IN THE COURT OF APPEALS OF THE
STATE OF OREGON

SECURITY NATIONAL INSURANCE COMPANY,
a Texas corporation
Plaintiff-Respondent,

v.

SUNSET PRESBYTERIAN CHURCH,
an Oregon non-profit corporation,
as assignee of Andersen Construction Co., Inc.;
an Oregon corporation,
Defendant-Appellant.

Washington County Circuit Court
C124608CV; A156062

D. Charles Bailey, Jr, Judge.

Argued and submitted October 6, 2015.

Kevin S. Mapes argued the cause for appellant. With him on the briefs were Phillip E. Joseph, James C. Prichard, and Ball Janik LLP.

Thomas S. Christ argued the cause for respondent. With him on the brief was Cosgrave Vergeer Kester LLP.

Before DeVore, Presiding Judge, and Hadlock, Chief Judge, and James, Judge.*

DeVORE, P. J.

Reversed and remanded.

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* Hadlock, C. J., *vice* Flynn, J. pro tempore; James, J., *vice* Duncan, J. pro tempore.

DeVORE, P. J.

This insurance dispute arises out of construction-defect litigation involving a church, its general contractor, one of the subcontractors, and the subcontractor's liability insurer. In the underlying litigation, the church had brought claims against the general contractor, who brought third-party claims against subcontractors. In settlement of that case, the general contractor assigned its rights against subcontractors to the church, Sunset Presbyterian Church (Sunset). In this case, the insurer, Security National Insurance Company (SNIC), sought a judgment declaring that it had had no duty to defend the general contractor, Andersen Construction Company (Andersen), from the church's construction-defect claims under the policy that SNIC had issued to a subcontractor, B&B Tile & Masonry Corporation (B&B). Sunset, now the assignee of Andersen, answered with counterclaims seeking recovery of $101,005 in prior defense costs and asserting claims for breach of the duty to defend, equitable contribution, and equitable subrogation.

The parties filed cross-motions for summary judgment. Relying on its prior rulings in the earlier case, the trial court granted SNIC's motion, denied Sunset's motion, and entered a judgment that dismissed Sunset's counterclaims and declared that SNIC had "no financial obligation" for Andersen's prior defense costs. Sunset assigns error to the trial court's rulings. For the reasons that follow, we agree that the court erred in granting SNIC's motion and in denying a part of Sunset's motion for partial summary judgment on SNIC's duty to have defended Andersen for liability from B&B's work. Accordingly, we reverse and remand.

The relevant facts are undisputed but complicated. Sunset contracted with Andersen to construct a main building and related wings. Andersen subcontracted with B&B for the work involving masonry. Article 13 of Andersen's subcontract with B&B provided that B&B was required to cause its insurer to endorse its liability policies to add Andersen as an additional-insured for liability arising out of the operations performed for Andersen by B&B, acts of Andersen in connection with supervision of B&B, and claims for injuries

to B&B employees related to the construction. SNIC provided B&B with liability coverage that included a blanket additional-insured endorsement that added, as an insured, any person B&B was required by written contract to add as an insured to the policy.

Upon discovering defects and water intrusion, Sunset filed contract and negligence claims against Andersen in 2010. In that underlying complaint, Sunset alleged, "Andersen hired subcontractors and suppliers to furnished [sic] labor, material, services, supplies or equipment for construction of *** the Church." Sunset specified, "Architectural stone has been used to embellish the lower portions of the walls around the sanctuary." In a "non-exclusive list of faulty workmanship," Sunset alleged, among other things, "Architectural stone has been terminated at the level of the finish grade along the base-of-wall at hard surfaces, contrary to Owens Corning manufacturer installation instructions." Sunset alleged "systemic building envelope deficiencies" and resulting property damage. Andersen tendered the defense of the Sunset litigation to SNIC, but SNIC refused to assume the defense of Andersen.

