STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1537

Midwest Family Mutual Insurance Company,
Appellant,

vs.

Steven S. Cummings, et al.,
Respondents,

Business Impact Group, LLC,
Respondent,

Cokem International, Ltd., et al.,
Respondents,

The Hartford, et al.,
Defendants.

Filed May 23, 2011
Affirmed in part and reversed in part
Kalitowski, Judge

Carver County District Court
File No. 10-CV-09-209

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Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

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

KALITOWSKI, Judge

In this declaratory-judgment action, appellant Midwest Family Mutual Insurance Company challenges the district court's determination that it has a duty to defend and indemnify respondents Steven Cummings, Vicki Cummings, and Shamrock Storage LLC. Midwest also challenges the denial of its posttrial motions. Because we conclude that Midwest's policies exclude Shamrock Storage from coverage but cover Steven and Vicki Cummings and that the doctrines of reasonable expectations and illusory coverage are inapplicable, we affirm in part and reverse in part.

FACTS

On July 2, 2008, a warehouse owned by respondent Steven Cummings and leased to respondent Shamrock Storage LLC burned down. Steven Cummings is the sole owner of Shamrock Storage. At the time of the fire, Steven Cummings and Shamrock Storage were separately named insureds on a business owner's policy and a commercial-liability umbrella policy issued by appellant Midwest Family Mutual Insurance Company (Midwest). Midwest paid Steven Cummings and Shamrock Storage approximately $2.9 million for the loss of the warehouse based on the building coverage in the business owner's policy.

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

Respondents Cokem International Ltd., Teton Acquisitions LLC, RNR Inc., and Business Impact Group LLC (BIG) stored goods inside the warehouse. Their property was destroyed in the fire. BIG sued Steven Cummings, his wife Vicki Cummings, and Shamrock Storage for negligence. Cokem International, Teton Acquisitions, and RNR intervened, asserting various theories of negligence and fraudulent conveyance.

Midwest appointed defense counsel for Steven and Vicki Cummings and Shamrock Storage in the underlying negligence suit. It then initiated this declaratory-judgment action, claiming that it owes no duty to defend or indemnify Steven and Vicki Cummings or Shamrock Storage under its policies.

Before trial in the declaratory-judgment action, Steven and Vicki Cummings and Shamrock Storage moved to add their insurance agent, Joe Carson, and his agency, Hornig Insurance Agency Inc., as third-party defendants and to assert a negligence claim against them. The district court denied the motion.

After a bench trial, the district court concluded that Midwest had a duty to defend and indemnify Steven and Vicki Cummings and Shamrock Storage, invoking two equitable doctrines. Midwest moved for a new trial and for amended findings. The district court denied the motions, and Midwest appeals from the declaratory judgment against it and the denial of its posttrial motions.

D E C I S I O N

Interpretation of an insurance policy and the existence of a duty to defend or indemnify an insured are questions of law, which we review de novo. *Wanzek Constr., Inc. v. Emp'rs Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004); *Franklin v. W. Nat'l*

Mut. Ins. Co., 574 N.W.2d 405, 406 (Minn. 1998). If the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). Ambiguities affecting coverage are resolved in favor of the insured. *Progressive Specialty Ins. Co. v. Widness by Widness*, 635 N.W.2d 516, 518 (Minn. 2001). Once the insured establishes a prima facie case of coverage, the burden shifts to the insurer to prove the applicability of an exclusion. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009). And all "exclusions are construed strictly against the insurer." *Thommes*, 641 N.W.2d at 880.

An insurer's duty to defend its insured is broader than its duty to indemnify. *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997). The duty to defend extends to every claim that arguably falls within the scope of coverage; the duty to defend one claim creates a duty to defend all claims; and the duty to defend exists regardless of the merits of the underlying claims. *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006). To support a declaration that the insurer has no duty to defend, the insurer has the burden to show that all parts of the cause of action fall clearly outside the scope of coverage. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165-66 (Minn. 1986), *as amended* (Minn. May 12, 1986).

In reviewing a question of law de novo, we must apply the facts as found by the district court unless those factual findings are clearly erroneous. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). "If there is reasonable evidence to support

the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

I.

We first address coverage for Shamrock Storage and Steven Cummings by examining the language of the policies. Midwest's business owner's policy and commercial-liability umbrella policy state:

> Separation Of Insureds
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this [policy] to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought.

