STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1957

Nicholas Johnson and Michelle Johnson,
individually and as parents and natural guardians of D.J., a minor,
Appellants,

vs.

West Bend Mutual Insurance Company,
intervening plaintiff and cross claimant,
Respondent,

vs.

Jewel Ann Plocienik, a/k/a Jewel A. Carlson,
a/k/a Jewel Ann Bristol-Carlson,
individually and f/d/b/a Jewel's Home Child Care,
Appellant.

Filed December 17, 2018
Affirmed in part and reversed in part
Ross, Judge

Hennepin County District Court
File No. 27-CV-14-13985

David E. Bland, Katherine S. Barrett Wiik, Robins Kaplan LLP, Minneapolis, Minnesota (for appellants)

Jeanne H. Unger, Mark R. Bradford, Patrick J. Sauter, Andrea E. Reisbord, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Ross, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Five-month-old D.J. suffered a skull fracture, subdural hematomas, and retinal hemorrhages while she was under the care of Jewel Plocienik's in-home daycare. D.J.'s parents, Nicholas Johnson and Michelle Johnson, sued Plocienik for negligence. Plocienik tendered the suit to her insurer, West Bend Mutual Insurance Company, which defended under a reservation of rights and intervened, seeking a declaration that the policy excluded coverage. After Plocienik and D.J.'s parents settled under a *Miller-Shugart* agreement, West Bend moved for summary judgment on grounds of noncoverage and collusion. We must decide whether the district court properly granted West Bend's summary-judgment motion with respect to coverage and denied it with respect to collusion. We affirm the district court's denial of West Bend's motion for summary judgment on the ground that the *Miller-Shugart* agreement was collusive as a matter of law. But we reverse the grant of summary judgment to West Bend on coverage because a genuine issue of material fact on the applicability of policy exclusions prevents judgment as a matter of law.

FACTS

Although D.J. was undisputedly injured in Plocienik's care in March 2009, the circumstances surrounding her injuries are murky. Plocienik maintains that D.J.'s injuries must have occurred while Plocienik was in the bathroom and D.J. was out of her sight. She asserts that she heard loud thumps and crying from the room where D.J. was alone with Plocienik's two-year-old child and her infant, after which she says the two-year-old ran to Plocienik, crying, with a "scared, oh no mommy" expression. In the consequent criminal

case, the district court convicted Plocienik of gross misdemeanor child neglect under Minnesota Statutes, section 609.378, subdivision 1(a)(1) (2008), after accepting Plocienik's *Alford* plea.

D.J.'s parents sued Plocienik, adopting her factual narrative and alleging that her *Alford*-plea-based conviction satisfied their burden of proof on negligence. West Bend defended under a reservation of rights, citing various exclusions in Plocienik's businessowners' liability policy. West Bend notified Plocienik of her right to retain new counsel and its willingness to pay reasonable costs and disbursements, and it intervened without objection in the negligence action to challenge coverage. The district court bifurcated the negligence and coverage proceedings for trial. Plocienik eventually retained coverage counsel, answered West Bend's coverage complaint, and alleged West Bend's bad faith. Days later, Plocienik and D.J.'s parents entered into a *Miller-Shugart* settlement that resolved the negligence claim. Under the agreement, Plocienik stipulated to entry of a judgment substantially greater than policy limits and assigned any claims she may have against West Bend to D.J.'s parents. In turn, D.J.'s parents agreed to pursue recovery only against West Bend—without specifying that collection would be limited to policy proceeds or limits.

West Bend moved for summary judgment, arguing that a criminal-acts-or-statutory-violation exclusion (criminal-statutory exclusion) barred coverage and the *Miller-Shugart* settlement was unenforceable against West Bend because it was collusive as a matter of law. The district court initially denied West Bend's motion after concluding that medical, child-protection, and licensure records attached to an attorney affidavit in support of the

motion lacked foundation, contained hearsay, and could not be considered in deciding the motion. The district court determined that, on the record before it, genuine issues of material fact precluded summary judgment on coverage. The district court also denied summary judgment on the ground that the *Miller-Shugart* agreement was collusive, citing the existence of genuine issues of material fact.

