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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1529

Hawkins, Inc., et al.,
Appellants,

vs.

American International Specialty Lines Insurance Company,
Respondent.

Filed October 14, 2008
Affirmed
Collins, Judge*

Hennepin County District Court
File No. 27-CV-06-7489

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

On appeal from a grant of summary judgment in favor of respondent-insurer, appellants-insureds argue that the district court erred by ruling that Minnesota law governed their claims alleging that respondent breached its contractual obligations under two insurance policies, and granting respondent summary judgment on those claims. We affirm.

FACTS

This case involves a dispute regarding the rights and obligations of the parties to two insurance policies issued by respondent American International Specialty Lines Insurance Company (AISLIC) to appellants Hawkins, Inc., et al., (Hawkins) in effect from September 30, 1998, to September 30, 2001. The primary policy had a per-occurrence limit of $1 million and an aggregate limit of $2 million; the umbrella policy had per-occurrence and aggregate limits of $10 million.

In April of 2000, Hawkins entered into an asset-purchase agreement to acquire all assets of appellant St. Mary's Chemicals, Inc., doing business as Universal Chemical (Universal),[1] a repackager of bulk pharmaceutical compounds. Under the terms of the asset-purchase agreement, Universal expressly indemnified Hawkins for any breach of representation or breach of warranty as to the merchantability of the inventory it sold to Hawkins.

[1] Appellant Patrick Soderlund was president of Universal. He, appellant William Soderlund, and appellant Ronald Welch were the only shareholders of Universal.

The incident that ultimately gave rise to litigation between appellants and AISLIC occurred in California. In December of 2000, a seven-year old girl, M.C., suffered a life-threatening reaction after taking prescribed medication. M.C. was in critical condition for a period of time, but eventually recovered. It was later discovered that M.C.'s reaction was the result of having taken mislabeled medication; she had been prescribed an anti-malarial medication, but the prescription's container contained an anti-hypertension medication. In September of 2001, M.C.'s parents (the plaintiffs), on her behalf and their own behalf, filed a lawsuit in California state court against several defendants, including Hawkins and Universal. The plaintiffs asserted, among others, claims of strict liability, breach of warranty, and negligence, and they sought both compensatory and punitive damages.

AISLIC retained the California law firm of Schaffer, Lax, McNaughton & Chen (Schaffer Lax) to defend both Hawkins and Universal. Within one month after the lawsuit was commenced, a Schaffer Lax attorney left a telephone message with Hawkins's corporate counsel inviting him to contact Schaffer Lax to discuss the lawsuit. Schaffer Lax engaged in discovery to evaluate the plaintiffs' damages claims, as well as to assess the potential liability of the respective defendants. Schaffer Lax informed AISLIC about the developments in the lawsuit, and Schaffer Lax's substantive communications regarding the developments generally were copied to Hawkins's corporate counsel or a Hawkins corporate officer, or both.

In September of 2002, the parties to the lawsuit engaged in mediation. The record includes two letters from Schaffer Lax that were copied to Hawkins's corporate counsel indicating that this mediation would be held in September of 2002, and that Hawkins's corporate counsel "should also plan on attending" the mediation. Following mediation, Schaffer Lax sent a letter dated September 9, 2002, to AISLIC, Hawkins's corporate counsel, and Hawkins's Vice President, Dan Soderlund, advising that "[n]o demand was received and no offer was made," and that "[w]e did not anticipate that the mediation would result in a resolution." The letter also advised that "although punitive damages have been alleged, we have never looked at this case as one that is legitimately having punitive exposure," and, "[b]ased upon the discussion with the mediator, I believe that he concurs with this analysis." Regarding punitive damages, the letter explained:

> [E]ven assuming there was a basis of a punitive damage claim, it would be against Universal and not Hawkins, and given that Universal is no longer in business any award of punitive damages against them would not be recoverable, as this would be liability that Hawkins would not have assumed, as I did not believe that there were any independent acts on the part of Hawkins that would rise to the level of punitive exposure.

In addition, the letter stated that the mediator had indicated that he believed that the settlement value of the case, without regard to punitive damages, was "something in the area of $500,000," although no specific demand had been received from the plaintiffs. The letter further stated that: (1) Schaffer Lax had notified the mediator that it was prepared to discuss settlement up to $200,000; (2) AISLIC had given settlement authority up to $250,000; and (3) additional authority from AISLIC would have been available had Schaffer Lax requested it.

