

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
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2 **STEPHANIE GARCIA RICHARD,**
3 **COMMISSIONER OF PUBLIC LANDS**
4 **OF THE STATE OF NEW MEXICO,**



Mark Reynolds

5 Plaintiff,

6 v.

No. A-1-CA-42258

7 **DAVID WILLIAMS and**
8 **REGINA WILLIAMS,**

9 Defendants,

10 and

11 **FARMERS INSURANCE EXCHANGE,**

12 Plaintiff in Intervention-Appellee,

13 v.

14 **DAVID WILLIAMS and**
15 **REGINA WILLIAMS,**

16 Defendants in Intervention-Appellants.

17 **APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY**

18 **Matthew J. Wilson, District Court Judge**

19 Cuddy & McCarthy, LLP

20 Scott P. Hatcher, LLP

21 Santa Fe, NM

22 for Appellee

1 Stalter Law LLC
2 Kenneth H. Stalter
3 Albuquerque, NM

4 for Appellants

5 **MEMORANDUM OPINION**

6 **HOUGHTON, Judge.**

7 {1} In this case we consider whether an insurance company had a duty to defend
8 its insured. The district court granted summary judgment in favor of Plaintiff in
9 Intervention Farmers Insurance Exchange (Farmers), declaring that Farmers had no
10 duty to defend—and consequently no duty to indemnify—Defendants in
11 intervention David and Regina Williams (Defendants) from a suit brought by
12 Plaintiff New Mexico State Land Office (Land Office).¹

13 {2} We conclude that the district court erred in granting summary judgment in
14 favor of Farmers because Farmers failed to prove, as a matter of law, that *all* of the
15 Land Office’s claims against Defendants “clearly fell outside of the polic[ies]’
16 coverage.” *See Dove v. State Farm Fire & Cas. Co.*, 2017-NMCA-051, ¶ 15, 399
17 P.3d 400. Accordingly, we reverse the district court’s order and remand to determine

¹During the pendency of the appeal from that ruling, Defendants and the Land Office reached a settlement. Farmers filed a motion to dismiss this appeal as moot because, as a result of the settlement, there is no longer an action to defend. As we explain below, we disagree that this appeal is moot and therefore deny Farmers’ opposed motion to dismiss.

1 whether Farmers has a duty to indemnify Defendants for their settlement with the
2 Land Office.

3 **BACKGROUND**

4 {3} Defendants own property in Rio Arriba County. Sometime prior to July 2022,
5 Defendants constructed a road and dirt pad (for a telecommunications tower) on
6 what they claimed to be their property. The Land Office learned of Defendants’
7 construction, and determined it was instead on state land. In December 2022, the
8 Land Office filed a complaint against Defendants, alleging five claims in connection
9 with Defendants’ construction of the road and pad: (1) quiet title; (2) common law
10 trespass; (3) common law negligence; (4) negligence per se based on statutory
11 trespass under NMSA 1978, Section 19-6-3 (1912); and (5) violations of NMSA
12 1978, Section 18-6-9 (1993) of the Cultural Properties Act. With respect to the third
13 count, the Land Office specifically alleged that “Defendants have acted negligently
14 in constructing the road and pad on the State Lands,” causing ongoing injury to the
15 land commissioner and state land trust beneficiaries.

16 {4} Defendants tendered a demand for defense of the suit to Farmers pursuant to
17 two liability insurance policies they held: a “New Mexico Smart Plan Home Policy”
18 and a “Personal Umbrella Policy.” The insuring language—the definitions, coverage
19 categories, and exclusions—are materially similar between the two policies
20 (Policies).

1 {5} The Smart Plan Home Policy provides \$300,000 liability coverage for “certain
2 damages you become legally obligated to pay because of bodily injury or property
3 damage resulting from an occurrence.” The Personal Umbrella Policy provides
4 coverage in the event that a claim exceeds the Smart Plan Home Policy’s coverage
5 limits, and provides a general personal liability limit of \$2,000,000 per occurrence.