On the day set for a jury trial on coverage, the district court heard motions in limine and continued trial to the following month. On the second trial date, the district court held another motion hearing and ruled admissible the evidence from Plocienik's criminal proceedings, including her *Alford* plea. Based on this ruling and further review of the allegations in the negligence complaint, the district court reconsidered its earlier denial of West Bend's motion for summary judgment. The district court determined that evidence of the criminal proceedings activated the criminal-statutory exclusion as a matter of law and granted summary judgment to West Bend. This appeal follows.

D E C I S I O N

The Johnsons[1] challenge the district court's summary-judgment determination of no coverage, arguing that the district court erred by (1) misinterpreting the insurance policy to apply the criminal-statutory exclusion, (2) denying discovery and ruling that West Bend

[1] Nicholas Johnson, Michelle Johnson, and Jewel Plocienik, represented by the same counsel, appeal the district court's grant of summary judgment. Although Plocienik remains a party to the action, as a practical matter, Nicholas and Michelle Johnson proceeded in the coverage action as Plocienik's assignees after entering into the *Miller-Shugart* settlement. For readability, we refer collectively to all three appellants as "the Johnsons." We refer to Nicholas and Michelle Johnson as "D.J.'s parents" when Plocienik is not included in the reference.

was not estopped from asserting coverage defenses, (3) deeming admissible Plocienik's *Alford* plea, and (4) granting summary judgment based on the *Alford* plea in conflict with *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003). By notice of related appeal, West Bend challenges the district court's denial of its summary-judgment motion on the ground that the *Miller-Shugart* settlement was collusive as a matter of law.

I

We first address the Johnsons' contention that the district court erroneously interpreted the criminal-statutory exclusion. Plocienik held a businessowners' liability policy with a childcare endorsement and a physical-abuse-and-sexual-molestation endorsement (physical-abuse endorsement). The Johnsons say the district court errantly construed the policy so as to eliminate all coverage under the physical-abuse endorsement.

Our answer to this coverage question depends on the interplay between certain endorsements and exclusions in the policy. Interpretation of an insurance policy and whether it provides coverage under given circumstances are questions of law reviewed de novo on appeal. *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013). The childcare endorsement extends coverage to "bodily injury," "personal injury," or other injury arising from the operation of a daycare. But it expressly excludes from coverage "bodily injury," "personal injury," or other injury arising out of the violation of a statute, rule, or regulation, or a criminal act (criminal-statutory exclusion). The physical-abuse endorsement provides coverage for "physical abuse" arising out of negligent employment, investigation, supervision, reporting, or retention. It expressly excludes from coverage any person who committed, or failed with advance knowledge to

prevent recurrence of, abuse. Stated another way, the physical-abuse endorsement covers negligent supervision of someone who, without the businessowners' knowledge or participation, commits abuse. The physical-abuse endorsement states that all other exclusions "remain unchanged and applicable to this endorsement."

The district court reasoned that the criminal-statutory exclusion in the childcare endorsement applied to the physical-abuse endorsement because (1) physical abuse fell under "other injury" in the criminal-statutory exclusion, and (2) the physical-abuse endorsement incorporates other exclusions in the policy. Because the district court's second reason resolves the issue, we begin and end there.

The Johnsons' appellate brief contends that, if the criminal-statutory exclusion applies to the physical-abuse endorsement, the endorsement provides no coverage at all because every act defined as "physical abuse" is a crime under Minnesota law. It maintains that applying the criminal-statutory exclusion to the physical-abuse endorsement "writes that endorsement out of the policy" and violates the policy-construction rule that all provisions must be interpreted to have meaning. At oral argument, however, the Johnsons' counsel conceded that "physical abuse" as defined in the policy is not always a criminal act. The concession is well founded, and we conclude that application of the criminal-statutory exclusion does not eliminate all coverage under the physical-abuse endorsement.[2]

[2] We understand the Johnsons' theory at this stage of the litigation to be that Plocienik's toddler physically abused D.J., causing her injuries. We need not resolve whether physical abuse by a toddler is a criminal act because West Bend concedes the issue in its brief, stating that "the acts of a two-year-old cannot be considered criminal."

