Michigan Supreme Court
Lansing, Michigan

Syllabus

Chief Justice:
Bridget M. McCormack

Chief Justice Pro Tem:
David F. Viviano

Justices:
Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:
Kathryn L. Loomis

SKANSKA USA BUILDING INC v MAP MECHANICAL CONTRACTORS, INC

Docket Nos. 159510 and 159511. Argued April 15, 2020 (Calendar No. 2). Decided June 29, 2020.

Skanska USA Building Inc. filed an action in the Midland Circuit Court against M.A.P. Mechanical Contractors, Inc. (MAP), Amerisure Insurance Company (Amerisure), and Amerisure Mutual Insurance Company, seeking coverage under an Amerisure policy for the cost of repairs Skanska performed to correct faulty work performed by MAP in the renovation of a medical center. Skanska, acting as the construction manager, subcontracted the heating and cooling portion of the renovation project to MAP. In connection with the project, Amerisure issued a commercial general liability insurance policy (the CGL policy) to MAP; Skanska and the medical center were additional named insureds on the CGL policy. In 2009, MAP performed the work on the medical center's heating system; two years later, Skanska determined that MAP had installed some of the expansion joints backward, resulting in damage to concrete, steel, and the heating system. Skanska repaired and replaced the damaged property and sent a demand letter to MAP, asserting that MAP was responsible for all repair costs. Skanska submitted a claim to Amerisure for the costs, seeking coverage as an additional insured under the CGL policy; Amerisure denied the claim. Skanska filed this action, and Amerisure moved for summary disposition, asserting, in part, that MAP's defective work was not a covered "occurrence," which was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions"; the term "accident" was not defined in the policy. Applying the definition of "accident" set forth in *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369 (1990), the court, Michael J. Beale, J., denied Amerisure's motion. Amerisure later filed a renewed motion for summary disposition, and Skanska moved for summary disposition on the issue of Amerisure's liability to Skanska. The court denied both motions, reasoning that it was bound to follow *Hawkeye* because the case had not been overruled. However, the court did not determine whether an accident occurred and therefore did not determine whether the defective workmanship resulted in an "occurrence." Amerisure and Skanska separately appealed by leave granted, and the Court of Appeals consolidated the appeals. Relying on *Hawkeye*, the Court of Appeals, SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., reversed the trial court's orders and remanded the case for entry of summary disposition in favor of Amerisure. The Court reasoned that although Skanska could seek coverage for any damage its work did to a third party's property, it could not recover for damage to its own work. The Court concluded that there was no "occurrence" under the CGL policy because the only damage was to Skanska's own work product, which did not constitute an "accident." *Skanska USA Bldg, Inc v MAP Mech Contractors, Inc*, unpublished per curiam opinion

of the Court of Appeals, issued March 19, 2019 (Docket Nos. 340871 and 341589). Skanska filed an application for leave to appeal in the Supreme Court, and the Supreme Court granted the application. 504 Mich 980 (2019).

In a unanimous opinion by Chief Justice McCormack, the Supreme Court *held*:

Under the current standard language of CGL policies, an "accident" may include unintentionally faulty subcontractor work that damages an insured's work product. Accordingly, Skanska may be able to recover under the Amerisure policy the cost of repairs Skanska incurred when it corrected faulty work performed by MAP in the renovation of the medical center. The holding in *Hawkeye*, which interpreted a 1973 CGL policy that did not cover damage caused by a subcontractor's faulty workmanship, was limited to cases involving pre-1986 insurance policies and was, therefore, not controlling in this case.

1. Under *Allstate Ins Co v McCarn*, 466 Mich 277 (2002), an "accident" is an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected. Faulty work by a contractor falls within the definition of "accident"; that is, it may happen by chance, is outside the usual course of things, and is neither anticipated nor naturally to be expected. To hold otherwise would render nugatory CGL policy language that precludes coverage for an insured's own work product but contains an exception for work performed by a subcontractor on the insured's behalf. In addition, the word "accident" plainly has a broader meaning than "fortuity." That is, while fortuity is one way to show that an incident is an accident, it is not the only way. Instead, an unanticipated or unforeseeable injury to a person or property—even absent true fortuity—may be an accident that is a covered occurrence; thus, an insured need not act unintentionally for the act to constitute an "accident." That an insured may recover under a CGL policy for faulty subcontractor work does not convert the policy into a performance bond, which is different in that the performance bond benefits the owner of the project by guaranteeing the completion of the project in the event the contractor defaults. For those reasons, faulty subcontractor work that was unintended by the insured may constitute an "accident" (and thus an "occurrence") under the CGL policy language at issue. That an "accident" may include damage to an insured's own work product is supported by the context and history of CGL policies and is reflective of significant changes in the insurance industry since the 1970s. Specifically, the 1973 CGL policy language developed by the Insurance Services Office, which was interpreted in *Hawkeye*, contained language that excluded many risks inherent in doing business, causing many earlier courts to read a general business-risk exception into the initial grant of coverage; the distinction between damage to a third party's property and an insured's own work product in relation to coverage is grounded in that policy language related to the business-risk doctrine. In contrast, the 1986 policy language at issue in this case expanded the scope of CGL coverage to include some of the previously excluded business risks, including damage caused by a subcontractor's faulty workmanship, with no differentiation based on whose property is damaged; thus, the 1986 reformation of CGL policy coverage emphasizes a plain reading of "accident," specifically, that faulty subcontractor work may fall within a policy's coverage.

