STATE OF MICHIGAN

IN THE SUPREME COURT

SKANSKA USA BUILDING, INC.,

Plaintiff,

SC No. 159510
COA No. 340871; 341589
L.C. No. 13-009864-CK

v

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

Defendants,
_____/

APPELLEES' APPENDIX

PLUNKETT COONEY

BY: JEFFREY C. GERISH (P51338)
TANYA M. MURRAY (P82517)
Attorneys for Defendants-Appellees
Amerisure Insurance Company and
Amerisure Mutual Insurance Company
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4031

TABLE OF CONTENTS

SKANSKA

Subcontract Agreement

THIS SUBCONTRACT (the "Subcontract") is made as of this 2nd day of June, 2008 ("Effective Date") by and between the Contractor and Subcontractor as identified below. Capitalized terms used in this document entitled Subcontract Agreement and not defined herein shall have the meanings assigned to them in Exhibit E.

Budget Code	Scheduled Amount
000-15.15000000.5020.990	$2,081,100.00

PROJECT NAME: MIDMICHIGAN MEDICAL ENERGY CENTER	PROJECT NUMBER:	318015
PROJECT ADDRESS: 4005 ORCHARD DRIVE, MIDLAND, MI 48670	SUBCONTRACT NO.:	011
	VENDOR NO.:	
	COST CODE REFERENCE:	

CONTRACTOR: Skanska USA Building Inc.	SUBCONTRACTOR: M.A.P. Mechanical Contractors, Inc.
HOME OFFICE ADDRESS: 5250 Lover's Lane, Suite 200 Portage, MI 49002	ADDRESS: 2000 Austin St. Midland, MI 48642
CONTACT: GEORGE RIGGEN	CONTACT: TIM MCATAMNEY
TELEPHONE: 269-342-5400	TELEPHONE: 989-496-3456
FACSIMILE: 866-299-4101	FACSIMILE: 989-496-7444
CONTRACTOR'S LICENSE NUMBER (IF REQUIRED):	SUBCONTRACTOR'S LICENSE NUMBER (IF REQUIRED):

WHEREAS, Contractor has entered into a contract with MidMichigan Medical Center - Midland (the "Owner") dated as of the 2nd day of June, 2008 (the "Owner Contract") to perform the construction and related work and services at the project commonly referred to as MidMichigan Medical Energy Center (the "Project");

OWNER: MIDMICHIGAN MEDICAL CENTER - MIDLAND	ARCHITECT: HDR, Inc.
ADDRESS: 4005 ORCHARD DRIVE MIDLAND, MI 48670	ADDRESS: 8550 West Bryn Mawr Ave, Suite 900 Chicago, IL 60631
	TELEPHONE: 773-380-7900
	FACSIMILE: 773-380-7979

WHEREAS, Subcontractor desires to perform, and Contractor has agreed to enter into this Subcontract with Subcontractor for the performance of, a portion of the work required to complete the Project.

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NOW THEREFORE, for and in consideration of the covenants and agreements of the parties contained herein, Contractor and Subcontractor agree as follows:

1. Subcontractor agrees to perform and complete the work required by this Subcontract, which generally consists of the Mechanical (the "Work").

2. As full consideration for complete performance of the Work, and except for increases or decreases by Change Order as provided for in Exhibit E, Subcontractor shall be paid the lump sum of Two million eighty-one thousand one hundred and 00/100 Dollars ($2,081,100.00) (the "Subcontract Amount").

3. Subcontractor ☐ is ☒ is not *(Mark the appropriate box with an "X")* required to provide performance and payment bonds securing the performance of the Work and the payment of Sub-Subcontractors. Subcontractor ☒ is ☐ is not *(Mark the appropriate box with an "X")* required to enroll in Contractor's Subguard performance insurance program.

4. Subcontractor shall perform the Work in accordance with and comply with all requirements contained in the following Exhibits, each of which is included as an integral part of the Subcontract:

MANDATORY SUBCONTRACT EXHIBITS					
☒	Exhibit A:	Scope of Work/Supply and Clarifications/Qualifications	☒	Exhibit G:	Skanska Standard Insurance Requirements
☒	Exhibit B:	Drawings and Sketches, Specifications, Addenda and Other Documents	☒	Exhibit H:	Skanska Standard Interim Estimate for Payment, Waiver and Release
☒	Exhibit C:	Alternates, Unit Prices and Labor Rates	☒	Exhibit I:	Skanska Standard Final Estimate for Payment, Unconditional Waiver and Release
☒	Exhibit D:	Project Schedule/Milestones	☒	Exhibit J:	Skanska Standard Subcontractor Environmental Health and Safety Requirements
☒	Exhibit E:	Skanska Standard Subcontract Terms and Conditions	☒	Exhibit K:	Skanska Standard Change Order
☒	Exhibit F:	Skanska Code of Conduct	☒	Exhibit N:	Supplemental Terms and Conditions for use in the State of Michigan

5. Subcontractor shall also perform the Work in accordance with and comply with all requirements contained in the Exhibits marked in the following list, each of which marked Exhibit is included as an integral part of the Subcontract *(Indicate which Exhibits apply by inserting an "X" in the box next to the Exhibit)*:

OPTIONAL SUBCONTRACT EXHIBITS					
	Exhibit L:	Reserved	☐	Exhibit V:	Guarantee to Owner
☐	Exhibit M:	Project Specific Requirements	☐	Exhibit W:	Owner Confidentiality and Non-Disclosure Requirements
☐	Exhibit O:	Payment and Performance Bonds	☐	Exhibit X:	Site Requirements and Logistics
	Exhibit P:	Reserved	☐	Exhibit Y:	Supplemental Terms and Conditions for Subcontractors with Design Responsibility
☐	Exhibit Q:	Skanska Standard Environmental Insurance Requirements		Exhibit Z:	Not Used
☐	Exhibit R:	Project Specific Quality Management Program	☐	Exhibit PS1:	Reserved
	Exhibit S:	Reserved	☐	Exhibit PS2:	Reserved
	Exhibit T:	Reserved	☐	Exhibit PS3:	Reserved
☐	Exhibit U:	Sub-Subcontractor Identification	☐	Exhibit PS4:	Reserved

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IN WITNESS WHEREOF, Contractor and Subcontractor have executed this Subcontract to be effective as of the Effective Date.

Contractor:	**Subcontractor:**
SKANSKA USA BUILDING INC.	**M.A.P. Mechanical Contractors, Inc.**
By: _____ (Signature) 7-1-08 (Date)	By: _____ (Signature) 6-24-08 (Date)
Jason Kopp (Printed Name) Vice President (Title)	Tim McAtamney (Printed Name) V.P. (Title)

GF 6/30/08

MidMichigan Medical Energy Center
318015-011

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EXHIBIT "A"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

SCOPE OF WORK/SUPPLY AND CLARIFICATIONS/QUALIFICATIONS

1. Scope of Work/Supply

The Scope of Work/Supply is identified in the following Specification Section(s) and further described below:

1.1. Reference Bid Category 1K - Mechanical

2. Clarifications/Qualifications

2.1. Includes painting of gas piping.
2.2. Includes complete installation of the underground steam system from the Energy Center to the 2nd exterior manhole, as shown in the Construction Documents.
2.3. Includes horizontal rigging of boilers as required.
2.4. Includes one new 6" backflow preventer, and one 6" backflow preventer to be relocated.
2.5. Includes Alternate Add No. 4: $59,000 to provide O2 Trim and Parallel Positioning for Fire Tube Boilers as specified in Section 15555-2.4(A).
2.6. Includes Alternate Add No. 5: $27,700 to provide Variable Speed Drive on Combustion Air Fan Blower for Fire Tube Boilers as specified in Section 15555-2.4(B).
2.7. Includes fabrication and installation of 6" pipe from the 6" steam header to the 6" steam venting valve, to serve the purpose of a simulated load and to vent the steam into the atmosphere.
2.8. Includes a $5,000 In-Contract Allowance.

3. Alternates

The following are not included in the Subcontract Amount/Purchase Order Amount and are included in Exhibit C.

3.1. None

4. Exclusions

The following items are specifically excluded from Scope of Work/Supply:

4.1. Reference Bid Category 1K – Mechanical
4.2. Excludes furnishing of new water meter.
4.3. Excludes the exterior manhole sump pumps.
4.4. Excludes the Consumers Energy gas costs.

EXHIBIT "B"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

DRAWINGS & SKETCHES, SPECIFICATIONS, ADDENDA and OTHER DOCUMENTS

The Contract Documents include the following documents, attached as separate sheets.

1.0 List of Specifications prepared by HDR Architects

DIVISION 0 – BIDDING REQUIREMENTS, CONTRACT FORMS, AND CONDITIONS OF THE CONTRACT

00009	Project Manual – Preface	04/18/2008
00440	Substitutions Prior to Bidding	04/18/2008

DIVISION 1 – GENERAL REQUIREMENTS

01012	Work By Owner	04/10/2008
01016	Coordination with Occupants	04/10/2008
01027	Applications for Payment and Schedule of Values (CM)	04/10/2008
01030	Alternates	04/10/2008
01034	Changes in Work	04/10/2008
01036	Requests for Information (RFI)	04/10/2008
01043	Coordination drawings (CM)	04/10/2008
01044	Cutting and Patching	04/10/2008
01094	Definitions	04/10/2008
01320	Progress Reports	04/10/2008
01340	Submittal Procedures	04/10/2008
01410	Tests and Inspections	04/10/2008
01412	Coeds, Regulations, and Guidelines	04/10/2008
01500	Construction Facilities, Temporary Controls and Utilities	04/10/2008
01605	Acceptable Manufacturers and Products	04/10/2008
01610	Delivery, Handling and Storage: Materials and Equipment	04/10/2008
01640	Substitution Procedures After Execution of Contract	04/10/2008
01670	System Demonstrations	04/10/2008
01701	Contract Closeout (CM)	04/10/2008
01710	Cleaning	04/10/2008
01720	Project Record Documents	04/10/2008
01730	Operation and Maintenance Data	04/10/2008
01740	Warranties and Guarantees	04/10/2008
01990	Reference Standards	04/10/2008

DIVISION 2 – SITE WORK

02060	Demolition	04/10/2008
02110	Site Clearing	04/10/2008
02160	Excavation Support Systems	04/10/2008
02211	Rough Grading	04/10/2008
02222	Building Excavation, Filling and Backfilling	04/10/2008
02223	Backfilling	04/10/2008
02225	Trenching	04/10/2008
02231	Aggregate Base Course	04/10/2008
02274	Soil Erosion Prevention and Sedimentation Control	04/10/2008

EXHIBIT "B"

Attachment to **Subcontract/Purchase Order No. 318015-011 dated 6/2/2008**, by and between **M.A.P. Mechanical Contractors, Inc.** and **Skanska USA Building Inc.** for **Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.**

02510	Asphaltic Concrete Paving	04/10/2008
02520	Portland Cement Concrete Paving	04/10/2008
02575	Roadway, Driveway and Traveled Surface Repair	04/10/2008
02660	Water Distribution	04/10/2008
02722	Site Sewerage Systems	04/10/2008
02732	Sanitary Sewerage System	04/10/2008
02932	Native Grass Seeding	04/10/2008
DIVISION 3 – CONCRETE		
03001	Concrete	04/10/2008
03005	Concrete Testing and Evaluation – Owner	04/10/2008
03100	Concrete Formwork	04/10/2008
03200	Concrete Reinforcement	04/10/2008
03300	Concrete Materials and Proportioning	04/10/2008
03310	Concrete Mixing, Placing, Jointing and Curing	04/10/2008
03312	Concrete Finishing and Repair of Surface Defects	04/10/2008
DIVISION 4 - MASONRY		
04050	Cold Weather Masonry Procedures	
04110	Portland Cement-Lime (PCL) Mortars & Grout	04/10/2008
04150	Masonry Accessories	04/10/2008
04220	Concrete Masonry (CMU)	04/10/2008
04300	Unit Masonry System	04/10/2008
04510	Masonry Cleaning	04/10/2008
DIVISION 5 - METALS		
05120	Structural Steel	04/10/2008
05321	Composite Metal Form Deck	04/10/2008
05500	Miscellaneous Metal Fabrications, Steel Stairs and Railings	04/10/2008
05520	Handrails and Railings	04/10/2008
DIVISION 6 – WOOD AND PLASTICS		
06000	Carpentry	04/10/2008
06100	Wood Framing & Sheathing	04/10/2008
DIVISION 7 – THERMAL AND MOISTURE PROTECTION		
07162	Dampproofing	04/10/2008
07170	Bentonite Waterproofing (WP-B)	04/10/2008
07210	Building Insulation	04/10/2008
07251	Fireproofing – Performance Based	04/10/2008
07270	Firestopping	04/10/2008
07411	Preformed Metal Siding	04/10/2008
07532	Fully Adhered EPDM Roofing	04/10/2008
07600	Flashing and Sheet Metal	04/10/2008

EXHIBIT "B"

Attachment to **Subcontract/Purchase Order No. 318015-011** dated **6/2/2008**, by and between **M.A.P. Mechanical Contractors, Inc.** and **Skanska USA Building Inc.** for **Mechanical** at **MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.**

07900	Joint Sealants	04/10/2008
DIVISION 8 – DOORS AND WINDOWS		
08100	Hollow Metal (HM) doors and Frames	04/10/2008
08363	Sectional Steel Door (SSD)	04/10/2008
08700	Finish Hardware	04/10/2008
DIVISION 9 - FINISHES		
09227	Exterior Stud Wall System	04/10/2008
09250	Gypsum Wallboard	04/10/2008
09705	Seamless Epoxy Flooring (SEF)	04/10/2008
09762	Concrete Floor Sealer/Hardener (CFS-HD)	04/10/2008
09902	Exterior Painting	04/10/2008
09904	Interior Painting	04/10/2008
DIVISION 10 – SPECIALTIES		
10200	Architectural Louvers	04/10/2008
10444	Signs	04/10/2008
10520	Fire Protection Specialties	04/10/2008
10802	Toilet and Bath Accessories	04/10/2008
DIVISION 11 – EQUIPMENT		
11165	Dock Bumpers	04/10/2008
DIVISION 15 – MECHANICAL		
15010	Mechanical General Requirements	04/10/2008
15021	Outside Utilities	04/10/2008
15060	Pipe and Fittings	04/22/2008
15100	Manual Valves	04/10/2008
15120	Piping Specialties	04/10/2008
15140	Penetrations and Supports	04/10/2008
15190	Mechanical Identification Systems	04/10/2008
15240	Mechanical Sound and Vibration Control	04/10/2008
15250	Pipe, Duct and Equipment Insulation	04/10/2008
15300	Fire Protection Systems	04/10/2008
15410	Plumbing Piping	04/10/2008
15440	Plumbing Fixtures	04/10/2008
15450	Domestic Water Heaters	04/10/2008
15483	Natural Gas Piping System	04/10/2008
15510	Hydronic Piping Systems	04/10/2008
15520	Steam Distribution System	04/22/2008
15540	HVAC Pumps	04/10/2008
15555	Boiler – Packaged Fire Tube	04/22/2008
15571	Boiler Economizers	04/22/2008
15574	Boiler Water Treatment	04/10/2008
15575	Stack and Breeching	04/10/2008
15582	Feedwater System – Deaerator	04/22/2008
15830	Hydronic Heating Terminal Units	04/10/2008

EXHIBIT "B"

Attachment to **Subcontract/Purchase Order No. 318015-011** dated **6/2/2008**, by and between **M.A.P. Mechanical Contractors, Inc.** and **Skanska USA Building Inc.** for **Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.**

15832	Electric Heaters	04/10/2008
15835	Combustion Air Steam Coils	04/22/2008
15870	Exhaust and Ventilating Fans	04/10/2008
15880	Air Distribution system	04/10/2008
15978	Adjustable Frequency Drives	04/10/2008
15990	Testing and Balancing	04/10/2008
DIVISION 16 – ELECTRICAL		
16010	Electrical General Requirements	04/10/2008
16110	Raceways	04/10/2008
16120	Low Voltage Electrical Power Conductors and Cables	04/10/2008
16130	Boxes and fittings	04/10/2008
16140	Wiring Devices	04/10/2008
16440	Enclosed Safety Switches	04/10/2008
16450	Grounding and Bonding for Electrical Systems	04/10/2008
16460	Low Voltage Distribution Transformers	04/10/2008
16470	Panelboards	04/10/2008
16475	Low Voltage Circuit Protective Devices	04/10/2008
16480	Motor Control Equipment	04/10/2008
16510	Interior Lighting	04/10/2008
16720	Fire Alarm System	04/10/2008
DIVISION 17 – CONTROLS		
17000	Building Management and Control Systems	04/22/2008

2.0 List of Drawings prepared by HDR Architects

Sheet No.	Title	Date
STRUCTURAL		
S-001	General Notes	04/10/2008
S-101	Foundation Plan	04/10/2008
S-102	Framing Plan	04/10/2008
S-201	Bracing Elevations, Sections & Details	04/10/2008
S-301	Typical Sections & Details	04/10/2008
S-302	Typical Sections & Details	04/10/2008
S-303	Sections & Details	04/10/2008
S-304	Sections & Details	04/10/2008
CIVIL		
CD-100	Demolition Plan	04/10/2008
CP-101	Site & Utility Plan	04/23/2008
CG-100	Site Grading & Erosion Control Plan	04/10/2008
CG-101	Pond Grading & Erosion Control Plan	04/23/2008
CS-102	Steam Piping Plan & Profile	04/10/2008
C-500	Site Details	04/10/2008

EXHIBIT "B"

Attachment to **Subcontract/Purchase Order No. 318015-011** dated **6/2/2008**, by and between **M.A.P. Mechanical Contractors, Inc.** and **Skanska USA Building Inc.** for **Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.**

ARCHITECTURAL		
G-00	Cover Sheet/Drawing Index	04/23/2008
G-01	Abbreviations, Legend & Life Safety Plan	04/23/2008
AD-101	Architectural Demolition Plan	04/23/2008
A-101	Architectural Floor Plan	04/23/2008
A-10R	Architectural Roof Plan	04/23/2008
A-201	Exterior Elevations	04/23/2008
A-301	Wall Sections	04/23/2008
A-302	Building Section/Stair section	04/23/2008
A-303	Building Section/Stair Section	04/23/2008
A-304	Building Section/Stair Section	04/23/2008
A-601	Door Schedule and Details	04/23/2008
PLUMBING		
PU-100	Plumbing Underfloor Plan	04/23/2008
PP-101	Sanitary & Storm Piping Floor Plan	04/23/2008
PP-10R	Plumbing Piping Roof Plan	04/10/2008
PW-101	Water & Natural Gas Floor Plan	04/10/2008
P-501	Plumbing Details, Schematics & Details	04/23/2008
P-701	Plumbing Schedules	04/23/2008
MECHANICAL		
M-001	Mechanical Legend	04/10/2008
MP-101	Mechanical Piping Floor Plan	04/23/2008
MP-10R	Mechanical Piping Roof Plan	04/10/2008
MS-101	Mechanical Site Layout Plan	04/10/2008
M-401	Mechanical Enlarged Plans	04/23/2008
M-501	Mechanical Details	04/23/2008
M-502	Mechanical Details	04/23/2008
M-601	Mechanical Steam Heating Flow Diagram	04/23/2008
M-602	Mechanical Steam Heating Flow Diagram	04/23/2008
M-603	Mechanical Steam Heating Flow Diagram	04/23/2008
M-604	Mechanical Steam Heating Flow Diagram	04/23/2008
M-701	Mechanical Equipment Schedules	04/23/2008
ELECTRICAL		
E-001	Electrical Legend	04/23/2008
EL-101	Electrical Lighting Floor Plan	04/23/2008
EP-101	Electrical Power and Systems Floor Plan	04/23/2008
E-501	Electrical Details & Single Line Diagrams	04/23/2008
E-701	Electrical Schedules	04/23/2008
FIRE PROTECTION		
F-101	Fire Protection Floor Plan	04/23/2008

EXHIBIT "B"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

3.0	**Project Manual as prepared by Skanska USA Building Inc** Includes Sheets SD-01 and SD-02	04/18/2008
4.0	**Bid Memorandum No. 1 as prepared by Skanska USA Building Inc** Includes Addendum No. 1 as prepared by HDR Architecture	04/29/2008 04/23/2008
5.0	**Bid Memorandum No. 2 as prepared by Skanska USA Building Inc**	05/02/2008
6.0	Bid Memorandum No. 3 as prepared by Skanska USA Building Inc	05/12/2008
7.0	**Bid Memorandum No. 4 as prepared by Skanska USA Building Inc**	05/13/2008

EXHIBIT "C"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

ALTERNATES, UNIT PRICES, AND LABOR RATES

Note: For the purposes of this Exhibit C, the term "Scope" shall mean the scope of Work to be provided by Subcontractor under the Subcontract or the Goods and Services to be supplied and performed by Seller under the Purchase Order, as applicable.

I. ALTERNATES

Contractor/Buyer may at any time elect to have Subcontractor/Seller provide as part of its Scope one or more of the alternates identified in this Section I. The "ADD" or "DELETE" price identified in connection with an alternate is inclusive of all of Subcontractor's/Seller's costs and expenses to provide the alternate in accordance with all requirements of the Subcontract/Purchase Order.

1. Insert the amount to be added to the Subcontract Amount/Purchase Order Amount if the Subcontractor/Seller is directed to provide payment and performance bonds.

   ADD $N/A

2. If the "No" box is checked, insert the amount to be added to the Subcontract Amount/Purchase Order Amount for Subcontractor/Seller to comply with the insurance requirements of the Subcontract/Purchase Order.

   Compliance: ☒ Yes ☐ No ADD $N/A

3. Insert the amount to be added to the Subcontract Amount/Purchase Order Amount for sales and use taxes on labor and material, if tax exemption certificates are not provided, or an Owner material purchase plan is not utilized so that the payment of such taxes is required.

   a. Labor ADD $N/A

   b. Material ADD $N/A

4. Additional Item

   ADD/DEDUCT $N/A

II. UNIT PRICES

If Contractor/Buyer elects to change the quantities of one or more of the following items to be provided by Subcontractor/Seller as part of its Scope, or a change otherwise occurs in the quantity of any such item and Subcontractor/Seller is entitled to a Subcontract/Purchase Order adjustment in connection with that change, Contractor/Buyer may in its sole discretion utilize the following "ADD" or "DEDUCT" Unit Prices as the basis for adjusting the Subcontract Amount/Purchase Order Amount. Each Unit Price is inclusive of all of Subcontractor's/Seller's costs and expenses to provide the specified quantity of the item in accordance with all requirements of the Subcontract/Purchase Order. Changed quantities (e.g. lbs, LF, SF, pieces, etc.) will be numerically netted (plus or minus) prior to the application of the appropriate dollar unit rate for each listed Unit Price.

EXHIBIT "C"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

	Item	Unit Price ADD	Unit Price DEDUCT
1.		$ /	$ /
2.		$ /	$ /
3.		$ /	$ /
4.		$ /	$ /

If requested, Subcontractor/Seller shall submit Unit Prices for additional items that may be utilized by Contractor/Buyer.

III. ALLOWABLE MARKUPS

Subcontractor/Seller shall apply the following overhead and profit markups for changes in the Scope:

		% Markup
A.	**Labor** The markup on labor shall be reflected in the labor rates stated in Section V and shown in the Labor Rate Breakdown.	15
B.	**Material** The markup on material shall be applied after all applicable discounts and rebates due Subcontractor/Seller are considered.	10
C.	**Third Party Rentals** The markup on third party rentals shall be applied to the direct invoiced cost. Equipment owned by the Subcontractor/Seller is not eligible for markup, and is subject to the rates shown in Section IV.	10
D.	**Sub-subcontractor/Subsupplier Work/Supply** The markup on Sub-subcontractor/Subsupplier work/supply in connection with a change in Scope shall be applied to the direct invoiced cost from the Sub-subcontractor/Subsupplier. Sub-subcontractor's/Subsupplier's markup for its own direct cost shall not exceed the percentages listed above for labor, material, and third party rentals.	10
E.	**Additional Bond Premium (if required)** The additional bond premium (if required) on a change in Scope shall be applied to the direct cost of the change.	N/A

Overhead and profit shall be inclusive of the following: home office costs, management supervision, training, vehicles and pickups, travel, reproduction, temporary facilities, computers, office equipment, small tools, and other incidentals. Small tools are defined as tools that do not have a new unit cost in excess of $750.00.

EXHIBIT "C"

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IV. EQUIPMENT RATES

Contractor/Buyer may elect to have Subcontractor/Seller provide any of the following equipment in connection with its Scope at the applicable "Hourly", "Daily", "Weekly", or "Monthly" rate specified. Each specified rate is inclusive of all of Subcontractor's/Seller's costs and expenses to furnish the equipment (not including operator) in accordance with all requirements of the Subcontract/Purchase Order, including but not limited to the following: transportation, delivery, pickup, fuel, energy costs, consumables, connections, maintenance, wear and tear, repair, depreciation, storage, tax, overhead, and profit. If an hourly rate is used, equipment shall be charged based upon actual usage within ½ hour.

	Rate			
Equipment Description	Hourly	Daily	Weekly	Monthly
See Attached				

Rental costs of Subcontractor/Seller-owned equipment not shown on the list above shall be charged as follows:

- 80% of the rates shown in the latest edition of "AED Green Book" prepared by EquipmentWatch, San Jose, CA ("AED"); or if not shown in AED,
- 80% of the rates shown in the latest edition of "Tool and Equipment Rental Guide" prepared by Mechanical Contractors Association of America ("MCA"); or if not shown in MCA,
- 60% of the rates shown in the latest edition of "Rental Rate Blue Book for Construction Equipment" published by EquipmentWatch, San Jose, CA ("Blue Book"); or if not shown in the Blue Book,
- 60% of the rates shown in the latest edition of "Tool and Equipment Rental Schedule" published by National Electrical Contractors Association, Bethesda, MD ("NECA").

Subcontractor/Seller shall not be reimbursed for the cost of leasing/renting an individual tool or piece of equipment in excess of its fair market value as determined above.

M.A.P. MECHANICAL CONTRACTORS, INC.
EQUIPMENT RENTAL RATES
5/1/08 TO 4/30/09

M.A.P.
MECHANICAL CONTRACTORS INC.

EQUIPMENT	HOUR	DAY	WEEK	MONTH
SIMON 4 X 4 MAN LIFT 40' (1 DAY MINIMUM)	N/A	$ 165.00	$ 750.00	NEGOTIABLE
FORD 9000 TRUCK W/14 TON BOOM 103' STICK WITH FIFTH WHEEL FLAT BED OR LOW BOY	$150.00	$ 1,050.00	NEGOTIABLE	NEGOTIABLE
TRUCK CRANE (2 HR. MIN. W/OP) 28 TON OSKOSH W/150' STICK	$150.00	$ 1,050.00	NEGOTIABLE	NEGOTIABLE
PACK 10 PLASMA ARC	$ 50.00	$ 185.00	NEGOTIABLE	NEGOTIABLE
REX PIPE MACHINE (6" CAP)	N/A	$ 25.00	$ 125.00	NEGOTIABLE
GAS WELDING MACHINE	N/A	$ 80.00	$ 400.00	NEGOTIABLE
ORBITAL TIG/GAS GENERATOR	N/A	$ 275.00	$ 810.00	NEGOTIABLE
PUMP, DIAPHRAGM (GAS)	N/A	$ 62.00	$ 185.00	NEGOTIABLE
CORE BORE MACHINE (BITS NOT INCLUDED)	N/A	$ 65.00	$ 245.00	NEGOTIABLE
GENERATOR (GAS)	N/A	$ 80.00	$ 360.00	NEGOTIABLE
HILLMAN ROLLERS (SET OF 4)	N/A	$ 25.00	$ 90.00	NEGOTIABLE
HOT TAP MACHINE (1 DAY MINIMUM)	N/A	$ 110.00	N/A	NEGOTIABLE
48" BEVEL BANDS	N/A	$ 190.00	$ 550.00	NEGOTIABLE
36" BEVEL BANDS	N/A	$ 110.00	$ 330.00	NEGOTIABLE
24" BEVEL BANDS	N/A	$ 75.00	$ 215.00	NEGOTIABLE
14"-20" BEVEL BANDS	N/A	$ 60.00	$ 180.00	NEGOTIABLE
4"-12" BEVEL BANDS	N/A	$ 30.00	$ 80.00	NEGOTIABLE
FLAT BED TRUCK (DAY RATE +$ .70 PER MILE)	$100.00	$ 700.00	NEGOTIABLE	NEGOTIABLE
BOSCH ELECTRIC HAMMER (4 HR. MIN. $40.00)	N/A	$ 68.00	$ 245.00	NEGOTIABLE
GROVE SCISSORS LIFT ($100.00 MINIMUM)	N/A	$ 115.00	$ 368.00	$ 875.00
SKYJACK 3015 SCISSORS LIFT	N/A	$ 58.00	$ 145.00	$ 500.00
ROUSTABOUT (1 DAY MINIMUM)	N/A	$ 30.00	$ 90.00	$ 310.00
MAN BASKET - DAY RENTAL	N/A	$ 35.00	$ 125.00	NEGOTIABLE
JOB TRAILER	N/A	N/A	$ 100.00	$ 350.00
LARGE OFFICE TRAILER	N/A	N/A	$ 150.00	$ 500.00
HYDRO TEST EQUIPMENT	N/A	$ 50.00		
ALLOY WELD MAT.	$1.50 PER DIAMETER INCH			

EXHIBIT "C"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

V. LABOR RATES

Contractor/Buyer may elect to have Subcontractor/Seller provide labor (or additional labor) in connection with its Scope. All additional labor shall be billed at the applicable rate as required by law. Each specified rate is inclusive of all of Subcontractor's/Seller's costs and expenses to furnish the additional labor in accordance with all requirements of the Subcontract/Purchase Order.

Subcontractor/Seller shall provide Contractor/Buyer a breakdown for each rate specified.

Trade	Rate Straight Time	Rate Premium Time	Rate Double Time
1. General Foreman	$ 85.60 /hr	$ 119.80 /hr	$ 162.60 /hr
2. Foreman Plumber, Pipe Fitter, or Welder	$ 75.35 /hr	$ 105.45 /hr	$ 143.15 /hr
3. Journeyman Plumber, Pipe Fitter, or Welder	$ 68.50 /hr	$ 95.90 /hr	$ 130.15 /hr
4. Apprentice	$ 60.60 /hr	$ 84.90 /hr	$ 115.15 /hr
5. Hartford Inspection	$ 143.85 /hr	$ 201.40 /hr	$ /hr
6. Quality Control Inspection	$ 79.10 /hr	$ 110.75 /hr	$ /hr

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LABOR RATE BREAKDOWN

PROJECT: As Submitted
WORK CLASSIFICATION:
SUBCONTRACTOR:
DATE:
EFFECTIVE DATES:

	FOREMAN			JOURNEYMAN			APPRENTICE		
	Straight	Premium 1½	Premium 2	Straight	Premium 1½	Premium 2	Straight	Premium 1½	Premium 2
*BASE RATE $_____									
*BENEFITS $_____		N/A	N/A		N/A	N/A		N/A	N/A
(EMPLOYER PAID) Health & Welfare									
Pension									
Apprentice									
Annuity									
PAYROLL TAXES @ $_____									
FICA _____%									
FUTA _____%									
SUTA _____%									
INSURANCES @ $_____		N/A	N/A		N/A	N/A		N/A	N/A
Workers' Comp. _____%									
General Liability _____%									
Automobile Insurance _____%**									
Experience Mod. _____%**									
Labor Cost									
Estimated Overhead & Profit ***	A	(same as A)	(same as A)	B	(same as B)	(same as B)	C	(same as C)	(same as C)
Revised Total									

* per union agreements (if applicable)
** If not in General Liability
*** overhead and profit shall not be applied to premium portion of labor

EXHIBIT "D"

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PROJECT SCHEDULE/MILESTONES

1. **PROJECT SCHEDULE**
   See Project Schedule dated 4/18/2008 (Reference Bid Package No. 1 Documents) as well as all subsequent schedules as developed throughout the project.

Required Submittals	Due Date
All Submittals	6/20/2008

"Substantial Completion" shall be defined as follows:
Substantial Completion is when the Architect certifies that the Work or designation portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. (AIA A201 General Conditions 1997 ed.)

2. **REQUIRED LEAD TIME AFTER SUBMITTAL APPROVAL**

Item Description	Lead Time	
1. All Materials	10	Weeks
2. Boiler / Deaerator	16	Weeks
3. Boiler Stacks	8	Weeks
4. CAU's	10	Weeks
5. Steam & Condensate (Site Pipe)	8 to 10	Weeks
6.		Weeks

List other items over four (4) weeks		
1.		Weeks
2.		Weeks
3.		Weeks

EXHIBIT "D"

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4. ANTICIPATED DURATIONS FOR KEY SUBCONTRACTOR ACTIVITIES

Activity	Workdays	Craft Hours
1. Sheetmetal	35	280
2. Insulation	40	
3.		
4.		
5.		
6.		

5. ANTICIPATED CRAFT LOADING

Average Crew Size 6-8 Men Peak Crew Size (16) all-trades Ins., Sheetmetal

EXHIBIT "E"

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SKANSKA STANDARD SUBCONTRACT TERMS AND CONDITIONS

TABLE OF CONTENTS

EXHIBIT "E"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

SUBCONTRACT TERMS AND CONDITIONS

Article 1 - DEFINITIONS, CONTRACT DOCUMENTS AND RELATED MATTERS PERTAINING TO SUBCONTRACTOR'S WORK

1.1 *Definitions.*
The following definitions apply internally to these terms and conditions and the Subcontract Agreement:

(a) "Applicable Law" all laws, treaties, ordinances, judgments, decrees, injunctions, writs and orders of any court or governmental agency or authority, and rules, regulations, codes, orders, interpretations of any federal, state, county, municipal, regional, environmental or other governmental body, instrumentality, agency, authority, or court having jurisdiction over the Project or any activity conducted at or in connection with the Project or in connection with the Subcontract.
(b) "Architect" means the architect employed by the Owner in connection with the Project as identified in the Subcontract Agreement.
(c) "Certificate of Final Completion" means the certificate indicating that the Work other than potential warranty obligations has been completed as required by the Owner Contract.
(d) "Certificate of Substantial Completion" means the certificate indicating that the Work has been substantially completed as required by the Owner Contract.
(e) "Change" means an addition, reduction, acceleration, suspension or other modification in the scope or time for the performance of Subcontractor's Work.
(f) "Change Order" has the meaning set forth in Section 10.1.
(g) "Contract Documents" has the meaning set forth in Section 1.3.
(h) "Contractor" means the entity identified as such in the Subcontract Agreement. It is understood that Skanska USA Building Inc. may also be referred to in the Owner Contract as the "Construction Manager", "Design-Builder", etc. In all such instances, the term "Contractor" shall be deemed interchangeable with the terminology used in the Owner Contract to refer to Skanska USA Building Inc.
(i) "Damages" means, individually and collectively, as applicable, any and all losses, costs, expenses, damages, injuries, claims, demands, obligations, liabilities, judgments, fines, penalties, interest and causes of action, including without limitation administrative and legal costs and reasonable attorney's fees.
(j) "Delay Events" has the meaning set forth in Section 11.3.
(k) "Design Professional" as used herein, means an architect, professional engineer, or other professional engaged by the Owner to provide design services to the Project.
(l) "Effective Date" shall mean the date defined as such in the heading portion of the Subcontract Agreement.
(m) "Indemnified Parties" means the Owner, Contractor, and their respective directors, officers, employees, parents and subsidiaries of any tier, representatives, agents, successors and assigns, and any and all representatives, agents, directors, officers, employees of any of the foregoing.
(n) "Owner" means Contractor's customer in connection with the Project as identified in the Subcontract Agreement.
(o) "Owner Contract" means the contract between Contractor and the Owner for the Project identified in the Subcontract Agreement, and all written amendments, change orders, modifications and supplements thereto.
(p) "Project" means the project in connection with the parties have entered into this Subcontract as identified in the Subcontract Agreement.
(q) "Schedule" has the meaning set forth in Section 3.2.
(r) "Subcontract" means the agreement between Contractor and Subcontractor for the Project and is comprised of the Contract Documents.
(s) "Subcontract Agreement" means the document entitled Subcontract Agreement and executed by Contractor and Subcontractor.
(t) "Subcontract Amount" means the amount to be paid by Contractor to Subcontractor for Subcontractor's performance of the Work as identified in the Subcontract Agreement. The Subcontract Amount includes all federal, state, county and municipal taxes imposed by Applicable Law upon labor, services, equipment, materials, supplies or other items acquired, performed, furnished or used in connection with or arising out of the Subcontractor's Work, including, but not limited to, transportation, sales, use, gross receipts, excise, unemployment, and personal property taxes, whether payable by or levied or assessed against Contractor, Owner or Subcontractor. If Applicable Law requires any such taxes to be stated and charged separately, Subcontractor shall include a separate line item on any applications for payment or invoices indicating the amount of such taxes. The total price of all items included in Subcontractor's Work plus the amount of all taxes applicable thereto, shall not exceed the Subcontract Amount.
(u) "Subcontract Exhibits" means the Exhibits marked in the Subcontract Agreement as applicable to the Agreement.
(v) "Subguard" has the meaning set forth in Section 15.2.
(w) "Subcontractor" means each vendor, supplier, materialmen, consultant, contractor or other person or entity performing a portion of the Work and/or providing equipment or services directly or indirectly in connection with the Work as defined in the Contract Documents as set forth in Section 1.3 hereunder.
(x) "Sub-subcontractor" means each lower tier vendor, supplier, materialmen, consultant, contractor, subcontractor or other person or entity performing a portion of the Work for Subcontractor hereunder and/or providing equipment or services directly or indirectly in connection with the Work or Subcontract.
(y) "Work" means the work to be performed by Subcontractor under the Subcontract as generally described in Section 1 of the Subcontract Agreement and more specifically set forth in Exhibit A. Subcontractor shall perform all technical, professional or other services and provide all supervision, labor, equipment, material, supplies, permits, insurance, hoisting, scaffolding, systems, tools, apparatus, transportation, shop drawings, samples and submittals, and all other items necessary to perform and complete the work required by this Subcontract.

1.2 *Safety.*
Subcontractor acknowledges that the safety of persons and property on and off the Project site in connection with performance of the Work is of prime importance to Contractor and Owner, and Subcontractor shall cooperate with Contractor and Owner in efforts to prevent injuries to persons and property and to comply with all applicable safety rules and regulations, including as set forth in Section 14.2, to create and maintain an injury free environment.

EXHIBIT "E"

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1.3 *Contract Documents.*
The Subcontract is comprised of the following "Contract Documents"; the Subcontract Agreement; the Subcontract Exhibits; and, the Owner Contract, but only with respect to those obligations that are applicable (directly or indirectly) to the Work to be performed by Subcontractor under the Subcontract and Owner's rights, redress and remedies as provided in Section 1.6. Subcontractor assumes toward the Contractor and the Owner all the obligations that the Contractor assumes toward the Owner in the Owner Contract with respect to the Work to be performed by Subcontractor under the Subcontract. Notwithstanding the foregoing, the payment and dispute resolution provisions contained in the Owner Contract are specifically excluded from the Contract Documents.

1.4 *Contract Documents are Complementary.*
The Contract Documents are intended to be read as a whole, and any Work required by one part and not mentioned in another (e.g., item shown in drawing and not mentioned in the specifications, or mentioned in the specifications and not shown in drawing), shall be executed to the same extent as though required by all. The addition, omission or incorrect placement of a word or character in one part of the Subcontract shall not change the intent of the Subcontract as a whole, and shall not constitute the basis for a claim by the Subcontractor for an increase in the Subcontract Amount or an extension of time within which to perform and complete the Work. In the event of a conflict between one or more provisions of the Contract Documents, the provision imposing the more demanding term, condition, duty or standard of performance, or the greater limitation on the nature and type of relief or damages allowed to Subcontractor, shall control. A conflict exists in the Contract Documents when the same subject matter is addressed by two or more provisions of the Contract Documents in a manner that cannot be reconciled to give effect to all provisions. In the various parts of the Contract Documents where reference is made to applicable codes and standards, the Work shall, except as otherwise specified, conform to the latest issue of the referenced code or standard available at the time the Work is performed.

1.5 *Obligation to Study the Contract Documents.*
Subcontractor shall carefully study and compare the Contract Documents and notify Contractor in writing of any error, inconsistency, omission or ambiguity prior to executing any affected Work. Contractor's determination of the Subcontract requirements in view of the error, inconsistency, omission or ambiguity shall be final and Subcontractor shall perform the Work consistent with that determination, subject to dispute resolution under Section 13.4. Subcontractor shall be liable for any added costs or damage resulting from its performance of any Work involving an error, inconsistency, omission or ambiguity in the Contract Documents that has not been reported to Contractor, including any re-performance and related costs of correction and any additional costs incurred by the Contractor.

1.6 *Rights and Remedies under the Owner Contract.*
Contractor shall have the benefit of all rights, redress and remedies against Subcontractor that Owner has against Contractor under the Owner Contract.

1.7 *The Architect.*
If Owner does not engage an Architect on the Project, the parties' rights and obligations under the Subcontract shall be determined without regard to any certificates, determinations or other functions the Contract Documents anticipate the Architect will issue, make or perform. The Owner may at any time substitute the Architect employed by it in connection with the Project.

Article 2 - SCOPE OF SUBCONTRACTOR'S WORK

2.1 *All Items Required to Perform the Work are Included.*
Subcontractor and its Sub-subcontractors shall strictly comply with all requirements of the Subcontract in the performance of the Work and other activities in connection with the Subcontract. Subcontractor acknowledges and agrees that it can perform and complete the Work in strict compliance with the Subcontract requirements, including Subcontract Amount and Project Schedule, and acknowledges and agrees that it can do so even though certain drawings, specifications, addenda and bulletins, may not be fully developed at the time of contracting. Subcontractor further acknowledges and agrees that the Work includes the provision of all equipment, components, systems, materials, documentation and other services and items required to perform the Work and make it complete, functional and/or operational, notwithstanding the fact that each such service or item may not be expressly mentioned in the Contract Documents.

2.2 *Project Investigation.*
Subcontractor represents that it has, or has had full opportunity to, examine the Project site and Contract Documents; that it has satisfied itself as to the requirements of the Work and all conditions which may affect the Work, including but not limited to the availability and costs of labor, services, equipment, materials, supplies and other items required for the Work, the observable condition of the Project site and access thereto to perform the Work and actual and anticipated local weather conditions; that the Subcontract Amount and Schedule have been determined with due regard for all such requirements and conditions which do or may affect the Work; and, that its entry into the Subcontract has not been induced either wholly or in part by any promises, representations or statements by or on behalf of Contractor, Owner and/or the Architect, other than those set forth in the Subcontract. Subcontractor acknowledges and accepts the risk of mistake or error with respect to all matters within the scope of its Project investigation, and agrees that it shall not be entitled to, and shall make no claim for, any additional compensation or damages of any kind or character or an extension of time for performance should any requirements or conditions applicable to the Work be different from or in addition to those identified by Subcontractor through such reasonable investigation.

2.3 *Existing Conditions.*
Subcontractor shall inspect the work provided by others onto which the Work is to be placed or to which the Work is to be applied or attached and shall notify Contractor in writing of any observable defect or other detrimental condition in any such work prior to the performance of the affected Work. If Subcontractor fails to so notify Contractor, Subcontractor shall be deemed to have accepted the condition of such work as suitable for its Work. Subcontractor shall be liable for any added costs or damage resulting from its performance of any Work involving any unsuitable work provided by others of which Subcontractor has not notified Contractor as required, including any re-performance and related costs of correction and any additional costs incurred by the Contractor, Owner or their other contractors.

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2.4 *Duty to Coordinate.*
Subcontractor agrees that Owner and Contractor shall have the right to perform or have performed other work in or about the Project site during the time when Subcontractor is performing its Work. Subcontractor shall: coordinate its Work activities at the Project site with those of Contractor, Owner, and their other contractors; afford a reasonable opportunity for the introduction and storage of materials and the execution of such work; and make every reasonable effort to enable both its Work and such other work to be completed without hindrance or interference. Subcontractor shall notify Contractor in writing of any potential conflicts between its Work and such other work and if requested by Contractor shall participate in the preparation of coordinated drawings in areas of congestion. In situations where a conflict arises between the Subcontractor's Work and the work of others, Contractor will determine in its discretion which work has the highest priority and direct the performance of the Work accordingly. Subcontractor shall not be entitled to an adjustment of the Subcontract Amount or an extension of time for its field coordination activities as the Subcontractor shall anticipate and provide for such activities in the Subcontract Amount and agreed time for performance.

2.5 *Protection of Work.*
Subcontractor shall protect the Work at all times prior to its acceptance by Owner. Subcontractor shall bear the risk of loss or any damage to the Work or a portion thereof prior to Owner's acceptance (regardless of the holder of title thereto), and Subcontractor shall promptly replace, repair, restore or rebuild any such damaged Work so that it conforms to the requirements of the Subcontract. If the damage is recognized by the insurer to be covered by a first party property insurance policy maintained by Owner or Contractor for the Project, Contractor will reimburse Subcontractor its direct costs to replace, repair, restore or rebuild damaged Work to the extent of insurance proceeds Contractor actually receives for that work, less Contractor's cost to prepare and adjust the claim. Subcontractor shall cooperate with Contractor and Owner in connection with the preparation and adjustment of any insurance claim for damage to the Work. Under no circumstances will Contractor or Owner be required to take any legal action to pursue coverage for damage to the Work in the event the insurer fails or refuses to recognize the existence or applicability of coverage for such damage. If requested by Subcontractor, Contractor shall assign and shall request that the Owner assign to Subcontractor its rights in connection with any such coverage issues, but only to the extent thereof.

2.6 *Quality and Protection of Equipment, Materials and Supplies.*
Unless otherwise expressly agreed, all equipment, material, supplies and other items furnished by Subcontractor and incorporated into the Work shall be new, unused, of first rate quality, suitable for use in the Work and in strict conformity with the requirements of the Subcontract. Subcontractor shall at all times cover and protect from damage and theft all equipment, materials, supplies and other items that are to be used in the performance of, or incorporated into, the Work at the Project. Subcontractor is solely responsible for and shall bear the risk of loss for all equipment, materials, supplies and other items stored by it at the Project site (regardless of the holder of title thereto), and Subcontractor shall replace any shortages thereof at its expense. If any damage or theft is recognized by the insurer to be covered by a first party property insurance policy maintained by Owner or Contractor for the Project, Contractor will reimburse Subcontractor its direct costs to replace damaged or stolen equipment, materials, supplies or other items to the extent of insurance proceeds Contractor actually receives for that replacement, less Contractor's cost to prepare and adjust the claim. Subcontractor shall cooperate with Contractor and Owner in connection with the preparation and adjustment of any insurance claim for any damage or theft. Under no circumstances will Contractor or Owner be required to take any legal action to pursue coverage for any damaged or stolen equipment, materials, supplies or other items in the event the insurer fails or refuses to recognize the existence or applicability of coverage for the damage or loss in question. If requested by Subcontractor, Contractor shall assign and shall request that the Owner assign to Subcontractor its rights in connection with any such coverage issues, but only to the extent thereof.

2.7 *Protection of On Site Property.*
Subcontractor shall at all times protect the Project, Project site and the work and property of Owner, Contractor and their other contractors on the Project site from any damage arising out of its operations. Subcontractor shall be responsible for any such damage and Contractor shall be entitled to backcharge Subcontractor the amount of any deductible payable under any first party property insurance maintained by Contractor or Owner for the Project in connection with such damage. Subcontractor shall at its expense promptly replace, repair, restore or rebuild any damage to the Project, Project site and the work and property of Owner, Contractor and their other contractors on the Project site arising out of its operations if so directed by Contractor. If the damage is recognized by the insurer to be covered by a first party property insurance policy maintained by Owner or Contractor for the Project, Contractor will reimburse Subcontractor its direct costs to replace, repair, restore or rebuild to the extent of insurance proceeds Contractor actually receives for that work, less Contractor's cost to prepare and adjust the claim. Subcontractor shall cooperate with Contractor and Owner in connection with the preparation and adjustment of any insurance claim for damage to the Work. Under no circumstances will Contractor or Owner be required to take any legal action to pursue coverage for damage to the Project, Project site and the work and property of Owner, Contractor and the other contractors on the Project site in the event the insurer fails or refuses to recognize the existence or applicability of coverage for such damage. If requested by Subcontractor, Contractor shall assign and shall request that the Owner assign to Subcontractor its rights in connection with any such coverage issues, but only to the extent thereof.

2.8 *Protection of Other Property.*
Subcontractor shall at all times take all necessary precautions to protect all third party property not covered by Sections 2.5, 2.6 and 2.7 from any damage arising out of its operations, including the property of adjacent landowners, utilities, roads, bridges, waterways and railroads. If any such third party property is damaged as a result of Subcontractor's operations, Subcontractor shall promptly replace, repair, restore or rebuild it at its expense.

2.9 *Housekeeping.*
Proper housekeeping is an essential component of creating and maintaining an injury free environment. Subcontractor shall observe proper housekeeping controls for construction debris, waste materials and rubbish arising from its operations and shall cleanup and remove all such items from the Project site on a daily basis (or shorter interval if required for safety or if directed by Contractor). If Contractor permits Subcontractor temporarily to store debris, waste materials or rubbish at a designated location on or near the Project site, Subcontractor shall ensure that the items are at all times stored safely and shall remove them from the designated location immediately following Contractor's direction that it do so. Fire exits, corridors, ladder ways, doorways and exit paths in general shall be clear and open to pedestrian and handicapped access traffic at all times, specifically including nights and weekends. As part of the completion of its Work and as a condition precedent to final payment, Subcontractor shall perform a final cleaning to remove all stains, splatter and dirt from its Work and to remove any remaining construction debris, waste materials and rubbish arising from its operations from the Project site. If Subcontractor fails to observe proper housekeeping within twenty-four (24) hours of Contractor's written notice (or shorter time if necessary) to properly correct a deficiency which

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compromises the maintenance of an injury free environment, Contractor may properly clean up and remove any such construction debris, waste materials or rubbish by the most expeditious means available and charge Subcontractor for the costs incurred.

2.10 *Clean-Up Crews.*
Contractor reserves the right, upon twenty-four (24) hours written notice to all responsible subcontractors, to clean-up one or more areas of the Project site and remove unidentifiable construction debris, waste materials and rubbish from the area. Contractor shall backcharge the costs incurred for this work on a pro-rata basis to each subcontractor working in the affected area.

2.11 *Temporary Structures and Facilities.*
Subcontractor shall provide all temporary offices, structures, sheds, storage facilities and other temporary structures or facilities required for the Work, complete with all required utility hookups and services, including gas, telephone and water. Subcontractor shall maintain temporary structures and facilities in a safe and orderly condition and in accordance with any applicable federal, state or local requirements.

2.12 *Layout and Field Measurements.*
Subcontractor shall provide any layouts, field measurements and verifications required for the performance of its Work and shall be responsible for their accuracy.

2.13 *Cutting, Fitting and Patching.*
Subcontractor shall perform all cutting, fitting, patching, sleeving, grouting, and sealing of its Work that may be required to fit it to, or to receive, the work of others.

2.14 *Use of Contractor's Equipment.*
Unless Contractor has expressly agreed in the Contract Documents to allow Subcontractor to use Contractor's equipment without charge, Subcontractor shall pay Contractor its rental cost for such equipment or, if the equipment is owned by Contractor, Contractor's charge out rate for that equipment. Subcontractor acknowledges that Contractor has no obligation to allow Subcontractor to use any of Contractor's equipment on the Project and that Subcontractor is solely responsible for supplying all equipment required to perform and complete the Work.

2.15 *Meetings.*
At weekly safety and other subcontractor meetings held by Contractor, Subcontractor shall be represented by personnel who are authorized to make binding decisions on Subcontractor's behalf in connection with the performance of the Work and its other obligations under the Subcontract, including committing to safe work practices, staffing levels, equipment, material and supply deliveries, and coordination of the Work. Subcontractor may be required by Contractor to attend, and Subcontractor agrees to actively participate in, any such meetings prior to commencement date of the Work, including meetings and safety orientations for the maintenance of an injury free environment.

2.16 *Daily Reports.*
If required by Contractor, Subcontractor shall submit a daily report to the Contractor, which shall, at a minimum, include: a description of the Subcontractor's Work activities for the day; a work force count by trade for Subcontractor and its Sub-subcontractors; a listing of any major deliveries; and, a description of any Delay Event or other matter that has or may adversely impact Subcontractor's ability to perform the Work in accordance with the Subcontract and its actual or anticipated impact on the Work. Subcontractor's daily report is due by noon the following day. In addition to any other applicable requirements in the Subcontract, Subcontractor's right to submit a claim for any Delay Event or other matter that adversely impacts the Work is conditioned on Subcontractor's submission of its daily report describing the matter, and Subcontractor waives any claim in connection with a matter that is not adequately described in Subcontractor's daily reports. Subcontractor's daily reports shall not serve as a substitute for, or relieve Subcontractor of its obligation to provide, formal written notice to Contractor as required elsewhere in the Contract Documents of any Delay Event or other matter that has or may adversely impact Subcontractor's ability to perform the Work in accordance with the Subcontract, and the Subcontractor waives any claim that does not comply with such requirements and agrees that Contractor's actual or constructive notice of the claim will have no effect on the claim or Subcontractor's waiver of the claim.

2.17 *Testing.*
Where testing agency standards are referenced in the Contract Documents, all materials to be incorporated into the Work shall be tested and certified by an approved, independent testing firm acceptable to the Contractor. Subcontractor is responsible for the cost of all required testing.

2.18 *Equipment, Material and Supply Deliveries.*
Subcontractor shall be responsible for offloading, storing and protecting any equipment, materials, supplies and other items for the Work at the Project site and shall make the appropriate provisions to receive, unload and safely store all such items. Subcontractor shall coordinate deliveries of equipment, materials, supplies and other items with Contractor in advance and shall only schedule such deliveries during hours designated for that purpose by Contractor. Equipment, material, supplies and other items stored on the Project site shall be in the care and custody of the Subcontractor and shall not be removed from the site without the written consent of the Contractor. Subcontractor agrees to keep Contractor fully informed regarding its delivery schedule for any equipment, materials, supplies or other items and shall immediately advise Contractor in writing of any delay or anticipated delay that may affect the progress of the Work or the work of Contractor, Owner, or their other contractors.

2.19 *Parking and Storage.*
The locations for employee and equipment parking, material and supply storage and temporary trailers shall be designated and approved by Contractor if on the project site or on another site arranged by the Contractor. Contractor reserves the right to change any designated or approved location and Subcontractor shall promptly advise its employees of the change and relocate any materials, supplies and temporary trailers to the newly designated location at no cost to Contractor.

EXHIBIT "E"

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2.20 *Royalties and License Fees.*
Except as otherwise provided by the Contract Documents, Subcontractor shall pay all royalties and license fees required as a result of its Work. Subcontractor shall defend, indemnify and hold harmless the Indemnified Parties as provided in Section 18.1 in connection with any suits or claims for infringement of any patent or other intellectual property rights.