Following the September 2002 mediation, discovery continued, and the plaintiffs began to articulate the basis for their punitive-damages claim. In May of 2003, Schaffer Lax informed AISLIC and Hawkins of the plaintiffs' position that they had a viable punitive-damages claim on the theory that, because Hawkins's acquisition of Universal "was spearheaded by Dan Soderlund," who is the brother to Patrick and William Soderlund, the owners of Universal, the due-diligence inquiry relative to potential quality-control issues "was not full and complete."

By letter dated September 18, 2003, Schaffer Lax informed AISLIC and Hawkins that the plaintiffs had made a demand for settlement in the amount of $3,999,999.97. Schaffer Lax offered to meet with Hawkins's board members, corporate officers, and corporate counsel before the second mediation, scheduled for October 7, 2003. Following receipt of the letter, Hawkins's corporate counsel wrote to AISLIC stating: "We are aware that the plaintiffs have made a claim for punitive damages, and that California law does not allow indemnification for punitive damage awards."

Schaffer Lax attorneys, Hawkins's corporate counsel, two Hawkins officers, and three AISLIC representatives attended the second mediation session. In a letter to AISLIC and Hawkins summarizing the discussions during the second mediation, Schaffer Lax reported that the plaintiffs continued to demand $4 million and that AISLIC had offered $850,000 for a full and complete resolution of the plaintiffs' claims against Hawkins and Universal. Schaffer Lax noted that it was their impression that the mediator did not agree with the plaintiffs' $4 million assessment of the value of the case. Schaffer Lax also advised that based on the discussions that took place during the second mediation, it was their view that the case could probably be settled for an amount between $2 million and $2.5 million.

In late October of 2003, a court-ordered settlement conference was held. Thereafter, Schaffer Lax informed AISLIC and Hawkins that the plaintiffs increased their settlement demand to $4.5 million. Schaffer Lax advised AISLIC and Hawkins that the district court suggested a settlement in the area of $2 million, but that the plaintiffs had replied that they were not ready to discuss a particular settlement amount until they received the results of M.C.'s brain scan. Schaffer Lax informed AISLIC and Hawkins that a second settlement conference was scheduled for November 10, 2003, and advised that persons from AISLIC and Hawkins with settlement authority should attend.

Shortly before the second settlement conference, AISLIC retained another law firm, Lynberg & Watkins, to serve as trial specialists. At the settlement conference, AISLIC maintained its offer of $850,000, but informed the district court that it would offer up to $1 million if that would settle the case. The plaintiffs held to their $4.5 million demand. Shortly thereafter, Hawkins informed Universal that the mediation and settlement attempts had been unsuccessful and reminded Universal of the likelihood that Hawkins would have to pay a sizeable amount of money not covered by insurance, in which case Hawkins would "invoke the indemnity provision" of the purchase agreement.

On January 20, 2004, an expert for the plaintiffs was deposed and a Food and Drug Administration (FDA) report from 1999 regarding quality-control concerns at Universal was disclosed. The report, of which Hawkins had not been made aware during its acquisition of Universal: (1) described a broad range of violations, irregularities, and regulatory infractions; (2) indicated a "much higher degree of FDA scrutiny and displeasure with Universal than was ever disclosed by [Universal] during Hawkins's due diligence investigation"; and (3) reflected a "defiant attitude" by Universal toward the FDA and its inspectors.

Also in January of 2004, AISLIC and Hawkins presented the case to three mock jury panels, with the mock plaintiffs seeking $4 million in compensatory damages and $15 million in punitive damages. One panel awarded $1.355 million in compensatory damages and $10 million in punitive damages; the second awarded $1.18 million in compensatory damages and $5 million in punitive damages; and the third panel awarded $3.436 million in compensatory damages and $10 million in punitive damages.

One week after the FDA report was disclosed, Schaffer Lax informed Hawkins, Hawkins's corporate counsel, and Universal that the discovery of the FDA report "creates a conflict of interest between Hawkins and Universal," and that "it would be impossible for [Schaffer Lax], as well as [its] co-counsel, Lynberg & Watkins, to represent the interests of both Hawkins and Universal, absent a formal waiver of the conflict." No such waiver was made, and Schaffer Lax and Lynberg & Watkins withdrew their representations, at which point AISLIC retained new and separate counsel to represent Hawkins and Universal respectively..

