[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11652
Non-Argument Calendar

D.C. Docket No. 1:15-cv-20941-JAL

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-
Counter Defendant-
Appellant
Cross Appellee,

versus

STATE FARM FLORIDA INSURANCE COMPANY,

Defendant-
Counter Claimant-
Appellee
Cross Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(May 1, 2019)

Before JILL PRYOR, NEWSOM, and GRANT, Circuit Judges.

PER CURIAM:

Liberty Mutual Fire Insurance Company initiated this action seeking a declaratory judgment that State Farm Florida Insurance Company had a duty to defend and indemnify Liberty Mutual in an underlying lawsuit against Liberty Mutual. The parties eventually filed cross-motions for summary judgment, and the district court granted in part and denied in part both motions. The upshot of the court's order was that State Farm had a duty to defend and indemnify Liberty Mutual in the underlying lawsuit, but only for vicarious-liability claims. The court later acknowledged that it made a factual error in analyzing State Farm's duty to defend, yet it never reconsidered any of the legal conclusions that flowed from that error. Liberty Mutual brought this appeal from the summary-judgment order, arguing that the district court erred in holding that State Farm only had to defend Liberty Mutual against vicarious-liability claims, and not claims involving Liberty Mutual's own acts. State Farm cross appealed, arguing that the district court erred in deciding when State Farm's duty to defend Liberty Mutual against vicarious-liability claims began. Because the district court did not reconsider any of its legal conclusions after it admitted that it made an erroneous factual finding on a threshold question, it never analyzed many of the thorny issues involved in its holding that State Farm had no duty to defend Liberty Mutual against its own acts,

hindering our ability to perform our function as a court of review. We therefore remand for the district court to reconsider that holding in light of its admitted factual misunderstanding and in light of this opinion. But because both parties agree that the district court correctly determined that State Farm had a duty (at the least) to defend Liberty Mutual against vicarious-liability claims, and because that duty began on October 18, 2012, we affirm that portion of the district court's order.

I.

To explain how this appeal arose, we begin by discussing another action, one that commenced in state court. That state-court action started when Regina Suarez and Jorge Sosa noticed that the floor in their dining room was sagging. They notified their homeowners insurance company, Liberty Mutual, of the problem and Liberty Mutual sent a contractor, Riteway Insurance Inc., to fix the floor. But Riteway caused even more damage to the structure of the home and to the couple's furniture and other personal belongings. As a result of the damage, the homeowners sued Liberty Mutual in the Eleventh Judicial Circuit for Miami-Dade County, Florida. Their complaint raised several claims, including breach of insurance contract, negligence, and fraud—but importantly, the complaint did not allege a claim for vicarious liability as a result of Riteway's acts. Later, the homeowners filed an amended complaint to add Riteway as a defendant and bring

more claims against Liberty Mutual—but again, the amended complaint did not include a vicarious-liability claim.

Over a year after the state-court action commenced, Liberty Mutual asked State Farm to defend and indemnify it in that action. Liberty Mutual made that request because when it initially hired Riteway to fix the dining-room floor, Riteway agreed to name Liberty Mutual as an additional insured under its insurance policies for liability arising out of work performed by Riteway. Riteway therefore arranged for its insurer, State Farm, to issue a certificate of insurance that indicated that Liberty Mutual was an additional insured under Riteway's contractors policy and umbrella policy.

Accordingly, Liberty Mutual thought that it was insured under the contractors policy, which provides that State Farm will "pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies." The policy also requires State Farm "to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent."

Liberty Mutual also thought that it was entitled to coverage under the umbrella policy, which provides: "If [a] claim or suit is covered by this policy but not covered by any underlying insurance or any other insurance available to the

insured," then State Farm "will have the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent." Alternatively, if the "limits of the underlying insurance are exhausted," then the umbrella policy also imposes a duty to defend, at least under some circumstances. The duty to defend under this policy extends not only to Riteway, but also to those persons or organizations for whom Riteway has "agreed to provide insurance such as is afforded by this policy." But for those persons or organizations that Riteway has agreed to provide insurance, the policy provides coverage "only with respect to: (1) operations you perform; (2) facilities you own or use; or (3) the underlying limit applicable to your insurance with respect to such operation or facility."