In 2012, Sunset settled with Andersen and took an assignment of Andersen's rights against its subcontractors. Sunset settled Andersen's third-party claims against all the subcontractors except B&B. Sunset asserted Andersen's rights against B&B under Article 12, an indemnity provision of the subcontract. On a motion for partial summary judgment, the trial court concluded that B&B had a contractual duty to have defended Andersen against Sunset's claims for liability due to B&B's negligence, but that the subcontract was partially voided to the extent that Article 12 required B&B to indemnify Andersen for the negligence of Andersen or others. According to the court, the indemnity provision was partly void by reason of an anti-indemnity statute relating to construction contracts, ORS 30.140.[1] In

[1] In relevant part, ORS 30.140 provides:

"(1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

a subsequent hearing on evidence of past defense costs, Sunset, as Andersen's assignee, contended that it was entitled to recover all of Andersen's defense costs, not just that portion attributable to B&B's negligence. Sunset offered no proof of the B&B portion of Andersen's defense costs. In the absence of proof of those costs, the trial court concluded that Sunset had failed to prove entitlement to damages for B&B's breach of its duty to defend Andersen. On appeal, we affirmed that conclusion. *Sunset Presbyterian Church v. Andersen Construction*, 268 Or App 309, 324, 341 P3d 192 (2014), *rev den*, 357 Or 551 (2015).[2] The trial court's ruling in that case became the basis for the trial court ruling in this case.

In this case, SNIC sought a declaration that it had no duty to have defended Andersen under the terms of its insurance policy. In its complaint, SNIC alleged, among other things, that the provision of the subcontract requiring insurance for Andersen was wholly void under ORS 30.140. SNIC also alleged that the additional-insured endorsement affords Andersen no coverage because the underlying complaint did not allege liability arising during B&B's "ongoing operations," within the meaning of that term in the endorsement. SNIC moved for summary judgment, making those arguments. In addition, SNIC argued that Andersen's claim in the underlying litigation against B&B based on Article 12, the indemnity provision of the subcontract, presented the same defense costs and that the court's conclusion in the underlying case should be "acknowledged" in this case.

Sunset, as Andersen's assignee, responded that the underlying complaint referred to stonework and subcontractors so as to trigger a duty to defend Andersen under B&B's policy. Sunset disputed that the "ongoing operations" term in the additional-insured endorsement meant that

> "(2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors."

[2] We reversed the conclusion that Sunset was the prevailing party. 268 Or App at 323-24.

damage must occur when B&B is still working. Going further, Sunset argued that SNIC owed a duty to defend all claims against Andersen, not just those against Andersen that involved B&B. In its own motion for partial summary judgment, Sunset sought two rulings declaring that: (1) generally speaking, SNIC owed Andersen a duty to defend and (2) the duty extends to *all* of Andersen's defense costs.

The trial court took SNIC's invitation to follow the court's prior rulings in the underlying case. In doing so, the court did not address the parties' other arguments. In a letter opinion, the court explained that it had decided that B&B had a duty to defend Andersen against Sunset's original complaint. The court recalled that it had previously ruled that "liability for 'on-ongoing operations' includes faulty work done during the construction phase that is discovered at a later time." For those reasons, the court refused to declare that the additional-insured endorsement did *not* apply or that "B&B" did not have a duty to defend, but the trial court concluded that, nonetheless, it would grant summary judgment for SNIC because the amount owed for defense had been determined to be zero dollars in the underlying case. The court entered a general judgment declaring that SNIC "has no financial obligation to Sunset, as putative assignee of Andersen Construction, for defense fees and costs Andersen Construction incurred in the underlying litigation." Premised on that ruling, the judgment also dismissed Sunset's three counterclaims for breach of duty to defend, equitable contribution, and equitable subrogation.

On appeal, Sunset assigns two errors, indistinctly identified, which we take to challenge the court's granting of SNIC's motion, insofar as it declares that SNIC has "no financial obligation" for Andersen's defense costs, and the denial of Sunset's cross-motion seeking declarations that SNIC owed Andersen a duty to defend something or duty to defend all claims. Sunset argues that the trial court erred by rejecting SNIC's duty to defend Andersen under the insurance policy based on a decision of a different sort in the underlying case. Beyond that, Sunset reprises its previous arguments.

SNIC concedes that the trial court erred by deciding the insurer's duty to defend based on the court's prior zero-dollar decision on a failure of proof in the subcontract claim between Andersen and B&B. Nevertheless, SNIC contends that the trial court was right for other reasons that the trial court did not reach. SNIC reiterates its argument that B&B's obligation under the subcontract to make Andersen an additional-insured under SNIC's policy is wholly void under ORS 30.140. Seemingly for the first time, SNIC adds a general argument that the underlying construction-defect complaint did not allege with sufficient particularity the liability of Andersen for the fault of B&B so as to trigger a duty to defend Andersen under B&B's policy. SNIC reiterates its specific argument that the complaint fails to allege liability arising during B&B's "ongoing operations" within the meaning of the additional-insured endorsement. Finally, SNIC argues that, if the policy does provide a duty to defend Andersen, it should be limited to defense costs correlated with Andersen's potential liability for B&B's negligence. That is, contrary to Sunset's cross-motion, ORS 30.140 should prevent coverage of defense costs due to Andersen's liability for allegations unrelated to B&B's negligence.

