STATE OF MINNESOTA

IN SUPREME COURT

A19-0078

Court of Appeals — Chutich, J.

King's Cove Marina, LLC,

Appellant,

vs.

Filed: April 14, 2021
Office of Appellate Courts

Lambert Commercial Construction LLC, et al.,

Defendants,

United Fire & Casualty Company,

Respondent.

Mark R. Bradford, Bassford Remele, P.A., Minneapolis, Minnesota; and

Stephen P. Watters, Watters Law Office, Minnetonka, Minnesota, for appellant.

Kay Nord Hunt, Keith J. Broady, Bryan R. Feldhaus, Lommen Abdo, P.A., Minneapolis, Minnesota, for respondent.

Jennifer E. Olson, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota, for amicus curiae Minnesota Association for Justice.

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S Y L L A B U S

1. A commercial general liability insurance policy does not cover property damage to an insured's own completed work under the plain language of a "your work" exclusion, which applies to work included in the "products-completed operations hazard."

2. A *Miller-Shugart* settlement agreement that does not allocate between claims that are covered and not covered by the insurance policy is not per se unreasonable and unenforceable against the insurer.

3. Determining the reasonableness of an unallocated *Miller-Shugart* settlement agreement is a two-part inquiry that first examines the overall reasonableness of the settlement and then determines how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

CHUTICH, Justice.

This case requires us to determine whether a commercial general liability insurance policy, which includes coverage for the "products-completed operations hazard," covers property damage to the insured's own completed work, notwithstanding an exclusion for property damage arising out of the insured's work. We also consider whether a

Miller-Shugart settlement agreement[1] that fails to allocate between claims that are covered and not covered by the insurance policy is per se unreasonable and unenforceable against the insurer. The district court determined that the insurance policy covers all of the claimed property damage and also determined that the *Miller-Shugart* settlement agreement is reasonable and enforceable against the insurer. The court of appeals reversed, concluding that (1) the insurance policy covers some but not all of the claimed property damage, and (2) the *Miller-Shugart* settlement agreement is unreasonable as a matter of law because the agreement failed to allocate between covered and uncovered claims. We hold that the insurance policy does not cover all of the claimed property damage and a *Miller-Shugart* settlement agreement that fails to allocate between covered and uncovered claims is not per se unreasonable and unenforceable. Therefore, we affirm in part, reverse in part, and remand to the court of appeals for the consideration of the remaining issues on appeal.

FACTS

Appellant King's Cove Marina, LLC, is a full-service marina in Hastings. King's Cove undertook an expansion and remodeling project involving the main building of the marina. The project included new exterior walls, new windows, a new second-level mezzanine space for offices, and a new roof. Defendant Lambert Commercial Construction LLC performed work on the building's roof and siding. Lambert also performed other work, including the framing of window openings, installing window trim

[1] A *Miller-Shugart* settlement agreement is a settlement between a plaintiff and an insured defendant in which the defendant, having been denied coverage for the claim, agrees that the plaintiff may enter judgment against it for a sum collectible only from the insurance policy. *See Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

materials, and installing wood flooring on the second level. Lambert hired Roehl Construction, Inc., to perform concrete work.

During the course of the construction project, King's Cove advised Lambert of a number of issues with the work. King's Cove stated that the concrete floors were showing "excessive cracking." King's Cove also reported problems with water leaking from the walls and the roof, leading to damage to interior finishes and damage to existing ceiling tiles, carpet, and sheetrock. When King's Cove refused to pay the outstanding balance on Lambert's invoices, Lambert stopped work on the project.

King's Cove sued Lambert and others for breach of contract and negligence.[2] King's Cove alleged that the concrete floors were not constructed in accordance with industry standards or project plans and specifications, resulting in excessive movement and cracking. King's Cove also alleged that there were defects with Lambert's metal building products and metal roof and claimed that the in-floor heating systems were not installed properly, causing the concrete floors to move, crack, and expand.

Lambert tendered the defense of the lawsuit to respondent United Fire & Casualty Company, which insured Lambert under a commercial general liability policy and a commercial liability umbrella policy. The commercial general liability policy contained a general aggregate limit of $2 million, a products-completed operations aggregate limit of $2 million, and an each-occurrence limit of $1 million. The umbrella policy contained a

[2] King's Cove also sued Roehl Construction for the concrete work and Majeski Plumbing, Inc., for the in-floor heating work. Majeski Plumbing was dismissed from the lawsuit, and the claims against Roehl Construction went to trial. Neither Roehl Construction nor Majeski Plumbing is a party to this appeal.

general aggregate limit of $1 million. United Fire denied coverage for the claims but defended Lambert under a reservation of rights.