2.21 *Sub-Subcontractors.*
Subject to the written approval of the Contractor, Subcontractor shall select Sub-subcontractors with a demonstrable commitment to safe work practices supportive of an injury free environment as is required of Subcontractor and shall bind all Sub-subcontractors to the provisions of the Subcontract applicable to the subcontracted Work. Neither the Subcontract nor any subcontract with a Sub-subcontractor shall create any contractual relationship between any Sub-subcontractor and either Owner or Contractor, nor any payment or other obligation on the part of either Owner or Contractor to any Sub-subcontractor. Notwithstanding the existence of any subcontract, Subcontractor shall be fully responsible for ensuring the safe performance of the Work as if no such subcontract exists. Each subcontract, purchase order or other agreement entered into by Subcontractor in connection with the Work shall be assignable and shall be assigned to Contractor on written request.

2.22 *Monthly Status Reports.*
If required by Contractor, Subcontractor's monthly estimates for payment shall be accompanied by a status report from Subcontractor, which shall include the following: (i) a submittal progress report as required by Section 6.2; (ii) information on the status of materials and equipment that may be in the course of preparation or manufacture (if requested by Contractor, a complete up-to-date procurement schedule shall be submitted on forms acceptable to the Contractor); and (iii) an updated schedule and a narrative progress update on Subcontractor's Work, including a description of any Delay Event or other matter that has or may adversely impact Subcontractor's ability to perform the Work in accordance with the Subcontract and its actual or anticipated impact on the Work.

2.23 *Prohibition on Certain Work and Dealings.*
Until final completion of Contractor's work under the Owner Contract, Subcontractor shall not perform any work in connection with the Project directly for the Owner or any of Owner's tenants (if applicable), or deal directly with the Owner's representatives or its other contractors in connection with the Project unless permitted to do so in writing by Contractor.

Article 3 - TIME FOR PERFORMANCE OF THE WORK

3.1 *Time for Performance.*
Subcontractor acknowledges that the dates required in the Schedule for the performance and completion of the Work are essential conditions of the Subcontract and agrees that Subcontractor's failure to perform and complete the Work consistent with such dates shall constitute a material violation of the Subcontract. Subcontractor represents that it has taken into consideration and made allowances for all hindrances and delays incident to its Work as provided in Sections 2.2 and 2.4.

3.2 *The Project Schedule.*
If not prepared and attached to the Subcontract as an Exhibit, Contractor will develop a Project schedule that will schedule and coordinate the times required for each area of work on the Project, including the Work (the "Schedule"). Subcontractor shall participate and cooperate with Contractor in scheduling the times and sequences required to perform Subcontractor's Work, and Subcontractor agrees to perform its Work in accordance with the Schedule, as it may be revised and amended from time to time by Contractor, including as provided in Section 9.2. The terms "Schedule", "Project Schedule", "Contractor's Schedule", "CPM Schedule" and like terms are used interchangeably in the Contract Documents and each shall refer to the "Schedule" pursuant to this Section 3.2.

3.3 *Work Plan.*
In support of the Project Schedule, Subcontractor shall, as a condition precedent to Contractor's obligation to process Subcontractor's first estimate for payment, furnish Contractor with an itemized breakdown of Subcontractor's Work, which shall include the anticipated sequence of the Work and durations in terms of days and man-hours for the work activities necessary to complete the Work in the time required to support the Project Schedule. Subcontractor represents that it shall: (i) prepare documents that are feasible and realistic for the planning, scheduling and coordination of the Work, and (ii) prepare schedules, updates, revisions and reports that accurately reflect Subcontractor's reasonable expectations as to the sequence of activities, duration of activities, productivity or efficiency, projected and actual completion of any Work item or activity, and delays or problems expected or encountered and specified float time, including as necessary, accounting for any direction provided by Contractor under Section 9.2.

Article 4 - PROGRESS PAYMENTS

4.1 *Schedule of Values.*
Within fifteen (15) days after the Effective Date, Subcontractor shall submit for Contractor's approval Subcontractor's itemized schedule of values that allocates the Subcontract Amount to the various portions of the Work. The schedule of values shall be in the form and supported by data to substantiate its accuracy as required by the Contract Documents, or as Contractor may reasonably require. Upon acceptance by Contractor, Subcontractor will use the schedule of values as the basis for its periodic estimates for payment. If it is later determined that the schedule of values is unbalanced, the Subcontractor shall revise the schedule as necessary and submit a revised schedule of values for Contractor's approval. Subcontractor's submission of the required schedule of values is a condition precedent to Contractor's obligation to make payments to the Subcontractor.

4.2 *Progress Payments.*
Contractor shall pay Subcontractor the Subcontract Amount on a monthly basis as follows:

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4.2.1 *Estimates for Payment.*
Unless otherwise stipulated by Contractor, on or before the earlier of: (i) the 25th day of each month; or (ii) no later than five (5) days prior to the date, if any, in the Owner Contract for the submission of estimates for payment, Subcontractor shall submit a written estimate for payment to Contractor in the form annexed as Exhibit H along with all substantiating data and information required by the Contract Documents or as reasonably requested by Contractor. The amount due Subcontractor on each estimate shall be calculated as provided in Section 4.2.2. If approved by Owner and Contractor, Contractor shall pay the net amount due to Subcontractor within fourteen (14) days after Owner pays the corresponding amount to Contractor under the Owner Contract. Subcontractor acknowledges and agrees that Owner's payment to Contractor under the Owner Contract of amounts due Subcontractor under the Subcontract is a condition precedent to Contractor's obligation to pay such amounts to Subcontractor. Subcontractor further acknowledges that it is relying on the credit and ability of the Owner to pay for Work performed and not Contractor and accepts the risk that it will not be paid by Contractor for Work performed in the event Contractor is not paid by Owner for such Work.

4.2.2 *Basis for Calculating Payment.*
The amount due Subcontractor on each estimate for payment shall be calculated based on the percentage of Work completed by Subcontractor to the date of the estimate as approved by the Contractor, Owner and/or Architect. The amount of the payment shall be the sum of: (a) the proportionate value of completed Work based on Subcontractor's approved schedule of values; less (b) the following amounts: (1) retainage of 10%; (2) all previous payments; (3) all charges for materials and services furnished by Contractor to Subcontractor, and (4) any other charges and deductions as provided for in the Subcontract.

4.2.3 *Payment for Stored Materials.*
Payments made on account of materials not incorporated in the Work but delivered to and accepted by Contractor and suitably stored (on or off the Project site), shall be made, if at all, in accordance with the Contract Documents. Sub-subcontractor invoices itemizing respective quantities and unit costs of such stored material shall accompany all requests for payments for stored materials. At its option, Contractor may make payment for stored material by joint check to Subcontractor and the applicable Sub-subcontractor and require as a condition precedent to payment for stored materials that a bill of sale, any necessary Uniform Commercial Code documentation and/or proof of proper insurance be furnished from Subcontractor and the applicable Sub-subcontractor. Materials accepted by Contractor and stored off site other than at the Subcontractor's premises shall be: (i) stored in a bonded warehouse; (ii) fully insured; (iii) segregated from other material; and (iv) clearly marked "Property of Skanska USA Building Inc.".

4.3 *Joint Checks.*
Prior to submitting its first estimate for payment, Subcontractor shall provide Contractor with a statement identifying the name, address and telephone number of each known Sub-subcontractor. Subcontractor shall update its statement with each monthly estimate for payment as required to identify any new Sub-subcontractors and any name, address or telephone number changes for existing Sub-subcontractors. Contractor may, in its sole discretion make payment for any portion of Subcontractor's Work by joint check to Subcontractor and the applicable Sub-subcontractor or benefit fund to which Subcontractor has an outstanding obligation. Any payments made by Contractor by joint check as provided in this Section 4.3 shall be deemed to have been made directly to Subcontractor.

4.4 *Subcontractor's Use of Payments.*
Subcontractor shall promptly pay for all labor, services, equipment, materials, supplies and other items acquired, performed, furnished or used in connection with the performance of the Work covered by payments received from Contractor, and shall furnish evidence satisfactory to verify compliance with this requirement when requested by Contractor. All funds paid to Subcontractor in connection with the Project constitute funds held in trust by Subcontractor. Subcontractor agrees to apply first to the payment of: (i) taxes owed by Subcontractor based on labor, services, equipment, materials supplies and other items acquired, performed, furnished or used in connection with the performance of the Work; (ii) Subcontractor bond and insurance premiums; and (iii) Sub-subcontractors and any applicable Sub-subcontractor benefit funds.

4.5 *Estimates For Payment and Partial Waivers and Release of Liens and Claims Required.*
As condition precedent to receipt of any progress payments, Subcontractor shall provide Contractor with its duly executed "Skanska Standard Interim Estimate for Payment, Waiver and Release" in the form annexed as Exhibit H.

4.6 *Payment is not a Release by the Contractor.*
No progress payment made by Contractor shall be deemed conclusive evidence that Subcontractor has satisfied its obligations in connection with all or part of the Work covered by such payment, and Contractor shall not by virtue of having made any such payment be deemed to have accepted any Work not meeting the requirements of the Subcontract or to have waived any claims against Subcontractor in connection therewith. All payments are provisional and any overpayment by Contractor to Subcontractor shall be deemed to be a mistake of fact and shall be promptly repaid to Contractor upon demand. The acceptance by Subcontractor of each progress payment from Contractor shall constitute a waiver and release by Subcontractor of all claims of any kind against the Contractor for payment for Work performed up to the date of Subcontractor's estimate for payment against which payment was made and accepted, excluding only Subcontractor's entitlement to retainage withheld in connection with such payment and any disputed amount withheld from payment by Contractor.

4.7 *Payment Withholding.*
Contractor may withhold the whole or any part of any payment to Subcontractor to such extent as Contractor reasonably deems necessary to protect it from loss as a result of: (a) incomplete, defective or damaged Work not remedied; (b) Contractor backcharges; (c) claims filed or reasonable evidence indicating probable filing of claims, including lien claims, involving or arising out of Subcontractor's Work; (d) damage to Contractor's, Owner's or their respective other contractors' work; (e) failure of Subcontractor to make payments when due to Sub-subcontractors; (f) reasonable insecurity regarding Subcontractor's intention or ability to continue with the proper and timely performance of the Work; (g) failure of the Subcontractor to perform or comply with any of its obligations under the Contract Documents; or (h) expenses arising from frivolous claims against Contractor. Contractor may also at any time on written notice to Subcontractor offset against any payment due to Subcontractor under the Subcontract any amount due from Subcontractor to Contractor under any other agreement between the parties.

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Article 5 - FINAL PAYMENT

5.1 *Final Payment.*
Subcontractor shall submit its final estimate for payment to Contractor when it has completed the Work, including punch list items, in accordance with all requirements of the Subcontract as approved by the Contractor and Owner and/or Architect. Subcontractor's final estimate for payment shall be in the form annexed as Exhibit I, and shall include all substantiating data and information required by the Contract Documents or as reasonably requested by Contractor. Subcontractor's final estimate for payment shall show the Work as one hundred percent (100%) complete and shall be calculated in the same manner as Subcontractor's periodic progress payments under Section 4.2, provided that retention shall not be deducted to arrive at the net amount due. If approved by Owner and Contractor, Contractor shall pay the net amount due to Subcontractor within ten (10) days after Owner pays the corresponding amount to Contractor under the Owner Contract, provided all conditions precedent to final payment under the Contract Documents, including the following, have been met: (i) any conditions precedent in the Owner Contract to Subcontractor's entitlement to final payment have been satisfied; (ii) Subcontractor's surety, if any, has consented in writing to the making of final payment; (iii) Subcontractor has provided Contractor with a statement that it has: (a) paid all federal, state, county and municipal taxes, duties and other amounts imposed by Applicable Law upon any labor, services, equipment, materials, supplies or other items acquired, performed, furnished or used in connection with Subcontractor's performance of the Work, including, but not limited to, sales, use, gross receipts, excise, unemployment, and personal property taxes; and (b) completed the Work and performed all other obligations as required under the Subcontract through the date of its final estimate for payment; (iv) Subcontractor has provided Contractor all: as-built drawings, certifications, maintenance manuals, operating instructions, statement of estimates, reports and other final submittals; software; written guarantees and warranties; and bonds required to be provided by Subcontractor under the Subcontract; and (v) Subcontractor has provided a duly executed "Skanska Standard Final Estimate for Payment, Unconditional Waiver and Release" in the form annexed as Exhibit I. Contractor may require a final waiver and release of liens and claims from Sub-subcontractors. Subcontractor acknowledges and agrees that Owner's payment to Contractor under the Owner Contract of the final payment due Subcontractor under the Subcontract is a condition precedent to Contractor's obligation to pay such amount to Subcontractor. Subcontractor further acknowledges that it is relying on the credit and ability of the Owner to pay for Work performed and not Contractor and accepts the risk that it will not be paid by Contractor for Work performed in the event Contractor is not paid by Owner for such Work.

5.2 *Effect of Final Payment.*
As provided in Exhibit I, Subcontractor's acceptance of final payment from Contractor shall constitute a final waiver and release of all liens and claims by Subcontractor against the Contractor and Owner arising out of or relating to the Subcontract.

Article 6 - SUBMITTALS AND SUBSTITUTIONS

6.1 *Submittal Requirements.*
Subcontractor shall furnish all required shop drawings, cut sheets, samples, material lists, as-builts, data or other submittals for approval with the required number of copies prior to fabricating or ordering any equipment, material, supply or other item requiring an approved submittal. Submittal data shall be complete, submitted promptly and in such sequence as to ensure scheduled delivery of the applicable equipment, material, supply or other item and to cause no delay in the Work or in the activities of Contractor or its other contractors. All submittals, data, reports and other documents shall be in the English language.

6.2 *Submittal Progress Reports.*
Within ten (10) days after the Effective Date, Subcontractor shall submit to Contractor a complete list of all submittals required to be furnished by Subcontractor under the Subcontract and their anticipated submittal date. Thereafter, Subcontractor shall furnish Contractor on a monthly basis (or more frequently if requested by Contractor), a progress report on the status of the submittals, including any delay or anticipated delay in their issuance, revision or completion as the case may be.

6.3 *Work Progress Documents and As-Builts.*
Subcontractor shall maintain construction drawings and other data and documents at the Project site and update them each workday as required to accurately reflect the progress of the Work. Subcontractor shall make such drawings, data and documents available for the Contractor's review at the Project site upon request, and at least on a monthly basis in connection with the Subcontractor's estimates for payment. Subcontractor shall furnish final as-built drawings to Contractor as part of its completion of the Work. Subcontractor's compliance with this Section 6.3 is a condition precedent to the Contractor's obligation to make interim progress payments and final payment to Subcontractor.

6.4 *Revisions to Submittals.*
Subcontractor shall specifically advise Contractor in writing when transmitting a revised shop drawing or other submittal of any revisions that are in addition to, or differ from, those requested by the Contractor or the Architect on prior versions of the submittal. If Subcontractor does not provide written notice of such additional or different revisions to Contractor, Contractor's and/or Architect's approval of the submittal shall not include such additional or different revisions. Notwithstanding the foregoing, Subcontractor acknowledges that the Project Schedule does not allow for the resubmission of shop drawings and other submittals and that Subcontractor is required to ensure its initial submittals meet the requirements of the Contract Documents. Subcontractor shall be liable for any added costs or damage resulting from its failure to furnish submittals when and as required by the Subcontract, including any re-performance and related costs of correction and any additional costs incurred by the Contractor, Owner or their other contractors.

6.5 *Professional Certifications.*
When professional certification of performance or design criteria of equipment, materials, systems or other items is required to be furnished by Subcontractor under the Subcontract, Contractor shall be entitled to rely upon such certification and shall not be expected or required to make any independent examination with respect thereto.

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6.6 *Coordination Drawings.*
If applicable to Subcontractor's Work, Subcontractor shall prepare coordination drawings showing exact alignment, physical location and other required details for those portions of its Work that must be coordinated with the work of Contractor, Owner or their other contractors, and shall participate in any related coordination efforts by Contractor.

6.7 *Contractor's Review of Submittals.*
Contractor's or Architect's review or approval of any Subcontractor submittals shall not relieve Subcontractor of any of its obligations under the Subcontract.

6.8 *Substitutions.*
Subcontractor shall not substitute any equipment, materials, supplies, specified by the Contract Documents, or any procedures or methods specified by the Contract Documents for performing the Work unless it first submits a written proposal to Contractor for substitution that complies with all applicable Subcontract requirements and Contractor thereafter approves the substitution in writing. Subcontractor acknowledges that unless expressly permitted by the Contract Documents, Subcontractor shall not be entitled to substitute any equipment, materials, supplies, procedures or methods specified by the Contract Documents.

6.9 *Ownership and Use of Documents*
To the extent not inconsistent with the Owner Contract, all submittals and other documents furnished by Subcontractor under the Subcontract, including any designs, drawings, specifications, calculations, sketches, models, reports, computer programs, computer discs, diskettes or tapes, charts, photographs and other documents, are instruments of Subcontractor's service and all intellectual property rights in such documents shall belong to Subcontractor; provided, however, Subcontractor hereby grants to Contractor and Owner a transferable, irrevocable and perpetual royalty-free license to retain and use all such documents for any purpose in connection with the Project. Subcontractor warrants and represents that any submittal or other document furnished by Subcontractor or any of its Sub-subcontractors do not infringe any patent, copyright, trademark or other intellectual property rights of any person or entity.

Article 7 - LABOR AND SUPERINTENDENCE

7.1 *Labor.*
Subcontractor shall engage a sufficient number of skilled workers to perform the Work promptly, diligently, and in accordance with the requirements of the Subcontract. If requested by Contractor, Subcontractor shall provide Contractor with copies of its policies regarding the furnishing of labor including copies of all wage agreements, working rules, and regulations, if applicable, affecting the Work. Subcontractor warrants that it is now, and will continue to be, in full compliance with the Immigration Reform and Control Act of 1986 (IRAC), specifically including all of its I-9 employer verification provisions. Subcontractor warrants that it will continue to properly train its staff regarding the execution and retention of these I-9 employment verification forms. Subcontractor warrants that it has an I-9 verification policy which it implements throughout the company. Further, Subcontractor agrees to indemnify Contractor and Owner for any legal fees, public relations costs, work stoppages, and any damages resulting from Subcontractor's employment of any unauthorized workers.

7.2 *Supervision.*
Subcontractor shall engage a sufficient number of competent supervisory personnel as are necessary to perform the Work in accordance with the requirements of the Subcontract. Subcontractor shall further have a competent superintendent continuously on the Project site during work hours and readily available on call. The superintendent shall be fully acquainted with the Work and shall have the authority to administer the Subcontract on Subcontractor's behalf and shall not be changed except with the consent of Contractor.

7.3 *Technical Services.*
Subcontractor shall provide all technical personnel required to start-up, test, commission and operate any equipment and to test and use any material, supplies or other items used or supplied by Subcontract in connection with the Work and to instruct Contractor's and Owner's personnel in the operation and maintenance of any such equipment, materials, supplies or other items.

7.4 *Compliance with Owner Requirements for Supervision.*
Subcontractor shall comply with any superintendence or project management obligations imposed upon Contractor under the Owner Contract to the extent necessary to ensure Contractor's compliance with such obligations to Owner.

7.5 *Subcontractor Labor Relations.*
Subcontractor shall be responsible for all labor relations matters relating to its performance of the Work and shall at all times maintain harmony among the personnel employed by it and its Sub-subcontractors in connection with the Project with those of Contractor, Owner and their other contractors. Subcontractor shall at all times use all reasonable efforts and judgment as a skilled and experienced contractor to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes. Subcontractor shall notify Contractor as promptly as possible of any actual or potential labor dispute that may affect the Work. If a labor condition threatens the timely completion of any portion of the Work and Subcontractor fails to give satisfactory assurance of its ability to complete the Work in a timely manner, or Subcontractor fails to employ labor that is compatible and in harmony with other labor employed on the Project, or Subcontractor fails to continue to perform the Work without interruption or delay during a strike, picket, walkout, or other work stoppage or slowdown caused by a labor dispute, Contractor may, at its option, terminate Subcontractor's right to proceed with Work for default in accordance with Section 12.1 or employ workmen to perform the affected Work and backcharge Subcontractor the cost thereof.

7.6 *Removal of Workmen.*
If Contractor notifies Subcontractor in writing that any employee or agent of Subcontractor or one of its Sub-subcontractors is incompetent, disorderly, or otherwise unsatisfactory, such person shall immediately be removed, at Subcontractor's cost, from the Work and shall not thereafter be employed in the performance of the Work.

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Article 8 - DETERMINATION AND INSPECTION OF THE WORK

8.1 *Determinations of Compliance with Contract Documents.*
Contractor, along with the Owner and Architect, shall determine the requirements of the Contract Documents in connection with the Work and whether the Work has been performed and completed in accordance with those requirements. These determinations shall be final and Subcontractor shall perform the Work consistent with them, subject to dispute resolution under Section 13.4.

8.2 *Access for Inspection.*
Subcontractor shall at all times provide Contractor, Owner, the Architect and their authorized representatives safe and sufficient facilities and access to review or inspect the Work on the Project site and, upon request, at Subcontractor's and its Sub-subcontractor's off-site facilities where any Work is being performed. Contractor shall have no obligation to review or inspect Subcontractor's Work, and any such review or inspection shall not relieve Subcontractor of its obligations under this Subcontract.

8.3 *Rejection of Work.*
Contractor, Owner or the Architect may reject any Work performed or equipment, materials, supplies or other items furnished by Subcontractor that are determined not to comply with the requirements of the Contract Documents. Within twenty-four (24) hours after receiving Contractor's written notice rejecting any Work performed or equipment, materials, supplies or other items furnished, Subcontractor shall take down the rejected Work and remove the rejected equipment, materials, supplies or other items from the Project site. Subcontractor shall promptly re-perform any rejected Work and replace any rejected equipment, materials, supplies or other items as necessary to comply with the requirements of the Contract Documents. If requested by Contractor, Subcontractor shall also correct any work of Contractor, Owner or their other contractors as required in connection with any rejected Work. All costs associated with re-performing rejected Work and replacing rejected equipment, materials, supplies or other items shall be borne by the Subcontractor without any increase in the Subcontract Amount or time for performance of the Work.

8.4 *Compliance with Additional Architectural Instructions.*
Subcontractor shall conform to and abide by any additional specifications, drawings, or explanations furnished by the Architect to illustrate the Work to be done, subject to the provisions of Article 10.

8.5 *Failure of Sources of Supply.*
In the event of a partial failure of the Subcontractor's sources of supply of the equipment, materials, supplies or other items to be furnished under the Contract Documents, whether due to allocation or otherwise, the Subcontractor shall make all reasonable efforts to fully meet its obligations under this Subcontract prior to making any allocations among the Subcontractor's other customers.

Article 9 - PROGRESS AND COMPLETION

9.1 *Commencement of Work.*
Except as otherwise provided elsewhere in the Contract Documents, Subcontractor shall commence the Work in accordance with the Schedule immediately upon receipt of verbal or written notice to proceed from Contractor. Subcontractor shall diligently and continuously prosecute its Work or any portion thereof in an efficient fashion and at a rate so as not to cause delay in the progress of the work of Contractor, Owner, or their other contractors. If requested by Contractor, Subcontractor shall maintain and update on a monthly basis (or more frequently if requested) a cost and resource loaded critical path method schedule for the Subcontractor's Work, which depicts Subcontractor's Work activities with logic ties for preceding/restraining work, duration, cost and/or crew size.

9.2 *Compliance with Owner's Scheduling Requirements.*
Contractor shall be entitled to decide the time, order and priority for performance of the various portions of Subcontractor's Work to the extent necessary, in Contractor's judgment, to assure Contractor's compliance with the scheduling requirements imposed on Contractor under the Owner Contract, and to direct the performance of the Work accordingly. Subcontractor shall not be entitled to an adjustment of the Subcontract Amount or an extension of time in connection with any such direction by Contractor as the Subcontractor shall anticipate and provide for such activities in the Subcontract Amount and agreed time for performance.

9.3 *Recovery Plan.*
If Contractor determines that Subcontractor has fallen behind in the progress of the Work or is in danger of falling behind at its then current rate of progress, or is responsible for any Project Schedule delays, Contractor may direct Subcontractor on written notice to take the steps Contractor deems necessary to improve the rate of progress of the Work, including requiring Subcontractor to increase its labor force, number of shifts and/or overtime operations, days of work, or to provide additional equipment or materials. Within forty-eight (48) hours of such written notice from Contractor, Subcontractor shall submit for Contractor's approval a recovery plan composed of a schedule and a safety assessment to demonstrate the manner by which Subcontractor will implement the required steps to attain the required rate of progress while maintaining an injury free environment. Subcontractor will implement the recovery plan immediately upon Contractor's approval. If Contractor determines that Subcontractor's plan will not attain the required rate of progress, Subcontractor will take the steps Contractor directs in that regard and perform the Work accordingly, all without additional cost to the Contractor. If Subcontractor fails to submit or follow a recovery plan as required or perform the Work in accordance with Contractor's directives in the event Subcontractor's recovery plan is not approved, Contractor may, following twenty-four (24) hour notice to Subcontractor, perform the Work as Contractor deems necessary to attain the required rate of progress. Contractor may deduct from any payment due Subcontractor or collect directly from Subcontractor on demand all Damages incurred or suffered by Contractor in connection with Subcontractor's delay in the progress of the Work or to the Project Schedule, including any Damages assessed against Contractor under the Owner Contract.

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9.4 *Substantial and Final Completion of Work.*
The Work will be deemed substantially and finally complete as of the dates indicated in the Certificate of Substantial Completion and Certificate of Final Completion, respectively, or earlier date agreed by Contractor in a written notice to Subcontractor.

9.5 *Punchlist.*
When Subcontractor deems its Work substantially complete, Subcontractor shall give written notice thereof to Contractor along with a punch list of remaining items to be performed to achieve final completion. Subcontractor shall revise its punch list to include any items Contractor advises Subcontractor should be included on that list and shall perform the punch list Work as directed by Contractor.

9.6 *Use and Acceptance of Portions of Work Prior to Final Completion of Work.*
At any time prior to final completion of all the Work, Contractor may temporarily take possession of and use any part of the Work. Contractor may return any such Work to Subcontractor for completion. The Contractor may at any time request in writing that Subcontractor permit Contractor to accept any part of the Work and Subcontractor shall make that part of the Work available for Contractor's inspection as soon as reasonably possible, and in no event later than five (5) days following the request. If Contractor agrees, following the inspection by the Owner and/or Architect, that the part of the Work in question can be accepted, Contractor shall issue a Certificate of Completion for such portion of the Work. The use or acceptance of part of the Work by Contractor as provided in this Section 9.6 shall not relieve Subcontractor of any of its responsibilities under the Subcontract. Subcontractor shall not use any portion of the Work other than as approved in writing by Contractor. In the case Subcontractor uses any of the Work; Subcontractor shall recondition such portion of the Work to meet the requirements of the Subcontract.

Article 10 - CHANGES AND IMPACTS

10.1 *Changes in the Work.*
Contractor shall have the right in its discretion at any time prior to final completion of the Work on written notice to Subcontractor (and without notice to Subcontractor's sureties), to direct a "Change". In the event of a Change, the Subcontract Amount and/or Subcontractor's time for performance shall be adjusted, if at all, by way of a written amendment or "Change Order" to the Subcontract as set forth in Sections 10.2 and 10.3. Unless directed by Contractor to proceed immediately with a Change, Subcontractor shall submit a written request to Contractor for a Subcontract adjustment as provided in Section 10.2 prior to proceeding with a Change.

10.2 *Change Order Requests.*

(a) Contractor Initiated Change: For any Contractor initiated Change, Subcontractor shall submit its written request for a Change Order within ten (10) days of receipt of Contractor's Change notice. Subcontractor's request shall include documentation sufficient to enable the Contractor to determine the factors necessitating the adjustment(s) being requested. If Contractor decides to proceed (or Subcontractor has already proceeded with the written direction of Contractor) with the Change and a Subcontract adjustment is warranted, Contractor shall issue a written Change Order to Subcontractor adjusting the Subcontract either: (i) as requested by Subcontractor; or, (ii) in the event the Contractor disagrees with Subcontractor's statement as to the effect of the Change, Contractor shall issue a Change Order to Subcontractor: (a) on terms Contractor reasonably deems appropriate. Subcontractor shall thereafter perform the Work in accordance with the Change Order, subject to dispute resolution under Section 13.4. Subcontractor shall have no right to suspend or delay the performance of its obligations under the Subcontract while the Contractor is reviewing Subcontractor's adjustment request or if Subcontractor disagrees with the Change Order issued by Contractor.

(b) Owner Initiated Change: For any Change initiated by the Owner or Architect, Subcontractor shall submit its written request for a Change Order no later two (2) days prior to the expiration of the time period specified in the Owner's Contract for the submission of a such request and shall include all information required under the Owner Contract. Contractor shall process Subcontractor's Change Order request in accordance with the change order process in the Owner Contract. Subcontractor's entitlement to additional compensation or a time extension in connection with a Change initiated by the Owner or Architect shall be limited to the cost and schedule adjustments approved by Owner for Subcontractor's Work in Owner's change order to Contractor under the Owner Contract.

(c) Contractor may at any time in its discretion decide not to proceed with a Change without obligation to Subcontractor.

10.3 *Requirements for Pricing Changes.*
Unless the Owner Contract requires different pricing, the amount of additional compensation paid to Subcontractor shall be determined by one of the following methods at the sole discretion of the Contractor:

10.3.1 Lump sum price in an amount proposed by Subcontractor (properly itemized and supported by sufficient substantiating data to permit evaluation) and accepted by Contractor;

10.3.2 Unit Prices or Alternates as set forth in Exhibit C (if applicable); or

10.3.3 Time and material basis.

If a Change is performed by Subcontractor on other than a lump sum basis, Subcontractor shall furnish each day to Contractor certified copies of all time sheets, receiving and inspection reports and shall provide Contractor with such purchase orders, invoices, Sub-subcontractor quotes and other documents and records as may enable Contractor to verify, to its reasonable satisfaction, the costs or savings reasonably incurred by Subcontractor in effecting the Change. All labor, services, equipment, materials, supplies and other items provided by Subcontractor on other than a lump sum basis shall be purchased at competitive market prices and reflect Subcontractor's actual cost after rebates and discounts. Subcontractor acknowledges and agrees that any request for an adjustment will be totally inclusive of all additional costs and time extensions related to the Change, whether resulting from delays, inefficiencies, interferences or any other impact to Subcontractor's performance of the Work. Subcontractor's failure to request a cost or time adjustment in connection with a Change shall constitute a representation by Subcontractor that no such adjustment is required and shall constitute a waiver by Subcontractor of its right to any such

EXHIBIT "E"

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adjustment. Subcontractor's failure to timely submit a proposed credit for deleted Work shall render Contractor's and/or Owner's or Architect's determination of the proper credit final and binding.

10.4 *Change Order Directive.*
If Contractor and Subcontractor do not agree as to the appropriate adjustment to the Subcontract Amount and/or Subcontractor's time for performance in connection with a Change, Contractor may issue a "directive" that directs Subcontractor to proceed with the Change and leaves the adjustment to the Subcontractor Amount and/or Subcontractor's time for performance open. Subcontractor shall proceed with the Change and provide Contractor the information and documents required under Section 10.3 in connection with Changes performed on other than a lump sum basis to support its additional costs and information and documents to support its request for a time extension. When the Change has been completed, Contractor shall determine the appropriate adjustment, or for claims resulting from the Owner or Architect, shall refer the matter to the Architect or Owner's representative to determine the appropriate adjustment to the Subcontract Amount and/or Subcontractor's time for performance. Their decision shall be binding on Subcontractor unless Subcontractor notifies the Contractor in writing that it disputes the decision within the shorter of: (i) twenty-four (24) hours before the expiration of the time allowed, if any, under the Owner Contract to contest the decision; or (ii) forty-eight (48) hours after Subcontractor's receipt of the decision. If Subcontractor properly disputes the decision, the matter shall be subject to dispute resolution under Section 13.4.

10.5 *Impacts to the Work.*
Subcontractor shall make all claims for additional compensation, and extensions of time due to acceleration, disruption or inefficiency or other adverse impacts to the Work or otherwise to Subcontractor's performance under the Subcontract within two (2) business days following the occurrence of the event giving rise to the claim and in such manner so as to permit the Contractor to satisfy the requirements of the Owner Contract for the submission of such claim. All such claims shall be supported by appropriate documentation and, in the case of requests for extensions of time, sufficient detail to demonstrate that the impact is to work activities on the critical path. If the Subcontractor fails to submit a claim to the Contractor as required and as a consequence Contractor is prejudiced in its ability to present such claim under the Owner Contract, then Subcontractor's entitlement to a Subcontract adjustment relating to such claims shall be equally prejudiced. Contractor's liability to the Subcontractor for any adverse impact to the Work or otherwise to Subcontractor's performance under the Subcontract attributable to the Owner, Architect or their separate contractors is limited to the cost, schedule or other relief, if any, actually granted by the Owner. Contractor's liability to the Subcontractor for any adverse impact to the Work or otherwise to Subcontractor's performance under the Subcontract attributable to Contractor's other subcontractors or suppliers for the Project is limited to the amount, if any, actually recovered from such other subcontractors or suppliers.

10.6 *Requirements for all Impact Claims.*
Subcontractor's compliance with the notice and time in Section 10.4 shall be a condition precedent to Subcontractor's entitlement to a Subcontract adjustment and Subcontractor waives and releases any claim for additional compensation or an extension of time in the event that Subcontractor does not so comply.

10.7 *Contractor's Receipt of Claims Does Not Create a Presumption of Validity.*
Nothing done or not done by Contractor or Owner shall be construed as an acknowledgment or acceptance of the accuracy or validity of any Subcontract adjustment requested by Subcontractor until a signed Change Order is issued to Subcontractor by Contractor.

10.8 *Allowable Mark-Ups.*
Subcontractor's overhead and profit mark-up percentages on additional costs incurred in connection with Changes and impacts to the Work for which Subcontractor is entitled to a Subcontract adjustment shall in no event exceed the mark-ups allowed to Contractor for changes under the Owner Contract. Subcontractor shall not apply a mark-up to any costs the Owner Contract provides are not subject to mark-up.

10.9 *Required Documentation in Support of Change Orders or Claims.*
Subcontractor shall allow Contractor to review any data Contractor may reasonably request to assist the Contractor, Owner and/or Architect to determine the validity of a Subcontract adjustment requested by Subcontractor. Data that may be reviewed includes, but is not limited to: (i) Subcontractor's payroll records for each employee working on the Project (which shall contain the employee's name, address, social security number, hourly wage, daily and weekly number of hours worked, gross wages earned, deductions made and actual wages paid); (ii) Subcontractor's Project estimate(s) and supporting calculations; (iii) Subcontractor work schedules and related documents; and (iv) Sub-subcontractor related documents (which Contractor may obtain from Subcontractor or directly from the Sub-subcontractor).

Article 11 - DELAYS

11.1 *Liability for Delays.*
Subcontractor shall be liable to Contractor for any and all loss or damage Contractor sustains as a result of Subcontractor's delay in the safe performance of the Work or delay to the Project attributable to Subcontractor, including any amounts due from Contractor to Owner under the Owner Contract. Permitting the Subcontractor to continue to perform its Work after the agreed time for performance has expired shall not be construed as or constitute a waiver by Contractor of any claims for loss or damage it may have against Subcontractor as a result of such delay.

11.2 *Liquidated Damages.*
Subcontractor shall be liable for any specific liquidated damages negotiated and agreed to by Contractor and Subcontractor in the Subcontract and that portion of any liquidated damages payable by Contractor under the Owner Contract attributable to Subcontractor's failure to discharge one or more of its obligations when and as required under the Subcontract. Subcontractor acknowledges that any liquidated damages payable by it are reasonable and appropriate in light of the probable increased costs and other anticipated damage to Contractor in the event of the performance failure by Subcontractor in connection with which such damages become payable. Subcontractor agrees to and does hereby waive any defense as to the validity or enforceability of any liquidated damages payable by it under the Subcontract on the grounds that such damages are void as penalties or are not reasonably related to actual damages, whether the damages were specifically established by Contractor and Subcontractor under the Subcontract or were established by Contractor and Owner under the Owner Contract. Subcontractor further agrees that Contractor shall be entitled to recover from Subcontractor any Damages Contractor incurs as a result of Subcontractor's failure to discharge a Subcontract obligation that exceeds any liquidated damages paid by Subcontractor in connection with that failure.

EXHIBIT "E"

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11.3 *Work Delay and Interference.*
Except as provided under Article 10.5the full and complete compensation to, and sole and exclusive remedy of, Subcontractor in the event of any delay, interference or other adverse impact to the Work shall be an extension of time for performance of the Work. Subcontractor acknowledges that in agreeing to the Subcontract Amount it has assessed the potential impact of the limitations in this Section 11.3 on its ability to recover additional compensation in connection with a Work delay or interference and agrees that these limitations will apply regardless of the accuracy of Subcontractor's assessment or actual costs incurred by Subcontractor.

11.4 *Force Majeure.*
Subcontractor shall not be liable for a delay in the performance of one or more of its obligations under the Subcontract due to events of force majeure, but only to the extent and upon the conditions that: (i) Subcontractor's written notice to Contractor of the event for which its seeks relief: (a) conspicuously indicates in the notice's subject heading, "CLAIM FOR FORCE MAJEURE RELIEF"; (b) meets the force majeure notice requirements under the Owner Contract; and (c) is provided to Contractor no later than two (2) business days prior to the date Contractor is required to submit such notice to Owner under the Owner Contract. If the Owner Contract does not contain a force majeure provision, Subcontractor shall provide its written notice to Contractor no later than three (3) days after the occurrence of the event with a description of the particulars of the event, the estimated duration of the event or the effect thereof and the probable impact on Subcontractor's performance. Subcontractor shall so far as possible avoid and/or remedy the effects of any event of force majeure on its performance with all reasonable dispatch, and shall use its best efforts to eliminate and mitigate the consequences thereof. Subcontractor's relief for a force majeure event shall be limited to the force majeure relief Contractor actually receives from the Owner under the Owner Contract in connection Subcontractor's Work.

Article 12 - TERMINATION

12.1 *Termination for Default.*
Subcontractor shall be in default under this Subcontract if Subcontractor: (a)(i) becomes insolvent or is unable to meet its debts as they mature; (ii) admits its inability to pay its debts generally; or (iii) institutes or has instituted against it under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, a proceeding which seeks the adjustment, protection or composition of Subcontractor or its debts or an order providing for the appointment of a receiver, trustee, or other similar official for Subcontractor or a substantial part of its property, or (b)(i) fails to supply enough properly skilled workmen or proper materials or equipment or to make sufficient progress, in each case so as to endanger the timely or proper performance of the Work; (ii) abandons the Work; (iii) repeatedly or persistently disregards Applicable Law or Contractor's instructions; or (iv) otherwise breaches any provision of the Subcontract. Subject to Subcontractor's right to notice and an opportunity to cure for certain defaults as provided below, Contractor may on written notice to Subcontractor at any time after it is in default: terminate Subcontractor's right to proceed with all or part of the remaining Work, take possession of the terminated Work and any and all of Subcontractor's materials, tools, appliances, equipment and other items at the Project site and finish the terminated Work by whatever method Contractor may deem expedient. Contractor shall deduct all Damages incurred by Contractor as a result of Subcontractor's default from the Subcontract balance. In the event the Subcontract balance is insufficient to cover the Damages, Subcontractor shall pay the difference to the Contractor within ten (10) days of Contractor's demand for payment of same. If the Subcontract balance exceeds the Damages, the difference shall be paid to Subcontractor, subject to Owner's acceptance of the Work as provided in Section 12.3. Any default termination by Contractor of Subcontractor for default that is subsequently determined to have been erroneous shall be deemed to have been termination for Contractor's convenience under Section 12.4 and the party's rights and obligations shall be adjusted accordingly. Prior to terminating Subcontractor's right to proceed with Work due to Subcontractor's default under clauses (b)(i), (ii), (iii) or (iv) of this Section 12.1, Contractor will provide Subcontractor written notice of the default. Contractor may terminate Subcontractor's right to proceed with Work if Subcontractor fails to fully and completely cure the default and provide reasonable evidence of such cure to Contractor within forty-eight (48) hours of receipt of Contractor's written notice.

12.2 *Execution of Remedy Under Subcontractor's Surety Performance Bond or Guarantee.*
In the event Subcontractor's performance under the Subcontract is secured by a surety performance bond or other guarantee of performance, Contractor may, in the event of a Subcontractor default, demand that Subcontractor's surety or guarantor complete performance of the Work In the event the surety or guarantor fails to perform and complete Subcontractor's Work and other obligations in accordance with the Subcontract and bond or guarantee (as applicable), Contractor may proceed to remedy Subcontractor's default in accordance with Section 12.1. To the extent Contractor's damages exceed the Subcontract balance at time the Subcontract is terminated, Contractor shall be entitled to pursue its remedies against Subcontractor's surety or guarantor for breach of its bond or guarantee obligations.

12.3 *Cessation of Payments Upon Termination.*
If the Contractor terminates Subcontractor's right to proceed with all or part of the remaining Work, Subcontractor shall not be entitled to further payment, if any, until Subcontractor's Work has been finally completed and accepted by Owner.

12.4 *Termination for Convenience.*
Contractor may upon written notice to Subcontractor, without cause and without prejudice to any other right or remedy, elect to terminate the remaining Work for Contractor's convenience. The termination shall be effective in the manner specified in Contractor's notice. Unless Contractor's notice directs otherwise, Subcontractor shall immediately discontinue performance of the Work and the placing of orders for equipment, materials, supplies and other items and demobilize from the Project. Subcontractor shall take the steps necessary to preserve and protect Work in progress and shall use its best efforts to mitigate its costs in connection with the termination. Contractor shall pay Subcontractor a termination payment as Subcontractor's sole and exclusive remedy in connection with Contractor's convenience termination. The termination payment shall be comprised of: (i) amounts invoiced and due for Work performed but not yet paid; (ii) payment for Work satisfactorily completed but not yet invoiced by Subcontractor prior to the termination; (iii) retainage held by Contractor at the date of termination; and, (iv) all reasonable, actual termination costs incurred by Subcontractor in terminating the Work (but excluding any and all costs and expenses incurred by Subcontractor from and after the date of termination for those of its employees who are not directly performing required termination activities); provided, that if the termination was effected by Contractor due to the elimination or termination of work by Owner under the Owner Contract or other Owner action, or, as a result of the order of a court or public authority, then Subcontractor's termination payment shall be limited to the amount paid by Owner to Contractor for the terminated Work under the Owner Contract, less Contractor's costs to obtain that amount from Owner. In no event shall

EXHIBIT "E"

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Subcontractor be entitled to recover any profit or overhead on terminated Work. Subcontractor's termination payment under this Section 12.4 will constitute its final payment for the Work and will be processed and become due to Subcontractor in accordance with Section 5.1.

Article 13 - DISPUTES

13.1 *Contractor to Make Initial Decision on Disputes.*
Except as otherwise provided in the Subcontract, Contractor shall initially decide all disputes arising out of the Subcontract. Contractor shall reduce its decision to writing and furnish a copy thereof to Subcontractor. Contractor's decision shall be final and conclusive unless Subcontractor advises Contractor in writing within forty-eight (48) hours of receiving the decision of the bases for its disagreement with the decision. Subcontractor agrees that if it does not contest the Contractor's decision within the time and in the manner required under this Section 13.1, Contractor's decision shall be final and conclusive and the Subcontractor shall be deemed to have waived any right to contest the decision. Contractor decisions properly contested by Subcontractor shall be resolved in accordance with Section 13.4.

13.2 *Continued Performance Required.*
Subcontractor acknowledges the importance of performing and completing the Work and its other obligations under the Subcontract in a timely manner. Subcontractor agrees that its rights in connection with any claim or dispute with Contractor in connection with the Subcontract shall be determined as provided in this Article 13 or elsewhere in the Subcontract, and that it shall not be entitled to suspend or otherwise delay its performance and completion of the Work or the performance of its other obligations under the Subcontract based on any alleged breach by Contractor or claim or dispute between the parties, regardless of whether such breach, claim or dispute is the subject of dispute resolution between Contractor and Subcontractor.

13.3 *Appeals Under the Contract Documents.*
If Subcontractor wishes to appeal a decision rendered under the Contract Documents by the Architect, Owner or another Owner representative that adversely affects Subcontractor's interests, Subcontractor may do so, provided Contractor's interests are unaffected, Subcontractor bears all costs associated with the appeal and assumes sole responsibility for its prosecution.

13.4 *Method of Dispute Resolution.*
Claims and disputes between Contractor and Subcontractor arising out of or in connection with the Subcontract or the Work shall be resolved by litigation unless Contractor, at its sole option, advises Subcontractor in writing prior to the institution of litigation with respect to a claim or dispute, or within thirty (30) days after either party has instituted litigation with respect to the claim or dispute that Contractor elects to have the claim or dispute resolved by arbitration. In such event, Subcontractor shall be bound by Contractor's election and any litigation filed shall be stayed by stipulation of the parties pending the conclusion of the arbitration proceedings. The arbitration proceedings shall be conducted pursuant to the Construction Industry Arbitration Rules issued by the American Arbitration Association then in effect. The parties shall afford each other informal discovery consistent with the discovery provisions of the Federal Rules of Civil Procedure, including the production of all documents related to the claim or dispute at issue and the deposition of witnesses having knowledge of facts pertaining to the claim or dispute at issue.

13.5 *Governing Law, Jurisdiction and Venue.*
This Subcontract shall be governed by and construed in accordance with the laws of the state in which Contractor's home office from which the Project being performed is located, excluding the conflicts of laws principles thereof; provided, however, that in the event the Contractor and Owner have elected to have the laws of another state govern the Owner Contract, then this Subcontract shall be governed by and construed in accordance with the laws of such state, excluding the conflicts of laws principles thereof. Subject to Section 13.6, for any action or proceeding involving claims and disputes between Contractor and Subcontractor arising out of or in connection with the Subcontract or the Work, Contractor and Subcontractor expressly and unconditionally: (a) agree that the presiding federal or state court in the district or state in which Contractor's home office from which the Project is being performed is located shall have exclusive jurisdiction over the action or proceeding; and (b) waive the right to a trial by jury in the action or proceeding. If Contractor elects to resolve a claim or dispute by arbitration, the arbitration shall be venued in the state and county court in which Contractor's home office from which the Project being performed is located.

13.6 *Joinder In Related Proceedings.*
In the event Contractor is involved in a separate arbitration, litigation, mediation or other legal proceeding in which any aspect of the Subcontractor's Work or entitlement to payment is at issue, or questions of law or fact common to the Subcontractor's performance under the Subcontract are involved; or, if complete relief cannot be afforded in such proceeding without the Subcontractor's participation therein, Subcontractor hereby consents, upon written demand by Contractor, to its consolidation or joinder in that proceeding to the applicability of any rules or procedures applicable to such proceeding; and hereby waives any objections to the location or forum in which the proceeding is pending. In the event Subcontractor has initiated litigation against Contractor at the time Contractor's demand for consolidation or joinder is received, and that proceeding cannot be consolidated with the proceeding in which the Contractor is involved, Subcontractor agrees to dismiss or, in the event dismissal would prejudice Subcontractor's rights, stay the litigation.

Article 14 - REGULATORY COMPLIANCE

14.1 *Compliance with Applicable Law Generally.*
Subcontractor, its Sub-subcontractors, and all Work provided under the Subcontract shall strictly comply with Applicable Law. Subcontractor shall, to the fullest extent permitted by law, indemnify, defend, and hold harmless the Indemnified Parties against and from any and all Damages resulting from or arising out of or in connection with any actual or alleged violation of Applicable Law by Subcontractor or its Sub-subcontractors concerning the Work. Subcontractor's compliance with Applicable Law shall include but not be limited to the specific compliance required under this Article 14.

EXHIBIT "E"

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14.2 *Safety Compliance.*
Subcontractor shall support and participate in the creation and maintenance of an injury free environment and shall be responsible for safety precautions and training programs and shall take all actions necessary to provide for the safety of persons and property on or off the project site in connection with the performance of the Work. Subcontractor shall comply with all Subcontract requirements relating to safety, including as set forth in Exhibit J and the Owner Contract, and all requirements under Applicable Law relating to safety, including the Williams-Steiger Occupational Safety and Health Act of 1970. Subcontractor shall immediately report in writing to Contractor any injury to any Subcontractor or Sub-subcontractor employee, or any property damage at the Project site in connection with Subcontractor's or one of its Sub-subcontractor's activities.

14.3 *Environmental Compliance.*
Subcontractor shall comply with Contractor's environmental requirements as set forth in Exhibit J and Applicable Law relating to the protection or preservation of the environment from hazardous material or waste, toxic substance, pollution or contamination or the discharge or release of, or exposure to, materials (including energy, odors, noise, soil, dust, etc.) into the environment. Subcontractor shall not under any circumstance apply to or enter into negotiations with any governmental authority or agency for acceptance of variations from or revisions to air, water or noise pollution or similar environmental laws or regulations relating to the Subcontract or the performance thereof, without Contractor's prior written approval.

14.4 *Tax Compliance.*
Subcontractor agrees to pay all taxes, fees and contributions on or measured by the income, gross receipts or assets of Subcontractor or any of its Sub-subcontractors and all taxes, fees and contributions on or measured by employees or other labor costs of Subcontractor or any of its Sub-subcontractors, including without limitation all payroll or employment compensation tax, social security tax or similar taxes for Subcontractor's or any of its Sub-subcontractor's employees. Subcontractor further agrees to pay all sales and use taxes, and all import, export and other customs duties, charges, levies and fees imposed or incurred in connection with the shipping and delivery of any equipment, materials, supplies or other items required for the Work to the Project site. In the event that Contractor should pay or be required to pay any of the foregoing items or any portion thereof, Contractor may deduct the amount from the Subcontract balance or invoice Subcontractor therefor. Subcontractor shall pay any such Contractor invoice in full within five (5) days of receipt.

14.5 *Affirmative Action and Non-Discrimination.*
Subcontractor shall comply with Contractor's affirmative action programs and any affirmative action obligations imposed upon Contractor under the Owner Contract. Subcontractor shall comply with all equal opportunity employment requirements, and shall not, under any circumstances, discriminate against any person because of race, creed, color, age, sex, national origin, marital status, sexual orientation, status with regard to public assistance, or the presence of a physical, sensory or mental disability.

14.6 *Harassment and Offensive Behavior.*
Contractor is committed to maintaining a work environment that is free of harassment and offensive behavior, and such behavior is strictly prohibited by Contractor. Harassment and offensive behavior prohibited by this policy includes but is not limited to requests to engage in illegal, immoral, or unethical conduct, or negative comments or actions based on any person's race, creed, color, age, sex, national origin, marital status, sexual orientation, status with regard to public assistance, or the presence of a physical, sensory or mental disability. Neither Subcontractor nor any of its Sub-subcontractor's shall engage in any harassment or offensive behavior in connection with the Subcontract or the Project. Subcontractor shall immediately address any claim of harassment or offensive behavior involving it or its Sub-subcontractors, properly discipline any person determined to have engaged in such conduct, including dismissal or removal from the Project where appropriate, and use its best efforts to ensure that such conduct does not reoccur.

14.7 *Skanska Code of Conduct.*
Subcontractor agrees that it shall operate and its employees shall conduct themselves in a manner consistent with the principles contained in the Skanska Code of Conduct attached as Exhibit F, as relevant to the Work.

Article 15 - BONDING AND SUBCONTRACT PERFORMANCE INSURANCE

15.1 *Payment and Performance Bonds.*
If bonds are required by the Subcontract, Subcontractor shall furnish separate performance and payment bonds to secure its obligations under the Subcontract, each with a penal amount equal to one hundred percent (100%) of the Subcontract Amount. The bonds shall be written on the forms attached as Exhibit O. Subcontractor shall pay the premium for the bonds and the cost thereof is included in the Subcontract Amount. Unless more stringent requirements are imposed by the Owner Contract, all bonds issued by Subcontractor shall be issued by a surety acceptable to Contractor that is listed in the most current Federal Register listing of approved surety companies (Federal Register, Vol. 55, Department of Treasury Circular 570) with an A.M. Best Rating of "A-" or better, and is authorized to issue the bonds in the state where the Project is located.

15.2 *Subcontract Performance Insurance.*
In lieu of requiring Subcontractor to provide payment and performance bonds, Contractor, at its sole option, may secure Subcontractor's obligations under the Subcontract by obtaining subcontract performance insurance (also known as "Subguard"), to insure Contractor against a Subcontractor default. Subguard shall be for the exclusive benefit of Contractor and the existence of Subguard insurance coverage shall not in any way limit or restrict any of Contractor's rights or remedies in the event of a Subcontractor default, nor shall it in any manner inure to the benefit of, or provide any rights or remedies to, Subcontractor or any of its Sub-subcontractors or any of their respective employees or agents.

15.3 *Pre-Qualification for Subguard Required.*
If Contractor elects to secure Subcontractor's obligations under the Subcontract through Subguard, Subcontractor shall comply with Contractor's Subguard qualification procedures, including providing documentation and information required by the Subguard insurer involving financial, technical, management and other matters relating to Subcontractor and its operations.

EXHIBIT "E"

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15.4 *Failure to Meet Subguard Requirements.*
If Subcontractor fails to qualify for Subguard coverage, Contractor may elect to require Subcontractor to furnish performance and payment bonds to secure Subcontractor's obligations under the Subcontract, and Subcontractor shall provide those bonds in the manner and time specified by Contractor and otherwise in accordance with Section 15.1.

15.5 *Work Not to Commence Until Bonds Issued or Subguard Enrollment Completed.*
If bonds or Subguard coverage are required for Subcontractor, Subcontractor shall not commence performance of the Work before it has furnished the required performance and payment bonds or qualified for and been enrolled in the Subguard program, as applicable. If Subcontractor commences performance of the Work in violation of this Section 15.5, Subcontractor shall be deemed to have done so at its own risk and shall not be entitled to payment until the bonds are furnished to Contractor or Subcontractor is qualified for and enrolled in the Subguard program, it being understood and agreed that Subcontractor's compliance with the applicable bond or Subguard requirements is a condition precedent to Contractor's obligation to pay Subcontractor for Work performed.

Article 16 - ENCUMBRANCES

16.1 *No Liens or Encumbrances.*
Subcontractor warrants and guarantees free and clear title to the Work and all equipment, materials, supplies and others items supplied by Subcontractor for incorporation into the Work shall pass to Contractor and Owner, and that the Work, the Project site and the Project and any and all interests and estates therein and any and all improvements and materials placed on the Project site by Subcontractor or its Sub-subcontractors shall be free and clear of, all liens, claims, security interests and other encumbrances made by, through or under Subcontractor or any of its Sub-subcontractors. In the event of any non conformity with the requirements of this Section 16.1, Subcontractor shall promptly: (i) defend Contractor's and Owner's title to the Work, the Project site and Project and such interests, estates, improvements and materials, as the case may be; and (ii) remove and discharge any such lien, claim, security interest or other encumbrance by paying the claimant, by posting a bond or other instrument as required by Applicable Law, or by providing Contractor collateral that is satisfactory in form and substance to it Contractor and Owner to fully indemnify and hold harmless Contractor and Owner from and against any Damages resulting from such encumbrances. Contractor may withhold from any amount due or to become due to Subcontractor an amount sufficient to remove and discharge such encumbrance until Subcontractor has removed and discharged such encumbrance as required by Section 16.1. If Subcontractor has not removed and discharged a lien, claim, security interest or other encumbrance covered by this Section 16.1 within ten (10) days after it has been made or filed, Contractor may cause the encumbrance to be removed and discharged with the moneys withheld, or by posting a bond, whereupon for purposes of this Subcontract such moneys or bonding costs (along with other costs incurred by Contractor in connection with the encumbrance), shall be deemed to have been paid to Subcontractor hereunder.