As a result of the third and final mediation held in February of 2004, the lawsuit was settled for $4.2 million, with $1.2 million paid by AISLIC, and Hawkins paying $3 million. Hawkins contended that it was entitled to indemnification from Universal for the $3 million paid by Hawkins toward the settlement. Universal apparently disagreed, and in July of 2004 Hawkins commenced a lawsuit against Universal venued in Hennepin County district court, claiming that Hawkins had been exposed to liability as a result of Universal's breaches of its representations and warranty regarding the quality of its inventory. Hawkins and Universal settled their case in October of 2005, whereby Hawkins agreed to subrogate to Universal any claims Hawkins may have against AISLIC arising out of the defense of the lawsuit.

On April 18, 2006, appellants commenced the present action against AISLIC seeking declaratory relief and damages, asserting that AISLIC breached its duties to defend, indemnify, and settle, as well as its fiduciary duties and the duty of good faith and fair dealing in connection with AISLIC's handling of the California lawsuit. Appellants moved for partial summary judgment, and AISLIC moved for summary judgment on all counts. The district court denied appellants' motion and granted AISLIC's motion. This appeal followed.

D E C I S I O N

I.

Appellants first challenge the district court's conclusion that Minnesota law governs their claims against AISLIC. A district court's resolution of a choice-of-law issue is a question of law, which this court reviews de novo. *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 4 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003).

Before the district court, appellants argued that California law should apply. The district court disagreed, relying on *Cargill, Inc. v. Evanston Ins. Co.* in concluding that "[w]hen, as here, the Policies contain no choice-of-law provision, 'if any states are to be involved in a choice-of-law analysis, it should be . . . the home states of the parties to the litigation.'" *See* 642 N.W.2d 80, 90 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). The district court explained that, although "the dispute underlying this matter arises out of a California lawsuit," that fact "does not inject California law into a choice-of-law analysis where California is not the home state of any party to this litigation." Because none of the parties contended that AISLIC's home state, New Jersey, should govern, the district court concluded that the law of the home state of Hawkins and Universal, Minnesota, must be applied.

Appellants argue that the district court erred by failing to follow the required methodology for resolving choice-of-law issues. Generally, when resolving a choice-of-law issue, a district court considers whether the choice of the law of one state over the law of another state creates an actual conflict, and, if so, whether the law of both states can be constitutionally applied. *See Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994). If conflict exists and the law of both states can be constitutionally applied, the district court considers five "choice influencing factors". *Id.* (citing *Milkovich v. Saari*, 295 Minn. 155, 161, 203 N.W.2d 408, 412 (1973) (stating that courts should consider: "(a) Predictability of results; (b) maintenance of interstate and international order; (c) simplification of the judicial task; (d) advancement of the forum's governmental interests; and (e) application of the better rule of law")). Here, appellants claim that because the district court decided the choice-of-law issue without conducting such an analysis, the district court's decision "must be reversed for this reason alone." But as we held in *Cargill*, a case that involved a dispute over whether the costs of cleaning a polluted site owned by an insured were covered under an environmental impairment liability policy, the only applicable laws through which a court may interpret the terms of an insurance policy when the policy contains no choice-of-law provision are the laws of the parties' home states. 642 N.W.2d at 90. Applying this principle to the facts in *Cargill*, we concluded that the district court erred by applying the law of Georgia, the state where the polluted site was located, but not the home state of any party, in interpreting the terms of the insurance policy to determine whether the insurer was required to provide coverage. *Id.*

Appellants contend that here, unlike in *Cargill*, the issues do not involve the interpretation of a specific term in an insurance policy; rather, they involve an insurer's conduct in handling a tort action that was litigated in the California courts, and, therefore, *Cargill* is not controlling. Appellants argue that insurers "expect that their conduct will be subject to different standards in the different jurisdictions where a claim may happen to arise;" thus, the law of the state where the tort claim was handled by AISLIC, California, should be considered in a choice-of-law analysis.

We find appellants' argument unavailing. The claims in this litigation, like those in *Cargill*, concern the rights and obligations of insureds under an insurance policy. That the question in *Cargill* involved the interpretation of a specific term, while the question here involves the scope of an insurer's duties, does not warrant the application of a different rule. Based on our holding in *Cargill*, the district court correctly concluded that, because this action involves a dispute over the rights and obligations of insureds under insurance policies that contain no choice-of-law provision, the only applicable laws considered in a choice-of-law analysis are the laws of the parties' home states. And because, as the district court noted in its well-reasoned order, none of the parties requested the application of the laws of the only home state other than Minnesota—that is, New Jersey—the laws of Minnesota apply and no further choice-of-law analysis was necessary.

