STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0078

King's Cove Marina, LLC,
Respondent,

vs.

Lambert Commercial Construction LLC, et al.,
Defendants,

United Fire & Casualty Company,
Appellant.

Filed December 16, 2019
Reversed and remanded
Slieter, Judge

Washington County District Court
File No. 82-CV-14-527

Stephen P. Watters, Watters Law Office, Minnetonka, Minnesota; and

Mark R. Bradford, Bassford Remele, Minneapolis, Minnesota (for respondent)

Kay Nord Hunt, Keith J. Broady, Bryan R. Feldhaus, Lommen Abdo, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Slieter, Judge; and Klaphake, Judge.*

S Y L L A B U S

A *Miller-Shugart* settlement agreement that fails to allocate covered and non-covered damages is unreasonable as a matter of law and unenforceable against the insurer.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

O P I N I O N

SLIETER, Judge

This appeal arises out of a *Miller-Shugart* settlement agreement[1] between respondent King's Cove Marina LLC and defendant Lambert Commercial Construction LLC, and a subsequent garnishment action filed by the marina against Lambert's insurance company, appellant United Fire & Casualty Company. The district court granted partial summary judgment in the marina's favor on coverage issues and approved the *Miller-Shugart* settlement agreement. On appeal, United Fire argues that the district court erred by granting partial summary judgment in the marina's favor on coverage issues and by approving the *Miller-Shugart* settlement agreement. Because an applicable policy exclusion limits Lambert's coverage and the *Miller-Shugart* settlement agreement failed to allocate between covered and non-covered damages, the agreement is unreasonable as a matter of law. As a result, we reverse and remand the district court's grant of partial summary judgment. Because we reverse and remand, we do not reach the additional arguments asserted by United Fire or the argument asserted by the marina on cross-appeal.

FACTS

King's Cove Marina is a full-service marina in Hastings. In 2011, the marina sought to expand and remodel its main building by installing new exterior walls, a new ceiling,

[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). *See Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

new windows, and a new second-level mezzanine floor above the showroom floor. The marina hired Lambert to perform construction work on the remodeling project, although the parties disagree over the nature and extent of Lambert's involvement. The marina claims that Lambert served as the project's general contractor, while Lambert argues that it was hired on a time-and-materials basis. However, it is uncontested that Lambert supplied pre-engineered metal building products, supplied and erected the metal building addition, supplied the exterior metal roof and metal wall paneling, supplied the metal insulation, and supplied and installed window trim. Lambert also hired Roehl Construction, Inc. as a subcontractor to install new concrete footings on the main level of the building and to provide concrete for the second-level mezzanine floor.

During the course of the remodeling project in 2012, the marina's president wrote a letter to Lambert explaining that there were problems with "extremely large cracks" on the first and second floors, and "cracking, popping and buckling" of the concrete floor. The letter stated that both the first and second floors required "significant and expensive repairs to the concrete and in floor heating system." The marina also identified problems with leaking from the walls and the roof, leading to damage to the interior finishes and to ceiling tiles, carpet, and sheetrock. The marina refused to pay the outstanding balance on Lambert's invoices and, in response, Lambert stopped performing work on the project.

In July 2013, the marina initiated a civil action against Lambert, asserting causes of action for breach of contract and negligence.[2] Specifically, the marina alleged that the

[2] The marina's complaint also asserted causes of action against Roehl Construction Inc. and Majeski Plumbing Inc. for alleged defects in work performed at the marina. Majeski

concrete floors on the first and second levels were not constructed in accordance with industry standards or with project plans and specifications, resulting in excessive movement and cracking of the new concrete floors. The marina also alleged defects with Lambert's metal building products and metal roof, and claimed that the in-floor heating systems were not installed properly, causing the concrete floors to move, crack, and expand. Lambert tendered its defense to its insurer, United Fire, who defended Lambert under a reservation of rights to deny any duty to defend or indemnify Lambert.