16.2 *Subcontractor and Sub-subcontractor Information.*
In addition to the requirements of Section 4.5, Subcontractor shall, as often as requested by Contractor, furnish a statement identifying each party that has furnished or is furnishing any services, labor, equipment, materials supplies or other items to Subcontractor in connection with the Project, along with other pertinent information including such party's address, the value of and the party's contract, the amount paid to date and the amount due or to become due thereunder. Contractor may also request Subcontractor from time to time to obtain similar information from one or more of its Sub-subcontractors and Subcontractor shall do so and provide it to Contractor within five (5) days of Contractor's written request. Contractor may alternatively request such information directly from one or more Sub-subcontractor and Subcontractor expressly consents to Contractor contacting its Sub-subcontractors for this purpose. Subcontractor shall furnish Contractor within five (5) days of Contractor's written request evidence that Subcontractor has paid all amounts incurred by the Subcontractor for services, labor, equipment, materials supplies and other items used or furnished by Subcontractor in connection with the Project, or other liability incurred by Subcontractor for the purpose of performing the Work.

16.3 *Assignment and Delegation Not Permitted Without Prior Written Consent.*
Subcontractor acknowledges and agrees that none of its rights or obligations under the Subcontract may be assigned or delegated without the prior written consent of the Contractor. Any assignment or delegation by Subcontractor of a right or obligation hereunder without Contractor's prior written consent shall be null and void and of no force or effect. Contractor shall have the right on written notice to Subcontractor to assign this Subcontract in whole or in part to the Owner or its designee (including Owner's lender) if Owner terminates Contractor's performance under the Owner Contract for any reason or other circumstances exist under the Owner Contract requiring such assignment. Subcontractor will cooperate with Contractor as required to effect any such assignment.

Article 17 - WARRANTIES AND GUARANTEES

17.1 *Work Warranties and Guarantees and Correction of Defects or Deficiencies.*
Subcontractor warrants and guarantees that all Work (i) shall be free of defects in design, workmanship and material, (ii) shall be performed in accordance with the generally accepted industry codes and standards applicable to the Work, (iii) shall be performed in a good and workmanlike manner; and (iv) shall strictly conform to the requirements of the Subcontract (including any warranties required of the Contractor under the Owner Contract to the extent applicable to the Work). Upon receipt of written notice of a defect or deficiency in the Work, Subcontractor shall at Contractor's sole option and at no cost to Contractor, promptly repair, replace, or re-perform such defective or deficient Work so that it conforms to the requirements of the Subcontract. Subcontractor's obligation to repair, replace, or re-perform defective or deficient Work under this Section 17.1 shall extend: (i) for the warranty or guarantee period(s) specifically established in the Subcontract; or, (ii) if no such warranty or guarantee period(s) has been established, for the warranty period established for Contractor's work under the Owner Contract. If Contractor deems it inexpedient for Subcontractor to repair, replace, or re-perform defective or deficient Work, Contractor may make a deduction from the Subcontract Amount in lieu of such repair, replacement and re-performance, as determined by Contractor. Subcontractor shall provide information and execute documents as requested or required by Contractor to assign any Subcontractor warranty or guarantee to Owner or another party.

EXHIBIT "E"

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17.2 *No Period of Limitation Established*
Nothing contained in Section 17.1, and no warranty or guarantee period(s) specifically established in the Subcontract shall be construed to establish a period of limitation on any of Subcontractor's obligations under the Subcontract, other than Subcontractor's obligation to repair, replace, or re-perform defective or deficient Work during the period in question as provided in Section 17.1.

17.3 *Sub-subcontractor Warranties and Guarantees.*
Subcontractor shall require warranties and guarantees from its Sub-subcontractors similar to those provided by Subcontractor under this Section 17.1. Subcontractor's Sub-subcontractor's warranties and guarantees shall be expressly stated to be for the benefit of and be enforceable by Contractor and Owner and assignable to Contractor and Owner on Contractor's demand therefor.

17.4 *Backcharges.*
If Contractor notifies Subcontractor in writing at any time during the performance of the Work to correct defective or deficient Work, and Subcontractor states, or by its actions, indicates that it is unable or unwilling to proceed with corrective action in a reasonable time, Contractor may upon written notice to Subcontractor accomplish the required corrective action by the most expeditious means available and backcharge Subcontractor for the costs incurred.

17.5 *Costs and Damages Resulting From Defects or Deficiencies in the Work.*
Subcontractor shall be liable for all Damages incurred by Contractor and its other contractors as a result of defects or deficiencies in the Work. This liability is in addition to Subcontractor's repair, replacement and re-performance obligations under Section 17.1.

Article 18 - INDEMNITY AND INSURANCE

18.1 *Indemnity.*
In addition to any other defense, indemnity or hold harmless obligation imposed on Subcontractor by the Subcontract or Applicable Law, Subcontractor shall, to the fullest extent permitted by law, indemnify, defend and hold harmless the Indemnified Parties from and against any Damages involving the following:

(a) Any actual or alleged infringements of any patent, trademark, copyright or other intellectual property or proprietary right by Subcontractor, its Sub-subcontractor or the Work furnished by Subcontractor;
(b) Injury or death to any person, or damage to or destruction of any property (including loss of use thereof), or any other damage or loss by whomsoever suffered resulting from or arising out of or in connection with the Work, whether or not any such damage or loss is due to the negligence of any kind or character or other fault of any one or more of the Indemnified Parties or breach of any statutory duty, contractual obligation or other obligation by one or more of the Indemnified Parties.
(c) Any failure of the Subcontractor or the Work to comply with the requirements of the Subcontract;
(d) Any lien, claim, security interest or other encumbrance made or filed against: (i) the Work, Project site and the Project; any and all interests and estates therein and any and all improvements and materials placed on the Project site by Subcontractor or its Sub-subcontractors; or, (ii) any payment, performance, lien prevention, or lien discharge bond posted by any of the Indemnified Parties; and,
(e) Any hazardous material or waste, toxic substance, pollution or contamination brought to or generated on the Project site by Subcontractor or its Sub-subcontractor, or used, handled, transported, stored, removed, remediated, disturbed or disposed of by Subcontractor or its Sub-subcontractor.

The foregoing obligations of Subcontractor shall not be affected or limited in any way by any insurance required of or provided to Subcontractor under the Subcontract. If a temporary restraining order or preliminary injunction is granted in any proceeding involving a claim, demand or cause of action covered by clause (a) above, Subcontractor shall make every reasonable effort at its expense to secure the suspension of the restraining order or injunction by giving a satisfactory bond or otherwise. If any portion of the Work is held in such proceeding to constitute an infringement and the use thereof is permanently enjoined, Subcontractor shall at its expense promptly secure a license authorizing Contractor's and Owner's continued use of such Work or, if Subcontractor is unable to secure such license, replace the affected Work or modify it so that it is non-infringing. Subcontractor shall not be required to defend, indemnify and hold harmless any Indemnified Party for Damages resulting, or to result from that Indemnified Party's sole negligence or intentional misconduct.

18.2 *Insurance.*
Subcontractor shall strictly comply with all of Contractor's standard insurance requirements set forth in Exhibit G to the Subcontract.

18.3 *Environmental Insurance.*
If Subcontractor's Work involves the remediation, removal or disposal of any hazardous material or waste, toxic substance, pollution or contamination, Subcontractor shall also strictly comply with all of the environmental insurance requirements set forth in Exhibit Q to the Subcontract.

Article 19 - MISCELLANEOUS REQUIREMENTS AND SPECIAL PROVISIONS

19.1 *Headings for Convenience Only.*
The Article and Section headings in these terms and conditions have been inserted for convenience or reference only and shall not in any manner affect the construction, meaning or effect of anything contained herein nor govern the rights and liabilities of the parties.

19.2 *Calculation of Time Periods.*
Unless specifically stated otherwise, all references in the Subcontract to days, or requirements that action be taken or notice be provided within a certain number of days, are to calendar days.

19.3 *Audit and Record Retention.*
Subcontractor's records related to the Project and the Subcontract shall be subject to audit and shall be made available to Contractor for that purpose upon five (5) days prior written notice. To the extent the foregoing audit provisions are different than, or inconsistent with, any audit provisions found in the Owner

EXHIBIT "E"

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Contract, the more stringent requirement shall control. Unless the Contract Documents or Applicable Law requires a longer period, Subcontractor shall maintain its entire Project and Subcontract related records, financial and otherwise, for a period of three (3) years after the Contractor achieves final completion of its work at the Project.

19.4 *Confidentiality.*
Subcontractor acknowledges and agrees that it will execute any confidentiality or nondisclosure agreements required by the Owner Contract, which will be attached as Exhibit W. Subcontractor further acknowledges and agrees that Contractor may disclose certain information to Subcontractor for purposes of the Work that Contractor and/or Owner considers to be confidential or proprietary or to constitute trade or business secrets (collectively "Confidential Information"). In the absence of more stringent requirements contained in the Owner Contract, when Contractor and/or Owner discloses any information designated as Confidential Information to Subcontractor, Subcontractor agrees that:

19.4.1 the Confidential Information shall be used solely for the purpose of performance under the Subcontract and disclosed only to those of Subcontractor's employees who have a need to know the information for that purpose;

19.4.2 it shall not disclose Confidential Information to any third party without Contractor's prior written consent;

19.4.3 it will take precautions to prevent the disclosure of the Confidential Information that are no less stringent than those employed to preserve the secrecy of its own confidential business information or trade secrets, and in no event less than reasonable precautions; and,

19.4.4 upon completion of the Work it will return all documents containing Confidential Information to the Contractor and/or Owner without retaining any copies thereof.

Unless a longer period is established by the Contract Documents, the provisions of this Section 19.4 shall remain in force for a period of five (5) years after Contractor's final completion of its work at the Project. Subcontractor agrees that in the event of its breach or threatened breach of its obligations under this Section 19.4, Contractor shall be entitled to equitable relief in order to restrain any continued or threatened breach.

19.5 *Contractor's Remedies Are Not Exclusive.*
The remedies provided to Contractor in the Subcontract are cumulative and not exclusive and additional to any other remedies available to Contractor under Applicable Law.

19.6 *Damages Limitation.*
In no event shall any of the Indemnified Parties be liable to Subcontractor or any of its Sub-subcontractors, whether based on delay, contract, tort, negligence, warranty, indemnity, strict liability, error or omission or otherwise, for any consequential, special, incidental, indirect, exemplary, multiple or punitive damages or damages arising from or in connection with loss of use or loss of revenue or profit, actual or anticipated or otherwise, and Subcontractor hereby releases each of the Indemnified Parties from any such liability. Subcontractor shall obtain similar releases from each of its Sub-subcontractors.

19.7 *Title to the Work.*
Title to the Work, or portions thereof, shall pass to Contractor upon the occurrence of the earliest of the following events, as applicable: a) when such Work or portion is delivered to the Contractor or the Project Site pursuant to the Subcontract; b) when Subcontractor has been paid any sum to which it may become entitled in respect to such Work or portion; c) when such Work or portion is identifiable to the Subcontract; or d) when the Certificate of Final Completion for all Work is issued by Contractor on behalf of the Owner and/or Architect. All equipment, materials, supplies and other items to which Contractor has title shall not be removed from the Project site without Contractor's prior written consent.

19.8 *Reformation of Unenforceable Provisions.*
Subcontractor acknowledges that Contractor conducts business on a nationwide basis and that it is Contractor's intent that the requirements of the Subcontract comply with and are fully enforceable under the laws of all jurisdictions where it conducts business. The parties agree that if any provision of the Subcontract is determined by a court to be unenforceable in whole or in part under Applicable Law, that determination shall not affect the validity and enforceability of the remainder of the Subcontract and that only the provision (or part thereof) in question shall be deemed unenforceable. Accordingly, in the event that any one or more of the provisions of the Subcontract shall be found to be contrary to public policy and unenforceable, the remaining provisions of this Subcontract shall remain in full force and effect, and such term or provision shall be deemed stricken to the extent and in the jurisdictions necessary for compliance with Applicable Law.

19.9 *Survival.*
The applicable provisions of Articles 12, 13, 14, 15, 16, 17, 18 and 19 and any other provision of the Subcontract that either: (1) provides for limitation of or protection against liabilities between Contractor and Subcontractor; or (2) expressly or by implication comes into or continues in force and effect after Subcontractor's completion of the Work, shall survive termination of the Subcontract and Subcontractor's completion of the Work.

19.10 *Notices.*
All notices required or permitted pursuant to this Subcontract shall be in writing and sent to the parties at the addresses set forth on the Subcontract Agreement. Notice shall be deemed delivered only upon receipt. Notice may be sent via facsimile, so long as the party sending the facsimile uses a machine that produces a printed confirmation of delivery, and retains the printed confirmation evidencing that the transmission was successfully completed as proof of delivery.

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19.11 *Subcontract Document.*
The Subcontract shall be construed without regard to any presumption or other rule requiring construction or interpretation against the party who caused it to have been drafted. The Subcontract may be executed in counterparts, each of which will be considered an original.

19.12 *Additional Documents to Subcontract.*
The Subcontract represents the entire integrated agreement between the parties with respect to the Project and supersedes all prior negotiations, proposals, correspondence, representations or agreements, whether written or oral, express or implied. This Subcontract may only be amended or modified in a Change Order or other writing signed by both Contractor and Subcontractor. The failure of Contractor to enforce at any time or for any period of time any one or more of the provisions of the Subcontract shall not be construed as a waiver of any such provision or provisions.

19.13 *Frivolous Claims.*
In the event the Subcontractor asserts any frivolous claim against Contractor (or submits a Subcontractor adjustment request that has no substantial merit or that is based in whole or in part upon materially inaccurate assertions), Contractor shall be entitled to collect from Subcontractor by offset or otherwise any and all costs and expenses (including but not limited to reasonable attorney's fees) incurred by Contractor in investigating, responding to, defending against and resolving such claim or request.

EXHIBIT "F"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

Skanska Code of Conduct

General Principles
It is our key responsibility to develop and maintain an economically sound and prosperous business. Skanska as a business with a long history and future assumes its responsibilities.

These include our responsibilities toward the countries, communities and environments in which we operate, toward our employees and business partners and toward society in general. Therefore we have defined some key underpinnings for our performance:

- We comply with legal requirements that apply in the countries where we do business.
- We respect the United Nations Universal Declaration of Human Rights and recognize our responsibility to observe those rights that apply to our performance toward our employees and the communities we work and live in.
- We are committed to do our business with a high standard of integrity and ethics.
- We are open-minded in dialogue with those who are affected by our operations. We respond to inquiries from external parties and communicate with affected parties in a timely and effective manner. Within the sphere of our influence we will endeavor to ensure that our suppliers and subcontractors abide by the principles in our Code of Conduct.

Employee Relations
A strong and consistent relationship to all employees, built on mutual respect and dignity, is of vital concern to Skanska. Employment conditions offered to the employees will meet the minimum requirements of national legislation and relevant ILO conventions.

- We do not use forced labor, slave labor or other forms of involuntary labor at our work sites. We do not allow any practice that would restrict free movement of employees.
- We do not employ any person below the age of 15 and where local standards are higher, no person under the legal minimum age will be employed.
- We provide equal opportunities to people without regard to race, color, gender, nationality, religion, ethnic affiliation or other distinguishing characteristics. We do not allow discrimination or harassment.
- We provide a safe and healthy working environment and are committed to continual improvement. Written health and safety instructions are available and implemented on all work sites.
- We recognize employees' rights to form or join trade unions in accordance with each country's laws and principles.

Business Ethics
Corruption, bribery and unfair anti-competitive actions distort markets and hamper economic, social and democratic development. Skanska is committed to avoiding such practices.

- We shall not act contrary to applicable competition laws. We shall not offer or give any undue payment or other consideration to any person or entity for the purpose of inducing such person or entity to act contrary to prescribed duties, in order to obtain or retain business for Skanska.
- We shall not solicit or accept any undue payment or other consideration that is given for the purpose of inducing us to act contrary to our prescribed duties.

EXHIBIT "F"

Attachment to **Subcontract/Purchase Order No. 318015-011** dated **6/2/2008**, by and between **M.A.P. Mechanical Contractors, Inc.** and **Skanska USA Building Inc.** for **Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.**

Environment

Caring about the environment permeates all of our work. Compliance with relevant legal and other environmental requirements, especially from our clients, provides the foundation for our environmental ambition. We are committed to preventing and continually minimizing adverse environmental impact and to conserving resources.

- We think ahead to determine how our work will affect the environment and base our decisions on available relevant facts.
- We avoid materials and methods with environmental risks when there are suitable alternatives available. We strive to recommend that clients use environmentally better alternatives whenever the circumstances permit.
- We do not engage in activities that have unacceptable environmental and social risks. We aim to identify such risks as early as possible to facilitate timely and adequate actions and decisions.

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

SKANSKA STANDARD INSURANCE REQUIREMENTS

SECTION I: DEFINITIONS

As used in this Exhibit G:

(a) "Project" means the project that is the subject of the Subcontract/Purchase Order.

(b) "Scope" means the scope of Work to be provided by Subcontractor under the Subcontract or the Goods and Services to be supplied and performed by Seller under the Purchase Order, as applicable.

(c) "State" means a state of the United States or the District of Columbia or the Commonwealth of Puerto Rico, as applicable.

Capitalized terms used in this Exhibit G and not defined in the Subcontract/Purchase Order shall have the meanings generally ascribed to such terms in the commercial insurance industry in the United States.

SECTION II: STANDARD INSURANCE COVERAGES

Subcontractor/Seller shall comply with the following:

1. Standard Insurance Coverages: Unless higher limits or additional coverages are required by the Subcontract/Purchase Order or Owner Contract, Subcontractor/Seller shall secure and maintain from the earlier of commencement of work or the effective date of the Subcontract/Purchase Order the minimum insurance coverages and limits required by this Exhibit G. Failure of the Contractor/Buyer to identify deficiencies in any insurance provided by Subcontractor/Seller shall not relieve Subcontractor/Seller from any insurance obligations. Required coverages are as follows:

   1.1 Workers Compensation and Employer's Liability

   Worker's Compensation Insurance and Employer's Liability Insurance (including occupational disease) to cover statutory benefits and limits under the Worker's Compensation laws of any applicable jurisdiction in which the Scope is to be performed, and Employers' Liability Insurance with minimum limits of five hundred thousand dollars ($500,000) each accident; five hundred thousand dollars ($500,000) for disease, each employee and five hundred thousand dollars ($500,000) disease, policy limit.

   Policy coverage terms and conditions to include:

   - USL&H – 'if any' basis, where applicable.
   - Jones Act – 'if any' basis, where applicable.
   - All states endorsement, where applicable.
   - Employers Liability/Stop Gap Liability if work is performed in the State of Washington, West Virginia, Wyoming, Ohio, North Dakota, or the Commonwealth of Puerto Rico
   - For the attainment of Workers Compensation in monopolistic states and Puerto Rico, coverage must be secured through the state fund of that state
   - Certificate must clearly identify that coverage applies in the State in which the Project is located.

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1.2 Commercial General Liability Insurance

Commercial General Liability Insurance ("CGL") written on ISO form CG 20 10 Edition date 10/01 or prior ISO edition occurrence form or equivalent for hazards of: (a) Construction Operation, (b) Subcontractors and Independent Contractors, (c) Products and Completed Operations applicable to the additional insured (with Completed Operations coverage to remain in force from the date of final completion of the Scope until the expiration of the statute of repose of the State in which the Project is located). The insurance shall include: (1) Contractual Liability coverage sufficient to meet the requirements of the Subcontract/Purchase Order (including defense costs and attorney's fees assumed under contract, which shall be payable in addition to the limit of liability); (2) Personal Injury Liability (with the standard contractual and employee exclusions deleted); and (3) Notice and Knowledge of Occurrence.

If marked as required, Subcontractor's/Seller's CGL insurance is required to provide the following coverages:

	Required Yes	No
• Mold	☐	☒
• EIFS	☐	☒
• Subsidence	☐	☒
• Operations (performed within) 50' of railroad	☐	☒
• Residential operations	☐	☒
• Pollution Coverage	☐	☒

If the Subcontractor's/Seller's CGL insurance excludes any of the required coverages, a separate policy acceptable to Contractor/Buyer must be obtained.

The insurance shall have the following minimum limits of liability, which shall be available to the Project:

EACH OCCURRENCE	$ 1,000,000
PRODUCTS-COMP/OP AGG.	$ 2,000,000
PERSONAL & ADV INJURY	$ 1,000,000
GENERAL AGGREGATE	$ 2,000,000

The general aggregate coverage limits shall be per project general aggregate and shall be evidenced on Subcontractor's/Seller's Certificate of Insurance.

1.3 Commercial Auto Liability Insurance

Commercial Automobile Liability insurance covering all owned, leased and non-owned vehicles used in connection with the Scope with limits of $1,000,000 combined single limit per accident for bodily injury and property damage. The policy must include coverage for bodily injury, death and property damage arising out of ownership, maintenance or use of any motorized vehicle on or off the site of the Project, and Contractual Liability coverage. If hauling of hazardous waste is part of the Scope, Automobile Liability Insurance with a $1,000,000 combined single limit per occurrence for bodily injury and property damage applicable to all hazardous waste hauling vehicles, and include MCS 90 endorsement and the ISO Form CA 9948 (Pollution Liability Broadened Coverage for Business Automobile).

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1.4 Commercial Umbrella Liability Insurance

Commercial Umbrella Liability Insurance for bodily injury and property damage liability over Subcontractor/Seller's primary Employer's Liability, Commercial General Liability, and Commercial Automobile Liability with limits available to the Project in the amount of $5,000,000 each occurrence and aggregate. All coverages and terms required under the Commercial General Liability, Automobile Liability and Employers Liability (sections 1.1, 1.2, and 1.3 above) must be included on the Umbrella Liability policy. Higher limits may be required by Contractor/Buyer or Owner on a project by project basis.

1.5 Leased Employee Liability

If Subcontractor/Seller leases one or more employees through the use of a payroll, employee management or other company, Subcontractor/Seller must directly procure workers compensation insurance. The insurance shall be written on a "Minimum Premium" or "If Any" policy form and will be in addition to the workers compensation coverage provided to and for the leased employees by the payroll, employee management or other company.

1.6 Property Insurance

Property Insurance coverage for tools and equipment owned, leased or used by the Subcontractor/Seller in the performance of the Scope. The Property Insurance shall extend to equipment, materials and supplies stored off the Project site or in transit to the Project site to be furnished as part of the Scope and incorporated into the Project.

1.7 Professional Liability Insurance

Required	
Yes	No
☐	☒

If marked as required, the Scope involves professional services and Professional Liability Insurance is required covering liability for claims that arise from the negligent errors, omissions or acts of the Subcontractor/Seller and its Sub-subcontractors/Sub-suppliers in the provision of professional services. The policy shall include Contractual Liability coverage and be effective (retroactively, if applicable) from the date of commencement of professional activities in connection with the Scope until five (5) years following completion of the Scope. Minimum limits are: (1) Prime Design Professional: $5,000,000 per occurrence/aggregate; (2) Sub-Design Professional: $2,000,000 per occurrence/aggregate. A copy of the policy shall be provided to the Contractor/Buyer.

Coverages shall include:

- Indemnification Endorsement: Skanska USA Building Inc., Skanska USA, Inc., and Owner, and any other parties as required by Owner Contract as indemnified parties
- Contractual Liability covering hold harmless agreement contained in contract must be included without exceptions
- Delays in project completion and cost guarantees are covered
- Insurance is primary and non-contributory
- Insuring agreement to read: "to pay on behalf of in lieu of to indemnify"
- Separation of insureds
- Retroactive date: Will apply back to the first date of professional Services
- No exclusions for construction means, methods, techniques, sequences and procedures
- General Aggregate must apply per project

For the purposes of Professional Liability Insurance, the term "Prime Design Professional" means the architect/engineer providing architectural, engineering and/or other professional services under a contract directly

EXHIBIT "G"

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with Contractor/Buyer, and the term "Sub-Design Professional" means any architect/engineer providing architectural, engineering and/or other professional services directly or indirectly to a Prime Design Professional in connection with the Project. A Prime Design Professional is also a Subcontractor/Supplier and a Sub-Design Professional is also a Sub-subcontractor/Sub-supplier.

1.8 Riggers Liability Required

Required	
Yes	No
☐	☒

If marked as required, the Scope involves the rigging, hoisting, lowering, raising or moving of property or equipment and Riggers Liability Insurance is required to insure against physical loss or damage to the property or equipment.

1.9 Aircraft/Watercraft

Required	
Yes	No
☐	☒

If marked as required, the Scope involves the use of any owned, leased, chartered or hired aircraft or watercraft of any type and Aircraft Liability Insurance or Watercraft Liability Insurance, as applicable, is required in an amount of not less than $10,000,000 per occurrence, including Passenger Liability for bodily injury and property damage.

2. Insurer Requirements: Each insurer providing insurance coverage as required in this Exhibit G shall be a licensed admitted insurer authorized to issue such coverages in each State in which any part of the Scope is performed. The insurer shall be acceptable to Contractor/Buyer and shall have an AM Best rating of "A-" or better.

3. Certificate of Insurance: Prior to commencing its performance under the Subcontract/Purchase Order, Subcontractor/Seller shall provide Contractor/Buyer a certificate of insurance evidencing the coverages required by this Exhibit G (a sample Certificate of Insurance is attached for reference purposes) for each Certificate Holder. Except as otherwise specified, the insurance required hereunder shall be maintained from the commencement of the performance of the Scope until the end of the applicable warranty period and Subcontractor/Seller shall maintain a current Certificate of Insurance with Contractor/Buyer for this period.

4. Sub-subcontractor/Sub-supplier: Before permitting any Sub-subcontractor/Sub-supplier to perform Scope under the Subcontract/Purchase Order, the Subcontractor/Seller shall require that the Sub-subcontractor/Sub-supplier maintains insurance in like form and amounts to that required herein. Subcontractor/Seller shall be responsible to ensure that Sub-subcontractor/Sub-supplier maintains insurance in like form and amounts and shall provide evidence of same to Contractor/Buyer if requested.

5. Notice of Cancellation: All insurance coverages required by this Exhibit G shall contain a provision that the coverage afforded hereunder cannot be cancelled, non-renewed, allowed to lapse, or have any restricted modifications added unless at least thirty (30) days prior written notice has been given to the Contractor/Buyer by certified mail, return receipt requested.

6. Additional Insureds: Unless otherwise required by the Subcontract/Purchase Order, all insurance required by this Exhibit G (excluding only Workers Compensation Insurance and Professional Liability Insurance) shall name Contractor/Buyer and Owner each as an additional insured (Owner, Skanska USA Building Inc., Skanska USA, Inc., and their respective directors, officers, employees and affiliates) and any other parties as required by the Owner Contract, and shall be primary and non-contributory to any insurance maintained by Contractor/Buyer and Owner and any other parties as required by Owner Contract, all of which shall be stated on the Certificate of Insurance provided by the Subcontractor. The Additional Insured Endorsement (on Form CG 2010 11/85, or CG 20 10 10/01 plus CG 20 37 10/01; or equivalent),

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

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shall include ongoing and completed operations, shall not contain any restrictions and shall be attached to the Certificate of Insurance.

7. Deductibles/Denial of Claims: Subcontractor/Seller shall be responsible, at no additional cost to Contractor/Buyer, for the payment of any deductibles or self-insured retention in connection with the insurance coverages required by this Exhibit G both for itself and all additional insureds. Any self-insured retention or deductible in excess of $25,000 must be declared at the time Subcontractor/Seller submits its bid and must be specifically approved by Contractor/Buyer prior to execution of the Subcontract/Purchase Order. Subcontractor/Seller shall be responsible for any loss arising out of coverage denial by its insurance carrier.

8. Dilution of Limits: For those policies containing an aggregate, as soon as incurred loss activity (paid plus reserve) depletes the aggregate by 50% or more, written notice must be sent to the Contractor/Buyer by certified mail return receipt requested.

9. OCIP/CCIP Program: Subcontractor/Seller may be required by Contractor/Buyer to enroll in an Owner Controlled Insurance Program ("OCIP") or Contractor Controlled Insurance Program ("CCIP"). Subcontractor/Seller shall strictly comply with all requirements of the program in which it is required to enroll and the Subcontract Amount/Purchase Order Amount shall be reduced by a deduct change order by the amount included therein by Subcontractor/Seller for insurance coverage replaced by the OCIP or CCIP.

10. Waiver of Subrogation: All insurance coverages maintained by Subcontractor/Seller shall include a waiver of any right of subrogation of the insurers thereunder against Owner, Contractor/Buyer and Owner's and Contractor's/Buyer's other contractors and all of their respective assigns, subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any person insured under any such policy (Workers Compensation – where permitted). Subcontractor/Seller further waives all claims and all rights of subrogation against Owner, Contractor/Buyer and Owner's and Contractor's/Buyer's other contractors and all of their respective assigns, subsidiaries, affiliates, employees, insurers and underwriters for loss of, or damage to, Subcontractor's/Seller's Scope, tools, machinery, equipment, material, supplies, or any other losses within the scope of any insurance maintained by Subcontractor/Seller.

11. No Limitation: The insurance coverages maintained by Subcontractor/Seller shall not limit any of Subcontractor's/Seller's indemnity obligations or other liabilities under the Subcontract/Purchase Order. Insurance coverages maintained by Subcontractor/Seller that exceed the minimum requirements in this Exhibit G shall be applicable to the Subcontract/Purchase Order.

12. Severability of Interests (Cross Liability): All insurance required by this Exhibit G (excluding only Workers Compensation Insurance and Professional Liability Insurance) shall be endorsed to provide that, inasmuch as the policy is written to cover more than one insured, all terms, conditions, insuring agreements and endorsements, with the exception of limits of liability, shall operate in the same manner as if there were a separate policy covering each insured. No cross liability exclusion will be accepted.

13. Insurance Policy Review/Exclusions/Copies: Contractor/Buyer has the right to receive copies of all insurance policies upon request. Policies shall not contain any exclusions that are not acceptable to Contractor/Buyer and Owner. If requested by Contractor/Buyer or Owner, all policies must be certified by the insurance carrier as being true and complete.

14. Claims Made Policies: Except for Professional Liability Insurance, claims made policies are not acceptable.

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

15. Effect of Specified Coverages: In specifying minimum requirements herein, neither Contactor nor Owner assert or recommend this insurance as adequate to Subcontractor's/Seller's requirements. Subcontractor/Seller is solely responsible to inform itself of types of insurance it may need beyond these minimum requirements to protect itself from loss, damage or liability.

16. Breach of Insurance Requirements: Subcontractor's/Seller's failure to obtain and maintain insurance coverages as required by this Exhibit G shall constitute a material breach of the Subcontract/Purchase Order. In such event Contractor/Buyer may at its option: (i) terminate the Subcontractor/Seller for default; or (ii) purchase such coverage and backcharge the premium and associated costs to Subcontractor/Seller.

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

Certificate of Insurance

Issue Date (MM/DD/YY)

PRODUCER

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED

Subcontractor's/Seller's Name

INSURER	A	
INSURER	B	
INSURER	C	
INSURER	D	
INSURER	E	

COVERAGES

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	Limits
	GENERAL LIABILITY	POLICY NUMBER			
X	COMMERCIAL GENERAL LIABILITY	PER PROJECT AGGREGATE ENDORSEMENT OR RAILROAD EXCLUSION ELIMINATED			
	CLAIMS MADE X OCCUR				EACH OCCURRENCE $ 1,000,000
	OWNER'S & CONTRACTOR'S PROT.	(1981 & PRIOR OR EQUIVALENT)			PRODUCTS-COMP/OP AGG $ 2,000,000
X	BRO FORM COVG				PERSONAL & ADV INJURY $ 1,000,000
X	CONTRACTUAL LIAB.				GENERAL AGGREGATE $ 2,000,000
	GEN'L AGGREGATE LIMIT APPLIES PER:				FIRE DAMAGE (Any one fire) $ 300,000
	POLICY X PROJECT LOC				MED. EXPENSE (Any one person) $ 5,000
	AUTOMOBILE LIABILITY	POLICY NUMBER			COMBINED SINGLE LIMIT $ 1,000,000
X	ANY AUTO				BODILY INJURY (Per person) $
	ALL OWNED AUTOS				BODILY INJURY (Per accident) $
	SCHEDULED AUTOS				
X	HIRED AUTOS				PROPERTY DAMAGE $
X	NON-OWNED AUTOS				
	GARAGE				
	EXCESS LIABILITY	POLICY NUMBER			
X	UMBRELLA FORM	PER PROJECT ENDORSEMENT INCLUDED			EACH OCCURRENCE 5,000,000
	OTHER THAN UMBRELLA FORM				AGGREGATE $ 5,000,000
	WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY	POLICY NUMBER			X STATUTORY LIMITS
		COVERAGE APPLIES IN STATE OF FOREIGN OPERATION UNDER THIS SUBCONTRACT			EACH ACCIDENT $ *500,000
					DISEASE-POLICY LIMIT $ *500,000
	THE PROPRIETOR, PARTNERS, EXECUTIVE OFFICERS ARE: X INCL. / EXCL.	USL&H COVERAGE IS INCLUDED WHERE REQUIRED			DISEASE-EACH EMPLOYEE $ *500,000
	OTHER				*EXCEPT WHERE UNLIMITED

The coverages provided shall be pursuant to insurance requirements contained in the Subcontract.
SEE ATTACHED DESCRIPTIONS.

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS

All operations performed under MidMichigan Medical Center – Midland: Energy Center Project, 4005 Orchard Drive, Midland, MI 48670. Skanska USA Building Inc. Project Number 318015. The following are included as Additional Insureds (Endorsement ISO Form B, CG2010 11/85 or CG 20 10 10/01 plus CG 20 37 10/01 or equivalent) for all coverages except Workers' Compensation: Owner, Skanska USA Building Inc. Skanska USA, Inc., and their respective directors, officers, employees and affiliates; MidMichigan Health, HDR, Inc. Endorsement Attached. This endorsement must also reflect that the coverage provided is Primary and Non-Contributory. Waiver of Subrogation applies to all policies for all additional insureds. Umbrella policy applies excess of General Liability, Automobile Liability, and Employers Liability.

CERTIFICATE HOLDER	CANCELLATION
Skanska USA Building Inc. 5250 Lover's Lane, Suite 200 Portage, MI 49002	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED ** BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT. AUTHORIZED REPRESENTATIVE

**NON-RENEWED OR MATERIALLY CHANGED

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

Certificate of Insurance

Issue Date (MM/DD/YY)

PRODUCER

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED	INSURER A	
Subcontractor's/Seller's Name	INSURER B	
	INSURER C	
	INSURER D	
	INSURER E	

COVERAGES

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)		Limits
	GENERAL LIABILITY	POLICY NUMBER				
	X COMMERCIAL GENERAL LIABILITY	PER PROJECT AGGREGATE ENDORSEMENT			EACH OCCURRENCE	$ 1,000,000
	CLAIMS MADE X OCCUR.	98' RAILROAD EXCLUSION ELIMINATED			PRODUCTS-COMP/OP AGG.	$ 2,000,000
	OWNER'S & CONTRACTOR'S PROT.				PERSONAL & ADV INJURY	$ 1,000,000
	X ISO FORM CG0001	(1993 & PRIOR OR EQUIVALENT)			GENERAL AGGREGATE	$ 2,000,000
	X CONTRACTUAL LIAB.				FIRE DAMAGE (Any one fire)	$ 300,000
	GEN'L. AGGREGATE LIMIT APPLIES PER:				MED. EXPENSE (Any one person)	$ 5,000
	POL-ICY X PROJ-ECT LOC					
	AUTOMOBILE LIABILITY	POLICY NUMBER			COMBINED SINGLE LIMIT	$ 1,000,000
	X ANY AUTO				BODILY INJURY (Per person)	$
	ALL OWNED AUTOS					
	SCHEDULED AUTOS				BODILY INJURY (Per accident)	$
	X HIRED AUTOS					
	X NON-OWNED AUTOS				PROPERTY DAMAGE	$
	GARAGE					
	EXCESS LIABILITY	POLICY NUMBER				
	X UMBRELLA FORM	PER PROJECT ENDORSEMENT INCLUDED			EACH OCCURRENCE	5,000,000
	OTHER THAN UMBRELLA FORM				AGGREGATE	$ 5,000,000
	WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY	POLICY NUMBER			X STATUTORY LIMITS	
	X INCL.	LOCATION APPLIES IN STATE OF JOBSITE OPERATION UNDER THIS SUBCONTRACT			EACH ACCIDENT	$ *500,000
	THE PROPRIETOR, PARTNERS, EXECUTIVE OFFICERS ARE: EXCL.	USL&H COVERAGE IS INCLUDED WHERE REQUIRED			DISEASE-POLICY LIMIT	$ *500,000
	OTHER				DISEASE-EACH EMPLOYEE	$ *500,000

*EXCEPT WHERE UNLIMITED

The coverages provided shall be pursuant to insurance requirements contained in the Subcontract.
SEE ATTACHED DESCRIPTIONS.

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS

All operations performed under MidMichigan Medical Center – Midland: Energy Center Project, 4005 Orchard Drive, Midland, MI 48670. Skanska USA Building Inc. Project Number 318015. The following are included as Additional Insureds (Endorsement ISO Form B, CG2010 11/85 or CG 20 10 10/01 plus CG 20 37 10/01 or equivalent) for all coverages except Workers' Compensation: Owner, Skanska USA Building Inc, and their respective directors, officers, employees and affiliates; MidMichigan Health, HDR, Inc. Endorsement Attached. This endorsement must also reflect that the coverage provided is Primary and Non-Contributory. Waiver of Subrogation applies to all policies for all additional insureds. Umbrella policy applies excess of General Liability, Automobile Liability, and Employers Liability.

CERTIFICATE HOLDER	CANCELLATION
MidMichigan Medical Center - Midland 4005 Orchard Drive Midland, MI 48670	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED ** BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT. AUTHORIZED REPRESENTATIVE

**NON-RENEWED OR MATERIALLY CHANGED

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY
CG 2010 11/85

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - - OWNERS, LESSEES OR CONTRACTORS (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

SAMPLE

CG 2010 11/85 Copyright, Insurance Services Office, Inc., 1984

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

ISO | Commercial General Liability Forms | 10/01/01

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY
CG 2010 10/01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. Section II - Who Is An Insured is amended to include as an additional insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

(2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 2010 10/01

EXHIBIT "G"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY
CG 2037 10/01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED -OWNERS, LESSEES OR CONTRACTORS - COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:
Location And Description of Completed Operations:
Additional Premium:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement).

Section II - Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" at the location designated and described in the schedule of this endorsement performed for that insured and included in the "products-completed operations hazard".

CG 2037 10/01

EXHIBIT "H"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

SKANSKA STANDARD INTERIM ESTIMATE FOR PAYMENT, WAIVER and RELEASE

TO: SKANSKA USA BUILDING INC. ("Skanska")

FROM: _____ ("Subcontractor/Seller") Vendor #: _____

Address: _____ Project No.: _____

Project Name: _____ Requisition #: _____

Project Site Address: _____

Subcontract or Purchase Order No.: _____ Cost Code #: _____

Period From: _____ To: _____

STATEMENT OF SUBCONTRACT AMOUNT/PURCHASE ORDER AMOUNT:

1.	ORIGINAL CONTRACT SUM	$ _____
2.	Net change by Change Order	$ _____
3.	CONTRACT SUM TO DATE (Line 1 ± 2)	$ _____
4.	TOTAL COMPLETED & STORED TO DATE	$ _____
5.	RETAINAGE	$ _____
6.	TOTAL EARNED LESS RETAINAGE (Line 4 less Line 5 Total)	$ _____
7.	LESS PREVIOUS CERTIFICATES for PAYMENT (line 6 from prior estimate for payment)	$ _____
8.	CURRENT PAYMENT DUE	$ _____
9.	BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)	$ _____
10.	GROSS THIS PERIOD	$ _____
11.	RETAINAGE THIS PERIOD	$ _____

SKANSKA PROJECT MANAGEMENT APPROVAL _____ DATE: _____

CERTIFICATION OF SUBCONTRACTOR/SELLER: I the undersigned, on behalf of the Subcontractor/Seller, hereby certify that:
(1) the "Total Completed & Stored to Date" as shown above represents the actual amount due to Subcontractor/Seller under the terms of the Subcontract/Purchase Order for all Work performed or Goods and Services supplied and performed, as applicable (including all authorized changes thereto), up through and including the period covered by this Estimate for Payment;
(2) Subcontractor/Seller has paid all amounts due to its Sub-subcontractors/Subsuppliers (as applicable and as defined in the Subcontract/Purchase Order respectively) for the period covered by previous payment received from Skanska; and
(3) Subcontractor/Seller has complied with all Federal, State, and Local tax laws, including income, sales and use tax laws, Social Security laws, Unemployment Compensation laws, and Workers' Compensation laws insofar as applicable to Subcontractor's/Seller's performance under the Subcontract/Purchase Order.
WAIVER OF SUBCONTRACTOR/SELLER: Conditioned only upon payment of the amount of this request, or such amount as is approved and paid by Skanska and/or Owner, and in order to induce such payment, I the undersigned, on behalf of the Subcontractor/Seller, do hereby, to the extent of such payment and all previous payments:
(a) waive and release any and all lien(s), claim of lien(s) and rights to file stop payment notices, preliminary notices of right to file lien and other similar notice documents under the statutes of the State in which the Property is located relating to mechanic's, materialmen's or other similar liens on the Property and all improvements thereon or any other aspect of the Project;
(b) waive and release any and all rights Subcontractor/Seller may now have against any labor, material, payment, performance or lien discharge bond pertaining to the Project; and
(c) waive and release any and all claims for additional compensation of any kind, including delay, disruption, interference, or acceleration occurring prior to the date of this Estimate for Payment, excepting those prior claims which are pending as of the date hereof, subject to the notice requirements of the Subcontract/Purchase Order.

ACKNOWLEDGED BY AND AGREED TO by the Undersigned's authorized representative as of the _____ day of _____, 20_____.
Signed, sworn to and subscribed before the undersigned witness and notary public:

_____
SUBCONTRACTOR/SELLER

_____
Name and Title

_____
Name and Title Printed

_____
Signature of Notary Public

_____
Notary Public/Notary Seal
My Commission Expires: _____

Skanska Standard Interim Estimate for Payment, Waiver and Release
(06/2006 ed., Rev. 1)

EXHIBIT "I"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

SKANSKA STANDARD FINAL ESTIMATE FOR PAYMENT, UNCONDITIONAL WAIVER and RELEASE

TO: SKANSKA USA BUILDING INC. ("Skanska")

FROM: _____ ("Subcontractor/Seller") Vendor #: _____

Address: _____ Project No.: _____

Project Name: _____ Requisition #: _____

Project Site Address: _____

Subcontract or Purchase Order No.: _____ Cost Code #: _____

Period From: _____ To: _____

STATEMENT OF SUBCONTRACT AMOUNT/PURCHASE ORDER AMOUNT:

1.	ORIGINAL CONTRACT SUM	$ _____
2.	Net change by Change Order	$ _____
3.	CONTRACT SUM TO DATE (Line 1 ± 2)	$ _____
4.	TOTAL COMPLETED & STORED TO DATE	$ _____
5.	RETAINAGE	$ _____
6.	TOTAL EARNED LESS RETAINAGE (Line 4 less Line 5 Total)	$ _____
7.	LESS PREVIOUS CERTIFICATES for PAYMENT (line 6 from prior estimate for payment)	$ _____
8.	CURRENT PAYMENT DUE	$ _____
9.	BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)	$ _____
10.	GROSS THIS PERIOD	$ _____
11.	RETAINAGE THIS PERIOD	$ _____

SKANSKA PROJECT MANAGEMENT APPROVAL _____ DATE: _____

CERTIFICATION OF SUBCONTRACTOR/SELLER: I the undersigned, on behalf of the Subcontractor/Seller, hereby certify that:
(1) the "Total Completed & Stored to Date" as shown above represents the actual amount due to Subcontractor/Seller under the terms of the Subcontract/Purchase Order for all Work performed or Goods and Services supplied and performed, as applicable (including all authorized changes thereto), through the Waiver Date in accordance with all requirements of the Subcontract/Purchase Order, as applicable;
(2) Subcontractor/Seller has paid all amounts due to its Sub-subcontractors/Subsuppliers (as applicable and as defined in the Subcontract/Purchase Order respectively) or will pay and satisfy all amounts due in full from and promptly following receipt of the above-referenced funds; and there are no outstanding claims of any kind or character by any such Sub-Subcontractors/Sub-Suppliers arising out of, or related to, the Undersigned's activities on, or improvements to, the Property; and
(3) Subcontractor/Seller has fully complied with all Federal, State, and Local tax laws, including income, sales and use tax laws, Social Security laws, Unemployment Compensation laws, and Workers' Compensation laws insofar as applicable to Subcontractor's/Seller's performance under the Subcontract/Purchase Order.

UNCONDITIONAL WAIVER and RELEASE OF SUBCONTRACTOR/SELLER: for and in consideration of and only upon receipt of final payment under the Subcontract/Purchase Order in the amount stated, the Undersigned, for itself, its employees and its Sub-Subcontractors/Subsuppliers, as applicable, hereby:
(a) waives and releases any and all lien(s), claim of lien(s) and rights to file stop payment notices, preliminary notices of right to file lien(s) and other similar notice documents under the statutes of the State in which the Property is located relating to mechanic's, materialmen's or other similar liens on the Property and all improvements thereon or any other aspect of the Project; and shall execute and file a lien discharge or appropriate discharge notice in the applicable registry or property records office for any previously filed property liens, and proof thereof to Skanska and the Owner, as a condition precedent to final payment hereunder;
(b) waives and releases any and all rights it has against any labor, material, payment, performance or lien discharge bond pertaining to the Project, including but not limited to statutory bond, retainage and/or Miller Act rights; and

EXHIBIT "I"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

(c) waives and releases any and all claims, causes of action, suits, damages, judgments and demands of any kind, character and description, whether known, unknown, asserted or unasserted against Skanska, Skanska's bonding company, the Owner and their respective directors, officers, principals, general and limited partners, employees, agents, subsidiaries, parents and related corporations, successors and assigns, arising out of or in connection with the Subcontract/Purchase Order or the performance of the Work or the supply of the Goods and the performance of the Services (as applicable and as defined in the Subcontract/Purchase Order);
(d) the Undersigned warrants and represents that it has not sold, assigned, or otherwise transferred or conveyed to any third party any claims, causes of action, suits, damages, judgments and demands arising out of or in connection with the Subcontract/Purchase Order or the performance of the Work or the supply of Goods and the performance of Services (as applicable and as defined in the Subcontract/Purchase Order);
(e) the individual executing this instrument on behalf of the Undersigned warrants and represents that he/she has personal knowledge of the matters stated herein, that such facts are true and correct and that he/she has full authority to execute this Unconditional Waiver and Release on behalf of the Undersigned;
(f) the Undersigned acknowledges that this Unconditional Waiver and Release is an independent covenant and shall operate and be effective with respect to all labor or services provided and materials furnished by, through, or on behalf of the Undersigned in connection with the Project, whether for Work or Goods or Services under the original scope of the Subcontract/Purchase Order or any supplemental contracts or agreements (oral or written) for extra or additional work, or labor, services, equipment, materials, supplies or other items furnished at any time by the Undersigned or its Sub-subcontractors/Subsuppliers.

NOTICE: THIS DOCUMENT WAIVES AND RELEASES RIGHTS UNCONDITIONALLY. BY SIGNING THIS DOCUMENT THE UNDERSIGNED AGREES THAT THE FINAL PAYMENT TO BE MADE TO IT BY SKANSKA AS PROVIDED ABOVE IS ADEQUATE CONSIDERATION FOR WAIVING AND RELEASING SUCH RIGHTS AND THAT SUCH WAIVER AND RELEASE SHALL BE EFFECTIVE UPON THE UNDERSIGNED'S RECEIPT OF SUCH FINAL PAYMENT.

ACKNOWLEDGED BY AND AGREED TO by the Undersigned's authorized representative as of the ____ day of ____, 20__

SUBCONTRACTOR/SELLER

Name and Title

Name and Title Printed

Signed, sworn to and subscribed before the undersigned witness and notary public:

Signature of Notary Public

Notary Public/Notary Seal
My Commission Expires: _____

EXHIBIT "J"

Attachment to Subcontract/Purchase Order No. 318015-011 dated 6/2/2008, by and between M.A.P. Mechanical Contractors, Inc. and Skanska USA Building Inc. for Mechanical at MidMichigan Medical Energy Center, 4005 Orchard Drive, Midland, MI 48670.

Note: If this Exhibit J is annexed to a Purchase Order, the term "Subcontract" means the Purchase Order, the term "Subcontractor" means Seller, the term "Sub-Subcontractors" means Subsuppliers and the term "Work" means the Goods and Services, each as defined in the Purchase Order terms and conditions.

SKANSKA STANDARD SUBCONTRACTOR ENVIRONMENTAL HEALTH and SAFETY REQUIREMENTS

Skanska USA Building Inc. (Skanska) is dedicated to providing a safe and injury free environment. Skanska expects Subcontractor management, supervision and workers to hold environmental health and safety as a top priority. Skanska's health and safety requirements are contained in this Exhibit J and in Skanska's Safety & Health Management Program (SHMP) for the project, which is hereby incorporated into the Subcontract. Subcontractor understands its responsibility to maintain a safe and healthy working environment and Subcontractor and its Sub-Subcontractors shall abide by the requirements contained in the SHMP. In addition, Subcontractor and its Sub-Subcontractors shall, at no additional cost to Skanska, comply with the following requirements:

Regulatory Compliance:
Subcontractor agrees that the prevention of accidents to workmen engaged upon or in the vicinity of the project is its responsibility. Subcontractor agrees to comply with all Federal, State, County and Municipal laws, ordinances, rules, regulations, codes, standards, orders and requirements concerning safety and health that are applicable to the Work, including, among others, the Federal Occupational Safety and Health Act of 1970 (OSHA), as amended, and all standards, rules, regulations and orders which have been and shall be adopted or issued thereunder, and with safety and health and environmental standards established by Skanska and the Owner. The most stringent of the aforementioned laws, ordinances, rules, regulations, codes, standards, orders and requirements shall prevail.

Subcontractor Commitment Agreement:
Subcontractor shall submit to Skanska a completed Subcontractor Commitment Agreement prior to mobilization. This agreement is to be signed by an executive of Subcontractor who has the authority to commit Subcontractor to comply with all provisions of the SHMP.

Subcontractor Safety Representative:
Prior to mobilization, Subcontractor shall designate in writing to Skanska a competent person that shall serve as the Subcontractor's project safety representative. This individual will be responsible and have the authority to ensure the Subcontractor's implementation, compliance with and enforcement of the SHMP. Qualifications for the Subcontractor's project safety representative are provided in the SHMP. Skanska reserves the right to require Subcontractor to replace its project safety representative if Skanska in its discretion determines the individual is not qualified, is ineffective or is not fulfilling all applicable safety and health responsibilities. If Subcontractor will have 50 or more workers on the project site at any time, including Sub-Subcontractors, Subcontractor will provide a full time, on site safety professional prior to mobilization. Subcontractor will submit to Skanska, in writing, the proposed safety professionals qualifications and experience. Skanska reserves the right in its discretion to reject Subcontractor's proposed safety professional.

Subcontractor Monthly Incident Summary Report:
Each month Subcontractor shall submit a completed Subcontractor Monthly Incident Summary Report to Skanska. This report will be attached to Subcontractor's monthly payment request. Monthly payment requests that are submitted without a completed Monthly Incident Summary Report will be returned to Subcontractor. The reporting form is provided in the SHMP.

SKANSKA

May 3, 2012
Skanska Job Number: 318015 Energy Center

Re: Executive Summary, Failed Steam System

Below is a written summary of the steam supply system issue we are currently working on in Midland MI, part of the Energy Center Project (318015).

Steam System Overview. The high pressure, 115 psi steam system is comprised of two - 750 hp and one - 600 hp gas fired boilers located in the Energy Center. The underground steam pipe system is a fiberglass jacketed steam pipe with 1500' of direct bury 10" steam supply pipe and direct bury 6" condensate pipe, going from the EC to the new Harlow Addition. The direct buried steam pipe system is oriented North to South, with the high side at the North end in the EC. The steam pipe system has two steam vaults located 260' from the EC (north vault) and 760' from the EC (south vault). The vaults allow the steam pipe to rise in elevation, creating a low side and high side of pipe in the vault, and house the pipe expansion joints. The steam pipes have a Link Seal water stop ring when entering and leaving the vaults. The north vault contains one expansion joint on the high side of the steam supply pipe and one expansion joint on the high side of the condensate pipe. The south vault contains two expansion joints on the steam supply pipe and two expansion joints on the condensate pipe, at each side of the vault. The expansion joints are designed to allow the expansion piston to travel approximately 12".

Steam Issue Summary. On December 16th 2011 we discovered a compromised 10" steam expansion joint located in the south vault of the steam system. At the time, the cause of the compromised expansion joint was thought to be the result of a water hammer caused by the Owners staff. The Energy Center steam system was transferred to a temporary steam boiler system and the Energy Center steam line was shut down. On February 28, 2012, in the South vault, we found that a high side 10" steam supply and low side 6" condensate expansion joint were installed backwards and that a low side 10" steam supply expansion was compressed 3"-4" prior to installation. In the north vault we found the high side 10" steam supply expansion joint was installed backwards. The improper installation was confirmed by the expansion joint manufacture representative EJ Ohler, with Wilson Brinker Associates and by the steam pipe system manufacture representative John Szydlowski, with Perma-Pipe. The installing contractor was M.A.P Mechanical Contractors, Inc. 2000 Austin Street, Midland Michigan, 48642. Allen Popp (989-496-3456) Owner. Mr. Popp was notified of the issue on March 1st, 2012 and shortly after came to the site for review of the improper installation and has since replaced the improperly installed expansion joints.

Repair Work Summary. On March 17, 2012 the replacement expansion joints were ordered and have been installed by MAP Mechanical Contractors. On April 18, 2012 we started the process of excavating and exposing the north side of each vault to determine the condition of the jacketed steam and condensate piping. At both locations the jacket of the steam supply pipe and condensate pipe were found to be damaged. On May 1, 2012 we excavated an inspection hole approximately halfway between the North and South vault and found the jacket of the steam supply and condensate pipe to be damaged at that location as well. On May 3, 2012 a test hole was dug at the anchor approximately 315' south of the South vault, the steam pipe was found to be in good condition and the condition of the condensate has yet to be determined. More test holes will be excavated to determine the extent of the damage.

Damaged Steam Underground Steam Summary. On March 28th Skanska contracted City Sewer to camera the steam service pipe from the south vault to the north vault and from the south vault to furthest point south. The camera investigation found no apparent damage to the steam service pipe. On April 5th the outer jacket of the steam was found to be damaged while attempting to repair the link seal assembly on the inside wall of the vault. The melted fiberglass jacket prompted Skanska to contact Perma-Pipe for a expert review of the pipe assembly and to provide an opinion as the extent of the damage. Perma-Pipe recommended that Skanska excavate and expose steam pipe the north exterior wall of each vault in order to inspect the pipe jacket. The steam and condensate pipe jacket was found to be damaged at both vault locations. Perma-Pipe then recommended that further investigation was required to completely ascertain the extent of the damage pipe jacket

Estimated Cost Summary. The cost to install the temporary boiler system, repair the steam system expansion joints replace 70' of the jacketed steam pipe and 40' of condensate, and remove the temporary boiler system has a order of magnitude estimate of $490,000. The replace of the direct buried steam pipe system has a preliminary order of magnitude estimate of $650,000.

