STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1031

Elbert Greene, et al.,
Appellants,

vs.

West Bend Mutual Insurance Company,
Respondent.

Filed February 1, 2011
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Scott County District Court
File No. 70-CV-06-27248

Brian A. Thompson, Brian A. Thompson, LLC, Woodbury, Minnesota (for appellants)

Tony R. Krall, Timothy S. Poeschl, Hanson Lulic & Krall, LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellants Elbert and Jessica Greene challenge the district court's grant of summary judgment to respondent West Bend Mutual Insurance Company. Because the district court did not abuse its discretion by denying the Greenes' request to amend their

complaint, we affirm in part. But because the district court erred as a matter of law by granting summary judgment, we reverse in part and remand.

FACTS

In late 2004, the Greenes suffered a series of losses related to their home. On November 26, 2004, there was an electrical fire in their home that made it temporarily uninhabitable. The following day, their unoccupied home was vandalized. Then on December 12, 2004, their home was completely destroyed by fire. The Greenes' home and its contents were insured by West Bend. The West Bend policy included the following provision entitled "Your Duties After Loss:"

> As often as we reasonably require:
> (1) Show the damaged property;
> (2) Provide us with records and documents reasonably related to the loss, or certified copies if the originals are lost, and permit us to make copies; and
> (3) Submit to examination under oath while not in the presence of any other "insured", and sign the same[.]

In addition, the policy contained a maintenance-of-suit clause that stated: "No action can be brought unless the coverage form provisions have been complied with and the action is started within two years after the date of loss."

In response to the Greenes' claim, West Bend investigated the fire, conducting under-oath examinations of Elbert and Jessica Greene and requesting financial and other documents. The Greenes produced most of the requested documents, but not all. Specifically, West Bend requested and did not receive a copy of the loan application for a line of credit that the Greenes obtained from MBNA, an explanation of an $11,000 credit-card transaction that occurred before the first fire, and the name of a fire-cause-and-origin

expert hired by the Greenes. West Bend paid the Greenes $10,000 for their temporary relocation after the first fire but ultimately denied the Greenes' claim for their loss related to the second fire.

The Greenes continued to make the mortgage payments on the destroyed home until February 2005. In October 2006, the Greenes sued West Bend for breach of contract. West Bend answered and raised several defenses. West Bend asserted that (1) the policy was void because the damages were intentionally caused by or at the direction of the Greenes and because the Greenes concealed or misrepresented material facts and (2) the Greenes' suit was contractually barred because they had failed to satisfy the policy's conditions precedent. In February 2007, the mortgagee of the Greenes' home foreclosed, and a sheriff's sale occurred.

West Bend moved for summary judgment in July 2007, based on its defenses that the Greenes failed to satisfy the conditions precedent to bringing a suit and that the policy was void due to the Greenes' material misrepresentations or concealments. West Bend sought a continuance in November 2007, until the State Fire Marshal could complete his arson investigation. The parties stipulated to a continuance and agreed that the Greenes would move to "Compel All Withheld Documents and Information Received From the State Fire Marshal's Office" on or before March 1, 2008.

After approximately two years of inactivity and no motion to compel by the Greenes, West Bend again moved for summary judgment on the same grounds that it had asserted in its first motion. The district court granted West Bend's motion, concluding that the Greenes had not satisfied certain conditions precedent to bringing suit.

Specifically, the district court found that Elbert Greene had failed to clarify his verification page of his under-oath examination, that the Greenes had failed to identify their fire-cause-and-origin expert, and that they had failed to provide a copy of their MBNA loan application. The district court noted that the Greenes eventually identified their fire-cause-and-origin expert and clarified Elbert Greene's changes to the verification page, but only after filing suit.

After its summary-judgment motion was granted, West Bend filed a notice of taxation of costs and disbursement, and the district court awarded West Bend $7,087.42 in costs, and judgment was entered. This appeal follows.

D E C I S I O N

I.

