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United States Court of Appeals
Tenth Circuit

August 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OWNERS INSURANCE COMPANY, a Michigan corporation,

Plaintiff - Appellant,

v.

GREENHALGH PLANNING & DEVELOPMENT, INC., a Utah corporation,

Defendant - Appellee,

and

STEVEN PICKENS, an individual; MICHELLE PICKENS, an individual,

Defendants.

No. 22-4008
(D.C. No. 2:21-CV-00060-BSJ)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

This appeal involves a coverage dispute between Owners Insurance Company and its insured, Greenhalgh Planning & Development, Inc. After Greenhalgh was sued in Utah state court, it filed an insurance claim asking Owners to defend and

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

indemnify it. In response, Owners filed this action in federal district court, seeking a declaratory judgment that it owed no duty to defend or indemnify. The district court granted Greenhalgh's motion for judgment on the pleadings, ruling that Owners owed a duty to defend and that the issue of indemnification was not ripe for adjudication. But because we conclude that there is no potential for coverage under the insurance policy, there is no duty to defend and therefore also no duty to indemnify. We accordingly reverse and remand with instructions to enter judgment in favor of Owners.

Background[1]

This insurance dispute arises from Greenhalgh's construction work on property in Summit County, Utah, owned at the time by Michelle and Steven Pickens. Greenhalgh remodeled the house and barn on the property, including by adding living quarters to the barn. The Pickenses then sold the property to Teague and Michelle Cowley.

The Cowleys later sued the Pickenses in Utah state court, asserting various fraud and breach-of-contract claims stemming from the property sale. As relevant here, the Cowleys' complaint alleges that the Pickenses misled them into reasonably

[1] Because this is an appeal from judgment on the pleadings, we take the facts from those pleadings, accepting all well-pleaded factual allegations as true and drawing all reasonable inferences in the nonmoving party's favor. *See Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1228 (10th Cir. 2012). Documents attached to the pleadings "are considered part of the" pleadings, so "we may consider their contents" as well. *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1201 n.3 (10th Cir. 2016).

believing that the barn was a habitable structure, even though it did not qualify as such under applicable building code because it lacked a fire-sprinkler system. The Cowleys' complaint further alleges that the Pickenses marketed the property as including "a new 2,880[-square-foot] barn with an attached [two-bedroom] apartment for a convenient place to house guests," staged the barn as a furnished apartment, and presented it to the Cowleys as such. App. vol. 1, 55. Yet, the complaint alleges, the Pickenses knew that the barn lacked a fire-sprinkler system and that the barn could not be used as a habitable structure under applicable code without one. As relief, the Cowleys sought monetary damages.

The Pickenses, in turn, filed a third-party complaint to assert claims against Greenhalgh for breach of contract, breach of the implied covenant of good faith and fair dealing, professional negligence and malpractice, and defective construction.[2] As relevant here, the third-party complaint alleges that the Pickenses entered into an oral agreement with Greenhalgh to remodel the barn and the house before they sold the property to the Cowleys and that Greenhalgh "hired various subcontractors to complete the work." *Id.* at 70. The complaint alleges that Greenhalgh "added living quarters to the [b]arn" and "performed a full remodel on the [h]ouse." *Id.* But, the complaint notes, the Cowleys have alleged that Greenhalgh's construction work "was not up to city and county codes" and that "the [b]arn did not have [fire] sprinklers and thus was not up to fire code for habitability." *Id.* at 70–71. The Pickenses assert

[2] The Pickenses' complaint also asserts various claims against their realtor and their realtor's brokerage, but those claims are not at issue in this appeal.

that Greenhalgh's failure to perform its construction work to code (among other things) breached the oral agreement, the implied warranty of habitability, the duty of good faith and fair dealing, and the duty of reasonable care. As relief, the Pickenses requested monetary damages and equitable indemnity.