We apply general principles of contract interpretation to interpret insurance policies. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). We read policy provisions in context with other relevant provisions. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). We will apply the plain and ordinary meaning of unambiguous policy language. *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 323 (Minn. App. 2008), *review denied* (Minn. Nov. 18, 2008). Applying the criminal-statutory exclusion to the physical-abuse endorsement effectuates the statement in the physical-abuse endorsement that all other policy exclusions "remain unchanged and applicable to this endorsement." And the statement is consistent with express exclusions in the physical-abuse endorsement that bar coverage for any person who committed abuse or knowingly failed to prevent its recurrence. Our reading of the policy as a whole supports the district court's conclusion that the criminal-statutory exclusion applies to the physical-abuse endorsement.

The Johnsons also intimate that the coverage provided by the physical-abuse endorsement is illusory. But issues not argued to and considered by the district court are forfeited. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The Johnsons did not raise this issue in briefing to the district court. It is therefore not properly before us.

II

We next consider the Johnsons' argument that the district court improperly foreclosed their discovery and erroneously decided that West Bend was not estopped from asserting coverage defenses.

The Johnsons contend that the district court errantly denied their discovery concerning West Bend's purported bad-faith conduct. The district court has wide discretion to issue discovery orders, which, absent a clear abuse of that discretion, we will not disturb. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). Before Plocienik answered West Bend's coverage complaint and assigned to D.J.'s parents any claims she may have against West Bend, D.J.'s parents noticed the depositions of two West Bend employees. West Bend moved to quash the notices, and the district court granted the motion because, as nonparties to the insurance contract, D.J.'s parents lacked standing to assert an estoppel defense based on bad faith. Without standing to bring a bad-faith claim, the noticed depositions would not bear on any claim in the action, failing the relevancy requirement of Minnesota Rule of Civil Procedure 26.02(b). The Johnsons do not challenge the district court's lack-of-standing ruling; we therefore understand their argument to be that the depositions would be relevant to Plocienik's bad-faith claim against West Bend. The flaw in this argument is that the district court quashed the deposition notices before Plocienik brought any bad-faith claim and it is only that quashing, and no other discovery ruling, that the Johnsons challenge in this appeal. Given the uncontested accuracy of the district court's standing decision at the time it was made and the Johnsons' failure to identify any later purportedly errant discovery decision, we cannot conclude that the district court abused its discretion by quashing the deposition notices of West Bend employees.

We turn to the question of estoppel. After Plocienik assigned her claims to the Johnsons as part of the *Miller-Shugart* settlement, the Johnsons opposed West Bend's summary-judgment motion in part on the ground that West Bend was estopped by bad-

faith conduct from invoking policy exclusions. The Johnsons now argue that the district court erred by ruling that West Bend is not estopped from invoking policy exclusions by its alleged bad-faith conduct, including failure to properly reserve its rights, failure to provide independent counsel to Plocienik, failure to investigate the cause of D.J.'s injuries, and improper intervention in the negligence action. When the district court determines as a matter of law that equitable relief is not available, we review the decision de novo. *Melrose Gates, LLC v. Moua*, 875 N.W.2d 814, 822 (Minn. 2016). We address each argument for estoppel in turn.

The Johnsons contend first that the district court erred by deciding that, because West Bend properly reserved its rights and Plocienik suffered no prejudice from any delay, it would not estop West Bend from invoking policy exclusions. The doctrine of estoppel generally is unavailable to enlarge insurance coverage. *Shannon v. Great Am. Ins. Co.*, 276 N.W.2d 77, 78 (Minn. 1979). An exception applies when an insurer defends its insured through trial without reserving its right to deny coverage. *Faber v. Roelofs*, 250 N.W.2d 817, 820 (Minn. 1977). Under *Faber*, when the insurer "withdraws from the case before trial," the insured must prove prejudice to estop the insurer from asserting noncoverage. *Id.* But prejudice is conclusively presumed "when the insurer exercises complete control over the defense without a reservation of rights," as when the insurer defends through trial and a first appeal. *Id.*

Two days after the March 2009 daycare incident, West Bend acknowledged that it received notice of D.J.'s injuries, stating that "this incident is now being investigated under a reservation of rights." Three years later, but still before D.J.'s parents served their

complaint, West Bend notified Plocienik that she did not have coverage for the incident, citing exclusions in the general policy language, physical-abuse endorsement, childcare endorsement, and Plocienik's *Alford* plea. More than two years later, two days after service of the complaint, West Bend's senior claim examiner notified Plocienik that it had appointed counsel to represent her. Five days after that notification, West Bend's senior attorney sent a letter to Plocienik, stating "we are defending the lawsuit under a Reservation of Rights. This is NOT a denial of coverage at this time." And two months after that, the same senior attorney sent Plocienik a 12-page reservation-of-rights letter detailing West Bend's position on policy exclusions and explaining that Plocienik could obtain substitute counsel at West Bend's expense. Plocienik settled with D.J.'s parents about ten months later, still represented by the lawyer originally appointed by West Bend.