On appeal from summary judgment, this court's review is limited to two questions: "(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The district court awarded summary judgment to West Bend based on its interpretation of the policy's maintenance-of-suit clause, which provided that "[n]o action can be brought unless the coverage form provisions have been complied with and the action is started within two years after the date of loss." The district court concluded that this clause imposed a condition precedent to bringing a lawsuit and that the Greenes' suit was barred because they had failed to comply with all of the policy provisions. Interpretation of insurance-policy and statutory language presents a question

of law, which we review de novo. *Nathe Bros., Inc. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000).

Insurance policies that provide coverage for losses from fire are subject to the Standard Fire Insurance Policy contained in Minn. Stat. § 65A.01 (2004). *See Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204, 209 (Minn. App. 1993). Because the Greenes' policy provided coverage for losses from fire, it was subject to this statute. "The Standard Fire Insurance Policy provide[s] a standard form, which contain[s] required terms and conditions for policies of fire insurance." *Nathe Bros.*, 615 N.W.2d at 345. Although parties are free to contract for additional or more protective coverage than the minimum requirements contained in the statute, "[t]his remedial statute guarantees coverage that will supersede any attempt to limit coverage to less than the statutory minimum." *Krueger*, 510 N.W.2d at 209. "The statute is founded on public policy. It was enacted to do away with the evils arising from the insertion in policies of insurance of conditions ingeniously worded which restricted the liability of the insurer and gave the insured less protection . . . ." *Id.* (quotation omitted).

The Standard Fire Insurance Policy contains a maintenance-of-suit clause, which states: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy have been complied with." Minn. Stat. § 65A.01, subd. 3. Insurance companies have argued that this clause makes compliance with policy requirements, such as submitting to an under-oath examination or timely filing a proof-of-loss statement, a condition precedent to

bringing suit. But this interpretation of the maintenance-of-suit clause has been squarely rejected by the Minnesota Supreme Court.

In *McCullough v. Travelers Cos.*, the supreme court considered whether this statutory clause required an insured to submit to an examination under oath before a lawsuit could be brought against the insurance company. 424 N.W.2d 542, 544 (Minn. 1988). The supreme court held that

> nothing in the policy provisions . . . bars suit or requires an oral examination prior to suit. The policy merely states that no suit shall be "sustainable" unless all the policy requirements have been complied with. Under this policy, an oral examination under oath is not a condition precedent to suit. Rather, we hold that the examination requirement is a condition to recovery under the policy. Thus, the fact that an insured brings suit before submitting to an examination by the insurer does not, in itself, constitute a breach and work a forfeiture of benefits under the policy.

Id. (citation and footnote omitted); *see also Nathe Bros.*, 615 N.W.2d at 346-47 (addressing whether the failure to submit a timely proof of loss operated to bar recovery and stating that *McCullough* makes it clear that the maintenance-of-suit clause does "not make strict compliance with all its terms a condition precedent to recovery").

West Bend argues that these cases interpreting the statutory language are inapplicable because the language in West Bend's policy is more explicit.[1] The West Bend policy states that no suit may be "brought" unless all of the conditions of the policy

[1] West Bend also argues that the Greenes waived their right to raise the applicability of *McCullough* and *Nathe* by failing to cite those cases to the district court. But a reviewing court may consider cases and statutes (among other materials) that were not presented to the district court. *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 340 n.3 (Minn. 1995).

are complied with as opposed to the statute which states that no suit may be "sustainable" if policy requirements are not met. West Bend asserts that its policy language expressly creates a condition precedent to bringing a lawsuit.

To the extent that West Bend is correct that its policy language expressly creates a condition precedent to suit where none exists in the uniform policy, this change of language is clearly an "attempt to limit coverage to less than the statutory minimum." *See Krueger*, 510 N.W.2d at 209. The statutory language therefore supersedes the policy language. *See id.* And, according to *McCullough* and *Nathe*, in which the maintenance-of-suit clauses mirrored the statute, the statutory language does not require strict compliance with all policy conditions as a condition precedent to bringing suit. Because the district court awarded summary judgment based on the fact that the Greenes had not strictly complied with all policy requirements before bringing their suit, summary judgment on this ground is not appropriate.[2]

But West Bend also moved for summary judgment on an alternative ground. Because this court "may affirm a summary judgment if there are no genuine issues of material fact and if the decision is correct on other grounds," it is appropriate to address the alternative ground on appeal. *See Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Feb. 13, 1996). West

[2] Because we conclude that the policy does not require strict compliance with all terms as a condition precedent to bringing suit, we do not reach the Greenes' argument that they complied with the terms of the insurance contract. But we note that nothing in this opinion should be construed as relieving the Greenes of their duty to comply with these terms; it was simply not necessary for them to strictly comply before initiating their lawsuit.