Remediation Work Summary. The remediation work start on May 7th with the commencement of the steam pipe system redesign. Vault ventilation will also be reviewed for Improvements. The lead time of the pipe is 5 weeks after design approval. The installation of the pipe and repair work to the disturbed areas will take approximately 20 weeks.

June 6, 2012

ZURICH

ALAN POPP
M A P MECHANICAL CONTRACTORS INC
2000 AUSTIN STREET
MIDLAND MI 48642

JOANNE COLLICK
AMERISURE INSURANCE (CGL POLICY NO. CPP203729605)
PO BOX 33478
DETROIT MI 48232-5478

Our Claim No.:	9260113193
Our Named Insured:	Skanska USA Building
Claimant(s):	MidMichigan Medical Center (Midland) - Energy Center
Loss Location:	MidMichigan Medical Center, 4005 Orchard Drive, Midland, MI
Your Additional Insured:	Skanska USA Building
Your Named Insured:	M.A.P. Mechanical Contractors Inc. (claim no. 1260126)

Zurich North America
Claims
P.O. Box 66965
Chicago, IL
60666-0965

Fax (866) 257-1205
http://www.zurichna.com

This letter will serve to follow up previous communications relating to this matter. We are the Commercial General Liability ("CGL") carrier for Skanska USA Building. As you are aware, Skanska USA Building has been notified by MidMichigan Medical Center (Midland) - Energy Center of a claim relating to alleged damages/claims at the above-referenced loss. The intent of this letter is to further notify you of the alleged claims/damages that are a result of the work that M.A.P. Mechanical Contractors Inc. performed at this loss location. Please provide us with confirmation that M.A.P. Mechanical Contractors Inc. will agree to defend and indemnify Skanska USA Building for this matter.

In the Subcontract Agreement (dated June 2, 2008) under Exhibit "E" Article 18, M.A.P. Mechanical Contractors Inc. agreed to defend and indemnify Skanska USA Building from and against any damages arising from the Agreement. Further, M.A.P. Mechanical Contractors Inc. agreed under Exhibit "G" to name Skanska USA Building as an additional insured (including "Products and Completed Operations") on the policies. Our investigation has revealed that most, if not all, of the alleged damages/claims being made relate to your work. Skanska USA Building hereby demands that M.A.P. Mechanical Contractors Inc. defend, indemnify, and hold Skanska USA Building harmless pursuant to the indemnity provisions in the subcontract and as an additional insured on any available insurance policies issued to M.A.P. Mechanical Contractors Inc. by its insurance carrier(s). At this time it is imperative that you take immediate action to get involved in this claim as we will be looking to your company for a significant contribution. We suggest that you, if you have not already done so, immediately submit this loss to any and all insurance carriers and/or insurance agencies that need to be involved. As an insured under your insurance policy, Skanska USA Building is entitled to defense and indemnity for any claims arising from your work at this loss location. We request that you and/or your potentially applicable CGL carrier(s) and/or agent(s) contact us as soon as possible.

The Additional Insured endorsements and/or the Certificates of Insurance ("COI") provided to Skanska USA Building do confirm that they were added as an additional insured to your above policy. The COIs state that Skanska USA Building Inc. is an Additional Insured relating to this

Project. The COIs also advise that this coverage is "on a primary and non-contributory basis." Please note that the Claimant is also listed on the COIs as an Additional Insured. The COIs list Amerisure Insurance (policy no. CPP203729605) as the respective insurer. As such, this letter has been sent directly to Amerisure Insurance as well. Skanska USA Building Inc. hereby demands that Amerisure Insurance immediately agree to provide coverage, defend, and indemnify Skanska USA Building. At this time it is imperative that Amerisure Insurance immediately acknowledge receipt of this demand and take immediate action to get involved in this claim as Skanska USA Building is looking for Amerisure Insurance to satisfy its obligations to Skanska USA Building Inc. as an insured under your respective policies.

This letter is also being sent to Amerisure Insurance (policy number CU203723002) as the excess/umbrella carrier listed on the Certificates of Insurance, and demand is being made to your company as well for additional insured coverage for the benefit of Skanska USA Building Inc. relating to this matter.

Further, the Certificates of Insurance list Saginaw Bay Underwriters as the agent/producer, and thus this letter is being copied to Saginaw Bay Underwriters as well with a request that you immediately put any/all other potentially applicable CGL carrier(s) for M.A.P. Mechanical Contractors Inc. on notice of this matter as soon as possible for their handling.

The Claimant in this matter has notified Skanska USA Building Inc. of alleged defects/damages. Your earliest involvement in this matter would be appreciated by all parties involved. Please submit to us a copy of all potentially applicable policies that should apply and written confirmation of your acceptance of this tender. The intent of this letter is to again put you on notice that this situation exists. We have every intention of pursuing this matter against your company. Should you fail to properly investigate this matter and Skanska USA Building Inc. is forced to perform the repairs and/or resolve the claims, Skanska USA Building Inc. will seek reimbursement of monies paid to defend and/or correct the damages as a result of your work.

We look forward to hearing from you and thank you in advance for your anticipated cooperation as we work to resolve this short of any legal action against your company.

Sincerely,

Tony Gabriel
Construction Defect Claims Specialist
Zurich American Insurance Company
952-461-5065

cc: Russ Johnson
Skanska USA Building
1633 Littleton Road
Parsippany NJ 07054

cc: Kathy Brewi
AON Construction Services Group
390 North Broadway
Jericho NY 11753

cc: Cengiz Muncuoglu
Skanska USA Building
4030 Boy Scout Blvd
Tampa FL 33607

cc: Saginaw Bay Underwriters
Commercial Lines
PO Box 1928
Saginaw MI 48605

9A Couch on Ins. § 129:17

Couch on Insurance Third Edition | December 2019 Update
Steven Plitt, Daniel Maldonado, Joshua D. Rogers, and Jordan R. Plitt

Part VI. RISKS AND ACTIVITIES COVERED BY INSURANCE POLICY

Subpart B. RISKS COVERED UNDER LIABILITY AND RELATED INSURANCE

Subpart 3. OTHER LIABILITY AND RELATED INSURANCE COVERAGES

Chapter 129. Risks and Losses Specific to Commercial General Liability Policies

III. Exclusions Common to Commercial General Liability Policies

B. Business Risk Exclusions

§ 129:17. Generally

References

Coverage under a commercial general liability insurance policy is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or work is not that for which the damaged person bargained.[1] Pursuant to this understanding, certain exclusions have been included within the standard commercial general liability policy for the express purpose of excluding coverage for risks relating to the repair or replacement of the insured's faulty work or products or defects in the insured's work or product itself.[2] These "business risk" exclusions, as they are commonly called, are intended to provide coverage for tort liability, not for the contractual liability of the insured for loss which takes place due to the fact that the product or completed work was not that for which the other party had bargained.[3]

CUMULATIVE SUPPLEMENT

Cases:

Under North Carolina law, "authorized representative" exclusion of insured retailer's business insurance policy did not apply to preclude coverage of losses resulting from embezzlement by owners of payroll services provider with which retailer had a contract; exclusion stated that it did not apply to losses otherwise covered under the employee theft insuring clause of the policy, and such clause applied to cover the embezzlement loss. Colony Tire Corporation v. Federal Insurance Company, 2016 WL 6683590 (E.D. N.C. 2016).

Under North Carolina law, "independent contractor" exclusion of insured retailer's business insurance policy did not apply to preclude coverage of losses resulting from embezzlement by owners of payroll services provider with which retailer had a contract; exclusion stated that it did not apply to losses caused by a contractual independent contractor, and owners of the payroll services provider were contractual independent contractors. Colony Tire Corporation v. Federal Insurance Company, 2016 WL 6683590 (E.D. N.C. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Bonded Concrete, Inc. v. Transcontinental Ins. Co., 12 A.D.3d 761, 762, 784 N.Y.S.2d 212, 213 (3d Dep't 2004); Jim Barna Log Systems Midwest, Inc. v. General Cas. Ins. Co. of Wisconsin, 791 N.E.2d 816, 823–24 (Ind. Ct. App. 2003); Newark Ins. Co. v. Acupac Packaging, Inc., 328 N.J. Super. 385, 391, 746 A.2d 47, 50–51 (App. Div. 2000); Wisconsin Label Corp. v. Northbrook Property & Cas. Ins. Co., 2000 WI 26, 233 Wis. 2d 314, 607 N.W.2d 276, 283 (2000).

In Colorado, the risk that an owner might reject performance as inadequate is a business risk allocated by the parties in a contract, and is insured by a performance bond, not general liability insurance intended to provide coverage for injuries or damage resulting from accidents. United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 633 F.3d 951 (10th Cir. 2011).

Claims based on negligent performance of commercial or professional services are ordinarily insured under "errors and omissions" or malpractice policies; for this reason, commercial general liability (CGL) policies typically exclude claims arising out of professional or other business services. Tri-Etch, Inc. v. Cincinnati Ins Co., 909 N.E.2d 997 (Ind. 2009).

Trial court did not err in failing to reduce construction company's judgment against steel fabricator by $8 million it received under construction company's policy which, by its plain language, covered claims arising out of negligent acts, errors, or omissions of design professionals for whom construction company was legally responsible and excluded coverage for claims involving faulty or noncompliant workmanship in "construction," "manufacturing," or "materials;" steel fabricator was not design professional, and claims arising from defective welding were expressly excluded from coverage; nor did steel fabricator make showing that construction company was legally responsible for work of design professional steel fabricator retained, in airport construction project. LB Steel, LLC v. Carlo Steel Corporation, 2018 IL App (1st) 153501, 2018 WL 4691083 (Ill. App. Ct. 1st Dist. 2018).

Under California law, general liability insurance policies, such as a commercial general liability (CGL) policy, are not designed to provide contractors and developers with coverage against claims that their work is inferior or defective since the risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer; rather, liability insurance coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work or products. Webcor Construction, LP v. Zurich American Insurance Company, 372 F. Supp. 3d 1061 (N.D. Cal. 2019).

The purpose of a commercial general liability (CGL) policy is to protect the insured contractor from tort liability, not to insulate it from its own faulty work; in contrast, a performance bond is intended to insure the contractor against claims for the cost of repair or replacement of faulty work. Nationwide Mutual Fire Insurance Company v. David Group, Inc., 2019 WL 2240382 (Ala. 2019).

2 Tolomeo v. Emanuelson, 2005 WL 1629900 (E.D. Wis. 2005); Grinnell Mut. Reinsurance Co. v. Lynne, 2004 ND 166, 686 N.W.2d 118, 124 (N.D. 2004).

Under Louisiana law, a shopping center owner's installation of tarps and use of adhesives on the roof following a hurricane constituted "repairs," for purposes of an insurance policy exclusion for losses caused by faulty, defective, or inadequate repairs and materials used in the repair, despite the owner's contention that the tarps were intended to protect the structure and mitigate damages. Cedar Ridge, LLC v. Landmark American Ins. Co., 4 F. Supp. 3d 851 (E.D. La. 2014).

Under South Carolina law, an exclusion for "structural alterations, new construction and demolition operations performed by or for [additional insured]," in "additional insured" endorsement of a commercial general liability insurance policy of a condominium complex's property owners association, did not include work done to the condominium complex in the process of converting it from an apartment to a condominium complex, where the work was merely "cosmetic," consisting of new light fixtures, new countertops, painting where needed, new carpeting where needed, new faucets where needed, and grading and sealing the parking lot. Auto-Owners Ins. Co. v. Madison at Park West Property Owners Ass'n, Inc., 834 F. Supp. 2d 437 (D.S.C. 2011).

Under West Virginia law, liability insurance policies are not designed to insure the work or workmanship which the contractor or builder performs; they are not performance bonds or builders' risk policies. Nationwide Property & Cas. v. Comer, 559 F. Supp. 2d 685 (S.D. W. Va. 2008).

An exclusion in a commercial general liability policy for new residential work or products did not apply to a masonry subcontractor's work on a mixed-use building identified in the contract as a university school and faculty residence, despite the claim that the exclusion did not require that the new construction be exclusively residential, where mixed-use buildings were not included in the exclusion's list of the types of buildings that constituted residential property. Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005).

Client's allegations that engineering company's completed construction work and labor on dam caused property damage when the basin failed and a large amount of sediment was discharged onto lands of downstream-property owners and state waters, and that engineering company failed to provide instructions for permits, were within the definition of "your work" under liability policy's products completed operations (PCO) coverage provision defining "your work" as "work or operations performed by you or on your behalf; and materials, parts or equipment furnished in connection with such work or operations," and including warranties or representations or providing/failing to provide warnings or instructions with respect to such work and materials. North Counties Engineering, Inc. v. State Farm General Insurance Company, 224 Cal. App. 4th 902, 169 Cal. Rptr. 3d 726 (1st Dist. 2014), review denied, (June 11, 2014).

Business risk exclusions in subcontractor's commercial general liability (CGL) policy applicable to faulty workmanship, damage to named insured's work, and damage to impaired property barred coverage for general contractor's claim as an additional insured for reimbursement for cost to repair subcontractor's faulty workmanship; policy contemplated possibility of qualifying an additional insured as a named insured, and limiting the exclusions to only that work performed by subcontractor would permit general contractor more coverage as an additional insured than that granted to subcontractor as policyholder and would effectively require insurer to financially guarantee subcontractor's work. Auto Owners Ins. Co. v. Gay Const. Co., 332 Ga. App. 757, 774 S.E.2d 798 (2015), cert. denied, (Oct. 5, 2015).

Coverage for insured beverage bottler's loss from destruction of almost 2 million bottles due to failure to pass quality control tests for sealing was barred by exclusion for "faulty workmanship, material, construction or design, from any cause"; the exclusion applied whether problem was faulty material due to change in bottle cap liners as they aged, faulty workmanship due to failure to apply the correct torque, or faulty design due to failure to take into account changes to the liners as they aged. H.P. Hood LLC v. Allianz Global Risks U.S. Ins. Co., 88 Mass. App. Ct. 613, 39 N.E.3d 769 (2015), review denied, 44 N.E.3d 862 (Mass. 2016).

Insurer was not relieved of its duty to defend insured under the "your work" exclusion in commercial general liability (CGL) insurance policy, which provided that policy did not cover property damage to a particular part of any property that had to be restored, repaired or replaced because "your work" was incorrectly performed on it; the gentry was damaged while be moved to truck bed, and an accident occurring during the movement of property did not constitute work incorrectly performed on the property, for the purpose of the exclusion. Mid-Continent Cas. Co. v. Advantage Medical Electronics, LLC, 2015 WL 6828722 (Ala. 2015).

Coverage for insured beverage bottler's loss from destruction of almost 2 million bottles due to failure to pass quality control tests for sealing was barred by exclusion for "faulty workmanship, material, construction or design, from any cause"; the exclusion applied whether problem was faulty material due to change in bottle cap liners as they aged, faulty workmanship due to failure to apply the correct torque, or faulty design due to failure to take into account changes to the liners as they aged. H.P. Hood LLC v. Allianz Global Risks U.S. Ins. Co., 88 Mass. App. Ct. 613, 39 N.E.3d 769 (2015), review denied, 44 N.E.3d 862 (Mass. 2016).

Ensuing loss provision of beverage bottler's all-risk policy did not limit defective workmanship exclusion so that it applied only to bottle caps themselves and not to loss of product inside bottles due to failure to pass quality control tests for sealing; loss of almost 2 million bottles was directly caused by, and completely bound up in, increased risk of future spoilage indicated by secure seal testing, and the losses of bottle caps and beverage were not separable. H.P. Hood LLC v. Allianz Global Risks U.S. Ins. Co., 88 Mass. App. Ct. 613, 39 N.E.3d 769 (2015), review denied, 44 N.E.3d 862 (Mass. 2016).

3 Grinnell Mut. Reinsurance Co. v. Lynne, 2004 ND 166, 686 N.W.2d 118, 124 (N.D. 2004).

Under Montana law, an "intended use" exclusion of a commercial general liability (CGL) policy issued to a contractor did not necessarily apply to an accident that occurred when a worker on a construction site fell through grating prior to the installation of saddle clips which were necessary to safely secure the grating, and thus, the insurer had a duty to defend the contractor in the underlying lawsuit; the project vendor supplied both the grating and the clips that were intended to secure it, the uninstalled clips had not yet been put to

their intended use, and it was not absolutely clear that the grating had been put to such use. Ames Const., Inc. v. Maxum Indem. Co., 445 Fed. Appx. 971 (9th Cir. 2011).

Under New Jersey law, a "business-risk exclusions" barred a flooring contractor, which was an additional insured under a subcontractor's liability policy, from coverage for alleged "property damage" to "that particular part" of property which [subcontractor] was then "performing operations" upon, and/or which "must be restored, repaired, or replaced" because [the subcontractor's] work was "incorrectly performed on it"; two exclusions related to property damage arising out of the subcontractor's work but occurring before the subcontractor had completed its work while the third exclusion barred coverage for damage to the impaired property or property that had not been physically injured, including loss-of-use and delay damage without regard to when that damage occurred. Travelers Cas. and Surety Co. v. Dormitory Authority State of N.Y., 732 F. Supp. 2d 347 (S.D. N.Y. 2010).

The purpose of the business risk exclusions in comprehensive general liability (CGL) policies is to allocate the risk between the insured and insurer as it relates to damages arising out of the insured's business. Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633 (Ky. 2007), as modified (Dec. 21, 2007) and as modified on denial of reh'g (Jan. 24, 2008).

Injuries alleged in underlying action against insured drug manufacturer, including a nation "awash in opioids," a nationwide opioid-induced public health epidemic, a resurgence in heroin use, and increased public health care costs imposed by long-term opioid use, abuse, and addiction, did not constitute "bodily injury caused by an accident" within meaning of manufacturer's commercial general liability insurance policies, but rather, fell within commercial general liability CGL insurance policies' products exclusions, which excluded coverage for bodily injury "arising out of" or which "results from" manufacturer's products and warranties or representations regarding those products; exclusion applied to "any goods or products" manufactured or sold by manufacturer, and was not limited to defective products. Traveler's Property Casualty Company of America v. Actavis, Inc., 16 Cal. App. 5th 1026, 225 Cal. Rptr. 3d 5 (4th Dist. 2017), review granted, see cal. rules of court 8.1105 and 8.1115, 229 Cal. Rptr. 3d 2, 410 P.3d 1221 (Cal. 2018).

End of Document

2019 IL App (1st) 190517

Appellate Court of Illinois, First District,
THIRD DIVISION.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, Subscribing to Certificate No. RTS000275-4, Plaintiff-Appellee and Cross-Appellant,
v.
METROPOLITAN BUILDERS, INC.; and AIG Property Casualty Company, as Subrogee of 1903 Schiller, LLC, Defendants (Metropolitan Builders, Inc., Defendant-Appellant and Cross-Appellee).

No. 1-19-0517
|
December 18, 2019

Synopsis

Background: Commercial general liability (CGL) insurer of general contractor of construction project in which wall of building collapsed brought action seeking declaratory judgment that it owed no duty to defend general contractor against action brought by insurer of building owner alleging warranty and contract claims, as well as various tort claims, against general contractor, after insurer paid owner over $1,802,479.88 for expenses arising from collapse. The Circuit Court, Cook County, Franklin U. Valderrama, J., granted summary judgment for insurer of general contractor. General contractor appealed, and insurer of general contractor cross-appealed.

Holdings: The Appellate Court, Ellis, J., held that:

[1] cross-appeal of insurer of general contractor was improper;

[2] collapse of wall was not "occurrence" within meaning of CGL policy;

[3] collapse of wall did not constitute "property damage" within meaning of CGL policy; and

[4] allegations of damage to building owner's personal property alleged "property damage" caused by an "occurrence" within meaning of CGL policy.

Reversed and remanded.

West Headnotes (23)

[1] Appeal and Error
Prevailing parties
30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(5) Prevailing parties
A party granted summary judgment may not appeal that order.

[2] Appeal and Error
Prevailing parties
30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(5) Prevailing parties
The forum of courts of appeal should not be afforded to successful parties who may not agree with the reasons, conclusion or findings below.

[3] Declaratory Judgment
Appeal and Error
118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak392.1 In general
Cross-appeal of insurer of general contractor following trial court's grant of summary judgment for insurer in action seeking declaratory judgment that it had no duty to defend general contractor in litigation involving

collapse of wall during construction project was improper, even though court ruled against insurer on its claim that underlying complaint did not allege "property damage" within meaning of commercial general liability (CGL) policy, where court granted summary judgment for insurer on its other argument that underlying complaint did not allege an "occurrence" within meaning of policy.

[4] Appeal and Error

Verdict, Findings, Sufficiency of Evidence, and Judgment

30 Appeal and Error
30XVI Review
30XVI(H) Theory and Grounds of Decision Below and on Review
30k4065 Particular Orders or Rulings Below, Theory and Grounds Supporting
30k4072 Verdict, Findings, Sufficiency of Evidence, and Judgment
30k4072(1) In general

Appellate Court may affirm the judgment of the trial court on any basis in the record, regardless of whether it was the trial court's stated reason.

[5] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

Generally, in determining an insurer's duty to defend an insured in an underlying suit, the court compares the allegations in the underlying complaint against the relevant policy language.

[6] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

An insurer has a duty to defend its insured in an underlying complaint if the underlying complaint alleges facts within or potentially within policy coverage; this duty arises even if the allegations are groundless, false, or fraudulent.

[7] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

Court liberally construes an underlying complaint and policy in favor of the insured in determining insurer's duty to defend.

[8] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

The question of policy coverage, used to determine whether an insurer has a duty to defend its insured in an underlying complaint, should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action.

[9] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

The threshold an underlying complaint must meet to trigger insurer's duty to defend its insured is low; insurer must defend an action unless it is clear from the face of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage.

[10] Principal and Surety

Building Contracts

Principal and Surety

Extent of liability

Principal and Surety

Rights of action against surety

309 Principal and Surety
309II Nature and Extent of Liability of Surety
309k80 Performance of Contract by Principal
309k82 Building Contracts
309k82(1) In general
309 Principal and Surety
309II Nature and Extent of Liability of Surety
309k80 Performance of Contract by Principal
309k82 Building Contracts
309k82(2) Extent of liability
309 Principal and Surety
309IV Remedies of Creditors
309k136 Rights of action against surety

When a surety has guaranteed to a property owner the performance of a contractor's contractual obligations on a construction project through issuance of performance bond, if the contractor fails to complete the project or performs in a substandard manner, the property owner can sue or demand performance directly from the surety, either by requiring the surety to complete the work in a timely and acceptable manner or by making the surety pay any excess costs incurred by the property owner to complete the work itself.

[11] Principal and Surety

Indemnity or reimbursement

309 Principal and Surety
309V Rights and Remedies of Surety
309V(B) As to Principal
309k181 Rights of Surety After Payment or Satisfaction by Him of Debt or Liability
309k185 Indemnity or reimbursement

If a property owner to whom surety has issued performance bond guaranteeing the performance of a contractor's contractual obligations on a construction project demands performance directly from surety as result of defective construction work, and if the surety is made to pay or perform on the performance bond, the surety can then sue the contractor for recovery for defective work.

[12] Principal and Surety

Building Contracts

Principal and Surety

Indemnity or reimbursement

309 Principal and Surety
309II Nature and Extent of Liability of Surety
309k80 Performance of Contract by Principal
309k82 Building Contracts
309k82(1) In general
309 Principal and Surety
309V Rights and Remedies of Surety
309V(B) As to Principal
309k181 Rights of Surety After Payment or Satisfaction by Him of Debt or Liability
309k185 Indemnity or reimbursement

The surety on a performance bond guaranteeing to a property owner the performance of a contractor's contractual obligations on a construction project is not an insurer of the contractor in the classic sense; it guarantees the contractor's performance to the property owner, but it can turn around and seek recovery against that contractor for any moneys it was forced to pay due to the contractor's breach of contract.

[13] Insurance

Liability Insurance

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(1) In general

A commercial general liability (CGL) insurer cannot sue an insured contractor to recoup money it paid on its behalf.

[14] Insurance

Risks and Losses

Insurance

Bodily injury

Insurance

Property damage

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2274 In general
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General

217k2273 Risks and Losses
217k2276 Bodily injury
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

A commercial general liability (CGL) insurer does not guarantee the contractual performance of work; instead, a CGL policy protects the insured from liability for injury or damage to the persons or property of others.

[15] Insurance
Insured's liability for damages

Insurance
Property damage

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2269 Insured's liability for damages
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

A commercial general liability (CGL) policy covers tort liability for damage to other property, not insured's contractual liability for economic loss.

[16] Insurance
Accident, occurrence, or event

Insurance
Accident, occurrence or event

217 Insurance
217XV Coverage--in General
217k2096 Risks Covered and Exclusions
217k2101 Accident, occurrence, or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

When determining insurance coverage, in the absence of a policy definition, the term "accident" is typically interpreted to mean an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character.

[17] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

A commercial general liability (CGL) policy does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.

[18] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

There is no "occurrence" to trigger coverage under a commercial general liability (CGL) policy when a subcontractor's defective workmanship necessitates removing and repairing work; rather, the mere repair or replacement of a contractor's poor work product is considered to be the natural and ordinary consequences of faulty workmanship.

[19] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Collapse of wall during construction project was not "occurrence" within meaning of commercial general liability (CGL) policy between insurer and general contractor, and thus did not trigger a duty of insurer to defend general contractor against underlying complaint brought by insurer

of building owner involving collapse, where contractor's allegedly faulty workmanship led to collapse.

[20] Insurance

Property damage

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Collapse of wall during construction project did not constitute "property damage" within meaning of commercial general liability (CGL) policy between insurer and general contractor, and thus did not trigger a duty of insurer to defend general contractor against underlying complaint brought by insurer of building owner involving collapse, where damages suffered by building owner involved only economic loss.

[21] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

When a construction defect results in damage to something other than the project itself, the damages are deemed to have been the result of an "accident" and thus the defect constitutes an "occurrence" under a commercial general liability (CGL) policy.

[22] Insurance

Accident, occurrence or event

Insurance

Property damage

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Allegations of damage to building owner's personal property in underlying complaint brought against general contractor of construction project that resulted in collapse of wall alleged "property damage" caused by an "occurrence" within meaning of commercial general liability (CGL) policy between insurer and general contractor, and thus allegations triggered insurer's duty to defend contractor, even though allegations were vague, where allegations involved damage to something other than construction project itself.

[23] Insurance

Several Grounds or Causes of Action

217 Insurance
217XXIII Duty to Defend
217k2920 Scope of Duty
217k2922 Several Grounds or Causes of Action
217k2922(1) In general

If an insured is entitled to a defense of any portion of an underlying complaint, the insured is entitled to a defense of that entire lawsuit.

Appeal from the Circuit Court of Cook County, 18 CH 1180, Honorable Franklin U. Valderrama, Judge Presiding

Attorneys and Law Firms

David E. Schroeder, of Tribler Orpett & Meyer, P.C., of Chicago, for appellant.

Neal R. Novak and Karen Andersen Moran, of Novak Law Offices, of Chicago, for appellee.

OPINION

PRESIDING JUSTICE ELLIS delivered the judgment of the court, with opinion.

***1** ¶ 1 Metropolitan Builders, Inc. (Metropolitan), appeals the circuit court's order finding that Certain Underwriters at Lloyd's London, Subscribing to Certificate No. RTS000275-4

(Lloyd's), did not have a duty to defend Metropolitan in an underlying case. In its order granting summary judgment to Lloyd's, the court found that the complaint in the underlying case alleged "property damage" but did not allege an "occurrence" within the meaning of the insurance policy.

¶ 2 We hold that the underlying complaint alleged both an "occurrence" and "property damage" under the policy. Metropolitan was thus entitled to a defense from Lloyd's of the underlying lawsuit. We reverse the trial court's judgment and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 A. General Facts

¶ 5 Metropolitan was hired as the general contractor for a construction job on property in Chicago. During the construction, a wall adjoining two structures collapsed. The amount of structural damage ultimately led the City of Chicago (the City) to declare the structures unsafe and demolish them.

¶ 6 The owner of the building turned to its insurer, AIG Property Casualty Company (AIG), for indemnification and reimbursement for the damages it suffered. AIG paid the owner "a sum of over $1,802,479.88 for repairs, demolition, construction, and other associated expenses arising from" the collapse.

¶ 7 AIG then invoked its rights of subrogation and filed suit against Metropolitan, the general contractor on the construction job (the Underlying Case). We draw our more detailed facts below from AIG's complaint in that action (the Underlying Complaint).

¶ 8 B. The Underlying Complaint

¶ 9 Metropolitan was hired as the general contractor for "construction, renovation, demolition, and/or other related activities" at contiguous properties on the 1900 block of West Schiller Street in Chicago—the 1907 Property, 1909 Property, and 1911 Property (collectively, the Properties).

¶ 10 As of October 2016, Metropolitan had obtained a permit from the City to perform construction activity to convert the 1909 and 1911 Properties into single-family dwellings. But as of that time, the City had not given Metropolitan a permit to perform construction activity of any kind on the 1907 Property.

¶ 11 In October 2016, the structures on the 1907 Property and 1909 Property collapsed. We do not know a great deal about how this collapse occurred. The allegations are that Metropolitan had "constructed a new wooden framing building and removed portions of the stairway within [the 1907 Property], without the authorization of a permit, in addition to altering the structural integrity and lower level supports of [the 1907 and 1909 Properties]."

¶ 12 In any event, the entire existing structures at the 1907 and 1909 Properties collapsed. The collapse caused significant damage to the Properties, "including in areas where [Metropolitan] was not conducting work." The existing structures on the Properties were later deemed unsafe and demolished by the City.

***2** ¶ 13 The Underlying Complaint alleged warranty and contract claims, as well as various tort claims, against Metropolitan. The various tort claims each alleged that, "[a]s a result of the aforementioned negligence, [the property owner] suffered losses including, but not limited to, damage to [its] real and personal property."

¶ 14 C. The Declaratory Judgment Action Before This Court

¶ 15 Metropolitan tendered defense of the Underlying Case to its insurer, Lloyd's. Lloyd's denied coverage and filed this declaratory judgment action, seeking a declaration that it owed no duty to defend Metropolitan. In its motion for summary judgment, Lloyd's argued that, while its insurance policy with Metropolitan required Lloyd's to defend Metropolitan for claims of liability resulting from "property damage" caused by an "occurrence," the allegations of the Underlying Complaint alleged *neither* "property damage" nor an "occurrence."

¶ 16 The trial court disagreed in part with Lloyd's, ruling that the Underlying Complaint adequately alleged "property damage." But the court agreed that the Underlying Complaint failed to allege an "occurrence" as defined by the insurance policy and thus entered summary judgment in favor of Lloyd's.

¶ 17 Metropolitan appeals, claiming that summary judgment for Lloyd's was inappropriate, as the Underlying Complaint alleged an "occurrence" as well as "property damage." Lloyd's not only urges affirmance on the basis that the trial court's ruling on the definition of "occurrence" was correct, but it also has cross-appealed as a backstop, arguing that summary judgment could be affirmed for the additional reason (contrary to the trial court's ruling) that the Underlying Complaint did not allege "property damage," either.

¶ 18 JURISDICTION

¶ 19 Our mention of the cross-appeal filed by Lloyd's leads us to a jurisdictional matter that we have an independent duty to address, even if the parties do not. See *Lakeshore Center Holdings, LLC v. LHC Loan, LLC*, 2019 IL App (1st) 180576, ¶ 9.

[1] ¶ 20 Lloyd's cross-appeals from the trial court's ruling that the Underlying Complaint alleged "property damage." That cross-appeal is improper, because Lloyd's received all the relief it sought below—a grant of summary judgment in its favor. A party granted summary judgment may not appeal that order. *Chicago Tribune v. College of Du Page*, 2017 IL App (2d) 160274, ¶ 28, 414 Ill.Dec. 59, 79 N.E.3d 694 ("Where the circuit court grants summary judgment in favor of a party, that party cannot file a cross-appeal to seek relief from the summary judgment order.").

¶ 21 We understand that Lloyd's is cross-appealing out an abundance of caution, a belt-and-suspenders approach. In the event we disagreed with the trial court's stated reason for finding no duty to defend—the lack of any allegation of an "occurrence"—Lloyd's would have us affirm on the secondary ground that no "property damage" was alleged, even though the trial court ruled otherwise on that question.

[2] **[3]** ¶ 22 Still, the avenue of a cross-appeal is improper. " 'It is fundamental that the forum of courts of appeal should not be afforded to successful parties who may not agree with the reasons, conclusion or findings below.' " *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 386, 75 Ill.Dec. 219, 457 N.E.2d 9 (1983) (quoting *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 414 Ill. 275, 282–83, 111 N.E.2d 329 (1953)). We must dismiss the cross-appeal.

***3** **[4]** ¶ 23 But this is a pyrrhic defeat only, as Lloyd's remains free to argue that the trial court's order should be affirmed based on the definition of "property damage" as well as "occurrence." We may affirm the judgment of the trial court on any basis in the record, regardless of whether it was the trial court's stated reason. *Material Service Corp.*, 98 Ill. 2d at 387, 75 Ill.Dec. 219, 457 N.E.2d 9. Indeed, that's precisely why a cross-appeal is both improper and unnecessary—because the appellee may raise this additional basis for affirmance on direct appeal. *Id.*; *Chicago Tribune*, 2017 IL App (2d) 160274, ¶ 28, 414 Ill.Dec. 59, 79 N.E.3d 694.

¶ 24 So the cross-appeal is dismissed, but we will consider the arguments of Lloyd's regarding the definition of "property damage" as an additional basis for affirmance, if necessary.

¶ 25 ANALYSIS

¶ 26 Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). We review an order granting summary judgment *de novo*. *Milwaukee Mutual Insurance Co. v. J.P. Larsen, Inc.*, 2011 IL App (1st) 101316, ¶ 7, 353 Ill.Dec. 662, 956 N.E.2d 524.

[5] **[6]** ¶ 27 Generally, in determining an insurer's duty to defend an insured in an underlying suit, we compare the allegations in the underlying complaint against the relevant policy language. *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 34, 411 Ill.Dec. 143, 72 N.E.3d 831. An insurer has a duty to defend "[i]f the underlying complaints allege facts within or *potentially* within policy coverage." (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73, 161 Ill.Dec. 280, 578 N.E.2d 926 (1991). This duty arises "even if the allegations are groundless, false, or fraudulent." *Id.*

[7] **[8]** **[9]** ¶ 28 We liberally construe the underlying complaint and policy in favor of the insured. *Id.* at 74, 161 Ill.Dec. 280, 578 N.E.2d 926. " 'The question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action.' " *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 361, 271 Ill.Dec. 711, 785 N.E.2d 905 (2003) (quoting *International Insurance Co. v. Rollprint Packaging*

Products, Inc., 312 Ill. App. 3d 998, 1007, 245 Ill.Dec. 598, 728 N.E.2d 680 (2000)). The threshold an underlying complaint must meet to trigger the duty to defend is low. *State Farm Fire & Casualty Co. v. Tillerson*, 334 Ill. App. 3d 404, 408, 268 Ill.Dec. 63, 777 N.E.2d 986 (2002); *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960, 161 Ill.Dec. 357, 578 N.E.2d 1003 (1991) ("minimal"). An insurer must defend an action "unless it is clear from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or *potentially* within, the policy's coverage." (Emphasis in original.) *Wilkin*, 144 Ill. 2d at 73, 161 Ill.Dec. 280, 578 N.E.2d 926.

¶ 29 We must decide both whether the Underlying Complaint alleged "property damage" within the meaning of the policy, and whether the Underlying Complaint properly alleged that this property damage was caused by an "occurrence" as defined by the policy. If the answer to both of those questions is yes, Metropolitan is entitled to a defense under the policy. If either answer is no, Metropolitan is not, and summary judgment was properly entered in favor of Lloyd's.

¶ 30 I

¶ 31 Before we dive into an analysis of the individual terms and phrases, we start with some general observations. Metropolitan had a commercial general liability (CGL) policy with Lloyd's that, in pertinent part, insured Metropolitan for liability resulting from " 'property damage' [that] is caused by an 'occurrence.' " The relevant questions here are the meanings of "occurrence" and "property damage."

***4** ¶ 32 We have had many occasions to interpret CGL policies in the context of underlying lawsuits against construction contractors, most of which policies contained identical or nearly identical definitions of "occurrence" and "property damage" as here. And as we will see below, much of our analysis in those cases has been driven less by literal textual construction and more by considering the overall purpose of CGL policies.

¶ 33 Indeed, in some cases, we have not even bothered to isolate the two definitions, instead considering them collectively as one phrase ("property damage caused by an occurrence") and determining whether the damages alleged against the contractor in the underlying lawsuit fit within or outside the purpose of CGL policies. See, *e.g.*, *Acuity Insurance Co. v. 950 West Huron Condominium Ass'n*, 2019 IL App (1st) 180743, ¶¶ 29-44, —— Ill.Dec. ——, —— N.E.3d ——. And even when the two definitions are isolated, some courts have used the same reasoning for determining whether an "occurrence" was pleaded as other courts did in determining whether "property damage" was pleaded.

¶ 34 Quite obviously, then, the purpose of CGL policies is an important first consideration. So we start there, with this oft-quoted passage from our supreme court:

> " 'C]omprehensive general liability policies * * * are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products, which are purely economic losses. [Citations.] Finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.' " *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 314, 258 Ill.Dec. 792, 757 N.E.2d 481 (2001) (quoting *Qualls v. Country Mutual Insurance Co.*, 123 Ill. App. 3d 831, 833-34, 78 Ill.Dec. 934, 462 N.E.2d 1288 (1984)).

¶ 35 We have often emphasized the distinction above, the difference between a CGL policy and a performance bond, in the case law discussing the meanings of "occurrence" and "property damage" in CGL policies. See, *e.g.*, *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 55, 294 Ill.Dec. 478, 831 N.E.2d 1 (2005); *Tillerson*, 334 Ill. App. 3d at 410, 268 Ill.Dec. 63, 777 N.E.2d 986; *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 752, 321 Ill.Dec. 114, 888 N.E.2d 633 (2008); *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill. App. 3d 697, 709, 214 Ill.Dec. 597, 661 N.E.2d 451 (1996).

[10] ¶ 36 Sureties offer performance bonds to the property owner to guarantee the performance of a contractor's *contractual* obligations on a construction project. See *Fisher v. Fidelity & Deposit Co. of Maryland*, 125 Ill. App. 3d 632, 639, 80 Ill.Dec. 880, 466 N.E.2d 332 (1984) ("[w]here a bond guarantees performance, the obligation of the contractor in legal effect becomes the obligation of the surety" (internal quotation marks omitted)). If the contractor fails to complete the project or performs in a substandard manner, the property owner can sue or demand performance directly from the surety, either by requiring the surety to complete the work in a timely and acceptable manner or by making the surety pay

any excess costs incurred by the property owner to complete the work itself. See *id.*; see also *Lake View Trust & Savings Bank v. Filmore Construction Co.*, 74 Ill. App. 3d 755, 758, 30 Ill.Dec. 678, 393 N.E.2d 714 (1979).

[11] **[12]** ¶ 37 The difference, however, is if the surety were made to pay or perform on the performance bond, the surety could then sue the contractor for recovery for defective construction work. See *Stoneridge*, 382 Ill. App. 3d at 752, 321 Ill.Dec. 114, 888 N.E.2d 633; *Wil-Freds*, 277 Ill. App. 3d at 709, 214 Ill.Dec. 597, 661 N.E.2d 451. The surety on a performance bond, then, is not an "insurer" of the contractor in the classic sense. It guarantees the contractor's *performance* to a third party (the property owner), but it can turn around and seek recovery against that contractor for any moneys it was forced to pay due to the contractor's breach of contract.

***5** **[13]** ¶ 38 Contrast performance bonds with a more traditional insurance contract like a CGL policy. For one thing, the CGL insurer can't sue the insured contractor to recoup money it paid on its behalf. *Stoneridge*, 382 Ill. App. 3d at 752, 321 Ill.Dec. 114, 888 N.E.2d 633; *Wil-Freds*, 277 Ill. App. 3d at 709, 214 Ill.Dec. 597, 661 N.E.2d 451. If a CGL policy covered simple economic loss stemming from a contractor's breach of contractual obligations, the contractor would be paid initially by the property owner to perform the (shoddy) work and then would get paid by the insurance company to repair or replace that (shoddy) work product, in essence an unfair and inappropriate double recovery—and a reward for poor performance. See *Stoneridge*, 382 Ill. App. 3d at 752, 321 Ill.Dec. 114, 888 N.E.2d 633; *Wil-Freds*, 277 Ill. App. 3d at 709, 214 Ill.Dec. 597, 661 N.E.2d 451.

[14] **[15]** ¶ 39 Another and more fundamental difference is that the CGL insurer is not guaranteeing the contractual performance of work; instead, as our supreme court noted, a CGL policy "protect[s] the insured from liability for injury or damage to the persons or property of others." (Internal quotation marks omitted.) *Travelers Insurance*, 197 Ill. 2d at 314, 258 Ill.Dec. 792, 757 N.E.2d 481. That is to say, it covers " '*tort* liability for damage to other property, not for the insured's contractual liability for economic loss.' " (Emphasis added.) *Stoneridge*, 382 Ill. App. 3d at 753, 321 Ill.Dec. 114, 888 N.E.2d 633 (quoting *Tillerson*, 334 Ill. App. 3d at 410, 268 Ill.Dec. 63, 777 N.E.2d 986); see also *Viking Construction*, 358 Ill. App. 3d at 42, 294 Ill.Dec. 478, 831 N.E.2d 1 ("It has generally been held that a CGL policy will not cover a general contractor's suit for breach of contract * * *." (Internal quotation marks omitted.)).

¶ 40 As we will see below, this distinction between damage to other property, usually redressed in tort, and purely economic loss or disappointed expectations, typically remedied in a contract claim, has served as the guiding principle in determining the definitions of both "occurrence" and "property damage" in CGL polices involving lawsuits against insured contractors.

¶ 41 II

¶ 42 We begin with Metropolitan's claim that the trial court erred in ruling that the Underlying Complaint did not adequately allege an "occurrence" as defined in Metropolitan's CGL policy with Lloyd's (the Policy). Again, the Policy insured Metropolitan against liability for " 'property damage' [that] is caused by an 'occurrence.' "

¶ 43 An "occurrence" under the Policy is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because we are not talking here about any kind of continuous-exposure harm like radon radiation, asbestos exposure, or lead poisoning, we can eliminate the second portion of the definition here and say that the Policy defines an "occurrence" as an "accident."

¶ 44 But the Policy contains no definition of "accident." That seems to be a common feature of CGL policies, defining an "occurrence" as did the Policy here and omitting any corresponding definition of "accident." See, *e.g.*, *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 10, —— Ill.Dec. ——, —— N.E.3d —— (identical definition of "occurrence" with no definition of "accident"); *J.P. Larsen*, 2011 IL App (1st) 101316, ¶ 25, 353 Ill.Dec. 662, 956 N.E.2d 524 (same); *Stoneridge*, 382 Ill. App. 3d at 749, 321 Ill.Dec. 114, 888 N.E.2d 633 (same); *Viking Construction*, 358 Ill. App. 3d at 37, 294 Ill.Dec. 478, 831 N.E.2d 1 (same).

[16] ¶ 45 In the absence of a policy definition, Illinois courts typically interpret "accident" to mean " 'an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character.' " *Stoneridge*, 382 Ill. App. 3d at 749, 321 Ill.Dec. 114, 888 N.E.2d 633 (quoting *Westfield National Insurance Co. v. Continental Community Bank & Trust Co.*, 346 Ill. App. 3d 113, 117, 281 Ill.Dec. 636, 804 N.E.2d 601 (2003)); see also *id.* at 749-50, 321 Ill.Dec. 114, 888 N.E.2d 633 (collecting cases).

***6** ¶ 46 Reading that definition alone, one might think that what constitutes an "accident" (and thus an "occurrence") would depend on what happened and how it happened—whether the event was sudden, unexpected, etc. But as previewed above, the case law has focused at least as much on the purposes of CGL policies as it has on textual interpretation and application.

[17] ¶ 47 We have held, for example, that because CGL policies are "not intended to pay the costs associated with repairing or replacing the insured's defective work and products" (internal quotation marks omitted) (*Travelers Insurance*, 197 Ill. 2d at 314, 258 Ill.Dec. 792, 757 N.E.2d 481), a lawsuit alleging only those damages against the insured contractor is not deemed to be alleging damages resulting from an "accident," and thus no "occurrence" has been pleaded to trigger coverage under the CGL policy. As our supreme court has said and we have reiterated, a CGL policy " ' "does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident." ' " *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 26, —— Ill.Dec. ——, —— N.E.3d —— (quoting *Pekin Insurance Co. v. Richard Marker Associates, Inc.*, 289 Ill. App. 3d 819, 823, 224 Ill.Dec. 801, 682 N.E.2d 362 (1997), quoting *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 498, 86 Ill.Dec. 493, 475 N.E.2d 872 (1985)).

[18] ¶ 48 Simply put, " 'there is no occurrence when a subcontractor's defective workmanship necessitates removing and repairing work.' " (Internal quotation marks omitted.) *J.P. Larsen*, 2011 IL App (1st) 101316, ¶ 26, 353 Ill.Dec. 662, 956 N.E.2d 524 (quoting *Viking Construction*, 358 Ill. App. 3d at 42, 294 Ill.Dec. 478, 831 N.E.2d 1). Rather, the mere repair or replacement of a contractor's poor work product is considered to be the " 'natural and ordinary consequences of faulty workmanship,' " not an " 'accident.' " *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 28, —— Ill.Dec. ——, —— N.E.3d —— (quoting *Tillerson*, 334 Ill. App. 3d at 409, 268 Ill.Dec. 63, 777 N.E.2d 986); *Wil-Freds*, 277 Ill. App. 3d at 705, 214 Ill.Dec. 597, 661 N.E.2d 451; *Indiana Insurance Co. v. Hydra Corp.*, 245 Ill. App. 3d 926, 930, 185 Ill.Dec. 775, 615 N.E.2d 70 (1993) ("The natural and ordinary consequences of an act do not constitute an accident.").

¶ 49 For example, if windows were improperly sealed and thus leaked water, the mere cost of repairing and replacing those windows would not be deemed the result of an "accident," and thus no "occurrence" would be alleged under the CGL policy. See *J.P. Larsen*, 2011 IL App (1st) 101316, ¶¶ 27-28, 353 Ill.Dec. 662, 956 N.E.2d 524. So, too, if a school's wall collapsed but the only damages alleged were the cost of repair or replacement of that wall, without any claim of damages to other parts of that school; the damage is not deemed to be the result of an "accident" or "occurrence" under the CGL policy. See *Viking Construction*, 358 Ill. App. 3d at 42, 55, 294 Ill.Dec. 478, 831 N.E.2d 1.

¶ 50 Likewise, a building owner's lawsuit against a contractor for the cost of repairing cracks in the flooring and loose paint on the walls did not constitute damages resulting from an "accident" or "occurrence" under the contractor's CGL policy, as the floor cracks and loose paint were merely "the natural and ordinary consequences of installing defective concrete flooring and applying the wrong type of paint." *Hydra Corp.*, 245 Ill. App. 3d at 930, 185 Ill.Dec. 775, 615 N.E.2d 70. A lawsuit against an insured contractor, alleging that the house the contractor built had an unstable foundation due to the contractor's failure to compact the soil beneath the foundation, did not allege an "occurrence" under the CGL policy, because the cracks that formed were the mere natural and ordinary result of faulty soil compaction, and the damage was merely to the house itself—the contractor's work product. *Stoneridge*, 382 Ill. App. 3d at 753, 321 Ill.Dec. 114, 888 N.E.2d 633.

***7** ¶ 51 This principle has been extended to situations where other parts of the same construction project, over which the insured contractor had responsibility, are also damaged. In that situation, as well, the damage is not deemed to be the result of an "accident" or "occurrence" but, rather, the natural and ordinary consequence of faulty workmanship. For example, if leaky windows led to water damage in other parts of the same structure that the insured contractor was building and over which that contractor had responsibility—the lobby, the basement, an adjoining building—the damage is not deemed to be the result of an "accident." See *Wil-Freds*, 277 Ill. App. 3d at 705, 214 Ill.Dec. 597, 661 N.E.2d 451. The reasoning is the same: the areas that were damaged were part of the same construction project and part of that contractor's overall responsibility; the work was allegedly done in a poor manner; the cost of repairing or replacing shoddy work is an ordinary and natural consequence of poor workmanship.

¶ 52 On the other hand, recall our supreme court's reminder that the purpose of a CGL policy is to protect the insured "from liability for injury or damage to the persons or property of others." (Internal quotation marks omitted.) *Travelers*

Insurance, 197 Ill. 2d at 314, 258 Ill.Dec. 792, 757 N.E.2d 481. Thus, we have been careful to emphasize that when the underlying lawsuit against the insured contractor alleges damages *beyond* repair and replacement, and *beyond* damage to other parts of the same project over which that contractor was responsible, those additional damages are deemed to be the result of an "accident." See *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 29, —— Ill.Dec. ——, —— N.E.3d —— ("[w]e have repeatedly recognized that while a CGL policy will not insure a contractor for the cost of correcting construction defects, 'damage to something other than the project itself *does* constitute an "occurrence" under a CGL policy' " (emphasis in original) (quoting *J.P. Larsen*, 2011 IL App (1st) 101316, ¶ 27, 353 Ill.Dec. 662, 956 N.E.2d 524)).

¶ 53 So while the repair or replacement of defective plumbing is not deemed to be damages resulting from an "accident," allegations of water damage to a homeowner's furniture, clothing and antiques *would* trigger coverage under a CGL policy, because that damage extends beyond the contractor's work product to the homeowner's personal property. *Richard Marker*, 289 Ill. App. 3d at 823, 224 Ill.Dec. 801, 682 N.E.2d 362.

¶ 54 As another example cited by the parties, the cost of repairing or replacing a poorly built second-story structure over an existing garage does not trigger coverage under the CGL policy, but damage to the garage below it, which wasn't part of the contractor's work, *would* be covered. See *Ohio Casualty Insurance Co. v. Bazzi Construction Co.*, 815 F.2d 1146, 1148-49 (7th Cir. 1987) (applying Illinois law and stating, "[h]ad Bazzi contracted to construct an entirely new building for [the owner], any damage to or defects in that building, which would be defined as the property or work product of Bazzi, would not be covered under the policy," but "[b]ecause [the owner's] complaint alleges damage to property *other than Bazzi's own work or product*, namely the structure of the existing garage, * * * the [underlying complaint] states a claim for property damage that is potentially within the coverage of the [CGL] policy" (emphasis added)).

¶ 55 Likewise, water leakage caused by poorly insulated windows, which damages other parts of the same structure the contractor erected, are not covered—it would be part of the repair and replacement for shoddy workmanship—but had the water leakage damaged homeowners' cars parked inside the parking garage, we had "little doubt" that such damage to personal property would have been deemed to have resulted from an "accident" under the CGL policy. *Wil-Freds*, 277 Ill. App. 3d at 705, 214 Ill.Dec. 597, 661 N.E.2d 451.

¶ 56 The upshot is that, in cases involving CGL policies with a definition of "occurrence" identical or functionally identical to the one here, the rule is as follows: If the underlying complaint against the insured contractor merely alleges construction defects that require repair and replacement (or that cause a diminution in value) of the contractor's work product, no "accident," and thus no "occurrence" under the CGL policy, has been alleged. But if the damage extends to other people or things that were not part of the contractor's work product, we have held that this damage is alleged to have resulted from an "accident," and thus an "occurrence" has been alleged to trigger coverage under the CGL policy.

¶ 57 III

***8** ¶ 58 We turn now to the meaning of "property damage" under the Policy. The Policy defines "property damage" in relevant part as "physical injury to tangible property, including all resulting loss of use of that property." Our supreme court has explained that:

> "[T]o the average, ordinary person, tangible property suffers a 'physical' injury when the property is altered in appearance, shape, color or in other material dimension. Conversely, to the average mind, tangible property does not experience 'physical' injury if that property suffers intangible damage, such as diminution in value as a result from the failure of a component * * *." *Travelers Insurance*, 197 Ill. 2d at 301-02, 258 Ill.Dec. 792, 757 N.E.2d 481.

¶ 59 Determining whether property is "altered in appearance, shape, color or in other material dimension" (*id.* at 301, 258 Ill.Dec. 792, 757 N.E.2d 481) is easy enough. But that determination is not enough by itself. As we noted at the outset, beyond the mere textual meaning of the phrase, many of the same considerations that drive the definition of "occurrence" have led courts to reach the same conclusions with regard to the presence or absence of allegations of "property damage," at least in cases where the definition of "property damage" mirrored the one here.

¶ 60 That is to say, when the "property" that is alleged to be "damaged" in the underlying lawsuit against the construction contractor is merely the contractor's work product, then in

essence the only damage is the disappointed commercial expectations of the property owner, and the damages alleged are purely economic losses for the cost of repair and replacement of the contractor's work product or for the property's diminution in value. In those instances, we have held that no "property damage" was alleged to trigger coverage under the CGL policy.

¶ 61 For example, when we held that the homeowners' lawsuit against a contractor for building the house on an unstable foundation did not allege an "occurrence," because the resulting cracks in the contractor's work product were the natural and ordinary consequence of poor workmanship, we also held that the cracks that developed in the home did not constitute "property damage" under the CGL policy. *Stoneridge*, 382 Ill. App. 3d at 753, 321 Ill.Dec. 114, 888 N.E.2d 633. Even though the cracks obviously constituted an alteration in the house's appearance, we held that the homeowners were alleging purely economic losses for repair, replacement, and diminution in value of the home. *Id.*

¶ 62 We reached the same decision, on nearly the same facts, in *Tillerson*, 334 Ill. App. 3d at 409, 268 Ill.Dec. 63, 777 N.E.2d 986, where homeowners sued the insured contractor for building an addition to a house on an uneven foundation, resulting in the addition being uninhabitable. We found no "accident" and thus no "occurrence" under the contractor's CGL policy because the damage to the contractor's work product was just the natural result of defective workmanship (*id.*), but we also found that the damage to the house was not "property damage," as the homeowners "merely [sought] either the repair or the replacement of defective work or the diminishing value of the home," which we deemed "economic loss" only (*id.* at 410, 268 Ill.Dec. 63, 777 N.E.2d 986).

¶ 63 Likewise, when we determined that the collapse of a masonry wall at a middle school did not constitute an "accident" or "occurrence" under the contractor's CGL policy because the only damages alleged were the cost of repair and replacement of that wall, we likewise held that the collapsed wall did not constitute "property damage" under the policy. *Viking Construction*, 358 Ill. App. 3d at 55, 294 Ill.Dec. 478, 831 N.E.2d 1. Much as we did in interpreting the word "occurrence," we reasoned that CGL policies are not intended to cover purely economic loss for the repair or replacement of defective work, and interpreting them in that manner would have the effect of converting CGL policies into performance bonds. *Id.* Thus, though it was beyond obvious that the masonry wall had been altered in appearance—it went from a standing wall to a rubble of bricks—it was not "property damage" because the replacement costs were purely economic contractual damages. *Id.* at 55-56, 294 Ill.Dec. 478, 831 N.E.2d 1.