After the Pickenses filed their third-party complaint, Greenhalgh turned to its insurer, Owners, for defense and indemnification under a commercial general liability (CGL) policy it had purchased. Owners appointed counsel to defend Greenhalgh in the state-court proceedings but then filed this action in federal district court, seeking a declaration that it had no duty to defend or indemnify Greenhalgh against the Pickenses' third-party claims under Utah law. It attached to its complaint the CGL policy, the Pickenses' complaint, and the Cowleys' complaint. Greenhalgh then moved for judgment on the pleadings, and Owners cross-moved for summary judgment. Ruling from the bench, the district court granted Greenhalgh's motion for judgment on the pleadings and denied Owners' summary-judgment motion. The court summarily determined that Owners owed Greenhalgh a duty to defend but that it was premature to decide whether Owners must indemnify Greenhalgh.

Owners now appeals.

Analysis

Owners asks us to reverse the district court's order granting judgment on the pleadings to Greenhalgh. We review that order de novo. *See BV Jordanelle*, 830 F.3d at 1200. The parties agree that Utah law governs this diversity action.

I. Duty to Defend

We begin by addressing the duty to defend because an insurer's duty to defend is broader than its duty to indemnify. *See Equine Assisted Growth & Learning Ass'n v. Carolina Cas. Ins. Co.*, 266 P.3d 733, 735–36 (Utah 2011). Utah law requires an insurer to defend its insured against liability claims that *potentially* fall within the policy's scope of coverage. *Id.* at 736 (emphasis added). That means an insurer may have a duty to defend the insured "even if . . . the insurer is ultimately not liable to indemnify the insured." *Fire Ins. Exch. v. Est. of Therkelsen*, 27 P.3d 555, 560 (Utah 2001). To determine whether an insurer owes a duty to defend, Utah courts ordinarily apply the "eight[-]corners rule" by "comparing the allegations within the four corners of the complaint [for which defense is sought] to the language contained in the four corners of the insurance policy." *Headwaters Res., Inc. v. Ill. Union Ins. Co.*, 770 F.3d 885, 891 (10th Cir. 2014). Here, however, the parties agree that determining whether Owners owes Greenhalgh a duty to defend requires comparing the allegations in both the Pickens complaint *and* the Cowley complaint to the CGL policy. We follow their lead.

Under Utah law, "the duty to defend 'is triggered when the allegations in the underlying complaint[,] if proved, could result in liability under the policy.'" *Id.*

(alteration in original) (quoting *Cincinnati Ins. Co. v. AMSCO Windows*, 921 F. Supp. 2d 1226, 1236 (D. Utah 2013)). If an insurer owes a duty to defend any claim, "the insurer is obligated to provide a defense to the entire suit, at least until it can limit the suit to those claims outside of the policy coverage." *Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 1210, 1216 (Utah 2006) (quoting Appleman on Insurance Law and Practice § 132[D] (2d ed. 2006)). And if factual questions make coverage uncertain, "the insurer must defend until those uncertainties can be resolved against coverage." *Id.* at 1215; *see also id.* ("When in doubt, defend." (quoting Appleman on Insurance Law and Practice § 136.2[C])). To avoid the duty to defend, then, the insurer must show that "none of the allegations of the underlying claim[s] is potentially covered [under the relevant insurance policy] (or that a policy exclusion conclusively applies to exclude all potential for such coverage)." *Headwaters Res., Inc.*, 770 F.3d at 891 (quoting *Cincinnati Ins. Co.*, 921 F. Supp. 2d at 1236–37).

The CGL policy at issue here provides that Owners "will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage'" that "occurs during the policy period." App. vol. 1, 103. The policy defines "property damage" to include both physical damage and the "[l]oss of use of tangible property that is not physically injured." *Id.* at 116. But to be covered under the policy, the property damage must have been "caused by an 'occurrence.'" *Id.* at 103. The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 115. Here, Owners does not dispute that the alleged inability to use the barn as a habitable

structure because it lacks a fire-sprinkler system is a loss of use that could constitute property damage under the policy. But Owners argues that it has no duty to defend Greenhalgh because this alleged property damage was not caused by an "occurrence"—that is, an "accident." *Id.*