Although Liberty Mutual thought it was insured under both of these policies and therefore expected State Farm to defend and indemnify it in the state-court action, State Farm saw things differently. According to State Farm, the agent who issued the certificate of insurance was supposed to send an electronic request to the State Farm underwriting department asking it to add Liberty Mutual as an additional insured under Riteway's policies. After that the department should have issued an additional-insured endorsement, which would have done two things. *First*, the endorsement would amend the contractors policy to define "insured" as Riteway *and* Liberty Mutual—without the amendment the contractors policy listed

only Riteway as an insured. *Second*, the endorsement would have limited Liberty Mutual's coverage to liability resulting from Riteway's acts (*i.e.* vicarious-liability claims) and excluded coverage for liability resulting from Liberty Mutual's own acts. But that never happened. Due to some still-unknown problem, the underwriting department never received an electronic request from the agent who issued the certificate of insurance. State Farm therefore did not issue the additional-insured endorsement. That led State Farm to refuse Liberty Mutual's request for a defense on the basis that it had no documents indicating that Liberty Mutual was an additional insured under any Riteway policy.

Liberty Mutual made numerous additional requests for State Farm to defend it, yet had no success. For example, Liberty Mutual requested a defense shortly after the homeowners amended their complaint for a second time to add a claim against Liberty Mutual for vicarious liability as a result of Riteway's fraud and negligence, and State Farm denied that request. Liberty Mutual therefore defended itself by moving to dismiss the vicarious-liability claim for failure to state a claim, and the trial court granted that motion. Liberty Mutual again unsuccessfully demanded that State Farm defend and indemnify it when the homeowners filed a third-amended complaint to add another vicarious-liability claim.

State Farm finally agreed to defend Liberty Mutual in the state-court action when Liberty Mutual sent it a letter requesting a defense and attached the

certificates of insurance indicating that it was an additional insured under Riteway's policies. According to State Farm, this was the first time it learned "that a mistake or failure in transmission had occurred with regard to Riteway's Contractors Policy." To correct that mistake, State Farm issued an additional-insured endorsement. The endorsement stated that Liberty Mutual was insured under the contractors policy, but only for liability imposed on it because of Riteway's work:

> WHO IS AN INSURED, under SECTION II DESIGNATION OF INSURED, is amended to include as an insured the Additional Insured shown above, but only to the extent that liability is imposed on that Additional Insured solely because of your work performed for that Additional Insured shown above.

State Farm then agreed to reimburse Liberty Mutual for its attorneys' fees and costs from May 1, 2013, forward. State Farm chose the May 1 date—rather than the date that the state-court action commenced (February 2010)—because it understood its duty to defend Liberty Mutual as applying only to claims attempting to hold Liberty Mutual liable for Riteway's acts. State Farm therefore asserted that its duty to defend did not arise until the homeowners alleged a vicarious-liability claim in their third-amended complaint, which was filed on May 1, 2013. State Farm agreed to pay costs incurred after that date, but no earlier.

Unsatisfied with that offer, Liberty Mutual sued State Farm in the U.S. District Court for the Southern District of Florida seeking a declaration regarding

State Farm's defense and indemnification obligations under the policies. The operative complaint alleged that State Farm breached the contractors policy and, to the extent that the contractors policy provided no coverage, that it breached the umbrella policy. State Farm counterclaimed for a declaratory judgment, arguing that it had no duty at all to defend Liberty Mutual for its own acts.