2. In this case, the CGL policy did not limit the definition of "occurrence" based on the owner of the damaged property; therefore, the Court of Appeals erred by concluding that the word "accident" cannot include damage limited to the insured's own work product. While the CGL

policy excluded coverage for damage to an insured's own work product arising out of that work, the exclusion expressly did not apply if the damaged work or the work out of which damage arose was performed on the insured's behalf by a subcontractor, a fact the Court of Appeals failed to recognize. Because an "accident" may include unintentionally faulty subcontractor work that damages an insured's work product, Skanska may be able to recover under the policy for the cost of repairs it incurred to correct MAP's faulty work. The Court of Appeals erred by reversing the trial court and ordering the court to enter summary disposition in favor of Amerisure. *Hawkeye*, which interpreted a 1973 CGL policy that did not cover damage caused by a subcontractor's faulty workmanship, was not persuasive, and its holding was limited to cases involving pre-1986 insurance policies.

Court of Appeals judgment reversed and case remanded to the Court of Appeals for consideration of any remaining issues.

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OPINION

Chief Justice:
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FILED June 29, 2020

S T A T E O F M I C H I G A N

SUPREME COURT

SKANSKA USA BUILDING INC,

Plaintiff-Appellant,

v

Nos. 159510-159511

M.A.P. MECHANICAL CONTRACTORS, INC., AMERISURE INSURANCE COMPANY, and AMERISURE MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

BEFORE THE ENTIRE BENCH

MCCORMACK, C.J.

May unintentionally faulty subcontractor work that damages an insured's work product constitute an "accident" under a commercial general liability insurance policy? Because we conclude the answer is yes, we reverse the Court of Appeals' judgment to the contrary. We also cabin the Court of Appeals' decision in *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369; 460 NW2d 329 (1990), to cases involving pre-1986

comprehensive general liability insurance policies. We remand to the Court of Appeals for consideration of any remaining issues.

I. FACTS AND PROCEDURAL HISTORY

The plaintiff, Skanska USA Building Inc., served as the construction manager on a renovation project for Mid-Michigan Medical Center–Midland (the Medical Center); the plaintiff subcontracted the heating and cooling portion of the project to defendant M.A.P. Mechanical Contractors, Inc. (MAP). MAP obtained a commercial general liability insurance policy (the CGL policy) from defendant Amerisure Insurance Company (Amerisure). The plaintiff and the Medical Center are additional named insureds on the CGL policy.

In 2009, MAP installed a steam boiler and related piping for the Medical Center's heating system. MAP's installation included several expansion joints. Sometime between December 2011 and February 2012, the plaintiff determined that MAP had installed some of the expansion joints backward. Significant damage to concrete, steel, and the heating system occurred as a result. The Medical Center sent a demand letter to the plaintiff, asserting that it must pay for all costs of repair and replacement.

The next day, the plaintiff sent a demand letter to MAP, asserting that MAP was responsible for all costs of repair and replacement. The plaintiff performed the work of repairing and replacing the damaged property. According to the plaintiff, the cost of the repair and replacement work was about $1.4 million. The plaintiff submitted a claim to Amerisure, seeking coverage as an insured. Amerisure denied the claim.

The plaintiff sued MAP and Amerisure, seeking payment for the cost of the repair and replacement work. Before the parties had completed discovery, Amerisure moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact), alleging among other things that MAP's defective construction was not a covered "occurrence" within the CGL policy. The trial court denied Amerisure's motion. The trial court first looked to the policy to determine whether installation of the backward expansion joints was an "occurrence." The relevant provision provides:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. . . .
>
> b. This insurance applies to . . . "property damage" only if:
>
> (1) The . . . "property damage" is caused by an "occurrence" . . . [.]

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." But the policy did not define the word "accident." The trial court looked to the Court of Appeals' decision in *Hawkeye*, 185 Mich App at 374, which defined "accident" as "anything that begins to be, that happens, or that is a result which is not anticipated and . . . takes place without the insured's foresight or expectation and without design or intentional causation on his part." (Quotation marks and citation omitted.) But, again citing *Hawkeye*, the trial court concluded that "[d]efective workmanship, standing alone, is not an occurrence within the meaning of a[] general liability insurance contract[;] an occurrence exists where the insured's faulty work product damages the property of another."