We take those four arguments in turn. We review an order on cross-motions for summary judgment to determine whether there are any disputed issues of material fact and whether either party is entitled to judgment as a matter of law. *Vision Realty, Inc. v. Kohler*, 214 Or App 220, 222, 164 P3d 330 (2007). We consider evidence submitted in support and opposition to both motions. *WSB Investments, LLC v. Pronghorn Devel. Co., LLC*, 269 Or App 342, 355, 344 P3d 548 (2015). Here, there are no disputed issues of material fact, and the issues are matters of law.

We accept SNIC's concession that the trial court erred in its one given reason for granting summary judgment to SNIC and denying summary judgment to Sunset. The underlying case turned on Sunset's failure to offer evidence of Andersen's defense costs that related solely to Andersen's liability due to B&B's alleged negligence. The trial court had found that the subcontract's indemnity provision, Article 12, did impose on B&B a duty to have defended that portion of

Andersen's potential liability. Yet, despite the trial court's repeated statements that Sunset would need to prove the B&B portion of Andersen's defense expense, Sunset insisted that B&B owed all Andersen's defense expense and did not offer evidence of that which it may have recovered. We agree that the failure of proof under the indemnity provision in a subcontract between B&B and Andersen did not determine SNIC's duty to defend Andersen under an insurance policy involving SNIC and Andersen. The issues are different. The evidentiary failure in the underlying contract case said nothing about the duty to defend under SNIC's policy.[3]

On appeal, SNIC argues that it had no duty to defend Andersen for several alternative reasons that the trial court did not reach. SNIC first argues that its additional-insured endorsement does not make Andersen an additional-insured. SNIC observes that the additional-insured endorsement provides that an additional-insured is "[a]ny person or organization you [B&B] are required by a written contract, agreement, or permit to name as an insured." SNIC argues that, because Article 13 of the subcontract allegedly requires that B&B provide more insurance for Andersen than ORS 30.140 permits, the additional-insured provision is wholly void.[4] SNIC observes that ORS 30.140 forbids an indemnity provision in a construction contract that would require an indemnitor, such as a subcontractor, to indemnify an indemnitee, such as a general contractor, for the negligence of the indemnitee itself. SNIC is correct that the terms of ORS 30.140 extend to insurance. Consequently, a subcontractor's insurer is not required to provide coverage under an additional-insured endorsement so as to provide coverage

[3] If, in this case, Sunset could show that SNIC had a duty under its policy to defend Andersen then, Sunset, as Andersen's assignee, would still have an opportunity to prove its damages (the underlying defense costs), whatever may be the scope of the duty to defend and the consequent measure of those damages.

[4] In part, Article 13 provides that the

> "[s]ubcontractor shall endorse its Commercial General Liability [policy] to add Andersen *** as 'additional-insureds' with respect to liability arising out of (a) operations performed for Andersen or the Owner by Subcontractor, (b) acts or omissions of Andersen or the Owner in connection with general supervision of Subcontractor's operations, and (c) claims for bodily injury or death brought against Andersen or the Owner by Subcontractor's employees *** however caused, related to the performance of operations under the Contract Documents."

for a general contractor—an indemnitee—for the indemnitee's own negligence. *Walsh Construction Co. v. Mutual of Enumclaw*, 338 Or 1, 6-9, 104 P3d 1146 (2005). SNIC argues that, because the subcontract's insurance requirement at Article 13 is overbroad, it is void and that, because Article 13 is void, there *is* no "written contract," within the meaning of the additional-insured endorsement that requires B&B to have added Andersen to the SNIC coverage.

