

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0988**

Fischer Sand and Aggregate, LLP,
Appellant,

vs.

Old Republic National Title Insurance Company,
Respondent.

**Filed April 10, 2017
Affirmed
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19HA-CV-15-2172

Aaron R. Hartman, Matthew S. Duffy, Mae J. Beeler, Monroe Moxness Berg P.A.,
Minneapolis, Minnesota (for appellant)

Thomas B. Olson, Katherine L. Wahlberg, Olson, Lucas, Redford & Wahlberg, P.A.,
Edina, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Hooten, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

This case involves an insurance-coverage dispute between a title-insurance company and the insured property owner. Appellant Fischer Sand & Aggregate, L.L.P., (Fischer) owns property comprised of two parcels, one of which is referred to as the East

50 parcel. The title to Fischer’s property is insured by respondent Old Republic National Title Insurance Company (Old Republic). From 2009 to 2015, Fischer was embroiled in protracted litigation with a neighboring property owner, Gene Rechtzigel, over the western boundary of the East 50 parcel. Old Republic refused to defend Fischer in this litigation, arguing that the policy’s defective-description and survey exceptions excluded coverage.

Fischer filed a breach-of-contract claim against Old Republic for its refusal to defend. The district court granted Old Republic’s motion for summary judgment, concluding that the policy excluded coverage under the defective-description exception and thus the duty to defend was not triggered. Fischer argues on appeal that the district court (1) failed to view the facts in the light most favorable to Fischer, (2) misinterpreted the defective-description exception, and (3) interpreted the policy in a way that results in illusory coverage. Because we conclude that, based on the undisputed material facts, the defective-description and survey exceptions apply to exclude coverage, and because the coverage is not illusory, we affirm.

FACTS

The Property

In 1998, Fischer Market Place, L.L.P., Fischer Sand’s predecessor in interest (collectively referred to as Fischer), bought a piece of property, which includes the East 50 parcel. The East 50 parcel’s western boundary borders a small parcel, referred to as the “gap parcel,” which separates the East 50 parcel from the West 30 parcel. Fischer does not

own the gap parcel or the West 30 parcel. Aside from several exceptions not relevant here, Fischer's land is legally described in the deed as follows:

The South 1/2 of the SE 1/4 except the East 1645 feet thereof and the East 50 acres of the SW 1/4; all in Section 35, Township 115, Range 20, Dakota County, Minnesota

Apart from the exceptions, which are described in metes and bounds, the property is described in acreage and not in metes and bounds.

The Policy

Before buying the property, Fischer sought title insurance from Old Republic. Old Republic provided Fischer with a commitment to insure, noting a number of exceptions. One of the exceptions in the commitment to insure was a defective-description exception. The property description in the proposed policy was the same as in the deed. The commitment to insure excepted coverage based on that description:

Defective description: We [cannot] insure a description based on acreage. We require a metes and bounds description and a survey to determine if there is an overlap with property described as the West 30 acres of the East 1/2 of the Southwest 1/4 of Section 35, Township 115, Range 20.

The commitment to insure also included a survey exception, which stated that the policy does not cover “[f]acts which would be disclosed by an accurate survey of the premises herein described.”

Fischer cured some of the other exceptions in the commitment to insure before Old Republic issued the final policy, but it did not cure the defective-description and survey exceptions, and both were incorporated into the final policy.

The Rechtzigel Litigation

In 2009, Fischer filed a Torrens petition, seeking to register its property and the gap parcel, which Fischer claimed based on adverse possession. Gene Rechtzigel objected to Fischer's registration of the gap parcel, claiming that the Evelyn I. Rechtzigel Trust and Frank H. Rechtzigel Charitable Remainder Unitrust owned the gap parcel.¹

Rechtzigel's objection triggered protracted litigation. Initially, Rechtzigel objected to Fischer's registration of the gap parcel, but he neither sought to register the gap parcel nor contested the boundaries of the East 50 parcel. In April 2012, the Dakota County District Court granted Fischer's registration of its property but denied Fischer's registration of the gap parcel. Rechtzigel moved for amended findings, claiming an overlap of the gap parcel and the East 50 parcel. Rechtzigel argued that the boundary line of the gap parcel extended to a historic fence line on the East 50 parcel. The district court reserved Fischer's application for registration of the East 50 parcel until Rechtzigel applied for registration of the gap parcel, at which point the district court would consider the applications for registration of both parcels concurrently. Rechtzigel never sought registration but, nevertheless, continued to litigate his objections. In November 2013, the district court concluded that even if Rechtzigel had acquired the gap parcel through adverse possession, the boundary of the gap parcel did not extend into the land Fischer sought to register as the East 50 parcel. This court affirmed. *In re Application of Fischer Sand & Aggregate*,

