STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0776

Minnesota Lawyers Mutual Insurance Company,
Respondent,

vs.

Bradshaw & Bryant Law Office PLLC,
Appellant.

Filed March 10, 2025
Affirmed; motion denied
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CV-23-7051

Christopher L. Goodman, Richard J. Sauceda, Thompson, Coe, Cousins & Irons, LLP, St. Paul, Minnesota (for respondent)

Patrick H. O'Neill, Jr., Patrick H. O'Neill, III, Larson • King, LLP, St. Paul, Minnesota (for appellant)

Considered and decided by Schmidt, Presiding Judge; Frisch, Chief Judge; and Smith, Tracy M., Judge.

SYLLABUS

1. When a professional-liability insurer and an insured are both parties to an action to resolve that insured's coverage, the claimant in the underlying action and other insureds do not need to be parties for the dispute to be justiciable under the Minnesota Uniform Declaratory Judgments Act, Minn. Stat. §§ 555.01-.16 (2024).

2. The insured law firm did not have coverage under the insurance policy because no claim was "deemed made" during the policy period when, under the language

of the policy, the claim was "deemed made" earlier and could only be "deemed made" once.

OPINION

SMITH, TRACY M., Judge

Respondent-insurer Minnesota Lawyers Mutual Insurance Company (MLM) brought a declaratory-judgment action to determine whether its insured, appellant Bradshaw & Bryant Law Office PLLC (B&B), was entitled to defense or indemnification for a malpractice action brought by claimant Raymond Kvalvog, whom B&B had represented in a wrongful-death action. The district court granted summary judgment in favor of MLM, concluding that there was no coverage under B&B's insurance policy because there was no genuine dispute that the malpractice claim against B&B was deemed made upon B&B's receipt of certain communications from Kvalvog in 2019 and that the claim was not timely reported to MLM during the applicable policy period, as required by the policy. The district court rejected B&B's interpretation of the policy, which would have allowed the claim to be deemed made again in 2022 and timely reported during that policy period.

B&B appeals. It argues, first, that no justiciable controversy exists as required for declaratory judgment because Kvalvog and the individual B&B attorneys insured under the policy, including the three attorneys named as defendants in Kvalvog's malpractice suit, were not joined as parties to this action. Second, it argues in the alternative that summary judgment was improper for three reasons: (1) as a matter of policy interpretation, a claim that was deemed made under one of the policy's two deemed-made provisions

could be deemed made again under the other provision and timely reported within the applicable policy period; (2) the 2019 communications did not constitute a "claim" that was "deemed made" because no malpractice claim could have been brought at that time and there was a genuine dispute of material fact as to whether B&B was aware of all of the 2019 communications and their significance; and (3) MLM failed to present evidence of actual prejudice from any delay in reporting the claim, which, B&B asserts, is necessary to deny coverage.

We conclude that the insurance-coverage dispute is justiciable under the Uniform Declaratory Judgments Act and that summary judgment declaring that MLM need not provide B&B coverage for Kvalvog's malpractice claim was proper. We therefore affirm.

FACTS

The Malpractice Claim

B&B, through its managing partner, attorney Michael Bryant, represented Kvalvog as trustee of the estates of Kvalvog's two sons in a wrongful-death action. *See Kvalvog v. Lee*, No. A20-0693, 2021 WL 3027269, at *1-2 (Minn. App. July 19, 2021) (describing Kvalvog's wrongful-death action), *rev. denied* (Minn. Sept. 29, 2021). In July 2019, a jury found that the defendants in Kvalvog's action were not negligent. As a result, damages—which the jury determined to be $5 million, consisting of $2.5 million for the loss of each son—were not awarded.

In September 2019, Bryant filed a posttrial motion on behalf of Kvalvog, seeking judgment notwithstanding the verdict and a new trial. Later that month, Kvalvog obtained new counsel in the action. Kvalvog, via his new counsel, sent B&B a request for Kvalvog's

records. Kvalvog's new counsel and Bryant jointly filed a notice of substitution of counsel with the district court, stating that Bryant was withdrawing his representation and Kvalvog's new counsel was taking over the matter.