United Fire subsequently brought a declaratory judgment action, seeking a ruling that United Fire does not have a duty to defend or indemnify Lambert. While the declaratory judgment action was pending, King's Cove and Lambert entered into settlement negotiations to resolve the underlying lawsuit. United Fire received notice of a proposed *Miller-Shugart* settlement and, according to the district court, "minimally participate[d] in discussions" about the settlement.

King's Cove and Lambert ultimately reached an agreement to resolve the lawsuit and executed a *Miller-Shugart* settlement agreement. According to the agreement, because United Fire had denied insurance coverage in the declaratory judgment action, Lambert faced the possibility of not having any coverage for the claims of King's Cove. And even if coverage is available, the agreement stated that Lambert faced exposure for amounts in excess of the coverage limits. Therefore, Lambert stipulated to a judgment against it for the sum of $2 million, plus interest and costs, and King's Cove agreed to enforce the judgment against only United Fire. The agreement specified that the settlement "relates to the claims and damages for the work provided by Lambert, including the roof and siding" of the main building at the marina, but not for the work of Roehl Construction or other defendants. The agreement reserved the right of King's Cove to pursue claims against Roehl Construction for the concrete work.

Specifically, the parties stipulated and agreed as follows regarding "the claims and damages for the work provided by Lambert." The estimated cost of repairing the main

building at the marina was $1,085,000. The agreement attributed $599,000 of the cost to Lambert for Lambert's work, including the roofing and siding work. In addition, because the cost of the repairs would exceed 50 percent of the value of the building, the parties believed that a municipal flood-plain ordinance would require King's Cove to raise the elevation of the main building, as well as make changes to other buildings and areas of the marina property. As a result, the total damages that King's Cove sustained, which included the cost to comply with the flood-plain ordinance, ranged from $4.5 million to $5.2 million. Lambert's proportionate share of liability—calculated as 55.2 percent of the total damages—ranged from $2,426,000 to $2,870,000.

The district court approved the *Miller-Shugart* settlement agreement. The court ordered the entry of judgment against Lambert for $2 million, plus interest and costs, "to be satisfied by any insurance coverage provided to Lambert by United Fire."

The district court then granted the motion of King's Cove to file a supplemental complaint for garnishment against United Fire. In the garnishment proceeding, United Fire denied that insurance coverage exists for the claims of King's Cove. United Fire also asserted, among other defenses, that the *Miller-Shugart* settlement agreement is unreasonable to the extent that the settlement fails to allocate damages between covered and uncovered claims.

The district court granted partial summary judgment to King's Cove. The court ruled that there is insurance coverage under the United Fire policies for the claims that King's Cove brought against Lambert. The court determined that "there have been

multiple 'occurrences' causing property damage" to the main building at the marina and that United Fire had not "established any exceptions to coverage."

The district court then considered the reasonableness of the *Miller-Shugart* settlement agreement. Following a 2-day evidentiary hearing, which included testimony from expert attorneys, the court ruled that the settlement was reasonable in light of Lambert's potential exposure. The court stressed that, at the time of the settlement, "Lambert had a very real and reasonable concern that it could be without insurance coverage for the claims" brought by King's Cove. Therefore, the court issued an order for judgment, naming United Fire as the judgment debtor for the judgment against Lambert. The court denied United Fire's post-trial motions.

Both sides appealed. The court of appeals reversed and remanded. *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 937 N.W.2d 458 (Minn. App. 2019). Applying an exclusion in the United Fire policies that bars coverage for property damage to the insured's own work, the court of appeals concluded that the district court erred in its coverage determination by failing "to distinguish between damages directly caused by Lambert's work, and damages arising from Lambert's work that were not part of the scope of work Lambert was hired to perform." *Id.* at 468. In addition, the court of appeals determined that King's Cove and Lambert were required to identify "covered and non-covered damages in their *Miller-Shugart* agreement." *Id.* at 470. Because the agreement does not "allocate between covered and non-covered damages," the court of appeals concluded that the agreement is "unreasonable as a matter of law and unenforceable"

against United Fire. *Id.* After resolving the appeal on these grounds, the court of appeals did not reach other issues raised on appeal. *Id.* at 464 n.3.[3]

King's Cove petitioned for further review. We granted review on two issues: the scope of coverage under the United Fire policies and the reasonableness of the *Miller-Shugart* settlement agreement.

ANALYSIS

I.

We first review the issue of coverage for the claimed property damage under the United Fire policies. If there is "no coverage for the *Miller-Shugart* judgment, that ends the matter; there is no recovery against the insurer and the reasonableness of the settlement becomes a moot issue." *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990).