¹ The Rechtzigel Trust had owned the West 30 parcel but had sold it around the time that Fischer purchased its property. Rechtzigel acknowledged that the trust had sold the West 30 parcel but claimed continued ownership of the gap parcel.

L.L.P., No. A14-0735, 2015 WL 1128658 (Minn. App. Mar. 16, 2015), *review denied* (Minn. May 27, 2015).

Fischer sent Old Republic a letter on August 20, 2013, seeking reimbursement for attorney fees and expenses incurred in the Rechtzigel litigation. Old Republic denied the claim, citing the defective-description and survey exceptions. In its denial letter, Old Republic stated that, “[w]ithout allegations of evidence of a record deed overlap,” it would deny the claim because the “fence encroachment would show on a survey and would not be detected in a search of the public records.” Fischer clarified that the Rechtzigel litigation “does involve an allegation of an overlap in the legal descriptions and is therefore a covered event.” Old Republic again denied the claim, asserting that the documents Fischer provided to Old Republic did not show allegations of a record overlap.

Fischer filed this lawsuit, alleging that Old Republic breached its obligations under the insurance contract by refusing to defend Fischer in the Rechtzigel litigation. Old Republic moved for summary judgment, which the district court granted. The district court concluded that the defective-description exception applied and excluded coverage. The district court acknowledged Old Republic’s survey-exception argument but did not further consider it.

Fischer appeals.

D E C I S I O N

On appeal from a grant of summary judgment, we review *de novo* (1) whether the district court properly applied the law and (2) whether there are any genuine issues of material fact that preclude summary judgment. *Riverview Muir Doran, L.L.C. v. JADT*

Dev. Grp., L.L.C., 790 N.W.2d 167, 170 (Minn. 2010). “A material fact is one of such a nature as 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). No genuine issue of material fact exists where “the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). We view the evidence in the light most favorable to the party against whom summary judgment was entered. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 664 N.W.2d 72, 76-77 (Minn. 2002).

Interpretation of an insurance policy is a question of law that we review de novo. *Franklin v. W. Nat’l Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998). “General principles of contract interpretation apply to insurance policies.” *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). The reviewing court must “give effect to the intention of the parties as it appears from the entire contract.” *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960). When its language is clear and unambiguous, the reviewing court must give effect to the policy’s plain language. *Id.* “A clear and unambiguous contract is enforced in accordance with the plain language of the contract; a reviewing court considers parol evidence or matters outside of the contract only when the contract terms are ambiguous.” *Terminal Transp., Inc. v. Minn. Ins. Guar. Ass’n*, 862 N.W.2d 487, 489 (Minn. App. 2015), *review denied* (Minn. June 30, 2015). Ambiguities regarding coverage are resolved in favor of the insured, but the reviewing court cannot read an ambiguity into the plain language of the policy. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). The insurer bears the burden of proving that an exception

bars coverage. *Smith v. State Farm Fire & Cas. Co.*, 656 N.W.2d 432, 436 (Minn. App. 2003). Once the insurer shows that an exception bars coverage, the burden of proof shifts back to the insured. *Id.*

I. The Rechtzigel litigation concerned challenges to both the East 50 parcel’s boundary line and its legal description.

Fischer argues that Old Republic had a duty to defend Fischer in the Rechtzigel litigation. Old Republic argues that it did not because one of two exceptions under the policy excludes coverage. If Rechtzigel challenged the East 50 parcel’s legal description, Old Republic argues that the defective-description exception excludes coverage. If Rechtzigel challenged the boundary line between the East 50 parcel and the gap parcel, Old Republic argues that the survey exception excludes coverage. As a threshold issue, we must determine the crux of Rechtzigel’s claims.