On October 21, 2019, Kvalvog's new counsel emailed Bryant, attaching a letter that stated, "This law firm has been retained by Ray and Kathie Kvalvog to investigate and handle potential legal action which may involve your law firm in connection with your representation of the Kvalvogs in their wrongful death action . . . ." The letter directed Bryant "to preserve all documents and records" related to his "representation of the Kvalvogs," identifying this preservation of records as a "litigation hold." It also asked that Bryant "notify any other persons who are likely to be material witnesses in [the] matter" that they were obligated "to preserve potential evidence." The letter stated that failure to preserve discoverable evidence could "result in substantial sanctions in addition to the loss of evidence that might be used in support of [B&B's] defenses in this matter."

Bryant immediately replied by email, confirming that he had received the letter and noting that B&B had not retained copies of the files that it had previously sent to the firm. About three hours later, Kvalvog's counsel replied to Bryant by email, stating, "The litigation hold letter concerns a potential malpractice action against you and/or [B&B] in connection with your representation of the Kvalvogs . . . . [I]f you haven't already, please notify your malpractice carrier of this potential claim."

It is undisputed that MLM insured B&B in 2019 and that B&B did not notify MLM about the 2019 letter and related emails at that time. In a 2023 declaration filed as part of the insurance-coverage dispute at issue here, Bryant asserted that he had "no specific

memory of opening, reading, or acting on that [reply] email" and stated that he "discovered the email while gathering documents to produce in connection with this litigation."

Kvalvog's posttrial motions in the wrongful-death action were unsuccessful, as was his appeal to this court, which was decided in 2021. *See id.* at *1-12.

In October 2022, Kvalvog again had new counsel, and this counsel sent Bryant a notice-of-claim letter stating that they had been retained to represent Kvalvog "in relation to a legal malpractice action against [Bryant] and [B&B]" in connection with the wrongful-death action. The letter requested that Bryant have his malpractice carrier contact Kvalvog's counsel as soon as possible. Five days after receiving the letter, B&B reported the claim to MLM.

MLM and B&B's Insurance Policy

At the time of the October 2022 letter and B&B's report to MLM, B&B was insured by MLM under a policy with a policy period of July 15, 2022, through July 15, 2023. The coverage section of the policy states, in relevant part, that MLM "will pay . . . all DAMAGES the INSURED may be legally obligated to pay and CLAIM EXPENSES," up to $2 million per claim, "provided that: . . . the CLAIM is deemed made during the POLICY PERIOD; and . . . the CLAIM is reported to [MLM] during the POLICY PERIOD or within 60 days after the end of the POLICY PERIOD." The coverage section of the policy also includes a deemed-made clause, which states:

> A CLAIM is deemed made when:
> (1) a demand is communicated to an INSURED for DAMAGES resulting from the rendering of or failure to render PROFESSIONAL SERVICES; or

> (2) an INSURED first becomes aware of any actual or alleged act, error or omission by any INSURED which could support or lead to a CLAIM.

The policy defines a "claim" as follows:

> (1) a demand communicated to the INSURED for DAMAGES [f]or PROFESSIONAL SERVICES;
> (2) a lawsuit served upon the INSURED seeking such DAMAGES;
> (3) any notice or threat, whether written or oral, that any person, business entity or organization intends to hold an INSURED liable for such DAMAGES; or
> (4) any act, error or omission by any INSURED which could support or lead to a demand for such DAMAGES.

Denial of Coverage and Declaratory-Judgment Action

After receiving B&B's report, MLM agreed to defend B&B under a reservation of rights until MLM finished its investigation to determine whether there was coverage. Specifically, MLM questioned whether, in light of the October 2019 litigation-hold letter and emails (which B&B had since provided to MLM), B&B was aware of a malpractice claim in 2019, which would make its 2022 report to MLM untimely.

In May 2023, after completing its investigation, MLM informed B&B that it was denying coverage because it had determined that, according to the insurance policy, a claim had been deemed made in October 2019 because "B&B first became aware that its acts, errors or omissions could support or lead to a CLAIM when it received the [2019 letter]." MLM determined that B&B had not reported Kvalvog's claim during the applicable policy period or within 60 days after the end of that policy period, and therefore, the 2022 report was untimely and precluded coverage.