On appeal from summary judgment, we consider whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Kelly v. Kraemer Constr., Inc.*, 896 N.W.2d 504, 508 (Minn. 2017). The interpretation of an insurance policy, "including whether provisions in a policy are ambiguous, is a legal question subject to de novo review." *Latterell v. Progressive N. Ins. Co.*, 801 N.W.2d 917, 920 (Minn. 2011). "Language in an insurance policy is ambiguous if it is reasonably

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[3] United Fire also argued that (1) the district court erred by granting King's Cove leave to serve and file a supplemental complaint against United Fire as garnishee, and (2) the district court abused its discretion by denying United Fire's motion for a new trial or amended findings. *King's Cove Marina*, 937 N.W.2d at 464 n.3. By notice of related appeal, King's Cove argued that the district court erred by denying its request for an award of pre- and post-judgment interest. *Id.* The court of appeals did not reach these issues. *Id.*

susceptible to more than one interpretation." *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 640 (Minn. 2013).

United Fire has not challenged the court of appeals' conclusion that King's Cove suffered some "property damage" that was caused by an "occurrence" within the meaning of the policies. *See King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 937 N.W.2d 458, 466 (Minn. App. 2019). The coverage dispute focuses on the applicability of a particular exclusion in the United Fire policies, exclusion *l*, which bars coverage for property damage to the insured's own work. The dispute concerns the insurer's duty to indemnify; the duty to defend is not at issue.

Our objective when interpreting an insurance policy is to "ascertain and give effect to the intentions of the parties as reflected in the terms" of the policy. *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). We construe an insurance policy, "if possible, so as to give effect to all provisions." *Bobich v. Oja*, 104 N.W.2d 19, 24 (Minn. 1960). We give unambiguous policy language its plain and ordinary meaning. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). We construe ambiguous policy language "in favor of coverage" and read exclusions "narrowly against the insurer." *Wanzek Constr., Inc. v. Emps. Ins. of Wausau*, 679 N.W.2d 322, 325 (Minn. 2004). The insurer carries the burden of establishing the applicability of an exclusion. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). But the insured carries the burden of establishing that an exception to an exclusion applies. *Midwest Family*, 831 N.W.2d at 636.

A.

We begin with an overview of the relevant provisions of the United Fire commercial general liability policy. According to United Fire, the policy is a standard commercial general liability "Insurance Service Organization form policy" with the last major revision in 1986. The United Fire umbrella policy contains the same relevant provisions.

The dispute here focuses on the application of exclusion *l*, captioned "Damage To Your Work." We have described similar policy exclusions as "business-risk exclusions," which exclude "coverage for property damage caused by the insured's 'faulty workmanship' where the damages claimed are the cost of correcting the work itself." *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 611 (Minn. 2012) (quoting *Wanzek Constr., Inc.*, 679 N.W.2d at 325–26).

Exclusion *l* is an exclusion under "Coverage A" of the policy, which addresses coverage for property damage liability. Under exclusion *l*, the insurance does not apply to:

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

The term "your work" means the work performed by or on behalf of the insured and the "[m]aterials, parts or equipment furnished in connection with such work." Exclusion *l* does not apply, however, "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." The policy defines the "products-completed operations hazard" as generally including " 'property damage' occurring away from

premises you own or rent and arising out of 'your product' or 'your work.' "[4] The declarations page of the policy specifies a products-completed operations aggregate limit of $2 million. The policy provides that this limit is the most that United Fire will pay because of " 'property damage' included in the 'products-completed operations hazard.' "

B.

We turn now to the dispute at hand, which concerns the applicability of exclusion *l*. Lambert argued in the court of appeals that the only exclusion in the United Fire policies that is "arguably" at issue is exclusion *l*. The court of appeals concluded that exclusion *l* applies "to at least some of the marina's claims and damages." *King's Cove Marina, LLC*, 937 N.W.2d at 469. The court of appeals determined that "any costs associated with repairing or replacing Lambert's faulty work are barred by exclusion *l*." *Id.* at 468. But the court of appeals explained that "[a] claim for damages caused by Lambert's work to preexisting structures located adjacent to the work performed by Lambert"—"damage to existing sheetrock, tiles, carpet, and the floor"—"would, if proven, be covered under the insurance policy and not excluded by exclusion *l*." *Id.* Finally, the court of appeals concluded that the subcontractor exception to exclusion *l* is irrelevant here because the *Miller-Shugart* settlement agreement "specifically excluded the concrete work" performed by Roehl Construction. *Id.*

[4] The policy definition of "products-completed operations hazard" excludes property damage to the insured's work if the work "has not yet been completed," but this exclusion is not relevant here because the parties agree that Lambert's work was completed.