The duty to defend “arises when any part of the claim is ‘arguably’ within the scope of the policy’s coverage.” *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986). “Usually, a duty to defend is determined by comparing the complaint with the policy language.” *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102, 106 (Minn. App. 2005), *review denied* (Minn. June 28, 2005). An insurer who seeks to avoid the duty to defend has the “burden of showing that all parts of the cause of action fall clearly outside the scope of coverage.” *Jostens*, 387 N.W.2d at 165-66.

Characterizing Rechtzigel’s claims is not as simple as examining the complaint because Rechtzigel’s arguments evolved continuously throughout the litigation. Initially, Rechtzigel objected only to Fischer’s registration of the gap parcel, but he later claimed

that the gap parcel's boundary line extended into a portion of the East 50 parcel claimed by Fischer. In the Rechtzigel-litigation appeal, this court described Rechtzigel's challenges to the initial determination of the boundary line as arguing that (1) "the fence line should be given priority over the line provided in the legal description," (2) "the fence line should control because it is a 'legal and sufficient' statutory partition fence," (3) "the legal description [of the East 50 parcel] is ambiguous and defective because it is inconsistent with the purported fence line," and (4) the "district court erred in not establishing a boundary by practical location." *In re Application of Fischer Sand & Aggregate*, 2015 WL 1128658, at *3-6. In (1) and (3), Rechtzigel challenged the legal description of the East 50 parcel because it did not reflect the historic fence line. In (2) and (4), Rechtzigel argued that the proper boundary between the gap parcel and the East 50 parcel was the historic fence line. The Rechtzigel litigation thus concerned challenges to the sufficiency of the East 50 parcel's legal description and challenges to the boundary line of the East 50 parcel.

Old Republic has the burden of showing that the policy excludes coverage for Rechtzigel's boundary-line and legal-description claims. *Jostens*, 387 N.W.2d at 165-66. The district court only considered whether the defective-description exception excludes coverage; however, "we may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). Because interpretation of the policy is a question of law, we review each exception to determine whether the policy excludes coverage for both of Rechtzigel's claims. *See Franklin*, 574 N.W.2d at 406.

II. The defective-description exception excludes coverage of Rechtzigel's legal-description claims.

We first address whether the policy excludes coverage for Rechtzigel's claims relating to the legal description of the East 50 parcel. Fischer argues that (1) the defective-description exception only excludes coverage for claims related to an overlap between the East 50 parcel and the West 30 parcel and (2) Fischer had a reasonable expectation of coverage. Old Republic responds that the policy unambiguously excludes *all* claims related to the legal description. The district court concluded that the plain language of the policy excluded coverage for all claims related to the legal description of the property.

A. The plain language of the defective-description exception excludes claims related to the legal description.

The defective-description exception states that Old Republic will not insure against claims related to the legal description because the property is described only in acreage:

Defective description: We [cannot] insure a description based on acreage. We require a metes and bounds description and a survey to determine if there is an overlap with property described as the West 30 acres of the East 1/2 of the Southwest 1/4 of Section 35, Township 115, Range 20.

To cure the defective-description exception, Fischer was required to provide Old Republic with (1) a metes-and-bounds description and (2) a survey. Metes and bounds are “measured by distances and angles from designated landmarks and in relation to adjoining properties.” *Black's Law Dictionary* 1141 (10th ed. 2014).

Fischer did not provide Old Republic with a metes-and-bounds description of the property.² On all relevant documents, including the deed, the commitment, the final policy, and the Schwanz survey, the property is described in acreage and not in metes and bounds. The policy unambiguously states that Old Republic cannot “insure a description based on acreage.” Fischer had notice prior to closing that Old Republic considered the legal description of the property defective but nevertheless accepted the policy without arranging to have the acreage description changed to a metes-and-bounds description. Therefore, the defective-description exception excludes coverage for any claims related to the legal description.

Fischer argues that the exception excludes only claims related to a potential overlap of the West 30 parcel and East 50 parcel.³ It derives this reading from the second sentence

² Fischer argues that it provided a metes-and-bounds description to Old Republic in the form of the Schwanz survey. A legal description and a survey are two different things. To cure the defective-description exception, Fischer had to provide both a metes-and-bounds description and a survey. While Fischer may have provided Old Republic with a metes-and-bounds survey, it did not provide Old Republic with a metes-and-bounds description. Moreover, even if Fischer had provided Old Republic with a metes-and-bounds description, the defective-description exception nevertheless was unambiguously included in the final policy, and we cannot consider parol evidence suggesting that the parties meant to exclude the exception. *See Terminal Transport*, 862 N.W.2d at 489.