In July 2015, two years after the initial lawsuit, United Fire commenced a declaratory-judgment action against Lambert and the marina, seeking a ruling that United Fire did not have a duty to defend or indemnify Lambert under the terms of its commercial general liability and umbrella insurance policies. While the declaratory-judgment action was pending, Lambert and the marina entered into settlement negotiations to resolve the underlying lawsuit. United Fire received notice of a proposed *Miller-Shugart* settlement, but did not participate in the settlement discussions.

On June 23, 2016, Lambert and the marina entered into a *Miller-Shugart* settlement agreement in which Lambert confessed judgment in the marina's favor in the amount of $2 million, plus interest. The *Miller-Shugart* settlement agreement was expressly limited to claims and damages for work performed by Lambert. On July 18, 2016, the district court

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was dismissed from the action and is not a party to the appeal. In June 2018, the claims between the marina and Roehl were determined by a jury trial, and Roehl is not a party to this appeal.

approved the *Miller-Shugart* settlement agreement between the marina and Lambert and entered judgment against Lambert.

Following approval of the *Miller-Shugart* settlement agreement, the marina moved to file a supplemental complaint for garnishment against United Fire, and the district court granted that motion. United Fire answered, asserting in part that the settlement was unreasonable to the extent it incorporated, but failed to allocate, covered and non-covered damages.

In November 2016, the marina moved for partial summary judgment against United Fire, seeking a determination that there is insurance coverage under the terms of the policies.

In April 2017, the district court determined that there was insurance coverage for the claims and damages asserted by the marina against Lambert. The district court concluded that United Fire provided coverage and insured Lambert "for defects related to or arising from the work and operations performed by Lambert on the project, the products or goods incorporated in the project, and the work performed 'on its behalf,' such as by [Lambert's subcontractors]."

In August 2018, following a hearing, the district court issued an order determining that the *Miller-Shugart* settlement agreement between the marina and Lambert was reasonable and enforceable against United Fire. The district court also issued an amended order for judgment removing Lambert as the judgment debtor and naming United Fire as the judgment debtor for the judgment entered against Lambert on July 18, 2016. United Fire filed posttrial motions for a new trial or for amended findings, which the district court

denied. The district court also denied the marina's motion for pre- and post-judgment interest. These appeals follow.[3]

ISSUES

I. Did the district court err in determining that Lambert had insurance coverage for the claims and damages asserted by the marina and settled in the *Miller-Shugart* settlement agreement?

II. Did the district court err in determining that the *Miller-Shugart* settlement agreement was reasonable and prudent despite its lack of allocation between covered and non-covered damages?

ANALYSIS

I.

A. Standard of Review

United Fire challenges the district court's grant of partial summary judgment in the marina's favor. Summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01.[4] On appeal from summary judgment, a reviewing court reviews *de novo* whether there are any genuine issues of material fact and whether the

[3] United Fire asserts on appeal that (1) the district court erred by granting the marina leave to serve and file a supplemental complaint against United Fire as garnishee, and (2) the district court abused its discretion by denying United Fire's motion for a new trial or amended findings. By notice of related appeal, the marina also argues that the district court erred by denying its request for an award of pre- and post-judgment interest. Because we reverse and remand for the reasons stated in this opinion, we do not address the additional arguments raised by the parties.

[4] The district court applied the former version of rule 56 which at the time was Minn. R. Civ. P. 56.03. The rule was recently "revamped" to more "closely follow" the federal rules and was renumbered to Minn. R. Civ. P. 56.01. Minn. R. Civ. P. 56 2018 advisory comm. cmt.

district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). The interpretation of an insurance policy is a question of law subject to *de novo* review. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006).

B. Existence of Policy Coverage

Where both the scope of an insurance policy's coverage and the enforceability of a *Miller-Shugart* settlement agreement are at issue, we first consider the scope of the coverage. *Alton M. Johnson Co.*, 463 N.W.2d at 278-79. "If there is found to be no coverage for the *Miller-Shugart* judgment, that ends the matter; there is no recovery against the insurer and the reasonableness of the settlement becomes a moot issue." *Id.* The marina, as the party seeking to enforce the *Miller-Shugart* settlement agreement, had the burden of demonstrating that claimed damages are covered by United Fire's insurance policies. *See Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 736 (Minn. 1997) (discussing burden of proof on coverage).