King's Cove challenges the court of appeals' conclusion that exclusion *l* bars coverage for the claimed damages associated with repairing or replacing Lambert's own work. *See* 937 N.W.2d at 468. Although the parties have made arguments about the applicability of other policy provisions and exclusions, as well as arguments concerning the scope of the *Miller-Shugart* settlement agreement, we decline to consider those issues because they were not properly raised or presented in this court.[5]

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[5] Specifically, we decline to consider the j(6) exclusion in the United Fire commercial general liability policy. This provision excludes coverage for property damage related to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it"; however, "this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard.' " Although King's Cove argued in its petition for review that the j(6) "exclusion *exception*" reinstates coverage under the products-completed operations hazard, King's Cove did not mention the j(6) exclusion until its reply brief. We do not consider arguments first made in a reply brief. *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 199 n.15 (Minn. 2020). We note, however, that the j(6) exclusion addresses work in progress, and King's Cove states that there is no dispute that "Lambert completed its work." *See* 9A Steven Plitt et al., *Couch on Insurance 3d* § 129:22 (2015 rev. ed.) (explaining that the j(6) exclusion bars "coverage for work in progress" and does "not apply to claims which arise after the insured's operations are complete").

We also decline to consider whether the *Miller-Shugart* settlement agreement covered the concrete work that Roehl Construction performed, and whether and to what extent Roehl Construction was a subcontractor of Lambert. King's Cove challenges the court of appeals' conclusion that the settlement agreement was "limited to roofing and siding performed by Lambert, and specifically excluded the concrete work performed by Roehl." *See King's Cove Marina*, 937 N.W.2d at 468. But King's Cove did not raise this issue in its petition for review. Therefore, the issue is forfeited. *See In re Welfare of Children of J.D.T.*, 946 N.W.2d 321, 326 n.3 (Minn. 2020). Nonetheless, we observe that the argument of King's Cove is not consistent with the language of the settlement agreement. The settlement agreement specifies that "[t]his Settlement relates to the claims and damages for the work provided by Lambert . . . and not to the claims or damages for the concrete work on the project by Roehl Construction" and that the settlement is "not intended to provide compensation for damages and losses sustained by King's Cove Marina, LLC arising from work and operations of Roehl Construction."

King's Cove focuses on the relationship between exclusion *l* and the products-completed operations hazard, arguing that the United Fire policies cover the costs to repair or replace Lambert's work on the roof and siding of the main building at the marina. Specifically, King's Cove argues that the United Fire policies provide coverage for this claimed damage under the products-completed operations hazard and that exclusion *l* does not bar this coverage. United Fire responds that exclusion *l* eliminates coverage for damage to Lambert's work and incorporates the products-completed operations hazard.

The construction of the policy set forth by King's Cove is not reasonable. To be sure, the costs to repair or replace Lambert's work on the roof and siding fall within the definition of "products-completed operations hazard" because the claimed property damage occurred away from Lambert's premises and arose out of Lambert's work after the work was completed. But exclusion *l* explicitly eliminates coverage for property damage to an insured's work arising out of the insured's work "and *included in* the 'products-completed operations hazard.' " (Emphasis added.) Although we construe policy exclusions narrowly against the insurer, the language of exclusion *l* is clear and unambiguous. *See Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015) (stating that we give unambiguous policy language "its plain and ordinary meaning"). We will not create ambiguity where none exists. *Eng'g Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 705 (Minn. 2013). Therefore, we conclude that the plain language of exclusion *l* bars coverage for the claimed property damage to Lambert's own work, notwithstanding the products-completed operations hazard.

King's Cove argues that this construction of the policy unfairly eliminates "$2 million in additional coverage for 'property damage' encompassed by the 'products-completed operations hazard' " for which Lambert paid a separate premium. King's Cove maintains that excluding the costs to repair or replace Lambert's work under exclusion *l* ignores the "plain language" of the policy—the definition of "products-completed operations hazard"—which includes "all" property damage that arises out of the insured's work. King's Cove also relies on the products-completed operations aggregate limit of $2 million that appears on the declarations page of the policy. According to King's Cove, the application of exclusion *l* to the claimed property damage would render coverage for the products-completed operations hazard meaningless.

For support, King's Cove relies on decisions of courts in other jurisdictions, which have held that similar policy provisions are confusing to the point of ambiguity and interpreted the provisions "in a light favoring coverage." *Mike Hooks, Inc. v. JACO Servs., Inc.*, 674 So. 2d 1125, 1127–28 (La. Ct. App. 1996); *see also Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148, 157 (Ala. 2014) (accepting the argument that "the 'your work' exclusion does not apply" if the policy's "declarations show coverage for 'products-completed operations' "); *N. Cntys. Eng'g, Inc. v. State Farm Gen. Ins. Co.*, 169 Cal. Rptr. 3d 726, 747 (Cal. Ct. App. 2014) (noting "the complications, if not outright ambiguity, presented by" the policy provisions addressing the products-completed operation hazard). These decisions, however, appear to be outliers.