The policy does not separately define "accident." But the Utah Supreme Court has construed that term in the insurance context as being "descriptive of means which produce effects which are not their natural and probable consequences." *N.M. ex rel. Caleb v. Daniel E.*, 175 P.3d 566, 569 (Utah 2008) (quoting *Richards v. Standard Accident Ins. Co.*, 200 P. 1017, 1023 (Utah 1921)). Under this definition, "harm or damage is not accidental if it is the natural and probable consequence of the insured's act or should have been expected by the insured." *Id.* "Th[is] generally presents a legal question as to what the average individual would expect to happen under the circumstances." *Id.* at 570. And Utah courts "look to whether the injury, rather than the act giving rise to the injury, is accidental." *Id.* at 571. Interpreting and applying these provisions of Utah law, we have explained that "the natural results of an insured's unworkmanlike or negligent construction" do not "constitute an occurrence (i.e., accident) triggering coverage under a CGL policy." *Emps. Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1174 & n.17 (10th Cir. 2010).

Here, the complaints allege property damage in the form of loss of use of the barn as a habitable structure. According to the complaints, this damage was caused by Greenhalgh's negligent failure to ensure that the barn complied with applicable building code, in particular by failing to install the code-mandated fire-sprinkler

system. But because the natural and expected consequence of this alleged negligent construction is that the barn cannot be used as a legally habitable structure, the alleged property damage was not caused by an occurrence. *See id.*

Resisting this conclusion, Greenhalgh contends the complaints present factual questions about the scope of work it was required to perform on the barn that preclude Owners from avoiding the duty to defend at this stage. At the outset, Greenhalgh argues that the complaints fail to sufficiently allege that it had a contractual obligation to make the barn legally habitable. Instead, Greenhalgh asserts, the Pickens complaint suggests that "add[ing] living quarters to the [b]arn" constituted the scope of the barn remodeling project, and neither complaint specifically alleges that the Pickenses hired Greenhalgh to render the barn habitable under applicable code. App. vol. 1, 70.

This argument misses the mark. To be sure, the complaints do not affirmatively allege that Greenhalgh had a duty, contractual or otherwise, to render the barn habitable. Instead, the existence of such a duty can be inferred only from the various breaches alleged in the Pickens complaint, such as Greenhalgh's failure to "complete all construction and remodeling of the [p]roperty in compliance" with applicable codes. *Id.* at 73–74. But even if Greenhalgh is correct that the complaints fail to sufficiently allege a duty to make the barn legally habitable, that does not trigger Owners' duty to defend. Again, Owners' duty to defend hinges on whether the allegations in the complaints, "if proved, could result in liability under the policy." *Headwaters Res., Inc.*, 770 F.3d at 891 (quoting *Cincinnati Ins. Co.*, 921 F. Supp. 2d

at 1236). If Greenhalgh had no duty to render the barn legally habitable (and therefore no obligation to install a fire-sprinkler system in it), then perhaps Greenhalgh will not be held liable for the alleged property damage in the underlying state-court litigation. But such a conclusion does nothing to bring the complaints' allegations within the scope of the policy's coverage because it does not establish a possibility that the alleged property damage was caused by an "accident" or "occurrence." *See Benjamin*, 140 P.3d at 1215 (explaining that existence of factual questions requires insurer to provide defense only if those questions "render coverage uncertain").

Greenhalgh next argues that even assuming it had a duty to make the living quarters habitable, only the loss of use of those living quarters—and not the entire barn—would be the natural and expected consequence of its negligence. According to Greenhalgh, we reached a similar conclusion under similar circumstances in *Cincinnati Insurance Co. v. AMSCO Windows*, 593 F. App'x 802 (10th Cir. 2014). There, a window manufacturer sought coverage for claims that it negligently manufactured and installed windows in several new houses. *See id.* at 804. The defective windows allegedly caused water damage to other surrounding areas of the homes, including the walls, paint, and floorboards. *Id.* at 806–07. The insurer argued that it had no duty to defend against the claims because this "resultant damage" was the natural and probable result of faulty workmanship. *Id.* at 806. But we rejected that argument, emphasizing that "the test for determining whether an event was an 'occurrence' under a liability policy is *not* whether the result was 'foreseeable,' . . .

