STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0472

Hailey Elisabeth Steele Daberkow, a minor, by and through her parents and natural guardians John Daberkow and Bernadette Steele,
Respondent,

vs.

Anne Remer, f/k/a Anne Hummel,
Respondent,

American Family Mutual Insurance Company, intervenor,
Appellant.

Filed February 19, 2019
Affirmed
Halbrooks, Judge

Mille Lacs County District Court
File No. 48-CV-16-2264

Grim Daniel Howland, Lindell & LaVoie, LLP, Minneapolis, Minnesota (for respondent Hailey Daberkow by and through her parents)

Michael C. Rajkowski, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondent Anne Remer)

Darwin S. Williams, Eden Prairie, Minnesota (for appellant American Family Mutual Insurance Company)

Jennifer E. Olson, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota (for amicus curiae Minnesota Association for Justice)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

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

HALBROOKS, Judge

In this appeal after remand, appellant-insurer challenges the district court's denial of its motion to intervene as a matter of right under Minn. R. Civ. P. 24.01 in respondent-personal-injury-plaintiff's action to approve a settlement with respondent-insured. Appellant also challenges the district court's denial of appellant's request to be heard on the substance of the settlement agreement before it was approved. We affirm.

FACTS

In May 2012, four-year-old respondent Hailey Elisabeth Steele Daberkow sustained injuries from a dog bite while in the care of respondent Anne Remer's in-home childcare center. *Daberkow v. Remer*, No. A17-0345, 2017 WL 5242609, at *1 (Minn. App. Nov. 13, 2017). Remer owned the dog. *Id.* The childcare center was insured under a childcare insurance policy issued by a non-party insurer, which provided a defense and tendered its $25,000 policy limits. *Id*. Remer was insured under a homeowner's policy issued by appellant American Family Mutual Insurance Company. *Id.* The American Family policy contained an exclusion for bodily injury arising out of business pursuits, except "activities which are normally considered non-business." "Business" is defined to include "home day care services." On July 18, 2012, American Family denied coverage for the claim brought by Hailey and her parents, John Daberkow and Bernadette Steele (collectively, the Daberkows). *Id*. American Family did not provide a defense for Remer.

Between July 2013 and October 2014, the Daberkows and Remer each notified American Family of their intent to enter into a *Miller-Shugart* settlement agreement.[1] *See Miller v. Shugart*, 316 N.W.2d 729, 733 (Minn. 1982). In July 2016, the Daberkows informed American Family that they had finalized a *Miller-Shugart* agreement that called for a determination of damages through binding arbitration. *Daberkow*, 2017 WL 5242609, at *1. American Family appeared at the arbitration hearing but did not participate. *Id.* The arbitrator valued damages at $510,000. *Id.*

In November 2016, the Daberkows filed a motion in district court to approve and enter judgment on the settlement agreement. *Id.* American Family filed a motion to intervene under Minn. R. Civ. P. 24.01 and asked the district court to continue the settlement-approval hearing until after the intervention motion was resolved. *See id.* The district court went forward with the settlement-approval hearing and declined to hear American Family's argument on the merits. *See id.* In its order approving the settlement and ordering entry of judgment against Remer, the district court found that the settlement was reasonable and prudent and "dismissed" American Family's motion to intervene. *Id.*

American Family appealed, and we reversed and remanded for the district court to consider whether American Family satisfied the test for intervention as of right under Minn. R. Civ. P. 24.01. *Id.* at *2. On remand, the district court denied the motion to

[1] "In a *Miller-Shugart* settlement, the insured, having been denied any coverage for a claim, agrees claimant may enter judgment against him for a sum collectible only from the insurance policy. To be binding on the insurer if policy coverage is found to exist, the settlement amount must be reasonable." *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 278 n.1 (Minn. 1990).

intervene, finding that American Family did not satisfy the four-part test.[2] American Family appeals.

D E C I S I O N

I. The district court properly denied American Family's motion to intervene as a matter of right under Minn. R. Civ. P. 24.01.

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Minn. R. Civ. P. 24.01. Under this rule, a non-party seeking to intervene as of right must show (1) timely application for intervention; (2) an interest relating to the property or transaction that is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) that the applicant is not adequately represented by the existing parties. *Id.*; *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). The district court ruled that American Family did not satisfy any of the four factors. Our review is de novo. *State Fund Mut. Ins. Co. v. Mead,* 691 N.W.2d 495, 499 (Minn. App. 2005). Because the third factor resolves our inquiry, we begin and end there.

[2] Shortly after the district court denied American Family's motion to intervene, Hailey's mother filed a declaratory-judgment action against American Family in federal court, seeking a declaration of coverage and an order directing American Family to satisfy the judgment against Remer.

American Family argues that, because the district court was "asked to determine that the agreement at issue was a *Miller-Shugart* Agreement, its reasonableness, and to enter Judgment against Remer, [the settlement-approval] hearing appears to be American Family's only opportunity to oppose such categorization, reasonableness, and [the] amount of Daberkow's damages." American Family therefore argues that the disposition of the action will impair its ability to protect its interests.

The district court found that American Family's interests are protected without intervention because a *Miller-Shugart* settlement is only enforceable if it is reasonable and not the result of fraud or collusion. The district court noted that coverage, fraud, and collusion can be addressed in a declaratory-judgment action and that "further safeguards are in place by which their agreement will be evaluated." Counsel for both parties nevertheless appear to be under the impression that the district court's determination of reasonableness in the settlement-approval action may be binding on American Family in a separate coverage or enforcement action. We disagree.