***9** ¶ 64 Along those same lines, when we have found that damages from a contractor's defective work *were* alleged to have resulted from an "occurrence," we have relied on much of the same reasoning for determining that "property damage" was alleged, as well. In *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 7, —— Ill.Dec. ——, —— N.E.3d ——, the underlying complaint alleged that a subcontractor's faulty installation and caulking of doors and windows in a segregated portion of a condo building resulted in water damage throughout the building. Because the subcontractor had only this particular responsibility on a pre-existing building, we held that damage to other parts of that building, completely unrelated to the scope of the subcontractor's isolated work, constituted damage to something other than the project itself, requiring something more than mere repair and replacement of the subcontractor's work product, and thus was the result of an "accident" or "occurrence" under the CGL policy. *Id.* ¶¶ 29, 44. And for the same reason, we found that this damage to other parts of the building constituted "property damage" under the policy. *Id.*

¶ 65 The prevailing rule, then, is that to constitute "property damage" in these CGL policies with definitions like the one here, the property's appearance must be altered in some measurable way, but it must also be property beyond that of the contractor's work product. If the only property injured is the very project on which the contractor was working—the windows it installed or sealed, the wall it built, the house it erected—then the damages sought are merely economic losses stemming from disappointed commercial expectations. They are *contractual* damages for the cost of repair or replacement or to make the property owner whole for the diminution in the property's value. And such damages are not recoverable in a CGL policy. But again, allegations of damage to property other than the project itself, requiring more than mere repair or replacement, constitute "proper damage" under the CGL policy.

¶ 66 IV

¶ 67 As mentioned at the outset and as shown above, there is considerable overlap between the analyses of the definition of "occurrence" and that of "property damage," at least with

regard to the standard definitions of those terms found in the CGL policies in those cases, which are the same or substantively identical to the ones in our case. While it may seem curious that essentially the same analysis underlies the definitions of two very different phrases—"occurrence" and "property damage"—the case law has been, if nothing else, consistent in this analysis. Whatever we may think of the merging of these analyses, we are not inclined to swim against a tidal wave of decisions on this subject, only some of which we have cited in this opinion. The case law is too settled and consistent to depart from it.

¶ 68 But we would be remiss not to add one caveat, which should be obvious: Not all insurance contracts are the same, and presumably not all CGL policies are, either. However helpful general discussions about the purposes of CGL policies may be, the language of the insurance policy should always be the primary focus when construing an insurance policy. The words the parties choose are the words that bind them, and the words a court should interpret and enforce. A future CGL policy might have very different language that might compel different interpretations and maybe different outcomes.

¶ 69 Here, however, the cases we have cited above all considered definitions of "occurrence" and "property damage" in CGL policies that are identical to, or so nearly so as to be indistinguishable from, the definitions in the Policy here. So we will follow the abundant case law that has developed regarding these definitions, with the caveat that no court should blindly adhere to this precedent without first comparing the relevant language in an insurance policy with the ones in the cases we have cited, including this opinion.

¶ 70 V

¶ 71 We now analyze the allegations in the Underlying Complaint to determine whether they allege "property damage" that was caused by an "occurrence."

***10** ¶ 72 A brief reminder of the Underlying Complaint's allegations, which AIG brought as subrogee of the property owner: The owner of the 1907, 1909, and 1911 Properties hired Metropolitan "as general contractor for renovation, demolition, construction, and/or other related activities," the point being the conversion of (some or all of) the existing structures on the Property into single-family dwellings. In the course of conducting construction activities, Metropolitan built a new wooden framing building and removed portions of the stairway inside the 1907 Property. Metropolitan's defective construction work resulted in altering the structural integrity and lower level supports of both the 1907 and 1909 Properties, causing their collapse. As a result, all three of the buildings on the Properties were demolished by the City, which deemed them unsafe.

¶ 73 AIG has paid the property owner "a sum of over $1,802,479.88 for damage to the real property, repairs, demolition, construction, and other associated expenses arising from the [collapse of the buildings]."

¶ 74 The Underlying Complaint, among other things, raises several theories of recovery sounding in tort. In each of those counts, the Underlying Complaint alleges two different kinds of damages suffered by the property owner: "losses including, but not limited to, damage to both [the property owner's] real and personal property."

[19] ¶ 75 We readily agree with Lloyd's that the damage to the real property is not covered by the CGL policy. Metropolitan was the general contractor on the job, with overall responsibility for the renovation and conversion of the Properties' existing structures into single-family housing. Instead of rehabbing and converting them, Metropolitan's allegedly faulty workmanship led to their collapse and ultimate demolition. Thus, the collapse of the structures was not an "accident" or "occurrence" but was, instead, the natural and ordinary result of faulty workmanship on the contractor's work product. See, *e.g.*, *Viking Construction*, 358 Ill. App. 3d at 42, 294 Ill.Dec. 478, 831 N.E.2d 1; *Stoneridge*, 382 Ill. App. 3d at 753, 321 Ill.Dec. 114, 888 N.E.2d 633; *Hydra Corp.*, 245 Ill. App. 3d at 930, 185 Ill.Dec. 775, 615 N.E.2d 70; *Wil-Freds*, 277 Ill. App. 3d at 705, 214 Ill.Dec. 597, 661 N.E.2d 451.

[20] ¶ 76 For many of the same reasons, the damage to the real property did not constitute "property damage" under the Policy, either. The damages suffered by the property owner (as to the real property) was nothing but economic loss—the cost of repair and replacing the demolished buildings to fulfill the owner's contractual expectations of Metropolitan to build single-family dwellings. See, *e.g.*, *Stoneridge*, 382 Ill. App. 3d at 753, 321 Ill.Dec. 114, 888 N.E.2d 633; *Tillerson*, 334 Ill. App. 3d at 410, 268 Ill.Dec. 63, 777 N.E.2d 986; *Viking Construction*, 358 Ill. App. 3d at 55-56, 294 Ill.Dec. 478, 831 N.E.2d 1.

¶ 77 Metropolitan argues that the Underlying Complaint alleged damage to parts of the Property on which Metropolitan was not working. So it did, but that does not change our conclusion. The Properties were under the responsibility of Metropolitan, as general contractor, to convert the structures into single-family homes. Even if the damage extended to parts of the project on which Metropolitan was not currently working, it was still part of Metropolitan's scope and responsibility, and thus was part of the project itself. See *Wil-Freds*, 277 Ill. App. 3d at 705, 214 Ill.Dec. 597, 661 N.E.2d 451.

[21] ¶ 78 We reach a different conclusion, however, with regard to the second claim of damages alleged in the Underlying Complaint—the claim of damage to the property owner's "personal property." As we have explained, when a construction defect results in " 'damage to something other than the project itself,' " the damages are deemed to have been the result of an "accident" and thus an "occurrence" under the CGL policy. *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 29, —— Ill.Dec. ——, —— N.E.3d —— (quoting *J.P. Larsen*, 2011 IL App (1st) 101316, ¶ 27, 353 Ill.Dec. 662, 956 N.E.2d 524); see also *Richard Marker*, 289 Ill. App. 3d at 823, 224 Ill.Dec. 801, 682 N.E.2d 362; *Bazzi Construction*, 815 F.2d at 1148-49; *Wil-Freds*, 277 Ill. App. 3d at 705, 214 Ill.Dec. 597, 661 N.E.2d 451.

***11** ¶ 79 The damage alleged to the property owner's personal property is, quite obviously, damage to something other than the project itself. To be sure, the Underlying Complaint gives no description whatsoever of what "personal property" of the owner was damaged—furniture, computers, appliances, keepsakes, etc. We don't know anything about these buildings on the Property before Metropolitan began renovation—whether they were office buildings, personal residences of some sort, or what have you. We have no clue whatsoever about this alleged damage to the owner's personal property.

¶ 80 It is the unspecified nature of that personal property, in fact, that leads Lloyd's to argue that no damage to personal property has been alleged whatsoever. Lloyd's says that this "free-standing reference" to personal property, without any reference to the type or nature of the personal property, is insufficient.

¶ 81 We disagree for two reasons. The first is that, while we may not know much about this personal property, we do know to whom it belonged—the property owner. That, in itself, distinguishes this case from *Westfield Insurance Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 20, 406 Ill.Dec. 99, 59 N.E.3d 877, cited by Lloyd's, where the "personal property" alleged to be damaged was not the building owner's, leaving the majority to question how the building owner even had the right to sue for such damages. Here, in contrast, the property owner unquestionably has the right to sue for injury to its own personal property.

¶ 82 More to the point, we have specifically rejected the notion that the alleged damage to "personal property" must be specifically identified in the underlying complaint to trigger coverage for an "occurrence." See *J.P. Larsen*, 2011 IL App (1st) 101316, ¶ 20, 353 Ill.Dec. 662, 956 N.E.2d 524 ("Although the damages to the common elements, individual units and personal property were not expressly described, we must construe the pleadings liberally to allow for coverage, or, at least, the potential for coverage."). Recall that, in considering whether an insurer has a duty to defend, we read the underlying complaint and the insurance policy in favor of coverage "unless it is clear from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." (Emphasis omitted.) *Wilkin*, 144 Ill. 2d at 73, 161 Ill.Dec. 280, 578 N.E.2d 926. It is certainly *not* "clear" from the Underlying Complaint that the allegation of damage to the owner's personal property falls outside the definition of "occurrence."

¶ 83 Lloyd's also argues that the Underlying Complaint could not be alleging damage to the owner's personal property because it doesn't allege that AIG *paid* the owner for any damage to personal property, and as the subrogee stepping into the shoes of the owner, AIG can only recover from the contractor the money that it paid out in claims to the owner. Simply put, if AIG didn't pay the owner any money in claims for damage to personal property, then it can't seek damages in the Underlying Complaint for damage to the owner's personal property.

¶ 84 Again, we agree that the Underlying Complaint is somewhat vague on this point, but it is sufficient under the lenient standard we must apply. It is not "clear from the face of the underlying complaint" (*id.*) that AIG did *not* cover claims of damage to the owner's personal property. For one thing, we have no idea what AIG's policy with the owner did or did not cover; the policy was not attached to the Underlying Complaint. One would think that a policy insuring an owner's home or building would include some

provision for the contents, too—the personal property within the structure. But the fact remains that we don't know, and if we were to assume (somewhat against reason) that AIG's policy did *not* cover personal property, we would not be interpreting the Underlying Complaint liberally in favor of coverage; we would be doing the precise opposite.

***12** ¶ 85 And the relevant allegations in the Underlying Complaint, at a minimum, do not foreclose the possibility that AIG paid the owner for damage to personal property. In the provision cited by Lloyd's, AIG alleged that it has paid the owner "a sum of over $1,802,479.88 for damage to the real property, repairs, demolition, construction, *and other associated expenses*" arising from the collapse of the buildings. It does not explain what "other associated expenses" means. We see no reason why that could not include payment for damage to the owner's personal property. Maybe the amount of personal property damage, compared to the massive cost of rebuilding three structures from scratch, was minor enough to warrant only a mention in wrap-up language like "other associated expenses." A liberal reading surely would not *exclude* that possibility.

¶ 86 And each count of the Underlying Complaint specifically alleges damage to the owner's personal, as well as real, property. One might ask why AIG would seek damages for the owner's personal property loss if AIG was not prepared to prove (as it would be required to do) that it first paid out money on personal-property claims. Unless we were to assume that AIG was filing a frivolous pleading, then, we would assume that AIG is seeking damages for the owner's personal property because it *paid out* on those claims to the owner. And at this stage, under this lenient standard, we are not permitted to inquire into whether the underlying allegations are frivolous. See *id.* (duty to defend arises "even if the allegations are groundless, false, or fraudulent.").

[22] ¶ 87 Thus, however vague they may be, the Underlying Complaint's allegations at least potentially satisfy the Policy's definition of "occurrence."

¶ 88 And because the damage to the owner's personal property is beyond a mere contractual-damages claim for repair or replacement of the contractor's work product, it likewise constitutes "property damage" under the Policy. See, *e.g.*, *Bazzi Construction*, 815 F.2d at 1148-49; *Acuity Insurance*, 2019 IL App (1st) 180743, ¶ 29, —— Ill.Dec. ——, —— N.E.3d ——.

¶ 89 In sum, these admittedly vague references to damage to the property owner's "personal property" are enough to allege "property damage" caused by an "occurrence" under the Policy. The allegations are enough to trigger the insurer's duty to defend.

[23] ¶ 90 If the insured is entitled to a defense of any portion of an underlying complaint, the insured is entitled to a defense of that entire lawsuit. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 453 n.2, 341 Ill.Dec. 497, 930 N.E.2d 1011 (2010) ("if [the insurer] has a duty to defend as to at least one count of the lawsuit, it has a duty to defend in all counts of that lawsuit"); *Wilkin*, 144 Ill. 2d at 73, 161 Ill.Dec. 280, 578 N.E.2d 926 ("if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy"). So even though the vast majority of the damages alleged in the Underlying Complaint appear to relate to non-covered damages to the real property and the project itself, the allegations of damage to the owner's "personal property" triggers the insurer's duty to defend the entire action. And for that same reason, we need not consider the contract claims in the Underlying Complaint, for the tort claims alone are sufficient to trigger the duty to defend.

¶ 91 We express no opinion on any duty on the part of Lloyd's to indemnify Metropolitan. That question is not before us. We hold only that the Underlying Complaint alleges sufficient facts to require Lloyd's to defend Metropolitan. The trial court thus erred in granting summary judgment in favor of Lloyd's.

¶ 92 CONCLUSION

¶ 93 The judgment of the trial court is reversed. The cause is remanded for further proceedings consistent with this opinion. The cross-appeal is dismissed.

***13** ¶ 94 Reversed and remanded; cross-appeal dismissed.

Justices McBride and Cobbs concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2019 IL App (1st) 190517, 2019 WL 6893267

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Superseded by Statute as Stated in Cherrington v. Erie Ins. Property and Cas. Co., W.Va., June 18, 2013

366 S.C. 117
Supreme Court of South Carolina.

L–J, INC. and Eagle Creek Construction Co., Inc., Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group, Plaintiffs,
Of Whom Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group, are, Respondents,
v.
BITUMINOUS FIRE AND MARINE INSURANCE COMPANY, Petitioner.

No. 25854.
|
Heard April 21, 2004.
|
Decided Aug. 9, 2004.
|
Reheard April 19, 2005.
|
Refiled Sept. 26, 2005.
|
Rehearing Denied Nov. 10, 2005.

Synopsis

Background: Insured and three commercial general liability (CGL) insurers brought declaratory judgment action against fourth insurer for indemnification and contribution for all defense costs and settlement payments arising from negligence and breach of contract claims against insured for faulty road construction. The Circuit Court, Charleston County, Thomas J. Wills, Special Master, ordered insurer to indemnify insured and awarded other insurers a proportionate contribution from insurer. Insurer appealed. The Court of Appeals, 350 S.C. 549, 567 S.E.2d 489, affirmed. Certiorari was granted.

[Holding:] On rehearing, the Supreme Court, Toal, C.J., held that, as a matter of first impression, premature deterioration of roads as result of contractor's faulty workmanship was not caused by an "occurrence."

Reversed.

West Headnotes (2)

[1] Appeal and Error
Character and Amount of Evidence in General

Appeal and Error
Total failure of proof

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3444 Character and Amount of Evidence in General
30k3445 In general
(Formerly 30k842(1))
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3485 Absence of Evidence
30k3488 Total failure of proof
(Formerly 30k1010.2)

In an action at law, the findings of fact will not be disturbed unless there is no evidence to reasonably support the trial judge's conclusions.

7 Cases that cite this headnote

[2] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Premature deterioration of subdivision roads as result of contractor's faulty workmanship was not caused by an "occurrence" within the meaning of contractor's commercial general liability (CGL) insurance policy; the workmanship caused damage to the roadway system only, and the alleged negligence included failure to prepare the subgrade by removing tree stumps and removing or compacting the wet clay in the subgrade, an

improperly designed drainage system, a thin road course ill-prepared to handle heavy-wheel loads, and an improperly designed curb-edge detail.

52 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

Chief Justice TOAL:

***119** Bituminous Fire and Marine Insurance Company (Bituminous) brought the underlying declaratory judgment action seeking a determination as to whether a commercial general liability (CGL) policy issued to L–J, Inc. (Contractor) covered damage caused by the faulty workmanship of Contractor and its subcontractors on a road construction project. We granted certiorari to review the court of appeals' decision, which held that damage to the roadway constituted an "occurrence" and policy exclusions did not apply. *L–J, Inc. v. Bituminous Fire & Marine Ins. Co.,* 350 S.C. 549, 567 S.E.2d 489 (Ct.App.2002). We withdraw our prior opinion on this matter and substitute it with this opinion. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In 1989, Dunes West Joint Venture (Developer) hired Contractor to perform site-development work and build roads for the Dunes West subdivision. Contractor, in turn, hired subcontractors to perform most of the work. In 1990, the project was completed, and by 1994, the roads had deteriorated. Because of the deterioration of the roads, Developer brought the underlying action against Contractor for breach of contract, breach of warranty, and negligence.

In 1997, the underlying lawsuit settled for $750,000. After settlement, Contractor sought indemnification from Bituminous and the three other insurers (Respondents). [1] Respondents contributed $362,500 to the settlement amount, but Bituminous refused to indemnify Contractor. [2]

1 Other providers included Transcontinental Insurance Company, The Home Indemnity Company, and The Maryland Commercial Insurance Group.

2 From 1989 to 1996, Contractor was insured under various policies. Bituminous issued Contractor a CGL policy covering the period from 1990 to 1992.

***120** Consequently, Respondents brought a declaratory judgment action against Bituminous seeking contribution and indemnification for all defense costs. The circuit court referred the action to a special master, who found that the damage to the roadway system was covered under the Bituminous CGL policy. More specifically, the special master found that the damage constituted an "occurrence," and the

"expected or intended" and "your work" exclusions did not apply to work performed by subcontractors. Finally, the special master found that the CGL "policy years" ran from 1989 to 1996, and because Bituminous's policy covered the two-year period from 1990 to 1992, Bituminous owed the other carriers a two-year contribution valued at $103,571.42.

Bituminous appealed and the court of appeals affirmed, finding that the property damage constituted an "occurrence" and that the policy exclusions did not apply. *L–J, Inc. v. Bituminous Fire & Marine Ins. Co.,* 350 S.C. 549, 567 S.E.2d 489 (Ct.App.2002). After granting certiorari, we reversed, holding that the CGL policy did not cover damage caused by faulty workmanship. *L–J, Inc. v. Bituminous Fire and Marine Ins. Co.,* Op. No. 25854, 2002 WL 1159680 (S.C. Sup.Ct. filed August 9, 2004) (Shearouse Adv. Sh. No. 31 at 55).

On rehearing, we now consider the following issues for review:

I. Did the court of appeals err in finding that the road deterioration constituted an "occurrence" as defined by the CGL insurance policy?

II. Did the court of appeals err in finding that the road deterioration was, from ****35** the Contractor's perspective, neither expected nor intended?

III. Did the court of appeals err in finding that the "your work" exclusion restored coverage?

STANDARD OF REVIEW

[1] Because this is an action at law, the findings of fact will not be disturbed unless there is no evidence to reasonably support the trial judge's conclusions. *Townes Assoc. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

*121 LAW/ANALYSIS

I. "Occurrence"

[2] Bituminous asserts that the court of appeals erred in finding that the road deterioration constituted an "occurrence" under the CGL policy. We agree.

The issue of whether property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence is a question of first impression in South Carolina. A majority of other jurisdictions deciding this issue have held that faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy. *See, e.g., Pursell Constr., Inc. v. Hawkeye–Security Ins. Co.,* 596 N.W.2d 67, 71 (Iowa 1999); *Amerisure, Inc. v. Wurster Constr. Co., Inc.,* 818 N.E.2d 998, 1004 (Ind.Ct.App.2004) (holding that faulty workmanship is not an accident and therefore not an occurrence); *Heile v. Herrmann,* 136 Ohio App.3d 351, 736 N.E.2d 566, 568 (1999) (holding that faulty workmanship does not constitute an occurrence when the damage is to the work product only); *Monticello Ins. Co. v. Wilfred's Constr.,* 277 Ill.App.3d 697, 214 Ill.Dec. 597, 661 N.E.2d 451, 456 (1996) (finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects). [3]

3 In addition to the authority cited, Florida, Illinois, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, and North Carolina have reported cases which hold that a CGL does not provide coverage for faulty workmanship where the property damage is to the work product only. Several different approaches are used in analyzing the issue, but a majority of the states reach the same conclusion—a CGL policy does not cover faulty workmanship. However, there are several jurisdictions, including Minnesota, New Hampshire, and Wisconsin, that have found CGL policies to be ambiguous and construed the ambiguity against the drafter. *See e.g., Wanzek Constr., Inc. v. Employers Ins. of Wausau,* 679 N.W.2d 322, 329 (Minn.2004) (holding the term subcontractor to be ambiguous and construing the ambiguity in favor of coverage).

Although our courts have not addressed the specific issue of whether faulty workmanship constitutes an occurrence, we have addressed the issue of whether CGL policies are intended to cover faulty workmanship. For example, this Court has held that a CGL policy is not intended to cover economic loss ***122** resulting from faulty workmanship. *Century Indem. Co. v. Golden Hills Builders, Inc.,* 348 S.C. 559, 563–64, 561 S.E.2d 355, 357 (2002). Moreover, our court of appeals has held that any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy. *Isle of Palms Pest Control Co. v. Monticello Ins. Co.,* 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct.App.1994); *see also*

C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, 281 S.C. 593, 596–97, 316 S.E.2d 709, 711 (Ct.App.1984) (holding that faulty workmanship is a business risk that is not intended to be covered by a CGL policy).

In the present case, Bituminous's CGL policy, subject to certain exclusions, provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies....
>
> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Four years after Contractor completed construction of the Dunes West road system, ****36** the roads began to deteriorate, showing many signs of "alligator cracking," a form of cracking in asphalt that looks like alligator skin. Two expert witnesses testified in deposition as to the cause of the damage. The first deponent, Kenneth Humphries, testified that approximately 50% of the cracking was caused by insufficient road subgrade preparation, which was caused by Contractor's failure to properly (1) remove tree stumps from the subgrade and (2) compact the soft, wet clay in the subgrade. Humphries also opined that the cracking was caused by insufficiently thick road course, improper drainage, and excessive traffic. The second deponent, L.G. Lewis, testified that the primary cause of the cracking was improper drainage. Other causes, according to Lewis, included an inadequate "edge of curb detail and ***123** the increased frequency of heavy wheel loads on the pavement."

Although the alligator cracking may have constituted property damage, we find that an "occurrence," as defined under the CGL policy did not take place. According to the deposition testimony outlined above, the only "occurrences" were various negligent acts by Contractor during road design, preparation, and construction, which led to the premature deterioration of the roads. Those negligent acts included: (1) failure to prepare the subgrade by deciding not to remove the tree stumps and by failing to remove or compact the wet clay in the subgrade; (2) improperly designed drainage system; (3) ill-prepared, thin road course that could not handle heavy-wheel loads; and (4) improperly designed curb-edge detail.

We find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.[4] We find the analysis used by the New Hampshire Supreme Court helpful in distinguishing between a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party. *High Country Assocs. v. New Hampshire Ins. Co.,* 139 N.H. 39, 648 A.2d 474 (1994). In *High Country Assocs.,* the court held that a CGL provided coverage for property damage caused by continuous exposure to moisture when the complaint alleged negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself. *Id.* at 477. The complaint in *High Country Assocs.* alleged:

> [a]ctual damage to the buildings caused by exposure to water seeping into the walls that resulted from the negligent construction methods of High Country Associates. The damages claimed are for the water-damaged walls, not the diminution in value or cost of repairing work of inferior ***124** quality. Therefore, the property damage described in the amended writ, caused by continuous exposure to moisture through leaky walls, is not simply a claim for the contractor's defective work.

Id. As a result, the court held that the plaintiffs' alleged negligent construction was the result of an occurrence, rather than an allegation of faulty or defective work. *Id.* at 478.

In the present case, the complaint did not allege property damage beyond the improper performance of the task itself. The complaint alleged breach of contract, breach of warranty, and negligence. However, each of the claims repeated verbatim the same allegation—faulty workmanship in completing the project. As a result, the insurance policy will not stand to cover liability for the Contractor's contract

4 The CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone.*

liability for a claim that was for money damages to compensate for the defective work.

Accordingly, we hold that the damage in the present case did not constitute an "occurrence." If we were to hold otherwise, the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents. *See* ****37** *State Farm Fire & Cas. Co. v. Tillerson,* 334 Ill.App.3d 404, 268 Ill.Dec. 63, 777 N.E.2d 986, 991 (2002) (holding that if courts were to find that CGL policies covered faulty workmanship, courts would effectively transforming CGL policies into performance bonds). A performance bond guarantees that the work will be performed according to the specifications of the contract by providing a surety to stand in the place of the contractor should the contractor be unable to perform as required under the contract. Consequently, our holding today ensures that ultimate liability falls to the one who performed the negligent work—the subcontractor—instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.

CONCLUSION

Based on the reasoning set forth above, we reverse the court of appeals' decision, and hold that the damage to the Dunes West roadway system is not covered under Bituminous's ***125** CGL policy. Therefore, Bituminous is not required to indemnify Contractor. Because we find that the faulty workmanship does not constitute an "occurrence," we do not address Issues II and III to determine whether the policy exclusions apply.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

All Citations

366 S.C. 117, 621 S.E.2d 33

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KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Ohio Northern University v. Charles Construction Services, Inc., Ohio, October 9, 2018

370 Ark. 465
Supreme Court of Arkansas.

ESSEX INSURANCE COMPANY, Plaintiff,
v.
John HOLDER, d/b/a J & H Enterprises, Tom Baumgartner, and Kara Baumgartner, Defendants.

No. 07–803.
|
Sept. 6, 2007.
|
Opinion Answering Certified Question
March 6, 2008.

Request to Certify Question of Law from the United States District Court for the Eastern District.

Opinion

PER CURIAM.

***465** In accordance with § 2(D)(3) of Amendment 80 to the Arkansas Constitution and Rule of the Rules of the Supreme Court and Court of Appeals of the State ***466** of Arkansas, Judge J. Leon Holmes of the United States District Court for the Eastern District of Arkansas has by proper motion and certifying order filed a motion and certifying order with our clerk on. The certifying court requests that our court answer one question of law which may be determinative of a cause now pending in the certifying court, and it appears to the certifying court that there is no controlling precedent in the decisions of the Arkansas Supreme Court. The law in question involves whether defective construction or workmanship (including failure to complete work, delays in construction, or failure to procure qualified subcontractors) constitutes an accident and, therefore, an occurrence within the meaning of commercial general liability insurance policies issued by an insurer to an insuree.

After a review of the certifying court's analysis and explanation of the need for this court to answer the question of law presently pending in that court, we accept certification of the following question: Does defective construction or workmanship, including failure to complete work, delays in construction, or failure to procure qualified subcontractors, constitute an accident and, therefore, an occurrence within the meaning of commercial general liability insurance policies?

This per curiam order constitutes notice of our acceptance of the certification of question of law. For purposes of the pending proceeding in the Supreme Court, the following requirements are imposed:

A. Time limits under Rule 4–4 will be calculated from the date of this *per curiam* order accepting certification. The plaintiff in the underlying action, Essex Insurance Company, is designated the moving party and will be denoted as the "Petitioner," and its brief is due thirty days from the date of this *per curiam;* the defendants, John Holder, d/b/a J & H Enterprises, Tom Baumgartner, and Kara Baumgartner, shall be denoted as the "Respondents," and their brief shall be due thirty days after the filing of Petitioner's brief. Petitioner may file a reply brief within fifteen days after Respondents's brief is filed.

B. The briefs shall comply with this court's rules as in other cases except for the brief's content. Only the following items required in Rule 4–2(a) shall be included:

***467** (3) Point of appeal which shall correspond to the certified question of law to be answered in the federal district court's certification order.

(4) Table of authorities.

(6) Statement of the case which shall correspond to the facts relevant to the certified question of law as stated in the federal district court's certification order.

****457** (7) Argument.

(8) Addendum, if necessary and appropriate.

(9) Cover for briefs.

C. Oral argument will only be permitted if this court concludes that it will be helpful for presentation of the issue.

D. Rule 4–6 with respect to *amicus curiae* briefs will apply.

E. This matter will be processed as any case on appeal.

F. Rule XIV of the Rules Governing Admission to the Bar shall apply to the attorneys for the Petitioner and Respondents.

Request granted.

TOM GLAZE, Associate Justice.

***535** We accepted certification of a single question of Arkansas law submitted by the United States District Court for the Eastern District of Arkansas under Ark. Sup.Ct. R. 6–8, asking this court whether defective construction or workmanship is an "accident" and, therefore, an "occurrence" within the meaning of commercial general liability insurance policies.

Tom and Kara Baumgartner contracted with John Holder's J & H Enterprises to build their new home; however, before construction of the home was completed, the Baumgartners filed suit against Holder in the Pulaski County Circuit Court seeking damages for breach of contract, breach of an express warranty, breach of implied warranties, and negligence. Specifically, the Baumgartners alleged that they suffered damages resulting from Holder's delays, employment of incompetent subcontractors, and defective or incomplete construction. In turn, Holder demanded ***536** that Essex Insurance Company (Essex) defend him in the Baumgartners' action under his commercial general liability (CGL) policies.

Essex responded by filing an action in federal court, seeking a declaratory judgment that it neither owes Holder a duty to defend him in the Baumgartners' lawsuit, nor a duty to pay any judgment the Pulaski County Circuit Court might enter against Holder. Essex asserted that there is no coverage under any of the three CGL policies for the damages alleged by the Baumgartners in state court, and, therefore, Holder is not entitled to a defense or indemnity under those policies. Although the federal district court determined that Arkansas law applies in the declaratory judgment action filed by Essex, it certified this question to the supreme court because we have not decided this specific issue.

Essex issued three separate policies to Holder. In the first policy, 3CM 7680, "occurrence" is defined simply as an "accident." However, the second and third policies, 3CP 6214 and 3CS 3351, added a "Combination Contractor Endorsement" that modified the definition of "occurrence" somewhat and listed several exclusions, stating:

> "Occurrence" means an accident, including the continuous or repeated exposure to substantially the same general harmful conditions; however, the following is not an "occurrence" under this policy:
>
> a. Actual and/or alleged defective work; and/or
>
> b. Actual and/or alleged defective workmanship; and/or
>
> c. Actual and/or alleged defective construction; and/or
>
> d. Actual and/or negligent construction

Although the Baumgartners deny that the Combination Contractor Endorsement operates to exclude coverage of their claims against Holder and state that this is an issue "not presently before this court," they contend that the endorsement and ****458** exclusions "indicate[ ] that Essex at one point considered "occurrence" and "accident" to include 'defective work,' 'defective workmanship,' 'defective construction,' or 'negligent construction.' " The Baumgartners' principal argument on this certified question though, is that the policy term ***537** "accident" is undefined within the CGL policy and is therefore ambiguous and should be interpreted liberally in favor of the insured—Holder.

Arkansas case law is well-developed on the construction of insurance policies. When reviewing insurance policies, this court adheres to the long-standing rule that, where terms of the policy are clear and unambiguous, the policy language controls, and absent statutory strictures to the contrary, exclusionary clauses are generally enforced according to their terms. *Smith v. Shelter Mut. Ins. Co.,* 327 Ark. 208, 937 S.W.2d 180 (1997). It is unnecessary to resort to rules of construction in order to ascertain the meaning of an insurance policy when no ambiguity exists. *Id.* In other words, the terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk which is plainly excluded and for which it was not paid. *Id.*

The fact that a term is not defined in a policy does not necessarily render it ambiguous. *Smith v. Southern Farm Bureau Cas. Ins. Co.,* 353 Ark. 188, 192, 114 S.W.3d 205, 207 (2003). In *Continental Insurance Co. v. Hodges,* 259 Ark. 541, 534 S.W.2d 764 (1976), the court addressed an insurance policy where the term "accident" was not defined in a liability insurance policy, but found that "accident" is usually defined as "an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, and therefore not expected." *Id.* at 542, 534 S.W.2d at 765 (quoting 44 Am. Jur.2d *Insurance* § 1219 (1969)). In *United States Fidelity & Guaranty Co. v. Continental Casualty Co.,* 353 Ark. 834, 120 S.W.3d 556 (2003), we addressed a question of whether a portion of

a judgment against an insured party was covered under a CGL policy, based on language which provided coverage for "an occurrence" leading to "property damage." Although the policy defined "occurrence" as an "accident," the term "accident" was undefined. *Id.* at 844–45, 120 S.W.3d at 562–63. We remanded the issue to the trial court, explaining the following:

> The policy defines an "occurrence" as "an accident." We have defined an "accident" as "an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." [Citation omitted.] Because the policy has defined "occurrence" and because we have defined "accident," we conclude ***538** that the remaining fact question must be resolved in this case before coverage can be determined is whether [ ] workmanship ... constituted an "accident." [Footnote omitted.]

Id. at 845, 120 S.W.3d at 563. Without addressing or deciding the question, the opinion noted that there was a "split in jurisdictions over whether defective workmanship is an accident and therefore an occurrence which is covered under the terms of an insurance policy." *Id.* at 845 n. 4, 120 S.W.3d 556.

Two years after *Continental Casualty Co.,* the federal judge in *Nabholz Construction Corp. v. St. Paul Fire & Marine Insurance Co.,* 354 F.Supp.2d 917 (E.D.Ark.2005) was presented the question of whether a CGL policy provided liability coverage for deficiencies in construction work. The federal court pointed out that while our court in *Continental Casualty* ****459** *Co., supra,* left this specific question unresolved, the federal judge offered his opinion that he believed the Arkansas Supreme Court would likely adopt the majority rule found in other jurisdictions that hold that faulty or defective workmanship is not an accident. *See id.* at 922 (citing *Heile v. Herrmann,* 136 Ohio App.3d 351, 353–54, 736 N.E.2d 566, 567 (1999)). Also, the federal court found our opinion in *Unigard Security Insurance Co. v. Murphy Oil,* 331 Ark. 211, 962 S.W.2d 735 (1998), instructive. There, an Alabama court entered a judgment against Murphy Oil for breach of a lease contract and trespass, and Murphy Oil subsequently sought coverage for the judgment under its general liability policy issued by Unigard. The key question was whether the damage award against Murphy Oil could be considered "sums" that Murphy Oil became legally obligated to pay due to property damage resulting from an "occurrence." *Id.* at 222, 962 S.W.2d at 740. The term "occurrence" in the policies at issue in *Unigard* was defined "as an accidental event." This court denied Murphy Oil's coverage claim, because the basis of the damage award against it resulted not from property damage, but rather from Murphy Oil's failure to perform contractual obligations. *Id.*

Based on the holding in *Unigard,* the federal district court in *Nabholz* stated:

> Similarly, here, the fact that "property damage" occurred does not alone resolve the issue of whether it was caused by an "event" for which the Policy provides coverage. "Event" [footnote omitted] is defined in this Policy to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Arkansas Supreme Court denies " accident" to ***539** be "an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected."

Nabholz, supra, 354 F.Supp.2d at 921 (quoting *Continental Cas. Co., supra,* 353 Ark. at 845, 120 S.W.3d at 563). Applying this court's definition of an "accident" from *Continental Casualty Co.,* the federal district court concluded that the contractor's obligation to repair or replace its subcontractor's defective workmanship could not be deemed unexpected on the part of the contractor, and therefore, failed to constitute an "event" for which coverage existed under the policy. *Id.* at 921–22, 120 S.W.3d 556. The federal court in *Nabholz* was "further persuaded" by the difference between CGL policies and performance bonds. It offered the following explanation:

> The purpose of a CGL policy is to protect an insured from bearing financial responsibility for unexpected and accidental damage to people or property. It is not intended to substitute for a contractor's performance bond, the purpose of which is to insure the contractor against claims for the cost of repair or replacement of faulty work. [Contractor] might have elected to purchase a performance bond to protect it from a known business risk that its subcontractor would not perform its contractual duties. That [the contractor] has no remedy for

> its subcontractor's default under its CGL policy is neither troublesome nor unexpected given the nature of the risk involved.

Id. at 923.

It appears that the majority of states that have considered this issue have held that defective workmanship, standing alone, which results in damages only to the work product itself, is not an accidental ****460** occurrence under a CGL policy.[1] While several jurisdictions have found CGL policies to be ambiguous and construed the ambiguity against the drafter, we find these cases ***540** unpersuasive.[2] Under Arkansas law, the fact that a term is not defined in a policy does not necessarily render it ambiguous, *Smith v. Southern Farm Bureau Casualty Insurance Co., supra,* and here, our case law has consistently defined an "accident" as an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. *See, e.g., Continental Cas. Co., supra,* 353 Ark. at 845, 120 S.W.3d at 563. Faulty workmanship is not an accident; instead, it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work.

1 *See, e.g., Pursell Constr., Inc. v. Hawkeye–Security Ins. Co.,* 596 N.W.2d 67, 71 (Iowa 1999) ("We agree with the majority rule and now join those jurisdictions that hold that defective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence under a CGL policy"); *Amerisure, Inc. v. Wurster Constr. Co., Inc.,* 818 N.E.2d 998, 1004 (Ind.Ct.App.2004) (holding that faulty workmanship is not an accident and therefore not an occurrence); *Heile v. Herrmann,* 136 Ohio App.3d 351, 736 N.E.2d 566, 568 (1999) (holding that faulty workmanship does not constitute an occurrence when the damage is to the work product only); *Monticello Ins. Co. v. Wilfred's Constr.,* 277 Ill.App.3d 697, 214 Ill.Dec. 597, 661 N.E.2d 451, 456 (1996) (finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects); *ACUITY v. Burd & Smith Const., Inc.* 721 N.W.2d 33, 39 (N.D.2006) ("We conclude property damage caused by faulty workmanship is a covered occurrence to the extent the faulty workmanship causes bodily injury or property damage to property other than the insured's work product."); *L–J, Inc. v. Bituminous Fire & Marine Ins. Co.,* 350 S.C. 549, 567 S.E.2d 489, 493 (Ct.App.2002); *Corder v. William W. Smith Excavating Co.* 210 W.Va. 110, 116, 556 S.E.2d 77, 83 (2001) ("Poor workmanship, standing alone, cannot constitute an 'occurrence' under the standard policy definition of this term as an 'accident including continuous or repeated exposure to substantially the same general harmful conditions.' "); *Auto–Owners Ins. Co. v. Home Pride Cos., Inc.,* 268 Neb. 528, 684 N.W.2d 571, 576–79 (2004) (CGL policy does not provide coverage for faulty workmanship that damages only the insured's work product); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.* 589 Pa. 317, 335–36, 908 A.2d 888, 899 (2006) ("We hold that the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship."); *Commerce Ins. Co. v. Betty Caplette Builders, Inc.* 420 Mass. 87, 92–93, 647 N.E.2d 1211, 1213–14 (1995) (no coverage is provided under a CGL for damages suffered by the homeowners in the underlying actions due to faulty construction or workmanship); *McAllister v. Peerless Ins. Co.,* 124 N.H. 676, 474 A.2d 1033, 1036–37 (1984) (claimed damages were for cost of correcting defective landscaping work with no claim that defects had caused damage to property other than the work product).

2 *See, e.g., Lamar Homes, Inc. v. Mid–Continent Cas. Co.,* 242 S.W.3d 1 (Tex.2007).

Accordingly, we hold that defective workmanship standing alone—resulting in damages only to the work product itself—is not an occurrence under a CGL policy such as the one at issue here.

Certified question answered.

All Citations

370 Ark. 465, 372 Ark. 535, 261 S.W.3d 456 (Mem)

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (2010)

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Cherrington v. Erie Ins. Property and Cas. Co., W.Va., June 18, 2013

306 S.W.3d 69
Supreme Court of Kentucky.

CINCINNATI INSURANCE COMPANY, Appellant,
v.
MOTORISTS MUTUAL
INSURANCE COMPANY, Appellee.

No. 2008–SC–000293–DG.
|
March 18, 2010.
|
As Corrected July 19, 2011.

Synopsis

Background: After homeowners brought faulty construction action against homebuilder and its commercial general liability (CGL) insurer, and action was settled with CGL insurer taking an assignment from homeowners and homebuilder for any claims against homebuilder's successor CGL insurer, CGL insurer filed a third-party complaint against successor CGL insurer contending that successor CGL insurer had wrongfully breached its duty to defend and indemnify homebuilder from homeowners' claims. The Circuit Court, Jefferson County, Mary M. Shaw, J., entered summary judgment in favor of successor CGL insurer. CGL insurer appealed. The Court of Appeals, 2008 WL 746689,vacated and remanded. Successor CGL insurer moved for discretionary review.

[Holding:] The Supreme Court, Minton, C.J., held, as a matter of first impression, that faulty construction-related workmanship, standing alone, is not an occurrence under a CGL policy.

Decision of Court of Appeals reversed; judgment of trial court reinstated.

West Headnotes (14)

[1] Appeal and Error

Insurers and insurance

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3771 Trade, Business, and Finance
30k3774 Insurers and insurance
(Formerly 30k893(1))

Proper interpretation of insurance contracts generally is a matter of law to be decided by a court, and thus an appellate court uses a de novo, not a deferential, standard of review.

14 Cases that cite this headnote

[2] Appeal and Error

Deference given to lower court in general

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)13 Summary Judgment
30k3552 Deference given to lower court in general
(Formerly 30k863)

When an appellate court reviews a trial court's decision to grant summary judgment, it must determine whether the trial court correctly found that there were no genuine issues of material fact; as findings of fact are not at issue, the trial court's decision is entitled to no deference.

2 Cases that cite this headnote

[3] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Faulty construction-related workmanship, standing alone, is not an "occurrence" under a commercial general liability (CGL) policy because a failure of workmanship does not involve the fortuity required to constitute an accident.

35 Cases that cite this headnote

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (2010)

[4] Insurance

Plain, ordinary or popular sense of language

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

Terms not defined in insurance policy must be afforded their ordinary meaning, if that meaning is not ambiguous.

7 Cases that cite this headnote

[5] Insurance

Particular words or terms

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1825 Particular words or terms

The term "accident," which was not defined in policy and had also not acquired a technical meaning in the realm of insurance law, had to be accorded its plain meaning.

8 Cases that cite this headnote

[6] Insurance

Construction by parties; course of conduct or prior dealings

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1853 Construction by parties; course of conduct or prior dealings

Insurer's letter declining coverage, in which it wrote that insureds' allegations did not "appear" to have arisen from an occurrence as defined in the policy, did not create an ambiguity; insurer's usage of term "appear" did not override the clear, unambiguous terms contained in the policy itself.

2 Cases that cite this headnote

[7] Insurance

Failure, delay, or inadequacy

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3110 Denial or Disclaimer of Liability on Policy
217k3110(2) Failure, delay, or inadequacy

Insurer's letter declining coverage, in which it wrote that insureds' allegations did not "appear" to have arisen from an occurrence as defined in the policy, did not work as a waiver of insurer's right to contest coverage; despite the curious word choices used in the letter, the upshot of the letter was a denial of coverage by insurer, and insurer had continued to deny coverage in the circuit court, Court of Appeals, and Supreme Court.

1 Cases that cite this headnote

[8] Insurance

Accident, occurrence, or event

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2101 Accident, occurrence, or event

Fortuity, a concept inherent in the plain meaning of "accident" in the insurance law context, consists of two central aspects: intent and control.

14 Cases that cite this headnote

[9] Insurance

Accident, occurrence, or event

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2101 Accident, occurrence, or event

One cannot intend to commit an accident because an accident in the insurance law context is an event that takes place without one's foresight or expectation.

3 Cases that cite this headnote

[10] Insurance

Accident, occurrence, or event

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2101 Accident, occurrence, or event

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (2010)

An "accident" in the insurance law context is something that does not result from a plan, design, or intent on the part of the insured.

5 Cases that cite this headnote

[11] Insurance

Accident, occurrence, or event

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2101 Accident, occurrence, or event

A fortuitous event in the insurance law context is one that is beyond the power of any human being to bring to pass, or is within the control of third persons.

12 Cases that cite this headnote

[12] Insurance

Exclusions and limitations in general

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2098 Exclusions and limitations in general

A court need not consider the applicability of an exclusion if there is no initial grant of coverage under the insurance policy.

5 Cases that cite this headnote

[13] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

An insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage terms of the insurance policy.

3 Cases that cite this headnote

[14] Insurance

Insurer's options in general

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 Insurer's options in general

An insurer need not always defend against a claim it believes falls outside the policy it issued; rather, if an insurer makes a determination that the claim is not covered, it may, among other equally valid choices, elect not to defend.

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Opinion of the Court by Chief Justice MINTON.

I. *INTRODUCTION.*

This case requires us to decide whether a claim of defective construction against a homebuilder is, standing alone, a claim for property damage caused by an "occurrence" under a commercial general liability (CGL) insurance policy. Like the majority of courts that have considered the question, we hold that the answer is no.

II. *FACTUAL AND PROCEDURAL HISTORY.*

Lawrence and Jennifer Mintman contracted with Elite Homes, Inc., for the construction of a residence. Elite substantially completed construction of the Mintmans' home, and the Mintmans moved into it and paid Elite in full.

About five years later, the Mintmans sued Elite; Joseph Pusateri, Elite's President; and Motorists Mutual Insurance Company, which insured Elite under a CGL policy during the period the home was under construction. The thrust of the Mintmans' complaint was that their home was so poorly built that it was beyond repair and needed to be razed and that Motorists had not properly handled the matter once it had been notified of Elite's faulty construction.

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (2010)

Motorists provided a defense for Elite and settled the Mintmans' claims against itself, Elite, and Pusateri. Under the terms of that settlement, the Mintmans and Elite assigned to Motorists all rights and claims they may have had against Cincinnati Insurance Company, which was a successor to Motorists, as Elite's CGL insurer. So Motorists then filed a third-party complaint against Cincinnati.[1] The ***72** gist of that third-party complaint was Motorists' contention that Cincinnati had wrongfully breached its duty to defend and indemnify Elite from the Mintmans' claims.

1 It is unclear from the record what entity, if any, was Elite's insurer from July 1995 (when the policy with Motorists lapsed) until July 1996 (when the policy with Cincinnati began). In any event, no party has argued that the identity (or existence) of that insuring entity is germane to the narrow issues presented in this appeal.

Eventually, Motorists and Cincinnati filed cross-motions for summary judgment with respect to whether Elite's CGL policy with Cincinnati provided coverage for the Mintmans' claims. The trial court granted summary judgment to Cincinnati, holding that "the Mintmans' claims of intangible economic loss are not such as to be an event that qualifies as an 'occurrence' causing 'property damage' under the clear and unambiguous language of [Cincinnati's] CGL policy."

Although it conceded that "Cincinnati's argument is compelling," the Court of Appeals vacated the trial court's grant of summary judgment. Purportedly guided by our recent opinion in *Bituminous Casualty Corporation v. Kenway Contracting, Inc.*,[2] the Court of Appeals concluded that "since [CGL] policies are designed to cover broad risks, Motorists has the better argument. The damage to the Mintmans' house was clearly property damage and was caused by an 'occurrence' since the damage was undoubtedly accidental in the sense that it was not intentional."

2 240 S.W.3d 633 (Ky.2007).

We granted Cincinnati's motion for discretionary review in order to consider, apparently as a matter of first impression in Kentucky, whether faulty construction-related workmanship, standing alone, qualifies as an "occurrence" under a CGL policy. After carefully reviewing the record and applicable law, we conclude that the trial court's conclusion that these claims are not an "occurrence" is correct. For that reason, we reverse the Court of Appeals.

III. *ANALYSIS.*

A. *The Policy Terms.*

The overarching question raised on appeal is whether the Mintmans' claims for faulty construction, which are now being advanced by Motorists, fall within the terms of the policy issued by Cincinnati to Elite. In order to answer that broad question, we must closely examine the relevant policy terms.

Section I(A)1 of the policy provides, in relevant part, as follows:[3]

3 The CGL policy attached as an exhibit to Cincinnati's brief, as well as the policy contained in the record, appears to have been in effect from July 2002 until July 2003. Nevertheless, no party contends that the 2002 policy differs in a material way from the 1996 policy.

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

Section V of the policy defines an *occurrence* as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term *accident* is not defined in the policy. After carefully construing the policy and ***73** the relevant law, however, we conclude that this claim of faulty workmanship is not an "occurrence."[4]

4 Because we conclude that the faulty workmanship at issue does not meet the policy's definition of *occurrence,* we find it unnecessary to address Cincinnati's related argument that Elite's faulty workmanship also does not meet the policy's definition of *property damage.*

B. *The Standard of Review.*

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (2010)

[1] **[2]** It is well settled that the proper interpretation of insurance contracts generally is a matter of law to be decided by a court; and, thus, an appellate court uses a de novo, not a deferential, standard of review.[5] Similarly, when we review a trial court's decision to grant summary judgment, as in this case, we must determine whether the trial court correctly found that there were no genuine issues of material fact; as findings of fact are not at issue, the trial court's decision is entitled to no deference.[6] Since there do not appear to be any genuine issues of material fact in this case, summary judgment was appropriate.

5 *See, e.g., Hugenberg v. West American Ins. Co./Ohio Cas. Group,* 249 S.W.3d 174, 185 (Ky.App.2006) ("Interpretation of insurance contracts is generally a matter of law to be decided by the court. As such, it is subject to de novo review on appeal.") (footnote omitted).

6 *Schmidt v. Leppert,* 214 S.W.3d 309, 311 (Ky.2007) ("When we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact. Since findings of fact are not at issue in this case, the trial court's decision is entitled to no deference.") (footnote omitted).

C. *The Doctrine of Fortuity.*

[3] Although this precise issue of whether faulty construction workmanship may be an "occurrence" under a CGL policy appears to be a matter of first impression in Kentucky, many other courts have already addressed it; and they have come to differing conclusions.[7] After careful analysis, we agree with the Supreme Court of Nebraska's characterization of this as a "difficult question...."[8] The majority viewpoint, however, appears to be that claims of faulty workmanship, standing alone, are not "occurrences" under CGL policies.[9] Because we believe the majority viewpoint is correct, we adopt it.

7 *See, e.g., General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.,* 205 P.3d 529, 534–35 (Colo.Ct.App.2009) (collecting cases).

8 *Auto–Owners Ins. Co. v. Home Pride Companies, Inc.,* 268 Neb. 528, 684 N.W.2d 571, 576 (2004).

9 *General Sec. Indem. Co. of Arizona,* 205 P.3d at 535 ("A majority of those jurisdictions has held that claims of poor workmanship, standing alone, are not occurrences that trigger coverage under CGL policies similar to those at issue here."). Though we do not need unduly to lengthen this opinion by listing their full citations, the Colorado Court of Appeals cited a federal case from the United States Court of Appeals for the Second Circuit, and state courts in Illinois, Iowa, Pennsylvania, and South Carolina, as comprising this majority viewpoint. *Id.*

Additionally, the Supreme Court of Arkansas recently cited additional cases from state courts in Indiana, Ohio, North Dakota, West Virginia, Nebraska, Massachusetts, and New Hampshire as having come to similar conclusions. *See Essex Ins. Co. v. Holder,* 370 Ark. 465, 261 S.W.3d 456, 460 (2008).

[4] **[5]** **[6]** **[7]** Since the term *accident* is not defined in the policy, we must afford it its ordinary meaning, if that meaning is not ambiguous.[10] We do not find the terms "accident" or "occurrence" to be ambiguous, ***74** [11] at least under these facts.[12] Thus, since the term "accident" has also not acquired a technical meaning in the realm of insurance law, we must accord the term "accident" its plain meaning.[13]

10 *Bituminous Cas. Corp.,* 240 S.W.3d at 638.

11 *Amerisure, Inc. v. Wurster Const. Co., Inc.,* 818 N.E.2d 998, 1002 (Ind.Ct.App.2002) ("an insurance contract is not regarded as ambiguous simply because controversy exists, and the parties have asserted contrary interpretations of the language of the contract.").

12 We also reject Motorists' seeming contention that an ambiguity was created by Cincinnati's letter to Elite declining coverage. In that letter, Cincinnati wrote that the Mintmans' allegations do not "appear to have arisen from an occurrence as defined in the policy." Motorists' argument is based upon semantic wordplay involving the word "appear." Cincinnati has clearly taken the position all along that it believed the Mintmans' claims fell outside the policy it issued to Elite. Moreover, although its usage of the less than definitive word *appear* in the letter declining coverage is somewhat curious, Cincinnati's usage of that term does not override the clear, unambiguous terms contained in the policy itself. In other words, the terms of the policy are controlling.

Similarly, we reject Motorists' argument that the letter declining coverage works as a waiver of Cincinnati's right to contest coverage. To the contrary, it is clear that despite the curious word choices used in the letter,

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (2010)

the upshot of the very letter referenced by Motorists is a denial of coverage by Cincinnati. Moreover, Cincinnati has continued to deny coverage in the circuit court, Court of Appeals, and this Court.

13 *Fryman for Fryman v. Pilot Life Ins. Co.,* 704 S.W.2d 205, 206 (Ky.1986) ("The words 'accident', 'accidental', and 'accidental means', as used in insurance policies, have never acquired a technical meaning in law, and must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured.").

[8] Inherent in the plain meaning of "accident" is the doctrine of fortuity. Indeed, "[t]he fortuity principle is central to the notion of what constitutes insurance...." [14] Although we have used the term "fortuity" in the past, we have not fully explored its breadth and scope. In short, fortuity consists of two central aspects: intent, which we have discussed in earlier opinions, and control, which we have not previously discussed.

14 46 C.J.S. *Insurance* § 1235 (2009). *See also* 16 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d* § 116.1B (2000) ("Fortuity is perhaps the most fundamental principle of insurance and insurance law.... The fortuity principle is central to understanding what constitutes insurance.").

We recently recognized that the concept of fortuity is "inherent in all liability policies[,]" and explained that a loss was fortuitous if it was "not intended...." [15] And we were correct in so doing because the issue of intent is one important aspect of the fortuity doctrine. As a leading insurance treatise notes, "[t]ortuity primarily concerns intent." [16] So "a loss or harm is not fortuitous if the loss or harm is caused intentionally by [the insured]." [17]

15 *Aetna Cas. & Sur. Co. v. Commonwealth,* 179 S.W.3d 830, 836 (Ky.2005) ("we state first that we agree with ANI and the Court of Appeals that the requirement that loss be fortuitous, *i.e.* not intended, is a concept inherent in all liability policies.").

16 16 *Holmes' Appleman on Insurance* at § 116.1B.

17 *Id.*

As Motorists asserts, it is highly unlikely that Elite subjectively intended to build a substandard house for the Mintmans. After all, as the Supreme Court of Pennsylvania observed, "the situation is rare indeed in which a contractor intends that the work product suffer injury." [18] So ***75** adoption of Motorists' viewpoint would mean that insurance policies would become performance bonds or guarantees because any claim of poor workmanship would fall within the policy's definition of an accidental occurrence so long as there was not proof that the policyholder intentionally engaged in faulty workmanship. This is a point made by other courts. [19] Instead, we agree with the Supreme Court of South Carolina that refusing to find that faulty workmanship, standing alone, constitutes an "occurrence" under a CGL policy "ensures that ultimate liability falls to the one who performed the negligent work ... instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract." [20]

18 *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 589 Pa. 317, 908 A.2d 888, 899 n. 9 (2006).