The trial court held that the plaintiff and others affected by MAP's negligence did not anticipate backward expansion joints or property damage. Because no one argued that MAP had purposefully installed the expansion joints backward, the trial court determined that an "occurrence" may have happened, triggering Amerisure's duty of coverage under the insurance policy. Finally, the trial court cited caselaw, including *Hawkeye*, for the proposition that damage arising out of an insured's defective workmanship that is confined to the insured's own work product cannot be viewed as accidental under the policy.[1] Because the damage caused by defective installation of the expansion joints by MAP may have gone beyond the scope of the work required by the contract between the plaintiff and the Medical Center, the court found a question of material fact was in dispute and denied summary disposition to Amerisure. Amerisure moved for reconsideration; the trial court denied the motion.

Amerisure then deposed the plaintiff's project manager and filed a renewed summary disposition motion. In response to Amerisure's renewed motion, the plaintiff sought summary disposition on Amerisure's liability to the plaintiff. The plaintiff argued that *Hawkeye* did not control because *Hawkeye* had interpreted a prior version of the standard CGL policy issued by the Insurance Services Office (ISO).[2] The new version of

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[1] The plaintiff urged the trial court to follow *Amerisure Mut Ins Co v Hall Steel Co*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2009 (Docket No. 286677), pp 3-4, in which the Court of Appeals concluded that supplying defective steel was an unanticipated event that qualified as an "accident" as that term was defined in *Hawkeye*.

[2] According to its website, the ISO "began life in 1971 as Insurance Services Office." ISO is not itself an insurance company; it "provides advisory services and information to many insurance companies" and "develops and publishes policy language that many insurance

the policy (the one at issue here) provides coverage for defective construction claims as long as a subcontractor completed the defective work.[3] The plaintiff further argued that MAP's backward installation of the expansion joints was an accident, which constituted an "occurrence" under the policy.

The trial court again denied summary disposition to both parties. The court reiterated its determination that "defective workmanship, standing alone, is not an occurrence within the meaning of a general liability insurance contract." The trial court clarified that it did not determine whether an accident occurred, and it therefore did not make a finding about whether there was an "occurrence." Rather, the court held that an occurrence *may* have happened because the damage caused by MAP's defective installation of the expansion joints *may* have gone beyond the scope of the work required by the contract between the plaintiff and the Medical Center. The trial court acknowledged the plaintiff's argument that it should not rely on *Hawkeye* but concluded that it had to follow the decision because it had not been overruled.

Both plaintiff and Amerisure filed an application for leave to appeal in the Court of Appeals, arguing that the trial court should have resolved the issue in their respective

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companies use as the basis for their products." Verisk, *Frequently Asked Questions* <https://www.verisk.com/insurance/about/faq> (accessed May 22, 2020) [https://perma.cc/LNQ2-5HVA].

[3] *Hawkeye* involved a 1973 comprehensive general liability policy (the 1973 policy) that contained an express exclusion of coverage for "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof[.]" *Hawkeye*, 185 Mich App at 383. But in 1986, the ISO revised the "your product" and "your work" exclusions to include coverage for construction defects by the insured's subcontractors (the 1986 policy).

favors. The Court of Appeals granted the applications and consolidated the appeals. In an unpublished per curiam opinion, it reversed the trial court and ordered that summary disposition be granted to Amerisure; applying the *Hawkeye* Court's definition of "accident," the Court reasoned that there was no "occurrence" under the CGL policy because the only damage was to the insured's own work product. *Skanska USA Bldg, Inc v MAP Mech Contractors, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket Nos. 340871 and 341589), pp 9-10.

The plaintiff filed an application for leave to appeal in this Court, arguing that the Court of Appeals erred by concluding that *Hawkeye* controlled and that installing the expansion joints backward constituted an "accident" as a matter of law. We granted leave to appeal, directed the parties to address two issues,[4] and invited several organizations to file amicus curiae briefs. 504 Mich 980 (2019).[5]

II. CONTRACTUAL ANALYSIS

Insurance policies are contracts and, absent an applicable statute, are subject to the same construction principles applicable to other contracts. *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). This case thus involves an issue of contract interpretation, which is an issue of law that this Court reviews de novo. *McDonald v Farm*

[4] Our grant order directed the parties to brief "whether: (1) the definition of 'occurrence' in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369 (1990), remains valid under the terms of the commercial general-liability policy at issue here; and (2) the plaintiff has shown a genuine issue of material fact as to the existence of an 'occurrence' under those terms."

[5] We again thank counsel for both parties for agreeing to use videoconferencing software to participate in oral arguments. That agreement prevented delay in disposition of this case because of the COVID-19 pandemic.