The short answer is that the insurance clause of the subcontract is not wholly void. Instead, such a clause in a subcontract can be enforced to the extent that it does not contravene ORS 30.140. The unlawful potential of such an insurance or indemnity provision can be excised, while the lawful portion can be enforced. *Montara Owners Assn. v. La Noue Development, LLC*, 357 Or 333, 343-44, 353 P3d 563 (2015). To the extent that the insurance provision of the subcontract requires B&B to secure insurance for potential liability to Andersen for B&B's work, there *is* a "written contract" that requires B&B to have added Andersen to the SNIC policy. Therefore, Andersen is an additional-insured within the blanket provision of the additional-insured endorsement.

Secondly, SNIC contends that the additional-insured endorsement affords no duty to defend because the underlying complaint simply failed to allege Andersen's liability for B&B's work.[5] SNIC argues, "Th[e] complaint did not even mention B&B[.]" SNIC reads the complaint to allege nothing but Andersen's liability for Andersen's own negligence seemingly unrelated to B&B's work.

The answer to that argument is that the subcontractor need not be identified by name in the complaint, nor must the general contractor's liability be expressly attributed

[5] In the trial court, SNIC made a different argument—that the complaint did not allege that the masonry work caused any damage to the building envelope. SNIC does not pursue that argument on appeal. The argument raised here for the first time—that the complaint did not allege Andersen's liability for B&B's work—would not have caused the record to develop otherwise in the trial court. *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (regarding arguments newly raised on appeal). Indeed, Sunset argued below that the allegations of the underlying complaint triggered the duty to defend. Those allegations suffice to reject the argument on its merits.

to the fault of the subcontractor. The same arguments were rejected in *West Hills Development Co. v. Chartis Claims*, 360 Or 650, 662-66, 385 P3d 1053 (2016) (*West Hills*). The Supreme Court explained:

> "Where the complaint does not state facts sufficient to bring the case clearly within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. In other words, in case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured's favor."

Id. at 662 (internal quotation marks omitted); *see also Ledford v. Gutoski*, 319 Or 397, 400, 877 P2d 80 (1994) (any ambiguity in a complaint must be resolved in favor of coverage). The court rejected the insurer's argument that a complaint must "rule in" coverage. *West Hills*, 360 Or at 663-65. The court recognized that the subcontractor may not have been identified by name in the underlying complaint, but that was not the issue. *Id.* at 665. The allegations of the complaint, which referred to faulty work that happened to have been done by the unnamed subcontractor, could reasonably be interpreted to result in the general contractor being held liable for the conduct covered by an additional-insured endorsement. Thus, the insurer had a duty to defend. *Id.* at 666.

The same is true here. The underlying complaint alleged that Andersen relied on the work of subcontractors. The complaint specified defects in the building envelope including problems with the stone masonry. As in *West Hills*, those allegations could reasonably be interpreted to allege Andersen's liability for conduct covered by SNIC's policy. Contrary to SNIC's argument about allegations of B&B's work, the underlying complaint alleged enough to trigger a duty to defend.

Thirdly, SNIC contends that the underlying complaint failed to allege that Andersen's liability arose out of B&B's "ongoing operations." SNIC relies on the term of the endorsement that promises coverage "but only with

respect to liability arising out of: 'your ongoing operations' [B&B's operations] performed for that insured [Andersen]." As SNIC interprets its additional-insured endorsement, it would cover Andersen only for property damage from B&B's work only while B&B is performing the work. SNIC sees the "ongoing operations" term to impose a temporal restriction. Sunset disagrees. So did the trial court. It wrote in its letter opinion that the term included "faulty work done during the construction phase that is discovered at a later time."

Mindful that the issue before us is the duty to defend, not the duty to indemnify, the interpretation of that term is not one that we need to resolve here. That is because, for purposes of the duty to defend, the complaint need only allege the possibility that Andersen could be liable for damage from defective work. A duty to defend exists if the complaint alleges the possibility that damage occurred during "ongoing operations." Even assuming SNIC's temporal limitation is correct, the complaint need not "rule in" coverage by expressly alleging that damage occurred within that narrower time frame. It suffices if the complaint reasonably can be read to include damage occurring during that allegedly narrower time frame. *See West Hills*, 360 Or at 665-66 (rejecting need to interpret "ongoing operations" term because, even under insurer's interpretation, the complaint would allow proof that such happened); *see also Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or 112, 122-23, 293 P3d 1036 (2012) (holding that, when complaint did not allege when loss occurred, the completed operations term could not eliminate the duty to defend). Therefore, even if the "ongoing operations" term had the temporal limitation that SNIC claims, the term does not eliminate SNIC's duty to defend Andersen. The underlying complaint does not allege when damage occurred in relation to when B&B was on the job, but, for purposes of the duty to defend, it suffices that the complaint alleges damages that may have occurred even during SNIC's narrower view of the time frame of "ongoing operations." *See id*. (finding duty to defend without specifying when loss occurred).