II.

When reviewing a grant of summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). There is no genuine issue of material fact when the record taken as a whole would not permit a rational fact-finder to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). A material fact is one that "will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). This court reviews the record in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). All factual inferences and ambiguities must be resolved in favor of the nonmoving party. *Wistrom v. Duluth, Missabe & Iron Range Ry. Co.*, 636 N.W.2d 611, 613 (Minn. App. 2001).

To withstand summary judgment, a nonmoving party "cannot rely upon mere general statements of fact but rather must demonstrate" that "specific facts are in existence which create a genuine issue for trial." *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul,* 533 N.W.2d 845, 848 (Minn. 1995). Unverified opinions and allegations are likewise insufficient. *See Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983) (stating that an affidavit opposing summary judgment is not adequate if it recites only argumentative and conclusory allegations).

A. Fiduciary Duties and Good Faith

When an insurer undertakes the defense of its insured for claims covered by an insurance policy, "the insurer owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify." *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983). Accordingly, "an insurer's right to control the negotiations for settlement must be subordinated to the purpose of the insurance contract—to defend and indemnify the insured within the limits of the insurance contract." *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 915 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001) (quotation omitted). The fiduciary duty that the insurer owes to the insured is measured by the standard of "good faith," meaning that the insurer must "view the situation as if there were no policy limits applicable to the claim, and . . . give equal consideration to the financial exposure of the insured." *Id.* at 916 (quotation omitted). "An insurer's duty of good faith is breached when the insured is clearly liable . . . and when the insurer's refusal to settle within the policy limits is not made in good faith and is not based upon reasonable grounds to believe that the amount demanded is excessive. *Id.* (quotation omitted).

In other words, because an insurer owes its insured fiduciary duties, the insurer must act in good faith in performing its contractual obligations—namely, the duty to defend and the duty to indemnify. Accordingly, although appellants' claims regarding fiduciary duties and the duty of good faith are not separate causes of action from their claims that AISLIC failed to perform its contractual obligations, the question of whether AISLIC breached those obligations is measured by the standard of good faith imposed by the fiduciary nature of its relationship to appellants.

B. Duty to Defend

An insurer's duty to defend arises when the insurance policy "arguably" provides coverage for claims made against the insured. *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406-07 (Minn. 1998). Here, the district court concluded that AISLIC "fulfilled its duty to defend [appellants] when it investigated the claims and provided [appellants] with defense counsel to represent [appellants] throughout the [ ] litigation." Appellants argue that the district court erred because there are fact issues regarding whether AISLIC: (1) adequately investigated the claims against appellants; (2) provided appropriate counsel to appellants; and (3) provided an adequate defense to appellants. We now address these arguments in turn.

1. Adequate Investigation

Appellants first contend that an insurer, once it decides to defend, has a continuing obligation to investigate claims. They further contend that "[i]t does not matter that the investigation is partly or wholly turned over to defense counsel," and that the insurer is "legally obligated to be fully informed about the claims against its insureds."

When an "insured comes forward with facts showing arguable coverage[,] . . . the insurer must either defend or further investigate the potential claim." *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995). But as the district court aptly noted, this requirement of investigation ends when the insurer decides to defend. While an insurer's failure to keep informed of the developments in a litigation against its insured might be relevant to a question of whether the insurer satisfied its fiduciary duty to act in good faith in rejecting a settlement demand, appellants cite no authority, and we are aware of none, to support their argument that a breach of the duty to defend can be predicated on such a failure. *See Short*, 334 N.W.2d at 389 (holding that insurer's lack of good faith was demonstrated by its failure to "ever apprise" insured of settlement offers).

2. Appropriate Counsel

Appellants next claim that AISLIC breached the duty to defend by failing to provide appropriate counsel when it engaged a single law firm to represent Hawkins and Universal jointly, knowing that "they had very differing interests." The differing interest that appellants point to is Hawkins's right to seek indemnity from Universal under the purchase agreement for any breaches of representations or warranties regarding the quality of Universal's inventory. Appellants maintain that AISLIC had a duty to advise them of this conflict and that, by failing to do so, AISLIC breached its duty to defend.

