profit exclusion, and the professional-services exclusion. The district court determined that each of Young America's three wrongful acts fell within one or more of the exclusions. Thus, the district court denied summary judgment to appellants and granted summary judgment to Endurance, issuing a declaratory judgment that the Endurance policy did not cover appellants' judgments.

USCC and Motorola appeal.

DECISION

Appellants challenge the district court's grant of summary judgment in favor of Endurance, arguing that Endurance's insurance policy covers appellants' underlying judgments because no exclusions apply to Young America's wrongful acts that caused appellants' damages. Appellants also argue that the concurrent-cause doctrine applies here

so that Young America’s three wrongful acts—commingling funds, making preferential payments, and canceling its Lloyd’s insurance policy—can be considered separately under each exclusion.

“We review a district court’s summary judgment decision de novo. In doing so, we 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) (citation omitted). Summary judgment is appropriate 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. “[T]he interpretation of insurance contract language is a question of law as applied to the facts presented.” *Meister v. W. Nat’l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992). When the material facts are undisputed, we independently review the district court’s interpretation of the contract. *Id.*

To determine whether contract language is clear or ambiguous, we construe words and phrases according to their plain and ordinary meaning and read words in the context of the contract as a whole, giving effect to the intent of the parties. *Elm Creek Courthome Ass’n v. State Farm Fire & Cas. Co.*, 971 N.W.2d 731, 736 (Minn. App. 2022), *rev. denied* (Minn. May 17, 2022). If the contract language is clear and unambiguous, it must be enforced as written. *Id.* at 736-37. But when contract language is subject to more than one reasonable interpretation, it is ambiguous, and we construe the ambiguity against the insurer and in favor of coverage. *Econ. Premier Assurance Co. v. W. Nat’l Mut. Ins. Co.*, 839 N.W.2d 749, 754 (Minn. App. 2013).

In a dispute between an insurer and an insured, “[t]he initial burden of demonstrating coverage rests with the insured; the burden of establishing the applicability of exclusions rests with the insurer.” *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 736 (Minn. 1997).³ We interpret exclusions narrowly, construing them strictly against the insurer. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895, 896 (Minn. 2006). “Once the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured” to establish the applicability of any exceptions to the exclusion. *Smith v. State Farm Fire & Cas. Co.*, 656 N.W.2d 432, 436 (Minn. App. 2003) (quotation omitted). Because Endurance does not dispute that appellants’ claims are covered absent an exclusion, we must determine whether Endurance has shown that any exclusions apply, and if so, whether appellants have shown that any exceptions to those exclusions apply.

I. The concurrent-cause doctrine does not apply.

We begin by addressing appellants’ argument that, pursuant to the concurrent-cause doctrine, the policy provides coverage so long as (1) at least one of the wrongful acts is not excluded and (2) the wrongful act that is not excluded could have caused appellants’ damages independently of the excluded acts.

The concurrent-cause doctrine provides that “[d]amages resulting from concurrent causes are covered so long as the covered cause is a direct cause of the damage . . . even

³ Where, as here, a plaintiff who was injured by an insured defendant brings a garnishment action against the defendant’s insurer, the plaintiff stands in the shoes of the insured defendant and has the same rights as the insured defendant would have against the insurer. *Midland Loan Fin. Co. v. Kisor*, 287 N.W. 869, 870 (Minn. 1939).

though an excluded cause may also have contributed to the loss.” *Campbell v. Ins. Serv. Agency*, 424 N.W.2d 785, 789 (Minn. App. 1988) (stating that, “if one excluded factor is not the overriding cause, [the insurer] may not deny coverage”). To determine whether the concurrent-cause doctrine applies, we look to whether a covered cause could have operated independently of the excluded cause to cause the loss. *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 65 (Minn. 1992). This requires “an analysis of the degree of interdependence of the acts and whether they are concurrent.” *Auto-Owners Ins. Co. v. Selisker*, 435 N.W.2d 866, 868 (Minn. App. 1989) (emphasis omitted), *rev. denied* (Minn. Apr. 24, 1989). If the concurrent-cause doctrine applies, then each of Young America’s wrongful acts would be analyzed separately under each exclusion.