When interpreting insurance policies, a reviewing court applies general principles of contract interpretation. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). "If the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning." *Travelers Indem. Co.*, 718 N.W.2d at 894. "Coverage provisions are construed according to the expectations of the insured." *Id.* "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." *Id.*

The policy language at issue in United Fire's Commercial General Liability Coverage Form, provides as follows:

> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.
>
> . . . .
>
> b. This insurance applies to 'bodily injury' and 'property damage' only if:
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory[.]"

"Property damage" is defined as "physical injury to tangible property," including "all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined by the insurance policy.

The district court concluded that the marina suffered "property damage," and that the damage was caused by an "occurrence." With regard to "property damage," the district court concluded that there is "clearly 'physical injury to tangible property' arising from the actions of Lambert and the subcontractors working on its behalf," including water intrusion in the walls and roof, the cracking and chipping of the concrete on the first and second floors, and related damage. The district court determined that this damage "clearly meet[s]

the definition of 'property damage' under the policies." In light of this determination, the district court concluded that there was coverage under United Fire's policy.

On appeal, United Fire argues that Lambert's poor workmanship and failure to fulfill its contractual duties does not constitute an occurrence of property damage. We disagree. An independent investigation into the causes of the construction defects at the property concluded that construction deficiencies "allow[ed] significant interior moisture laden air to infiltrate into the walls or attics." Because the moisture could not dry completely, the trapped moisture in the insulated spaces "create[d] several problems, including staining, dripping, degradation of the thermal performance and the effective service life of the insulation system and corrosion of metal components." Additionally, the defects potentially caused "undesirable microbial problems such as staining that appeared to be organic growth and odors." The investigation also uncovered cracks in the concrete floors as "a result of shrinkage during the initial drying process" caused by "the omission of control joints and welded wire fabric reinforcement in the concrete." We discern no error in the district court's determination that the marina suffered "property damage" as defined by the terms of the insurance policy.

With regard to whether the damage was caused by an "occurrence," United Fire argues that the property damage arose as a result of Lambert's failure to perform its work completely and properly. Lambert acknowledged that it did not finish certain aspects of the construction work, including work related to the window trim. United Fire argues that Lambert's failure to complete its work does not constitute an "accident," and therefore cannot be an "occurrence." Minnesota courts define the term "accident" under a

commercial general liability policy as an "unexpected, unforeseen or undesigned happening or consequence." *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001); *see also Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 611 (Minn. 2012). Further, "where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional." *Am. Family Ins. Co.*, 628 N.W.2d at 612. Such determinations are made through a "case by case factual inquiry." *Id*. at 613.

The district court's opinion was informed by the *Remodeling Dimensions* case, which held that moisture damage resulting from "continuous or repeated exposure" to water intrusion into a building constitutes an "occurrence" under a commercial general-liability insurance policy similar to the policy at issue here. 819 N.W.2d at 611. Applying *Remodeling Dimensions* to undisputed facts of this case, the district court found that the "occurrences" at the marina's main building "were the result of 'continuous or repeated exposure to substantially the same general harmful conditions.'" The district court rejected United Fire's argument that the damages were caused by Lambert's "intentional deviation" from the construction plans, noting that there was no evidence that Lambert intended to cause harm or property damage to the marina's main building.