We are not convinced that *Faber* supports the notion that estoppel can be premised on an insurer's provision of defense for only five days without expressly reserving its right to deny coverage, or for two months without its providing a detailed analysis of the insurer's coverage position, particularly when trial was not imminent and the insurer had pre-suit communications with the insured about its coverage position. Prejudice must be shown. We are not persuaded otherwise by the Johnsons' reliance on *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, where the supreme court built on its *Faber* holding to analyze an insurer's duties to its insured in arbitration proceedings. 819 N.W.2d 602 (Minn. 2012). *Remodeling Dimensions* does not eliminate *Faber*'s requirement of prejudice when a reservation of rights is communicated early in the litigation. *See id.* at 617–19. The Johnsons identify no prejudice that Plocienik suffered from the timing of West

Bend's reservation of rights and argue instead that prejudice can be presumed. But under *Faber*, prejudice is not presumed when communication of a reservation of rights is not immediate but is still early in the litigation. *See Faber*, 250 N.W.2d at 820. The district court properly decided not to estop West Bend from denying coverage based on the timing of West Bend's formal reservation of rights.

The Johnsons contend second that West Bend should be estopped from denying coverage because it failed to "provide Defendant Plocienik with independent counsel" when a conflict arose. It is undisputed that West Bend notified Plocienik of her right to retain substitute counsel to defend the negligence claim and that West Bend would pay substitute counsel's reasonable fees. The Johnsons argue that West Bend was required to hire—not just pay reasonable fees and costs for—new counsel for Plocienik. The argument fails for two reasons. First, the supreme court has held that, "[w]hen an insurer is obligated to defend its insured and contests coverage in the same suit, the insurer must pay reasonable attorneys' fees for its insured rather than conduct the defense itself." *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 389 (Minn. 1979) (syllabus by the court). Second, even if the Johnsons are correct that an insurer has a duty to hire "independent counsel" under the circumstances, they identify no legal authority suggesting that a breach of this duty estops an insurer from challenging coverage. Again, the general rule in Minnesota is that insurance coverage cannot be enlarged by estoppel. *See Shannon*, 276 N.W.2d at 78. The district court correctly concluded as much.

The Johnsons contend third that West Bend failed to investigate the cause of D.J.'s injuries and should therefore be estopped from denying coverage. The Johnsons cite

caselaw requiring only that an insurer must either defend or conduct an investigation after its insured comes forward with facts showing arguable coverage, and it must then timely communicate its coverage decision. *See SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995). Although the daycare incident occurred in March 2009, the Johnsons did not serve their negligence complaint until August 2014. An insurer's duties under a liability policy are usually triggered by a formal claim against the insured. *See Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997) ("In determining the existence of [a duty to defend], a court will compare the allegations in the *complaint* in the underlying action with the relevant language in the *insurance policy*."); *see also Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006) (reiterating that the duty to defend is broader than the duty to indemnify); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165–66 (Minn. 1986) ("A duty to defend an insured on a claim arises when any part of the claim is 'arguably' within the scope of the policy's coverage, and an insurer who wishes to escape that duty has the burden of showing that all parts of the cause of action fall clearly outside the scope of coverage.").

West Bend appointed counsel immediately and sent Plocienik a detailed reservation-of-rights letter in early November 2014, referencing medical, criminal-investigation, court, child-protection, and license-revocation records among the material it reviewed in making its coverage decision. We need not assess the adequacy of West Bend's investigation because we have previously held that an insurer's violation of its duties to investigate and communicate a coverage decision does not provide a basis for estopping the insurer from invoking policy exclusions. *See Redeemer Covenant Church of Brooklyn*

Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 76 (Minn. App. 1997) (concluding that a violation of claims-processing requirements in Minnesota Statutes, section 72A.201, subdivision 4(11) (1996), did not estop insurer from invoking policy exclusions), *review denied* (Minn. Oct. 1, 1997). The Johnsons identify no legal authority that would compel the district court to estop West Bend from denying coverage on the undisputed circumstances here. The district court properly declined to estop West Bend based on the alleged inadequacy of its investigation.

