

2001 Minn. App. LEXIS 834, \*

Kathleen Paglarini, Appellant, vs. Owners Insurance Company an Ohio Corporation, Respondent.

C6-00-1996

COURT OF APPEALS OF MINNESOTA

2001 Minn. App. LEXIS 834

July 24, 2001, Filed

**NOTICE:** [\*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. STAT. § 480A.08, SUBD. 3 (2000).

**PRIOR HISTORY:** St. Louis County District Court. File No. C7-00-300048. Hon. Jeffry S. Rantala.

**COUNSEL:** Richard E. Prebich, Hibbing, Minnesota, (for appellant).

Betsy Lee Radtke, Hanson, Lulic & Krall, Minneapolis, MN, (for respondent).

**JUDGES:** Considered and decided by Amundson, Presiding Judge, Toussaint, Chief Judge, and Huspeni, Judge. \*

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

**OPINIONBY:** Roland C. Amundson

**OPINION:** UNPUBLISHED OPINION

AMUNDSON, Judge

Appellant brought an action to recover over \$ 20,000 in damages under her homeowner's policy. The policy excluded coverage for backup water damage, but was excepted by a policy endorsement insuring such event up to \$ 5,000. The district court granted summary judgment in favor of the insurer, concluding that the overriding cause of the damage was water backup, for which damages were limited to \$ 5,000. We affirm.

FACTS

Kathleen Paglarini owns a home in Hibbing, Minnesota that, from July 13, 1998 to July 13, 1999, was insured by Owners Insurance [\*2] Company (OIC). The base insurance policy covered personal property loss from the following perils relevant to the present case:

12. Sudden and accidental tearing apart, cracking, burning or bulging of a heating \* \* \* system, \* \* \* or a water heating appliance.

13. Accidental discharge or overflow of water \* \* \* from within a plumbing, [or] heating \* \* \* system or domestic appliance. This peril does not include loss:

(a) to the appliance or system from which the water or steam escapes;

\* \* \* \*

(c) caused by or resulting from water from outside the plumbing system that enters through sewers or drains, or water which enters into and overflows from within a sump pump, sump pump well or other type system designed to remove subsurface water which is drained from the foundation area

A plumbing system does not include a sump, sump pump or related equipment.

The base policy contained the following relevant language under the section listing additional coverages:

o. Heating Fuel Damage

We will pay for loss to covered property at the residence premises caused by or resulting from:

- (1) accidental discharge or overflow of heating fuel from your heating system, including [\*3] your heating fuel storage tank;
- (2) delivery of heating fuel into a wrong receptacle at the residence premises; or
- (3) delivery of one fuel for the other at the residence premises.

The policy also included the following exclusions to the coverage for personal property loss and loss to "other structures:"

Loss to covered property caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss:

\* \* \* \*

(3) Water damage, meaning:

\* \* \* \*

- (b) water or sewage from outside the plumbing system that enters through sewers or drains;
- (c) water which enters into and overflows from within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area; or
- (d) Water below the surface of the ground. This includes water which exerts pressure on or flows, seeps or leaks through any part of a building, sidewalk, driveway, swimming pool or other structure.

This exclusion does not apply to ensuing direct loss to covered property caused by theft, fire or explosion.

There is also another relevant exclusion applicable only to coverage [\*4] of "other structures" that reads:

Except as to ensuing loss not otherwise excluded, we do not cover loss resulting directly or indirectly from:

\* \* \* \*

(4) \* \* \* \*

(h) discharge, release, escape, seepage, migration or dispersal of pollutants unless caused by a peril we insure against under Coverage C - Personal Property. This exclusion does not apply to ADDITIONAL COVERAGE, o. Heating Fuel Damage.

The policy limit for loss of personal property was \$ 44,100.

Paglarini purchased an optional endorsement for "water backup of sewers or drains" which provided a maximum of \$ 5,000 personal property coverage for risk of accidental direct physical loss to [other structures and personal property] caused by:

- a. Water from outside the plumbing system that enters through sewers or drains; and b. Water which enters into and overflows from within a sump pump, sump pump well or any other system designed to

remove subsurface water which is drained from the foundation area.

On July 5, 1999, a severe storm hit Hibbing. Heavy rains caused the sewers in Paglarini's home to back up--flooding her basement, which in turn caused Paglarini's hot water heater to lift off of its base and [\*5] break away from the pipes. The separation of the pipes increased the water flooding into the basement. The increased flooding tore Paglarini's anchored fuel oil tank from its supports, and more than 250 gallons of fuel oil were discharged and mixed with the water in the basement.

The combination of water and fuel oil resulted in significant losses to Paglarini, which Paglarini asserts may exceed \$ 24,000. Paglarini filed the appropriate paperwork and documented losses of \$ 21,696. OIC paid \$ 5,000 on the claim, the amount owing under the sewer backup endorsement, but denied coverage for Paglarini's remaining claim on the basis that coverage beyond the \$ 5,000 sewer backup endorsement specifically excluded coverage for sewer backup.

Paglarini filed this action for breach of contract against OIC, alleging she sustained "substantial and severe water damage and damage from heating fuel spillage in her basement due to flooding caused by a storm." The parties filed cross-motions for summary judgment on the issue of coverage under the terms of the policy. Questions regarding damages were specifically reserved until after the summary judgment motions were determined.