Because the policies contain this severability clause, we must determine coverage for Shamrock Storage and Steven Cummings independently. *See Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006) (*Bloomington Steel*) (stating that "a severability clause requires that coverage exclusions be construed only with reference to the particular insured seeking coverage").

Business Owner's Policy

The business owner's policy contains a special-property-coverage form and a liability-coverage form. The relevant language in the liability-coverage form is nearly identical to the language of the umbrella policy and is reviewed with the umbrella policy. The special-property-coverage form states:

> A. Coverage
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
>
> 1. Covered Property
>
> Covered Property, as used in this policy, means the following types of property for which a Limit of Insurance is shown in the Declarations:
>
> a. Buildings, meaning the buildings and structures at the premises described in the Declarations . . . .
>
> b. Business Personal Property located in or on the buildings at the described premises . . . , including:
>
> . . .
>
> (2) Property of others that is in your care, custody, or control . . . .

The supplemental-declarations page lists five covered buildings: three buildings on the premises where the fire occurred, and two buildings—each on a separate premises—in a different city. The "coverages" section of the declarations page lists all the buildings. Each of the buildings are described as having "Building - RC" coverage, with a different limit of insurance assigned to each building. The declarations page does not describe any other type of coverage or limit of insurance for the buildings.

The special-property-coverage form provides coverage for buildings and personal property only if a limit of insurance is listed on the declarations page for that type of property. The declarations page includes a limit of insurance only for building coverage. Because no limit of insurance is included for business personal property, the business owner's policy does not cover "[p]roperty of others that is in [Shamrock Storage's or Steven Cummings's] care, custody or control."

Our construction of the plain language of the policy is consistent with the testimony of Steven Cummings and Carson that Steven Cummings declined business-personal-property coverage. Carson testified that he circled the optional coverage for customer goods on the insurance-policy application form, that he discussed this optional coverage with Steven Cummings, and that Cummings declined the coverage because "he had a contract drawn up by an attorney that said that he takes care of the building and [the customers] take care of the contents." Steven Cummings confirmed that he decided not to pay for coverage for personal property, including customer goods, as part of his business owner's policy.

Business Owner's Liability-Coverage Form and the Commercial-Liability Umbrella Policy

The relevant terms of the business owners liability-coverage form and the commercial-liability umbrella policy are essentially the same and we review them together. There is no dispute that the fire is a covered "occurrence" under both policies. But Midwest argues that a policy exclusion and the definition of an insured operate to bar liability coverage for Shamrock Storage and Steven Cummings. Again, the severability clause requires us to review coverage for the two named insureds independently.

Coverage for Shamrock Storage

The parties agree that Shamrock Storage qualifies as an insured under the definition in the business owner's liability-coverage form and in the umbrella policy. But both policies contain an exclusion for property damage to "[p]ersonal property in the care, custody or control of the insured." This is a standard exclusion in general liability

insurance. Its purpose has been described as "prevent[ing] the general liability insurance from becoming tantamount to property insurance when property is in the hands of a bailee or lessee, or is otherwise in the custody and control of a named insured and therefore subject to damage or loss due to the named insured's own acts or omissions." 21 Eric Mills Holmes, *Holmes' Appleman on Insurance* § 132.9[B], at 146-47 (2d ed. 2002); *see also* 9 Steven Plitt et al., *Couch on Insurance* § 126:20 (3d ed. 2008) (consolidating cases describing purpose of exclusion).

In deciding whether a "care, custody or control" exclusion applies, courts should consider "(1) [w]hether the property is realty or personalty; (2) the location, size, shape, and other characteristics of the property; and (3) the insured's duties with respect to the property as a whole, the property damaged, and other workers." *Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450, 453 (Minn. 1977). This determination is primarily a question of fact. *Id.*

The district court found that Shamrock Storage operated the warehouse and had "care, custody or control" of respondents' property at the time of the fire. This finding is supported by Steven Cummings's trial testimony and is not contested on appeal. Consequently, we conclude that Midwest's liability policies do not provide Shamrock Storage with liability coverage for respondents' property.

Coverage for Steven Cummings

Steven Cummings is the sole owner of Shamrock Storage. Shamrock Storage's executive officers, directors, and stockholders are included as insureds through Shamrock Storage, but Steven Cummings is also listed as an individual insured. Midwest argues

that it is incorrect to analyze coverage for Steven Cummings in his different capacities as owner and landlord of the warehouse and as owner of Shamrock Storage. It argues instead that he has no coverage because he was the individual managing the warehouse on behalf of Shamrock Storage. But under Minnesota law, a limited-liability company is a separate legal entity from its members. Minn. Stat. §§ 322B.20 reporter's notes (West 1999); 322B.88 reporter's notes (West 1992). And the fact that Shamrock Storage takes action through Steven Cummings does not necessarily bar coverage for him as an individual distinct from his role in his business.