After denying coverage, MLM immediately commenced this action, filing a complaint in district court seeking declaratory judgment that B&B does not have coverage under the policy for Kvalvog's malpractice claim because the claim was not deemed made during the policy period in which it was reported. Additionally, MLM sought judgment declaring that Kvalvog's malpractice action is a single claim that is subject to the policy's limit of $2 million per claim.

In July 2023, Kvalvog commenced his malpractice suit, naming as defendants B&B, Bryant, and two other B&B attorneys.

In November 2023, MLM moved for summary judgment in this coverage action, seeking a declaration of no duty to defend or indemnify B&B regarding the malpractice claim and a declaration that the maximum coverage applicable to the malpractice action is the $2 million per-claim limit. The district court granted MLM's motion, determining that MLM's insurance policy unambiguously required that a claim be timely reported when it is first deemed made, that the malpractice claim against B&B was deemed made in October 2019, that the claim could not be deemed made again and reported later, and that, as a result, MLM was not required to defend or indemnify B&B.[1]

B&B appeals.

ISSUES

I. Does a justiciable controversy exist without Kvalvog and individual B&B attorneys being parties to the declaratory-judgment action?

[1] The district court did not address the question of the amount of coverage.

II. Did the district court err by granting summary judgment declaring that MLM did not need to provide coverage on the ground that, based on the undisputed facts, the claim was not deemed made during the policy period in which B&B reported it?

ANALYSIS

We address, in turn, B&B's arguments that the declaratory-judgment action does not present a justiciable controversy and that summary judgment declaring that there was no insurance coverage was improper.

I. The coverage dispute is justiciable under the Uniform Declaratory Judgments Act.

Appellate courts review justiciability issues de novo. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011). An action under the Uniform Declaratory Judgments Act "must present a justiciable controversy or a district court has no jurisdiction to declare rights under the act." *Hoeft v. Hennepin County*, 754 N.W.2d 717, 722 (Minn. App. 2008), *rev. denied* (Minn. Nov. 18, 2008).

> A justiciable controversy exists if the claim (1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.

Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611, 617-18 (Minn. 2007).

Applying this test, the district court concluded that a justiciable controversy exists between MLM and B&B. B&B asserts, for the first time on appeal, that there is not a justiciable controversy because MLM failed to join necessary parties to the lawsuit.

Specifically, B&B argues that Kvalvog and the individual B&B attorneys insured under the policy had to be parties for the coverage-dispute to be justiciable. MLM counters that B&B forfeited its argument by not raising it in the district court and that, in any event, the controversy is justiciable. We begin with the forfeiture argument.

A. B&B's justiciability argument is not forfeited.

MLM contends that B&B forfeited its argument that the controversy is nonjusticiable because B&B raised the argument for the first time on appeal. MLM invokes the well-settled rule that appellate courts generally do not address issues that were not raised before the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

We are not persuaded that B&B forfeited its justiciability argument. In *Izaak Walton League of America Endowment, Inc. v. State, Department of Natural Resources*, a case involving specific performance of a contract, the supreme court stated that, "[b]ecause the existence of a justiciable controversy is essential to [an appellate] court's exercise of jurisdiction," an appellate court could raise the issue itself. 252 N.W.2d 852, 854 (Minn. 1977). In support of that statement, the supreme court cited four declaratory-judgment cases requiring justiciable controversies. *Id.* (citing *Cnty. Bd. of Educ. v. Borgen*, 257 N.W. 92 (Minn. 1934); *Seiz v. Citizens Pure Ice Co.*, 290 N.W. 802 (Minn. 1940); *State ex rel. Smith v. Haveland*, 25 N.W.2d 474 (Minn. 1946); *Arens v. Village of Rogers*, 61 N.W.2d 508 (Minn. 1953)). Consistent with this caselaw, we conclude that a party does not forfeit the argument that a declaratory-judgment action does not present a justiciable controversy by not raising the argument until appeal.