Appellants assert that, because AISLIC received a copy of the purchase agreement containing the indemnity clause, it was aware of the conflict. However, that AISLIC had a copy of the purchase agreement does not establish that it in fact knew that the indemnity provision created an actual conflict. Appellants' related claim that AISLIC in fact knew about the conflict, and that one of its employees conceded that Hawkins and Universal "should have [had] separate counsel," is simply a misrepresentation of the record. The alleged concession was clearly in response to a hypothetical question:

> Q. Were you aware there was an indemnity agreement between the insureds in that case . . . ?
>
> A. No.
>
> Q. If you were to accept my hypothetical . . . that there was an indemnity agreement . . . and that if one of them was responsible for an uninsured liability such as the punitive damages, . . . [t]hat would be a potential conflict in your mind?
>
> . . . .
>
> A. On the limited facts you have presented to me, I would say yes. . . . [T]here could be a conflict and they should have separate counsel.

In an analogous situation of a conflict arising between an insurer and its insured when the insurer agrees to defend, but under a reservation of rights, we have stated that the requirement of providing independent counsel for the insured arises only when there is "an actual conflict of interest, rather than an appearance of a conflict of interest." *Mut. Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368 (Minn. App. 1991). Even viewed in the light most favorable to appellants, the record here demonstrates that there was only a potential conflict or the appearance of a conflict, not an actual conflict. That the purchase agreement contained the indemnity clause does not establish that an actual conflict existed. An actual conflict would not have arose until it became clear that Hawkins was attempting to enforce its rights under the indemnity clause because of a claimed misrepresentation by Universal regarding the quality of its inventory. The record indicates that Hawkins made it clear to Universal that it intended to enforce the indemnity provision in a late 2003 letter. In January of 2004, the FDA report suggesting that it was possible that Universal misrepresented the quality of its inventory to Hawkins was disclosed. Schaffer Lax then recognized that there was a conflict between Hawkins and Universal and notified the parties. AISLIC promptly appointed new and separate counsel. Under these circumstances, AISLIC fulfilled its duty to appellants.

3. Adequate Defense

Appellants also claim that AISLIC breached its duty to defend by failing to provide an adequate defense, asserting that AISLIC "exercised control" over Schaffer Lax and prevented Schaffer Lax from engaging in certain discovery and hiring certain experts. They maintain that AISLIC is therefore liable for the negligence of Schaffer Lax, citing caselaw holding an employer liable for the negligence of an independent contractor when the employer "retains detailed control over a project and then fails to exercise reasonably careful supervision." *See Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 189 (Minn. 2005). But "it is well-established . . . that defense counsel hired by an insurer to defend a claim against its insured represents the insured." *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 449 (Minn. 2002). To the extent that appellants argue for an extension of the law to recognize a principal-agent relationship between the insurer and defense counsel hired by that insurer to represent the insured, such a task falls to the legislature or to the supreme court, not us. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987).

In rejecting appellants' argument, the district court stated that appellants' allegations that Schaffer Lax improperly allowed itself to be controlled by AISLIC, and that this was contrary to appellants' interest, could give rise to an action against Schaffer Lax for malpractice, but does not support appellants' claims against AISLIC. We agree with the district court's well-reasoned explanation and conclude that there are no genuine issues of material fact regarding appellants' claim that AISLIC breached its duty to defend.

C. Duty to Indemnify

In concluding that there were no genuine issues of material fact regarding appellants' claims that AISLIC breached the duty to indemnify, the district court noted that the insurance policies contain the following consent clause: "No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." The district court concluded that the consent clause prohibited appellants, except at their own expense, from voluntarily making payment or incurring any expense without AISLIC's consent, and that, because appellants "knowingly" made the contribution to the settlement "voluntarily and without the consent of AISLIC," AISLIC had no obligation to indemnify appellants.[2]

[2] The district court noted that if appellants' contribution represented the settlement of punitive damages, appellants were not entitled to indemnification for that contribution as a matter of law. *See Wojciak v. N. Package Corp.*, 310 N.W.2d 675, 680 (Minn. 1981) (noting that generally, insurance coverage for punitive damages is prohibited as contrary to public policy in that it would defeat purpose of punishing wrongdoers). But the district court ultimately concluded that a genuine issue of material fact exists as to whether appellants' contribution represented settlement of claims of punitive damages, and not compensatory damages.