Both parties moved for summary judgment, and the district court granted in part and denied in part both motions. The court began by finding that neither the certificate of insurance nor anything else in the record indicated that Liberty Mutual was an additional insured under the contractors policy. Having concluded that the contractors policy did not apply, the court went on to hold that the certificate of insurance indicated that Liberty Mutual was an additional insured under the umbrella policy. The court then determined that the umbrella policy "unambiguously limits coverage to operations performed by Riteway," so "Liberty Mutual is only covered for its vicarious liability arising from Riteway's negligent acts." The court therefore held that State Farm's duty to defend started on October 18, 2012, the date that the homeowners filed their second-amended complaint to add a vicarious-liability claim against Liberty Mutual. When the court entered its final judgment, State Farm had only paid Liberty Mutual's attorneys' fees from May 1, 2013, on so the court ordered State Farm to pay Liberty Mutual

$284,414.40 plus interest—the cost of defending the suit from October 18 through May 1.

Shortly after the court's decision, Liberty Mutual moved for the court to reconsider its summary-judgment order because both parties agreed that the court incorrectly found that the certificate of insurance did not reference the contractors policy. The court acknowledged that—contrary to its earlier order—the certificate of insurance *did* reference the contractors policy, and therefore purported to add Liberty Mutual as an additional insured under that policy. But the court nonetheless declined to analyze the scope of coverage provided under the contractors policy or otherwise reconsider any of its legal conclusions.

Liberty Mutual appealed, arguing that it was entitled to coverage under the contractors policy and that the contractors policy required State Farm to defend it against claims arising out of Liberty Mutual's own acts. State Farm cross appealed, challenging the district court's conclusion that its duty to defend began on October 18, 2012—rather than May 1, 2013—and therefore seeking to vacate the order requiring it to pay Liberty Mutual's attorneys' fees from October 18 on.

II.

We review a district court's summary-judgment order de novo, applying the same legal standards as those used by the district court. *Lindley v. FDIC*, 733 F.3d 1043, 1050 (11th Cir. 2013), *aff'd sub nom. Lokey v. FDIC*, 608 F. App'x 736, 736

(11th Cir. 2015) (per curiam). We also review de novo a district court's interpretation of a contract, including an insurance policy. *Tobin v. Mich. Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005) (per curiam).

III.

A.

The first question presented on appeal is the extent to which—if any—the contractors policy covers Liberty Mutual. The certificate of insurance indicates that Liberty Mutual is an additional insured under the contractors policy—a critical fact that the district court misunderstood in its summary-judgment order. Based on the certificate of insurance, Liberty Mutual argues that it is entitled to the same coverage under the contractors policy as Riteway, the primary insured. If Liberty Mutual is correct, then State Farm would have a duty to defend and indemnify Liberty Mutual against liability resulting from its own acts, in addition to liability resulting from Riteway's acts. In response, State Farm concedes that the certificate of insurance mentions the contractors policy but argues that Liberty Mutual's coverage under the contractors policy must be understood in light of the additional-insured endorsement, which purports to modify the policy to add Liberty Mutual as an insured only for claims holding Liberty Mutual liable for Riteway's acts. Liberty Mutual's comeback is that the endorsement is unenforceable because it was added after the loss occurred.

And the debate goes on from there. State Farm argues that if Liberty Mutual is correct that the endorsement is not enforceable, then Liberty Mutual cannot receive *any* coverage under the contractors policy—even for vicarious-liability claims. In support of this contention, a State Farm agent testified that the only way an additional insured can be added to a policy is through an additional-insured endorsement. State Farm therefore argues that without the endorsement, Liberty Mutual is not an "insured" under the contractors policy and cannot receive *any* coverage under that policy. Liberty Mutual, on the other hand, says that the certificate of insurance standing alone provides it with the same coverage under the contractors policy as the primary insured, such that the endorsement is unnecessary to effectuate coverage. To rebut that, State Farm points to the language of the certificate itself, which states that the certificate "is not a contract of insurance and neither affirmatively nor negatively amends, extends or alters the coverage approved by any policy."

Our review of the record reveals that the district court did not address any of these arguments. Instead, it concluded that nothing in the record, including the certificate of insurance, indicated that Liberty Mutual was insured under the contractors policy. Although it later acknowledged that the certificate of insurance *did* indicate that Liberty Mutual was an additional insured under the contractors policy, the court never reconsidered any of the conclusions that flowed from its

earlier misstep. And because the court stopped its analysis short, it never interpreted the scope of the contractors policy or any of the issues outlined above.