A federal district court recently observed that courts "generally reach the same conclusion—that there is no ambiguity" between exclusion *l* and the products-completed

operations hazard and that insureds "are not entitled to coverage for their own faulty work." *Sunwestern Contractors Inc. v. Cincinnati Indem. Co.*, 390 F. Supp. 3d 1009, 1019 (D. Ariz. 2019) (concluding that the products-completed operations hazard does not entitle an insured "to coverage for its own faulty work, if that faulty work led to property damage that occurred after completion" of the work); *see, e.g.*, *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 903 n.6 (3d Cir. 1997) (rejecting the argument that an insurance policy is "ambiguous as a whole" based on the products-completed operations hazard); *Am. Home Assur. Co. v. AGM Marine Contractors, Inc.*, 379 F. Supp. 2d 134, 137 (D. Mass. 2005) (concluding that "the 'products-completed operations hazard' provision does not create an ambiguity"), *aff'd*, 467 F.3d 810 (1st Cir. 2006); *cf. Valmont Energy Steel, Inc. v. Com. Union Ins. Co.*, 359 F.3d 770, 776 (5th Cir. 2004) (concluding that a policy exclusion for "your product" unambiguously applied to restrict coverage for property damage, despite the products-completed operations hazard). Our conclusion is consistent with the great weight of authority from other jurisdictions. A policy's complexity does not necessarily signify ambiguity. *See Moorhead Mach. & Boiler Co. v. Emps. Com. Union Ins. Co. of Am.*, 285 N.W.2d 465, 469 (Minn. 1979).

We also reject the argument of King's Cove that the products-completed operations hazard is a distinct category of coverage. The declarations page merely shows that the products-completed operations hazard has "a different applicable *limit*"—not that it is "a separate form of coverage." *Sparta Ins. Co. v. Colareta*, 990 F. Supp. 2d 1357, 1364 (S.D. Fla. 2014). In explaining coverage limits, the policy states that the completed operations aggregate limit is the "most [United Fire] will pay under Coverage A" for property damage

included in the products-completed operations hazard. Because exclusion *l* is an exclusion under Coverage A, exclusion *l* applies to coverage for property damage that is included in the products-completed operations hazard under Coverage A. "The fact that a policy's declarations page sets forth a special policy limit for products-completed operations does not mean that the coverage for products-completed operations exists independently of the exclusions and conditions set forth in the policy." 3 Allan D. Windt, *Insurance Claims & Disputes* § 11:32 (6th ed. 2020); *see also, e.g.*, *Sunwestern Contractors*, 390 F. Supp. 3d at 1020 (explaining that the products-completed operations hazard is "subject to any relevant exclusions and any faulty work that is encompassed in the products-completed operations hazard provision is unambiguously excluded from coverage by exclusion (l)"). Therefore, we conclude that coverage for property damage arising from Lambert's completed work under Coverage A is subject to the exclusions under Coverage A, including exclusion *l*.

Although exclusion *l* may limit coverage for property damage included in the products-completed operations hazard, the coverage is not illusory, as King's Cove suggests. *See W. Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 704 (Minn. 2009) (distinguishing limited coverage from illusory coverage). United Fire acknowledges that "exclusion *l* does not apply to damage to other property" arising out of Lambert's work, such as damage to existing "sheetrock, tiles and carpeting." Exclusion *l* also contains an exception for the work of subcontractors. Our interpretation of the United Fire policies is consistent with the general purpose of a commercial general liability policy, which is intended to protect the insured when its work "damages someone else's property" and is

not intended to be "a performance bond covering an insured's own work." *Wilshire Ins. Co. v. RJT Constr., LLC*, 581 F.3d 222, 226 (5th Cir. 2009).

In sum, we conclude that the claimed property damage to Lambert's own work on the roof and siding of the main building of the marina is not covered under the United Fire policies based on the plain language of exclusion *l*. We therefore affirm the coverage determination of the court of appeals.

II.

We now turn to the second issue: whether the *Miller-Shugart* settlement agreement is invalid and unenforceable as a matter of law because the agreement failed to allocate between covered and uncovered claims. As we concluded above, the claimed property damage to the roof and siding of the main building at the marina, arising from Lambert's own work, is not covered by the United Fire policies. And United Fire has not challenged the court of appeals' conclusion that damage to "existing sheetrock, tiles, carpet, and the floor" of the main building, which was "adjacent to the work performed by Lambert would, if proven, be covered under the insurance policy." *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 937 N.W.2d 458, 468 (Minn. App. 2019). Therefore, the United Fire policies cover some but not all of the property damage claimed by King's Cove.

The allocation issue presents a matter of first impression for our court. Determining a legal standard is a question of law that we review de novo. *See Jerry's Enters. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006).

A.