19 *See, e.g., id.* at 899 ("We hold that the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident' or its common judicial construction in this context. To hold otherwise would be to convert a policy for insurance into a performance bond. We are unwilling to do so, especially since such protections are already readily available for the protection of contractors.") (footnote omitted); *Nabholz Const. Corp. v. St. Paul Fire and Marine Ins. Co.,* 354 F.Supp.2d 917, 922 (E.D.Ark.2005) ("The Court is further persuaded by the distinctions between CGL policies and performance bonds. The purpose of a CGL policy is to protect an insured from bearing financial responsibility for unexpected and accidental damage to people or property. It is not intended to substitute for a contractor's performance bond, the purpose of which is to insure the contractor against claims for the cost of repair or replacement of faulty work. [Contractor] might have elected to purchase a performance bond to protect it from the known business risk that its subcontractor would not perform its contractual duties. That [contractor] has no remedy for its subcontractor's default under its CGL Policy is neither troublesome nor unexpected given the nature of the risks involved."); *Cincinnati Insurance Companies v. Collier Landholdings, LLC,* 614 F.Supp.2d 960, 966 (W.D.Ark.2009) ("The performance

bond is the proper instrument for protection against financial loss arising from the repair and remediation of defective construction. It protects the general contractor to the extent of his or her work, irrespective of whether subcontractors performed certain aspects of that work. In other words, a general contractor cannot segment his or her work into that performed by various subcontractors, some of which is defective and some of which is not, in order to create an occurrence.") (citations and quotation marks omitted); *United States Fidelity & Guaranty Corp. v. Advance Roofing & Supply Co., Inc.,* 163 Ariz. 476, 788 P.2d 1227, 1233 (Ariz.Ct.App.1989) ("Nevertheless, we recognize that there are some authorities that appear to conclude that the mere showing of faulty work is sufficient to bring a claim for resulting damages (of whatever nature) within policy coverage. In our opinion these authorities disregard the fundamental nature of a comprehensive general liability policy of the type involved in this litigation, and ignore the policy requirement that an occurrence be an accident. If the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured's performance of the contract, and the policy takes on the attributes of a performance bond. We find these authorities unpersuasive.") (citations omitted).

20 *L–J, Inc. v. Bituminous Fire and Marine Ins. Co.,* 366 S.C. 117, 621 S.E.2d 33, 37 (2005).

Motorists' viewpoint reflects the minority viewpoint of other courts who have considered this issue. [21] And we agree with ***76** the Supreme Court of Pennsylvania that Motorists' position "is an overly broad interpretation of accident" that fails to take into account the full nature of the concept of fortuity. [22] In other words, although we may have done so in factually distinguishable cases in the past, we rightly should not end our analysis in this case by merely concluding that coverage exists simply because it is virtually certain that Elite would not have intentionally built a shoddy home for the Mintmans.

21 *See General Sec. Indem. Co. of Arizona,* 205 P.3d at 535 ("a minority of jurisdictions has held that the damage resulting from faulty workmanship is an accident, and thus, a covered occurrence, so long as the insured did not intend the resulting damage."). The Colorado Court of Appeals cited a case from the United States District Court for the District of Utah, as well as state courts in Florida, Kansas, Tennessee, Texas, and Wisconsin, as being members of this minority. *Id.*

22 *Kvaerner Metals Div. of Kvaerner U.S., Inc.,* 908 A.2d at 899 n. 9 ("While the majority of Courts have held that coverage under a CGL policy is not triggered by poor workmanship which causes injury to the work product itself, a minority of jurisdictions have held that faulty or negligent workmanship constitutes an accident so long as the insured did not intend for the damage to occur. We believe that this is an overly broad interpretation of accident, as the situation is rare indeed in which a contractor intends that the work product suffer injury. Because we believe that CGL policies are not the proper means to protect against such risks, we concur with the majority of Courts and decline to apply coverage in such cases.") (citations omitted).

[9] **[10]** **[11]** For an event to be truly fortuitous, it must, of course, be accidental because the policy only covers occurrences that are accidents. Of course, one cannot intend to commit an accident because an accident is "an event that takes place without one's foresight or expectation...." [23] Or, as our late colleague William E. McAnulty, Jr., wrote as a judge of the Kentucky Court of Appeals, an accident in the insurance law context is "something that does not result from a plan, design, or ... intent on the part of the insured." [24] So focusing solely upon whether Elite intended to build a faulty house is insufficient. Rather, a court must also focus upon whether the building of the Mintmans' house was a " 'chance event' beyond the control of the insured [Elite]." [25] Or, in other words, a court must bear in mind that a fortuitous event is one that is "beyond the power of any human being to bring ... to pass, [or is] ... within the control of third persons...." [26] It is abundantly clear, therefore, that the issue of control is encompassed in the fortuity doctrine.

23 *Essex Ins. Co.,* 261 S.W.3d at 460.

24 *Stone v. Kentucky Farm Bureau Mut. Ins. Co.,* 34 S.W.3d 809, 812 (Ky.App.2000).

25 16 *Holmes' Appleman on Insurance* 2d at § 116.1B.

26 46 C.J.S. *Insurance* at § 1235.

Clearly, Elite had control over the construction of the Mintmans' home, either directly or through the subcontractors it chose. One cannot logically say, therefore, that the allegedly substandard construction of the Mintmans' home by Elite was a fortuitous, truly accidental, event. This leads to the inevitable conclusion that the faulty workmanship claim at issue is not covered by the CGL policy Elite purchased from Motorists because the faulty workmanship was not

an accidental occurrence. As stated before, this conclusion is in accordance with decisions of numerous other courts comprising the majority viewpoint. Simply put, "[f]aulty workmanship is not an accident...." [27]

27 *Essex Ins. Co.,* 261 S.W.3d at 460.

D. *Precedent Does Not Compel a Different Conclusion.*

1. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*

We reject any contention that *Bituminous Cas. Corp.* compels a different result. *Bituminous Cas. Corp.,* greatly relied upon by both the Court of Appeals and Motorists, did involve, like the case at ***77** hand, a CGL policy dispute over whether a contractor's actions constituted an "occurrence." But the contractor's action in *Bituminous Cas. Corp.* is readily factually distinguishable from the case at hand because that case was not a faulty construction case.

The contractor in *Bituminous Cas. Corp.* improperly demolished over half of a residential structure. [28] We held that the contractor's improper destructive act was an "occurrence" under the CGL policy because the damage to the property was "not the plan, design, or intent of the insured." [29] Given that conclusion, we did not address the control aspect of the fortuity doctrine. *Bituminous Cas. Corp.* does not compel a conclusion that Elite's allegedly substandard construction of the Mintmans' home in the case at hand is an "occurrence" because the quick destruction of a residence is manifestly a completely different undertaking than the protracted improper construction of a residence. The home construction in the case at hand occurred over a period of weeks; the mistaken destruction of a carport in *Bituminous Cas. Corp.* occurred in a short flurry of activity on only one day. Because of this inescapable, material factual difference, *Bituminous Cas. Corp.* is not controlling on the narrow issue presented in this case: whether a claim of faulty construction may qualify as an "occurrence" under a standard CGL policy.

28 240 S.W.3d at 636.

29 *Id.* at 639.

2. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*

Likewise, we do not believe our nearly two-decade old decision in *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.* [30] compels us to affirm the Court of Appeals. Again, that case is markedly factually distinguishable from the case at hand.

30 814 S.W.2d 273 (Ky.1991).

James Graham Brown Foundation, Inc. involved a question of whether a CGL policy purchased for a wood treatment facility provided coverage for a federally mandated environmental cleanup. We held that the trial court erred by finding on summary judgment that there was no "occurrence" under the CGL policy. [31] In the course of explaining our decision, we made some expansive statements about CGL policies. Specifically, we opined that the term "occurrence" is to be "broadly and liberally construed" and that a CGL policy's very nature "suggests" an "expectation of maximum coverage." [32] Furthermore, we held that "if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable." [33]

31 *Id.* at 281.

32 *Id.* at 278.

33 *Id.*

Perhaps some of our language in *James Graham Brown Foundation, Inc.* could lead to the conclusion reached by the Court of Appeals. But a close examination of the different definition of *occurrence* in that case and this one reveals that our decision in *James Graham Brown Foundation, Inc.* does not compel affirming the Court of Appeals in this case.

[12] The CGL policies *in James Graham Brown Foundation, Inc.* defined *occurrence* as "[a]n accident, including continuous or repeated exposure to conditions, which result in bodily injury or property ***78** damage, *neither expected nor intended from the standpoint of the insured.*" [34] The language referencing the expectations and intentions of the insured led us to adopt a broad, subjective standard of policy construction. The policy at hand, however, in accordance with modern CGL policies, completely omits from the definition of *occurrence* any language referencing the expectations or intent of the insured. [35]

34 *Id.* at 275 (emphasis added).

35 9A *Couch on Insurance* § 129:3 (2009) ("As initially drafted in 1966, the occurrence definition essentially contained the language of what is now commonly known as the intentional acts exclusion. The original definition stated that an occurrence was 'an accident, including injurious conditions which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.' While this exclusionary language was eventually separated from the occurrence definition and was included as a separate exclusion within the policy, the inclusion of this language in the definition of an occurrence initially has created an ongoing split among courts across the country as to whether an intentional act with unintentional consequences is an occurrence.") (footnote omitted).

> We are aware that the language regarding an insured's intent and expectations is now contained in the exclusions portion, specifically Section I(A)(2)(a), of the CGL policy. In pertinent part, that subsection provides that the policy does not apply to bodily injury or property damage that "may reasonably be expected to result from the intentional or criminal acts of an insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended." However, a court need not consider the applicability of an exclusion if there is no initial grant of coverage under the policy. *See, e.g., Amerisure, Inc.,* 818 N.E.2d at 1005 ("In simplistic terms, the process is such: if the insuring clause does not extend coverage, one need look no further. If coverage exists, exclusions must then be considered. If an exclusion excludes coverage, an exception to the exclusion may re-grant coverage. However, the entire process must begin with an initial grant of coverage via the insuring clause; otherwise, no further consideration is necessary. Therefore, in the present case, we do not address any arguments regarding exclusions or exceptions to exclusions because here there is no initial coverage due to the lack of ... an 'occurrence.' "). Since we conclude that there is no coverage in this case because there was no occurrence, we need not examine any exclusions.

The policy at issue in *Bituminous Cas. Corp.* contained the same definition of *occurrence* as does the policy in the case at hand.[36] In *Bituminous Cas. Corp.,* therefore, we likely should not have quoted and relied upon much of the sweeping language of *James Graham Brown Foundation, Inc.* without acknowledging that the policy to be interpreted in *Bituminous Cas. Corp.* contained a definition of *occurrence* materially different from that found in *James Graham Brown Foundation, Inc.*[37] Upon reflection, we now recognize the crucial, materially different definition of *occurrence* in this case renders *James Graham Brown Foundation, Inc.* of, at most, limited value in determining whether there is an "occurrence" in the case at hand.[38]

36 240 S.W.3d at 639.

37 *See id.* at 638 (devoting section IV(A) to the purposes underlying CGL policies by liberally quoting from *James Graham Brown Foundation, Inc.*).

> As discussed before, we do not question the result in *Bituminous Cas. Corp.* because of the factual distinctions between it and the case at hand

38 *See, e.g., Gen. Sec. Indem. Co. of Arizona,* 205 P.3d at 537 (distinguishing prior precedent because that precedent construed a policy defining an *occurrence* based, in part, on the expectations or intentions of the insured; but the policy in the instant case "does not focus on the *expectations or intentions* from the insured's standpoint. Thus, our interpretation of the term here need not be limited to the expectations or intentions of the insured.").

***79** Even if we broadly construed the term, however, faulty construction would not constitute an "occurrence" because, as previously explained, the poor workmanship was not an accident.[39] Because the allegedly poor workmanship at issue cannot reasonably be construed to fall within the policy's definition of *occurrence,* then Elite (and, by extension, Motorists) cannot reasonably expect coverage for the acts at issue.[40] To the contrary, we believe the policy's requirement that its coverage extends only to an "occurrence," combined with the policy's definition of *occurrence,* is an "unequivocal, conspicuous and plain and clear manifestation of the company's intent to exclude coverage...."[41] As Justice David Souter noted in an opinion he wrote while serving on the Supreme Court of New Hampshire, defective workmanship does not meet the definition of fortuity; and, thus, "[d]espite proper deference, then, to the reasonable expectations of the policyholder, we are unable to find in the quoted policy language a reasonable basis to expect coverage for defective workmanship."[42]

39 *Essex Ins. Co.,* 261 S.W.3d at 460 ("Faulty workmanship is not an accident; instead it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work.").

40 *James Graham Brown Foundation,* 814 S.W.2d at 277 ("The insurer's responsibility under a comprehensive policy is not measured by its intent. The insured is entitled to all the coverage he may reasonably expect under the policy.").

41 *Id.* ("Only an unequivocal, conspicuous and plain and clear manifestation of the company's intent to exclude coverage will defeat this expectation [of coverage by an insured under a CGL policy].").

42 *McAllister v. Peerless Ins. Co.,* 124 N.H. 676, 474 A.2d 1033, 1036 (1984).

E. *Cincinnati Owed No Duty to Defend in this Case.*

[13] **[14]** We likewise reject Motorists' contention that Cincinnati had a duty to defend Elite because there was a possibility at the outset that the Mintmans' allegations came within the scope of the CGL policy Elite purchased from Cincinnati. As Motorists correctly points out, our precedent holds that "an insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage terms of the insurance policy."[43] However, as we explained in the very next sentence of *Aetna Cas. & Surety Co.,* an insurer need not always defend against a claim it believes falls outside the policy it issued. Rather, if an insurer makes a determination that the claim is not covered, it may, among other equally valid choices, "elect not to defend."[44] Thus, Cincinnati's refusal to defend Elite against a claim clearly falling outside the policy at issue was not inherently improper.

43 *Aetna Cas. & Surety Co., Inc.,* 179 S.W.3d at 841.

44 *Id.* ("If the insurer believes there is no coverage, it has several options. One is to defend the claim anyway, while preserving by a reservation of rights letter its right to challenge the coverage at a later date. Another is to elect not to defend. However, should coverage be found, the insurer will be liable for all damages naturally flowing from the failure to provide a defense.") (internal quotation marks omitted).

F. *Summary.*

In summary, we join the majority of other courts who have considered this question by holding that "a claim for faulty ***80** workmanship, in and of itself, is not an "occurrence" under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident."[45]

45 9A *Couch on Insurance Third Edition* § 129:4 (2009). It appears as if a general rule exists whereby a CGL policy would apply if the faulty workmanship caused bodily injury or property damage to something other than the insured's allegedly faulty work product. *Id.* ("In other words, although a commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product, the policy does provide coverage if the faulty workmanship causes bodily injury or property damage to something other than the insured's work product."). Thus, as we construe it, application of the general rule could lead to coverage if, for example, the Mintmans' allegedly improperly constructed home damaged another's property. However, we need not definitively decide in this case whether we should adopt this general rule, as the facts do not present a claim that would fall within it.

IV. *CONCLUSION.*

For the foregoing reasons, the decision of the Court of Appeals is reversed; and the judgment of the trial court granting summary judgment to Cincinnati Insurance Company is reinstated.

All sitting. All concur.

All Citations

306 S.W.3d 69

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Sheehan Const. Co., Inc. v. Continental Cas. Co., Ind., September 30, 2010

124 N.H. 676
Supreme Court of New Hampshire.

David H. McALLISTER
v.
PEERLESS INSURANCE COMPANY.

No. 82–383.
|
April 9, 1984.

Synopsis

Insured who conducted landscaping and excavating business brought declaratory judgment action against insured to resolve disputed claim for coverage. The Superior Court, Hillsborough County, Goode, J., entered a decree for the insurer based on master's conclusion that there was no coverage for customer's claim for defective workmanship, and insured appealed. The Supreme Court, Souter, J., held that: (1) master's findings that insured's agent had made no representation that coverage would be provided for liability of the sort asserted by customer's claim and that agent's conversation with insured did not give rise to any obligation to provide such coverage had a sufficient evidentiary basis; (2) "completed operations" coverage in policy did not extend to customer's claims of faulty workmanship; and (3) even if insured had been covered by comprehensive general liability policy, coverage would not have extended to claim of defective workmanship in which customer sought to recover cost of correcting the defective work and did not claim that such defects had caused damage to any property other than the work product.

Affirmed.

West Headnotes (5)

[1] Appeal and Error
Sufficiency of evidence
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)11 Verdict, Findings, and Sufficiency of Evidence: Additional Considerations
30k3514 Proceedings Before Referee, Master, Commissioner, or Auditor
30k3517 Sufficiency of evidence
(Formerly 30k1017)

Supreme Court will sustain master's findings of fact if there was evidence on which a reasonable person could have found as he did.

4 Cases that cite this headnote

[2] Insurance
Weight and sufficiency
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3126 Evidence
217k3131 Weight and sufficiency
(Formerly 217k401.1(3))

In action by insured to determine coverage for a claim for faulty workmanship brought by a customer of insured's landscaping and excavating business, master's findings that insurer's agent had made no representation that coverage would be provided for liability of the sort asserted by customer's claim and that agent's conversation with insured did not give rise to any obligation to provide such coverage, had a sufficient evidentiary basis, which included insured's testimony that he did not remember that the agent ever mentioned anything about coverage for faulty workmanship.

4 Cases that cite this headnote

[3] Insurance
Products and completed operations hazards
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2296 Products and completed operations hazards
(Formerly 217k435.24(5))

"Completed operations" coverage in policy issued to insured who conducted landscaping and excavation business did not extend to customer's claims of faulty workmanship, where policy language indicated that property damage giving rise to liability must take place

after completion of the operation and where customer's claims were for correction of defects in workmanship, even though the evidence of the faulty workmanship in question may well have appeared only after completion of the work.

31 Cases that cite this headnote

[4] **Insurance**
Commencement and Duration of Coverage
Insurance
Pleadings
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2263 Commencement and Duration of Coverage
217k2264 In general
(Formerly 217k514.10(1))
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings
(Formerly 217k514.10(1))
To determine time when damage was alleged to have occurred to claimant who brought action against insured, for purposes of determining whether policy covered the damage, Supreme Court would look to declarations in underlying action by claimant against insured.

[5] **Insurance**
Scope of coverage
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities
217k2361 Scope of coverage
(Formerly 217k435.24(7))
Even if insured who conducted landscaping and excavation business had been covered by comprehensive general liability policy, coverage would not have extended to claim of defective workmanship, in which customer sought to recover cost of correcting the defective work and did not claim that such defects had caused damage to any other property than the work product.

26 Cases that cite this headnote

Attorneys and Law Firms

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Devine, Millimet, Stahl & Branch P.A., Manchester (Lee C. Nyquist, Manchester, on the brief and orally), for defendant.

Opinion

SOUTER, Justice.

This is an action for declaratory judgment under RSA 491:22 to resolve a disputed claim for coverage under an insurance policy. In 1978 the plaintiff began to conduct a landscaping and excavating business. He met with an agent of the defendant to ***678** obtain insurance coverage. The parties disagree over the details of the conversation between the plaintiff and the agent, but it is undisputed that each party understood that the defendant would issue to the plaintiff a comprehensive general liability policy with completed operations coverage. The defendant issued such a policy, but failed to deliver to the plaintiff a set of ****1035** documents that included all the written terms governing the coverage.

Through the agent, the defendant did deliver a so-called deck sheet, which normally would have functioned as a cover or binder for written endorsements. The deck sheet identified the parties, bore some notations indicating coverage, and set out various standard definitions and conditions. It did not include language generally granting coverage, but it did include a definition of "completed operations hazard."

In 1979 Michael Finkelstein hired the plaintiff to landscape his property and to construct a leach field on it. In 1980 Mr. Finkelstein brought action against the plaintiff for breaches of contract, claiming faulty workmanship in constructing the leach field and in performing the landscaping. Mr. Finkelstein sought damages to pay for correcting the allegedly defective work. He did not claim that such defects had caused damage to any other property than the work product, nor did he claim any damage to the work product other than the defective workmanship.

The plaintiff brought the present action to determine coverage for the liability asserted in the underlying action brought

by Mr. Finkelstein. Following trial, the Master (*R. Peter Shapiro, Esq.*) concluded that there was no coverage, and the Superior Court (*Goode,* J.) accordingly entered a decree for the defendant. We affirm.

The plaintiff claims that he is entitled to coverage for any liability for failure to perform in accordance with his contractual obligations. He rests his claim on two grounds, his dealings directly with the agent and the terms of the policy itself.

The master found that the plaintiff had discussed the insurance requirements of his business with an acquaintance, and that by the time he met with the agent, he understood that he ought to obtain general liability and completed operations coverage. The master also found that neither the plaintiff nor the agent definitely recalled any representations the agent made about the coverage the defendant would provide. He found the agent had made no representation that coverage would be provided for liability of the sort asserted by Mr. Finkelstein, and he concluded that the agent's conversation with the plaintiff did not give rise to any obligation to provide such coverage.

***679** **[1]** We will sustain the master's findings of fact if there was evidence on which a reasonable person could have found as he did. *U.S. Fidelity & Guaranty Co., Inc. v. Johnson Shoes, Inc.,* 123 N.H. 148, 153, 461 A.2d 85, 88 (1983). Judged on this standard, the master's findings must stand. It is true that the plaintiff did testify that as a result of his conversation with the agent he understood that the insurance company would pay the cost of correcting substandard work. But the plaintiff also admitted that he had no recollection that the agent had said the plaintiff would have "warranty insurance," or "guaranteed [sic] insurance" and no memory that the agent "ever even mentioned anything at all about coverage for faulty workmanship."

[2] No further references to the testimony are needed to demonstrate that there was a sufficient evidentiary basis for the master's findings. Since the findings must be sustained, there is no occasion to apply the rule that prior dealings between insured and insurer can lead to enforceable expectations of coverage. *See Robbins Auto Parts, Inc. v. Granite State Ins. Co.,* 121 N.H. 760, 762–63, 435 A.2d 507, 508 (1981).

The plaintiff also claims coverage based on the terms of the policy. He argues that in construing those terms we should hold that the defendant's failure to deliver complete policy terms estops it to claim that any policy exclusions limit coverage, and he urges that any ambiguity in policy terms be construed against the defendant. We do not consider these claims about the application of estoppel and the resolution of ambiguity, because nothing in the policy language that was or should have been ****1036** delivered could give rise to the coverage that the plaintiff seeks.

In considering the plaintiff's claim based on the terms of the policy, we look first to those terms set out on the deck sheet, the one document that was delivered to the plaintiff. Although the deck sheet did not include the general grant of liability coverage, it did include the definition of "completed operations hazard." Since it is undisputed that the insurance to be provided included coverage for liability arising out of completed operations, we look to that definition to determine whether completed operations coverage extends to claims of faulty workmanship. The portion of the definition that concerns us provides coverage by reference to liability for "property damage arising out of operations ... but only if the ... property damage occurs after such operations have been completed or abandoned."

[3] **[4]** Two portions of this language make it clear that liability for faulty workmanship is not the subject of coverage for completed ***680** operations. First, it is clear from the language that the property damage giving rise to liability must take place after the completion of the operation. To determine the time when the damage is alleged to have occurred, we look to the declarations in the underlying action. *Lumbermen's &c. Co. v. McCarthy,* 90 N.H. 320, 321, 8 A.2d 750, 751 (1939). The claims for faulty workmanship as set out in those declarations are claims for defects in existence by the time the work was completed. The evidence of faulty workmanship may well have appeared only after completion, when effluent failed to disperse and grass died. But the claim in each instance before us remains a claim to correct a defect in workmanship. Such a defect is complete when the work is complete, and thus cannot give rise to liability covered under the quoted language of the policy.

A second element of that language also indicates that there is no coverage. The property damage in question must "occur" after completion. The deck sheet defines "occurrence" in the standard fashion as "an accident, including continuous or repeated exposure to conditions, which results in property damage." Since the context does not indicate different definitions for the noun and verb forms, no property damage in question can "occur" without such accident or exposure.

See Williams v. Aetna Casualty & Surety Co., 151 N.J.Super. 68, 376 A.2d 562 (1977).

The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship. *Hull v. Berkshire Mut. Ins. Co.,* 121 N.H. 230, 427 A.2d 523 (1981); Tinker, *Comprehensive General Liability Insurance —Perspective and Overview,* 25 Fed'n. Ins.Couns.Q. 217, 231 (1975). The master therefore rightly concluded that the declarations in the underlying action allege no occurrence. Despite proper deference, then, to the reasonable expectations of the policyholder, *Town of Epping v. St. Paul Fire & Marine Ins.,* 122 N.H. 248, 252, 444 A.2d 496, 498 (1982), we are unable to find in the quoted policy language a reasonable basis to expect coverage for defective workmanship.

[5] We reach the same result if we extend our consideration of the language of the policy to the general grant of coverage customarily used in general liability policies. The defendant did not deliver a written statement of this term in this case, but even if delivered it would have provided no coverage on a claim of defective workmanship.

The evidence at trial included a copy of the general coverage provision that the defendant should have delivered. Its pertinent language would obligate the defendant to pay damages arising out of "property damage to which this insurance applies, caused by an ***681** occurrence." This general provision is thus equivalent to the language quoted from the definition of "completed operations hazard" in providing coverage only when the damage results from an occurrence, and our earlier discussion of ****1037** the nature of an occurrence applies with equal force here. In fact, the holding in *Hull v. Berkshire Mutual Insurance Co.,* 121 N.H. 230, 427 A.2d 523 (1981), was that a general grant of coverage identical to the general coverage provision here does not insure against liability for the cost of correcting defective work.

The plaintiff seeks to distinguish *Hull* as a case for "money damages" for "unaesthetic work, an intangible." But *Hull* did not turn on the nature of the relief sought in the underlying action, or on the visual perceptibility of the defect. Rather, we held there that defective work, standing alone, did not result from an occurrence, and indeed was not property damaged within the meaning of the policy. The holding in *Hull* is squarely applicable to the present case, whether we consider the requirement of occurrence in the general grant of coverage or the same requirement in the terms relating to completed operations.

The plaintiff further seeks to avoid the precedent of *Hull,* and the analysis on which it rested, by invoking *Commercial Union Assurance Cos. v. Gollan,* 118 N.H. 744, 394 A.2d 839 (1978). That latter case is inapposite here. The record in that case indicates that the parties had stipulated that the only issue to be decided was whether certain policy exclusions negated coverage, and the opinion was concerned solely with resolving what was held to be ambiguity created by the exclusions in question. In the absence of such a stipulation, it is not appropriate to consider exclusions unless coverage has first been found. In the instant case, and in *Hull,* it is clear that the policy terms granting coverage provide none against the liability asserted in the underlying actions. For the same reason, we do not reach the plaintiff's claim that a requirement of fair notice should estop the defendant to deny coverage. It is not apparent how an estoppel to deny coverage can arise unless there is some basis to find coverage in the first instance.

The record indicates that the defendant met its burden under RSA 491:22–a to prove there was no coverage under the policy. We affirm the judgment below.

Affirmed.

All concurred.

All Citations

124 N.H. 676, 474 A.2d 1033

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205 P.3d 529
Colorado Court of Appeals,
Div. I.

GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, f/k/a Fulcrum Insurance Company, an Arizona corporation, Plaintiff–Appellant,
v.
MOUNTAIN STATES MUTUAL CASUALTY COMPANY, a New Mexico corporation; American Family Mutual Insurance Company, a Wisconsin corporation; Colony National Insurance Company, a Virginia corporation; Farmers Alliance Mutual Insurance Company, a Kansas corporation; Hartford Insurance Company; and Western Heritage Insurance Company, Defendants–Appellees.

Nos. 07CA2291, 07CA2292.
|
Feb. 19, 2009.

Synopsis

Background: Framing subcontractor's insurer brought contribution and indemnification action against sub-subcontractors' commercial general liability (CGL) insurers, seeking relief for such insurers failure or refusal to share the costs in the defense of framing subcontractor against third-party complaint filed by general contractor in construction defect action. The Boulder County District Court, Morris W. Sandstead, J., granted sub-subcontractors' insurers summary judgment, and subcontractor's insurer appealed.

[Holding:] The Court of Appeals, Taubman, J., held that as a matter of first impression, complaints in construction defect action that only alleged poor workmanship did not allege an occurrence that triggered a duty to defend in the CGL policies issued to the sub-subcontractors.

Affirmed.

West Headnotes (11)

[1] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

In construction defect action, complaint filed against general contractor by homeowners' association and third-party complaint filed by general contractor against framing subcontractor did not allege an "occurrence" that triggered a duty to defend, in commercial general liability (CGL) insurance policies issued to framing subcontractor's sub-subcontractors; CGL policies defined "occurrence" as an "accident," the necessary element of fortuity was inherent in the meaning of the term "accident," complaints in construction defect action only alleged poor workmanship and did not allege any damage beyond the work product of the framing subcontractor or that the poor workmanship caused consequential damages, poor workmanship was not a fortuitous event, and CGL policies were not intended to hold insurers as guarantors of an insured's work.

23 Cases that cite this headnote

[2] Appeal and Error
Insurers and insurance

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3771 Trade, Business, and Finance
30k3774 Insurers and insurance
(Formerly 30k893(1))

A trial court's interpretation of an insurance policy is reviewed de novo, applying ordinary principles of contract interpretation.

[3] Insurance
Plain, ordinary or popular sense of language

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

Courts give words in an insurance policy their plain and ordinary meaning, unless the policy evinces a contrary intent.

[4] Insurance
Construction as a whole

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 Construction as a whole

Courts read insurance policy provisions as a whole, rather than in isolation.

[5] Insurance
Function of, and limitations on, courts, in general

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1807 Function of, and limitations on, courts, in general

Courts cannot rewrite, add, or delete provisions in their interpretations of insurance policies.

1 Cases that cite this headnote

[6] Insurance
Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

In determining whether a duty to defend exists under an insurance policy, a trial court must limit its examination to the four corners of the underlying complaint.

2 Cases that cite this headnote

[7] Insurance
Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

An insurer's duty to defend arises when the underlying complaint against the insured alleges any facts that might fall within the coverage of the policy.

3 Cases that cite this headnote

[8] Insurance
Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

An insurance company has a duty to defend if the allegations in the complaint could impose liability under the policy.

4 Cases that cite this headnote

[9] Insurance
Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

An insurance company has a duty to defend if the allegations in the complaint state a claim which is potentially or arguably within the policy coverage or if there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded.

5 Cases that cite this headnote

[10] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

A claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered "occurrence" under a commercial general liability (CGL)

insurance policy, regardless of the underlying legal theory pled.

21 Cases that cite this headnote

[11] Insurance
Construction as a whole
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 Construction as a whole
Courts must avoid reading an insurance policy so as to render some provisions superfluous.

3 Cases that cite this headnote

Attorneys and Law Firms

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Fowler, Schimberg & Flanagan, P.C., Katherine Taylor Eubank, Denver, Colorado, for Defendant–Appellee Hartford Insurance Company.

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Opinion

Opinion by Judge TAUBMAN.

Plaintiff, General Security Indemnity Company of Arizona (GSINDA), appeals the trial court's orders granting summary judgment in favor of six insurance company defendants, American Family Mutual Insurance Company (American), Colony National Insurance Company (Colony), Farmers Alliance Mutual Insurance Company (Farmers), Hartford Insurance Company (Hartford), Mountain States Mutual Casualty Company (Mountain), and Western Heritage Insurance Company (Western). We affirm.

In granting defendants' summary judgment motions, the trial court rejected GSINDA's claims that defendants were obligated to contribute to the defense of GSINDA's insured, Foster Frames, against a third-party construction defect complaint.

The sole issue for review is whether the trial court erred in determining that defendants, who insured Foster Frames' subcontractors (the sub-subcontractors), had no duty to defend Foster Frames as a matter of law because there was no "occurrence" alleged in the underlying complaints of the construction defect litigation. We perceive no error because we conclude that claims of defective workmanship, standing alone, do not constitute an "occurrence." Further, we conclude the broad allegations of "other" or "consequential" damages here are insufficient to give rise to a duty to defend.

I. Background

In 2003, Summit at Rock Creek Homeowners Association, Inc. (HOA) filed suit against D.R. Horton, Inc.—Denver (DRH) for alleged construction defects in the Summit at Rock Creek housing project. Specifically, the HOA asserted, inter alia, that DRH's negligence resulted in property damage and that DRH breached contractual and implied warranties, which also resulted in property damage. Eventually, the HOA settled its claims against DRH.

After the HOA complaint was filed, DRH filed a third-party indemnification complaint against its subcontractors, including Foster Frames. DRH asserted claims of breach of contract, breach of express warranty, and negligence, among others.

Because GSINDA had insured Foster Frames, it defended it against DRH's third-party complaint. The DRH third-party complaint was later dismissed by the trial court, and the dismissal was affirmed by a division of this court. *See D.R.*

Horton, Inc.—Denver v. AAA Waterproofing, Inc., 2008 WL 4516292 (Colo.App. No. 06CA 1874, Oct. 9, 2008) (not published pursuant to C.A.R. 35(f)).

In the trial court, Foster Frames filed a fourth-party complaint against the sub-subcontractors, seeking indemnity if it were found liable to DRH.

The trial court stayed proceedings on Foster Frames' fourth-party claims, pending appeal of the dismissal of the DRH complaint.

In this action, GSINDA filed a complaint against the sub-subcontractors' insurance companies, seeking relief for their failure or refusal to share in the costs of the defense of Foster Frames against the DRH third-party complaint. GSINDA sought a declaratory judgment as to the duties owed by defendants with respect to Foster Frames. It also sought equitable contribution, equitable subrogation, equitable indemnity, and damages, in the nature of reimbursement, from defendants for the costs of defending or indemnifying Foster Frames.

GSINDA filed motions for partial summary judgment against defendants, asserting that as a matter of law the insurance policies ***532** issued to the sub-subcontractors obligated defendants to defend Foster Frames against DRH's third-party complaint because the underlying complaints alleged damage arguably covered under the insurance policies. Defendants filed cross-motions for summary judgment.

The trial court granted defendants' cross-motions for summary judgment in six separate orders and determined that defendants were not obligated to defend Foster Frames as a matter of law because the property damage alleged by the HOA was not caused by an "occurrence," as defined in defendants' insurance policies.

The trial court certified its summary judgment orders pursuant to C.R.C.P. 54(b) as final and appealable. GSINDA now appeals.

The trial court stayed all other issues in the insurance coverage action, pending resolution of DRH's appeal of the trial court's dismissal of its third-party complaint.

II. Coverage of Defective Workmanship Under Insurance Policies

GSINDA contends that the trial court erred in not following *Hoang v. Monterra Homes (Powderhorn) LLC,* 129 P.3d 1028 (Colo.App.2005) *(Monterra Homes), rev'd on other grounds sub nom. Hoang v. Assurance Co. of Am.,* 149 P.3d 798 (Colo.2007), in its determination that the underlying HOA complaint and the DRH third-party complaint did not allege an "occurrence."

More specifically, GSINDA argues that the trial court should have applied *Monterra Homes* to determine that because the sub-subcontractors did not know, intend, or expect property damage to result from their work, the HOA complaint and DRH third-party complaint sufficiently alleged that defective workmanship by DRH resulted from an accident. Thus, in GSINDA's view, the underlying complaints alleged an occurrence that triggered coverage under the policies. We perceive no error in the trial court's orders because we conclude a claim of defective workmanship, standing alone, does not allege an occurrence.

We review a trial court's summary judgment order de novo. *West Elk Ranch, L.L.C. v. United States,* 65 P.3d 479, 481 (Colo.2002). Summary judgment is appropriate when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. *Id.* The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Id.*

[1] The sole issue here is whether the underlying complaints —the HOA complaint and the DRH third-party complaint- alleged an occurrence that would trigger a duty to defend under the insurance policies defendants issued to the sub-subcontractors. We conclude that they did not.

[2] **[3]** **[4]** **[5]** We review a trial court's interpretation of an insurance policy de novo, applying ordinary principles of contract interpretation. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.,* 74 P.3d 294 (Colo.2003). We give words in an insurance policy their plain and ordinary meaning, unless the policy evinces a contrary intent. *McGowan v. State Farm Fire & Casualty Co.,* 100 P.3d 521, 522 (Colo.App.2004). We read policy provisions as a whole, rather than in isolation. *Id.* We cannot rewrite, add, or delete provisions in our interpretation. *Id.*

[6] In determining whether a duty to defend exists, a trial court must limit its examination to the four corners of the underlying complaint. *Cyprus Amax Minerals,* 74 P.3d at 299.

[7] An insurer's duty to defend arises when the underlying complaint against the insured alleges any facts that might fall within the coverage of the policy. *Hecla Mining Co. v. New Hampshire Ins. Co.,* 811 P.2d 1083, 1089 (Colo.1991) (citing *Douglass v. Hartford Ins. Co.,* 602 F.2d 934, 937 (10th Cir.1979)).

[8] **[9]** An insurance company has a duty to defend if the allegations in the complaint could impose liability under the policy. *Id.* (citing *Douglass,* 602 F.2d at 937). Alternatively, an insurance company has a duty to ***533** defend if the allegations in the complaint state a claim which is potentially or arguably within the policy coverage or if there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded. *Id.* (citing *City of Willoughby Hills v. Cincinnati Ins. Co.,* 9 Ohio St.3d 177, 459 N.E.2d 555, 558 (1984)).

With these principles in mind, we review the allegations of the complaint against the sub-subcontractors, which is based on the allegations in the HOA and DRH complaints. Then we review the terms of the insurance policies.

As relevant here, the HOA complaint alleged:

> 2. The Community's existing 226 units were completed in approximately February 2001.
>
> ....
>
> 31. On information and belief, these errors [enumerated in ¶ 30 of the complaint], deficiencies and defects, for which defendants are legally liable, have caused, and continue to cause, actual property damage, loss of use and/or other losses to the Association, and consequential damage to, and the loss of use of, various elements of the Project, over time, from the date those areas were first put to their intended use.

The DRH complaint incorporated the same property damage allegations, asserting, "To the extent that the allegations made in the HOA's Complaint are true, which [DRH] denies, any and all damages incurred by the HOA were proximately caused in whole or in part by the breach of contract by the Third–Party Defendants [including Foster Frames] and/or their subcontractors." DRH made this same allegation with regard to the HOA's other claims as well.

The trial court determined that "[t]he HOA complaint, on which the [DRH] Third–Party complaint was based, sought damages for numerous construction defects, but does not claim damages from any event that would qualify as an 'occurrence' under" the policies. Further, the trial court determined that "the [DRH] third-party complaint contains no allegation of the timing of the property damages," and it "contains nothing substantive about the extent or nature of the property damages either."

Our review of the HOA and DRH complaints shows that the claims asserted lay in tort, contract, and breach of warranty. They alleged the contractors, subcontractors, and sub-subcontractors were negligent, breached contractual obligations, and breached various express or implied warranties in constructing the housing project. The claims also alleged general defects, poor workmanship, improper design, and misrepresentation or failure to disclose material facts about the project. Because Foster Frames and the sub-subcontractors at issue in this appeal worked only on the construction aspect of the project, the claims against them are limited to allegations that their poor workmanship caused property damage.

The commercial general liability (CGL) insurance policies defendants issued to the sub-subcontractors limit defense and liability coverage to property damage caused by an "occurrence." The policies issued by American, Western, Mountain, and Colony state:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies....
>
> b. This insurance applies to "bodily injury" and "property damages" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory": and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

The language in the Hartford and Farmers policies is substantially the same.

The word "occurrence" is defined in the American, Western, Mountain, Colony, and Hartford policies as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Farmers policies similarly define "occurrence" as: "an accident and includes repeated exposure to similar conditions."

Thus, all the insurance policies at issue require an accident to trigger an occurrence. Because "accident" is not defined by the ***534** policies, we apply the ordinary definition of "accident" to determine if the underlying complaints alleged an occurrence.

The trial court used *Black's Law Dictionary* to define an accident as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not reasonably be anticipated." *Black's Law Dictionary* 6 (2d pocket ed.2001). Applying that definition, it concluded that the allegations in the underlying complaints did not concern unanticipated events, and thus were not accidents.

A. "Occurrence"

Divisions of this court have previously defined "accident" in CGL policies as: "an unanticipated or unusual result flowing from a commonplace cause." *Monterra Homes,* 129 P.3d at 1034; *Union Ins. Co. v. Hottenstein,* 83 P.3d 1196, 1201 (Colo.App.2003); *Fire Ins. Exchange v. Bentley,* 953 P.2d 1297, 1300 (Colo.App.1998). In addition, courts in Colorado and other jurisdictions have considered an accident to be a "fortuitous event." *See American Home Assurance Co. v. AGM Marine Contractors, Inc.,* 379 F.Supp.2d 134, 136 (D.Mass.2005), *aff'd,* 467 F.3d 810 (1st Cir.2006); *McGowan,* 100 P.3d at 525; *Auto–Owners Ins. Co. v. Home Pride Cos.,* 268 Neb. 528, 684 N.W.2d 571, 577 (2004); 9A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 129:4 (3d ed.2005) (fortuity is required to constitute an accident) (collecting cases).

A division of this court previously determined that poor workmanship constituting a breach of contract is generally not an accident that constitutes a covered occurrence. *Hottenstein,* 83 P.3d at 1202. There, the homeowner's underlying complaint against a construction company included breach of contract claims based on defective workmanship. *Id.* at 1198. Although the homeowner was awarded damages for breach of contract, the trial court did not require the defendant's insurance company to indemnify the defendant. On appeal, a division of this court held that the insurance policy precluded coverage of the breach of contract liability for defective workmanship because the breach of contract was not an accident that constituted an occurrence. *Id.* at 1202.

Here, the HOA complaint and the DRH third-party complaint alleged not only breach of contract, but tort and breach of warranty claims as well.

Whether defective workmanship can constitute an occurrence for purposes of both tort and breach of warranty claims is an issue of first impression in Colorado. We are persuaded by the reasoning of courts in other jurisdictions that have extended the *Hottenstein* rule to all claims of poor workmanship, regardless of whether the claims are based on contract, tort, or breach of warranty theories. *See, e.g., Pursell Constr., Inc. v. Hawkeye–Security Ins. Co.,* 596 N.W.2d 67 (Iowa 1999) (making no distinction when analyzing an underlying complaint with both breach of contract and negligence theories where the claim was based on the same allegation of defective workmanship).

[10] We conclude the better rule is that a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence, regardless of the underlying legal theory pled. *See* Ronald M. Sandgrund & Leslie A. Tuft, *Liability Insurance Coverage for Breach of Contract Damages,* 36 Colo. Law. 39, 39 (Feb.2007) (difficulties arise "in jurisdictions that attempt to clearly demarcate coverage between tort and contract liabilities, because some liabilities may sound both in tort and contract"); *cf. Gerrity Co. v. CIGNA Prop. & Cas. Ins. Co.,* 860 P.2d 606, 607 (Colo.App.1993) (duty to defend is determined by factual allegations, not by legal claims).

Next, we address whether general allegations of faulty workmanship constitute an occurrence under the policies at issue here. There is a split among other jurisdictions whether a defective workmanship claim, standing alone, is an "occurrence" under CGL policies. *See* 9A *Couch on Insurance* § 129:4 (collecting cases). *Compare* Clifford J. Shapiro, *Point/Counterpoint: Inadvertent Construction Defects are an "Occurrence" Under CGL Policies,* 22 Constr. Law. 13 (Spring 2002), *with* Linda B. Foster, *Point/Counterpoint: No Coverage Under the* ***535** *CGL Policy for Standard Construction Defect Claims,* 22 Constr. Law. 18 (Spring 2002).

A majority of those jurisdictions has held that claims of poor workmanship, standing alone, are not occurrences that trigger coverage under CGL policies similar to those at issue here. *See J.Z.G. Resources, Inc. v. King,* 987 F.2d 98 (2d Cir.1993); *State Farm Fire & Cas. Co. v. Tillerson,* 334 Ill.App.3d 404, 268 Ill.Dec. 63, 777 N.E.2d 986 (2002); *Pursell Constr.,* 596 N.W.2d 67; *Auto–Owners,* 684 N.W.2d at 576; *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 589 Pa. 317, 908 A.2d 888 (2006); *L–J, Inc. v. Bituminous Fire & Marine Ins. Co.,* 366 S.C. 117, 621 S.E.2d 33 (2005); Christopher Burke, *Construction Defects and the Insuring Agreement in the CGL Policy—There is No Coverage for a Contractor's Failure to Do What It Promised,* Prac. L. Inst.: Litig. No. 8412, Insurance Coverage 2006: Claim Trends and Litigation 73, 82 (May 2006) (Burke) (collecting cases) ("Courts from no less than 25 states have adopted the position that there is no coverage [under CGL policies] for construction defect claims.").

Further, a corollary to the majority rule is that an "accident" and "occurrence" are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity. *J.Z.G.,* 987 F.2d at 102; *see, e.g., Auto–Owners,* 684 N.W.2d. at 578–79 (faulty installation of roof shingles that caused consequential damage to roof structures and other buildings was sufficient to constitute an occurrence). As discussed below, we conclude there is no basis to apply this corollary here.

In contrast, a minority of jurisdictions has held that the damage resulting from faulty workmanship is an accident, and thus, a covered occurrence, so long as the insured did not intend the resulting damage. *See Great Am. Ins. Co. v. Woodside Homes Corp.,* 448 F.Supp.2d 1275 (D.Utah 2006); *United States Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So.2d 871 (Fla.2007); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.,* 281 Kan. 844, 137 P.3d 486 (2006); *Travelers Indem. Co. v. Moore & Assocs., Inc.,* 216 S.W.3d 302 (Tenn.2007); *Lamar Homes, Inc. v. Mid–Continent Cas. Co.,* 242 S.W.3d 1 (Tex.2007); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65, 83 (2004).

We are persuaded by the majority rule because it is consistent with *Hottenstein* and *McGowan* and relies on the necessary element of fortuity inherent in the ordinary meaning of the term "accident." Additionally, the Tenth Circuit and Colorado courts have found an "occurrence" only when additional, consequential property damages were alleged as a result of the faulty workmanship. *Adair Group, Inc. v. St. Paul Fire & Marine Ins. Co.,* 477 F.3d 1186, 1187–88 (10th Cir.2007); *see, e.g., Am. Employer's Ins. Co. v. Pinkard Constr. Co.,* 806 P.2d 954, 955 (Colo.App.1990) (coverage when the poor workmanship in using the wrong material for a roof installation led to the roof collapsing, which caused additional property damage); *Colard v. Am. Family Mut. Ins. Co.,* 709 P.2d 11, 13 (Colo.App.1985) (coverage when the poor workmanship created an exposure to continuous condition, which resulted in additional property damage).

In *McGowan,* a division of this court determined that a CGL policy excluded coverage for faulty workmanship. 100 P.3d at 525. There, the division relied on an explicit exclusion in the insurance policy for faulty workmanship. However, the division explained that CGL policies "normally exclude coverage for faulty workmanship based on the rationale that poor workmanship is considered a business risk to be borne by the policyholder" and such policies are "not intended to be the equivalent of performance bonds." 100 P.3d at 525.

This same rationale has been used in jurisdictions that have adopted the majority rule. For example, in *Pursell Construction,* the Iowa Supreme Court refused to adopt the minority rule because the "fundamental nature of a comprehensive general liability policy" would then hold the insurer as "a guarantor of the insured's performance of the contract," and the insurance policy would thus take on the attributes of a performance bond. 596 N.W.2d at 71; *see also Kvaerner,* 908 A.2d at 899 (the minority rule improperly ***536** converts an insurance policy into a performance bond).

Additionally, the *McGowan* division concluded that poor workmanship is not a "fortuitous event." Other jurisdictions adopting the majority rule have similarly focused on the fortuity required to constitute an accident.

For example, the Nebraska Supreme Court examined a CGL policy similar to the ones at issue here. *Auto–Owners Ins. Co.,* 684 N.W.2d 571. It adopted the majority rule because it concluded that "[t]he fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Id.* at 577 (quoting *McAllister v. Peerless Ins. Co.,* 124 N.H. 676, 474 A.2d 1033, 1036 (1984)).

The Pennsylvania Supreme Court rejected the minority rule because it relied on "an overly broad interpretation of accident." *Kvaerner,* 908 A.2d at 899 n. 9. The court held that faulty workmanship claims "simply do not present the

degree of fortuity contemplated by the ordinary definition of 'accident' or its common judicial construction in this context." *Id.* at 899.

In contrast, the jurisdictions adopting the minority rule have unconvincingly concluded that defective work is unforeseeable, and thus the property damage caused by defective work is an accident that constitutes an occurrence. *See J.S.U.B.,* 979 So.2d at 883; *Moore & Assocs.,* 216 S.W.3d at 309. However, courts adopting the minority rule and applying a broad definition of "accident" do not address the reasoning of courts following the majority rule that an accident must be fortuitous. *See, e.g., J.S.U.B.,* 979 So.2d at 885–86.

Furthermore, the minority rule has been criticized as improperly shifting the burdens of a subcontractor's poor workmanship from the contractor to the insurance company. For example, in *Lamar Homes,* the dissent reasoned that the minority rule would dissuade contractors from avoiding unqualified subcontractors because the insurance companies, not the contractors, would pay for the consequences of a subcontractor's defective workmanship. 242 S.W.3d at 20 (Brister, J., dissenting).

B. *Monterra Homes*

Despite the large number of jurisdictions following the majority rule, GSINDA argues that we must reverse because the trial court disregarded *Monterra Homes* in determining that the underlying HOA complaint and DRH third-party complaint here did not allege an occurrence. GSINDA asserts that the insureds, Foster Frames and the sub-subcontractors, did not intend defective workmanship, and thus there was an accident that constituted an "occurrence." We disagree. *Monterra Homes* is unpersuasive because (1) it does not address the out-of-state case law discussed above, (2) its standard would render other provisions in defendants' insurance policies superfluous, and (3) it relies on *Hecla's* interpretation of "occurrence," which involved a definition materially different from that in the policies at issue.

1. Out–of–State Authority

The *Monterra Homes* division cited only Colorado case law in its discussion. It did not consider the out-of-state authority discussed above, particularly the majority rule, which we have found persuasive.

Thus, the *Monterra Homes* division did not consider whether defective workmanship was accidental based on the concept of fortuity. As discussed above, we are persuaded that defective workmanship is not a fortuitous event that constitutes an accident. Therefore, as a matter of law, faulty work is not included under the definition of "occurrence" in this case.

In *Monterra Homes,* the homeowners had prevailed on their underlying complaint against a builder for property damage. The homeowners brought a garnishment action against the builder's insurer to recover the award of damages. The trial court entered judgment in favor of the homeowners and against the insurance company, and a division of this court affirmed.

That division held that the trial court applied the proper legal standard in determining that there was an occurrence under the ***537** insurance policy because it had focused on the knowledge, actions, and intentions of the insured builder. That division relied on *Hecla* for the proposition that "it is the 'knowledge and intent of the insured' that make injuries or damages expected or intended rather than accidental." 129 P.3d at 1034 (quoting *Hecla,* 811 P.2d at 1088). Then, it affirmed the trial court's finding of an occurrence based on evidence showing that the builder did not intend or expect the property damages resulting from its negligence.

2. Superfluous Provisions

[11] A reading of the insurance policies at issue that focuses only on the knowledge and intent of the insureds would render other provisions in those policies superfluous. Under Colorado law, we must avoid reading an insurance policy so as to render some provisions superfluous. *See Holland v. Bd. of County Comm'rs,* 883 P.2d 500, 505 (Colo.App.1994) (in construing contracts, courts must give effect to every provision, if possible).

The American, Western, Mountain, Colony, and Hartford policies contain an explicit exclusion for expected or intended damage:

> This insurance does not apply to ... "[b]odily injury" or "property damage" expected or intended from the standpoint of the insured....

Similarly, the Farmers policies state:

> "We" do not pay for "bodily injury," or "property damage": a. which is expected by, directed by, or intended by the "insured"; or b. that is the result of intentional and malicious acts of the "insured."

Applying the *Monterra Homes* "occurrence" definition would render these provisions superfluous, because they already exclude coverage for property damage resulting from expected or intended conduct. *See* Burke, at 94 (defining "occurrence" based on "whether the insured 'expected or intended' to cause the damage ... renders the expected or intended injury exclusion in the policy meaningless"). Significantly, the *Monterra Homes* division did not address whether a similar provision existed in the policy at issue there.

3. "Occurrence" in *Hecla*

Additionally, the reliance on *Hecla* was misplaced in *Monterra Homes* because the *Hecla* insurance policy defined "occurrence" differently from its definition in the policies at issue here. *Hecla* interpreted a pre–1986 CGL policy, which had defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which result in ... property damage, *neither expected nor intended from the standpoint of the insured.*" 811 P.2d at 1086 (emphasis added). The *Monterra Homes* division did not explain how to reconcile the two different "occurrence" definitions. However, the "occurrence" definition at issue here does not focus on the *expectations or intentions* from the insured's standpoint. Thus, our interpretation of the term here need not be limited to the expectations or intentions of the insured.

C. Consequential Damage

As discussed above, the HOA complaint alleged various construction defects and deficiencies, which were also incorporated into the DRH third-party complaint. Based on the allegations within the four corners of those complaints, the terms of the insurance policies at issue, and the plain meaning of "accident," we conclude the trial court did not err in determining that the allegations did not trigger a duty to defend. Even viewing the allegations in the light most favorable to GSINDA, we are not persuaded that the underlying complaints alleged any damage beyond the work product of Foster Frames or the sub-subcontractors.

In reaching this conclusion, we reject GSINDA's further contention that a duty to defend was triggered by allegations in the HOA complaint of "other losses" and "consequential damage" to "various elements of the Project." At oral argument, GSINDA argued that additional property damage was alleged based on the list of defects contained in the HOA complaint. However, it did not provide any specific instances of the additional or "other property" damage. Further, GSINDA has not identified any allegations of consequential damages in the HOA complaint resulting from defective workmanship that ***538** would apply to Foster Frames or the sub-subcontractors. *See* C.R.C.P. 8(a) (pleading must include short and plain statement of claim showing the pleader is entitled to relief).

The DRH third-party complaint alleged that Foster Frames performed framing, siding installation, window installation, and sliding glass door installation for the project. Similarly, the Foster Frames complaint alleged the sub-subcontractors were hired to "perform framing, window installation, siding and sliding glass door work and other activities at Rock Creek."

The HOA complaint generally alleged faulty workmanship in construction of the entire project, which encompassed numerous contractors, subcontractors, and sub-subcontractors. This appeal is limited to Foster Frames and its sub-subcontractors. However, any potential consequential damage alleged in the HOA complaint concerns work on the project unrelated to Foster Frames, for example, "cracking of interior flooring materials (tile, etc.) from structural foundation movement." There are no allegations that Foster Frames was responsible for placement of the foundation, or for faulty workmanship that could have caused the foundation

movement, or resulted in the interior floor cracking. Thus, there was no consequential damage alleged that would trigger a duty to defend.

Neither the DRH third-party complaint nor Foster Frames' fourth-party complaint identified any consequential property damage relating to Foster Frames or the sub-subcontractors. Further, neither on summary judgment nor on appeal has GSINDA specified any allegations of consequential damages for which there was a duty to defend. The general allegations in the HOA complaint, such as "[o]ver-driven nails for the attachment of the horizontal hardboard siding," describe potential defects in the work product itself, not additional or consequential property damage.