Appellants argue that the concurrent-cause doctrine applies because the underlying judgments against Young America conclusively establish that there are multiple causes of appellants’ damages: commingling funds, making preferential payments, and canceling the Lloyd’s insurance policy. Endurance argues that the concurrent-cause doctrine does not apply because there is only one cause of appellants’ damages—Young America’s wrongful use of the program funds—and the individual wrongful acts that gave rise to that failure are inextricably linked and therefore cannot be considered independent causes.⁴

⁴ Appellants also argue that Endurance is prohibited from arguing that the concurrent-cause doctrine does not apply because causation was litigated in the underlying actions against Young America and Endurance elected not to participate in that litigation. In general, an insurer that did not defend in the underlying action despite having notice of the claim may raise coverage defenses only; the insurer is not permitted to raise defenses that go to the merits of the underlying claim. *Parr v. Gonzalez*, 669 N.W.2d 401, 405 (Minn. App. 2003). However, where an issue material to coverage was not a “necessary or essential issue” in the underlying action, an insurer may raise it. *Id.* at 405-06 (citing *Brown v. State*

We agree with Endurance. The underlying complaints and judgments against Young America demonstrate that the three wrongful acts are inextricably linked and could not have caused appellants' damages independently. Appellants alleged in their complaints that Young America commingled their program funds with other funds held by Young America, which in turn allowed it to make preferential payments instead of returning the funds to appellants, and that appellants were unable to recover the funds because Young America had canceled the Lloyd's policy. Appellants further alleged that Young America's cancellation of the Lloyd's policy allowed Young America to keep funds that it would have spent on premiums and redirect the funds elsewhere, including toward the preferential payments. Indeed, the district court that presided over USCC's lawsuit stated in its order: "Ultimately, through its various breaches of its fiduciary duties, [Young America] made the Program Funds available to [its] other creditors, and the Program Funds were never returned to USCC."

The act of commingling the program funds could not have caused appellants' damages independently because if Young America had not used the funds for preferential payments and operating expenses, Young America could have returned the funds to appellants regardless of where it held the funds. The act of making preferential payments would not have resulted in damages if, as appellants alleged in the underlying litigation,

Auto. & Cas. Underwriters, 293 N.W.2d 822, 825 (Minn. 1980)). The issue of whether any of the three wrongful acts could have independently caused appellants' damages was not a necessary or essential issue in the underlying actions because appellants never alleged that they had, or could have had, a claim based solely on one of those acts. Endurance is therefore permitted to rebut appellants' argument that the concurrent-cause doctrine applies.

Young America had not canceled the Lloyd's policy. And the act of failing to maintain the Lloyd's policy would not have resulted in damages if Young America had not commingled appellants' funds and made preferential payments using those funds. All three acts are factually and causally related and worked in concert to cause appellants' damages.

Therefore, Young America's acts of commingling program funds, making preferential payments, and canceling the Lloyd's policy cannot be considered independent causes of appellants' damages and the concurrent-cause doctrine does not apply. We thus proceed with the analysis of whether any of the exclusions bar coverage for appellants' judgments by considering Young America's wrongful use of the program funds as a whole.

II. Endurance met its burden to show that the policy exclusions apply to appellants' judgments, and thus, the judgments are not covered by its insurance policy with Young America.

Endurance argues that three separate policy exclusions preclude coverage for appellants' judgments: the contractual-liability exclusion, the conduct-and-illegal-profit exclusion, and the professional-services exclusion. Appellants argue that none of the three exclusions apply and that, even if Endurance met its burden to show that the contractual-liability exclusion applies, appellants met their burden to show that the judgments fall within the exception to that exclusion.

Appellants concede that coverage is available only if all three exclusions do not apply. We conclude that, even if the contractual-liability exclusion does not apply, Endurance met its burden to show that the conduct-and-illegal-profit and professional-services exclusions preclude coverage.

A. The conduct-and-illegal-profit exclusion precludes coverage for appellants' judgments.

The conduct-and-illegal-profit exclusion provides, in relevant part:

The Insurer shall not be liable for Loss on account of any Claim based upon, arising from, or attributable to . . . an Insured having gained any profit, remuneration, or advantage to which such Insured was not legally entitled[] if established by a final and non-appealable judgment or adjudication adverse to such Insured.

The underlying judgments that establish Young America's liability are final and non-appealable; thus, the question is whether the judgments established that Young America gained any profit, remuneration, or advantage to which Young America was not legally entitled.

Appellants assert that they never alleged in the underlying lawsuits that Young America gained a profit, remuneration, or advantage or that it did so by illegal means, and they argue that Endurance is therefore prohibited from arguing that this court should construe the underlying claims in that manner. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Ill. Corp.*, 666 F. Supp. 1180, 1199 (N.D. Ill. 1987) (stating that "[c]laims are simply not 'based upon or attributable to' certain conduct unless they allege such conduct" and that insurers are not permitted to "second guess the plaintiffs in the Underlying Litigation" by attempting to prove that "the underlying claims were really attributable to" illegal conduct).

But we need not look past the underlying complaints to conclude that the conduct-and-illegal-profit exclusion applies. As to appellants' claim that they did not allege that Young America gained any profit, remuneration, or advantage, the underlying

complaints include allegations that Young America’s breaches of fiduciary duty resulted in Young America spending appellants’ funds “in operating its business,” including compensating its personnel, “rather than maintain[ing] insurance coverage pertaining to [its] legitimate creditors.” These allegations establish that Young America kept funds that belonged to appellants and used the funds for its own purposes. In doing so, Young America and its personnel gained a profit, remuneration, or advantage.

As to appellants’ claim that they did not allege that Young America kept their program funds illegally, appellants appear to argue that Young America’s retention of the funds was not “illegal” because a breach of fiduciary duty is not a violation of the law. However, the exclusion does not require proof of a crime; rather, it applies when an insured “gains any profit, remuneration, or advantage to which such insured was not *legally entitled*.” (Emphasis added.) Appellants alleged that the program funds belonged to them and that Young America kept and used those funds for its own benefit. Specifically, USCC alleged that Young America “agreed that the Program Funds would . . . remain the property of USCC while held in trust by [Young America]” and that Young America breached its fiduciary duty through its “use of Program Funds for its own benefit” and its “failure to protect and preserve the Program Funds from dissipation.” Motorola alleged that Young America had a “duty to use funds received from Motorola for the limited purposes set forth in the [MSA]” and that it breached that duty by “using such funds for its own benefit.” These allegations establish that, although the program funds belonged to appellants and the funds were to be used for limited and specific purposes to benefit appellants, Young

America used the funds for its own purposes and thereby gained a profit, remuneration, or advantage to which it was not legally entitled.

We thus conclude that the conduct-and-illegal-profit exclusion precludes coverage for appellants' judgments.

B. The professional-services exclusion precludes coverage for appellants' judgments.

The professional-services exclusion provides, in relevant part:

Professional Services means any service performed by an Insured, and any activities that are incidental or ancillary to the performance of any such service, including, but not limited to, any service that requires a license granted by a federal or state authority in order to perform.

. . . .

The Insurer shall not be liable for Loss on account of any Claim made against a Company based upon, arising from, or attributable to the performance of or failure to perform Professional Services.

Appellants argue that this exclusion is ambiguous, and must therefore be construed against Endurance, because there is more than one reasonable interpretation of "professional services." Citing dictionary definitions of "profession" and "service," appellants contend that a professional service is a service undertaken for a third party that requires advanced education and training to perform, such as medical or legal services. Applying their proposed definition, appellants argue that Young America's actions do not fall within this definition because the actions required no professional education and were not performed for a third party; rather, they were "internal operational actions."

Appellants also argue that Young America’s actions were not professional services because, to the extent Young America provides any “professional” services, those services are limited to the administration of rebate programs. Appellants contend that “to be considered a professional service, the conduct must arise out of the insured’s performance of his specialized vocation or profession” and that Young America’s specialized vocation or profession is merely administering rebate programs—not handling client funds. And because the conduct at issue did not arise out of Young America’s administration of rebate programs, appellants argue, the conduct did not constitute professional services.

We conclude that there is no need to look to dictionary definitions or parse which services were “professional” because the term “professional services” is specifically defined in the policy as “any service performed by an Insured, and any activities that are incidental or ancillary to the performance of any such service.” This definition unambiguously includes Young America’s management and use of the program funds. The duty to protect those funds and the obligation to maintain insurance were “activities that are incidental or ancillary to the performance of” its core professional service of administering rebate programs because, in order to administer the programs, Young America received advanced program funds from its clients and used them to pay its clients’ customers. In order to receive the advanced program funds, Young America agreed to use them only for permissible purposes and to obtain insurance to protect them. All of these activities are connected to the services Young America provided and are thus “incidental or ancillary to” those services. We thus conclude that the professional-services exclusion precludes coverage for appellants’ judgments.

In sum, because the conduct-and-illegal-profit exclusion and the professional-services exclusion apply to appellants' claims, the insurance policy does not cover appellants' judgments against Young America.

Affirmed.