To convince us otherwise, MLM cites two cases, neither of which is analogous to this case. In *Citizens for Rule of Law v. Senate Committee on Rules & Administration*, we determined that the respondents—who were the State of Minnesota and various legislative committees and offices—could not assert for the first time on appeal that they lacked the capacity to be sued or were not proper defendants of the plaintiffs' constitutional claims. 770 N.W.2d 169, 174 n.1 (Minn. App. 2009), *rev. denied* (Minn. Oct. 20, 2009). In the nonprecedential case of *Vik v. Wild Rice Watershed District*, we determined that, after the district court concluded that the controversy was nonjusticiable for purposes of declaratory judgment, a new argument for why a justiciable controversy in fact existed could not be presented for the first time on appeal. No. A09-1841, 2010 WL 3119424, at *6 (Minn. App. Aug. 10, 2010).[2] Neither case stands for the proposition that a party forfeits an argument that a declaratory-judgment action lacks a justiciable controversy when they do not raise it until appeal. B&B therefore did not forfeit its challenge to justiciability.

B. MLM's declaratory-judgment action presents a justiciable controversy.

We turn to the question whether MLM's action presents a justiciable controversy. The Uniform Declaratory Judgments Act states, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Minn. Stat. § 555.11. "Whether the failure to add . . . a party would affect justiciability and therefore jurisdiction depends on the nature of the rights sought to be

[2] Nonprecedential opinions may be cited for their persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

declared." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 275 (Minn. App. 2001). In determining whether a party must be joined, we have considered whether adjudicating the case would affect the nonjoined party's interest without affording the nonjoined party "a full opportunity to litigate the issue or a full adjudication of [their] rights." *Unbank Co. v. Merwin Drug Co.*, 677 N.W.2d 105, 108 (Minn. App. 2004).

B&B contends that Kvalvog and the individual B&B attorneys have a claimed interest in the outcome of the declaratory-judgment action. According to B&B, Kvalvog has a claimed interest because MLM sought a declaration regarding the coverage limit. The individual B&B lawyers, according to B&B, have a claimed interest because they are insured under B&B's policy with MLM and three of them have been personally sued in the malpractice action. B&B contends that Kvalvog and the individual B&B attorneys were therefore necessary parties to the declaratory-judgment action. *See* Minn. Stat. § 555.11. We disagree.

MLM's action against B&B asked the district court to determine B&B's coverage based on the insurance policy between MLM and B&B. We also note that Kvalvog's and the individual attorneys' rights and claimed interests align with B&B's interests—they all share the interest that there be coverage and that it be as broad as possible. Moreover, fundamentally, Kvalvog's interest is recovering damages from B&B and the individual lawyers in the malpractice action—an action that Kvalvog properly commenced against those defendants and not against MLM. *See Cincinnati Ins. Co.*, 621 N.W.2d at 274 (noting that "Minnesota does not have a direct-action statute that allows an injured plaintiff to

proceed directly against an insurer"). Whether those defendants can recoup any of the damages from MLM is a separate question from Kvalvog's right to damages.

Finally, the cases that B&B cites do not support the proposition that, when both the insurer and the insured are parties to a dispute concerning the insured's coverage, the absence of the malpractice claimant or other insureds as parties to the action renders the dispute nonjusticiable. In *Cincinnati Insurance Co.*, we held that a coverage dispute was nonjusticiable when an umbrella insurer brought a declaratory-judgment action against an injured party but did not include its own insureds as parties to the action. *Id.* at 276.[3] And in *Unbank*, we concluded that an action seeking a declaration of a state agency's licensing power did not present a justiciable controversy when the agency was not included as a party to the action. 677 N.W.2d at 107-09. Neither case is similar to the straightforward coverage dispute here. Accordingly, we conclude that Kvalvog and the B&B attorneys were not necessary parties and that the failure to join them as parties does not make this controversy nonjusticiable.[4]

[3] The umbrella insurer's failure to include the primary insurer as a party also made the controversy nonjusticiable in the circumstances of that case. *Id.*

[4] To support its argument that Kvalvog was not a necessary party, MLM moved to supplement the appellate record with a letter showing that Kvalvog was made aware of MLM's action against B&B and did not attempt to intervene in the proceeding. Because we conclude on the appellate record before us that the controversy is justiciable without Kvalvog being a party, we deny MLM's motion as moot.