The Johnsons argue fourth that West Bend should be estopped because it breached its fiduciary duties by intervening in the negligence action. West Bend maintains that it intervened because neither party in that action had an interest in determining the cause of D.J.'s injuries and an adverse determination of cause might become binding in a coverage action. The timing of the litigation elements in this case is atypical, giving a framework for the Johnsons' argument. It is more common on appeal for liability to have been decided in a separate action from coverage or settlement enforceability. *See, e.g. Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) (garnishment action following declaratory-judgment coverage action and tort-liability action); *Burbach v. Armstrong Rigging & Erecting, Inc.*, 560 N.W.2d 107 (Minn. App. 1997) (garnishment action addressing enforceability of settlement), *review denied* (Minn. June 11, 1997); *Brownsdale Coop. Ass'n v. Home Ins. Co.*, 473 N.W.2d 339 (Minn. App. 1991) (declaratory-judgment action against insurer addressing coverage and enforceability of settlement), *review denied* (Minn. Sept. 25, 1991).

In any event, the Johnsons' argument is not compelling. Although they suggest that a conflict of interest influenced Plocienik's counsel's choice not to object to West Bend's notice to intervene, they do not explain D.J.'s parents' failure to object. Because no party objected to West Bend's notice to intervene, we have no district court ruling to review. The Johnsons acknowledge that Minnesota courts have not decided whether an insurer can intervene in its insured's tort suit, but they argue that intervention should be prohibited and that, if an insurer does successfully intervene, it forfeits its coverage defenses. Again, no reference to binding authority accompanies the argument, and the district court would have been adopting a new exception, improperly, by accepting it.

The Johnsons argue finally that the district court failed to view the facts in the light most favorable to the nonmoving party in evaluating their estoppel argument. They do not identify any facts that the district court viewed unfavorably or any evidence that raises a genuine issue of material fact on the question of estoppel. They maintain instead that the lack of record evidence of West Bend's motives results from the district court's alleged improper quashing of deposition notices—a quashing we have already affirmed. Because the Johnsons concede that no evidence supports their improper-claims-handling theory, they cannot establish that the district court failed to view the facts in the light most favorable to the nonmoving party.

III

We now address the Johnsons' argument that the district court abused its discretion by denying their motion in limine to exclude Plocienik's *Alford* plea. They do not specifically challenge the district court's ruling that other evidence of the criminal

proceedings is admissible. The district court has broad discretion when ruling on evidentiary matters, and appellate courts will not reverse absent an abuse of that discretion. *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). "By their very nature, evidentiary rules demand a case by case analysis, an analysis best left to the trial judge familiar with the setting of the case." *Id.* (quotation omitted).

In Minnesota, a district court may accept a guilty plea even if the defendant claims innocence, so long as the defendant acknowledges on the record that the state's evidence is sufficient for a jury to find her guilty beyond a reasonable doubt and the district court concludes that the record contains a strong factual basis for the plea. *State v. Theis*, 742 N.W.2d 643, 649 (Minn. 2007). This kind of guilty plea is commonly referred to as an *Alford* plea. *See id.* at 645 (citing *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S. Ct. 160, 167–68 (1970)); *see also State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (holding that a district court may accept an *Alford* plea).

The supreme court recently observed that, although evidence that a party entered a conventional guilty plea is generally admissible in a civil trial regarding the same course of conduct and *Alford* pleas generally carry the same collateral consequences as conventional guilty pleas, the question of whether evidence of an *Alford* plea is admissible in a later civil trial was a matter of first impression in Minnesota. *Liebsch*, 872 N.W.2d at 880–81. The *Liebsch* court held that the district court did not abuse its discretion when it excluded, under Minnesota Rule of Evidence 403, an *Alford* plea to fifth-degree criminal sexual conduct in the crime victim's civil suit for sexual battery and abuse against the criminal defendant. 872 N.W.2d at 882.