The supreme court considered a similar argument in *Bloomington Steel*. There, Travelers provided insurance to Bloomington Steel, a corporation of which Cecil Reiners was the sole shareholder. *Bloomington Steel*, 718 N.W.2d at 891-92. The policies included a severability clause and an exclusion for bodily injury "expected or intended from the standpoint of the insured." *Id.* at 892. Reiners assaulted another individual, who sued Reiners and Bloomington Steel. *Id.* at 891. Travelers argued that the intentional-act exclusion barred coverage because Reiners's expectation and intent must be attributed to Bloomington Steel as "the sole owner and operator of the corporation." *Id.* at 894-95. The supreme court rejected this assertion, stating that "Travelers explicitly acknowledged Bloomington Steel's separate status for coverage purposes when it issued the policies at issue here." *Id.* at 895. It remanded the case for the fact-finder to determine "whether Bloomington Steel, as an entity separate and distinct from Reiners, expected Reiners' assault" under general corporate legal principles. *Id.* at 897.

Applying *Bloomington Steel*, we conclude that the "care, custody or control" exclusion does not preclude coverage for Steven Cummings as a separate insured, in a capacity independent of Shamrock Storage, solely because he is excluded from coverage as an officer, director, or stockholder of Shamrock Storage. To decide otherwise would ignore the structure and purpose of limited-liability companies under Minnesota law.

We next address whether Steven Cummings was an insured in his capacities as owner and landlord of the warehouse. Both liability policies state that "[i]f you are designated in the Declarations as . . . [a]n individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner." Midwest argues that Steven Cummings does not qualify as an insured in any capacity except as owner of Shamrock Storage because (1) he does not operate a business other than Shamrock Storage; (2) no other business was disclosed to Midwest; and (3) to the extent that Steven Cummings operates a separate business, he is not its sole owner. We disagree.

First, the district court found that Steven and Vicki Cummings operated a commercial-real-estate business in addition to Shamrock Storage. Midwest challenges the district court's finding that the Cummingses acquired and managed commercial property as a business and operated it separately from Shamrock Storage, but we conclude that the district court's findings are supported by the record. The record shows that the Cummingses purchased commercial real estate to sell at a profit and to use for their storage business; that the Cummingses maintained separate bank accounts for Shamrock Storage; that the Cummingses leased each of the buildings to Shamrock

Storage; that Shamrock Storage did not hold title to the real estate; that Vicki Cummings maintained separate accounting records for Shamrock Storage's activity and the Cummingses' other business activities; and that Vicki Cummings received a W-2 from Shamrock Storage, which distinguished her role in that business from her position as co-owner of multiple commercial properties. The district court heard evidence that the real estate was depreciated on Shamrock Storage's tax schedules, which could undermine the separation of the two businesses, but it also heard evidence that where the real estate was depreciated had no tax consequence. It is for the fact-finder to reconcile conflicting evidence and the record does not show that the district court's findings on the Cummingses' separate commercial-real-estate business were "manifestly and palpably" wrong. *See Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 424-25, 108 N.W.2d 347, 351 (1961) (discussing standard for reviewing findings of fact).

Second, Midwest asserts that it was only aware of Shamrock Storage when it issued the policies and did not insure the conduct of a separate commercial-real-estate business. But Midwest compensated Steven Cummings and Shamrock Storage for the loss of the warehouse. Shamrock Storage did not own the warehouse; Steven Cummings therefore was only able to receive compensation as the owner of the warehouse because he was listed as an individual insured on the policies. And the policies listed the five properties owned by the Cummingses, all of which are leased to Shamrock Storage. Midwest understood that Steven Cummings owned multiple commercial properties and that it was insuring the risks incurred by the landlord of the buildings, e.g. damage to or loss of the structures. Moreover, covering the conduct of Steven Cummings's real-estate

business is consistent with the terms of Midwest's policies, which purport to cover the buildings described in the declarations. Midwest may have believed that the policy exclusions operated equally on Steven Cummings and Shamrock Storage. But the severability clause requires us to consider each insured separately and Midwest drafted the exclusion to apply to property in the care, custody or control of *the* insured rather than *any* insured. It is well-established that "[i]nsurance contract exclusions are construed narrowly and strictly against the insurer." *Bloomington Steel*, 718 N.W.2d at 894.