II. Summary judgment declaring that MLM is not required to defend or indemnify B&B was proper.

We now turn to the merits of the coverage dispute. Appellate courts "review [a] grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). When considering the record on summary judgment, appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Summary judgment is appropriate when "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

As noted at the start of this opinion, B&B argues that summary judgment was improper for three reasons. We address each argument in turn.

A. Under the policy, a claim deemed made before the policy period could not be deemed made again during the policy period.

B&B contends that, even if the claim was deemed made in 2019 and not reported during that policy period, B&B still has coverage under the 2022-2023 policy because the claim was deemed made again in 2022 and reported at that time. B&B argues that the district court erred by determining that the policy unambiguously requires that, to trigger coverage, a claim must be timely reported when it is first deemed made and that the claim

cannot be deemed made again. Instead, B&B contends, the policy unambiguously permits the same claim to be deemed made twice—once under each alternative method identified in the deemed-made clause—and provides coverage if the claim is timely reported when it is deemed made the second time. At the very least, B&B argues, the policy is ambiguous and should be interpreted to favor coverage.

The interpretation of an insurance policy, including "whether a policy provides coverage in a particular situation" and "whether provisions in a policy are ambiguous," presents a question of law, which appellate courts review de novo. *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018) (quotation omitted); *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310, 316 (Minn. 2021) (quotation omitted). "The question of whether an insurer has a duty to defend or indemnify is also a legal question subject to de novo review." *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). Appellate courts interpret an insurance policy "to ascertain and give effect to the intentions of the parties as reflected in the terms of the policy" and "give unambiguous policy language its plain and ordinary meaning." *King's Cove Marina*, 958 N.W.2d at 316 (quotation omitted).

"A contract must be interpreted in a way that gives all of its provisions meaning." *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). An insurance policy is ambiguous only "if it is susceptible to two or more reasonable interpretations." *Midwest Fam. Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013). When there are two or more reasonable interpretations, that ambiguity must be construed "in favor of providing coverage to the insured." *Eng'g & Constr. Innovations,*

Inc. v. L.H. Bolduc Co., 825 N.W.2d 695, 705 (Minn. 2013). But courts must be careful not "to create ambiguities where none exist." *Am. Com. Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224, 227 (Minn. 1996) (quotation omitted).

MLM's policy states that a claim is "deemed made" when "(1) a demand is communicated to an INSURED for DAMAGES resulting from the rendering of or failure to render PROFESSIONAL SERVICES; or (2) an INSURED first becomes aware of any actual or alleged act, error or omission by any INSURED which could support or lead to a CLAIM." B&B argues that, even if the malpractice claim was deemed made under the second provision when B&B received the 2019 communications, the claim could be deemed made again in 2022 under the first provision and reported then to trigger coverage. We disagree.

Appellate courts "normally interpret the conjunction 'or' as disjunctive rather than conjunctive." *Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008). Accordingly, under its ordinary meaning, "or" indicates alternative options. The language of the deemed-made clause thus indicates that the claim is made when either of two options occurs. And, based on the policy as a whole, it is clear that the policy requires that the claim be reported when the claim is first made under either of those alternatives. The policy states that it will cover disputes "provided that: . . . the CLAIM is deemed made during the POLICY PERIOD; and . . . the CLAIM is reported to [MLM] during the POLICY PERIOD or within 60 days after the end of the POLICY PERIOD." MLM has what is called a "claims-made-and-reported" policy. Under a claims-made-and-reported policy, "the claim needs to be made against the insured *and* reported to the insurer by the insured within the policy

period." *Black's Law Dictionary* 958 (12th ed. 2024) (defining "claims-made-and-reported" with respect to liability-insurance policies).[5] If the claim is not deemed made and reported during the policy period, there is no coverage. *N.K.K. by Knudson v. St. Paul Fire & Marine Ins. Co.*, 555 N.W.2d 21, 25 (Minn. App. 1996), *rev. denied* (Minn. Dec. 23, 1996). To permit B&B to delay reporting would undermine the basic principle of a claims-made-and-reported policy, like MLM's, by allowing B&B to request coverage for a claim that was deemed made in a previous policy period but not reported during the then-applicable policy period.