The district court here applied rule 403 and *Liebsch* in deciding the Johnsons' motion in limine. At the first motion hearing, the district court stated that it needed to balance the potential for misleading the jury if jurors heard about a criminal investigation without hearing of a prosecution or conviction versus the potential for juror confusion given the nuances of *Alford* pleas. The district court ultimately determined that Plocienik's *Alford* plea was relevant and probative to the question of coverage because, in the underlying suit, D.J.'s parents alleged a statutory violation and crime, maintaining that Plocienik's *Alford* plea eliminated their burden of proving negligence. The district court concluded that the danger of unfair prejudice is less in a coverage action assigned to the injured party than in a tort action against the criminal defendant. The district court also observed that, although the *Liebsch* defendant's only real admission was that a jury might have found him guilty, the record surrounding Plocienik's *Alford* plea was sufficiently developed in a manner that would avoid the risk of confusing the issues or misleading the jury. Based on these considerations, the district court concluded that the *Alford* plea was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Accordingly, it denied the Johnsons' motion to exclude the evidence.

The Johnsons argue that the district court erred when it concluded that Plocienik admitted more than an *Alford* plea typically requires, but they do not address the district court's consideration of the allegations in the underlying complaint or challenge the district court's reasoning that the danger of unfair prejudice was less in the coverage context. Our

review of the record leaves us unpersuaded that Plocienik admitted any more at her plea hearing than did the defendant in *Liebsch*, and we are not certain that the district court concluded that she did. But we conclude that the district court reasonably determined that the allegations in the negligence complaint are relevant to the question of coverage. And we see no flaw in the district court's reasoning that the danger of unfair prejudice is reduced when the civil liability of the criminal defendant has been resolved and will not be impacted by the plea's admission into evidence. At trial, we would expect the parties to vigorously dispute the probative value of the *Alford* plea so that the fact finder is equipped to weigh the evidence fairly. And as D.J.'s parents argued in opposition to Plocienik's earlier motion to exclude the *Alford* plea from the negligence trial, any potential for prejudice or confusion could be mitigated with a jury instruction explaining the nature of an *Alford* plea.

On balance, we are satisfied with the district court's careful approach to the question of unfair prejudice. "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *In re Civil Commitment of Spicer*, 853 N.W.2d 803, 813 (Minn. App. 2014) (quotation omitted). The district court was in the best position to evaluate the likelihood of unfair prejudice. *See Liebsch*, 872 N.W.2d at 879. The district court did not abuse its broad discretion by concluding that the probative value of the *Alford* plea is not substantially outweighed by concerns that the plea will persuade illegitimately.

IV

This brings us to the Johnsons' argument that the district court's grant of summary judgment collaterally estopped them from litigating the cause of D.J.'s injuries. The order, argue the Johnsons, conflicts with *Illinois Farmers Insurance Company v. Reed*, 662 N.W.2d 529 (Minn. 2003). We review de novo the district court's grant of summary judgment, and we will reverse if the record contains a genuine issue of material fact or if the district court erred in applying the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). On this record, a disputed material fact lingers.

The central question at the summary-judgment stage was whether genuine issues of material fact necessitated a trial on the question of the cause of D.J.'s injuries. In support of its summary-judgment motion, West Bend argued—based on medical records, the county's determination of a statutory violation and revocation of Plocienik's childcare license, and Plocienik's criminal conviction—that there were no genuine issues of material fact and the criminal-statutory exclusion applied as a matter of law. The Johnsons objected, arguing that, among other things, these medical, child-protection, and licensure records lacked foundation and contained hearsay. The district court agreed with the Johnsons, striking most of the challenged medical and human-services records from the summary-judgment record. It then determined that, viewing the remaining evidence in the light most favorable to the nonmoving party, Plocienik's *Alford* plea was insufficient to support a determination that Plocienik committed a criminal act. It similarly determined that a statement-of-agency decision summarily affirming the revocation of Plocienik's childcare license was insufficient to support a determination that Plocienik violated a statute.

