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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-150**

Engineering & Construction Innovations, Inc.,
Respondent,

vs.

Western National Mutual Insurance Co.,
Appellant.

**Filed August 17, 2010
Reversed
Stoneburner, Judge**

Ramsey County District Court
File No. 62CV082879

David D. Hammargren, Timothy C. Cook, Adina R. Bergstrom, Hammargren & Meyer
PA, Bloomington, Minnesota (for respondent)

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appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant-insurer challenges summary judgment granted to respondent-insured
holding that its commercial general-liability policy issued to respondent covers clean-up
costs incurred by respondent to remove grout that respondent inadvertently injected into a

segment of sewer pipe during respondent's installation of structures necessary to connect segments of the sewer pipe. Because we conclude that the policy excludes coverage for these costs, we reverse.

FACTS

Appellant Western National Mutual Insurance Co. (Western National) issued a commercial general-liability (CGL) policy to respondent Engineering & Construction Innovations Inc. (ECI), that provides, in relevant part, that Western National will indemnify ECI for ECI's liability to a third party for "property damage" caused by an "occurrence." The policy defines "property damage," in relevant part, as "[p]hysical injury to tangible property." "Occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The policy excludes, in relevant part, property damage to "[t]hat particular part of real property on which you . . . [are] directly . . . performing operations, if the 'property damage' arises out of those operations; or . . . [t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it." The policy defines "your work," in relevant part, as "[w]ork or operations performed by you or on your behalf; and materials, parts or equipment furnished in connection with such work or operations."

During the policy period, ECI contracted to install below-ground, forcemain-access structures (FAS) to connect segments of sewer pipe installed by Frontier Pipeline

LLC in the White Bear/Hugo area. The parties agree that the installed pipe was a fixture, constituting real, not personal, property for purposes of the CGL policy.

To prevent excess groundwater from entering the excavations necessary for its work, ECI injected cementitious grout into the ground through tubes to form a collar around the pipes in the FAS construction area. On one occasion, ECI workers were aware that approximately 16 cubic yards of injected grout did not go into the expected area, but continued their work without determining where the injected grout actually went.

Approximately two months later, while ECI was still working at the same site where the grout was lost, it was discovered that the grout had entered the open end of one of the segments of sewer pipe that was to be connected via the FAS. By the time it was discovered, the grout had hardened inside 120 linear feet of the pipe filling, on average, 18 inches of the pipe's 22-inch internal diameter.

ECI acknowledges that it had a contractual duty to Frontier to remove the grout from the pipe. Removal turned out to be very difficult, ultimately taking two months and costing \$705,000 in labor and materials. It is undisputed that there was no loss of use of the pipe during the process because the sewer line was not yet operational. It is also undisputed that there was no physical damage to the pipe either by entry or removal of the grout.

ECI sought coverage for the costs involved in cleaning out the grout under the CGL policy provision covering "property damage" resulting from an "occurrence." Western National denied coverage, and ECI brought this declaratory-judgment action

seeking, in relevant part, a declaration that the costs related to cleaning out the grout are covered by the CGL policy.

Both parties moved for summary judgment. The district court concluded that the incident caused property damage covered by the policy and granted ECI's motion for summary judgment and denied Western National's motion for summary judgment. Western National appeals the district court's grant of summary judgment and entry of judgment in favor of ECI.

D E C I S I O N

On an appeal from summary judgment we review to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d, 2, 4 (Minn. 1990). In this case, the parties agree that there are no material-fact issues: the issue on appeal is whether the district court correctly interpreted the policy.

“Interpretation of an insurance policy is a question of law that we review de novo.” *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). Unambiguous language in an insurance contract must be given its plain and ordinary meaning. *Id.* The insured has the initial burden of demonstrating coverage, but the insurer has the burden of establishing that exclusions apply. *Id.* “Where the language [of an insurance contract] is unambiguous, we will not render a construction which is more favorable to finding coverage, but will apply the phrase to the facts of the case in order to give effect to the plain meaning of the language.” *Firemen's Ins. Co. of*

Newark, N.J. v. Viktora, 318 N.W.2d 704, 706 (Minn. 1982). But ambiguous exclusions are construed against the insurer. *Travelers*, 718 N.W.2d at 894.

Western National argues that ECI failed to demonstrate coverage because the grout in the sewer pipe did not constitute “property damage” as defined in the policy. The district court, without explanation, concluded that property damage occurred to the pipe when ECI injected the grout in an area around the pipe and the grout infiltrated the pipe. But the parties agree that the pipe was not physically damaged and that there was no resulting loss of use of the pipe because the sewer line was not yet operational. Because property damage is defined in the policy as “[p]hysical injury to tangible property, including all resulting loss of use of that property,” we find merit in Western National’s argument. We need not reach this issue, however, because we agree with Western National’s assertion that even if the grout in the pipe constituted property damage, exclusions in the policy preclude coverage for the cost of clean-up.

The first exclusion relied on by Western National is found at paragraph 2j(5) in the policy and states that the policy does not apply to property damage to “[t]hat particular part of real property on which you . . . are performing operations, if the ‘property damage’ arises out of those operations.”

The district court said that it was undisputed that ECI was not working on the pipe, and therefore concluded that the property damage to the pipe was not property damage to that particular part of real property on which ECI was performing operations. The district court did not cite any authority for this conclusion, but ECI argues that it is supported by *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002).

Thommes involved unconsented-to clearing of land adjacent to land that the insured had contracted to clear. *Id.* The insurer in that case denied coverage based on an exclusion identical to exclusion 2j(5) in this case. *Id.* at 879, 882. The supreme court, noting that the policy failed to define “that particular part of real property” or “operations,” concluded that the terms were ambiguous in the context of that case, to be construed against the insurer and therefore did not bar from coverage the accidentally cleared land that belonged to third parties. *Id.* at 883.

In this case, however, it is undisputed that the property damage occurred on the real property on which ECI had contracted to perform work. To install an FAS, ECI cut and removed sections of the pipe, surrounded the pipe with grout, then connected the pipe to the FAS, and it is not disputed that the property damage occurred during ECI’s “operation” of injecting the grout. In this context, there is no ambiguity in the exclusion language. ECI was performing an operation on the pipe which is part of the real property where ECI was working, installing a grout collar around the pipe, at the time the damage accrued, and the damage plainly arose out of ECI’s operations.

Because we conclude that Western National has met its burden of establishing the application of exclusion 2j(5), we do not reach Western National’s arguments that two other exclusions also apply.

Reversed.