This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0443

Integrity Mutual Insurance Company,
Respondent,

vs.

Terry J. Klampe, et al.,
Respondents,

Hruska Builders, LLC,
Appellant.

Filed December 23, 2008
Affirmed
Kalitowski, Judge

Olmsted County District Court
File No. 55-CV-06-3975

Douglas A. Boese, Dunlap & Seeger, P.A., 206 South Broadway Suite, 505, P.O. Box 549, Rochester, MN 55903-0549 (for respondent Integrity Mutual Insurance Company)

Raymond L. Hansen, O'Brien & Wolf, L.L.P., 206 South Broadway, Suite 611, Rochester, MN 55904 (for respondents Terry J. and Jennifer Klampe)

James McGeeney, Doda & McGeeney, P.A., 421 First Avenue Southwest, Suite 301W, Rochester, MN 55902 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this declaratory-judgment action, appellant Hruska Builders, L.L.C. challenges the district court's determination that respondent Integrity Mutual Insurance Company owed no duty to defend or indemnify appellant. Appellant argues that the district court: (1) erred in determining that there was no "occurrence" within the terms of its comprehensive general liability insurance (CGL) policy and therefore, there was no coverage under the policy; (2) erred in deciding that even if there was an "occurrence," several of the policy exclusions apply to prevent coverage; and (3) erred in concluding that respondent was not liable for appellant's attorney fees or costs in defending this action. We affirm.

DECISION

Appellant entered into a contract with respondents Terry and Jennifer Klampe to build an addition onto the Klampes' existing house. When appellant entered into the agreement with the Klampes, appellant was insured by respondent Integrity Mutual Insurance Company (Integrity) under a CGL policy. Appellant argues that the district court erred in determining that the property damage sustained in the Klampes' house was not covered under the CGL policy.

Interpretation of an insurance policy, and its application to the facts of the case, are questions of law that this court reviews de novo. *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004); *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998). The existence of a legal duty to defend or indemnify

is also a legal question that this court reviews de novo. *Franklin*, 574 N.W.2d at 406. An insurer may ordinarily determine whether a cause of action includes an "arguably covered" claim, that would give rise to a duty to defend or indemnify, by comparing the wording of the policy to the allegations of the underlying complaint. *Id.* at 407. However, the words of the complaint need not precisely match the words of the policy; the complaint must simply put the insurance company on notice of a claim within the scope of the policy coverage. *Id.*

Once the insured establishes a prima facie case of coverage, the burden shifts to the insurer to prove the applicability of an exclusion. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995). If the insurer shows that an exclusion to coverage under the policy applies, the burden shifts back to the insured to show that an exception to an exclusion applies "because the exception to the exclusion" restores coverage for which the insured bears the burden of proof. *Id.*

I.

To establish coverage under the CGL policy at issue, appellant—the insured—is required to show that there was an "occurrence" resulting in "property damage" within the particular policy period. The district court determined that the property damage sustained in the Klampes' house does not constitute an "occurrence" under the CGL policy.

Appellant's CGL policy defines property damage as "physical injury to tangible property" or the "loss of use of tangible property that is not physically injured." The policy defines "[o]ccurrence" as an "accident, including continuous or repeated exposure

to substantially the same general harmful conditions." The policy does not further define the term "accident." In Minnesota, *Hauenstein v. Saint Paul-Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954), is the seminal case defining "accident" for purposes of interpreting insurance policies. *Bituminous Cas. Corp. v. Bartlett*, 307 Minn. 72, 77, 240 N.W.2d 310, 312-13 (1976).

In *Hauenstein*, the insurer agreed to "[pay] any loss by reason of the liability imposed by law or contract upon the Insured for damages because of injury to or destruction of property, including the loss of use thereof, *caused by accident*." *Hauenstein v. Saint Paul-Mercury Indem. Co.*, 242 Minn. 354, 355, 65 N.W.2d 122, 124 (1954) (emphasis added). The policy in *Hauenstein*, like the policy here, did not contain any language about whether coverage extended only to damage that was neither expected nor intended. *See id.* The Minnesota Supreme Court stated that an "[a]ccident, as a source and cause of damage to property, within the terms of an accident policy, is an *unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause*." *Id.* at 358-59, 65 N.W.2d at 126 (emphasis added). If the policy at issue provides its own definition of accident, the *Hauenstein* definition does not apply. *Walser*, 628 N.W.2d at 610 (citing *Bartlett*, 307 Minn. at 80, 240 N.W.2d at 313). Because the CGL policy at issue here does not define "accident," we apply the *Hauenstein* definition.