The district court [\*6] found that the facts material to a determination of coverage were "essentially not in dispute," and determined that the overriding cause of Paglarini's damages was the backup of water in her basement. The district court also construed the exclusionary provision and the endorsement provision together, found the language to be clear and unambiguous, and held that the plain and ordinary meaning of the language demonstrated OIC's express intention to limit its liability in this case. The district court granted summary judgment in OIC's favor and this appeal followed.

## DECISION

### I.

As a threshold matter, OIC argues that Paglarini's arguments on appeal are improper because they were not preserved below. Generally, this court will not consider matters not argued and considered in the court below. [Thiele v. Stich, 425 N.W.2d 580, 582 \(Minn. 1988\).](#)

OIC first argues that Paglarini only disputed the interpretation of the contract, and not whether any fact questions remained. OIC contends that this is evidenced by the parties' apparent agreement to submit this case to the court on cross-motions for summary judgment. But OIC's position on appeal would transform these motions [\*7] into a trial by stipulated facts. OIC cites no authority to suggest that cross-motions on summary judgment are equivalent to a trial by stipulated facts. Furthermore, Paglarini's brief is not materially different from her summary judgment memorandum.

OIC next argues that even if Paglarini's argument to the court raises the same general issue litigated below, it constitutes a "new theory." But Paglarini's theory is the same as always--that the damage is covered by the insurance contract. That Paglarini interprets the facts differently from OIC does not constitute a new theory.

Finally, OIC argues that Paglarini failed to meet her burden to show "specific indications that there is a genuine issue of fact." [Id. at 583.](#) But evidence of the material facts that Paglarini suggests remain was clearly before the court at the time the cross-motions were made.

### II.

Paglarini next contends that the language of the insurance policy is ambiguous, thereby making summary judgment improper. Interpretation of the language in an insurance policy is a question of law that this court reviews de novo. [Illinois Farmers Ins. Co. v. Duffy, 618 N.W.2d 613, 615 \(Minn. App. 2000\).](#) [\*8] *review denied* (Minn. Jan. 26, 2001). A determination of whether insurance contract language is ambiguous is also a question of law. [Amatuzio v. United States Fire Ins. Co., 409 N.W.2d 278, 280 \(Minn. App. 1987\).](#)

We first address the question of whether the sewer backup exclusion in the base policy is broad enough to exclude the additional damage caused by the hot water heater and fuel oil spillage. On appeal, we construe the policy as a whole and resolve all doubts about the meaning of the language in favor of the insured. [Canadian Universal Ins. Co. v. Fire Watch, Inc., 258 N.W.2d 570, 572 \(Minn. 1977\)](#). If the terms of the policy are plain and unambiguous, that plain meaning should be given effect. [Home Mut. Ins. Co. v. Thalman, 387 N.W.2d 219, 222 \(Minn. App. 1986\)](#), review denied (Minn. June 30, 1986).

The policy states that loss to covered property is excluded if that loss is caused "directly or indirectly by [water damage], \* \* \* whether or not any other cause or event contributes concurrently or in any sequence to the loss." Although insurance contract exclusions must be construed narrowly against an insurance company, [\*9] [Hubred v. Control Data Corp., 442 N.W.2d 308, 310 \(Minn. 1989\)](#), Paglarini has suggested no alternate reading of this clause that gives it meaning. While the clause contains broad language, it nevertheless applies. The general policy clearly excludes losses caused even indirectly by water damage.

Paglarini contends an ambiguity exists in the language about whether the \$ 5,000 cap for water/sewer damage also applies as a limit to the fuel oil coverage and the hot water heater coverage provisions of the policy. But there is no question that the \$ 5,000 cap cannot apply to those provisions. And the district court did not apply them. Losses that can properly be attributed to water/sewer damage are subject to the \$ 5,000 limit. Losses attributable to the accidental discharge of water from the hot water heater or fuel oil leakage are clearly subject to the policy limits applicable to the base policy (\$ 44,100 for personal property).

### III.

Paglarini argues that the district court erred in finding that the water/sewer backup was an overriding cause of the damages and that, therefore, there were no genuine issues of material fact and summary judgment was proper. When [\*10] excluded perils and included perils combine to cause a loss, the causation question is generally one for the jury. [Campbell v. Insurance Serv. Agency, 424 N.W.2d 785, 789 \(Minn. App. 1988\)](#). The insurer may only defeat coverage in this situation when, as an affirmative defense, it proves that the excluded cause was the "overriding cause" of the damage. [SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 314 \(Minn. 1995\)](#).

No genuine issue of material fact exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." [DLH, Inc. v. Russ, 566 N.W.2d 60, 69 \(Minn. 1997\)](#) (quoting [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 \(1986\)](#)). Although proximate cause generally is a question of fact for the jury, "where reasonable minds can arrive at only one conclusion," proximate cause becomes a question of law and may be disposed of by summary judgment. [Lubbers v. Anderson, 539 N.W.2d 398, 402 \(Minn. 1995\)](#). Here, regardless of whether the addition of the fuel oil increased the amount of damage sustained, [\*11] reasonable minds can only arrive at the conclusion that the sewer backup was the overriding cause of the loss sustained.

**Affirmed.**

Dated: July 18, 2001