STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0703

Homestead Hills Homeowner Association,
Appellant,

vs.

American Family Mutual Insurance Company,
Respondent.

Filed November 26, 2012
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Washington County District Court
File No. 82-CV-10-7204

Patrick D. Boyle, Minneapolis, Minnesota (for appellant)

Stephen P. Laitinen, Mark A. Solheim, Larson King, LLP, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kirk, Judge; and Harten, Judge.*

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

KIRK, Judge

In this property insurance dispute, appellant challenges the district court's grant of summary judgment in favor of respondent, arguing that genuine issues of material fact

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

remain in dispute regarding both the cause of the damage and the applicability of the "concealment" exclusion to coverage. Appellant also argues that the district court abused its discretion by denying appellant's motions for leave to amend the complaint and to amend the scheduling order. We affirm in part, reverse in part, and remand.

FACTS

Wind and hail were reported in Washington County on July 24, 2009. Approximately two weeks later, a member of appellant Homestead Hill Homeowners Association notified Homestead that the July storm had dislodged a significant quantity of shingle granules from his home's roof. Based on this information, Homestead submitted a claim to its insurer, respondent American Family Insurance Company.

During an initial inspection, an American Family adjuster inspected five of Homestead's 34 roofs and concluded that Homestead's roofs had been damaged by hail. A representative of BEI Exterior Maintenance Corporation observed the inspection on behalf of Homestead. The BEI representative informed American Family's adjuster that he agreed with the adjuster's assessment.

The next day, a supervising adjuster from American Family led a second inspection of three additional roofs. After the inspection, the supervising adjuster stated that a manufacturing defect had caused the shingles to deteriorate and there was no hail damage. The supervising adjuster also stated that the prior assessment was incorrect and the five initial roofs were damaged by a manufacturing defect, not hail. The initial adjuster was present for the second inspection and "never disagreed with any statements

made by the [s]upervisng [a]djuster."[1] Shortly thereafter, American Family declined to cover Homestead's reported loss.

The following spring, Homestead sought additional review of its claim and coverage to replace its roofs. Homestead mentioned issues with its roofs, including that "the style of roof in place that was manufactured by CertainTeed is no longer made and further at the time these roofs were installed there were different minimum building code standards that these roofs no longer meet; particularly as it relates to ice and water shield along the eaves and within the valleys." In reply, American Family reaffirmed its position that Homestead had sustained no storm-related damage and requested a "detailed and itemized estimate documenting the cause of loss and the cost of repairs." Homestead subsequently authorized American Building Contractors, Inc. (ABC) "to perform an inspection and valuation of the cost to repair [its] Covered Property as a result of the [July storm]." ABC estimated the cost of such repairs at more than one million dollars. In July 2010, American Family invoked the policy's appraisal provision and the parties began the appraisal process.

On August 18, 2010, Homestead received a letter from its shingle manufacturer, CertainTeed Corporation, offering to settle a warranty claim by providing materials to

[1] The BEI representative asserts that he "did not state an opinion as to whether or not [he] agreed with the [s]upervising [a]djuster's conclusions."

replace Homestead's roofs.[2] CertainTeed's release specifically declines to admit liability and includes a confidentiality clause.[3]

In November 2010, Homestead initiated this action. The district court established September 2, 2011 as the deadline for disclosing expert witnesses and their opinions and November 2, 2011 as the close of discovery. On August 2, 2011, Homestead moved to amend the complaint to add a claim for bad-faith denial of coverage and for summary judgment on count IV of its amended complaint. This count sought a declaratory judgment that:

> a. The Storm constitutes a Covered Cause of Loss to Homestead's Covered Property, Am. Fam. is contractually obligated by the Policy to pay for direct physical loss of or damage to Homestead's Covered Property caused by or resulting from the Storm; and
> b. No proper and legitimate basis exists for Am. Fam. to deny Homestead's Claim.

On August 15, with these motions pending, Richard Herzog, a registered roof consultant and meteorologist with Haag Engineering, submitted a 10-page report, plus attachments and photographs, to American Family. The report, prepared after three inspections of Homestead's roofs, concluded that "[t]here was no hail-caused damage to shingles" on Homestead's roofs and "[n]o hail-related repairs were needed to the shingles."

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[2] The record does not establish when Homestead submitted the warranty claim.

[3] This confidentiality clause provides: "The Releaser agrees to keep the terms and conditions of this Release completely confidential. The Releaser may disseminate the terms of this Release only: (i) as necessary for internal administrative purposes; and (ii) to its legal and tax advisors for the purposes of legal or tax advice. . . . This provision does not prohibit disclosure of information compelled by legal process or otherwise required by law. . . ."

On October 14, in response to an interrogatory, Homestead disclosed the existence of the August 2010 CertainTeed release offer. Homestead sent the release offer to American Family; American Family received the document one day before the close of discovery. On November 18, American Family moved for summary judgment. With its motion, American Family submitted a four-page affidavit from its expert, Herzog, stating that the CertainTeed release offer "would enable [Homestead] to replace all existing roof shingles at the 34 buildings."