Bureau Ins Co, 480 Mich 191, 197; 747 NW2d 811 (2008). That means that the Court reviews the issue independently, with no required deference to the trial court. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

A. TEXT

As usual, when interpreting a contract, we begin with the text. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). The contract defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Accordingly, the parties' arguments rightfully focus on whether MAP's erroneous backward installation of the expansion joints is an "accident."

This Court has said that an "accident" is "an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) (quotation marks and citation omitted).[6] Generally, faulty work by a subcontractor may fall within the plain meaning of most of these terms. It happens

[6] The parties concede that the policy does not define "accident" and that the definition of "accident" from this Court's opinion in *McCarn* controls here; they disagree only over how it applies.

by chance, is outside the usual course of things, and is neither anticipated[7] nor naturally to be expected.[8]

Reading the contract as a whole confirms this conclusion. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003) ("We read contracts as a whole[.]"). The policy contains an exclusion precluding coverage for an insured's own work product, but it contains an exception for work performed by a subcontractor on the insured's behalf:

> l. Damage To Your Work

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[7] Even if an insured acts intentionally, the act may still be an accident. *Metro Prop & Liability Ins Co v DiCicco*, 432 Mich 656, 670; 443 NW2d 734 (1989) (opinion by RILEY, C.J.); see also *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 638; 527 NW2d 760 (1994) ("[A]n accident may include an unforeseen consequence of an intentional act of the insured.") (opinion by RILEY, J.). In *Frankenmuth Mut Ins Co*, 460 Mich at 115, in interpreting a CGL policy like the one at issue here, this Court reiterated that "an insured need not act unintentionally for the act to constitute an 'accident' and therefore an 'occurrence.' " (Quotation marks and citation omitted.) "[T]he appropriate focus of the term 'accident' must be on both the injury-causing act or event and its relation to the resulting property damage or personal injury." *McCarn*, 466 Mich at 282 (quotation marks, citations, and emphasis omitted). And this analysis is subjective from the standpoint of the insured. *Id*. at 284.

[8] Other courts have reached this same conclusion in this same context. See, e.g., *Greystone Constr, Inc v Nat'l Fire & Marine Ins Co*, 661 F3d 1272, 1283 (CA 10, 2011) (stating that "damage caused by faulty workmanship is neither expected nor intended from the standpoint of the policyholders and, therefore, receives coverage so long as it does not fall under a policy exclusion"); *Capstone Bldg Corp v American Motorists Ins Co*, 308 Conn 760, 776; 67 A3d 961 (2013) (stating that "because negligent work is unintentional from the point of view of the insured, we find that it may constitute the basis for an 'accident' or 'occurrence' under the plain terms of the commercial general liability policy"); *Lamar Homes, Inc v Mid-Continent Cas Ins Co*, 242 SW3d 1, 8 (Tex, 2007) (stating that "a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly").

> "Property damage" to "your work"[9] arising out of it or any part of it and included in the "products-completed operations hazard".[10]
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

If faulty workmanship by a subcontractor could never constitute an "accident" and therefore never be an "occurrence" triggering coverage in the first place, the subcontractor exception would be nugatory. Just as with statutory interpretation, courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).[11] Many other courts have recognized this same flaw in the

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[9] The CGL policy defines "your work" in relevant part as "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts, or equipment furnished in connection with such work or operations."

[10] The CGL policy defines "products-completed operations hazard," which includes, in relevant part, " 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except: . . . (2) Work that has not yet been completed or abandoned." (Paragraph structure omitted.)

[11] Considering the exclusions as part of our textual analysis does not, as Amerisure argues, violate this Court's two-step process for assessing whether there is coverage under an insurance policy: first, determine whether coverage exists and second, determine whether an exclusion applies that would negate coverage. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). Nor does it violate the corollary rule that "exclusionary clauses *never* grant coverage, but rather limit the scope of the basic protection statement." *Fresard v Mich Millers Mut Ins Co*, 414 Mich 686, 697; 327 NW2d 286 (1982). Not allowing the exclusions to grant coverage does not require us to blind ourselves to their existence when determining the scope of coverage; to do so would violate the rule that courts must read the contract as a whole. *Id*. at 694; see also *US Fire Ins Co v JSUB, Inc*, 979 So 2d 871, 886 (Fla, 2007) (stating that "our interpretation of the term 'occurrence' is guided by a view of the policy as a whole, . . . [and] '[a]lthough exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read *in pari materia*' ") (second alteration in original).

reasoning put forth by insurers. See, e.g., *Greystone Constr, Inc v Nat'l Fire & Marine Ins Co*, 661 F3d 1272, 1289 (CA 10, 2011) ("[T]he only way [the "your work" exclusion] has effect is if we find that physical injury caused by poor workmanship—whether to some part of the work itself or third-party property—may be an occurrence under standard CGL policies."); *Sheehan Constr Co, Inc v Continental Cas Co*, 935 NE2d 160, 171 (Ind, 2010) ("If the insuring provisions do not confer an initial grant of coverage, then there would be no reasons for a 'your work' exclusion."), mod on reh 938 NE2d 685 (Ind, 2010).