Third, Midwest argues that Steven Cummings is not an insured with coverage for the conduct of his real-estate business because Vicki Cummings co-owns two of the properties. But accepting this argument would make the provision including spouses as insureds a nullity. The policy definition of an insured includes spouses of named individual insureds, presumably because spouses have ownership interests in a business owned by the other spouse and could be liable for the business's actions, necessitating liability coverage for both spouses. *See* Minn. Stat. § 518.003, subd. 3b (2010) (defining marital property). Thus, reading this provision to bar coverage when a spouse has an interest in the business would mean that a married business owner would not be covered as an individually named insured because that spouse would rarely "solely own" the business. *See Doughty v. Insured Lloyds Ins. Co.*, 576 So. 2d 461, 462, 465 (La. 1991) (finding liability coverage under a policy with identical language when one spouse was a named insured and the other spouse co-owned the business through marital-property laws). We conclude that Vicki Cummings's co-ownership of two of the commercial properties does not bar coverage for Steven Cummings as an individually named insured.

Finally, Midwest argues that even if Steven Cummings qualifies as an insured separate from Shamrock Storage, he is nonetheless precluded from coverage by the care, custody or control exclusion. The district court found that Steven Cummings did not have "care, custody or control" of respondents' property as the owner and landlord of the warehouse. This factual finding is not clearly erroneous. Steven Cummings testified that his responsibilities as a landlord involved deciding whether to make improvements to the property, such as constructing a new building or adding electricity; that he exercised some control over the types of goods that could be stored in the warehouse; but that he had little involvement in the warehouse's operations after leasing it to Shamrock Storage.

In summary, we conclude that the district court did not clearly err when it found that Steven Cummings operated a separate commercial-real-estate business and that he did not have "care, custody or control" of respondents' property as the owner and landlord of the warehouse. Consequently, under the language of Midwest's policies, Steven Cummings is an insured and is not excluded from coverage. Midwest, therefore, has a duty to defend and indemnify Steven and Vicki Cummings for the conduct of their commercial-real-estate business, which includes owning and leasing the warehouse. Thus, we affirm this part of the district court's declaratory judgment.

II.

In finding coverage for Shamrock Storage and Steven Cummings, the district court relied in part on the equitable doctrines of reasonable expectations and illusory coverage. We consider the applicability of these doctrines in turn.

Reasonable Expectations

In applying the doctrine of reasonable expectations, the district court made several factual findings and legal conclusions about the actions of insurance agent Carson. But the district court denied the Cummingses' and Shamrock Storage's motion to add Carson as a third-party defendant and to assert a negligence claim against him. We therefore agree with Midwest that the district court should not have concluded that Carson and Steven Cummings had a special relationship and that Carson breached his duty to Steven Cummings. Carson was not a party to these proceedings and the district court erred in making factual findings and legal conclusions about Carson's duties and performance. We express no opinion on any possible future action involving Carson or Hornig Insurance Agency.

The doctrine of reasonable expectations allows "'[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts [to] be honored 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) (first alteration in original) (quoting Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970)).

Minnesota first adopted the doctrine in *Atwater*, in which the insureds purchased burglary insurance, and the policy defined "burglary" to require "evidence of forcible entry." *Id.* at 274. The supreme court applied the doctrine, reasoning that "no one purchasing something called burglary insurance would expect coverage to exclude skilled

burglaries that leave no visible marks of forcible entry or exit." *Id.* at 276. The supreme court also emphasized that this major exclusion was created in the definitions section of the policy. *Id.*

When considering whether to apply this doctrine, courts analyze "the reasonable expectations of the insured, along with such factors as whether the insured was told of important, but obscure, conditions or exclusions and whether the particular provision in the contract at issue is an item known by the public generally." *Id.* at 278. But the doctrine does not excuse an insured from reading the policy. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 48 (Minn. 2008). Further, the supreme court recently stated that the doctrine of reasonable expectations should be limited to

> its current use as a tool for resolving ambiguity and for correcting extreme situations like that in *Atwater*, where a party's coverage is significantly different from what the party reasonably believes it has paid for and where the only notice the party has of that difference is in an obscure and unexpected provision.

Id. at 49.