Appellants further argue that the district court erred by relying on the consent clause in concluding that they are not entitled to indemnification because AISLIC: (1) never withheld its consent; (2) breached its own obligations, excusing appellants from complying with the consent clause; (3) attempted to renounce coverage at the time of settlement; and (4) was not prejudiced by appellants' failure to comply with the consent clause. We next address these arguments in turn.

1. Withheld Consent

Appellants argue that AISLIC never withheld its consent, and therefore, the consent clause is unenforceable. But this argument misses the mark. Although AISLIC did not object to the voluntary contribution, there is nothing in the record establishing that AISLIC actually gave its consent and agreed to indemnify appellants for the contribution.

2. Breach

Appellants' argument that AISLIC breached its obligations, thus excusing appellants from compliance with the consent clause, is based on their assertion that AISLIC acted in bad faith in refusing to pay the entire $4.2 million settlement amount.

When an insurer refuses to settle an action against the insured without reasonable grounds for doing so, the insurer releases the insured from a clause in the insurance policy prohibiting the insured from settling without the insurer's consent. *See Butler Bros.*, 120 Minn. at 165, 139 N.W. at 358 ("This court has never held that when the [insurer], in violation of its contract, refuses to take the defense of the case, the insured may not settle it without relieving the [insurer] from all liability for its breach of the contract.”). Appellants maintain that there are disputed facts as to whether AISLIC acted in good faith when it refused to pay the $4.2 million settlement amount and, in support, they claim that the record contains evidence establishing that AISLIC: (1) was uninformed and made an unreasonably low settlement offer; (2) deliberately chose not to inform appellants of uncovered claims; (3) failed to inform appellants of settlement opportunities; (4) failed to investigate the claims or allow Schaffer Lax to conduct necessary discovery; (5) appointed one defense counsel to represent two insureds “known to have conflicting interests”; and (6) used the threat of punitive damages to coerce appellants to contribute to the settlement. The record belies appellants’ claim that there are such genuine issues.

The record does not support appellants’ contention that AISLIC acted in bad faith in that its assessment of the value of the plaintiffs’ compensatory damages claims was uninformed or unreasonably low. AISLIC estimated the value of the plaintiffs’ compensatory claims to be between $1.875 million and $2.875 million. And Schaffer Lax had advised AISLIC that it was their opinion that: (1) the mediator who convened the first mediation in September of 2002 thought the value of the claims was about $500,000; (2) the mediator at the October of 2003 mediation valued the claims to be in the $2 million range; and (3) the judge who presided at the settlement conference that same month likewise thought the value of the claims to be around $2 million. Moreover, when the case was presented to three mock jury panels, one of the panels assessed compensatory damages at $1.355 million, another at $1.180 million, and the third reached $3.436 million. Although Schaffer Lax informed AISLIC that the lawsuit posed a chance of "aggravated liability" that increased the potential exposure, there is nothing in the record to support appellants' assertion that Schaffer Lax actually advised AISLIC to increase its valuation of the claims or that AISLIC rejected such advice. The record fails to establish that AISLIC did not have reasonable grounds for its rejection of the plaintiffs' demand in excess of $4 million, a showing that is necessary to support an inference of bad faith.

Citing a portion of a deposition of an AISLIC employee, appellants contend that the record shows that AISLIC deliberately chose not to inform them of uncovered claims for punitive damages. That employee testified that he personally did not send a letter to appellants regarding the punitive-damages claim, but he did not testify that AISLIC deliberately chose not to inform appellants of the punitive-damages claim. In fact, it is uncontradicted that the employee testified: "It was reported to the insured that punitive damage claims were made," and "They were aware of the punitive damages claims in letters and in the complaint that their corporate attorney reviewed." And there is nothing in the record contradicting the evidence that AISLIC notified either an officer of Hawkins or Hawkins's corporate counsel of every mediation and settlement conference, beginning with the first mediation in September of 2002. The evidence is also undisputed that the first time any formal settlement demand was made by the plaintiffs' (in September of 2003), AISLIC communicated the demand to Hawkins's vice president and corporate counsel.[3] Also, as noted above, the record does not establish, as appellants claim it does,

[3] Throughout their argument, appellants insist that they were not informed about the punitive-damages claim and developments in the lawsuit, but they do not mention the

that AISLIC failed to investigate, that there was an actual conflict between Hawkins and Universal, and that even if there were, AISLIC knew about that conflict but failed to appoint separate counsel.