Amerisure counters that mere unanticipated damage is insufficient; an "accident," Amerisure asserts, must involve a "fortuity," which means something over which the insured has no control. This is an overly stingy reading of the word "accident." As our definition in *McCarn* shows, fortuity is *one way to show* that an incident is an accident, but it is not the *only* way.[12] See also *Greystone Constr, Inc*, 661 F3d at 1285 (stating that "an *unanticipated* or *unforeseeable* injury to person or property—even in the absence of true fortuity—may be an accident and, therefore, a covered occurrence"); *Capstone Bldg Corp v American Motorists Ins Co*, 308 Conn 760, 775; 67 A3d 961 (2013) (rejecting the argument that "defective construction lacks the element of 'fortuity' necessary for an accident" because "the mere fact that defective work is in some sense volitional does not preclude it from coverage under the terms of the policy"); *Lamar Homes, Inc v Mid-*

[12] We reject Amerisure's argument that because we used eight descriptors for the term "accident" in *McCarn* and connected those descriptors with the word "and," each one of those descriptors must be satisfied for an "accident" to have occurred. We have never said that, and when interpreting a contractual or statutory term, we typically apply the definition of a term that is the most reasonable given the context in which it is used; we do not hold that a term has to meet every single one of the potential definitions.

Continent Cas Co, 242 SW3d 1, 8 (Tex, 2007) (stating that "a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result"). Amerisure's position would also contradict this Court's statement that "an insured need not act unintentionally" for the act to constitute an "accident." *Frankenmuth*, 460 Mich at 115 (quotation marks and citation omitted). And as discussed, the plain meaning of the word "accident" has a broader meaning than "fortuity." See *Greystone Constr, Inc*, 661 F3d at 1285 (concluding that "fortuity is not the sole prerequisite to finding an accident under a CGL policy" and citing dictionary definitions of "accident" to conclude that the covered occurrences included unanticipated or unforeseeable injuries "even in the absence of true fortuity").[13]

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[13] The courts that have held that an "accident" must involve a true fortuity notwithstanding the plain meaning of "accident" have relied more on judicial gloss on that term than on the plain meaning of the word. See, e.g., *Kvaerner Metals Div of Kvaerner US, Inc v Commercial Union Ins Co*, 589 Pa 317, 335; 908 A2d 888 (2006) (holding that "the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship" because "[s]uch claims simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident' *or its common judicial construction in this context*") (emphasis added); *Cincinnati Ins Co v Motorists Mut Ins Co*, 306 SW3d 69, 74 (Ky, 2010) (stating that "[i]nherent in the plain meaning of 'accident' is the doctrine of fortuity" but citing two secondary sources rather than a lay dictionary for the proposition that "[t]he fortuity principle is central to the notion of what constitutes insurance") (second alteration in original). We acknowledge, but decline to adopt, this view for the reasons stated in this opinion.

Some courts retain a fortuity requirement not based on the plain meaning of the word "accident" but, instead, based on a common-law prerequisite to insurance coverage. See, e.g., *Aluminum Co of America v Aetna Cas & Surety Co*, 140 Wash 2d 517, 556; 998 P2d 856 (2000) (noting that "the fortuity principle never appears in insurance contracts" but that "[t]he principle is rooted in common law"); *Fed Ins Co v Coast Converters, Inc*, 130 Nev 960, 967; 339 P3d 1281 (2014) (stating that "the fortuity principle applies even if not explicitly written into the insurance contract"); see also 7 Couch, Insurance, 3d (rev ed), § 102:10, p 102-35 (stating that "[t]he known risk, known loss, and loss in progress

Nor is there any support for the Court of Appeals' conclusion that "accident" cannot include damage limited to the insured's own work product. See *Skanska USA Bldg*, unpub op at 10. Amerisure does little to defend that holding, and focuses mainly on its fortuity argument. Most significantly, the Court of Appeals accepted that an insured can seek coverage for its damage to a third party's property. *Id*. at 9-10. But the policy does not limit the definition of "occurrence" by reference to the owner of the damaged property. See *Capstone Bldg Corp*, 308 Conn at 777 (stating that "we see no basis in the language of the policy for limiting coverage to liability for harm to third parties"); *Lamar Homes*, 242 SW3d at 9 (noting that "no logical basis within the 'occurrence' definition allows for distinguishing between damage to the insured's work and damage to some third party's property"); *Greystone Constr, Inc*, 661 F3d at 1283 (concluding that the cases that define "occurrence" on the basis of *who* was injured, and not on *what caused* the injury, "subdivide[] 'occurrence' into two camps," which renders "the 'your work' exception superfluous, the subcontractor exception unnecessary, and therefore creates a fundamental inconsistency with the logic of CGL policies").[14] The Court of Appeals failed to recognize