³ Relatedly, Fischer argues that the district court failed to view the facts in the light most favorable to the nonmoving party because, according to Fischer, the district court found that the West 30 and East 50 parcels overlapped. Although the district court acknowledged that the *Rechtzigel* litigation arose from a possible overlap of the gap parcel and the East 50 parcel, the district court did not find that the West 30 parcel and East 50 parcel overlapped. Fischer reads the district court’s order too narrowly. Regardless, it is immaterial whether the West 30 parcel and the East 50 parcel overlapped, because the defective-description exception excluded coverage for any claims related to the legal description, not just an overlap between the West 30 parcel and the East 50 parcel.

of the defective-description exception: “We require a metes and bounds description and a survey to determine if there is an overlap with property described as the West 30 acres of the East 1/2 of the Southwest 1/4 of Section 35, Township 115, Range 20.” But Fischer ignores the first sentence of the exception: “We [cannot] insure a description based on acreage.” Both sentences must be given effect. *See Bobich*, 258 Minn. at 294-95, 104 N.W.2d at 24. The first sentence describes the exception, affirming that Old Republic will not insure against any claim related to the legal description. In order to cure the exception, the second sentence instructs Fischer to provide Old Republic with (1) a description in metes and bounds and (2) a survey showing that the West 30 parcel does not overlap with the East 50 parcel. The second sentence does not narrow the application of the exception. Therefore, the exception applies.

B. Fischer did not have a reasonable expectation of coverage.

Fischer further argues that it had a reasonable expectation that the policy would cover the legal description. The district court acknowledged that it “understands [Fischer’s] position that no one would purchase title insurance expecting that it would not cover the legal description of the property,” but found that the defective-description exception “is not hidden in fine print but is instead included with material that is specific to the property at issue in the transaction.”

Under the reasonable-expectations doctrine, the court honors the “objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts . . . even though painstaking study of the policy provisions would have negated those expectations.” *Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co.*, 366 N.W.2d

271, 277 (Minn. 1985) (quotation omitted). Ambiguity is not a condition precedent to the application of the reasonable-expectations doctrine. *Id.* at 278.

In *Frey*, this court affirmed a district court's grant of summary judgment after concluding that the insured did not have a reasonable expectation of coverage. *Frey v. United Servs. Auto. Ass'n*, 743 N.W.2d 337, 342-43 (Minn. App. 2008). First, this court determined that the exclusion was not ambiguous. *Id.* at 343. Second, this court determined that the exclusion was not hidden because the exclusion was contained in a section labeled "exclusions." *Id.* Finally, this court agreed with the district court that the exclusion "may be a surprise to most policy holders," but concluded that "in the absence of an ambiguity, a hidden major exclusion, or other special circumstances, the doctrine of reasonable expectations is inapplicable." *Id.*

Similarly, the exception here was unambiguous and was clearly presented in a list of exceptions on two pages of a three-page document. In addition, Fischer has presented no evidence of special circumstances. While most individuals would expect title insurance to cover the legal description, the reasonable-expectations doctrine is inapplicable in the absence of an ambiguity, a hidden exclusion, or other special circumstances. *See id.*

Because the plain language of the defective-description exception excludes coverage of any claim related to the legal description, and Fischer did not have a reasonable expectation of coverage, the defective-description excludes coverage with respect to Rehtzigel's claims challenging the East 50 parcel's legal description.

III. The survey exception excludes coverage of Rechtzigel’s boundary-line claims.

We turn to whether the policy excluded coverage for Rechtzigel’s claims that the boundary line between the gap parcel and the East 50 parcel was determined by the historic fence line. Fischer argues that (1) Old Republic’s survey-exception argument is not within our scope of review and (2) a survey would not have revealed the boundary dispute alleged by Rechtzigel. Old Republic argues that the survey exception excludes coverage for the Rechtzigel litigation because an accurate survey would have disclosed the boundary line between the gap parcel and the East 50 parcel. The district court acknowledged Old Republic’s survey-exception argument, but did not rule on it.