GSINDA has cited no authority, and we have found none, holding that such conclusory allegations of consequential damages trigger a duty to defend. We agree with the trial court that the "allegations contain nothing substantive about the extent or nature of the property damages."

Therefore, the corollary rule providing coverage for consequential damages is not applicable, and the allegations in the underlying complaints could not impose a duty to defend under defendants' insurance policies as a matter of law.

III. Other Issues

Because we affirm the trial court, we need not address the other issues raised by defendants, including whether Foster Frames was an additional insured under the policies and whether the ongoing operations exclusion in certain policies precluded coverage.

The trial court's orders are affirmed.

Judge ROMÁN and Judge LICHTENSTEIN concur.

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205 P.3d 529

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NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY
v.
The DAVID GROUP, INC.

1170588
|
May 24, 2019

Synopsis

Background: Insured, a home construction company, brought action for a declaratory judgment that insurer, which had issued a commercial general liability (CGL) policy to insured, was obligated to defend insured in homeowners' action over alleged defects in home purchased from insured, which was an action that ended with an arbitration award for homeowners, and insured sought to have insurer pay all fees and expenses that insured incurred in defending against homeowners' action. The Circuit Court, Jefferson County, Bessemer Division, No. CV-08-902856, entered partial summary for insured on the issue of coverage and later awarded insured damages. Insurer appealed.

[Holding:] The Supreme Court, Shaw, J., held that the arbitration award to homeowners did not support a conclusion that homeowners suffered damages because of an occurrence caused by faulty workmanship.

Reversed and remanded.

West Headnotes (8)

[1] Appeal and Error
Determining action and preventing judgment

Appeal and Error
Interlocutory, collateral, and supplementary matters in general

30 Appeal and Error
30III Decisions Reviewable
30III(E) Nature, Scope, and Effect of Decision
30k93 Determining action and preventing judgment
30 Appeal and Error
30XVI Review
30XVI(B) Considerations Preliminary to Conducting Review
30XVI(B)3 Matters Brought up with Ruling Appealed from
30k3052 Interlocutory, collateral, and supplementary matters in general

An appeal from a pretrial final judgment disposing of all claims in the case entitles the appellant, for purposes of appellate review, to raise issues based upon the trial court's adverse rulings, including the denial of the appellant's summary-judgment motions.

1 Cases that cite this headnote

[2] Appeal and Error
De novo review

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)1 In General
30k3137 De novo review

When no oral testimony is presented to the circuit court and the judgment is based entirely upon documentary evidence, the appellate court reviews the matter de novo.

[3] Alternative Dispute Resolution
Conclusiveness of Adjudication

Insurance
Accident, occurrence or event

Insurance
Property damage

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk381 Conclusiveness of Adjudication
25Tk382 In general
217 Insurance

217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Arbitration award to homeowners in their action against home construction company did not support a conclusion that homeowners suffered damages because of an occurrence caused by faulty workmanship, and thus construction company was not entitled to coverage and indemnification under its commercial general liability (CGL) policy; arbitrator specifically determined that homeowners failed to prove any defects in the home other than some minor damage, and arbitration award did not indicate any kind of damage to homeowners' property, personal or otherwise, from continuous or repeated exposure to some other general harmful condition.

[4] Contracts
Workmanship and workmanlike performance

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k205 Warranties
95k205.15 Implied Warranties
95k205.15(4) Workmanship and workmanlike performance

Alabama law recognizes an implied warranty of workmanship, i.e., a duty that a contractor will use reasonable skill in fulfilling his contractual obligations.

1 Cases that cite this headnote

[5] Contracts
Workmanship and workmanlike performance

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k205 Warranties
95k205.15 Implied Warranties
95k205.15(4) Workmanship and workmanlike performance

Even when a contractor has completed the work contracted for, the contractor can be held liable for breaching the parties' contract and the implied warranty of workmanship if it failed to use reasonable skill in performing its work.

1 Cases that cite this headnote

[6] Insurance
Accident, occurrence or event

Insurance
Property damage

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Faulty workmanship itself is not property damage caused by or arising out of an occurrence within meaning of a commercial general liability (CGL) policy.

[7] Insurance
Coverage--Liability Insurance

Principal and Surety
Suretyship Distinguished from Other Contracts

Principal and Surety
Nature of liability

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2260 In general
309 Principal and Surety
309I Creation and Existence of Relation
309I(A) Between Individuals
309k4 Suretyship Distinguished from Other Contracts
309k5 In general
309 Principal and Surety
309II Nature and Extent of Liability of Surety

309k65 Nature of liability

The purpose of a commercial general liability (CGL) policy is to protect the insured contractor from tort liability, not to insulate it from its own faulty work; in contrast, a performance bond is intended to insure the contractor against claims for the cost of repair or replacement of faulty work.

[8] Insurance

Burden of proof

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2117 Burden of proof

The insured normally bears the burden of establishing that a claim falls within the coverage of the policy.

Appeal from Jefferson Circuit Court (CV-08-902856); Michael G. Graffeo, Judge

Attorneys and Law Firms

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William E. Rutledge, Birmingham, for Appellee.

Opinion

SHAW, Justice.

***1** Nationwide Mutual Fire Insurance Company ("Nationwide"), the defendant in a declaratory-judgment action below, appeals from a judgment entered in favor of the plaintiff below, The David Group, Inc. ("TDG"), holding that TDG was entitled to coverage and indemnification under a commercial general-liability ("CGL") insurance policy issued by Nationwide. We reverse and remand.

Facts and Procedural History

In January 2004, TDG, a construction company that specializes in custom-built houses, remodeling, and construction services, purchased a CGL policy from Nationwide. Under the terms of that CGL policy, Nationwide agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." According to the policy, its coverage applied to "bodily injury" and "property damage" only if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence.' "

In October 2006, while TDG's CGL policy with Nationwide was in effect, Saurin and Valerie Shah purchased a newly built house from TDG. After they moved in, the Shahs began experiencing problems with their new house. Despite TDG's efforts at correcting the problems, however, in February 2008, the Shahs sued TDG.

In their complaint, the Shahs alleged that the house had "severe structural issues" and that they had discovered "numerous and substantial construction defects in the residence including, but not limited to, serious defects resulting in health and safety issues, building code violations, poor workmanship, misuse of construction materials, and disregard of proper installation methods." They also asserted claims of rescission, breach of contract, breach of express and implied warranties, negligence and wantonness, negligent supervision and training, misrepresentation and fraud, suppression, and "gross negligence" and "incompetence." As a result of the purported defects in the house, the Shahs alleged that they "suffered and/or are continuing to suffer damages including, but without limitation[,] repair, and/or replacement costs, loss of the use and enjoyment of areas of their home, loss of market value in their home, mental anguish and emotional distress damages."

Although Nationwide initially defended TDG against the Shahs' action, Nationwide withdrew its defense after conducting its own investigation into the Shahs' allegations. Nationwide explained in a letter to TDG that, based on its investigation, it concluded that it had no duty either to defend or to indemnify TDG because, according to Nationwide, the damage the Shahs complained of did not constitute an "occurrence" so as to trigger coverage under the CGL policy.

In September 2008, TDG initiated an action against Nationwide seeking a judgment declaring that Nationwide was obligated to defend TDG in the Shahs' action and to indemnify TDG for any judgment entered against it. TDG also requested that all fees and expenses it incurred in defending against the Shahs' action be paid by Nationwide. Finally, TDG sought a preliminary injunction to prevent the Shahs' action

from going forward until TDG's case against Nationwide had been resolved.

***2** Despite that request, however, the Shahs' case against TDG proceeded to arbitration, and TDG's case against Nationwide was stayed pending the results of the arbitration proceeding. On October 20, 2009, the arbitrator issued an award in favor of the Shahs in the amount of $ 12,725.

In July 2011, Nationwide filed a motion for a summary judgment on TDG's claims. In its motion, Nationwide argued, among other things, that TDG's alleged faulty workmanship in constructing the Shahs' house did not constitute an "occurrence" so as to trigger coverage under the CGL policy. In December 2011, Nationwide filed a renewed motion for a summary judgment, to which TDG responded, and later filed supplemental evidence in support of that motion.

On January 29, 2015, the Jefferson Circuit Court ("the trial court") issued an order denying Nationwide's motion for a summary judgment. In that same order, the trial court also entered a partial summary judgment in favor of TDG on the issue of coverage. Based on the allegations in the Shahs' complaint and the findings in the arbitrator's award, the trial court, applying the reasoning found in this Court's decision in Owners Insurance Co. v. Jim Carr Homebuilder, LLC, 157 So.3d 148 (Ala. 2014), held that the complaint alleged, and the arbitration award indicated, that there was damage to the Shahs' house that resulted from or was caused by TDG's faulty work. The trial court thus concluded that TDG was entitled to coverage and indemnification under the CGL policy not only for the damages awarded against it in the Shahs' action but also for its attorney fees and expenses incurred in defending the Shahs' action. The specific amount of damages to which TDG was entitled was not covered in that order.

Between February 2015 and April 2017, the parties filed various motions with the trial court related to damages. On April 19, 2017, the trial court entered a judgment in favor of TDG and assessed damages. Nationwide filed a motion to alter, amend, or vacate that judgment, arguing several grounds. On August 17, 2017, the trial court granted Nationwide's motion and withdrew its April 2017 order after finding, among other things, that it had miscalculated the prejudgment interest it had awarded to TDG. On February 15, 2018, the trial court entered a new final judgment awarding damages. Thereafter, Nationwide appealed.

Standard of Review

[1] **[2]** "An 'appeal from a pretrial final judgment disposing of all claims in the case ... entitles [the appellant], for purposes of our review, to raise issues based upon the trial court's adverse rulings, including the denial of [the appellant's] summary-judgment motions.' " Barney v. Bell, 172 So.3d 849, 856 (Ala. Civ. App. 2014) (quoting Lloyd Noland Found., Inc. v. City of Fairfield Healthcare Auth., 837 So.2d 253, 263 (Ala. 2002)). "[W]hen no oral testimony is presented to the circuit court and the ' " 'judgment is based entirely upon documentary evidence,' " ' the Court reviews the matter de novo." Swindle v. Remington, [Ms. 1161044, March 8, 2019] ––– So. 3d ––––, ––––, 2019 WL 1090393 (Ala. 2019) (quoting Weeks v. Wolf Creek Indus., Inc., 941 So.2d 263, 268-69 (Ala. 2006), quoting in turn Padgett v. Conecuh Cty. Comm'n, 901 So.2d 678, 683 (Ala. 2004), quoting in turn Alfa Mut. Ins. Co. v. Small, 829 So.2d 743, 745 (Ala. 2002)).

Discussion

***3** **[3]** On appeal, Nationwide argues that the trial court erred in finding that TDG was entitled to coverage under the CGL policy and thus entering a judgment in favor of TDG. According to Nationwide, because the "defects" alleged by the Shahs and identified by the arbitrator referred to nothing more than faulty work performed by TDG, those defects were not "occurrences" that would trigger coverage under the CGL policy and, thus, Nationwide was not required to indemnify TDG for the damages awarded against it in the Shahs' action.

As noted above, under the terms of the CGL policy, Nationwide agreed to "pay those sums that [TDG] becomes legally obligated to pay as damages because of 'bodily injury' and 'property damage' ... only if ... [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory ... [and] occurs during the policy period.' " [1] An "occurrence" is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although the Nationwide policy does not define the term "accident," this Court has previously stated that, in this context, an "accident" is " '[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could [not] be reasonably anticipated.' " Hartford Cas. Ins. Co. v. Merchants

& Farmers Bank, 928 So.2d 1006, 1011 (Ala. 2005) (quoting Black's Law Dictionary 15 (7th ed. 1999)).

1 The policy specifically defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of that property" or "loss of use of tangible property that is not physically injured." Additionally, "bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

[4] **[5]** The Shahs alleged that TDG breached the parties' contract and express and implied warranties by failing to properly construct their house in a "good workmanlike" manner. Alabama law recognizes an implied warranty of workmanship, i.e., a duty that a contractor will " 'use reasonable skill in fulfilling [his] contractual obligations.' " Blackmon v. Powell, 132 So.3d 1, 5 (Ala. 2013) (quoting Turner v. Westhampton Court, L.L.C., 903 So.2d 82, 93 (Ala. 2004)). Even when a contractor has completed the work contracted for, the contractor can be held liable for breaching the parties' contract and the implied warranty of workmanship if it failed to use reasonable skill in performing its work. See id.

[6] **[7]** This Court has repeatedly held, however, that "faulty workmanship itself is not an occurrence" under a CGL policy like the one here. See Town & Country Prop., LLC v. Amerisure Ins. Co., 111 So.3d 699, 706 (Ala. 2011). Phrased more precisely, "faulty workmanship itself is not 'property damage' 'caused by' or 'arising out of' an 'occurrence.' " Owners Ins., 157 So.3d at 155. This Court has recognized, however, that faulty work may lead to an occurrence and thus trigger coverage under a CGL policy, "if it subjects personal property or other parts of the [damaged] structure to 'continuous or repeated exposure' to some other 'general harmful condition' ... and, as a result of that exposure, personal property or other parts of the structure are damaged." Town & Country, 111 So.3d at 706. This concept is consistent with the idea that the purpose of a CGL policy is to protect the insured contractor from tort liability, not to insulate it from its own faulty work. [2] See Town & Country, 111 So.3d at 707. This means that, although there is no coverage for replacing poor work, there may be coverage for repairing resulting damage caused by the poor work. This necessarily depends on the "nature of the damage" that results from that faulty work. Owners Ins., 157 So.3d at 153.

2 In contrast, a performance bond " ' "is intended to insure the contractor against claims for the cost of repair or replacement of faulty work." ' " Town & Country, 111 So.3d at 707 (quoting Essex Ins. Co. v. Holder, 372 Ark. 535, 261 S.W.3d 456, 459 (2007), quoting in turn Nabholz Constr. Co. v. St. Paul Fire & Marine Ins. Co., 354 F.Supp.2d 917, 923 (E.D. Ark. 2005)).

***4** For example, when a contractor hired to repair a roof performs the work so poorly that it results in leaks but those leaks cause no damage, there is no "accident" constituting an "occurrence." See Berry v. South Carolina Ins. Co., 495 So.2d 511, 513 (Ala. 1985). In contrast, when a contractor is hired to repair a roof and his work causes a leak that results in damage to the ceilings, walls, or floors of the building, the resulting damage is an "accident" that is covered. See United States Fid. & Guar. Co. v. Bonitz Insulation Co. of Alabama, 424 So.2d 569, 573 (Ala. 1982).

A case illustrating this concept is Owners Insurance, supra. In Owners Insurance, the Johnson family hired a contractor to build a new house. After construction was completed and the Johnsons moved in, they began to notice a number of problems with the house relating to water leaking through the roof, walls, and floors that resulted in water damage to several areas of the house. As a result, the Johnsons sued the contractor, alleging breach of contract, fraud, and negligence and wantonness. 157 So.3d at 150. The action proceeded to arbitration, and the arbitrator issued an award in favor of the Johnsons after finding that several parts of the house were faulty and that damage had resulted from leaks, moisture, and water invasion. 157 So.3d at 151-52.

At the time of the events underlying the Johnsons' lawsuit, the contractor held a CGL policy issued by Owners Insurance Company ("Owners"). Although Owners initially hired counsel to defend its insured contractor, it later filed an action seeking a judgment declaring whether, under the CGL policy, it had a duty to defend and indemnify the contractor with regard to the Johnsons' claims. The trial court entered a judgment holding that the arbitrator's award was covered by the policy and that Owners was required to indemnify the contractor. 157 So.3d at 152.

On appeal, this Court held, among other things, that, although CGL policies are not meant to cover the cost of repairing faulty workmanship, the definition of the term "occurrence" does not itself exclude from coverage additional damage resulting from faulty work. 157 So.3d at 155-56. See also Moss v. Champion Ins. Co., 442 So.2d 26 (Ala. 1983) (finding an occurrence when a contractor's poor work on a roof resulted in damage to the plaintiff's attic, interior

ceilings, and some furnishings caused by rain entering into the structure), and Bonitz, 424 So.2d at 573 (holding that negligence in installing a roof did not prevent there from being an "occurrence" when it rained and water leaked through the roof, causing damage to the interior).

In the present case, the Shahs' complaint alleged that there were "numerous and substantial construction defects" throughout their house. Although the Shahs did not specifically describe those "defects" in their complaint, they did allege that those defects were "prevalent throughout the [house]" and included, but were not limited to, "structural issues," "serious defects resulting in health and safety issues, building code violations, poor workmanship, misuse of construction materials, and disregard of proper installation methods." (Emphasis added.) The Shahs alleged that, as a result of those defects, they had incurred "damages," including "repair, and/or replacement costs, loss of the use and enjoyment of areas of their home, loss of market value in the home, mental anguish, and emotional distress damages."

***5** During the arbitration proceedings, both the Shahs and TDG offered a variety of exhibits and witness testimony. The arbitrator made the following findings:

> "3) The [Shahs'] experts failed to prove specifically any defects in the home other than some minor damage;
>
> "....
>
> "6) The Arbitrator finds no mental anguish damages are available to the [Shahs]."

(Emphasis added.) In light of the above findings, the arbitrator awarded damages against TDG "for $ 10,225.00 which is the total estimate for repairs and $ 2,500 for the money owed on the 'pool.' "[3]

3 Nothing in either the briefs or the record explains what "the money owed on the pool" is referring to. In any event, the phrase "money owed" does not indicate that any damage to the pool resulted from TDG's faulty workmanship.

Applying the law from Owners Insurance, supra, the trial court held that, although the arbitrator's award was not "expressly clear" as to the basis for awarding damages, the Shahs' complaint "sufficiently allege[d] claims other than faulty workmanship and pray[ed] for damages on [those] claims" and that the arbitrator "had the opportunity to find [that] the Shahs suffered damages due to occurrences caused by faulty workmanship." We disagree.

[8] Under Alabama law, the insured--here, TDG--normally bears the burden of establishing that a claim falls within the coverage of the policy. See, e.g., Chandler v. Alabama Mut. Ins. Co., 585 So.2d 1365, 1367 (Ala. 1991). The Shahs' complaint clearly alleges faulty workmanship, but at no point do the Shahs allege additional or resulting damage to their house or to their personal property as a result of that faulty workmanship.

Additionally, unlike the significant damage resulting from the faulty work found by the arbitrator in Owners Insurance, the arbitrator here specifically determined that the Shahs failed to prove any "defects" in the home "other than" some "minor damage." Although TDG contends that the "minor damage" referred to in the arbitrator's award indicates that the arbitrator believed that there was some damage that resulted from TDG's faulty work, the Shahs' complaint alleged no such damage. The "minor damage" mentioned by the arbitrator appears to actually be a reference to minor construction defects the Shahs' experts did prove. Stated differently, the arbitrator held that the experts failed to prove faulty workmanship ("defects") except for ("other than") "minor damage." This is further evidenced by the fact that the arbitration award does not indicate that any kind of damage to the Shahs' property--personal or otherwise--resulted from " 'continuous or repeated exposure' to some other 'general harmful condition.' " Town & Country, 111 So.3d at 706. Moreover, if the damages awarded for "minor defects" referenced an award to repair resulting damage, then that would mean that the arbitrator awarded nothing to repair the faulty work referenced in the Shahs' complaint that would have caused such damage.

The record before us does not support the conclusion that the arbitrator found the Shahs to have "suffered damages" because of an occurrence caused by faulty workmanship. Under these circumstances, there is nothing in this case demonstrating that there was property damage or personal injury resulting from an "occurrence" that triggered coverage under the CGL policy.

Conclusion

***6** For the foregoing reasons, we conclude that the trial court erred in finding that TDG was entitled to coverage and indemnification under its CGL policy with Nationwide. Thus, we reverse the trial court's judgment and remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

All Citations

--- So.3d ----, 2019 WL 2240382

End of Document

Big-D Const. Corp. v. Take it for Granite Too, 917 F.Supp.2d 1096 (2013)

917 F.Supp.2d 1096
United States District Court, D. Nevada.

BIG–D CONSTRUCTION CORP., Plaintiff,
v.
TAKE IT FOR GRANITE TOO, et al., Defendants.

No. 2:11–cv–00621–PMP–PAL.
|
Jan. 22, 2013.

Synopsis

Background: General contractor that was additional insured under commercial general liability (CGL) insurance policies with regard to performance of subcontractor's ongoing operations for it filed action in state court against subcontractor and its insurers seeking declaratory judgment regarding its rights to coverage under policies, and alleging breach of contract and unfair insurance claims practices. Defendants removed action. Insurers moved for summary judgment.

Holdings: The District Court, Philip M. Pro, J., held that:

[1] unexpected, unforeseen, and unintended events of three stone tiles falling from exterior of building on which insured subcontractor was working came within plain, ordinary, and common meaning of accident;

[2] replacement of stone tile that fell from exterior wall of building that had been installed by insured subcontractor was not property damage;

[3] damage to each stone tile that fell from exterior of building after installation by insured subcontractor was property damage;

[4] safety measures taken to prevent future property damage or bodily injury caused by additional falling stone tiles from exterior wall of building that had been installed by insured subcontractor were property damage;

[5] physical injury to stucco substrate upon removal of stone tiles that had been installed by insured subcontractor was property damage;

[6] loss of use of front entrance of building from property damage due to falling stone tile from exterior wall of building that had been installed by insured subcontractor was covered;

[7] water damage to other subcontractor work from pockets of efflorescence forming between stone tiles and substrate as result of water migrating under stone tiles installed by insured subcontractor was occurrence; and

[8] factual issue existed as to whether notice of claim was late, and whether insurer was prejudiced by any delay in notice.

Motions granted in part and denied in part.

West Headnotes (40)

[1] Insurance
Questions of law or fact
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 Questions of law or fact
In Nevada, the interpretation of an insurance contract is a question of law for the court.

[2] Insurance
Construction as a whole
Insurance
Laypersons or experts
Insurance
Plain, ordinary or popular sense of language
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 Construction as a whole
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1819 Understanding of Ordinary or Average Persons
217k1821 Laypersons or experts

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

Under Nevada law, an insurance policy should be read as a whole, and its language should be analyzed from the perspective of one untrained in law or in the insurance business; policy terms should be viewed in their plain, ordinary and popular connotations.

[3] Insurance
Ambiguity, Uncertainty or Conflict

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) In general

Under Nevada law, any ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured.

[4] Insurance
Ambiguity in general

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 Ambiguity in general

Under Nevada law, a provision in an insurance policy is ambiguous if it is reasonably susceptible to more than one interpretation.

[5] Insurance
Reasonable expectations

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1817 Reasonable expectations

Ultimately, a Nevada court should interpret an insurance policy to effectuate the reasonable expectations of the insured.

[6] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Unexpected, unforeseen, and unintended events of three stone tiles falling from exterior of building on which insured subcontractor was working came within plain, ordinary, and common meaning of accident under commercial general liability (CGL) insurance policies in Nevada, even if insured's faulty workmanship in installing tile was not accident or occurrence under those policies, and thus each stone tile that fell from building was occurrence.

1 Cases that cite this headnote

[7] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

In Nevada, faulty workmanship itself does not fall under the common meaning of an accident, and therefore is not an occurrence under a commercial general liability (CGL) insurance policy, as predicted by a federal district court.

2 Cases that cite this headnote

[8] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

In Nevada, an unexpected happening caused by faulty workmanship could be an occurrence under a commercial general liability (CGL) insurance policy, as predicted by a federal district court.

2 Cases that cite this headnote

[9] **Insurance**
Accident, occurrence or event

Insurance
Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Replacement of stone tile that fell from exterior wall of building that had been installed by insured subcontractor was not property damage under commercial general liability (CGL) insurance policy in Nevada; installation of stone tiles was not occurrence, and therefore could not cause property damage covered by policy, and even if faulty installation was occurrence, installation itself did not cause any physical injury to building or stucco, installation had not been taken to prevent further damage, and replacement had been done for aesthetic purposes and not to prevent further damage.

[10] **Insurance**
Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Under Nevada law, costs incurred to prevent future occurrences that may cause damage to property or life may be considered property damage under a commercial general liability (CGL) insurance policy.

[11] **Insurance**
Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Damage to each stone tile that fell from exterior of building after installation by insured subcontractor was property damage under commercial general liability (CGL) insurance policy in Nevada.

[12] **Insurance**
Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Safety measures taken to prevent future property damage or bodily injury caused by additional falling stone tiles from exterior wall of building that had been installed by insured subcontractor were property damage under commercial general liability (CGL) insurance policy in Nevada; this included removal, scaffolding, and any other safety measures taken to prevent future bodily injury or property damage.

[13] **Insurance**
Accident, occurrence or event

Insurance
Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Under commercial general liability (CGL) insurance policy in Nevada, physical injury to stucco substrate upon removal of stone tiles that had been installed by insured subcontractor was property damage caused by stone tiles that previously fell from exterior wall of building; stone tiles falling were occurrences, and those

occurrences caused physical injury to stucco because stone tiles had to be removed from stucco to prevent property or bodily damage.

[14] Insurance

Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Loss of use of front entrance of building from property damage due to falling stone tile from exterior wall of building that had been installed by insured subcontractor was covered in Nevada under provision for "loss of use" of tangible property under commercial general liability (CGL) insurance policy, where front entrance of building was closed due to falling tile and side entrance was used to prevent bodily harm to entrants.

[15] Insurance

Accident, occurrence or event

Insurance

Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

Water damage to other subcontractor work from pockets of efflorescence forming between stone tiles and substrate as result of water migrating under stone tiles installed by insured subcontractor was occurrence under commercial general liability (CGL) insurance policy in Nevada, and thus was covered property damage.

[16] Insurance

Continuous acts and injuries; trigger

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2263 Commencement and Duration of Coverage
217k2265 Continuous acts and injuries; trigger

Safety measures and loss of use that occurred after policy period had ended were not covered under commercial general liability (CGL) insurance policy in Nevada that provided coverage for property damage that occurred during policy period, even though insured subcontractor's faulty work occurred during policy period.

[17] Insurance

Continuous acts and injuries; trigger

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2263 Commencement and Duration of Coverage
217k2265 Continuous acts and injuries; trigger

Safety measures and loss of use that occurred during policy period were covered under commercial general liability (CGL) insurance policy in Nevada that provided coverage for property damage that occurred during policy period, even though insured subcontractor's faulty work did not occur during policy period.

[18] Insurance

Continuous acts and injuries; trigger

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2263 Commencement and Duration of Coverage
217k2265 Continuous acts and injuries; trigger

Provision in commercial general liability (CGL) insurance policy that applied under Nevada law to property damage that occurred during policy period only if property damage "did not first exist, nor is alleged to have existed, in whole or in part, prior to the inception date of this policy" did not apply to property damage that resulted from stone tile falling from exterior of building that had been installed by insured subcontractor,

where only property damage that occurred before policy period was damage to first stone that fell and all other property damage that occurred was distinct and separate from that first stone falling and was within policy period.

1 Cases that cite this headnote

[19] Insurance

Continuous acts and injuries; trigger

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2263 Commencement and Duration of Coverage
217k2265 Continuous acts and injuries; trigger

Provision in commercial general liability (CGL) insurance policy that applied under Nevada law to property damage that occurred during policy period only if property damage "was not, nor is alleged to have been, in the process of taking place prior to the inception date of this policy, even if the actual or alleged "property damage" continues during this policy period" did not apply to property damage that resulted from stone tile falling from exterior of building that had been installed by insured subcontractor, since faulty installation of tiles was not property damage within meaning of policy and that was only condition that arguably continued on into policy period.

1 Cases that cite this headnote

[20] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to whether provision in commercial general liability (CGL) insurance policy that applied under Nevada law to property damage that occurred during policy period only if property damage "was not caused, nor is alleged to have been caused, by any construction defect or condition which existed, or is alleged to have existed, prior to the effective date of this policy" applied to property damage that resulted from stone tile falling from exterior of building that had been installed by insured subcontractor, precluding summary judgment in additional insured's action against insurer seeking declaratory judgment regarding its rights to coverage. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[21] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to whether property damage that resulted from stone tile falling from exterior of building occurred during performance of subcontractor's ongoing operations for general contractor, as additional insured, as required by commercial general liability (CGL) insurance policy, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights to coverage under policy in Nevada. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[22] Insurance

Exclusions, exceptions or limitations

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(2) Exclusions, exceptions or limitations

Under Nevada law, clauses excluding coverage are interpreted narrowly against the insurer.

[23] Insurance

Exclusions and limitations in general

Insurance

Burden of proof

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2098 Exclusions and limitations in general
217 Insurance
217XV Coverage—in General
217k2114 Evidence
217k2117 Burden of proof

In Nevada, to prove that an exclusion excludes coverage under a policy, the insurer must write the exclusion in obvious and unambiguous language, show that the insurer's proposed interpretation is the only fair interpretation of the exclusion, and show that the exclusion clearly applies to the claim at hand.

[24] Insurance

Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Exclusion in commercial general liability (CGL) insurance policy that barred coverage under Nevada law for "property damage" to "your product" arising out of product or any part of product, where "Your product" was defined as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by [the insured]," applied to stone tiles installed by insured subcontractor that subsequently fell from exterior of building.

[25] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to when insured subcontractor completed its work, and thus whether exclusion in commercial general liability (CGL) insurance policy that barred coverage under Nevada law for "property damage" to "your product" arising out of product or any part of product, where "Your product" was defined as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by [the insured]," applied to stone tiles installed by insured subcontractor that subsequently fell from exterior of building and caused property damage, precluding summary judgment, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights, as additional insured, to coverage under policy. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[26] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to when insured subcontractor completed its work or put it to its intended use, and thus whether exclusion in commercial general liability (CGL) insurance policy that barred coverage under Nevada law for "property damage" to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" applied to stone tiles installed by insured subcontractor that subsequently fell from exterior of building and caused property damage, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights, as additional insured, to coverage under policy. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[27] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to when insured subcontractor completed its work or put it to its intended use, and thus whether exclusion in commercial general liability (CGL) insurance policy that barred coverage under Nevada law for "property damage" to insured's work arising out of its work or any part of its work and included in products-completed operations hazard applied to stone tiles installed by insured subcontractor that subsequently fell from exterior of building and caused property damage, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights, as additional insured, to coverage under policy. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[28] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to whether notice of claim was late, and whether insurer was prejudiced by any delay in notice, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights, as additional insured, to coverage under commercial general liability (CGL) insurance policy. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[29] Insurance

Prejudice to insurer

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(B) Claim Procedures
217XXVII(B)2 Notice and Proof of Loss
217k3166 Effect of Noncompliance with Requirements
217k3168 Prejudice to insurer

For an insurer to deny coverage under Nevada law due to late notice, the insurer must show the notice was late and the delay materially impaired the insurer's ability to contest liability.

[30] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to whether insurer had wrongfully denied claim of general contractor, as additional insured, under commercial general liability (CGL) insurance policy, and therefore, issues of fact remained as to whether general contractor's noncompliance with voluntary settlement clause precluded coverage, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights to coverage. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[31] Insurance

Insurer's Duty to Indemnify in General

Insurance

Insured's liability for damages

Insurance

Accrual; conditions precedent

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2268 In general
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2269 Insured's liability for damages
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2271 Accrual; conditions precedent

Duty under commercial general liability (CGL) insurance policy to indemnify in Nevada could be triggered absent court order or judgment making insured liable for damages, and could include amounts insured was legally obligated to pay due to contractual obligations, as predicted by federal district court.

1 Cases that cite this headnote

[32] Insurance

Insurer's Duty to Indemnify in General

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2268 In general

For a duty to indemnify to arise under Nevada law, the insured's activity and the resulting loss or damage must actually fall within the coverage provisions of the commercial general liability (CGL) insurance policy.

[33] Insurance

Laypersons or experts

Insurance

Plain, ordinary or popular sense of language

Insurance

Ambiguity, Uncertainty or Conflict

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1819 Understanding of Ordinary or Average Persons
217k1821 Laypersons or experts
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) In general

Under Nevada law, insurance contracts must be interpreted according to the plain meaning of the words in the policy and from the viewpoint of a person untrained in the law, and any ambiguities must be construed in favor of the insured.

[34] Insurance

Contractual liabilities

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(8) Contractual liabilities

Exclusion from coverage under commercial general liability (CGL) insurance policy for property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement" was ambiguous, since it could exclude coverage for insured's damages arising from assumption of any contractual liability or it could be interpreted to apply to assumption of liability of third-party by insured, and thus exclusion had to be construed against insurer, to apply to assumption of liability of third party by insured.

[35] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases

Genuine issue of material fact existed as to whether general contractor was legally obligated to pay sums associated with remediation and repair as damages, and consequently whether insurer owed duty to general contractor, as additional insured, to indemnify, precluding summary judgment in general contractor's action against insurer seeking declaratory judgment regarding its rights to coverage under commercial general liability (CGL) insurance policy. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[36] Insurance

Notice, proof, and demand by insured

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3341 Prerequisites for Claim of Breach or Bad Faith
217k3343 Notice, proof, and demand by insured

Notice of claim to subcontractor's insurer's from general contractor's direct insurer was sufficient to put subcontractor's insurer on notice of claim, as required for unfair claims practices claim under Nevada law by general contractor, as additional insured under subcontractor's commercial general liability (CGL) insurance policy. West's NRSA 686A.020.

[37] Insurance

Settlement Duties; Bad Faith

Insurance

Prerequisites for Claim of Breach or Bad Faith

Insurance

Communications and explanations

Insurance

Communications and explanations

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 In general
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3341 Prerequisites for Claim of Breach or Bad Faith
217k3342 In general
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3346 Settlement by Liability Insurer
217k3355 Communications and explanations
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3363 Communications and explanations

Failing to promptly communicate, affirm or deny within a reasonable time, or explain the basis for a denial of coverage are all evidence of unfair claims practices under Nevada law; an insurer is not required to breach its duties under the insurance contract to be liable for unfair claims practices. West's NRSA 686A.020.

[38] Insurance

Insurer's settlement duties in general

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3346 Settlement by Liability Insurer
217k3349 Insurer's settlement duties in general

Insurer did not fail to effectuate prompt, fair, and equitable settlements of claims in which insurer's liability had become reasonably clear under commercial general liability (CGL) insurance policy, and thus insurer did not engage in unfair practices under Nevada law, where insurer was not liable for insurance claim. West's NRSA 686A.020.

[39] Insurance

Insurer's settlement duties in general

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3346 Settlement by Liability Insurer
217k3349 Insurer's settlement duties in general

Insurer did not fail to effectuate prompt, fair, and equitable settlements of additional insured's claims in which insurer's liability had become reasonably clear under commercial general liability (CGL) insurance policy, and thus insurer did not engage in unfair practices under Nevada law, where there were genuine issues of material fact on summary judgment as to whether insurer was liable on claims by additional insured for coverage for certain property damage. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; West's NRSA 686A.020.

[40] Federal Civil Procedure

Insurance cases

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases
170Ak2501 Insurance cases
Genuine issue of material fact existed as to whether insurers failed to acknowledge and act reasonably promptly upon communications with respect to claim under commercial general liability (CGL) insurance policy, affirm or deny coverage of claim within reasonable time after proof of loss requirements had been met, and promptly provide reasonable explanation to additional insured of basis in policy for denial of claim, precluding summary judgment on unfair practices claim under Nevada law. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; West's NRSA 686A.020.

Attorneys and Law Firms

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ORDER

PHILIP M. PRO, District Judge.

Before the Court is Defendant Nautilus Insurance Company's ("Nautilus") Motion for Summary Judgment (Doc. # 41), filed on July 5, 2012. Plaintiff Big–D Construction Corp. ("Big–D") filed a Response (Doc. # 51) on August 3, 2012. Nautilus filed a Reply (Doc. # 54) on August 24, 2012.

Also before the Court is Defendant Century Surety Company's ("Century") Motion for Summary Judgment (Doc. # 55), filed on August 31, 2012. Big–D filed a Response (Doc. # 62) on September 24, 2012. Century filed a Reply (Doc. # 70) on November 2, 2012. Big–D filed a Motion to Strike Certain of Defendant Century's Exhibits in Support of its Motion for Summary Judgment (Doc. # 61) on September 24, 2012. Century filed a Response (Doc. # 71) on November 2, 2012. Big–D filed a Reply (Doc. # 76) on November 19, 2012. The Court held a hearing on these motions on December 20, 2012. (Mins. of Proceedings (Doc. # 85).)

I. BACKGROUND

A. The Policies

On March 10, 2005, International Gaming Technologies ("IGT") and Big–D entered ***1103** into a contract whereby Big–D would be the general contractor for remodeling IGT's Las Vegas building. (Def. Nautilus Ins. Co.'s Mot. for Summ. J. (Doc. # 41) ["Nautilus Mot. Summ. J."], Ex. A at 1.) Thereafter, Big–D and Defendant Take it for Granite Too ("TIFGT") entered into a subcontract whereby TIFGT would install various tiling and stonework on the interior and exterior of the IGT building. (*Id.,* Ex. B at ex. B.)

Defendant Nautilus insured TIFGT under a Commercial General Liability ("CGL") insurance policy from February 1, 2007 to February 1, 2008, and under another CGL insurance policy from February 1, 2008 to February 1, 2009. (*Id.,* Exs. C & D.) The policies from Nautilus contain the same pertinent provisions, and they will be referenced collectively as the "Nautilus Policy." The Nautilus Policy included an endorsement which amended the Policy to include Big–D as an additional insured with regard to the performance of TIFGT's ongoing operations for Big–D. (*Id.,* Ex. F.) TIFGT cancelled the Nautilus Policy effective June 1, 2008. (*Id.,* Ex. E.)

Defendant Century issued TIFGT a CGL insurance policy ("Century Policy") from June 1, 2008 to February 26, 2009. (Def. Century Surety Co.'s Mot. For Summ. J. (Doc. # 55) ["Century Mot. Summ. J."], Ex. B at 3, Ex. I.) The Century Policy contained a blanket additional insured endorsement which provided coverage for Big–D for property damage arising out of TIFGT's ongoing operations. (*Id.,* Ex. B at 53.)

B. TIFGT's Stonework

TIFGT began its stonework at the IGT building sometime in 2007. In April 2008, while TIFGT still was installing stonework, a stone tile installed by TIFGT fell from an exterior wall of the IGT building. (Nautilus Mot. Summ. J., Ex. I at 6; Opp'n to Mot. for Summ. J. By Nautilus Ins. Co. (Doc. # 51) ["Opp'n to Nautilus Mot. Summ. J."], Ex.

2 at 23, 73, 116.) Certificates of Occupancy for the IGT building were issued on May 16, 2008, and June 16, 2008. (Nautilus Mot. Summ. J., Ex. H.) Certificates of Completion were issued on May 19, 2008, and June 26, 2008. (*Id.,* Ex. G.) However, Brent Brinkerhoff ("Brinkerhoff"), a representative of Big–D, testified he did not believe TIFGT ever completed its stonework obligation under the subcontract. (Opp'n to Nautilus Mot. Summ. J., Ex. 1 at 92–93, 97.)

On July 22, 2008, IGT notified Big–D that another stone installed by TIFGT had fallen from the same exterior wall of the building. (Nautilus Mot. Summ. J., Ex. K at 1; Opp'n to Nautilus Mot. Summ. J., Ex. 2 at 25, 73.) After the second stone tile fell, IGT directed Big–D to replace TIFGT's stonework on the wall from which the two stone tiles had fallen. (Nautilus Mot. Summ. J., Ex. I at 6, Ex. K at 2–3.) Big–D thus ordered new stone tiles and scheduled the replacement for the spring of 2009. (Opp'n to Nautilus Mot. Summ. J., Ex. 1 at 34–35.)

On December 29, 2008, IGT notified Big–D that a third stone tile installed by TIFGT had fallen from a different exterior wall of the building. (Nautilus Mot. Summ. J., Ex. K at 10–11; Opp'n to Nautilus Mot. Summ. J., Ex. 2 at 73–74.) The tiles fell near IGT's main entrance for customers and employees. (Opp'n to Nautilus Mot. Summ. J., Ex. 2 at 33.) Each stone tile weighed from 25 to 40 pounds. (*Id.,* Ex. 2 at 24.) Due to the safety risk to people using the main entrance, after the third stone tile fell in December 2008, Big–D put up scaffolding around the stone tiles, closed the area off, and directed people to enter using a side entrance. (*Id.,* Ex. 2 at 92–93, Ex. 3 at 26, Ex. 4 at 95.)

***1104** IGT expressed concern that the second and third stone tiles fell due to a lack of a mortar bond between the tile and the substrate to which it was attached. (Nautilus Mot. Summ. J., Ex. K at 2–3, 11.) IGT directed Big–D to replace all of the stonework done by TIFGT, rather than just the wall where the first two stone tiles fell. (Opp'n to Nautilus Mot. Summ. J., Ex. 3 at 62–63.)

Big–D advised TIFGT of the tile problem in January 2009 and requested TIFGT take immediate steps to remedy the problem, but TIFGT did not respond. (Nautilus Mot. Summ. J., Exs. L and M.) Around that time, TIFGT notified Big–D that it was going out of business. (Opp'n to Nautilus Mot. Summ. J., Ex. 1 at 38–39.)

Inspection of the building in March 2009 revealed efflorescence between the tile and the substrate. (Opp'n to Mot. for Summ. J. by Century Surety Co. (Doc. # 62) ["Opp'n to Century Mot. Summ. J."], Ex. 6 at 92, 97–98, Ex. 9 at 129; Resp. to Mot. to Strike, Ex. HH at 43, 48–49.) Efflorescence is when the stone starts to "deteriorate, spall, become soft," and is caused by water entering through an open joint and getting behind the stone tile, and as the water dries it is drawn through the stone tile. (Opp'n to Century Mot. Summ. J., Ex. 6 at 48–49.)

Big–D's expert concluded "the primary cause of the tile failures was that the installers did not apply the thin-set mortar adhesive properly," and that the "only way to remediate this deficiency and avoid potential safety issues is to remove and replace all of the tiles." (Nautilus Mot. Summ. J., Ex. AB at 10–11.) Big–D's expert also concluded that because the plaster substrate was substantially damaged by the removal of various stone tiles during the experts' investigation, it would be "necessary to completely remove the plaster substrate and reapply it" after removing the stone tiles. (*Id.,* Ex. AB at 11.) Another of Big–D's consultants concluded that there were "more concerns than just the proper application of stone to the backup plaster," including loose and separated plaster in the stucco substrate to which the stone was attached. (Nautilus Mot. Summ. J., Ex. N.)

Brinkerhoff testified that because some stone tiles adhered to the substrate and some did not, that "nobody could guarantee that [a tile] would not fall off so eventually a decision was made to remove it all." (Opp'n to Nautilus Mot. Summ. J., Ex. 1 at 41.) Big–D's representatives also testified that "structurally the [stucco substrate] product was good," and that the removal is what damaged the stucco. (*Id.,* Ex. 1 at 94–95, Ex. 2 at 29, 114.)

Big–D and IGT entered into a settlement agreement on April 9, 2009, under which IGT would withhold some payment to Big–D pending resolution of the stone tile work issues, but otherwise IGT would pay Big–D for other satisfactorily completed work. (Nautilus Mot. Summ. J., Ex. T at 5; Opp'n to Nautilus Mot. Summ. J., Ex. 2 at 93–101.) Big–D eventually contracted with another subcontractor to install a new substrate after the stone tiles were removed. (Nautilus Mot. Summ. J., Ex. O.) However, after further complications and dissatisfaction with Big–D's repair work, IGT did not allow Big–D to complete the repair. (Opp'n to Nautilus Mot. Summ. J., Ex. 2 at 124–25.)

In April 2009, Big–D filed a complaint against IGT in state court to foreclose on the mechanic's lien Big–D held against the IGT property. (Century Mot. Summ. J., Ex. R.) IGT did not file an answer or assert counterclaims against Big–D. (*Id.,* Ex. W.) In January 2011, Big–D and IGT amended the settlement agreement, and IGT agreed to accept an offset against the gross amount of Big–D's damages claim as ***1105** full and complete settlement to resolve the stone tile issues between Big–D and IGT. (*Id.,* Ex. S at ex. 10 at 3.) On March 10, 2011, Big–D voluntarily dismissed its claims against IGT with prejudice. (*Id.,* Ex. L.)

C. Nautilus's Handling of the Claim

On April 20, 2009, Travelers Insurance Company ("Travelers"), Big–D's direct insurer, sent Nautilus notice of the potential construction defect claim by IGT against Big–D. (Nautilus Mot. Summ. J., Ex. U.) On July 15, 2009, Travelers sent Nautilus a second notice of this matter. (*Id.*) On July 29, 2009, Nautilus sent a letter to Travelers stating Nautilus was investigating the issue under a reservation of rights and requested more information. (*Id.,* Ex. W.) Nautilus sent a letter to TIFGT and Big–D's counsel requesting the same documents. (*Id.,* Exs. X & Y.) Counsel for Big–D sent Nautilus Big–D's job file for TIFGT's work and photographs from the site. (*Id.,* Ex. Z.)

In January 2010, Travelers e-mailed Nautilus requesting "a response to our additional insured tender." (*Id.,* Ex. AA.) After this, a series of communication between Nautilus and Travelers occurred, with Nautilus asking for work invoices showing the dates that TIFGT worked on the project and when TIFGT completed its work, and Travelers requesting a coverage decision. (*Id.,* Exs. X & AA.)

D. Century's Handling of the Claim

On April 20, 2009, Travelers sent a letter tendering the IGT claim to Century, asserting Big–D's status as an additional insured under the Century Policy. (Century Mot. Summ. J., Ex. C.) In May 2009, Century spoke with a Travelers agent, and noted that "the building owners believe there is more potential problems with the stone." (*Id.,* Ex. F at 201.) Century then wrote to TIFGT, requesting documents and reserving its rights to deny coverage. (*Id.,* Ex. E.) In November 2009, Big–D's counsel sent Century a letter acknowledging Century's investigation under a full reservation of rights and requesting an update on the status of that investigation and a coverage determination. (Century Mot. Summ. J., Ex. G at 49.) Century hired an investigator in March 2010 to determine when the building was completed, and the investigator issued a report in April 2010. (*Id.,* Ex. H.; Opp'n to Century Mot. Summ. J., Ex. 7 at 39.) On June 21, 2010, Century sent a letter to TIFGT denying coverage for the IGT claim, and disclaiming any obligation to defend or indemnify TIFGT or anyone else claiming coverage under the Century Policy. (Century Mot. Summ. J., Ex. K.)

E. Present Litigation

Big–D thereafter filed suit in Nevada state court against TIFGT, Nautilus, and Century. (Pet. For Removal of Action Under 28 U.S.C. § 1441 (Doc. # 1), Ex. A ["Compl."].) Nautilus removed the case to this Court, and Century and TIFGT consented to the removal. (Pet. For Removal (Doc. # 1); Def. Century Surety Co.'s Joinder & Consent to Removal (Doc. # 4); Def. Take it for Granite Too's Joinder & Consent to Removal (Doc. # 12).) Big–D requests a declaratory judgment against both Century and Nautilus which declares Big–D's rights to coverage under both insurance Policies (counts 4 and 5, respectively). (Compl. at 6–7.) Big–D additionally alleges breach of contract (count 6) and unfair insurance claims practices under Nevada statutes (count 7) against Nautilus and Century. [1] (*Id.* at 7–9.)

1 Big–D alleges breach of contract (count 1), negligence (count 2), and failure to indemnify (count 3) against TIFGT.

***1106** Nautilus and Century now move for summary judgment, arguing their Policies do not cover Big–D's damages for various reasons, and they did not commit unfair insurance practices. Big–D opposes both motions.

II. LEGAL STANDARDS

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a), (c). A fact is "material" if it might affect the outcome of a suit, as determined by the governing substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. *In re Barboza,* 545 F.3d 702, 707 (9th Cir.2008).

Initially, the moving party bears the burden of proving there is no genuine issue of material fact. *Leisek v. Brightwood Corp.,*

278 F.3d 895, 898 (9th Cir.2002). After the moving party meets its burden, the burden shifts to the non-moving party to produce evidence that a genuine issue of material fact remains for trial. *Id.* The Court views all evidence in the light most favorable to, and draws all reasonable inferences in favor of, the nonmoving party. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,* 555 U.S. 271, 274 n. 1, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009).

[1] [2] [3] [4] [5] The interpretation of an insurance contract is a question of law for the court. *Powell v. Liberty Mut. Fire Ins. Co.,* 127 Nev. 14, 252 P.3d 668, 672 (2011). "An insurance policy should be read as a whole, and its language should be analyzed from the perspective of one untrained in law or in the insurance business. Policy terms should be viewed in their plain, ordinary and popular connotations." *Fourth St. Place v. Travelers Indem. Co.,* —— Nev. ——, 270 P.3d 1235, 1239 (Nev.2011) (quotation omitted). "[A]ny ambiguity or uncertainty in an insurance policy must be construed against the insurer and in favor of the insured." *Benchmark Ins. Co. v. Sparks,* —— Nev. ——, 254 P.3d 617, 621 (Nev.2011) (quotation omitted). "A provision in an insurance policy is ambiguous if it is reasonably susceptible to more than one interpretation." *Id.* (quotation omitted). "Ultimately, a court should interpret an insurance policy to effectuate the reasonable expectations of the insured." *Powell,* 252 P.3d at 672 (quotation omitted).

III. DECLARATORY JUDGMENT AND BREACH OF CONTRACT (COUNTS 4–5)

Nautilus moves for summary judgment on Big–D's declaratory judgment and breach of contract claims against it. Nautilus argues there was no occurrence or property damage under the policy, the damages occurred after the policy was cancelled, various exclusions in the policy apply, and Big–D's voluntary settlement with IGT precludes coverage.

Century also moves for summary judgment on Big–D's declaratory judgment and breach of contract claims against it. Century argues it had no duty to indemnify Big–D, there is no property damage, and even if there was property damage it occurred prior to or after the Century Policy's coverage period. Century also argues various exclusions bar coverage. Century further contends Big–D did not give prompt notice of the claim or obtain ***1107** Century's consent for the IGT settlement, which precludes coverage.

Big–D responds that there are genuine issues of material fact as to whether Century had a duty to indemnify. Big–D also argues genuine issues of material fact remain as to whether an occurrence or property damage occurred under the Policies, when the property damage occurred, whether the exclusions apply, whether notice of the claim was prompt, and whether attempting to obtain consent for the settlement would have been futile.

A. "Occurrence"

[6] Nautilus contends that TIFGT's faulty or poor workmanship installing the stone tiles was not an accident, and is therefore not an "occurrence" under the Nautilus Policy. Big–D responds that there is a genuine issue of material fact as to whether TIFGT's deficient construction work is an occurrence because deficient construction work is an unexpected, unforseen, and unintended happening.

Under both the Nautilus Policy and the Century Policy, coverage extends to "property damage" caused by an "occurrence." (Nautilus Mot. Summ. J., Ex. D at Comm. Gen. Liability Coverage Form ["CGL Coverage Form"], Sec. I, ¶ 1.b(1); Century Mot. Summ. J., Ex. B at 41.) Both policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Nautilus Mot. Summ. J., Ex. D at CGL Coverage Form, Sec. V, ¶ 13; Century Mot. Summ. J., Ex. B at 21.)

The Policies do not define accident, however, the Nevada Supreme Court has defined "accident," in the absence of a definition in a CGL policy, as "a happening that is not expected, foreseen, or intended." *Beckwith v. State Farm Fire & Cas. Co.,* 120 Nev. 23, 83 P.3d 275, 276 (2004) (en banc) (quotation omitted). The Nevada Supreme Court has not determined whether an insured's faulty workmanship itself constitutes an accident, and therefore an occurrence. Consequently, the Court must predict how the Nevada Supreme Court would decide the issue. *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.,* 383 F.3d 940, 944 (9th Cir.2004).

The majority of courts that have addressed the issue have found faulty workmanship itself is not an accident and therefore not an occurrence under a CGL policy. *See Essex Ins. Co. v. Holder,* 370 Ark. 465, 261 S.W.3d 456, 459–60 (2007) ("Faulty workmanship is not an accident; instead, it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work."); *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.,* 306 S.W.3d

69, 73 (Ky.2011) (adopting the majority view that claims of faulty workmanship, standing alone, are not "occurrences" under CGL policies). *Compare with Auto–Owners Ins. Co. v. Pozzi Window Co.,* 984 So.2d 1241, 1248 (Fla.2008) (finding a subcontractor's defective installation of windows, which the general contractor did not intend or expect, was an "occurrence" under the CGL policy).

But even courts that find faulty workmanship itself is not an occurrence find that unexpected events resulting from the faulty workmanship can be occurrences. *See Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.,* 216 S.W.3d 302, 309 (Tenn.2007) (finding the faulty installation of a window was not an occurrence, but the subsequent water penetration due to the faulty installation was an occurrence); *Lamar Homes, Inc. v. Mid–Continent Cas. Co.,* 242 S.W.3d 1, 16 (Tex.2007) (finding "the unexpected, unforeseen or undesigned happening or consequence of the insured's ***1108** negligent behavior" may constitute an occurrence) (quotation omitted).

[7] The Court concludes that the Nevada Supreme Court would hold that faulty workmanship itself does not fall under the common meaning of an accident, and therefore is not an occurrence. Although not directly addressing this issue, the Nevada Supreme Court has indicated that a negligent act that allows damage to occur does not fall under the commonly understood meaning of an accident in some circumstances. *See Fire Ins. Exch. v. Cornell,* 120 Nev. 303, 90 P.3d 978, 980 (2004) (finding that parents' negligent supervision of their adult son was not an accident under the common meaning of the term). Thus, Nevada likely would follow the majority of courts who have held faulty workmanship in and of itself is not an accident.

[8] However, the Court predicts that the Nevada Supreme Court would hold that an unexpected happening caused by faulty workmanship could be an occurrence. An event such as this would fit within the commonly understood meaning of accident, and is in accordance with Nevada's definition of accident as an unexpected, unforeseen, and unintended happening. Nevada therefore likely would follow the courts which recognize that although faulty workmanship itself is not an accident, the unexpected consequences of that faulty workmanship is an accident.

Here, TIFGT's faulty workmanship was not an accident or occurrence under the Policies. However, the events of the three stone tiles falling from the building were unexpected, unforeseen, and unintended, and come within the plain, ordinary, and common meaning of an accident. Thus, each stone tile that fell from the building is an occurrence under the Nautilus Policy and the Century Policy.

B. "Property Damage" Caused by an Occurrence

[9] Nautilus argues damage to the work of another from the repairs necessary to correct an insured's faulty workmanship is not property damage. Nautilus thus concludes the damage to the stucco substrate is not property damage. Nautilus further argues that the stucco substrate was defective on its own, independent of any work by TIFGT. Nautilus also submits Big–D's measures taken to prevent a safety risk are not covered because the Nautilus Policy requires covered property damage apart from the preventative measures. Nautilus additionally argues there was no loss of use because the IGT building could be used during the repair.

Century contends that incorporation of a defective component into a larger structure does not constitute physical injury unless and until the defective component causes actual harm. Century also argues that the "rip and tear" damage to the stucco substrate upon removal of the stone tiles is not covered under the Century Policy. Additionally, Century contends costs incurred to prevent future damage are not covered in the absence of other property damage. Century further asserts Big–D has failed to provide any evidence of the loss of business or disruption in operations and thus cannot show a loss of use of the IGT building. Century finally argues Big–D has failed to provide any evidence that the other subcontractor work sustained water damage.