We conclude that, under the policy, once a claim was deemed made under either provision of the deemed-made clause, the claim had to be reported during the then-applicable policy period and could not later be deemed made again and reported during another policy period. Thus, if Kvalvog's malpractice claim was deemed made in 2019, it could not be deemed made again in 2022 and reported under the 2022-2023 policy.

[5] The Wisconsin Supreme Court has provided a helpful explanation of the types of professional-liability insurance policies. *See Anderson v. Aul*, 862 N.W.2d 304, 310-11 (Wis. 2015). "There are two primary types of professional liability insurance policies: occurrence policies and claims-made policies." *Id.* at 310. "Occurrence policies provide coverage if the negligent act or omission occurs within the policy period," regardless of when the claim is made. *Id.* (quotation omitted). "Claims-made" policies are divisible into two types: "pure claims-made" policies and "claims-made-and reported" policies. *Id.* A "pure claims-made policy provides coverage for claims made during the policy period." *Id.* at 311. "A claims-made-and-reported policy, as its name suggests, provides coverage for claims both made and reported during the policy period." *Id.* The policy here was entitled a "CLAIMS-MADE and REPORTED" professional-liability policy. We note that the district court referred to the policy as simply a "claims-made" policy.

B. Kvalvog's claim against B&B was deemed made in 2019.

The district court determined that, based on the undisputed facts, Kvalvog's malpractice claim against B&B was deemed made in 2019 under the second provision of the deemed-made clause—namely, when the "INSURED first becomes aware of any actual or alleged act, error or omission by [the insured] which could support or lead to a CLAIM." B&B challenges that determination, arguing that the 2019 communications were not a "claim" that was "deemed made" because (1) a malpractice claim could not have been brought at that time because damages were not yet fixed, (2) the policy language is ambiguous, and (3) there was a genuine issue of material fact whether B&B was subjectively aware that the 2019 communications could result in a claim.

1. Under the policy, a claim could be deemed made even though damages were not yet fixed.

B&B asserts that the 2019 communications did not assert a "claim" that could be "deemed made" under the policy. The policy defines "claim" as, among other things, "any act, error or omission by any INSURED which could support or lead to a demand for [damages for professional services]." B&B argues that the 2019 communications did not satisfy that definition because damages were not yet fixed. In his declaration, Bryant stated that he did not think that "Kvalvog was considering suing [him]" when Bryant received the 2019 litigation-hold letter, asserting that a lawsuit "would have been premature, as the posttrial motions were still under advisement and no appeal had been taken." Because there was no claim in 2019, B&B argues, no claim could be deemed made at that time. We are not persuaded.

The deemed-made clause of the policy provides that a claim is "deemed made" when "an INSURED first becomes aware of any actual or alleged act, error or omission by any INSURED which could support or lead to a CLAIM." And a "claim" includes acts, errors, or omissions that "could support or lead to a demand for . . . DAMAGES." Together, these provisions provide that a claim is deemed made when the insured knows of acts, errors, or omissions that could lead to or support a demand for damages. There is no provision in the insurance-policy language that a claim is only deemed made when the damages are fixed.

2. B&B's ambiguity argument fails.

B&B argues that the deemed-made clause and the policy's definition of "claim" create "an ambiguous mix between a claims-made and occurrence policy" and that the ambiguity leads to the conclusion that no claim was deemed made in 2019. We are not convinced.

We have previously concluded that the fact that an insurance policy is a "hybrid" of those two types of policies does not mean that the policy is ambiguous. *Id.* B&B argues, though, the language here would have a claim "deemed made" whenever an attorney has a bad result. B&B compares this case to our nonprecedential decision in *Kantrud v. Minnesota Lawyers Mutual Insurance Co.*, No. A19-0628, 2019 WL 6284258, at *2-3 (Minn. App. Nov. 25, 2019).