6 {6} Farmers agreed to provide a defense but reserved the right to later disclaim
7 coverage. As the litigation progressed, Farmers exercised that right and intervened
8 in the case. Farmers moved for summary judgment on its claim for declaratory
9 judgment that the claims fell outside the coverage provided by the Policies, and
10 therefore it did not owe a duty to defend or indemnify Defendants as a matter of law.

11 {7} The district court granted Farmers’ motion for summary judgment, finding
12 that Farmers did not have a duty to defend Defendants in the suit brought by the
13 Land Office because “there [was] an insufficient showing or pleading of an
14 occurrence or accidental behavior sufficient to trigger a duty of defense in the
15 underlying suit.” The district court noted that the parties “stipulate and agree that the
16 duty to defend is broader than the duty to indemnify, and the [c]ourt’s ruling on the
17 duty to defend is therefore dispositive on the issue of the duty to indemnify.”
18 Defendants filed this appeal seeking review of the district court’s grant of summary
19 judgment.

1 {8} After the parties completed briefing for the appeal, Defendants settled the
2 underlying suit with the Land Office. As a result, the district court dismissed the
3 underlying suit with prejudice. Farmers now asks us to dismiss this appeal for
4 mootness because there is no longer an underlying case to defend. Defendants
5 contend that the appeal remains live because the parties had stipulated that “if the
6 Court of Appeals reverses the district court on the issue of the duty to defend, the
7 issue of the duty to indemnify becomes a live controversy once again.”

8 **DISCUSSION**

9 **I. The Questions Presented in This Appeal Are Not Moot**

10 {9} Farmers argues that this appeal is moot because “the only purpose” for its
11 complaint in intervention was a declaration as to “whether it had any ongoing duty
12 of defense or indemnity of [Defendants] . . . in the underlying suit.” Farmers claims
13 that “[b]ecause of the settlement in the underlying suit, the issues of coverage raised
14 by [Farmers] are moot and there is no basis or need for the appeal.”

15 {10} We disagree that this case is moot. “An issue is moot when no actual
16 controversy exists, and the court cannot grant actual relief.” *Cobb v. Gammon*, 2017-
17 NMCA-022, ¶ 13, 389 P.3d 1058. Although all underlying claims have been
18 resolved between the Land Office and Defendants, the order granting dismissal of
19 those claims does not resolve the coverage dispute between Defendants and Farmers,
20 as set forth in Farmers’ complaint in intervention for declaration of rights. In fact,

1 the district court’s order dismissing the underlying case neither captioned nor
2 referenced Farmers at all. Moreover, the parties stipulated that reversal from this
3 Court would reanimate the question of indemnification, which demonstrates both
4 that a controversy still exists between these two parties, and illustrates the actual
5 relief that this Court could provide. Further, requiring the underlying controversy in
6 an insurance dispute to remain live in order to preserve the issue of indemnification
7 would frustrate New Mexico’s policy of encouraging settlement. *See, e.g., Wilson v.*
8 *Gillis*, 1986-NMCA-112, ¶ 11, 105 N.M. 259, 731 P.2d 955 (“[I]t is imperative that
9 the judiciary encourage settlement when at all possible.”).

10 {11} Finally, granting Farmers’ motion to dismiss could make the district court’s
11 order unreviewable. The district court’s ruling that Farmers had no duty to defend
12 necessarily included the determination that Farmers had no obligation to Defendants
13 under the narrower question of indemnification. Treating the district court’s ruling
14 on Farmers’ duty to defend as final could preclude any future claims by Defendants
15 as to the question of indemnification for their settlement. *See Bank of N.Y. v. Romero*,
16 2016-NMCA-091, ¶ 24, 382 P.3d 991 (discussing how issue preclusion applies
17 when “the issue was actually litigated and necessarily determined in the first suit”
18 (internal quotation marks and citation omitted)). For these reasons we proceed to the
19 merits.