On November 30, the district court ruled on Homestead's August 2 motions, denying the motion to amend the complaint and granting the motion for partial summary judgment "only as follows: Homestead is entitled to a Declaration that Homestead's buildings are Covered Property." It denied the motion "in all other respects." On December 13, Homestead moved to amend the scheduling order to allow it to depose Herzog. Following a hearing, the district court denied the motion.

On March 12, 2012, concluding that there was insufficient evidence to infer that Homestead's roofs were damaged by hail and that American Family had established certain policy exclusions as a matter of law, the district court granted American Family's November 18 motion for summary judgment. This appeal followed.

D E C I S I O N

I. The district court erroneously granted summary judgment in favor of American Family.

Homestead challenges the district court's grant of summary judgment in favor of American Family, arguing that genuine issues of material fact remain in dispute

regarding both the cause of the roof damage and the applicability of the "concealment" exclusion to coverage. Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the 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). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. Rather, a party opposing summary judgment "must demonstrate that there are specific fact issues in existence which create a genuine issue for trial." *Sphere Drake Ins. Co. v. Tremco, Inc.*, 513 N.W.2d 473, 477 (Minn. App. 1994), *review denied* (Minn. Apr. 28, 1994). Evidence that "merely creates a metaphysical doubt as to a factual issue" is not sufficient. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

A. Cause of damage.

It is undisputed that on July 24, 2009, a storm occurred in the general vicinity of Homestead's property. It is also undisputed that Homestead's roofs are damaged. But the parties dispute whether the storm caused the roof damage. The district court found that (1) "Homestead's evidence is simply not sufficient to infer that hail from the July

2009 storm was a cause of direct damage to its roofs," and (2) American Family established the roofs were damaged by a combination of neglect, wear and tear, and hidden or latent defects. Because the district court found that there is no genuine issue of material fact regarding the cause of the roof damage, it concluded that Homestead failed to establish a prima facie case for coverage and American Family established exclusions to coverage based on the cause of the damage. Homestead challenges the district court's grant of summary judgment on these grounds.

To survive a motion for summary judgment, Homestead need only present evidence that a genuine issue of material fact exists as to whether the damage to the roofs was caused by the July storm; it need not prove that the storm actually caused the damage. *See Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995). As evidence that its roofs were damaged by the storm, Homestead submitted multiple pieces of evidence to the district court. Homestead submitted a printout from the National Weather Service reporting wind and hail near its property on July 24, 2009.[4] Homestead submitted affidavits from its property manager and the president of its board of directors, each stating that "[o]n or about July 24, 2009, Homestead fell victim to a severe wind and hail storm," and approximately two weeks after the storm, a Homestead property owner "reported that he had collected a significant quantity of shingle granules dislodged from the shingles of his home as a result of the

[4] The record establishes that Homestead's property is located in Woodbury, near Cottage Grove. The printout reports hail in Woodbury and Cottage Grove and wind near Cottage Grove.

[July storm.]" Homestead submitted an article to explain the connection between hail and the loss of shingle granules.[5]

Homestead also submitted an affidavit from the BEI representative who observed American Family's August 2009 inspections. The affiant states that, after inspecting five roofs, both the BEI representative and American Family's initial adjuster concluded that Homestead's roofs had been damaged by hail from the July storm. He also states that American Family's supervising adjuster dismissed this conclusion without inspecting any of the five roofs inspected the previous day.

The affidavit of the president of Homestead's board of directors states that Homestead hired ABC "to satisfy American Family's request" for "a detailed and itemized estimate documenting the cause of loss and the cost of repairs." Homestead submitted an affidavit from ABC's vice president of operations that states that he personally "performed an inspection of the damage to Homestead's [p]roperty" and estimated the cost of repairing damage resulting from the July storm. Homestead submitted this estimate, which ABC described as its "estimate for Homestead Hills storm damage claim."

Viewed in the light most favorable to Homestead, the record establishes that Homestead presented evidence of a genuine issue of material fact as to whether the damage to the roofs was caused by the July storm. Thus, the district court erred as a matter of law by granting summary judgment in favor of American Family on this ground. *See* Minn. R. Civ. P. 56.03.

[5] Herzog, American Family's expert, is one of the article's joint authors.

B. Concealment exclusion.

The district court also determined that, because Homestead did not disclose the CertainTeed release offer for approximately 14 months, as a matter of law, American Family established an exclusion based on concealment. Homestead challenges this conclusion.

The exclusion at issue provides, in relevant part:

> This policy is void . . . if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:
> 1. This policy;
> 2. The Covered Property;
> 3. Your interest in the Covered Property; or
> 4. A claim under this policy.