We begin with an overview of our case law relating to *Miller-Shugart* settlement agreements. In *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982), we approved a settlement method that protects an insured defendant when an insurer denies insurance coverage for a plaintiff's claims. Under a *Miller-Shugart* settlement agreement, a plaintiff and an insured defendant stipulate to a judgment against the defendant on the condition that the plaintiff releases the defendant from any personal liability and agrees to seek recovery solely from the insurer. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 330 (Minn. 1993). The plaintiff judgment creditor then proceeds against the insurer in a garnishment proceeding. *See Miller*, 316 N.W.2d at 732. In the garnishment proceeding, the insurer may challenge not only the scope of coverage under the insurance policy, but also the validity and reasonableness of the settlement. *See Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990). A *Miller-Shugart* settlement agreement is enforceable against the insurer if the insurer receives notice of the settlement, and the settlement is reasonable and not the product of fraud or collusion. *Miller*, 316 N.W.2d at 733–35. Reasonableness is "a question of fact" for the district court to resolve as the fact-finder. *Alton M. Johnson*, 463 N.W.2d at 279. If insurance coverage is established, but the settlement is unreasonable, the default rule is that the parties to the settlement agreement are returned "to the even footing of a trial on the merits of the main action." *Id.* at 280.

B.

We turn next to the parties' dispute—whether the *Miller-Shugart* settlement agreement is unreasonable as a matter of law because the agreement fails to allocate

between covered and uncovered claims.[6] In a prior case, we held that a *Miller-Shugart* settlement agreement that failed to allocate the damages among multiple defendants was unreasonable and unenforceable against the insurer, explaining that there was "no efficient way for the trial court to allocate the damages among the defendants." *Bob Useldinger & Sons, Inc.*, 505 N.W.2d at 331. "Except in the most unusual case," we stated that "it is unreasonable for a defendant to settle a case for an unspecified sum." *Id.* We have not considered the failure to allocate in a case involving a single defendant.

Federal courts in Minnesota have addressed the failure to allocate a *Miller-Shugart* settlement agreement in cases involving a single defendant, holding that the failure to allocate between covered and uncovered claims makes the settlement agreement

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[6] Neither party accepts the court of appeals' determination that the *Miller-Shugart* settlement agreement resolved a mix of covered and uncovered claims. *See King's Cove*, 937 N.W.2d at 470 (stating that "the district court failed to distinguish between repair-and-replacement damages caused by work Lambert was hired to perform—to which exclusion *l* applies—and damages to adjacent structures that were not caused by, though arising from, Lambert's construction work"). King's Cove asserts that the settlement agreement resolved "a unitary damage claim for the total enhanced repair costs to comply with the flood-plain ordinance," which King's Cove treats as a covered claim under a concurrent causation theory. According to King's Cove, the agreement "did not settle any uncovered damage claims." United Fire, on the other hand, asserts that "on the contemporaneous record" of the settlement "nothing is covered." While acknowledging that King's Cove "made assertions of damaged carpet and ceiling tile," United Fire claims that King's Cove "produced no evidence that damage to other property played any part in the $2 million settlement." Neither party, however, raised an issue regarding the scope of the settlement agreement in a petition for review or request for conditional cross-review. Therefore, having concluded that exclusion *l* bars insurance coverage for property damage to Lambert's own work, we accept the premise of the court of appeals' decision that the *Miller-Shugart* settlement agreement resolved a mix of covered and uncovered claims and decline to address the scope of the settlement agreement. *See In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005) ("Generally, we do not address issues that were not raised in a petition for review.").

unreasonable and unenforceable as a matter of law. *E.g.*, *Corn Plus Coop. v. Cont'l Cas. Co.*, 516 F.3d 674, 681 (8th Cir. 2008); *Interlachen Props., LLC v. State Auto Ins. Co.*, 275 F. Supp. 3d 1094, 1111 (D. Minn. 2017). The Eighth Circuit Court of Appeals reasoned that our "requirement in *Bob Useldinger & Sons* that the insured allocate damages among multiple defendants applies with equally compelling logic to the allocation of damage items in cases of a single defendant." *Corn Plus Coop.*, 516 F.3d at 681. The Eighth Circuit concluded that "a judicial determination into the reasonableness" of an unallocated settlement is "impractical since the parties are naturally in a better position to calculate the damages." *Id.* The Eighth Circuit also explained that parties would be "tempted to inflate their covered claims post hoc" if there was no contemporaneous allocation of the claims. *Id.*

The court of appeals found the reasoning in the federal decisions persuasive. *King's Cove*, 937 N.W.2d at 470 n.6. Because the *Miller-Shugart* settlement agreement does not allocate between covered and uncovered claims, the court of appeals concluded that the settlement is unreasonable as a matter of law and unenforceable against United Fire. *Id.* at 470.

King's Cove urges us to adopt a new rule in cases involving a single defendant. It advocates for a rule that permits the district court to determine the reasonableness of a *Miller-Shugart* settlement agreement based on the value of the covered claims. King's Cove asserts that a strict allocation rule is "unnecessary" and "imposes unrealistic and unfair burdens on settling parties" at a time when coverage issues remain unresolved. King's Cove also argues that "there is no factual or legal basis to assume that district courts

are incapable, in every case, of determining the reasonableness of unallocated settlements." United Fire responds that *Miller-Shugart* settlement agreements are "suspect" because of concerns with overreaching, and the burden of allocation after the fact should not be placed on the courts when the settling parties are "in the best position to know how they valued the claims."