The district court here concluded that the inclusion of "[p]roperty of others that is in [the insured's] care, custody or control" as covered property in the special-property-coverage form of the business owner's policy and the exclusion of such property in the liability policies created an ambiguity. Whether an insurance policy is ambiguous is a question of law. *Am. Commerce Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224, 227 (Minn. 1996).

The special-property-coverage form states that business personal property constitutes "covered property" only if a limit of insurance is listed on the declarations page. This page includes limits of insurance for "building" coverage but not business personal property. And Steven Cummings testified that he declined personal-property coverage. Moreover, the "care, custody or control" exclusion in the liability policies is common and is regularly enforced. *See* Plitt, *supra*, § 126:20 (consolidating cases addressing this point). The optional coverage in the special-property-coverage form allowed Steven Cummings to purchase a specified amount of coverage to compensate for the general liability exclusion based on Midwest's willingness to underwrite the risk. We conclude that these policy provisions are not ambiguous.

Nor is the "care, custody or control" exclusion hidden or obscure. The exclusion is part of the exclusions section of both liability policies and was clearly designated as such. *See Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 891 (Minn. 1994) (rejecting argument that pollution exclusion was hidden or obscure when it was clearly designated as an exclusion in the policy). "Where a policy exclusion lies in the 'exclusion' section of a policy, . . . it is not hidden and . . . the insured should therefore reasonably expect the clause to limit coverage." *Frey v. United Servs. Auto. Ass'n*, 743 N.W.2d 337, 343 (Minn. App. 2008).

Because the "care, custody or control" exclusion is neither ambiguous nor hidden, application of the reasonable-expectations doctrine to invalidate the exclusion would expand the scope of this doctrine beyond what the supreme court approved in *Carlson*.

We conclude that it was error to find coverage for Shamrock Storage or Steven Cummings under the doctrine of reasonable expectations.

Illusory Coverage

The doctrine of illusory coverage is based on the premise that "[l]iability insurance contracts should, if possible, be construed so as not to be a delusion" to the insured. *Motor Vehicle Cas. Co. v. Smith*, 247 Minn. 151, 157, 76 N.W.2d 486, 490-91 (1956). The illusory-coverage doctrine, like the reasonable-expectations doctrine, qualifies the general rule that courts will enforce an insurance contract as written. *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). "[T]he doctrine of illusory coverage is best applied . . . 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.

In concluding that the doctrine of illusory coverage applied, the district court relied on its factual finding that the premium included a charge for "liability insurance which was included in the 55 cent base rate and an additional charge of 4 cents per thousand for a higher level of liability coverage." But this charge is explained because the record shows that the rate of $.55 per thousand square feet was the premium charged for the standard limit of $300,000 of liability coverage per occurrence and the additional $.04 per thousand square feet was to increase the liability coverage to $1,000,000.

There is no allegation that business owner's liability coverage as a whole was nonexistent. The base premium purchased a standard amount of liability coverage, subject to the exclusions listed in the policy. Steven Cummings chose to pay an

additional premium to increase the amount he could be compensated for a single occurrence. The additional premium was not allocated misleadingly to a new form of coverage and was not described as compensating for a policy exclusion; it simply increased the policy limit. The record shows that each premium amount purchased a specific level of liability coverage; consequently, we conclude that the doctrine of illusory coverage does not apply.

Because the doctrines of reasonable expectations and illusory coverage do not apply here, we conclude that the district court erred in determining that Shamrock Storage was entitled to coverage in the face of policy language to the contrary. Midwest, therefore, has no duty to defend or indemnify Shamrock Storage in the underlying action. Accordingly, we reverse this part of the district court's declaratory judgment.

III.

Finally, we address Midwest's challenge to the district court's denial of its motions for amended findings and a new trial. An appellant must show both error and prejudice resulting from the error before reversal is warranted. Minn. R. Civ. P. 61 (stating that harmless error is to be ignored); *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that "error without prejudice is not ground for reversal" (quotation omitted)). Where the findings necessary for a legal conclusion are adequately supported, a court's inclusion of other unsupported findings is harmless error. *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979).

In reviewing the district court's judgment, we examined those factual findings that were relevant to the judgment and concluded that they were not clearly erroneous. To the

extent that any of the other findings Midwest challenges are erroneous, the errors are harmless and further review is unnecessary. Because we conclude that the district court's findings and conclusions regarding Carson were in error and because we reverse the district court's judgment that Midwest has a duty to defend and indemnify Shamrock Storage, we need not address Midwest's arguments that a new trial is necessary on these grounds.

Affirmed in part and reversed in part.