So the case was set for a trial where, presumably, the foundational infirmities with the documentary evidence bearing on causation might be addressed. On the eve of trial and just after the district court ruled that evidence of the criminal proceedings was admissible, however, the court suddenly reconsidered its denial of West Bend's summary-judgment motion. We cannot tell exactly what prompted the district court to reconsider its summary-judgment decision, but the record suggests that an off-the-record telephone conference was held at which the district court sought additional information from counsel. At the final pretrial hearing on the record, the district court indicated that the Johnsons' counsel had expressed the view that admission of the *Alford* plea would necessarily resolve the applicability of the policy exclusion. Critical to our review, the district court never revisited its earlier decision striking the documentary evidence that West Bend presented with its summary judgment motion.

The district court then granted summary judgment, concluding that Plocienik's *Alford* plea and criminal conviction by themselves eliminated any genuine issues of material fact as to whether Plocienik violated a statute when someone injured D.J. at her daycare facility. On that reasoning, the district court held that the criminal statutory exclusion applied as a matter of law.

The Johnsons contend that the district court's decision contravenes the supreme court's decision in *Reed*. The *Reed* case arose out of similar facts but a different procedure. An insured daycare provider was convicted, following a bench trial, of first-degree assault and malicious punishment of a child for causing life-threatening head injuries to a one-year-old in her care. 662 N.W.2d at 530. The child's parents sued the daycare provider,

who tendered defense of the suit to her homeowner's insurer. *Id.* at 530–31. The insurer brought a declaratory-judgment action to determine coverage, arguing that the claim was not covered because the injury was caused by intentional acts. *Id.* at 531. The insurer moved for summary judgment, arguing that the criminal conviction collaterally estopped relitigation of whether the injury was intentional. *Id.* The district court denied the insurer's motion for summary judgment and under Minnesota Rule of Civil Appellate Procedure 103.03(i), certified the question of whether a criminal conviction can be used as collateral estoppel in a civil case (interpreting an intentional-acts exclusion in a liability policy) other than when the criminal defendant seeks to profit from her own crime. *Id.* The supreme court answered, no. *Id.* at 529–30.

Here, West Bend did not argue that it was entitled to summary judgment because Plocienik's criminal conviction collaterally estopped the Johnsons from litigating whether D.J.'s injuries arose from a criminal act or statutory violation. Nor did the Johnsons analyze the collateral-estoppel factors or argue that *Reed* precluded summary judgment. In light of the arguments presented to it, the district court likewise did not analyze *Reed* or apply collateral estoppel in making its ruling. Although the Johnsons argued that *Reed* supported their motion in limine to exclude the *Alford* plea, the district court properly analyzed the admissibility of that evidence under the Minnesota Rules of Evidence. It was never asked to determine whether, if the *Alford* plea was admissible, summary judgment was unavailable because collateral-estoppel elements were not satisfied. We will not attempt to apply the *Reed* analysis here, as the argument has been presented in the first instance on appeal. *See Thiele*, 425 N.W.2d at 582.

The moving party has the initial burden to show the absence of factual issues before summary judgment can be granted. *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 191 (Minn. 2005). The district court had struck the medical and human-services records submitted by West Bend based on foundation and hearsay concerns, and its order granting summary judgment indicates that the district court focused on the *Alford* plea transcript and its order accepting the plea. At her plea hearing, Plocienik testified that she heard a loud thump while she was in the bathroom, after which D.J. had no visible signs of injury but was determined later that night to have bleeding on the brain, subdural hematoma, and other injuries. During her plea colloquy Plocienik denied harming D.J., acknowledging only that the state's evidence would be sufficient to convict her.

We are convinced that the statements in the plea transcript cannot establish that West Bend met its initial burden to show the absence of genuine issues of material fact as to whether D.J.'s injury arose from a criminal act. The summary-judgment record might establish as a matter of law that D.J.'s injuries resulted in a criminal conviction, but the policy excludes, in relevant part, injury arising from conduct that constitutes a criminal act or statutory violation. With respect to a criminal-acts exclusion, "the critical inquiry concerns the criminality of the conduct purportedly justifying invocation of the clause." *SECURA*, 755 N.W.2d at 325 (distinguishing criminal-acts from intentional-acts exclusions). Without a clearer admission of her conduct or of her guilt, or additional evidence from some other source, Plocienik's equivocal plea statements leave open the possibility that D.J. was injured by negligent supervision that did not amount to a criminal act or involve a statutory violation.