Damage resulting from "grossly, obviously defective workmanship" or "obvious violations of contract standards of workmanship are not 'unexpected,'" and an insured cannot be covered for such results. *Johnson v. AID Ins. Co. of Des Moines, Iowa.*, 287 N.W.2d 663, 664-65 (Minn. 1980). But here, Lambert did not make "willful and knowing violations of contract specifications" or of expected standards of workmanship. *See id*. (noting that insured contractor's willful and knowing violations of contract specifications

and expected standards of workmanship did not constitute "occurrence" under standard liability insurance-policy language); *see also Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450, 452-53 (Minn. 1977) (reasoning that contractor's faulty work constituted an "occurrence," where contractor's work "was perhaps negligent, but not reckless or intentional"). Thus, the district court determined that "[a]s it is undisputed that Lambert did not intend to cause property damage to the building, there are 'occurrences' as defined by the policy." Because the district court found that there were "occurrences" resulting in "property damage," it concluded that United Fire's insurance policy provided coverage for the marina's damages. We discern no error in this determination.

C. Existence of Policy Exclusion

"If the insured meets its burden of establishing coverage of the claim, the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense." *Remodeling Dimensions*, 819 N.W.2d at 617. "Insurance contract exclusions are construed narrowly and strictly against the insurer, and, like coverage, in accordance with the expectations of the insured." *Travelers Indem. Co.*, 718 N.W.2d at 894 (citation omitted).

United Fire's insurance policy provides that property damage coverage is limited by 12 exclusions. United Fire argued that exclusions j(5), j(6), *l*, and m—known as the "business risk exclusions"—bar coverage for damages arising out of Lambert's work at the marina. The district court rejected United Fire's argument and concluded that none of the policy exclusions applied. We reverse the district court with respect to the applicability of exclusion l, which excludes coverage for damages arising from Lambert's own work.

"Generally, a business-risk exclusion is predicated on the business-risk doctrine, which excludes coverage for property damage caused by the insured's 'faulty workmanship' where the damages claimed are the cost of correcting the work itself." *Remodeling Dimensions*, 819 N.W.2d at 611. In exclusion *l*, United Fire's insurance policy excludes coverage for damages associated with Lambert's work. This provision excludes coverage for:

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Under the terms of the insurance policy, "you" and "your" refer to Lambert. The term "Your work" is defined as "work or operations" performed by the insured, or on the insured's behalf, along with "[m]aterials, parts or equipment furnished in connection with such work or operations." It also includes "warranties or representations." This provision also includes work arising out of or related to the products-completed operations hazard. The products-completed operations hazard includes, with certain exceptions, "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work.'" The Minnesota Supreme Court has explained that

> [a] comprehensive general liability policy provides protection to an insured, generally a contractor, under premises-operations coverage, who performs work at various locations but once such operation has been completed, as defined, it is excluded under the policy and if the insured requires liability protection from losses that may occur from its work product it

> then must carry completed *operations coverage* or else it is without protection.

R.E.M. IV, Inc. v. Robert F. Ackermann & Assocs., Inc., 313 N.W.2d 431, 435 (Minn. 1981) (quoting 7A John Alan Appleman, *Insurance Law & Practice* § 4508.03 (1979)).

Minnesota caselaw analyzing the "your work" exclusion under the business-risk doctrine recognizes that it bars coverage for the costs associated with repairs of the insured's defective work, such that there is no coverage for costs incurred during the "repair" or "redoing" of the insured's defective work. *See Corn Plus Coop. v. Cont'l Cas. Co*., 516 F.3d 674, 680 (8th Cir. 2008) (citing *Bright Wood Corp. v. Bankers Standard Ins. Co*., 665 N.W.2d 544, 548-49 (Minn. App. 2003) (barring coverage for damages associated with the cost of repairing or replacing an insured's defective product or work)); *see also* 22 Britten D. Weimer, Clarance E. Hagglund & Andrew F. Whitman *Minnesota Practice*, § 5:11 (2018 ed.)