Because none of the alternative reasons to affirm the trial court justify granting SNIC's motion for summary judgment, we conclude that the court erred in granting

summary judgment for SNIC and in entering a judgment declaring that SNIC had no "financial obligation" to pay any of Andersen's underlying defense costs. Likewise, because that judgment dismissed Sunset's counterclaims, based on the same mistaken premise that SNIC had "no financial obligation," the dismissal of those counterclaims was error.

We turn to Sunset's cross-motion for partial summary judgment. Sunset argues that the court should have granted partial summary judgment declaring a duty to defend, in at least some way, and, more particularly, declaring that SNIC had a duty to defend all claims against Andersen, not just those arising out of B&B's work. SNIC responds that its duty to defend should be circumscribed by ORS 30.140, just like the subcontract provision on indemnity, to only the defense costs that correlate with Andersen's liability for B&B's work.

In the underlying case, *Sunset Presbyterian*, we faced a similar question: whether ORS 30.140 would limit the scope of B&B's defense obligation to Andersen under the indemnity provision in Article 12 of the subcontract. 268 Or App at 318. We recognized that a principle of insurance had been extended from insurance to indemnity agreements. The principle was that, generally, an insurer with coverage of one claim must defend all claims in a complaint against an insured. *Id.* at 315-16. In the underlying case, Sunset contended that such a "defend-one-defend-all rule" should govern. We concluded, however, that ORS 30.140, "a statute unique to construction agreements," served as an exception to the rule so as to limit the indemnitor's obligation to the indemnitee. Specifically, the indemnitor, B&B, was obligated to provide a defense to the indemnitee, Andersen, only to the extent that the complaint threatened liability to the indemnitee, Andersen, arising out of the work of the indemnitor, B&B. *Id*. at 320-22.

With that background, the question presented by the parties' arguments over the scope of the duty to defend reduces to whether the limitation of ORS 30.140, which was recognized in our prior decision about an indemnity contract, is equally applicable to an insurance policy in this setting. The answer is intimated in the seminal decision of the

Supreme Court cited at the outset. In *Walsh Construction*, the court had faced the argument that ORS 30.140 applied only to contractors' indemnity agreements but not to policies provided by insurers. 338 Or at 4-5. The court emphasized the statute's express reference to "an insurer" where the statute describes an agreement that requires "a person or that person's surety *or insurer* to indemnify." ORS 30.140(1) (emphasis added). The court concluded that the statute that addresses indemnity contracts also governs insurance policies in that case. 338 Or at 7-11.

In our prior decision, we determined that the "defend-one-defend-all" principle of insurance, when applied to contracts of indemnity, was limited by ORS 30.140, such that the contract of indemnity could require the indemnitor to defend only the indemnitee's potential liability for the indemnitor's fault. *Sunset Presbyterian*, 268 Or at 322. In *Walsh Construction*, the court determined that ORS 30.140 limits insurance policies as it limits indemnity contracts. We conclude, therefore, that ORS 30.140 circumscribes the insurer's duty to defend just as it circumscribes the indemnitor's duty to defend. Accordingly, SNIC's duty to defend under its policy does not extend to defend all claims; rather, SNIC's duty to defend corresponds to Andersen's potential liability that arises out of the fault of B&B. *See* ORS 30.140(2) ("to the extent that [injury or damage] arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors").

That conclusion means that Sunset was entitled only in part to the rulings that it sought on partial summary judgment. For the reasons already discussed in rejecting SNIC's second argument, the underlying complaint did trigger SNIC's duty to defend Andersen. Thus, the first ruling that Sunset sought—a ruling that, in some way, SNIC had a duty to defend—should have been granted. However, the second ruling—that SNIC should have defended all claims against Andersen—was properly denied. Due to ORS 30.140, SNIC's duty to defend corresponds to the risk of Andersen's liability for B&B's fault and no more. In the end, the trial court erred in granting summary judgment for SNIC, in dismissing Sunset's counterclaims, and in denying Sunset

a limited ruling declaring SNIC's duty to have defended Andersen for liability for B&B's work.

Reversed and remanded.