Under Minnesota law, after the district court approves a *Miller-Shugart* settlement, an insurer may challenge—in a garnishment or declaratory-judgment action—coverage, as well as the validity and reasonableness of the settlement and whether it was obtained through fraud or collusion. *Miller*, 316 N.W.2d at 733-35 (establishing that insured has a right to enter into settlement relieving personal liability, and insurer has right to challenge coverage, reasonableness, and absence of fraud and collusion); *see also Jorgensen v. Knutson*, 662 N.W.2d 893, 900, 904 (Minn. 2003) (reviewing coverage and reasonableness of *Miller-Shugart* settlement in garnishment action); *Emp'rs Mut. Co. v. Oppidan*, 518

N.W.2d 33, 37 (Minn. 1994) (commenting in declaratory-judgment action that *Miller-Shugart* settlement may be invalid because insured had a defense and at least $500,000 in coverage from a second insurer, but declining to rule on validity of settlement after determining claim not covered); *Alton M. Johnson Co.*, 463 N.W.2d at 279 (addressing reasonableness in garnishment action against insurer); *Burbach v. Armstrong Rigging & Erecting, Inc.*, 560 N.W.2d 107, 108-09 (Minn. App. 1997) (determining in garnishment action that underlying settlement was not enforceable against insurer because "so-called *Miller-Shugart* agreement" was not valid), *review denied* (Minn. June 11, 1997); *Indep. Sch. Dist. No. 197 v. Accident & Cas. Ins. of Winterthur*, 525 N.W.2d 600, 603, 607 (Minn. App. 1995) (addressing coverage, reasonableness, and collusion in garnishment action against insurer), *review denied* (Minn. Apr. 27, 1995); *see also Corn Plus Coop. v. Cont'l Cas. Co.*, 516 F.3d 674, 678-81 (8th Cir. 2008) (determining coverage, validity, and reasonableness of *Miller-Shugart* settlement in federal court declaratory-judgment action after state court approval of settlement).

An insurer is entitled to challenge reasonableness in a separate action because the judgment entered against the insured is not "an adjudication on the merits" and the insured "would have been quite willing to agree to anything as long as plaintiff promised them full immunity." *Miller*, 316 N.W.2d at 735.

> In these circumstances, while the judgment is binding and valid as between the stipulating parties, it is not conclusive on the insurer. The burden of proof is on the claimant, the plaintiff judgment creditor, to show that the settlement is reasonable and prudent. The test as to whether the settlement is reasonable and prudent is what a reasonably prudent person in the position of the defendant would have settled for on the

> merits of plaintiff's claim. This involves a consideration of the facts bearing on the liability and damage aspects of plaintiff's claim, as well as the risks of going to trial.

Id.; *see also Alton M. Johnson Co.*, 463 N.W.2d at 280 ("As we noted in *Miller v. Shugart*, the exposed insured has no incentive to drive a hard bargain; to avoid personal liability, the insured has no compunction to agreeing that judgment may be entered against him for the policy limits, even if the claim is worth much less than the policy limits, if it is worth anything.").

An insurer may also challenge the validity of the settlement in a separate action. *See Emp'rs Mut. Co.*, 518 N.W.2d at 37 (commenting that "circumstances to which one looks for justification of the *Miller-Shugart* arrangement were not present here" but declining to evaluate validity of settlement because coverage was lacking); *Burbach*, 560 N.W.2d at 109-10 (determining settlement was unenforceable against insurer because it was not a valid *Miller-Shugart* settlement). Accordingly, the district court's determination here that the "*Miller-Shugart* Agreement" was "reasonable and prudent" is not binding on American Family, and disposition of the settlement-approval action does not impair American Family's ability to protect its interest.

Because under Minnesota law, American Family has the opportunity to challenge the characterization of the settlement and its reasonableness in an action to recover under the settlement in a separate action, the third factor for intervention as a matter of right in this matter is not satisfied. Because American Family cannot satisfy the third factor for intervention under rule 24.01, we need not address the other factors. The district court properly denied American Family's motion to intervene.

II. The district court properly exercised its discretion by declining to hear argument from a non-party.

American Family argues that the district court erred in declining to allow American Family to participate in the settlement-approval hearing. As a threshold matter, the Daberkows contend that American Family forfeited this argument when it failed to petition for further review of our earlier decision, in which we stated, "Because American Family will now have an opportunity to present argument to the district court concerning the four requirements of its motion to intervene, we need not decide whether the district court abused its discretion by refusing to allow American Family to argue at the hearing." *Daberkow*, 2017 WL 5242609, at *2. We did not need to resolve this issue in the first appeal because we reversed and remanded for a ruling on American Family's motion to intervene. The issue is now properly before us. The Daberkows' assertion that American Family failed to preserve this argument in the district court is also unfounded. American Family attempted to argue at the settlement-approval hearing and was limited to making a record of its objection.

"Generally, the trial court may establish the procedure for presentation of a case in an unusual situation, absent an abuse of discretion." *Goswitz v. Fiedler*, 435 N.W.2d 857, 859 (Minn. App. 1989) (citing *Simon v. Carroll*, 62 N.W.2d 822 (Minn. 1954)). The decision whether to permit a non-party to participate in a court hearing is discretionary. *See id.* (reviewing district court's ruling limiting participation by intervening party). American Family cites no relevant legal authority in support of its argument that, as a non-party to the settlement-approval action, it was entitled to participate. The district court did

not abuse its discretion by refusing to hear argument from a non-party at the settlement-approval hearing.[3]

Affirmed.

[3] American Family also challenges certain factual statements in the district court's February 14, 2018 order as premature or unsupported by the record. The concern appears to be that the challenged statements could bear on coverage. It is undisputed that the issues of coverage and exclusions were not litigated at the settlement-approval stage and that these issues would need to be resolved in a separate action. Any factual statements in the district court's February 14, 2018 order that could bear on coverage are simply extraneous.