Regarding whether AISLIC used the threat of punitive damages to coerce appellants' contribution toward the settlement, appellants point to internal AISLIC memoranda noting the potential exposure to punitive damages and suggesting that AISLIC planned on asking appellants to contribute toward the settlement. But appellants have identified nothing in the record showing that AISLIC followed through on such a plan by actually demanding, or even requesting, that appellants contribute. When deposed, the AISLIC employee who prepared the internal memoranda testified that, although she had written that she planned on asking appellants to contribute, she never actually did so. Our review of the record reveals nothing establishing that AISLIC did in fact make such a demand upon appellants to contribute and, at oral argument, counsel for appellants was unable to direct us to any such evidence. The record shows that appellants were well aware of the fact that punitive damages would not be covered by their insurance policies and that they faced potential exposure to punitive damages in excess of $5 million. It appears, therefore, that appellants had good reason for their decision to

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uncontroverted evidence showing that Hawkins's corporate counsel was copied on numerous correspondences regarding developments in the lawsuit. To the extent appellants appear to contend that communicating with Hawkins's corporate counsel was insufficient to inform them of developments in the lawsuit, we find this argument to be hollow.

contribute $3 million toward the settlement to avoid a potential exposure in excess of $5 million.[4]

3. Renounced Coverage

When an insurer disputes coverage, it cannot compel the insured to forgo a favorable settlement, and accordingly, the insured does not breach his duty of cooperation under a consent clause by concluding the favorable settlement directly. *Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982). But here, AISLIC never disputed coverage for the plaintiffs' claims. Appellants contend that AISLIC's position in the lawsuit—namely, that punitive damages would not be covered—is equivalent to disputing coverage. But they cite no authority in support of that proposition, and precedent holds that AISLIC's position does not amount to disputing coverage. In *Buysse v. Baumann-Furrie & Co.*, the supreme court stated that a dispute between an insurer and an insured over the extent to which claims are covered is not equivalent to a dispute regarding whether the insurance policy covers the insurer's liability, if any. 448 N.W.2d 865, 874 (Minn. 1989). The *Buysse* court held that an insurer that "does not deny that some part of the claim against its insured" is covered and that "affords its insured a defense" does not breach the insurance policy by "disputing with its insured the amount of coverage." *Id.*

[4] As appellants correctly note, no Minnesota court has addressed the issue of whether a bad-faith claim can be maintained on the theory that an insurer used the threat of punitive damages to unreasonably coerce an insured to contribute toward a settlement. But because the record fails to demonstrate that there is a genuine issue of material fact as to whether AISLIC engaged in such coercion, we need not opine on whether such a claim is recognized under Minnesota law.

Appellants also contend that AISLIC waived its right to dispute coverage regarding the punitive damages when it assumed control of the defense and settlement of the lawsuit without a reservation-of-rights letter. But punitive damages are uninsurable as a matter of public policy. *See Wojciak v. N. Package Corp.*, 310 N.W.2d 675, 680 (Minn. 1981). Therefore, the failure to send a reservation-of-rights letter does not result in a waiver regarding coverage for punitive damages. *Cf. Hosford v. Bd. of Educ. of City of Minneapolis*, 203 Minn. 138, 145, 280 N.W.2d 859, 862 (1938) (holding that waiver of rule of law has no effect when it "thwarts the public policy of the law").

4. Prejudice

Appellants argue that AISLIC was not prejudiced by the voluntary contribution and thus, its failure to comply with the consent clause does not give rise to a breach that voids coverage. But the issue here does not concern whether coverage under the insurance polices should be voided entirely because of appellants' failure to comply with the consent clause. Nothing in the record demonstrates that AISLIC took a position suggesting that appellants' contribution voided coverage altogether. On the contrary, AISLIC consistently acknowledged coverage, at least with regard to covered compensatory damages, and contributed $1.2 million toward the settlement. Furthermore, even if it were proper to consider whether AISLIC was prejudiced, our supreme court has stated that "the deprivation of [a] contractual right"—here, the insurer's contractual right to insist that the insured not make any contributions toward a settlement without the insurer's consent—prejudices the insurer. *See Buysse*, 448 N.W.2d at 874.

In sum, there are no fact issues as to whether the effects of the consent clause may be avoided, and therefore, the district court did not err by concluding that, because appellants' contribution was voluntary and made without AISLIC's consent, their claim that AISLIC breached the duty to indemnify fails as a matter of law.

Affirmed.