but rather whether it was 'intended' or 'expected.'" *Id.* (quoting *N.M. ex rel. Caleb*, 175 P.3d at 571). And applying the proper legal standard, we saw nothing to suggest that the additional damage to the surrounding property "was expected—from the [window manufacturer]'s perspective—to result from its manufacturing process." *Id.* at 807. So we concluded that this additional damage was caused by an occurrence, triggering the insurer's duty to defend the window manufacturer. *Id.* at 808.

Here, Greenhalgh maintains that any property damage to the barn beyond the added living quarters constitutes additional damage that it could not have expected or intended. That is so, Greenhalgh says, because bringing the living quarters up to code for habitability only required "install[ing fire] sprinklers in . . . those living quarters." Aplee. Br. 21. And although Greenhalgh would therefore "expect [its negligent] failure to install sprinklers in the added, attached living quarters" to "mean those living quarters would not be habitable," the argument goes, it could not expect that same failure "to render the remainder of the [b]arn uninhabitable." *Id.*

This argument, however, ignores the allegations in the complaints. Those allegations specifically assert that "the [b]arn required a fire[-sprinkler] *system* to be installed in order to be used as a habitable *structure*" under applicable code. App. vol. 1, 54 (emphases added). This indicates that making any portion of the barn legally habitable required bringing the entire barn up to code for habitability. Under the complaints' allegations, then, Greenhalgh's duty to render the living quarters habitable necessarily required it to make the whole barn habitable. So the loss of use

of the entire barn was the natural and expected consequence of Greenhalgh's negligent failure to satisfy that duty.

Perhaps more importantly, even if we could separate the barn as a whole from the added living quarters in particular, as Greenhalgh would have us do, the loss of use of the remainder of the barn was still not caused by an occurrence. True, in this scenario, that alleged property damage was not "expected—from [Greenhalgh]'s perspective—to result from its" alleged negligent failure to install fire sprinklers in the living quarters. *Cincinnati Ins. Co.*, 593 F. App'x at 807. But that is simply because such damage would not have resulted from Greenhalgh's alleged negligence at all. Indeed, the barn was uninhabitable to begin with, and it would have remained that way whether or not Greenhalgh added fire sprinklers in the living quarters. So in this scenario, Greenhalgh's negligent failure to install fire sprinklers in those living quarters did not result in *any* property damage to the remainder of the barn, much less damage caused by an occurrence.

In short, Greenhalgh's arguments focus on the possibility that it lacked a duty to install fire sprinklers and thus did not act negligently in failing to do so. But Owners' duty to defend does not hinge on whether Greenhalgh ultimately had a duty to render the barn, or any portion of the barn, habitable. It turns on whether, assuming Greenhalgh did have such a duty, the loss of use of the barn as a habitable structure was an unnatural or unexpected consequence of Greenhalgh's negligent failure to satisfy that duty. *See N.M. ex rel. Caleb*, 175 P.3d at 569. And as Greenhalgh all but concedes, the answer to that question is no.

Nevertheless, Greenhalgh makes one final attempt to bring the complaints' allegations within the potential scope of coverage. Greenhalgh argues that even if the alleged property damage was a natural and expected result of its negligent work, we should require Owners to defend it because one of its subcontractors may have caused the damage. Although no Utah court has addressed the issue, the District of Utah has predicted that the Utah Supreme Court would hold property damage from faulty or negligent subcontractor work constitutes an "occurrence" under CGL policies. *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275, 1281 (D. Utah 2006); *see also Auto-Owners Ins. Co. v. Fleming*, 701 F. App'x 738, 742 n.5 (10th Cir. 2017) (assuming this prediction is "accurate").[3]

But even if we assume that the district court's prediction in *Great American Insurance Co.* is correct, there is no potential for coverage here. As an initial matter, we question whether either complaint leaves open the possibility that a subcontractor caused the alleged property damage. Although the Pickens complaint does allege that Greenhalgh "hired various subcontractors to complete the work on the [p]roperty," the complaint also asserts that it was Greenhalgh, as the general contractor, who was responsible for ensuring code compliance. App. vol. 1, 70. And as Greenhalgh put it when moving for judgment on the pleadings, the complaints allege that *Greenhalgh's* "breach of duties rendered the [b]arn uninhabitable." App. vol. 2, 160. If that is so, Greenhalgh cannot benefit from a subcontractor exception here.