No other admissible evidence in the summary-judgment record overcomes the deficiency. Summary judgment is inappropriate when the moving party fails to meet its initial burden to show the absence of genuine issues of material facts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158, 90 S. Ct. 1598, 1609 (1970). On this record, we hold that the district court improperly concluded that there are no genuine issues of material fact so as to establish that the criminal-statutory exclusion applies as a matter of law.

V

We address last West Bend's cross-appeal, in which West Bend argues that the district court erred by denying its summary-judgment motion on the ground that the *Miller-Shugart* settlement was collusive as a matter of law. "In reviewing an appeal from the denial of summary judgment, [appellate courts] must determine whether there are genuine issues of material fact and whether the district court erred in applying the law." *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006).

The district court declined to enter summary judgment on the question of alleged settlement collusion between the Johnsons and Plocienik. A money judgment confessed by an insured is not binding on the insurer if it is obtained through fraud or collusion. *Miller*, 316 N.W.2d at 734. "Collusion, for purposes of a *Miller-Shugart* settlement, is a lack of opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining." *Indep. Sch. Dist. No. 197 v. Accident & Cas. Ins. of Winterthur*, 525 N.W.2d 600, 607 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). The district court denied summary judgment based on the existence of unresolved fact questions:

> Ignoring fact disputes between the parties about how the *Miller-Shugart* was entered into, all that is left for the Court to determine that the agreement is collusive is (1) the agreement itself and (2) the fact that Ms. Plocienik did not file an answer to West Bend's complaint until shortly before the *Miller-Shugart* agreement was announced. Why Ms. Plocienik agreed to a [settlement substantially exceeding policy limits] and agreed to assign all her claims is not readily apparent from the agreement itself. It is not clear whether a reasonable person would have done this or whether it was the product of hard bargaining. Further clarity needs to be established regarding the claims that the joint parties' counsel were working in concert together to bring about the settlement before this Court can rule on these issues.

West Bend contends that the settlement was collusive as a matter of law because (1) it failed to limit collection to the policy limits, (2) Plocienik unnecessarily assigned any bad-faith claims she may have, and (3) the parties impermissibly attempted to manipulate coverage through the assignment of late-asserted estoppel and bad-faith claims, which violated Plocienik's duty to cooperate. These three bases share the same theme, which is that Plocienik and D.J.'s parents conspired to seek recovery in excess of Plocienik's policy limits.

West Bend relies on *Miller v. Shugart* for the proposition that the agreement should have limited recovery to the policy limits. But *Miller* was set in a different procedural posture—an appeal from a garnishment action. 316 N.W.2d at 731. The injured party's claim against the insurer had been established by the pleadings. *See id.* Although the insured had confessed judgment for twice the policy limits, the injured party claimed only the policy limits in the garnishment action. *Id.* at 734 & n.5. The settlement agreement appears to have limited recovery to "proceeds of any applicable insurance," but the

supreme court focused on what the injured party sought in its garnishment action, not on the express language of the agreement. *Id.* at 732, 734. The *Miller* court concluded that there was nothing "wrong with the insureds' confessing judgment in an amount double the policy limits," but it noted that, if the injured party had sought an excess recovery, "an issue of fraud or collusion *might present itself*." *Id.* at 734 & n.5 (emphasis added). The *Miller* court did not hold that agreeing to recovery in excess of policy limits would demonstrate collusion as a matter of law. *See id.* at 734.

D.J.'s parents have not yet attempted to recover from West Bend, and it is unknown what recovery they might seek. If they seek to recover within policy limits, the agreement itself would not necessarily support a finding of collusion. *See id.* (rejecting claim of fraud or collusion based on confession of judgment for a sum twice the amount of policy limits). We think the district court properly determined that West Bend was not entitled to summary judgment based merely on the language of the agreement.

West Bend contends that D.J.'s parents' "counsel facilitated the assertion of Plocienik's bad faith claims, and then obtained their assignment, in order to try to bar West Bend from asserting its coverage defenses, and potentially expand the limits." The district court rightly determined that this assertion can be validated only by resolving disputed fact questions. The district court properly held that genuine issues of material fact preclude summary judgment in West Bend's favor.

Affirmed in part and reversed in part.