We hold that the failure to allocate between covered and uncovered claims does not make the *Miller-Shugart* settlement agreement per se unreasonable. Our prior decisions show that the test for the reasonableness of a *Miller-Shugar*t settlement agreement is a flexible one, grounded in principles of equity. The district court is "asked to apply its sense of fairness to evaluate a compromise of conflicting interests, a characteristic role for equity." *Alton M. Johnson Co.*, 463 N.W.2d at 279. In *Bob Useldinger & Sons*, where the *Miller-Shugart* settlement agreement did not allocate damages among multiple defendants, we concluded that, "[w]ithout knowing what each defendant has agreed to pay as its share, there is no way of judging the reasonableness or prudence of the agreement from the standpoint of each defendant." 505 N.W.2d at 331. This conclusion does not hold true, however, when the settlement agreement involves a single defendant that has agreed to pay a fixed sum to settle claims. Further, we agree with King's Cove that requiring allocation between covered and uncovered claims may "unfairly burden[] the settling parties with predicting how the court in the garnishment action may resolve complex coverage issues,"

particularly in cases like this one, when the insurer and insured both took all-or-nothing positions. Therefore, we reject the rigidity of a per se allocation rule.[7]

C.

We now consider the reasonableness of the unallocated *Miller-Shugart* settlement agreement. King's Cove argues that the district court should evaluate the reasonableness of the settlement "in light of the value of the covered damage claims." According to King's Cove, "[i]f the value of the covered claim exceeds the value of the settlement, there is no reason to invalidate a *Miller-Shugart* settlement." But we have explained that "[t]he issue of how much of the settlement is covered is distinct from the issue of whether a settlement is reasonable." *Jostens, Inc. v. CNA Ins./Cont'l Cas. Co.*, 403 N.W.2d 625, 629 (Minn. 1987), *overruled on other grounds by N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994). The allocation issue relates to the relative value of covered and uncovered claims. "An allocation is, by its very nature, a determination of the *relative* value—not the *absolute* value—of the items being assessed." *UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, 47 F. Supp. 3d 863, 877 (D. Minn. 2014).

We hold that determining the reasonableness of an unallocated *Miller-Shugart* settlement agreement involves a two-step inquiry. The district court first considers the

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[7] In the context of non-*Miller-Shugart* settlement agreements, we have allocated settlement costs when there was an appropriate basis for doing so. *See Jostens, Inc. v. CNA Ins./Cont'l Cas. Co.*, 403 N.W.2d 625, 630–31 (Minn. 1987), *overruled on other grounds by N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994) (determining the appropriate allocation of class-action settlement amounts). We do not consider the circumstances of a *Miller-Shugart* settlement to be so unusual as to require a departure from this accepted procedure.

overall reasonableness of the settlement. If the settlement is reasonable, the district court then considers how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement.

As a threshold matter, the district court must find that the settlement is reasonable, examining the value of both the covered and uncovered claims. We have imposed a reasonableness requirement "to discourage possible overreaching in *Miller-Shugart* settlement negotiations." *Jorgensen v. Knutson*, 662 N.W.2d 893, 905 (Minn. 2003); *see Alton M. Johnson Co.*, 463 N.W.2d at 280 (noting that "the exposed insured has no incentive to drive a hard bargain" in settlement negotiations if it will have no personal liability for the amount of the settlement). The plaintiff judgment creditor bears the burden of showing that "the settlement is reasonable and prudent." *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982).

The test is "what a reasonably prudent person in the position of the defendant would have settled for on the merits" of the plaintiff's claims at the time of the settlement. *Id*. This is a multi-factor objective test, which requires the district court to consider "the facts bearing on the liability and damage aspects" of the plaintiff's claims. *Id.* The relevant evidence regarding reasonableness includes "the customary evidence on liability and damages," as well as the risks of going to trial, "the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues if the tort action had been tried," expert legal opinions, and "other factors of forensic significance." *Alton M. Johnson*, 463 N.W.2d at 279.

If the district court finds that the unallocated *Miller-Shugart* settlement agreement is reasonable, the district court then considers the issue of allocation. The test is how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement. *See UnitedHealth Grp. Inc. v. Exec. Risk Specialty Ins. Co.*, 870 F.3d 856, 863 (8th Cir. 2017) (adopting a similar allocation test in a dispute over coverage for settlements under professional liability excess insurance policies).