Because the court did not reach the scope of the contractors policy or the validity of the additional-insured endorsement, we are "without the benefit" of a district-court opinion "to guide our analysis." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012). As a court of review, we ordinarily "do not decide in the first instance issues not decided below." *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)); *see also Clay v. Equifax, Inc.*, 762 F.2d 952, 957 (11th Cir. 1985) ("[A]ppellate review of what the district court did is largely an error-correcting function."). That is especially true under these circumstances, where resolution of the issues turns on factual disputes, as well as legal disagreements. The district court thus is best suited to resolve this question in the first instance. The scope of the contractors policy, and the affect (if any) of the additional-insured endorsement on the coverage provided by that policy is therefore left to the district court to resolve on remand.

B.

As to the umbrella policy, we do not find it necessary to review, at this point, whether the district court correctly interpreted that policy to cover Liberty Mutual only for claims seeking to hold Liberty Mutual liable for Riteway's acts. The district court considered the scope of the umbrella policy only because it

concluded that the contractors policy did not apply. On remand, the district court may find that the contractors policy *does* apply, either to cover Liberty Mutual solely for Riteway's acts or to cover Liberty Mutual for its own acts, too. If the district court reaches either conclusion, then the umbrella policy may not apply. Thus, any opinion that we issue at this stage regarding the district court's analysis of the umbrella policy may be unnecessary to the district court on remand, or, in the alternative, based on an incorrect reading of the contractors policy. To avoid either result, we also decline to review the district court's analysis of the umbrella policy.

C.

Turning to State Farm's cross appeal, State Farm does not dispute that it had a duty to defend Liberty Mutual against vicarious-liability claims. So both parties agree that—no matter how the district court on remand interprets the scope of the contractors policy or the umbrella policy—there is no interpretation that would change the fact that State Farm at least had a duty to defend Liberty Mutual against vicarious-liability claims. We agree, and we affirm the district court's holding that State Farm had a duty to defend Liberty Mutual against vicarious-liability claims.

Although State Farm undisputedly had a duty to defend Liberty Mutual against vicarious-liability claims, we also must address State Farm's contention that the district court erred when it held that the duty to defend against those claims

began on October 18, 2012. We conclude that the district court did not err in holding that State Farm's duty to defend under the umbrella policy began on October 18. State Farm contends that it had no duty to defend against the vicarious-liability claims raised in the October 18 complaint because the trial court dismissed the vicarious-liability claim for failure to state a claim. In other words, State Farm argues that because Liberty Mutual successfully defended itself against the claim there was no real claim, and State Farm thus had no duty to provide a defense.

As State Farm sees it, its duty to defend did not begin until May 1, 2013, when the homeowners amended their complaint to add *another* vicarious-liability claim. But both the contractors policy and the umbrella policy provide that State Farm must defend against claims "even though the allegations of the suit may be groundless, false or fraudulent." And even without those contract provisions, in Florida, the "general rule is that an insurance company's duty to defend an insured is determined solely from the allegations in the complaint against the insured," and not "by the actual facts of the cause of action against the insured, the insured's version of the facts or the insured's defenses." *Amerisure Ins. Co. v. Gold Coast Marine Distribs., Inc.*, 771 So. 2d 579, 580 (Fla. Dist. Ct. App. 2000). Thus, under Florida law and the plain language of the insurance policies, the district court correctly determined that State Farm's duty to defend Liberty Mutual against

vicarious-liability claims began on October 18, 2012, the date that the homeowners amended their complaint to allege a vicarious-liability claim for the first time.

IV.

In sum, we affirm that part of the district court's summary-judgment order holding that State Farm had a duty to defend Liberty Mutual against vicarious-liability claims starting on October 18, 2012. But as to the question of whether either the contractors policy or the umbrella policy imposed a broader duty to defend against claims seeking to hold Liberty Mutual liable for Liberty Mutual's own acts, the district court's summary-judgment order and subsequent order on a motion for reconsideration left several questions of fact and law unresolved. We therefore vacate that part of the summary-judgment order and remand for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED.