STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1526

Bella Vista Condominium Association, et al.,
Appellants,

vs.

Western National Mutual Insurance Company,
Respondent.

Filed September 13, 2021
Reversed and remanded
Slieter, Judge

Goodhue County District Court
File No. 25-CV-20-520

Kay Nord Hunt, Michael R. Moline, Lommen Abdo, P.A., Minneapolis, Minnesota; and

Roger L. Kramer, Kramer Law, LLC, Mendota Heights, Minnesota (for appellants)

John M. Bjorkman, Patrick H. O'Neill III, Larson • King, LLP, St. Paul, Minnesota (for respondent)

Considered and decided by Bryan, Presiding Judge; Reilly, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from the district court's grant of summary judgment to respondent-insurer, appellant-claimant argues that the district court erred by granting summary judgment on the ground that an agreement between appellant and a third-party contractor

was an unenforceable *Miller-Shugart* agreement. Because a *Miller-Shugart* analysis is not an appropriate basis to grant summary judgement, and we conclude that there remain unresolved issues of fact, we reverse and remand.

FACTS

Bella Vista is a multi-unit condominium development in Goodhue County. A permit was issued to build the condominium development in November of 2005, and appellant Bella Vista Condominium Association (Bella Vista) was incorporated in 2006. Numerous construction subcontractors assisted in the construction of the development, including appellant Watertight Specialties Inc. (Watertight), who was to serve as the development's waterproofing subcontractor. Watertight installed all waterproofing for the foundation as well as water/weatherproofing for all of the residential balconies and decks between October 2005 and February 2006.

Pursuant to allegations made by Bella Vista—as incorporated into an order for default judgment against Watertight—faulty waterproofing performed by Watertight resulted in substantial water-intrusion damage throughout the property. This damage was first noticed in 2012 with more substantial damage noticed in 2015, at which point Bella Vista began further investigation into its cause. In 2016, Bella Vista brought suit against Watertight and the other subcontractors, alleging negligence, breach of warranty, and other causes of action.[1] Bella Vista settled the claims involving most of the defendants and, in

[1] In its initial lawsuit, Bella Vista sued the general contractor who subsequently commenced a third-party contribution action against Watertight. Bella Vista amended its original complaint to include a direct action against Watertight.

September 2018, sought and obtained a default judgment against Watertight and the remaining defendants. The district court found, pursuant to affidavits and expert reports submitted by Bella Vista, that "defects in the construction of the [property]" had resulted in "damages sustained by Bella Vista." The district court concluded that because the defendants had "acted in a common scheme or plan to construct the [property]," they shared liability for the damage, "jointly and severally, in the amount of $2,919,350."

Following default judgment, Bella Vista contacted the insurer for the judgment-debtor Watertight, respondent Western National Mutual Insurance Company (Western National) and presented a claim for indemnification for the full damages amount. Western National denied the claim, indicating that "there [was] no coverage provided for [Bella Vista]'s loss" because it is "unlikely" that "any alleged damage occurred before [the] policy was canceled on April 25, 2006."

In October 2019, Bella Vista commenced the current declaratory-judgment action against both Watertight and Western National, seeking a declaration that the Western National insurance policy provided coverage for the damage caused to the property. While this action was pending, Bella Vista and Watertight executed an "Assignment of Claim under *Miller v. Shugart*," in which Watertight stipulated to liability to Bella Vista as set forth in the district court's default judgment in the amount of $2,919,350 and assigned to Bella Vista of all of Watertight's rights to any resulting cause of action it might have against Western National. The agreement also provided that Bella Vista would seek collection of the default judgment only from Western National.

The parties presented the district court with cross-motions for summary judgment. The district court granted summary judgment to Western National, concluding that the agreement was an unenforceable *Miller-Shugart* agreement.[2] This appeal follows.

DECISION

Bella Vista argues that the district court erred by applying a *Miller-Shugart*[3] analysis in granting Western National summary judgment. Western National counters that *Miller-Shugart* was both applicable and determinative and that, even if it were not applicable, the district court's grant of summary judgment was proper for a reason not considered: the undisputed material facts establish that the damage to the property was not insured.

A *Miller-Shugart* agreement is a settlement agreement in which "a plaintiff and an insured defendant stipulate to a judgment against the defendant on the condition that the plaintiff releases the defendant from any personal liability and agrees to seek recovery solely from the insurer." *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310, 320-21 (Minn. 2021). Such agreements are designed to protect defendants should their insurer deny coverage for a plaintiff's claims. *Id.* at 320.

Once an agreement has been reached, the plaintiff may "proceed[] against the insurer in a garnishment proceeding." *Id.* at 321. However, a *Miller-Shugart* settlement agreement is valid only if two conditions are met: first, the insurer must receive notice of the settlement, and second, the settlement must be "reasonable." *Id.* As such, in the

[2] Because the district court did not consider appellants' motion for summary judgment, neither do we.

[3] *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

garnishment proceeding, the insurer may challenge not only the scope of coverage but also the "validity and reasonableness of the settlement." *Id.*

Summary judgment is appropriate "if the movant shows that 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. Appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). In reviewing a district court's grant of summary judgment, appellate courts review *de novo* whether there were any genuine issues of material fact and whether the district court erred in its application of law. *Montemayor v. Sebright Prods, Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). The district court's determination as to the applicability of a *Miller-Shugart* analysis is one such issue of law, and interpretation of the provisions of the relevant insurance policy is another. We therefore review *de novo* whether the district court was correct in applying *Miller-Shugart* to this matter and whether, concluding as we have that *Miller-Shugart* is inapplicable, the grant of summary judgment is alternatively justified due to the insurance-policy terms.

I. Applicability of *Miller-Shugart*

The district court, analyzing the "Assignment of Claim under *Miller v. Shugart*" between Bella Vista and Watertight as a *Miller-Shugart* agreement and citing to the holding of this court in *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 937 N.W.2d 458 (Minn. App. 2019), *rev'd* 958 N.W.2d 310 (Minn. 2021), concluded that the agreement's failure to "properly allocate between covered and uncovered damages" rendered it *per se* unreasonable and unenforceable. *See id.* at 470 ("Because the *Miller-Shugart* settlement

agreement did not allocate between covered and non-covered damages, it is unreasonable as a matter of law.").

However, we conclude that the district court erred by applying a *Miller-Shugart* analysis in granting Western National summary judgment. As noted, in a *Miller-Shugart* agreement, "a plaintiff and an insured defendant *stipulate to a judgment* against the defendant." *Kings Cove*, 958 N.W.2d at 320 (emphasis added). No stipulated judgment exists between Bella Vista and Watertight. Instead, Bella Vista obtained a default judgment against Watertight, and that judgment was obtained prior to their stipulation to liability for the existing judgment. It was that default judgment for which it sought enforcement in a direct action against Western National. Such a direct action is legally appropriate. *See Camacho v. Todd & Lieser Homes*, 706 N.W.2d 49, 56 (Minn. 2005) ("[I]t is a longstanding common-law rule that courts will not allow third parties to maintain a direct action against an insurer *until the third party has a judgment against the insured*.") (emphasis added); *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 870 (Minn. App. 2002) (recognizing rule that "plaintiff [can] not bring a direct action against the insurer" where it "had not obtained a judgment against the tortfeasor.").

It is the default judgment Bella Vista obtained against Watertight, rather than the subsequent stipulation between Bella Vista and Watertight, which gave rise to Bella Vista's cause of action against Western National. That Bella Vista and Watertight entered into a stipulation to liability for that judgment which purported to incorporate some elements of a *Miller-Shugart* agreement, is irrelevant to Bella Vista's right to pursue a direct action

against Western National. The district court erred by applying the *Miller-Shugart* analysis to grant summary judgment in this matter.[4]

II. Existence of Coverage

Western National argues it is entitled to summary judgment for two grounds argued by appellant but not decided by the district court because the district court relied solely on its *Miller-Shugart* analysis, which we now conclude was in error. Summary judgment may be affirmed pursuant to reasoning other than that applied by the district court. *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) ("[Appellate courts] will not reverse a correct decision simply because it is based on incorrect reasons."). However, neither of the alternative grounds presented by Western National support summary judgment.

Western National first argues that Watertight's failure to provide Western National notice of Bella Vista's suit "as soon as reasonably practicable," as required by Watertight's insurance policy, voided any potential coverage. Second, Western National argues that Bella Vista failed to provide any evidence creating a genuine issue of material fact as to whether property damage occurred during the policy period. The law and the record compels our disagreement as to each assertion. "Interpretation of an insurance policy, and whether a policy provides coverage in a particular situation, are questions of law that

[4] Even if application of *Miller-Shugart* to this matter had been appropriate, the Minnesota Supreme Court's recent ruling in *King's Cove*, 958 N.W.2d 310 (Minn. 2021), which was issued after the district court's order and which created a new test for determining the reasonableness of a *Miller-Shugart* agreement, would have required a remand for application of that new test**.**

[appellate courts] review de novo." *See Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018) (quotation omitted).

Lack of Notice, Voiding of Coverage

"[A] trial court must determine if an insured has met all notice requirements as a condition precedent to determining whether there exists a duty to defend or indemnify." *Hooper v. Zurich American Ins. Co.*, 552 N.W.2d 31, 35 (Minn. App. 1996), *rev. denied* (Minn. Sept. 20, 1996) (alteration in original) (quotation omitted). Once a failure to provide timely notice has been established, the insurer must then show "prejudice from the insured's delay in giving notice of a claim." *Id.* at 36. Western National argues that it "had no notice from Watertight concerning the lawsuit and [Watertight] never tendered its defense of the suit prior to entry of the default judgment," and that it was prejudiced as a result of this lack of notice. Therefore, Western National argues, "[t]his lack of notice voids any coverage that might otherwise have been available." Appellants claim that Western National "waived any late notice argument" due to their failure to assert such an argument in their initial coverage denial letter. Appellants are correct.

Denial of liability on grounds other than notice constitutes waiver of the defense that timely notice was not given. *See Johnson v. Bankers' Mut. Cas. Co.*, 151 N.W. 413, 415 (Minn. 1915); *see also Food Market Merchandising, Inc. v. Scottsdale Indem. Co.*, 857 F.3d 783, 788-89 (8th Cir. 2017), *quoting Minnesota Farm Bureau Serv. Co. v. Am. Cas. Co. of Reading, Pa.*, 167 F. Supp. 315, 319 (D. Minn. 1958) ("It is the law in Minnesota and many other jurisdictions that a refusal by an insurer to pay a claim or to defend an action on the grounds that the loss occurred in consequence of risk not covered by the

policy is in itself a waiver of the policy provisions requiring notice."). Western National's letter denying coverage stated its denial was because "there [wa]s no coverage provided for th[e] loss under the Commercial General Liability Policy covering Watertight." The denial letter made no mention of late notice as its reason for denial. Therefore, the lack of notice argument was thereby waived. *Johnson*, 151 N.W. at 415.[5]

Damage During Policy Period

Western National argues that the record was insufficient to create a genuine issue of material fact as to whether damage occurred during the policy period. Watertight's insurance policy was effective from May 17, 2005 until its cancellation on April 25, 2006. The policy states that Western National "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy further stated that it "applie[d] to . . . 'property damage' only if . . . [t]he . . . 'property damage' [wa]s caused by an 'occurrence' that t[ook] place . . . during the policy period."

Policies such as this, which are triggered by an "occurrence," are subject to the "actual-injury" trigger rule. *In re Silicone Implant Ins. Coverage Litigation*, 667 N.W.2d 405, 415 (Minn. 2003) (quotation omitted). "Whether damages . . . actually occurred within the policy coverage period is a question of fact." *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102, 106-107 (Minn. App. 2005), *rev. denied* (Minn. Jun. 28, 2005). Pursuant to the actual-injury rule, "the time of the occurrence is . . . the time the complaining party was

[5] Because we find any claim of late notice to be waived, we need not reach the issue of whether Western National was prejudiced by a lack of notice.

actually damaged." *Singsaas v. Diederich*, 238 N.W.2d 878, 880 (Minn. 1976). "For purposes of the actual-injury trigger theory, an injury can occur even though the injury is not diagnosable, compensable, or manifest during the policy period as long as it can be determined, *even retroactively*, that some injury did occur during the policy period." *In re Silicone*, 667 N.W.2d at 415 (emphasis added) (quotations omitted). Therefore, to trigger Watertight's policy coverage, Bella Vista "must show that some damage occurred during the policy period." *Id.*; *N. States Power Co. v. Fidelity and Casualty Co. of N.Y.*, 523 N.W.2d 657, 663 (Minn. 1994).

Bella Vista maintains that the actual injury—improper installation of waterproofing—caused immediate water intrusion and damage. In support of this assertion and in response to Western National's summary judgment motion, Bella Vista submitted to the district court an expert report from Encompass Engineering Consultants (Encompass). Encompass had performed "numerous inspections of reported water intrusion issues occurring at the Bella Vista Condominiums" and concluded that the deficient waterproofing caused damage that "would have begun immediately following [] installation." The Encompass report, therefore, directly supports the proposition that the actual injury—in the form of water damage—occurred during the policy period. Viewed in the light most favorable to the Bella Vista, this creates a genuine issue of material fact as to whether that injury occurred during the policy period.[6]

[6] Western National additionally argues that Bella Vista is collaterally estopped from arguing that it experienced damage immediately upon installation of the defective waterproofing because it previously argued, in the underlying suit against Watertight, that no damage to the building was discovered before 2012. However, the first element of

In summary, we conclude that the district court erred by its application of a *Miller-Shugart* analysis to this matter and, therefore, its grant of summary judgment was error. Furthermore, because the record establishes genuine issues of material fact as to whether the damage to the property occurred during the insurance coverage period, summary judgment for that reason is also not appropriate.

Reversed and remanded.

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collateral estoppel is that "the issue was identical to one in a prior adjudication." *Nelson v. Am. Family Ins. Grp.*, 651 N.W.2d 499, 511 (Minn. 2002) (quotation omitted). As noted above, "[f]or purposes of the actual-injury trigger theory, an injury can occur even though the injury is not diagnosable . . . as long as it can be determined . . . that some injury did occur during the policy period." *In re Silicone*, 667 N.W.2d at 415 (quotation omitted). Therefore, though the previously litigated issue relating to the issue of the statute of limitations revolved around the issue of when the injury was *discovered*, the current issue is when the first instance of damage *occurred*.