1 **II. Law Relevant to an Insurer’s Duty to Defend**

2 **A. Standard of Review**

3 {12} Our “review of orders granting or denying summary judgment is de novo.”
4 *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243. When reviewing
5 an order for summary judgment we “review the facts and make all reasonable
6 inferences in the light most favorable to the non-moving party.” *Hernandez v.*
7 *Grando’s LLC*, 2018-NMCA-072, ¶ 6, 429 P.3d 1259. “Similarly, the interpretation
8 of terms within an insurance policy is a matter of law about which the court has the
9 final word, and is subject to de novo review.” *United Nuclear Corp. v. Allstate Ins.*
10 *Co.*, 2012-NMSC-032, ¶ 9, 285 P.3d 644 (internal quotation marks and citation
11 omitted).

12 **B. Determining Whether There is a Duty to Defend**

13 {13} We begin our discussion with an insurer’s obligation to defend its insureds
14 against lawsuits, which is a separate but related question from an insurer’s duty of
15 indemnification. *See City of Albuquerque v. BPLW Architects & Eng’rs, Inc.*, 2009-
16 NMCA-081, ¶ 31, 146 N.M. 717, 213 P.3d 1146 (“[T]he duty to indemnify is distinct
17 from the duty to defend, and resolution of whether a party has a duty to defend does
18 not necessarily depend on there being a duty to indemnify.” (alteration, internal
19 quotation marks, and citation omitted)).

1 {14} When reviewing the question of an insurer’s duty to defend its insureds, “the
2 district court must have been indisputably correct in its assessment . . . that the
3 complained-of occurrence in the primary action clearly fell outside the policy’s
4 coverage.” *Dove*, 2017-NMCA-051, ¶ 16. “[A]n insurance company is obligated to
5 defend when the complaint filed by the claimant alleges facts *potentially* within the
6 coverage of the policy.” *Id.* ¶ 11 (emphasis added) (internal quotation marks and
7 citation omitted). An insurer also has a duty to defend “when the facts in the
8 complaint are not stated with sufficient clarity so that it can be determined from the
9 face of the complaint whether the action falls within the coverage of the policy.” *Id.*
10 (internal quotation marks and citation omitted). “Any doubt about whether the
11 allegations are within policy coverage is resolved in the insured’s favor.” *Id.*
12 (internal quotation marks and citation omitted).

13 {15} Because of the strong presumption in favor of an insurer’s duty to defend, “it
14 is the norm that an insurer, though denying coverage and liability, must nonetheless
15 defend its insured unless and until it receives a judicial ruling in its favor relieving
16 it of any further obligations.” *Id.* ¶ 12 (text only) (citation omitted). This duty
17 “continues until final resolution of the covered claims. In other words, the duty to
18 defend continues . . . until it can be concluded as a matter of law that there is no basis
19 on which the insurer may be obligated to indemnify the insured.” *Guest v. Allstate*
20 *Ins. Co.*, 2010-NMSC-047, ¶ 33, 149 N.M. 74, 244 P.3d 342 (internal quotation

1 marks and citation omitted). Under circumstances where an insurer believes they are
2 not required to indemnify their insureds, they may “seek a court determination as to
3 non-coverage of the primary action” and be relieved of the duty to defend. *Dove*,
4 2017-NMCA-051, ¶ 12 (internal quotation marks and citation omitted).

5 **III. Farmers Had a Duty to Defend the Underlying Suit**

6 {16} Having reviewed the legal framework surrounding an insurer’s duty to its
7 insureds in New Mexico, the Land Office’s allegations against Defendants in the
8 underlying case, and the Policies, we conclude that Farmers had a duty to defend
9 Defendants in the underlying suit. We explain and discuss how the district court
10 erred in granting summary judgment in favor of Farmers.