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defenses are generally considered to be part of the 'fortuity' requirement that runs throughout insurance law"); Couch, § 101:2, pp 101-7, 101-9 (stating that to be covered, an insured's loss "must occur as a result of a fortuitous event, not one planned, intended, or anticipated" and that "[*e*]*xcept for the risk requirements previously discussed* and barring public policy considerations, the parties are free to contract for which risks the insurer shall or shall not insure") (emphasis added). We decline to address whether an extra-textual fortuity requirement could provide an independent basis for denying coverage here because Amerisure has not made that argument; it argues only that the meaning of "accident" in the policy is limited to a true fortuity.

[14] Indeed, an inquiry based on "whose property is damaged" has been pretty universally condemned. See, e.g., *US Fire Ins Co*, 979 So 2d at 883-884, which stated:

that an insured's own defective workmanship is excluded from coverage via the explicit exclusions, not in the initial grant of coverage. See, e.g., *American Family Mut Ins Co v American Girl, Inc*, 268 Wis 2d 16, 39; 2004 WI 2; 673 NW2d 65 (2004) ("CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss

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> Further, we fail to see how defective work that results in a claim against the contractor because of injury to a third party or damage to a third party's property is "unforeseeable," while the same defective work that results in a claim against the contractor because of damage to the completed project is "foreseeable." This distinction would make the definition of "occurrence" dependent on which property was damaged. For example, applying U.S. Fire's interpretation in this case would make the subcontractor's improper soil compaction and testing an "occurrence" when it damages the homeowners' personal property, such as the wallpaper, but not an "occurrence" when it damages the homeowners' foundations and drywall. As the Tennessee Supreme Court explained, in rejecting this distinction:
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> > A shingle falling and injuring a person is a natural consequence of an improperly installed shingle just as water damage is a natural consequence of an improperly installed window. If we assume that either the shingle or the window installation will be completed negligently, it is foreseeable that damages will result. If, however, we assume that the installation of both the shingle and the window will be completed properly, then neither the falling shingle nor the water penetration is foreseeable and both events are "accidents." Assuming that the windows would be installed properly, Moore could not have foreseen the water penetration. Because we conclude the water penetration was an event that was unforeseeable to Moore, the alleged water penetration is both an "accident" and an "occurrence" for which there is coverage under the "insuring agreement."
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> [Quoting *Travelers Indemnity Co of America v Moore & Assoc, Inc*, 216 SW3d 302, 309 (Tenn, 2007).]

actionable only in contract can never be the result of an 'occurrence' within the meaning of the CGL's initial grant of coverage.").[15]

Amerisure also argues that interpreting the policy to cover faulty subcontractor work essentially converts the policy into a performance bond. But that coverage may overlap with a performance bond is not a reason to deviate from the most reasonable reading of the policy language. *Lamar Homes*, 242 SW3d at 10 (observing that "[t]he CGL policy covers what it covers" and finding no basis for eliminating coverage "simply because similar protection may be available through another insurance product"). Performance bonds have a few key differences from the CGL policies. First, "a performance bond benefits the owner of a project rather than the contractor" because the bond's purpose "is to guarantee the completion of the contract upon default by the contractor." *US Fire Ins Co v JSUB, Inc*, 979 So 2d 871, 887 (Fla, 2007) (quotation marks and citation omitted). Second, "a

[15] Many courts have expressly limited the extent to which damages may be covered for faulty subcontractor work based on whether the damage is to defective or nondefective work product. For example, the court in *Greystone Constr, Inc*, 661 F3d at 1283, held that "CGL policies are meant to cover unforeseeable damages—a category that encompasses faulty workmanship that leads to physical damage of nondefective property." The court explained "that CGL policies implicitly distinguish between damage to nondefective work product and damage to defective work product" and because "[t]he obligation to repair defective work is neither unexpected nor unforeseen under the terms of the construction contract or the CGL policies," only damage to the nondefective work product is covered under the policy. *Id*. at 1286. Other courts, however, have held that—rather than limit coverage to nondefective work based on the definition of "accident"—the defective workmanship itself is not covered because it does not constitute "property damage" as defined under the policy. See, e.g., *Capstone Bldg Corp*, 308 Conn at 776, *Taylor Morrison Servs, Inc v HDI-Gerling America Ins Co*, 293 Ga 456; 746 SE2d 587 (2013), and *US Fire Ins Co*, 979 So 2d at 886. We express no opinion regarding these approaches because they were not raised by the parties and do not have any direct impact on how we define "accident." Because our holding is simply that faulty subcontractor work *may* constitute an "accident," we leave any determination regarding the extent to which the damages to the work product are covered under the policy to the lower courts.

surety, unlike a liability insurer, is entitled to indemnification from the contractor." *Id*. at 888. And third, a performance bond's coverage "is broader than a CGL policy in that it guarantees the completion of a construction contract upon the default of the general contractor." *Id*.