Bend's alternative ground for summary judgment is that the policy is void due to the Greenes' intentional concealment or misrepresentation of facts. The district court did not award summary judgment on this basis but found that the Greenes failed to explain why they transferred $11,000 prior to the fire and that they "inappropriately" included their daughter's Mercedes Benz on the proof-of-loss statement.

The West Bend policy contains a condition that states: "With respect to loss caused by fire, we do not provide coverage to the 'insured' who has: (a) Before a loss, willfully; or (b) After a loss, willfully and with intent to defraud: concealed or misrepresented any material fact or circumstance relating to this insurance." Generally, intent to defraud is "a question of fact to be determined by the jury, or the [court] if the trial is without a jury, unless the evidence is conclusive one way or the other." *Craigmile v. Sorenson*, 248 Minn. 286, 295, 80 N.W.2d 45, 51 (1956). The district court did not find that the Greenes misrepresented or concealed information with the intent to defraud West Bend, nor does the existing record support such a finding. Because the parties dispute this issue and because the evidence is not conclusive as to the Greenes' intent, this is a question for a factfinder that is not appropriately resolved by summary judgment.

Because we conclude that the district court erred as a matter of law by determining that West Bend's maintenance-of-suit clause barred the Greenes from initiating their lawsuit before they had strictly complied with all of the terms of the insurance contract and because summary judgment on West Bend's alternative ground would have been

inappropriate, we reverse the district court's decision to award summary judgment and remand for further proceedings.[3]

II.

In response to West Bend's motion for summary judgment, the Greenes sought to amend their complaint to see relief under Minn. Stat. § 604.18 (2008). The district court denied this request. The Greenes argue that this was an abuse of discretion. The decision of whether to permit a party to amend its pleadings is within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The Greenes made this request in their memorandum in response to West Bend's motion for summary judgment; they never made a formal motion to amend their complaint. In addition, although the Greenes made a passing reference to this statutory section in their appellate brief, they failed to provide any argument regarding how the district court abused its discretion by denying their request to amend their complaint. We affirm the district court on this issue.[4]

III.

The Greenes contend that the district court abused its discretion by granting West Bend's motion for costs before the time to appeal had expired. A district court's award

[3] The Greenes also argue that the district court erred by ignoring the "innocent insured" doctrine in the context of whether their policy was void. Because we are reversing the district court's award of summary judgment and remanding, we do not reach this argument.

[4] We also note that this statute was not enacted until 2008 and only applies to conduct that occurred on or after 2008. 2008 Minn. Laws ch. 208, § 2, at 524. It is therefore unlikely that the Greenes would have succeeded on the merits of a motion to amend their complaint even if such a motion had been properly made and argued.

of reasonable costs is reviewed for an abuse of discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 482 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). But legal issues regarding these rulings are reviewed de novo. *Vandenheuvel v. Wagner*, 690 N.W.2d 753, 754 (Minn. 2005). Generally, a "prevailing party" is entitled to fixed statutory costs and reasonable disbursements incurred in connection with the litigation. Minn. Stat. §§ 549.02, .04 (2008). Because we are reversing the district court's award of summary judgment and remanding, West Bend is no longer the prevailing party. We therefore reverse the district court's award of costs to West Bend.[5]

Affirmed in part, reversed in part, and remanded.

[5] West Bend requests that we strike from the Greenes' appendix all of the documents that were not submitted to the district court in conjunction with West Bend's second summary-judgment motion. But all documents filed with the district court are part of the record on appeal. Minn. R. Civ. App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."). The documents that West Bend objects to were filed with the district court and are part of the record. We therefore deny West Bend's request.