Here, any costs associated with repairing or replacing Lambert's faulty work are barred by exclusion *l*. It is uncontested that Lambert's work included supplying and installing the exterior metal roof and metal wall paneling, as well as supplying the metal insulation, vapor barrier, steel girders, and wood flooring. Lambert also framed window openings and installed trim materials around exterior windows. The record establishes that Lambert—rather than its subcontractors—performed this work. Further, the *Miller-Shugart* settlement agreement states that "Lambert performed all Roofing and Siding work and operations on the project," and the "[t]otal cost of repair damages related to the Roofing and Siding work by Lambert, as opposed to work and operations by any other defendants,

is determined by taking the Roof and Siding damage amounts plus a proportionate share of the general damages." As it is uncontested that the marina's claimed damages arose at least in part out of Lambert's work, any damages associated with repairing Lambert's work are excluded from insurance coverage under the plain language of exclusion *l*. *See Corn Plus Coop.*, 516 F.3d at 680. The district court erred by failing to apply exclusion *l* to bar coverage for this aspect of the marina's claims.

Exclusion *l* includes an exception, stating that "[t]his exclusion does not apply if the damaged work, or the work out of which the damage arises was performed on your behalf by a subcontractor." The marina bears the burden of establishing that the subcontractor exception to the exclusion applies. *See Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013) (discussing burden of proof for exception to exclusion). The district court held that exclusion *l* does not bar coverage for the damage to the marina's property because "[t]he concrete work was performed by Roehl Construction, which subcontracted with Lambert." The district court reasoned that "[t]he subcontractor exception to the 'your work' exclusion has been recognized as restoring coverage to claims that would otherwise be excluded as property damage to the insured's own work." *See O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99, 104-05 (Minn. App. 1996) (determining there was coverage under commercial general liability policy when damage to insured's work was caused by work performed on insured's behalf by subcontractor), *review denied* (Minn. Mar. 28, 1996). The record demonstrates that Roehl was Lambert's only subcontractor, and that Roehl performed concrete work on the building. However, the *Miller-Shugart* settlement agreement is limited to roofing and

siding performed by Lambert, and specifically excluded the concrete work performed by Roehl. Thus, the subcontractor exception to exclusion *l* does not apply to the claims at issue in the *Miller-Shugart* settlement agreement.

Moreover, the district court failed to distinguish between damages directly caused by Lambert's work, and damages arising from Lambert's work that were not part of the scope of work Lambert was hired to perform. Specifically, the marina asserted that it suffered damage to existing sheetrock, tiles, carpet, and the floor. A claim for damages caused by Lambert's work to preexisting structures located adjacent to the work performed by Lambert would, if proven, be covered under the insurance policy and not excluded by exclusion l. *See Remodeling Dimensions*, 819 N.W.2d at 612 (holding that a "your work" exclusion did not apply to preclude coverage for damage caused to preexisting adjacent walls and structures that were not otherwise part of contractor's work).

Because the district court erred by failing to apply exclusion *l* to at least some of the marina's claims and damages, and because the subcontractor exception to exclusion *l* does not apply, the district court erred in its coverage determination.[5]

II.

Following approval of a *Miller-Shugart* settlement agreement, in addition to coverage, the insurer may challenge the validity and reasonableness of the settlement. *See Miller*, 316 N.W.2d at 733-35 (establishing insurer's right to challenge *Miller-Shugart*

[5] Because our determination that the district court erred by concluding that exclusion *l* did not bar coverage resolves this appeal, we do not consider whether the marina's damages are barred under exclusions j(5), j(6), or m.

settlement in garnishment or declaratory-judgment proceeding); *see also Alton M. Johnson Co.*, 463 N.W.2d at 279 (addressing reasonableness of *Miller-Shugart* settlement). The insurer is permitted to challenge reasonableness after approval of the settlement 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. The district court has broad discretion to conduct an objective inquiry into the overall reasonableness of the *Miller-Shugart* settlement agreement. *Alton M. Johnson Co.*, 463 N.W.2d at 279 ("The test as to whether the settlement is reasonable and prudent is what a reasonably prudent person in the position of the [insurer] would have settled for on the merits of [claimant's] claim.").