For these reasons, given the plain meaning of the word "accident," we conclude that faulty subcontractor work that was unintended by the insured may constitute an "accident" (and thus an "occurrence") under a CGL policy.

B. CONTEXT AND HISTORY

The context and history of CGL policies support our conclusion that an "accident" may include damage to an insured's own work product, and they are particularly helpful in understanding the term given the significant changes in the insurance industry since the 1970s. The distinction between damage to property of a third party and the insured's own work product stands on an outdated rationale grounded in the language of the 1973 policy. That earlier policy featured the "business risk" doctrine—a concept advanced by Roger Henderson in a 1971 law review article[16]—under which many risks inherent in doing business were excluded.[17] O'Connor, *What Every Court Should Know About Insurance*

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[16] See Henderson, *Insurance Protection for Products Liability and Completed Operations–What Every Lawyer Should Know*, 50 Neb L Rev 415, 438-441 (1971).

[17] The 1973 CGL policy included language that purported to exclude certain "business risks"; in that regard, the 1973 policy stated that the insurance did not apply to the following:

> (n) to property damage to the named insured's products arising out of such products or any part of such products;

Coverage for Defective Construction, 5 C Constr Law J 1, 12-13 (Winter, 2011) (arguing that "[t]he common denominator of the reported decisions that reject as outcome-determinative the 'business risk' doctrine and the old Henderson article, is the courts' conscientious insistence that policy coverage disputes begin and end with the language of the policy" and that "[a]s between these two conflicting coverage criteria—the 'business risk' doctrine and the actual language of the policy—the latter should always control").[18] Indeed, *Weedo v Stone-E-Brick, Inc*, 81 NJ 233, 240-241; 405 A2d 788 (1979), a seminal

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> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
>
> (p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein . . . . [French, *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, 19 U Pa J Bus L 101, 106-107 (2016) (referring to the three "business risk exclusions" in the 1973 CGL policy), quoting ISO Form No. GL 00 02 01 73, Comprehensive General Liability Insurance Coverage Form (1973).]

[18] Earlier courts appear to have erred by reading a general "business risk" exception into the initial grant of coverage—instead of relying on the explicit exclusions in the contract. See, e.g., *Travelers Indemnity Co of America*, 216 SW3d at 307 ("Reliance upon a CGL's 'exclusions' to determine the meaning of 'occurrence' has resulted in 'regrettably overbroad generalizations' concerning CGLs.") (citation omitted). This error allowed courts to distinguish damage to a third party's property and damage to an insured's work product despite the absence of any textual support for it. This error has also resulted in courts, like the Court of Appeals here, continuing to deny coverage for a subcontractor's faulty workmanship despite the ISO's 1986 changes to the CGL policy.

case in this area (and cited in *Hawkeye*) relied on Henderson's article in distinguishing covered occurrences involving damage to the property of a third party and noncovered business risks involving damage to the contractor's own work. See *id*. (quoting the Henderson article and then including a hypothetical about "the boundaries between 'business risks' and occurrences giving rise to insurable liability").

Decisions such as *Weedo* reflect an outdated view of the insurance industry.[19] In 1986, the ISO distributed the policy language at issue, reshaping the scope of coverage under CGL policies. And it adopted those changes to expand coverage to include some of those business risks, specifically damage caused by a subcontractor's faulty workmanship (with no carveout based on whose property is damaged). See *US Fire Ins Co*, 979 So 2d at 879 (citing the ISO circular confirming that the 1986 revisions to the standard CGL policy not only incorporated the "Broad Form" property endorsement but also specifically "cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed") (quotation marks and citation omitted; alteration in original); French, *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, 19 U Pa J Bus L 101, 119 (2016) (stating that "the *Weedo* decision is obsolete and of little value today in analyzing whether construction defects can constitute occurrences" and noting that "the court did not analyze the definition of 'occurrence' in the policy at issue" and that "the business risk exclusions at issue in the case were redrafted in 1986 to provide much

[19] As we do here, the New Jersey Supreme Court also distinguished *Weedo* from cases involving 1986 CGL policies. See *Cypress Point Condo Ass'n, Inc v Adria Towers, LLC*, 226 NJ 403; 143 A3d 273 (2016).

narrower reductions in coverage than the earlier versions of such exclusions").[20] Thus, the 1986 reformation of the scope of coverage under the CGL policies underscored a plain reading of "accident"—that faulty subcontractor work may fall within the policy's coverage.[21]

III. *HAWKEYE*

So what of *Hawkeye*? *Hawkeye* considered whether a 1973 policy provided coverage to a contractor for damages resulting from its own defective work, not the work of its subcontractor. Those differences are significant, and as a result, whether *Hawkeye* was correctly decided is not properly before us. We therefore see no reason to answer that question today.[22] Further, because *Hawkeye* interpreted a 1973 policy that did not cover

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[20] See generally *Ohio Northern Univ v Charles Constr Servs, Inc*, 155 Ohio St 3d 197, 205-206; 2018-Ohio-4057; 120 NE3d 762 (2018) (citing Ohio Supreme Court precedent for the proposition that "the general principle underlying CGL policies is that they are not intended to protect business owners from ordinary business risks" but not considering the 1986 changes to CGL policies).