The parties dispute whether the CertainTeed release offer, which declines to admit liability but offers replacement materials without charge, constitutes a material fact. Without determining the offer's materiality, we conclude that there is a genuine issue of material fact regarding the applicability of the concealment exclusion. Under the clear language of the policy, the exclusion applies only to *intentional* concealment. Our careful review of the record suggests that Homestead did not intentionally conceal information regarding its shingles. Rather, the record demonstrates that American Family knew of the alleged defect since August 2009, approximately one week after Homestead filed its coverage claim and one year *before* CertainTeed's release offer. And Homestead repeatedly acknowledged various issues with its CertainTeed roofs. Moreover, Homestead disclosed the release offer during discovery—timing arguably mandated by the release offer's confidentiality clause. The district court erred as a matter

of law by granting summary judgment in favor of American Family on this ground. *See* Minn. R. Civ. P. 56.03.

II. The district court did not abuse its discretion by denying Homestead's motions.

Because we reverse and remand for trial, we address Homestead's additional challenges.

A. Motion to amend complaint.

Homestead challenges the district court's denial of its motion to amend its complaint to include a claim under Minn. Stat. § 604.18 (2010). We review the district court's decision to permit or deny amendments to pleadings for a clear abuse of discretion. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).

Minn. Stat. § 604.18 provides a discretionary remedy for the bad-faith denial of first-party insurance claims. Minn. Stat. § 604.18. An initial complaint "must not seek a recovery under this section." *Id.*, subd. 4(a). Rather, after filing suit, a party must move to amend the pleadings and establish prima facie evidence of "the absence of a reasonable basis for denying the benefits of the insurance policy" and "that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy." *Id.*, subds. 2(a), 4(a). The majority of states with statutes similar to Minn. Stat. § 604.18 have adopted a "fairly debatable" standard when evaluating an insurer's denial of benefits. *Friedberg v. Chubb & Son, Inc.*, 800 F. Supp. 2d 1020, 1025 n.1 (D. Minn. 2011).

Here, it is undisputed that in August 2009 an adjuster from American Family inspected five of Homestead's roofs and stated that "in his opinion, each of the five . . . roofs had suffered hail damage as a result of the [July storm.]" But it is also undisputed that, the following day, a supervising adjuster from American Family led a second inspection of three additional roofs. After the second inspection, the supervising adjuster determined that the initial adjuster "had been incorrect in his assessment." The supervising adjuster stated that the damage to Homestead's roofs was caused by a "manufacturing defect" in the shingles and there was "no hail damage that would result in a claim." The initial adjuster participated in the second inspection and "never disagreed with any statements made by the [s]upervising [a]djuster." In light of the supervising adjuster's explicit conclusion and the initial adjuster's implicit conclusion that Homestead's roofs were damaged by a manufacturing defect rather than hail, the district court did not clearly abuse its discretion by concluding that Homestead's hail damage claim was "fairly debatable," and thus Homestead failed to establish prima facie evidence in support of its motion. Homestead is not entitled to relief on this ground. *See* Minn. Stat. § 604.18.

B. Motion to amend scheduling order.

Homestead challenges the district court's denial of Homestead's motion to amend the scheduling order. The district court has broad discretion to amend scheduling-order deadlines, and we review its decision for an abuse of discretion. *Mercer v. Andersen*, 715 N.W.2d 114, 123 (Minn. App. 2006).

Homestead sought to amend the scheduling order "to extend the discovery deadline to allow for oral discovery or striking the Affidavit of Richard Herzog, dated November 9, 2011." In support of its motion, Homestead argued that American Family's November 18 motion for summary judgment "was based almost entirely on Mr. Herzog's newest interpretation (after the close of discovery) of documents relevant to this case." Homestead also alleged that American Family "went so far as to include an Affidavit from Mr. Herzog discussing his interpretation of these documents, which had been in [American Family's] possession for at least a month." But the record does not support these arguments.

First, in support of its November 18 motion for summary judgment, American Family relied primarily on Herzog's August 2011 report; it referenced Herzog's November affidavit only to establish that CertainTeed offered to replace *all* of Homestead's roof shingles.[6] In its motion to amend the scheduling order, Homestead admitted that it received Herzog's report in August 2011. This is more than two months before the close of discovery. Homestead also admitted that American Family disclosed Herzog as an expert witness in early September 2011, in conformity with the district court's scheduling order. Second, contrary to Homestead's assertion, American Family possessed the CertainTeed release offer—the subject of Herzog's November affidavit—

[6] The crux of Herzog's November affidavit is that, according to his calculations, the CertainTeed release offer "would enable [Homestead] to replace all existing roof shingles at the 34 buildings which are located at [Homestead]." On appeal, Homestead asserts that Herzog's November affidavit "presented a shifting set of values and conclusions that went beyond a simple math equation." But Homestead does not explain this assertion and we fail to see how Herzog's November affidavit conflicts with his August report.

only 17 days when it moved for summary judgment. The district court did not abuse its discretion by denying Homestead's motion to amend the scheduling order. Homestead is not entitled to relief on this ground.

Affirmed in part, reversed in part, and remanded.