In that case, an insurance policy provided that a claim is "deemed made" when (1) a damages demand is made to the insured or (2) the insured "first becomes aware of any actual or alleged act, error or omission . . . which could reasonably support or lead to a

CLAIM." *Kantrud*, 2019 WL 6284258, at *1. When the insured lawyer was sued by his former client for malpractice, he reported the claim to his insurer. *Id.* The insurance company denied coverage on the ground that, under the second provision of that deemed-made clause, the claim was deemed made during an earlier policy period—when the lawyer became aware of actions that "could reasonably support or lead to a claim." *Id.* Specifically, the insurance company argued that it had no duty to defend the lawyer because he knew at the time it happened that he had failed to respond to discovery requests, which led to the default judgment that was the basis for the malpractice claim. *Id.* at *2-3.

We assumed that the policy was unambiguous and concluded that the insurance company had a duty to defend the lawyer under the policy. *Id.* We observed that "[t]he duty to defend is broader than the duty to indemnify" and that an insurer may avoid the duty to defend if it is aware of facts outside the complaint that "conclusively establish" that the claim lacks coverage. *Id.* at *2 (quotation omitted). We concluded that, because the insurance company had access to information outside of the complaint that indicated that the default judgment may have been due to the clients' actions, not the lawyer's negligence, the insurance company had "not conclusively establish[ed] that [the lawyer] was aware of acts or omissions that a reasonable attorney would conclude could support a claim for damages." *Id.* at *3. Therefore, we concluded, the insurance company had a duty to defend. *Id.*

Because the facts are different, *Kantrud* is not persuasive authority for B&B's argument here. In *Kantrud*, we did not determine that the policy was ambiguous; rather, we assumed it was not. Our decision turned on facts outside the complaint that suggested

that the insured lawyer would not have been aware of acts or omissions on his part that a reasonable attorney would conclude would support a claim for damages. Here, as described in the next subsection—there is no genuine dispute that B&B became aware of a claim when it received the 2019 communications from Kvalvog's lawyer. We therefore disagree that *Kantrud* supports B&B's argument here.

3. There is no genuine dispute of fact that, based on the 2019 communications, B&B was aware that its representation in the wrongful-death action could lead to a claim.

B&B argues that there is a genuine dispute of fact as to whether the 2019 communications made B&B aware of allegations that could lead to a claim. We disagree.

When the facts are viewed in the light most favorable to B&B, including Bryant's declaration, it is undisputed that Bryant knew the following when he received the 2019 letter: B&B had just represented Kvalvog at trial and Kvalvog was "understandably upset" about the result. Two months after the trial, Kvalvog requested a substitution of counsel "to handle the posttrial and appeal process." The next month, Bryant received and read the 2019 litigation-hold letter from Kvalvog's successor counsel, which referred to a "potential legal action which may involve [B&B] in connection with [Bryant's] representation of the Kvalvogs in their wrongful death action." The letter also stated that failure to comply with the litigation hold could negatively affect Bryant's "defenses in this matter." Bryant then received (although does not remember reading) an email that explicitly stated that the "letter concerns a potential malpractice action" and instructed him to "notify [his] malpractice carrier."

Given these facts, B&B was aware of allegations that could lead to a claim for damages upon receiving the 2019 communications. Even if Bryant was "confused" by the litigation-hold letter and even if he did not open or read the reply email until he was preparing for this litigation, given the context in which Bryant received the litigation-hold letter, there can be no genuine dispute that Bryant would have understood that the letter was discussing a potential malpractice lawsuit related to his representation.

Viewing the facts in the light most favorable to B&B, we conclude that the undisputed evidence establishes that, upon receiving the 2019 letter, B&B was aware of allegations that could lead to a claim for damages. Accordingly, a claim was deemed made at that time.

C. Prejudice to MLM is not required to deny coverage.

B&B argues that the district court erred by not considering whether MLM showed actual prejudice as a result of the delay in reporting the claim when it was deemed made in 2019. B&B argues that MLM needed to establish prejudice because MLM's policy did not make timely notice a condition precedent to coverage. B&B also cites *Reliance Insurance Co. v. St. Paul Insurance Cos.*, 239 N.W.2d 922, 925 (Minn. 1976), to argue that lawyers' professional-liability insurers, unlike other types of insurers, must always establish prejudice resulting from a delay in reporting, regardless of whether timely notice is a condition precedent to coverage. MLM challenges both arguments and asserts that prejudice need not be shown to defeat coverage under its claims-made-and-reported policy.