11 {17} When multiple claims are contained within a complaint, each claim must be
12 separately evaluated against an insurer’s duty to defend its insureds and we will
13 remand unless we determine “that *all* claims arose out of [an excluded activity] as a
14 matter of law.” *Lopez v. N.M. Pub. Schs. Ins. Auth.*, 1994-NMSC-017, ¶ 11, 117
15 N.M. 207, 870 P.2d 745; *accord Guest*, 2010-NMSC-047, ¶ 33 (“When multiple
16 alternative causes of action are stated, the duty continues until every covered claim
17 is eliminated.” (internal quotation marks and citation omitted)). As discussed
18 previously, the Land Office made five claims against Defendants. Therefore, to be
19 released from their duty to defend, Farmers had the burden of proving that all five
20 claims were not potentially covered. Our case law is also settled that it is Farmers,

1 and not Defendants, that must bear the burden of proving a lack of coverage to the
2 district court. *See Dove*, 2017-NMCA-051, ¶ 13 (“[T]he insurer bears the burden of
3 proving as a matter of law that all claims arose out of an uncovered act.” (alteration,
4 internal quotation marks, and citation omitted)).

5 **A. The Land Office’s Claim of Negligence Targeted a Potential Occurrence**

6 {18} In its claim of negligence against Defendants, listed as Count III, the Land
7 Office alleged that “Defendants have acted negligently in constructing the road and
8 pad on the State Lands,” and sought damages for, among other things, “the value of
9 the cultural properties damaged by Defendants.” Farmers failed to clearly
10 demonstrate how damage to cultural properties under a theory of common-law
11 negligence was not an occurrence.

12 {19} The Policies define an occurrence as “an accident which first occurs during
13 the policy period, and which results in bodily injury or property damage.” “The word
14 ‘accident’ has never acquired any technical signification in law, and when used in
15 insurance contracts, it is to be construed and considered according to the ordinary
16 understanding and common usage of people generally.” *King v. Travelers Ins. Co.*,
17 1973-NMSC-013, ¶ 8, 84 N.M. 550, 505 P.2d 1226 (alteration, internal quotation
18 marks, and citation omitted).

19 {20} Defendants argue that “New Mexico courts have consistently interpreted the
20 term ‘accident’ in insurance policies to include unintended consequences of

1 negligent conduct,” and urge us to follow this same reasoning now. *See Pulte Homes*
2 *of N.M., Inc. v. Indiana Lumbermens Ins. Co.*, 2016-NMCA-028, ¶ 23, 367 P.2d 869
3 (“To adopt the narrow view that the term ‘accident’ in liability policies of insurance
4 necessarily excludes negligence including negligent workmanship would mean that
5 in most, if not all, cases the insurer would be free of coverage and the policy would
6 be rendered meaningless.” (text only) (citation omitted)).

7 {21} Our case law confirms Defendants’ view. In *Scott v. New Empire Insurance,*
8 *Co.*, 1965-NMSC-034, ¶¶ 13-14, 75 N.M. 81, 400 P.2d 953, our Supreme Court held
9 that a motorist’s death was the result of “accidental means” when he failed to
10 navigate a turn at high speed at night. This Court held in *Pulte Homes of New*
11 *Mexico, Inc.* that it was an accident when a subcontractor negligently installed doors
12 and windows, which allowed water to intrude into newly built homes. 2016-NMCA-
13 028, ¶ 24. We have also held that data loss caused by the erroneous reformatting of
14 a hard drive was accidental. *Computer Corner, Inc. v. Fireman’s Fund Ins. Co.*,
15 2002-NMCA-054, ¶ 11, 132 N.M. 264, 46 P.3d 1264. Defendants also cite federal
16 applications of New Mexico law to support their assertion: in *Proassurance*
17 *Specialty Insurance Company, Inc. v. Familyworks, Inc.*, 599 F. Supp. 3d 1082,
18 1094-95 (D.N.M. 2022), it was determined to be an accident when an agency placed
19 children into a foster home where they suffered abuse, and in *Mid-Continent*
20 *Casualty Co. v. Circle S Feed Store, LLC*, 754 F.3d 1175, 1181-83 (10th Cir. 2014),

1 it was determined to be an accident when mining operations unintentionally caused
2 subsidence on adjacent properties.