Like the reasonableness inquiry, the allocation inquiry is a multi-factor objective test, which requires the consideration of "any facts that bear on the issues of liability, damages, and the risks of trial." *Jorgensen*, 662 N.W.2d at 904. The relevant evidence regarding allocation may include (1) information that was available to the parties at the time of the settlement regarding the underlying facts, (2) materials produced in discovery and any court rulings in the underlying litigation, (3) evidence of how the parties and their attorneys evaluated the claims at the time of the settlement, and (4) expert testimony about the value of the settled claims. *See UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, 47 F. Supp. 3d 863, 874–75 (D. Minn. 2014) (discussing "several types of evidence" that are relevant in determining "what portion of a multi-claim settlement should be allocated to a particular claim"); *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 264 (4th Cir. 2006) (identifying "a variety of factors" that may be relevant in allocating settlements). As the Eighth Circuit explained, "Events and circumstances happening after settlement are relevant only insofar as they inform how a reasonable party would have

valued and allocated the claims at the time of settlement." *Exec. Risk Specialty Ins. Co.*, 870 F.3d at 864.

Because the relevant evidence on reasonableness and allocation overlaps, we contemplate that the district court typically will consider the reasonableness and allocation issues at the same time. If the district court finds that the unallocated settlement is reasonable, the district court then makes an allocation ruling in light of the ultimate coverage determination.[8]

We acknowledge that a post-hoc allocation of covered and uncovered claims may in some circumstances be a difficult task for district courts. Analyses of reasonableness are required in many areas of the law, however, and district courts are asked to weigh the relevant evidence to determine the reasonable value of covered and uncovered claims in other contexts. For example, in an analogous situation involving the failure to allocate an arbitration award between claims that were covered and not covered under a commercial general liability policy, we directed the parties to present evidence to the district court and stated that "the district court must, as best it can, establish the allocation the arbitrator would have made if allocation had been requested." *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012); *see also RSUI Indem. Co. v.*

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[8] The district court already ruled on the overall reasonableness of the *Miller-Shugart* settlement agreement here after concluding that the United Fire policies cover the claims that King's Cove brought against Lambert. United Fire challenged the district court's reasonableness ruling on appeal, but the court of appeals did not reach this issue. We too do not reach this issue. The court of appeals may consider this issue on remand. Nothing in our opinion should be construed as an expression of our views on the overall reasonableness of the *Miller-Shugart* settlement agreement.

New Horizon Kids Quest, Inc., 933 F.3d 960, 966 (8th Cir. 2019) (applying our allocation analysis in *Remodeling Dimensions* to an unallocated jury award). As long as the parties present sufficient evidence, the district court has the expertise and authority to determine post-hoc allocations in the *Miller-Shugart* settlement agreement context as well.

King's Cove will bear the burden of proof on allocation. Placing the burden of proof on the plaintiff judgment creditor is consistent with the general rule that "the burden of proof rests upon the party claiming coverage under an insurance policy," *Boedigheimer v. Taylor*, 178 N.W.2d 610, 614 (Minn. 1970), as well as the more specific rule that the plaintiff judgment creditor bears the burden of establishing the reasonableness of a *Miller-Shugart* settlement agreement, *Miller*, 316 N.W.2d at 735–36. *See UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, 941 F. Supp. 2d 1029, 1036 (D. Minn. 2013) (concluding that the insured bears the burden of proving how much of a settlement was allocated between covered and excluded claims); *cf. Bor-Son Bldg. Corp. v. Emp'rs Com. Union Ins. Co. of Am.*, 323 N.W.2d 58, 64 (Minn. 1982) (concluding that the insured failed to meet its burden of proving a reimbursement claim regarding a settlement under a comprehensive general liability policy). And in the context of an arbitration award, we concluded that the insured generally bears the burden to prove allocation unless the insurer who controls the insured's defense "fails to make a timely disclosure of the insured's interest in obtaining a written explanation of the award." *Remodeling Dimensions*, 819 N.W.2d at 619.

Moreover, because King's Cove negotiated and was a party to the *Miller-Shugart* settlement agreement, King's Cove is "not only in a better position to know how the settling parties valued the claims," but also "was able to shape the record on that issue—and to do

so at a time when [the parties] knew that allocation would almost certainly become a crucial issue" in the litigation. *Columbia Cas. Co.*, 941 F. Supp. 2d at 1036–37. The *Miller-Shugart* settlement agreement here specifically acknowledged that "Lambert may not have any insurance coverage for the claims alleged" by King's Cove.

In sum, we reject a per se rule that invalidates unallocated *Miller-Shugart* settlement agreements in cases involving a single defendant. We instead adopt a flexible approach that allows a district court to consider all relevant facts and circumstances in determining the overall reasonableness of the settlement and in allocating the settlement between covered and uncovered claims. We remand to the court of appeals to resolve the remaining issues on appeal in light of the coverage determination and allocation standard that we announce here.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is affirmed in part, reversed in part, and the case is remanded to the court of appeals.

Affirmed in part, reversed in part, and remanded.