[3] We cite unpublished cases for their persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

In any event, as Owners points out, the policy contains an exclusion that precludes from coverage any claims for "'[p]roperty damage' to 'your work' arising out of it or any part of it." App. vol. 1, 106. And the policy defines "your work" as "[w]ork or operations performed by you or on your behalf," a definition broad enough to encompass—and therefore exclude coverage for—work performed by Greenhalgh's subcontractors.[4] *Id.* at 116. To be sure, many CGL policies (including the one at issue here) include an exception to the your-work exclusion that restores coverage for property damage to work performed by subcontractors. *See, e.g.*, *Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd*, 882 F.3d 952, 965–66 (10th Cir. 2018) (describing history of standard-form CGL policies and the your-work exclusion). But here, that exception was expressly removed by an endorsement. So even if the complaints leave open the possibility that one of Greenhalgh's subcontractors negligently failed to install the fire-sprinkler system in the barn and thus caused the property damage, the your-work exclusion bars coverage.

[4] We reject Greenhalgh's argument that Owners cannot show the your-work exclusion applies at this stage because the complaints allege property damage that was not exclusive to Greenhalgh's own work. Greenhalgh contends that because the complaints suggest the scope of its work on the barn "was limited to" constructing the living quarters, only the loss of use of those living quarters—and not the remainder of the barn—constitutes property damage to its own work. Aplee. Br. 34. But as we explained above, the complaints indicate that rendering any portion of the barn legally habitable required bringing the entire barn up to code for habitability, meaning that the scope of Greenhalgh's work necessarily included rendering the whole barn habitable. Thus, the alleged property damage was to Greenhalgh's own work. (And recall that even if Greenhalgh is correct that rendering the living quarters habitable actually only required installing fire sprinklers in those living quarters, then its negligent work did not cause *any* property damage to the remainder of the barn.)

Because there is no potential for coverage under the policy, Owners owes no duty to defend Greenhalgh.

II. Duty to Indemnify

We next turn to the indemnification issue. Relying on a 1966 case applying Oklahoma law, Greenhalgh contends that any decision on this issue is premature, even if Owners owes no duty to defend. *See C.P. Culp v. Nw. Pac. Indem. Co.*, 365 F.2d 474, 478 (10th Cir. 1966) (holding that even though insurer had no duty to defend insured, trial court erred in determining insurer had no duty to indemnify because it remained "possibl[e]," even if "highly improbable, that a claim [could] ultimately be established . . . within the coverage of the policy"). But Utah law, not Oklahoma law, governs this diversity action. And we have specifically said that because in Utah the duty to defend is broader than the duty to indemnify, "there cannot be a duty to indemnify" if there is no duty to defend. *Banner Bank v. First Am. Title Ins. Co.*, 916 F.3d 1323, 1328 (10th Cir. 2019). To the extent Greenhalgh disagrees with this reading of Utah law, we are "bound by our own prior interpretations of state law" in the absence of "'an intervening decision of the state's highest court.'" *Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1295 (10th Cir. 2010) (quoting *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003)). Thus, having found that Owners owes no duty to defend, we likewise conclude that Owners owes no duty to indemnify.

Conclusion

The allegations in the underlying complaints do not fall within, or potentially within, the CGL policy's coverage, so Owners has no duty to defend or indemnify Greenhalgh against the Pickenses' third-party claims. We accordingly reverse the district court's decision granting Greenhalgh's motion for judgment on the pleadings and remand for the district court to enter judgment in Owners' favor.

Entered for the Court

Nancy L. Moritz
Circuit Judge