As an initial matter, it is unclear whether the question of prejudice from delay in reporting is actually relevant here, since this case involves coverage under the 2022-2023

policy. We have already held that Kvalvog's claim was not deemed made in 2022 because it was indisputably deemed made in 2019. Thus, there was no 2022 claim to report under the 2022-2023 policy and delay in reporting under the 2022-2023 policy is not at issue. Instead, the question of prejudice seems to go to coverage under the policy applicable in 2019. That policy is not in the record before us. But both parties brief the question of prejudice and appear to agree that the relevant terms of the policy in 2019 were the same as the 2022-2023 policy. We therefore address the parties' arguments.

1. Notice is a condition precedent to coverage under the policy.

Insurers are not required to make a showing of prejudice when the insured has failed to comply with a condition precedent to coverage because "noncompliance with that provision is fatal to recovery." *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 87 (Minn. App. 2002) (quotation omitted), *rev. denied* (Minn. June 26, 2002). "A condition precedent is a contract term that calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which [the promisor's] obligation is made to depend." *Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 916 N.W.2d 23, 27 (Minn. 2018) (quotation omitted).

MLM's policy states:

COVERAGE

> [MLM] will pay, subject to [its] limit of liability, all DAMAGES the INSURED may be legally obligated to pay and CLAIM EXPENSES, due to any CLAIM, *provided that* . . . the CLAIM is reported to [MLM] during the POLICY PERIOD or within 60 days after the end of the POLICY PERIOD.

(Emphasis added.)

It is true that the policy does not use the term "condition precedent" with respect to notice. But "provided that" is language that sets forth a condition. *E.g.*, *Black's Law Dictionary* 1482 (12th ed. 2024) (defining "provided" as "[o]n the condition or understanding (that)"). And, in the policy, the phrase "provided that" directly connects coverage with notice—the quoted policy language states that MLM "will pay" "provided that" the claim is timely "reported." Accordingly, contrary to B&B's argument, MLM's policy unambiguously requires B&B to report a claim within a certain time frame as a condition precedent to coverage. *See Cargill*, 642 N.W.2d at 87.

2. *Reliance* does not require prejudice to deny coverage when notice is untimely under a claims-made-and-reported policy.

B&B argues that *Reliance* stands for the proposition that a lawyers' professional-liability insurer may not deny coverage for failure to give timely notice of a claim unless the insurer establishes actual prejudice, including under a claims-made-and-reported policy. In *Reliance*, the supreme court addressed a policy that required the insured to provide notice to the insurer of acts or omissions that might lead to a claim "as soon as practicable." 239 N.W.2d at 924. The supreme court concluded that, because "[p]eculiar to a lawyer's professional liability policy is coverage for the failure to act in a timely manner," it should be anticipated that an insured lawyer might delay providing notice of an event leading to a claim and that coverage must be provided unless the delay causes prejudice. *Id.* at 923.

But B&B has not cited any authoritative caselaw holding that an insurer must show prejudice when, as here, notice is a condition precedent to coverage. And, because prejudice is not required when the insured has failed to comply with a condition precedent to coverage, *see Cargill*, 642 N.W.2d at 87, we are not convinced that *Reliance* applies.

Because B&B failed to comply with a condition precedent to coverage when it did not report the claim during the policy period, or within 60 days of the policy period, in which it was deemed made, MLM did not need to establish actual prejudice resulting from the delay in reporting in order to deny coverage.

DECISION

We conclude that MLM's declaratory-judgment action against B&B was justiciable although the malpractice claimant and the individual insured B&B attorneys were not parties to the action. We also conclude that the district court did not err by granting summary judgment for MLM. We therefore affirm the district court's summary judgment declaring that MLM is not required to defend or indemnify B&B.

Affirmed; motion denied.