In the suit commenced by the Klampes against appellant, the Klampes claimed appellant's poor workmanship caused the following defects and damages to their home: frozen and burst pipes; water leaks; a defective second-story balcony; uninsulated

crawlspace walls; splitting window frames; speaker wires lost in the ceiling; nonfunctional electrical switches; hot electric wire loose in the soffit; light fixtures connected to the wrong switches and placed in the wrong locations; water penetration into the ceiling of the dining room and floor of the old master bedroom; water infiltration into the furnace room wall; water leaking into the old laundry room coming through the ceiling; sunken floors on the upstairs level; a hump in the floor and sagging ceiling in the main floor kitchen; rewiring of the air conditioner; damage to personal property; binding doors on the second floor; carpet replacement on the second floor; damaged walls on the second floor requiring repair; a crack along the wall and ceiling of the beam between the kitchen and great room; improperly wired light fixtures on the deck; improperly supported, assembled and installed support column between the kitchen and great room; improperly wired light fixtures on the deck; additional ledger board not bolted to the existing house; improperly constructed closet in the basement; improperly vented air exchanger for the furnace; and crawlspace with openings directly to the garage. The record indicates that much of the alleged damage was caused by several changes to the construction plans and specifications knowingly and intentionally performed by appellant at the request of Terry Klampe.

With the exception of the damage caused by a burst pipe, which is discussed below, we conclude that the district court correctly determined that none of the alleged defects constitute an "occurrence" requiring coverage under the CGL policy provided by Integrity to appellant.

This court, in generally discussing the risks covered by a CGL policy, has stated that CGL policies are designed to insure tort liability, not contractual liability:

> The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the [CGL] coverages in question are designed to protect against. *The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.*

Sphere Drake Ins. Co. v. Tremco, Inc., 513 N.W.2d 473, 478 (Minn. App. 1994) (emphasis added) (quoting *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co.*, 323 N.W.2d 58, 63 (Minn. 1982) (other quotation omitted), *review denied* (Minn. Apr. 28, 1994). Moreover, to the extent that a third-party owner seeks damages for building and structural damage, there is no coverage under the CGL policies. *Id.* "A comprehensive general liability policy is intended to protect third parties who suffer damage to person or property. It is not intended to guarantee the insured's workmanship." *Id.* (quotation omitted).

In *Bor-Son*, the supreme court explained the differences between business risks and those risks covered by a CGL policy. 323 N.W.2d at 64. With respect to business risks, the "insured-contractor can take pains to control the quality of goods and services supplied. At the same time he undertakes the risk that he may fail in this endeavor and thereby incur contractual liability whether express or implied." *Id.* (quotation omitted). Thus, the "consequence of not performing well is part of every business venture; the

replacement or repair of faulty goods is a business expense, to be borne by the insured-contractor in order to satisfy customers" and not an expense to be borne by the insurer. *Id.* (quotation omitted).

In contrast to business risks, there exists another form of risk in the insured-contractor's line of work, injury to people and damage to property caused by faulty workmanship:

> *Unlike business risks of the sort described above, where the tradesman commonly absorbs the costs attendant upon the repair of his faulty work, the accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities.* While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting.

Id. (quotation omitted) (emphasis added). In *Bor-Son*, the supreme court was persuaded that the "standard comprehensive general liability policy does not provide coverage to an insured-contractor for a breach of contract action grounded upon faulty workmanship or materials, where the damages claimed are the cost of correcting the work itself." *Id.* (quotation omitted).

Here, the Klampes' complaints about the quality of appellant's work mirror the business risks described in *Bor-Son*, not the risks of accidental injury that a CGL policy is intended to protect against. The Klampes identified over 20 problems with appellant's work, all but one of which are complaints about poor workmanship negatively affecting the existing house and its addition's structure. With the exception of the burst pipes,

these are complaints about the quality of work consciously and intentionally provided by appellant, not claims of accidental injury to property substantially caused by appellant's unworkmanlike performance.

Moreover, a "contractor who knowingly violates contract specifications is *consciously controlling his risk of loss and has not suffered an occurrence*." *Bartlett*, 307 Minn. at 78-80, 240 N.W.2d at 314 (emphasis added), *cited in Franklin*, 574 N.W.2d at 408. And where the result is a highly predictable outcome of the insured's business decision, it will not qualify as an occurrence under the CGL policy. *Franklin*, 574 N.W.2d at 408. Here, appellant knowingly violated contract specifications and failed to consult with a city building official before making structural changes. Thus, there was no accident since there was no unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause. *See Hauenstein*, 242 Minn. at 358-59, 65 N.W.2d at 126 (defining "accident").