A. Old Republic’s survey-exception argument is within our scope of review.

As a threshold issue, Fischer argues that we cannot review Old Republic’s survey-exception argument because Old Republic did not file a notice of related appeal. A respondent is barred from presenting issues not raised by a notice of related appeal. *Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986). But a respondent is not required to file a notice of related appeal where the respondent “advances on appeal an argument that was presented to, but was not ruled on by, the district court and is an alternative ground that supports affirmance of a judgment or order that was entered in respondents’ favor.” *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 332 (Minn. 2010). The district court acknowledged but did not decide the survey-exception issue. We therefore conclude that Old Republic was not required to file a notice of related appeal and the survey-exception issue is within our scope of review.

B. The plain language of the survey exception excludes coverage of Rechtzigel's boundary-line claims.

Under the survey exception, Old Republic will not insure against loss by reason of “[f]acts which would be disclosed by an accurate survey of the premises herein described.”

Fischer argues that the boundary between the East 50 parcel and the gap parcel would not have been disclosed by an accurate survey because finding the historic fence line required the use of radar. We disagree. The relevant fact for purposes of the survey exception is the location of the western boundary line of the East 50 parcel. An accurate survey would have disclosed this boundary. The district court in the Rechtzigel litigation made its boundary determination relying on survey evidence that revealed that no historic fence line encroached on the East 50 parcel's western boundary.

Fischer had an opportunity to cure the survey exception. At oral argument, Old Republic suggested that, if Fischer had provided a satisfactory survey before issuance of the final policy, it probably would have cured the survey exception. Fischer argues that it cured the exception by providing Old Republic with the Schwanz survey. But the exception remains in the policy. We need not speculate why the Schwanz survey did not cure the exception. “A clear and unambiguous contract is enforced in accordance with the plain language of the contract; a reviewing court considers parol evidence or matters outside of the contract only when the contract terms are ambiguous.” *Terminal Transport*, 862 N.W.2d at 489. The survey exception was unambiguously included in the final policy, and therefore we cannot consider parol evidence suggesting that Fischer cured the exception.

Because the western boundary of the East 50 parcel would have been revealed by an accurate survey, the survey exception excludes coverage of Rehtzigel's boundary-line claims.

IV. The district court did not err in concluding that the exceptions do not render insurance coverage illusory.

Fischer argues that enforcement of the defective-description and survey exceptions would render coverage under the policy illusory. Old Republic argues that the policy covers other adverse claims and Fischer produced no evidence that any of the premium was specifically allocated to coverage for a defective legal description or for facts that would have been disclosed in an accurate survey. The district court concluded that "there are a number of other title challenges that would be covered, including a forged deed or an earlier judgment with priority," and determined that coverage was not illusory.

The illusory-coverage doctrine is "an independent means to avoid an unreasonable result when a literal reading of a policy unfairly denies coverage." *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). The doctrine applies "where part of the premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent." *Id.* at 119. Absent "extra-contractual evidence" that the insured reasonably thought a "specific part of its premium was allocated" toward the particular coverage, the court bases its decision "on a reading of the policy language under the usual rule of insurance contract interpretation—an insurer's liability is governed by the parties' contract and the court's function is to enforce that agreement." *Id.*

Fischer did not produce any evidence that it reasonably believed that a specific part of its premium was allocated toward covering the legal description or the western boundary. The policy clearly states that Old Republic would not cover claims like those in the Rechtzigel litigation—there was no illusion of coverage. Moreover, the policy covered other actions not related to the legal description or to facts that would have been disclosed in a survey. Therefore, there appears to be “no basis to invoke the illusory coverage doctrine and to depart from the policy as written.” *Id.*

Fischer argues in its illusory-coverage-doctrine section that changing the legal description of the property would have required a quiet-title action, that the policy did not instruct Fischer to complete a quiet-title action, and that Fischer could not have pursued a quiet-title action without ownership. But the inability of Fischer to cure an exception does not create an illusion of coverage; if anything, it placed Fischer on notice that Old Republic would not insure against particular claims. Fischer had three options: find a different insurer, find a way to cure the exceptions, or accept the exceptions. Fischer chose to accept the exceptions.

Because we conclude that the policy excluded coverage of the Rechtzigel litigation under the defective-description and survey exceptions, and because we conclude that enforcement of the exceptions does not render coverage illusory, we affirm.

Affirmed.