3 {22} The common thread running through these cases is that the resulting harm of
4 the insured’s conduct was not “of the same general type as that expected or intended
5 by [the insured]” when it undertook the conduct. *Knowles v. United Servs. Auto.*
6 *Ass’n*, 1992-NMSC-030, ¶ 13, 113 N.M. 703, 832 P.2d 394. Defendants here do not
7 dispute that the construction of the road and pad was intentional, only that the
8 consequence of doing so—damage to cultural properties on state land—was
9 unexpected and unintended. Damaging cultural properties by building a road on
10 what you believe is your property is even less related to the underlying intentional
11 act than being killed while failing to navigate a turn at night while speeding, as in
12 *Scott*; or hiring subcontractors who install leaking windows, as in *Pulte Homes of*
13 *New Mexico, Inc.*; or losing data while reformatting a hard drive, as in *Computer*
14 *Corner, Inc.* Here, there was certainly an intent to clear and compact a pathway over
15 terrain, which could be expected to cause damage to vegetation, soil, the
16 environment, and potentially divert water runoff causing further erosion. But without
17 knowledge of cultural properties in the area, a person could not reasonably expect to
18 damage the state’s hidden treasures by building a road and pad.

19 {23} Farmers relies primarily on two cases to support its argument that this event
20 was not a covered occurrence: *Vihstadt v. Travelers Insurance Co.*, 1985-NMSC-

1 104, 103 N.M. 465, 709 P.2d 187; and *Hartford Fire Insurance Co. v. Gandy*
2 *Dancer, LLC.*, 864 F. Supp. 2d 1157 (D.N.M. 2012). These cases are distinguishable
3 from the facts before us.

4 {24} In *Vihstadt*, our Supreme Court held that a claim for medical expenses was
5 not the result of a covered accident where an individual was hospitalized after
6 ingesting fifty aspirin with the intent of “commit[ting] suicide or [scaring] her
7 mother.” 1985-NMSC-104, ¶ 2. *Vihstadt* is factually different from the instant case
8 in that the intended outcome of the overdose was medical harm, for which
9 hospitalization is a natural consequence. *Id.* ¶¶ 10-11.

10 {25} In *Gandy Dancer, LLC*, a federal application of New Mexico law, the district
11 court found that flooding on an adjacent property caused by the intentional
12 construction of a water diversion system was not accidental. 864 F. Supp. 2d at
13 1198. This was because “Gandy Dancer reconstructed the water diversion system,
14 and . . . the water went where Gandy Dancer and BNSF Railway directed it.” *Id.*
15 Again, this is distinguishable because the outcome—flooding of the adjacent
16 property—followed inexorably from the activity: construction of a diversion system
17 that intentionally directed water towards that property.

18 {26} Farmers fails to point to any evidence in the record that would support an
19 inference that Defendants were aware of the presence of cultural properties in the
20 location where they are alleged to have negligently sited their road and pad. We also

1 note that the Land Commissioner has an obligation under NMSA 1978, Section 18-
2 6-11.1 (1979) to keep confidential “[a]ny information . . . concerning the location of
3 archaeological resources.” In fact, the parties stipulated to a protective order “to
4 allow the Commissioner to produce documents . . . without compromising . . . the
5 location of cultural resources.” The record contains redactions for locations,
6 photographs, and other information that could enable nonparties to discover the
7 location of the cultural resources that Defendants are alleged to have damaged. This
8 secrecy supports Defendants’ claim that any damage to cultural properties would
9 have been due to negligence and not deliberate intent. On these facts, we cannot
10 agree that the district court was “indisputably” correct that the alleged damage to
11 cultural properties was “of the same general type as that expected or intended” by
12 Defendants in constructing the road, and therefore not a potentially covered
13 occurrence.