In June 2016, Lambert and the marina entered into a *Miller-Shugart* settlement agreement in which Lambert confessed judgment in the marina's favor for $2 million, plus interest. The settlement covered the marina's damages "for the work provided by Lambert, including the roof and siding of the Main Building." The district court approved the settlement agreement in July 2016, determining that the agreement was reasonable. The district court noted that Lambert "fac[ed] the possibility of substantial damages" and that, by settling, Lambert "avoid[ed] the possibility of a jury awarding damages which might put [the company] out of business because United Fire was contesting their duty to defend and indemnify." The district court further stated:

> The *Miller/Shugart* agreement was entered into on June 23, 2016, almost a year after the filing of the declaratory judgment action. For all of that time, and until the court found that United Fire had an obligation to defend and indemnify Lambert by its order of April 24, 2017, Lambert was exposed to the

> potential of up to $5.2 million in damages, without insurance to cover the potential damage award. A high jury verdict could have easily put Lambert out of business, depriving him of his livelihood. Faced with conflicting opinions [regarding the scope of damages], and in light of the potential damages facing him, the court finds that the $2,000,000 agreed upon in the *Miller/Shugart* agreement was entirely reasonable from the perspective of Lambert.

A *Miller-Shugart* settlement agreement is invalid and unenforceable when the parties fail to allocate liability and damages among various defendants. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 331 (Minn. 1993). The *Useldinger* decision reasoned that "[w]ithout knowing what each defendant has agreed to pay as its share, there is no way of judging the reasonableness or prudence of the agreement from the standpoint of each defendant." *Id*. at 331. Relatedly, the Eighth Circuit has applied *Useldinger* to conclude that a *Miller-Shugart* settlement agreement that encompasses both covered and non-covered damages under the insured's commercial general-liability insurance policy, but fails to allocate between covered and non-covered damages, is also unreasonable as a matter of law. *Corn Plus Coop.*, 516 F.3d at 681 ("[F]ailure to allocate the settlement amount by damage item precludes enforcement of a Miller-Shugart agreement consisting of covered and non-covered claims.").

As discussed above, Lambert's insurance policy with United Fire expressly excluded coverage under exclusion *l* for damages arising from Lambert's own work. Under the terms of the insurance policy, United Fire is not responsible for repair or replacement costs incurred as a result of Lambert's own defective work. However, the district court failed to distinguish between repair-and-replacement damages caused by

work Lambert was hired to perform—to which exclusion *l* applies—and damages to adjacent structures that were not caused by, though arising from, Lambert's construction work. Accordingly, the parties were required to identify those covered and non-covered damages in their *Miller-Shugart* agreement.

The marina, as the party seeking to enforce the *Miller-Shugart* settlement agreement, bears the burden of establishing this allocation between covered and non-covered damages. *See Ebenezer Soc'y. v. Dryvit Sys., Inc.*, 453 N.W.2d 545, 549 (Minn. App. 1990) (holding that party who fails to allocate in settlement agreement for covered and non-covered claims cannot establish probable cause). The *Miller-Shugart* settlement agreement in this case does *not* allocate between covered and non-covered damages. A settlement agreement that "encompassed settlement of claims for some damages for which there was no coverage and . . . failed to allocate the settlement amount among covered and non-covered claims" is "unenforceable as a matter of law." *Interlachen Props., LLC v. State Auto Ins. Co.*, 275 F. Supp. 3d 1094, 1111 (D. Minn. 2017) (citing *Corn Plus Coop.*, 516 F.3d at 681).[6]

Because the *Miller-Shugart* settlement agreement did not allocate between covered and non-covered damages, it is unreasonable as a matter of law. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.

[6] Although not precedential authority, we find the reasoning in *Interlachen* persuasive. *See Hinckley Square Assocs. v. Cervene*, 871 N.W.2d 426, 430 (Minn. App. 2015) (noting that federal law is not binding on Minnesota courts but may be persuasive).

D E C I S I O N

The district court erred in granting partial summary judgment on coverage in the marina's favor because an exclusion to the insurance policy, exclusion *l*, applies to the facts of this case and excludes certain damages caused by Lambert's work. Further, as the *Miller-Shugart* settlement agreement fails to allocate between covered and non-covered damages, it is unreasonable as a matter of law and unenforceable against the insurer. We therefore reverse and remand.

Reversed and remanded.