In conclusion, because the Klampes' claims of breach-of-contract, breach-of-warranty, negligence and strict liability are all grounded on faulty workmanship or materials, and the damages claimed are the cost of correcting the work itself, we conclude that with the exception of the burst pipes, there was no occurrence that requires Integrity to defend or indemnify appellant against the Klampes' claims.

II.

Appellant contends that the district court erred in concluding that there was no coverage for the damage caused by a burst pipe because it was not an occurrence or in the alternative because the policy's frozen-plumbing exclusion precluded coverage.

Although we agree that the district court erred, because another policy exclusion bars coverage we affirm the district court's conclusion that damage from the burst pipe is not covered by the CGL policy.

The record indicates that in the winter of 2004-2005, the temperature dropped to approximately 20 degrees below zero, and a water pipe inside the Klampes' existing home burst, causing water damage to the lower level of the home. Prior to the bursting of the pipe, appellant had removed the west exterior wall of the house. The district court determined that there was no occurrence related to the burst pipe and that Integrity had no duty to defend or indemnify appellant because the risk that "an exposed, uninsulated water pipe" may freeze and burst in December is "not an unexpected, unforeseen, or undesigned happening or consequence such that an occurrence may be found for purposes of coverage." The district court went on to conclude that even if the bursting of the pipe was an occurrence, the policy's frozen-plumbing exclusion applied to bar coverage for the damage resulting from the burst pipe.

We disagree with the district court's conclusion that the damage from the burst pipe was not an occurrence. Because the dramatic temperature drop, the bursting of the pipe, and the subsequent damages were unexpected, unforeseen, and undesigned happenings or consequences, we conclude that the bursting of the pipe was an occurrence. *See Hauenstein*, 242 Minn. at 358-59, 65 N.W.2d at 126. There is nothing in the record to indicate that appellant anticipated that the intervening act of nature of a temperature drop to 20 degrees below zero would result in a burst pipe, or that the burst pipe would cause extensive water damage to the existing home. Nor does the record

indicate that appellant had control over the heat in the existing structure because the Klampes were residing there when the pipe burst. Thus, the bursting of the pipe was an accident that caused damage to the existing residential structure and thus qualifies as an "occurrence" under the CGL policy definition.

The district court alternatively concluded that damage from the burst pipe came under the CGL's frozen-plumbing exclusion. We disagree. The frozen-plumbing exclusion relied on by the district court is found in a section of the policy concerning "Covered Property [located] at the premises described in the Declarations." But this section of the policy applies solely to the property located at the premises described in the "Declarations." And the only premises described in the Declarations is appellant's business, not the Klampe residence. Thus, this section of the policy and its exclusions are not applicable to the issues of liability for the damage caused by the Klampes' burst water pipe, and the district court erred in applying this exclusion to the Klampes' damage.

We will not reverse a correct decision simply because it is based on incorrect reasons. And we will affirm a district court's decision if it can be sustained on any grounds. *Myers Through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991).

We conclude that a different exclusion in the policy excludes coverage for the damage caused by the burst pipe. The CGL policy specifically excludes coverage for "property damage" to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing

operations, if the 'property damage' arises out of those operations." "Property damage" is defined in the policy as "physical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not physically injured." And the term "'[r]eal property' is generally defined as land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements)." *Wanzek*, 679 N.W.2d at 327 (quotation omitted).

Here, the record indicates that appellant had performed the operation of removing the west exterior wall of the existing house in order to construct the addition and connect it to the existing structure. It is not disputed that the burst pipe caused property damage to the Klampe residence. And appellant does not dispute that it removed the west wall of the existing structure. Rather, appellant argues that the damage to property exclusion does not apply because appellant was not hired to work on the existing house, which is the "real property" for which the exclusion is concerned. We disagree.

Appellant's operations, which involved tearing down the west wall on the Klampes' existing "real property," led to the damage to that particular part of real property. Moreover, the nature of connecting an addition to the Klampes' home required appellant to work on the existing structure in order to connect it to that addition. Thus, for purposes of the CGL policy's damage to property exclusion, by removing the west wall, appellant was "performing operations" on "that particular part of real property" – the existing residential structure. And the property damage to the existing structure arose out of appellant's operations.

We therefore conclude that although the burst pipe was an occurrence, the CGL policy's damage to property exclusion applies to bar coverage to appellant for any damage claimed as a result of the burst pipe.

III.

Appellant argues that respondent Integrity is liable to reimburse appellant for its costs, including attorney fees, incurred in its defense of the declaratory-judgment action commenced by Integrity. Attorney fees are recoverable when an insurer breaches its duty to defend. *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 422 (Minn. 2003). Because the district court properly concluded that Integrity has no duty to defend appellant, Integrity is not required to pay appellant's attorney fees and costs.

Affirmed.