14 **B. The Alleged Negligent Damage to Cultural Properties Is Not an Excluded**
15 **“Intentional Act”**

16 {27} Having determined that Farmers failed to prove that the Land Office’s claim
17 of negligence was not an occurrence, we must now determine whether this
18 occurrence falls within the Policies’ exclusions, noting that “[g]enerally, a
19 determination of whether an exclusion relieves an insurer from a duty to defend must
20 be made in the primary lawsuit . . . because it is a factual question.” *Lopez*, 1994-

1 NMSC-017, ¶ 11. Of particular relevance is the exclusion for “intentional acts,”

2 which excludes coverage for:

3 [B]odily injury, property damage or personal injury which is caused by,
4 arises out of or is the result of an intentional act by or at the direction
5 of any insured. This includes, but is not limited to, any intentional act
6 or intentional failure to act by any insured, whether a criminal act or
7 otherwise, where resulting injury or damage would be an objectively
8 probable consequence, even if not subjectively intended or expected by
9 any insured.

10 This exclusion applies whether:

- 11 a. any insured mistakenly believes he or she has the right to engage
12 in certain conduct;
- 13 b. the injury or damage is sustained by persons or property not
14 intended or expected by any insured;
- 15 c. the injury or damage is different or greater or of a different
16 quality than that intended or expected;
- 17 d. any insured did not understand that injury or damage may
18 result[.]

19 {28} Our Supreme Court has interpreted similar exclusion clauses as being limited

20 to “harm of the same general type as intended by the insured.” *Knowles*, 1992-

21 NMSC-030, ¶ 12. The exclusion clause in the Policies further encompasses “any

22 intentional act . . . where resulting injury or damage would be an objectively

23 probable consequence” of the insured’s actions. For the alleged damages to be

24 excluded, therefore, Farmers was required to show that it was objectively probable

25 that negligently siting the road and pad would result in damage to state cultural

26 properties. For the same reasons discussed above, it failed to do so.


1 {29} To conclude, the parties dispute whether the facts as alleged fall under the
2 Policies, and both parties cite case law that could reasonably support their position.
3 Under the facts as alleged in the complaint, we cannot say that the district court was
4 “*indisputably* correct in its assessment that . . . the complained-of occurrence in the
5 primary action clearly fell outside of the [P]olic[ies]’ coverage.” *See Dove*, 2017-
6 NMCA-051, ¶ 16 (emphasis added). Without opining as to whether any of the Land
7 Office’s other claims may be an objectively probable consequence of road
8 construction, we hold that Farmers failed to carry its burden on the Land Office’s
9 claimed damages to cultural properties caused by Defendants’ alleged negligence.
10 Farmers has offered no argument or evidence to show that the negligent construction
11 of this road and pad could have been expected to damage cultural properties, such
12 that a finder of fact could find this outcome objectively probable. As discussed
13 above, upon the facts in the record, it is quite possible that the alleged damage to
14 cultural properties was not “harm of the same general type” as Defendants intended
15 or could have expected. *See Knowles*, 1992-NMSC-030, ¶ 12. Accordingly, we hold
16 that this claim does not clearly fall within the Policies’ exclusion for intentional acts.

17 {30} Our holding should not be construed to mean that Farmers has a duty to
18 indemnify Defendants as to the negligence claim or any other claim made by the
19 Land Office. “[That] factual determination is not for this Court but for the court in
20 the primary action.” *Lopez*, 1994-NMSC-017, ¶ 12.

1 **CONCLUSION**

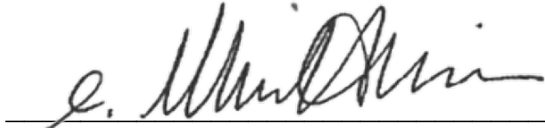
2 {31} Because Farmers did not prove with undisputed facts that, as a matter of law,
3 all of the Land Office’s claims arose out of excluded acts, we reverse the district
4 court’s grant of summary judgment in favor of Farmers and remand consistent with
5 the Parties’ stipulation that “if the Court of Appeals reverses the district court on the
6 issue of the duty to defend, the issue of the duty to indemnify becomes a live
7 controversy once again.”

8 {32} **IT IS SO ORDERED.**

9
10 

KRISTOPHER N. HOUGHTON, Judge

11 **WE CONCUR:**

12 

13 **J. MILES HANISEE, Judge**

14 

15 **MEGAN P. DUFFY, Judge**