[21] Of course, an insurer is free to contractually limit the coverage for subcontractor work. "[I]f the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage, as can be done simply by either eliminating the subcontractor exception or adding a breach of contract exclusion." *US Fire Ins Co*, 979 So 2d at 891; see also *Lamar Homes*, 242 SW3d at 12 ("More recently, the [ISO] has issued an endorsement that may be included in the CGL to eliminate the subcontractor exception to the 'your-work' exclusion.").

[22] While the alteration to the definition of "occurrence" from the 1973 policy to the 1986 policy was slight and didn't change the portion of the definition analyzed in *Hawkeye*, as explained, the changes to other portions of the policy language illustrate that the new policy broadened the scope of coverage. Despite this change, in a case involving the 1986 policy, *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 147; 610 NW2d 272 (2000), the Court of Appeals described the state of the law in Michigan as follows: "[W]hen an insured's defective workmanship results in damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy." This

damage caused by a subcontractor's faulty workmanship, *Hawkeye* is not persuasive.[23] Therefore, we limit its holding to cases involving the pre-1986 CGL policy language.[24]

IV. CONCLUSION

We hold that an "accident" may include unintentionally faulty subcontractor work that damages an insured's work product. We therefore reverse the Court of Appeals' judgment and cabin the Court of Appeals' decision in *Hawkeye* to cases involving pre-

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statement doesn't reflect the revised policy's broadened scope of coverage given the revised language of the exclusions, under which defective workmanship by the insured's subcontractor resulting in damage to work performed by or on behalf of the insured is not excluded from coverage. Given the broadened scope of coverage stemming from the changes to the language of the exclusions, we do not find it significant that the definition of "occurrence" in *Radenbaugh* was "not significantly different in substance" from the definition in *Hawkeye*. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 38; 772 NW2d 801 (2009).

[23] *Hawkeye* is also arguably not persuasive here because the plaintiff appears to seek coverage for property damage that goes beyond the scope of MAP's defective work. See, e.g., *High Country Assoc v New Hampshire Ins Co*, 139 NH 39, 43; 648 A2d 474 (1994) (distinguishing its prior decision in *McAllister v Peerless Ins Co*, 124 NH 676; 474 A2d 1033 (1984), relied on by the *Hawkeye* panel, see *Hawkeye*, 185 Mich App at 377-378, because "the plaintiff in the underlying suit alleged negligent construction that resulted in property damage, rather than merely negligent construction"). In *Hawkeye*, the defendant sought coverage solely for the removal and repouring of defective concrete—the fixing and redoing of the work it had performed before. *Hawkeye*, 185 Mich App at 378-379. Thus, its holding that defective workmanship, "standing alone" is not a covered occurrence, *id*. at 378, does not apply. But we need not definitively resolve that issue because we hold that subcontractor work that damages only an insured's work product may constitute an "accident." See note 15 of this opinion.

[24] The last four digits of the 10-digit ISO policy form provide the edition date in month and year format. For example, the policy form at issue here is CG 00 01 12 07, so the edition date is December 2007.

1986 insurance policies. We remand to the Court of Appeals for consideration of any remaining issues.[25]

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[25] In addition to the issues discussed, Amerisure argues briefly that we should affirm the Court of Appeals on alternative grounds because coverage is barred by the "your work" policy exclusion. Specifically, Amerisure asserts that because MAP is a named insured under the CGL policy, the subcontractor exception to the "your work" exclusion does not apply. See, e.g., *Double AA Builders, Ltd v Preferred Contractors Ins Co, LLC*, 241 Ariz 304, 306; 386 P3d 1277 (2016) (holding that the subcontractor exception to the "your work" exclusion did not apply because the subcontractor was a "Named Insured" under the CGL policy). Amerisure also asks that if we overrule *Hawkeye* (and presumably that if we simply limit it, as we have here), we do so only prospectively, citing our decision in *Pohutski v Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002). We also directed the parties to brief whether there is a genuine issue of material fact as to the existence of an occurrence. We decline to address these issues because the first two were not decided below and the parties do not present adversarial arguments about the last. On remand, the Court of Appeals may, but need not necessarily, address these issues, depending on whether it determines they are properly presented and preserved for its review.