Big–D responds that it has shown disputed issues of fact as to various different types of property damage. Big–D argues the faulty installation of the stone tiles caused property damage to the construction project as a whole and to the stucco substrate. Big–D further argues the repairs and other safety measures taken by ***1109** Big–D were necessary to prevent imminent safety risks and therefore constitute property damage. Big–D also argues IGT's loss of use of its front entrance while TIFGT's work was repaired constitutes property damage. Finally, Big–D argues the water damage to the stucco substrate constitutes property damage.

[10] Both policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not physically injured." (Nautilus Mot. Summ. J., Ex. D at CGL Coverage Form, Sec. V, ¶ 17; Century Mot.

Summ. J., Ex. B at 22.) Costs incurred to prevent future occurrences that may cause damage to property or life may be considered property damage as well. *See U.S. Fid. & Guar. Co. v. Nev. Cement Co.,* 93 Nev. 179, 561 P.2d 1335, 1336–38 (1977) (finding the insured should not be penalized for taking measures to prevent the collapse of a building constructed with defective cement, and that the preventative measures were property damage under the policy); *see also Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.,* 225 Ariz. 194, 236 P.3d 421, 437–38 (Ariz.Ct.App.2010) (holding preventative measures are covered if the damage intended to be prevented "probably would have occurred during the policy period if the preventative measures had not been performed"). To find otherwise would require the insured to intentionally allow property damage or bodily harm to occur for the damages to be covered. The reasonable expectations of an insured would be that the policy would cover safety measures taken to prevent further damage to property or life. *See Powell,* 252 P.3d at 672 (noting that insurance policies should be read to effectuate the reasonable expectations of the insured).

Here, there was no property damage to the construction project as whole or to the stucco substrate resulting from the faulty installation of the stone tiles. The installation of the stone tiles is not an occurrence, and therefore cannot cause property damage covered by either Policy. But even if the faulty installation of the stone tiles was an occurrence, Big–D has presented no evidence that the installation of the stone tiles itself caused any physical injury to the IGT building or the stucco. The installation also cannot be considered property damage itself because it was not taken to prevent further damage. The replacement of the stone tiles, as opposed to the removal, also is not a physical injury and was done for aesthetic purposes and not to prevent further damage. Therefore, the replacement of the stone tile also is not property damage.

[11] **[12]** **[13]** However, the actual stone tiles that fell from the building and hit the ground were physically injured. Therefore, the damage to each stone tile that fell is property damage. Additionally, the safety measures taken to prevent future property damage or bodily injury caused by additional falling stone tiles are property damage. This would include the removal, scaffolding, and any other safety measures taken to prevent future bodily injury or property damage. Big–D also has presented evidence that the stucco substrate was physically injured upon the removal of the stone tiles, and is therefore property damage caused by the stone tiles falling. (Opp'n to Nautilus Mot. Summ. J., Ex. 1 at 94–95, Ex. 2 at 29, 114.)

Century's argument that the damage to the stucco is uncovered "rip and tear" damage fails. The cases Century relies on find no occurrence or that damage resulting from repairing defective work is not covered. *See* ***1110** *OneBeacon Ins. v. Metro Ready–Mix, Inc.,* 427 F.Supp.2d 574, 577 (D.Md.2006) (no occurrence); *Nas Sur. Group v. Precision Wood Prod., Inc.,* 271 F.Supp.2d 776, 783 (M.D.N.C.2003) (no occurrence); *Desert Mountain Props. Ltd. P'ship,* 236 P.3d at 441–42 (finding removing and repairing nondefective property was not damage caused by the defective work itself but by the repair of the defective work). Here, the stone tiles falling were occurrences, and these occurrences caused the physical injury to the stucco because the stone tiles had to be removed from the stucco to prevent property or bodily damage.

[14] Furthermore, the loss of use of the front entrance of the IGT building is property damage. The front entrance of the IGT building was closed and a side entrance was used to prevent bodily harm to entrants. Additionally, the Policies include the loss of use of tangible property in the definition of property damage. Nautilus and Century argue that Big–D has not shown that the entire IGT building could not be used due to the stone tile issues. But the plain and ordinary meaning of "loss of use" would cover the "loss of use" of an entrance to the building. The extent of the damages caused by the loss of use is an issue for a fact finder to determine.

[15] Finally, the water damage to the other subcontractor work is property damage. The occurrence is the water migrating under the stone tiles, and thus if this caused physical injury to the other contractors' work, there would be covered property damage. There is evidence that water had migrated under the stonework and there were pockets of efflorescence between the stone tiles and the substrate. (Opp'n to Century Mot. Summ. J., Ex. 6 at 48–49, 92, 97–98, Ex. 9 at 129.) Therefore, taking the evidence in the light most favorable to Big–D, there is a genuine issue of material fact as to whether water intrusion damaged the substrate.

In sum, there are genuine issues of material fact as to whether the damage to the stones that fell, the removal, scaffolding, and other safety measures, the damage to the stucco substrate resulting from the removal, the loss of use of the front entrance, and the water damage constitute property damage under the Policies. However, the construction project as a

whole suffered no property damage and the replacement of the stone tiles is not property damage. Therefore, the Court will grant summary judgment in favor of Nautilus and Century to the extent Big–D is claiming property damage to the construction project as a whole and due to the replacement of the stone tiles. The Court denies summary judgment on any other identified property damage.

C. Timing of the Property Damage

[16] Nautilus contends that all of the property damage occurred after the Nautilus Policy ended, because the removal occurred after the third stone fell in December 2008, and because the safety measures were taken after the Nautilus Policy's coverage ended and were not designed to prevent damage that probably would have occurred during the coverage period. Nautilus also argues any loss of use is not covered by the Nautilus Policy because it occurred after the Nautilus Policy ended.

Century argues that the Century Policy does not cover the property damage because there was pre-existing property damage, and the property damage arose out of a construction defect that pre-existed the Century Policy. Century further argues its Policy does not apply to claims for defective work completed before the policy period. Century also contends that its Policy precludes coverage for damages occurring after work has been completed ***1111** or put to its intended use. Century finally argues that the repair and removal occurred after the Century Policy ended.

Big–D responds that property damage occurred during both policy periods. Big–D argues the property damage that required the replacement of the stone tiles and the safety measures by Big–D occurred from April 2008 to October 2009. Big–D further contends the loss of use occurred in April 2008, July 2008, and December 2008. Big–D finally argues that it is disputed whether TIFGT's work was completed by the date the Century Policy began providing coverage.

1. Property Damage During the Policy Periods

Both Policies cover property damage that occurs during the policy period. (Nautilus Mot. Summ. J., Ex. C at CGL Coverage Form, Sec. I, ¶ 1.b; Century Mot. Summ. J., Ex. B at 41.) The Nautilus Policy's coverage ended on June 1, 2008. Big–D presents no evidence of safety measures or loss of use before June 1, 2008. Thus, the only property damage that occurred during the Nautilus Policy's coverage period was to the stone that fell in April 2008.

[17] The Century Policy began on June 1, 2008 and ended on February 26, 2009. The second and third stones fell during this time period, in July 2008 and December 2008, respectively. The scaffolding and other safety measures were installed sometime after the second stone fell in July 2008, as well as after the third stone fell in December 2008. (Opp'n to Century Mot. Summ. J., Ex. 1 at 30, Ex. 3 at 25–26.) The loss of use of the front entrance also occurred after the third stone fell. (*Id.,* Ex. 4 at 95.) The water damage was discovered in March 2009, and viewing the evidence and reasonable inferences therefrom in Big–D's favor, the water damage could have occurred during the Century Policy period. (*Id.,* Ex. 6 at 92, 97–98.) Additionally, any other property damage, such as any removal work, which occurred between June 1, 2008, and February 26, 2009, would be covered by the Century Policy.

Therefore, the Court will grant summary judgment in favor of Nautilus on this basis except for the damage to the actual stone tile that fell from the building in April 2008. The Court will deny summary judgment for Nautilus on this basis for the damage which occurred to the stone tile that fell in April 2008. The Court will grant summary judgment in favor of Century on this basis for the property damage which occurred to the stone that fell in April 2008, and any property damage that occurred after February 26, 2009. The Court will deny summary judgment to Century on this basis as to all other property damage that occurred between June 1, 2008 and February 26, 2009.

2. Pre–Existing Property Damage

[18] **[19]** **[20]** The Century Policy applies to property damage that occurs during the policy period only if the property damage:

> (a) did not first exist, nor is alleged to have existed, in whole or in part, prior to the inception date of this policy; or
>
> (b) was not, nor is alleged to have been, in the process of taking place prior to the inception date of this policy, even if the actual or alleged ... "property damage" continues during this policy period; or
>
> (c) was not caused, nor is alleged to have been caused, by any construction defect or condition which existed, or is

alleged to have existed, prior to the effective date of this policy.

(Century Mot. Summ. J., Ex. B at 41.)

Provision (a) does not apply. The only property damage that occurred before the ***1112** Century Policy was the damage to the first stone that fell in April 2008. All of the other property damage which occurred is distinct and separate from this first stone falling, and therefore did not exist prior to the Century Policy period.[2] Provision (b) also does not apply because the faulty installation of the tiles is not property damage within the meaning of the Century Policy, and that is the only condition which arguably continued on into the Century Policy period.

2 Century also argues Big–D and TIFGT knew about the stone tile failures prior to the inception of the Century Policy, which precludes coverage. The Century Policy applies to property damage only if prior to the Policy coverage period "no insured [or its employee] knew that the ... 'property damage' had occurred in whole or in part." (Century Mot. Summ. J., Ex. B at 41.) Big–D and TIFGT knew the first stone fell before the Century Policy's coverage began. However, Century has not presented any evidence that prior to the Century Policy's inception Big–D or TIFGT knew this was more than an isolated incident and that more stone tiles would fall, prompting the removal and other safety measures. Therefore, Century has not established no genuine issue of material fact remains that the knowledge clause in the Century Policy would preclude coverage for Big–D's damages.

There is a genuine issue of material fact as to whether provision (c) precludes coverage. Neither Big–D nor Century disputes that TIFGT inadequately installed the stones, and TIFGT's work therefore may constitute a construction defect or condition. Furthermore, the faulty installation of the stone tiles is the underlying cause of all the property damage, even if the faulty workmanship is not an occurrence under the meaning of the Century Policy.

To the extent Century contends this construction condition "existed" prior to the Century Policy, Big–D asserts TIFGT's representative, Richard Meyer ("Meyer"), testified at his deposition that TIFGT did not complete its operations by the time the certificate of completion was issued and that TIFGT was working into the fall of 2008. (Opp'n to Century Mot. Summ. J. at 7.) Big–D failed to include pages 193–96 of Meyer's deposition testimony in its exhibits, however, Century does not dispute the proffered testimony. Therefore, the Court will accept Big–D's representation of the testimony, on the condition that Big–D file the deposition testimony with this Court within ten days of the entry of this Order. The Court therefore will deny summary judgment to Century on this basis.

3. Property Damage After the Work Was Completed or in Use

[21] Big–D was named an additional insured under the Century Policy "with respect to liability for ... 'property damage'... caused, in whole or in part, by" the act or omissions of TIFGT "in the performance of [TIFGT's] ongoing operations" for Big–D. (Century Mot. Summ. J., Ex. B at 53.) The Century Policy does not apply to property damage occurring after "that portion of [TIFGT's work] out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor" working on the project. (*Id.,* Ex. B at 53.)

As noted previously, it is disputed when TIFGT completed the stone installation, and therefore an issue of fact remains as to whether TIFGT's operations were ongoing during the Century Policy period. Furthermore, the May 19, 2008 certificate of completion alone does not indicate IGT actually occupied the building on that date. Therefore, an issue of fact remains as to when IGT actually used the building. ***1113** Thus, the Court will deny summary judgment to Century on these two bases.

D. Exclusions

[22] **[23]** "[C]lauses excluding coverage are interpreted narrowly against the insurer." *Powell,* 252 P.3d at 672 (quotation omitted). To prove an exclusion excludes coverage under a policy, the insurer must 1) "write the exclusion in obvious and unambiguous language," 2) show the insurer's proposed interpretation is the only fair interpretation of the exclusion, and 3) show the exclusion clearly applies to the claim at hand. *Id.* at 674.

1. Damage to the Insured's Product

[24] Nautilus and Century argue exclusion k under their respective Policies precludes coverage for any damage to the stone tiles installed by TIFGT because the stone tiles were

TIFGT's product. Big–D responds that exclusion k does not extend to work or services performed by the insured, and Big–D has alleged its damages were caused by TIFGT's work and services, not TIFGT's products. Big–D also argues this exclusion does not apply because Big–D has not alleged the stones were defective.

Under both policies, exclusion k bars coverage for "property damage" to "your product" arising out of the product or any part of the product. (Nautilus Mot. Summ. J., CGL Coverage Form, Sec. I, ¶ 2.k; Century Mot. Summ. J., Ex. B at 12.) "Your product" is defined as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by [the insured]." (Nautilus Mot. Summ. J., Ex. C at CGL Coverage Form, Sec. V, ¶ 20.a; Century Mot. Summ. J., Ex. B at 22.)

The plain language of exclusion k contemplates exclusion of property damage to the insured's goods and products, which would include the stone tiles TIFGT installed. *See St. Paul Fire & Marine Ins. Co. v. Sears, Roebuck & Co.,* 603 F.2d 780, 784 (9th Cir.1979) (stating this exclusion "clearly precludes any recovery for damages to materials originating from the Named Insured.") Exclusion k thus bars compensation to Big–D for the property damage to the three stone tiles that fell.

[25] Other than a single tile falling in April 2008, there is no other property damage which occurred during the Nautilus Policy period. Therefore, the Court will grant summary judgment in favor of Nautilus on Big–D's declaratory judgment and breach of contract claims against Nautilus. The Court also will grant summary judgment in favor of Century on this basis for the property damage to the two stones that fell during the Century Policy period. However, genuine issues of fact remain regarding other property damage during the Century Policy Period, as discussed previously.

2. Damage to Property

[26] Century argues exclusion j(5) of the Century Policy bars coverage for the part of the building on which TIFGT was working when the stone tile fell in April 2008. Century argues exclusion j(6) of the Century Policy bars coverage for the damage to the stucco substrate resulting from TIFGT's faulty workmanship. Big–D responds that exclusions j(5) and (6) do not apply because Big–D incurred damages after TIFGT finished work on the wall where the stone fell in April 2008, and the TIFGT work damaged other subcontractor work.

Exclusion j(5) bars coverage for property damage to "that particular part of real property on which you ... are performing operations, if the 'property damage' arises out of those operations." (Century Mot. ***1114** Summ. J., Ex. B at 11–12.) There is a genuine issue of material fact as to when TIFGT completed its work on the IGT building, and therefore issues of fact remain as to whether this exclusion applies.

Exclusion j(6) bars coverage for property damage to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." (Century Mot. Summ. J., Ex. B at 11–12.) This exclusion does not apply to property damage included in the "products-completed operations hazard." (*Id.,* Ex. B at 12.) The "products-completed operations hazard" includes property damage arising out of TIFGT's product or completed work. (*Id.* at 22.) Work is deemed completed "when that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor" working on the same project. (*Id.*)

This exclusion may exclude coverage for property damage to the stucco substrate resulting from the removal of TIFGT's work, to the extent the damage occurred before the Century Policy ended. However, there is a genuine issue of material fact as to when TIFGT's work was completed or put to its intended use. Therefore, whether and to what property damage this exclusion may apply is an issue of fact that must be resolved by a fact finder. The Court therefore will deny summary judgment to Century on the basis of exclusions j(5) and (6).

3. Damage to the Insured's Work

[27] Century argues exclusion I bars coverage for any damage arising out of TIFGT's faulty work. Big–D responds that exclusion I does not apply because Big–D has alleged damages other than just to the TIFGT work.

Exclusion I of the Century Policy excludes from coverage property damage to TIFGT's work arising out of TIFGT's work or any part of TIFGT's work and included in the products-completed operations hazard. (Century Mot. Summ. J., Ex. B at 12.) As noted previously, there is a genuine issue of material fact as to when the TIFGT work was completed and when it was put to its intended use by IGT. Therefore, issues of fact remain as to whether this exclusion applies to

bar coverage, and the Court will deny summary judgment to Century on this basis.

E. Notice of Claim

[28] Century argues Big–D did not provide Century with immediate notification of the claim, and the notice it did provide was insufficient, and therefore did not comply with the notice condition of coverage in the Century Policy. Big–D responds that Century had notice of Big–D's claims shortly after Big–D became aware of them, and Century had sufficient notice to investigate.

[29] The Century Policy states that if an occurrence occurs or a claim is brought against any insured, the insured must notify Century "as soon as practicable." (Century Mot. Summ. J., Ex. B at 18.) "As soon as practicable" means "notice within a reasonable length of time under all the facts and circumstances of each particular case." *Am. Fid. Fire Ins. Co. v. Adams,* 97 Nev. 106, 625 P.2d 88, 89 (1981) (quotation omitted) (finding the "as soon as practicable" requirement met when the insured gave notice seven months after the accident based on a good faith belief that no action would be filed against the insured). For an insurer to deny coverage due to late notice, the insurer must show the notice was late and the delay materially impaired the insurer's ability to contest liability. *Las Vegas Metro. Police Dep't v.* ***1115** *Coregis Ins. Co.,* —— Nev. ——, 256 P.3d 958, 965 (Nev.2011).

There is a genuine issue of material fact as to whether Big–D's notice was late, and whether Century was prejudiced by any delay in notice. Big–D has presented evidence that when the first stone tile fell it was unclear whether this was going to be a continuing problem, and the stone tile issues progressively worsened over time. (Opp'n to Century Mot. Summ. J., Ex. 2 at 23–25, 28–30.) Furthermore, Big–D has presented evidence that the decision to remove all of the stone tiles was not made until after the third stone tile fell in December 2008. (*Id.,* Ex. 3 at 62–63.) Big–D also has presented evidence that Century was sent notice that stones were falling off the IGT building on April 20, 2009, and the next day Big–D filed suit against IGT to obtain the payments IGT was withholding due to the stone issues. (Century Mot. Summ. J., Exs. C & R.) Century denied coverage based on its assessment that TIFGT completed its work before the Century Policy began and that other exclusions applied, and Century has not shown its determination would have been affected by earlier notice of the claim. (*Id.,* Ex. K.) The Court will deny summary judgment to Century on this basis.

F. Consent for the Settlement

[30] Century argues Big–D did not obtain Century's consent for the settlement with IGT, and therefore the settlement is not covered by the Century Policy. Big–D responds that giving Century notice of the settlement would have been futile because Century denied coverage before Big–D finally settled with IGT.

The Century Policy states "[n]o insured will, except at that insured's own cost, voluntarily make a payment ... without [Century's] consent." (Century Mot. Summ. J., Ex. B at 18); *see also Las Vegas Star Taxi, Inc. v. St. Paul Fire & Marine Ins. Co.,* 102 Nev. 11, 714 P.2d 562, 564 (1986) (finding the insured's failure to give notice of the claim until ten days before trial and then settling without the insurer's consent barred coverage). However, courts have held that when an insurer wrongfully denies coverage and the insured subsequently settles without insurer's consent, the insurer cannot invoke a "no voluntary payments clause in the policy." *See Cmty. Title Co. v. Safeco Ins. Co. of Am.,* 795 S.W.2d 453, 461 (Mo.Ct.App.1990) (listing various jurisdictions that have ruled similarly). Nevada recognizes a similar rule as a matter of general contract law. *Thornton v. Agassiz Constr., Inc.,* 106 Nev. 676, 799 P.2d 1106, 1108 (1990); *Bradley v. Nevada–California–Oregon Ry.,* 42 Nev. 411, 178 P. 906, 908 (1919) ("[T]he party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform.").

Issues of fact remain as to whether Century wrongfully denied Big–D's claim. Therefore, issues of fact remain as to whether Big–D's noncompliance with the voluntary settlement clause precludes coverage, and the Court will deny summary judgement on this basis.

G. Century's Duty to Indemnify

[31] Century argues that it had neither a duty to defend nor indemnify Big–D for its damages related to TIFGT's stone work issues. Century contends it had no duty to defend Big–D because there was no suit against Big–D. Century further argues the duty to defend is broader than the duty to indemnify, so if there is no duty to defend there can be no duty to indemnify. Century also argues that Big–D was not legally obligated to pay damages to IGT because there was no underlying court action which found Big–D liable ***1116** for damages, so Century had no obligation to indemnify Big–D.

Big–D responds that the duty to defend is broader than the duty to indemnify in the sense that the insurer must defend if the complaint pleads facts on which coverage would be triggered, regardless of whether the damages are actually covered. Big–D argues it did not make any claim against Century triggering its duty to defend. Therefore, Big–D argues the lack of a duty to defend has no bearing on Century's duty to indemnify. Big–D further argues it had a legal obligation to IGT under the construction contract, and Big–D paid damages arising out of this legal obligation in the form of the settlement with IGT and the remediation work related to the stone tiles. Big–D contends this triggered Century's duty to indemnify.

[32] The Century Policy states Century will indemnify the insured for "those sums that the insured becomes legally obligated to pay as damages." (Century Mot. Summ. J., Ex. B at 8.) For a duty to indemnify to arise, "the insured's activity and the resulting loss or damage [must] actually fall within the CGL policy's coverage." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.,* 120 Nev. 678, 99 P.3d 1153, 1158 (2004) (quotation omitted).

The Nevada Supreme Court has not addressed whether an insured can be "legally obligated to pay as damages" an amount stemming from an existing contractual obligation in the absence of a judgment. Again, the Court must predict what the Nevada Supreme Court would do.

Some courts find the term "legally obligated to pay as damages" under a CGL policy requires a final judgment or a settlement as a result of a suit. *See Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.,* 793 F.Supp.2d 785, 794–97 (E.D.Va.2011) (listing multiple jurisdictions that have ruled similarly), *vacated on other grounds,* 497 Fed.Appx. 313 (4th Cir.2012); *Certain Underwriters at Lloyd's of London v. Superior Court,* 24 Cal.4th 945, 960, 103 Cal.Rptr.2d 672, 16 P.3d 94 (2001) ("[T]he insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' under the standard [CGL] insurance policy is limited to money ordered by a court."). These courts reason that "sums the insured becomes legally obligated to pay" is followed by the phrase "as damages," and this presupposes that a court has ordered damages. *Certain Underwriters,* 24 Cal.4th at 963, 103 Cal.Rptr.2d 672, 16 P.3d 94.

Other courts have found an insured may be "legally obligated to pay as damages" a sum in the absence of a lawsuit or a court order requiring the insured to make the payment. *See Desert Mountain Props. Ltd. P'ship,* 236 P.3d at 427–28 (citing cases that have ruled similarly). These courts reason that although a court may enforce a legal obligation, court action is not necessarily required to create a legal obligation. *Id.* at 428. At least one court has held "legally obligated to pay as damages" would cover a legal obligation to pay a sum arising from a contract. *See id.* at 428–29.

The Nevada Supreme Court has used language in some of its opinions which suggest there can be no legal obligation to pay a sum as damages without a judgment. *See United Servs. Auto. Ass'n v. Crandall,* 95 Nev. 334, 594 P.2d 704, 706 (1979) (finding insurer had a duty to defend "and, to the extent of policy limits, pay any judgment entered against [the insured]"); *Roberts v. Farmers Ins. Co.,* 91 Nev. 199, 533 P.2d 158, 159 (1975) (finding the rights of a third party, who was suing the insured regarding an automobile accident, "will not mature until [the third party] first has recovered a judgment against the insured" ***1117**). However, the Nevada Supreme Court was not confronted in these cases with the specific issue of whether other sources of legal obligations could fall within the policy language.

[33] The Court concludes if the Nevada Supreme Court addressed this issue, it would find that a legal obligation to pay a sum as damages would include sums due as a legal obligation under a contract. Under Nevada law, insurance contracts must be interpreted according to the plain meaning of the words in the policy and from the viewpoint of a person untrained in the law, and any ambiguities must be construed in favor of the insured. *Fourth St. Place,* 270 P.3d at 1239; *Benchmark Ins. Co.,* 254 P.3d at 621. The phrase "those sums that the insured becomes legally obligated to pay as damages" is ambiguous. To one trained in the law the phrase "as damages" may signify an amount ordered by a court, but a lay person would not necessarily make this same assumption. A lay person may conclude the language would include coverage for sums due to fulfill a legal obligation under a contract. Therefore, under the Century Policy, the duty to indemnify may be triggered absent a court order or judgment making the insured liable for damages, and could include amounts the insured was legally obligated to pay due to contractual obligations.

[34] **[35]** Century does not dispute that Big–D was contractually obligated to attempt to remediate and ultimately pay IGT, in the form of an offset from the original contract price, for the failures in the installation of the stone tiles. Big–D has presented evidence that under the construction

contract with IGT, Big–D was required to "deliver[ ] the product to specification." (Opp'n to Century Mot. Summ. J., Ex. 4 at 95–96.) Thus, there is a genuine issue of material fact as to whether Big–D was legally obligated to pay the sums associated with the remediation and repair as damages, and consequently whether Century owed Big–D a duty to indemnify.[3] The Court will deny Century's Motion on this basis.

3 In its Reply, Century argues the Century Policy excludes coverage for property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." (Century Mot. Summ. J., Ex. B at 9.) This term is ambiguous. It could exclude coverage for Big–D's damages arising from the assumption of any contractual liability. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118, 124, 127 (Tex.2010). It also could be interpreted to apply to an assumption by the insured of liability of a third party. *See Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of La.,* 912 So.2d 400, 407 (Ct.App.La.2005); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65, 80–81 (2004) (noting "assumption" must be interpreted to add something to the exclusion). Construing this exclusion against Century, this exclusion applies to the assumption by the insured of the liability of a third party, and does not bar coverage for Big–D's damages.

IV. UNFAIR INSURANCE CLAIMS PRACTICES (COUNTS 6–7)

[36] Nautilus moves for summary judgment on Big–D's claims of unfair insurance practices against Nautilus. Nautilus argues it timely and properly investigated Big–D's claim, and communicated its position appropriately, and thus did not engage in any unfair claims practices. Nautilus further contends Big–D never directly sent Nautilus notice of the IGT claim, which precludes a finding that Nautilus committed unfair claims practices. Finally, Nautilus argues its liability was not reasonably clear so Nautilus was not required to effectuate a settlement.

***1118** Century also moves for summary judgment on Big–D's claims of unfair insurance practices against Century. Century argues that it reasonably handled Big–D's claim because it attempted to gather as much information as it could from TIFGT and Big–D, and it denied coverage based on Big–D's own lawyer's assertions. Century also argues a failure to investigate is relevant only when the investigation would have revealed facts in favor of coverage, and further investigation would have shown the claim was not covered.

Big–D responds that genuine issues of material fact preclude summary judgment on its unfair insurance practices claims against both insurers. Big–D argues Nautilus delayed in responding to the claim, failed to obtain any experts or investigate, failed to affirm or deny coverage for over a year, failed to effect settlement, caused Big–D to file suit due to the lack of a coverage decision, and failed to provide an adequate basis for reserving its rights or denying coverage. Big–D argues Century failed to adequately investigate or make a prompt coverage decision despite Big–D's repeated requests to do so.

[37] Nevada Revised Statutes § 686A.020 prohibits engaging in "an unfair or deceptive act or practice in the business of insurance." Failing to promptly communicate, affirm or deny within a reasonable time, or explain the basis for a denial of coverage are all evidence of unfair claims practices. *Estate of LoMastro ex rel. LoMastro v. Am. Family Ins. Group,* 124 Nev. 1060, 195 P.3d 339, 351–52 (2008) (finding genuine issues of material fact when the insurer did not promptly respond to the insured's communications, investigated the claim for ten months without affirming or denying coverage, and gave an insufficient explanation in denying the claim); *Albert H. Wohlers & Co. v. Bartgis,* 114 Nev. 1249, 969 P.2d 949, 961 (1998) (finding unfair practices where the insurer acted unreasonably in denying the claim through an absurd interpretation of the policy and failed to offer a reasonable explanation for the denial of coverage). Section 686A.020 does not require that an insurer breach its duties under the insurance contract to be liable for unfair claims practices. *See Zurich Am. Ins. Co. v. Coeur Rochester, Inc.,* 720 F.Supp.2d 1223, 1236 (D.Nev.2010) (noting § 686A.020 "address[es] the manner in which an insurer handles an insured's claim" regardless of whether the claim is denied" (quotation omitted)).

Nautilus argues it cannot be liable for unfair claims practices because Big–D itself never provided Nautilus with notice of the claim. However, it is undisputed that Travelers gave Nautilus notice of the claim, and Nautilus cites no authority showing this would be insufficient to put Nautilus on notice of the claim. The Court will therefore deny summary judgment to Nautilus on this basis.

[38] **[39]** Nevertheless, summary judgment is warranted on four of Big–D's claims of unfair insurance practices against

Nautilus and Century. Big–D has presented no evidence that Nautilus or Century misrepresented any pertinent facts or insurance policy provisions relating to any coverage at issue. Big–D also has presented no evidence that Nautilus or Century failed to adopt and implement reasonable standards for the prompt investigation and processing of claims. Big–D also presented no evidence that this litigation was compelled by Nautilus or Century offering Big–D less than Big–D ultimately retained under either policy. Furthermore, Nautilus is not liable for the claim, and therefore did not fail to effectuate prompt, fair and equitable settlements of claims in which Nautilus's liability had become reasonably clear. Furthermore, ***1119** because there are genuine issues of material fact as to whether Century is liable to Big–D for certain property damage, Century did not fail to effectuate prompt, fair and equitable settlements of claims in which Century's liability had become reasonably clear. Therefore summary judgment is granted in favor of Nautilus and Century on these four unfair insurance practices claims.

[40] However, Big–D has shown genuine issues of material fact remain with respect to the rest of its unfair insurance practice claims. There is evidence that Nautilus may have had notice of the claim by April 2009, but did not respond until July 2009 after a second notice. (Nautilus Mot. Summ. J., Exs. U & W.) Nautilus had not issued a coverage decision as of the time Big–D filed this action even though Big–D sent Nautilus a copy of Big–D's job file for TIFGT's work and photographs from the site, and Travelers indicated the reason for the delay in getting the invoices outlining the damage and costs to repair to Nautilus was due to Nautilus's delay in requesting them. (*Id.,* Exs. Z & AA.) Additionally, there is no evidence that Nautilus did anything on the claim from July 2009 until February 2010, or that Nautilus ever hired an expert or conducted an independent investigation of the claim.

As to Century, Century responded to Travelers's notice of the claim in just over a month by requesting documents. (Century Mot. Summ. J., Ex. E.) However, Big–D has presented evidence that Century did not hire an independent investigator until almost ten months after this initial correspondence. (Opp'n to Century Mot. Summ. J., Ex. 7 at 39.) Big–D also has presented evidence undermining Century's independent investigation on which it based its coverage denial: the investigation took 2.5 hours and consisted of calling one person and obtaining a copy of the certificate of completion for the IGT building. (*Id.*) Additionally, Century did not issue its disclaimer of coverage until June 2010, over a year after Travelers gave Century notice of the IGT claim. Big–D also has presented evidence raising an issue of fact that further investigation may have shown Century was liable, as there are genuine issues of material fact as to whether the Century Policy covers the property damage at issue.

Thus, genuine issues of material fact remain as to whether Nautilus and Century failed to: acknowledge and act reasonably promptly upon communications with respect to the claim; affirm or deny coverage of the claim within a reasonable time after proof of loss requirements had been met; and provide promptly to Big–D a reasonable explanation of the basis in the policy for the denial of the claim. Therefore, the Court will deny summary judgment on these three claims of unfair insurance practices against Nautilus and Century.

V. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Nautilus Insurance Company's Motion for Summary Judgment (Doc. # 41) is hereby GRANTED in part and DENIED in part. The Motion is DENIED with respect to the three noted claims of unfair insurance claims practices, and GRANTED in all other respects.

IT IS FURTHER ORDERED that Defendant Century Surety Company's Motion for Summary Judgment (Doc. # 55) is hereby GRANTED in part and DENIED in part as set forth more specifically in this Order.

IT IS FURTHER ORDERED that Plaintiff Big–D Construction Corp.'s Motion to Strike Exhibits Offered in Defendant Century Surety Company's Motion ***1120** for Summary Judgment (Doc. # 61) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff Big–D Construction Corp. file within ten days of the entry of this Order pages 193–96 of Richard Meyer's deposition.

All Citations

917 F.Supp.2d 1096

End of Document

383 F.3d 940
United States Court of Appeals,
Ninth Circuit.

The BURLINGTON INSURANCE COMPANY, Plaintiff–Appellee,
v.
OCEANIC DESIGN & CONSTRUCTION, INC., Defendant–Appellant.

No. 02–17317.
|
Submitted Feb. 11, 2004. *
|
Filed Sept. 8, 2004.

* Appellant moved for submission without oral argument. The panel granted the motion, unanimously finding the case suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2).

Synopsis

Background: Commercial general liability (CGL) insurer sought declaratory judgment that it had no duty to defend or indemnify insured home contractor in underlying state court suit brought by homeowners. The United States District Court for the District of Hawaii, Barry M. Kurren, United States Magistrate Judge, entered judgment for insurer, and insured appealed.

Holdings: The Court of Appeals, Clifton, Circuit Judge, held that:

[1] under Hawaii law, claim for negligent breach of contract did not involve occurrence within coverage of CGL policy;

[2] claim for intentional infliction of emotional distress did not allege actions independent of contractual duties that might involve occurrence; and

[3] allegations of underlying complaint could not be construed as alleging claim for negligent recommendation of subcontractor.

Affirmed.

West Headnotes (20)

[1] Federal Courts
State or local law in general
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3566 Questions of Law in General
170Bk3568 State or local law in general
(Formerly 170Bk781)
District court's interpretation of state law is reviewed under the same de novo standard that is used to review questions of federal law.

4 Cases that cite this headnote

[2] Federal Courts
Anticipating or predicting state decision
170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(C) Unsettled or Undecided Questions
170Bk3103 Anticipating or predicting state decision
(Formerly 170Bk390)
To the extent case raises issues of first impression under state law, Court of Appeals, sitting in diversity, must use its best judgment to predict how the state supreme court would decide issue.

74 Cases that cite this headnote

[3] Federal Courts
Sources of authority; assumptions permissible
170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(C) Unsettled or Undecided Questions

170Bk3104 Sources of authority; assumptions permissible
(Formerly 170Bk391)

In determining issues of first impression under state law, a federal court, sitting in diversity, may be aided by looking to well-reasoned decisions from other jurisdictions.

37 Cases that cite this headnote

[4] Insurance
Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

Under Hawaii law, broad duty to defend arises whenever the pleadings raise a potential for indemnification liability of the insurer to the insured.

12 Cases that cite this headnote

[5] Insurance
In general; standard

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 In general; standard

Under Hawaii law, duty to defend is based on the possibility for coverage, even if remote, determined at the time suit is filed.

9 Cases that cite this headnote

[6] Insurance
Several Grounds or Causes of Action

217 Insurance
217XXIII Duty to Defend
217k2920 Scope of Duty
217k2922 Several Grounds or Causes of Action
217k2922(1) In general

Under Hawaii law, when a suit raises a potential for indemnification liability of insurer to insured, insurer has duty to accept defense of entire suit even though other claims of complaint fall outside policy's coverage.

9 Cases that cite this headnote

[7] Insurance
Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

Under Hawaii law, complaint allegation rule limits insurer's duty to defend to situations where pleadings have alleged claims for relief which fall within terms for coverage of insurance contract.

23 Cases that cite this headnote

[8] Insurance
Plain, ordinary or popular sense of language

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

Under Hawaii law, the terms of an insurance policy are to be interpreted according to their plain, ordinary, and accepted sense in common speech.

23 Cases that cite this headnote

[9] Insurance
Construction as a whole

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 Construction as a whole

Under Hawaii law, an insurance policy is to be interpreted according to the entirety of its terms and conditions.

13 Cases that cite this headnote

[10] Insurance
In general; standard

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 In general; standard

Under Hawaii law, all doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured.

7 Cases that cite this headnote

[11] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Hawaii law, there is no occurrence that triggers an insurer's duty to defend under a standard commercial general liability (CGL) policy where the underlying complaint alleges an intentional breach of contract.

9 Cases that cite this headnote

[12] Negligence

Contractual duty

272 Negligence
272II Necessity and Existence of Duty
272k217 Voluntarily Assumed Duty
272k219 Contractual duty

Under Hawaii law, there is no cause of action for negligent breach of contract; there is no tort recovery in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract.

4 Cases that cite this headnote

[13] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Hawaii law, contractually based tort claim that contractor in building home under contract committed acts of malfeasance, misfeasance, and nonfeasance, leading to improper design and construction of foundation, did not involve covered "occurrence" under commercial general liability (CGL) insurance policy.

17 Cases that cite this headnote

[14] Negligence

Necessity and Existence of Duty

272 Negligence
272II Necessity and Existence of Duty
272k210 In general

Under Hawaii law, a cause of action founded on negligence requires an assertion that a defendant has breached a duty or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

[15] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Hawaii law, an occurrence under a commercial general liability (CGL) insurance policy cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions.

14 Cases that cite this headnote

[16] Insurance

Insurer's options in general

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 Insurer's options in general

Under Hawaii law, liability insurer may provide a defense under a reservation of rights and simultaneously seek a declaration that under the given circumstances there is no coverage under the policy.

3 Cases that cite this headnote

[17] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Hawaii law, claim that insured general contractor was responsible for infliction of emotional distress on homeowners in course of supervising subcontractors and building defective home arose out of parties' contractual relationship and did not allege independent tort claim for negligent infliction of emotional distress that would constitute an "occurrence" under the policy; but for their contract, which included duty on part of contractor to supervise work of others on project, homeowners would have had claim for negligent infliction of emotional distress.

20 Cases that cite this headnote

[18] Damages

Labor and Employment

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.51 In general

Under Hawaii law, damages for emotional distress in the employment context are recoverable under a contract only if the alleged conduct (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract.

2 Cases that cite this headnote

[19] Insurance

Risks and Losses

Insurance

Claim, suit, or demand for damages

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2274 In general
217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2918 Claim, suit, or demand for damages

Under Hawaii law, which determines duty to defend at time suit is brought, allegation in underlying complaint, that insured general contractor committed acts of malfeasance, misfeasance, and nonfeasance in course of building defective home, could not be construed as including claim that contractor negligently recommended unqualified mason to do excavation work, based on statements made by homeowners in memorandum filed more than three years after suit was brought.

2 Cases that cite this headnote

[20] Insurance

Claim, suit, or demand for damages

Insurance

Tender or other notice

217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2918 Claim, suit, or demand for damages
217 Insurance
217XXIII Duty to Defend
217k2916 Commencement of Duty; Conditions Precedent
217k2919 Tender or other notice

Under Hawaii law, the duty to defend is determined at the time suit is brought or at the latest, when defense is tendered.

Attorneys and Law Firms

***942** Gerald S. Clay and Scott I. Batterman, Stanton Clay Chapman Crumpton & Iwamura, Honolulu, HI, for the defendant-appellant.

Stephen B. MacDonald and Ralph O'Neill, MacDonald Rudy Byrns O'Neill & Yamauchi, Honolulu, HI, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Hawaii; Barry M. Kurren, Magistrate Judge, Presiding. D.C. No. CV–02–00219–BMK.

Before: TASHIMA and CLIFTON, Circuit Judges, and LEIGHTON, District Judge. **

** The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

Opinion

***943** CLIFTON, Circuit Judge:

The issue presented by this case is whether, under Hawaii law, a company which contracted to build a house is covered under its commercial general liability policy against claims brought against the company by the dissatisfied homeowners. The district court granted summary judgment to the insurer on the ground that claims for breach of contract and breach of contract-related tort duties did not give rise to coverage within the scope of the policy. We affirm.

I. BACKGROUND

Defendant–Appellant Oceanic Design & Construction, Inc., a Hawaii corporation, contracted to build a single-family residence in Honolulu, Hawaii for homeowners Jeanette C. Chae, Susan K. Woo, and Diana Han (a/k/a Diana Chong) (collectively the "homeowners"). Construction was completed, but not to the satisfaction of the homeowners, and they refused to pay. Oceanic filed suit against the homeowners in Hawaii state court in April 1999, alleging the homeowners had breached the contract by failing to pay the balance due. *See Oceanic Design & Constr., Inc. v. Jeanette C. Chae, et al.,* Civil No. 99–1536–04, Circuit Court of the First Circuit, State of Hawaii (the "underlying lawsuit").

The homeowners asserted a counterclaim against Oceanic in that lawsuit, alleging five causes of action: (1) breach of contract; (2) breach of express and implied warranties; (3) deceptive trade practices; [1] (4) negligent and/or intentional infliction of emotional distress upon homeowner Han; and (5) punitive damages. The gravamen of the homeowners' allegations was that Oceanic improperly designed and/or constructed the foundation of the residence causing earth movement and resulting in physical and structural damage to both the residence and the retaining walls on the property.

1 The deceptive trade practices claim was based on Oceanic's alleged violation of HAW REV. STAT. § 481A–3.

At the time the counterclaim was filed, Oceanic was the named insured under a standard-form commercial general liability ("CGL") insurance policy issued by Defendant–Appellee Burlington Insurance Company. [2] Coverage A of the policy, titled "Bodily Injury and Property Damage Liability," provided that Burlington will "pay those sums that the insured becomes legally obligated to pay because of 'bodily injury' or 'property damage' to which this insurance applies." The policy further provided that Burlington has the "right and duty to defend the insured against any 'suit' seeking those damages," but "no duty to defend the insured against any 'suit' seeking damages ... to which this insurance does not apply." Coverage was limited to " 'bodily injury' or 'property damage' caused by an 'occurrence.' " The policy defined "[o]ccurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," but did not define "accident." Coverage was excluded for " 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured."

2 Burlington's policy covered Oceanic from July 28, 1997 through July 28, 1999.

Oceanic timely tendered defense of the counterclaim to Burlington. Burlington agreed to defend under a reservation of rights. Burlington then filed this action in the district court seeking a declaration that the CGL policy did not provide coverage against the homeowners' counterclaim.

Burlington moved for summary judgment, arguing that none of the allegations in the counterclaim were covered under ***944** the policy. Oceanic filed a cross-motion for summary judgment, asserting that it was entitled to a defense from Burlington because there was a possibility that one or more of the allegations in the counterclaim were covered under the policy. The district court concluded that the claims alleged in the counterclaim were contract or contract-based tort claims not within the scope of coverage of the CGL policy. [3] Accordingly, the district court granted Burlington's motion for summary judgment and denied Oceanic's cross-motion for summary judgment.

3 The district court held that the homeowners' claims for breach of express and implied warranties, deceptive

> trade practices, and punitive damages were not within the scope of coverage. Oceanic does not challenge this portion of the ruling on appeal. Accordingly, we only consider the possibility of coverage for the homeowners' remaining claims.

Oceanic timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

[1] We review de novo a district court's decision to grant summary judgment and apply the same summary judgment standard employed by the district court. *United States v. City of Tacoma,* 332 F.3d 574, 578 (9th Cir.2003). Therefore, we must determine, viewing the evidence in the light most favorable to Oceanic, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.* The district court's interpretation of state law is reviewed under the same de novo standard that is used to review questions of federal law. *Conestoga Servs. Corp. v. Executive Risk Indem., Inc.,* 312 F.3d 976, 981 (9th Cir.2002).

[2] **[3]** To the extent this case raises issues of first impression, our court, sitting in diversity, "must use [its] best judgment to predict how the Hawaii Supreme Court would decide[the] issue." *Helfand v. Gerson,* 105 F.3d 530, 537 (9th Cir.1997). "In so doing, a federal court may be aided by looking to well-reasoned decisions from other jurisdictions." *Takahashi v. Loomis Armored Car Serv.,* 625 F.2d 314, 316 (9th Cir.1980).

[4] **[5]** **[6]** Hawaii insurance law provides for a broad duty to defend arising whenever the pleadings raise a potential for indemnification liability of the insurer to the insured. *Hawaiian Holiday Macadamia Nut Co. v. Indus. Indem. Co.,* 76 Hawai'i 166, 872 P.2d 230, 233 (Haw.1994). The duty to defend exists irrespective of whether the insurer is ultimately found not liable to the insured and is based on the possibility for coverage, even if remote, determined at the time suit is filed. *See Commerce & Indus. Ins. Co. v. Bank of Hawaii,* 73 Haw. 322, 832 P.2d 733, 736 (1992). "Furthermore, where a suit raises a potential for indemnification liability of the insurer to the insured, the insurer has a duty to accept the defense of the entire suit even though other claims of the complaint fall outside the policy's coverage." *Hawaiian Holiday,* 872 P.2d at 233 (citation and quotation marks omitted).

[7] **[8]** **[9]** **[10]** Hawaii adheres to the "complaint allegation rule." *Pancakes of Hawaii, Inc. v. Pomare Props. Corp.,* 85 Hawai'i 286, 944 P.2d 83, 88 (App.1997). The focus is on the alleged claims and facts. The duty to defend "is limited to situations where the pleadings have alleged claims for relief which fall within the terms for coverage of the insurance contract. 'Where pleadings fail to allege any basis for recovery within the coverage clause, the insurer has no obligation to defend.' " ***945** *Hawaiian Holiday,* 872 P.2d at 233 (citation omitted). In Hawaii, the terms of an insurance policy are to be interpreted according to their plain, ordinary, and accepted sense in common speech. *Dairy Road Partners v. Island Ins. Co.,* 92 Hawai'i 398, 992 P.2d 93, 106 (2000). Each policy is to be interpreted according to the entirety of its terms and conditions. *See AIG Hawaii Ins. Co. v. Estate of Caraang,* 74 Haw. 620, 851 P.2d 321, 326 (1993). "All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured." *Dairy Road Partners,* 992 P.2d at 107 (citation and quotation marks omitted).

Both parties have acknowledged that there are no genuine issues of material fact. We are therefore asked to decide whether any of the claims asserted against Oceanic by the homeowners in the underlying lawsuit are covered under the policy to trigger Burlington's duty to defend.

The policy covers claims for liability for "bodily injury" or "property damage" if "caused by an occurrence." Because Burlington has conceded for purposes of appeal that the counterclaim has alleged both "bodily injury" and "property damage," we must decide whether, under Hawaii law, any of the homeowners' allegations present the possibility that their damages were caused by an "occurrence," for which there is coverage under the policy.

A. Homeowners' Negligent Breach of Contract Allegation

Oceanic argues that the policy potentially covers the "other acts" claim asserted in paragraph 10(*l*) of the homeowners' counterclaim. That claim reads in context:

> FIRST CAUSE OF ACTION
>
> *BREACH OF CONTRACT*
>
> 8. [Homeowners] contracted with [Oceanic] on or about December 1, 1998 for the construction and supervision of the Poola Street residence.

9. In consideration of the services described above, [Oceanic] was paid certain sums of money.

10. [Oceanic] breached its contractual obligations in at least the following respects:

a. Failure to properly plan, supervise, inspect, and construct the Poola Street residence, including but not limited to the retaining walls and the preparation of the soils and/or foundation of the residence;

b. Failure to ensure that said Poola Street residence was free from faults and defects;

c. Planned, designed, engineered, and constructed a structure which was unable to support foreseeable loads;

d. Planned, designed, engineered, and constructed a structure which was susceptible to water and earth movement damage;

e. Violated applicable State of Hawaii, County of Honolulu and/or Uniform building codes, ordinances, laws and regulations;

f. Planned, designed, engineered, and constructed a residence and [sic] substantially inferior to the standard of care and quality which had been agreed;

g. Identified for use or allowed to be used, improper construction materials, techniques and methods;

h. Failure to use reasonable care in performing contractual obligations appropriate for this type of construction in this particular location;

i. Failure to provide services in accordance with the standard of care appropriate for the plan, design, engineering, supervision, inspection ***946** and construction of this type of residence in this particular location;

j. Breached the implied warranty of merchantability for services rendered;

k. Proposed inadequate, improper and negligent plans, designs, specifications and related revisions thereto;

l. *Committed other acts and omissions amounting to misfeasance, malfeasance and nonfeasance.*

11. As a direct, proximate and foreseeable result of [Oceanic's] breaches of contract, [Homeowners] have suffered substantial damage....

12. As a direct and further result of the breaches of contract by the [Oceanic]. [Homeowners] have sustained consequential damages....

(emphasis added).

Relying on a line of cases from the District of Hawaii, the district court held that Burlington did not owe Oceanic a duty to defend the homeowners' "other acts" allegation. Those cases hold that contract and contract-based tort claims are not within the scope of CGL policies. *See CIM Ins. Corp. v. Midpac Auto Ctr., Inc.,* 108 F.Supp.2d 1092, 1099–1100 (D.Haw.2000); *CIM Ins. Corp. v. Masamitsu,* 74 F.Supp.2d 975, 986 (D.Haw.1999); *WDC Venture v. Hartford Accident and Indem. Co.,* 938 F.Supp. 671, 679 (D.Haw.1996).

Oceanic asserts that the district court erred because allegations of negligence, even alongside allegations of a breach of contract, are sufficient to raise a duty to defend.

[11] We note at the outset that the Hawaii Supreme Court has not resolved whether a claim for a negligent breach of contract can constitute an occurrence under a CGL policy. The Hawaii Supreme Court has held, however, that where an underlying complaint alleges an intentional breach of contract, there is no occurrence that triggers an insurer's duty to defend under a standard CGL policy. *See Hawaiian Holiday,* 872 P.2d at 233–34. In that case, prompted by a failed business venture, plaintiffs filed suit alleging that the insured had purposely planted fewer trees than that had been agreed upon in the contract and had planted trees and seedlings which did not meet contract requirements. As here, the issue was whether the alleged damage was caused by an "occurrence" under the policy.[4] The Hawaii Supreme Court noted that it had previously addressed what constitutes an "accident": "[I]n order for the insurer to owe a duty to defend or indemnify, the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions." *Id.* at 234 (citing *AIG Hawaii Ins. Co.,* 851 P.2d at 329).

4 The definition of occurrence in *Hawaiian Holiday* was nearly identical to the one at issue here. There, "occurrence" was defined as "an accident, including

> continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the viewpoint of the insured." *Hawaiian Holiday,* 872 P.2d at 234. Here, " 'occurrence' means an accident, including continuous or repeated exposure to substantially the same harmful conditions," where coverage is excluded for " 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured."

In holding that the insurer had no duty to defend, the court recognized that the plaintiffs' complaint alleged breach of contract and fraud claims "based on intentional acts performed by Hawaiian Holiday" and sought "contractual relief." *Id.* at 234, 851 P.2d 321. The court held that because the "conduct alleged was not accidental" and "did not sound in negligence," it did ***947** not constitute an occurrence within the meaning of the CGL policy. *Id.* at 235, 851 P.2d 321. The court did not discuss whether facts alleging a *negligent* breach of contract claim could trigger the duty to defend.

[12] Language from a recent Hawaii Supreme Court case indicates, however, that Hawaii would not recognize a claim for a negligent breach of contract. In *Francis v. Lee Enters., Inc.,* 89 Hawai'i 234, 971 P.2d 707, 708 (1999), an employee filed suit in Hawaii state court for tortious breach of an employment contract after he had been terminated. After the case was removed to the federal district court, the district court certified the following question to the Hawaii Supreme Court: "Does Hawaii law recognize a tortious breach of contract cause of action in the employment context?"

To answer that question, the court first turned to its prior decisions. It recognized that in *Dold v. Outrigger Hotel,* 54 Haw. 18, 501 P.2d 368 (1972), it had established the rule that "where a contract is breached in a wanton or reckless manner [so] as to result in a tortious injury, the aggrieved person is entitled to recover in tort." [5] *Francis,* 971 P.2d at 710 (quoting *Dold,* 501 P.2d at 372) (quotation marks omitted). The court also noted it had reaffirmed and extended the *Dold* rule to the commercial contract setting in *Chung v. Kaonohi Center Co.,* 62 Haw. 594, 618 P.2d 283, 289 (1980). *Francis,* 971 P.2d at 710. ("We do not think that the dispositive factor in allowing damages for emotional distress is the nature of the contract. The dispositive factor is, rather, the wanton or reckless nature of the breach.") (quoting *Chung,* 618 P.2d at 289) (quotation marks omitted). [6]

5 In *Dold,* plaintiffs, tourists from the mainland, arranged for hotel accommodations at a particular hotel. Upon arrival, however, due to the lack of availability, plaintiffs were refused accommodation and were transferred to a lesser quality hotel. Plaintiffs sued for actual and punitive damages based on the alleged breach of contract. The trial court refused an instruction on punitive damages but permitted one on damages for emotional distress. The jury found in favor of plaintiffs. On appeal, the Hawaii Supreme Court affirmed, holding that "the jury was properly instructed on the issue of damages of emotional distress." *Dold,* 501 P.2d at 372.

6 In *Chung,* plaintiffs were prospective lessees of a concession space for a fast-food restaurant. Although the contract to lease the property had been signed by the plaintiffs, the defendant continued to negotiate a lease for the same space with three additional parties. The defendant ultimately leased the space to one of those parties, despite the fact that defendant was aware of the effort and funds the plaintiffs had expended in reliance on the lease. The trial court gave an instruction that allowed the jury to award damages for emotional distress. The jury awarded plaintiffs damages for emotional distress and the defendant appealed, arguing that the *Dold* rule should only apply in special circumstances, i.e., contracts for marriage, burial, and delivery of personal messages. The Hawaii Supreme Court disagreed and extended the *Dold* rule to the commercial contract setting. *Chung,* 618 P.2d at 289.

Nonetheless, the court concluded that the *Dold–Chung* rule should not apply in the employment context, and abolished the rule altogether. *Id.* at 712, 618 P.2d 283. The court reasoned, "the *Dold–Chung* rule unnecessarily blurs the distinction between—and undermines the discrete theories of recovery relevant to—tort and contract law." *Id.* The court noted that "[t]he distinction between tort and contract law is well established in common law, and distinct objectives underlie the remedies created in each area." *Id.* It recognized that the court's objective in contract law is to ascertain and effectuate the intention of the parties, whereas tort law is primarily designed to vindicate social policy. *Id.* ***948** The court thus concluded that because contract damages are normally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by the parties at the time, "damages for emotional distress ... are generally *not* recoverable in contract." *Id.* at 712–13, 618 P.2d 283 (citation and quotation marks omitted) (emphasis in original).

As to the certified question, the court accordingly answered it in the negative. It stated: "we now hold that Hawaii law will not allow tort recovery in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract." *Id.* at 717, 618 P.2d 283.

The Hawaii Supreme Court has also cautioned of the need to examine carefully a complaint to "ensure that plaintiffs could not, through artful pleading, bootstrap the availability of insurance coverage under an insured defendant's policy by purporting to state a claim for negligence based on facts that, in reality, reflected manifestly intentional, rather than negligent conduct." *Dairy Road Partners,* 992 P.2d at 112; *see also Bayudan v. Tradewind Ins. Co.,* 87 Hawai'i 379, 957 P.2d 1061, 1069 (1998).

[13] **[14]** Applying these principles to this case, we conclude that the homeowners' "other acts" allegation cannot be read to constitute an occurrence under Hawaii law. As the district court explained, "[t]he allegations of 'other acts and omissions' is clearly and unambiguously included as one of several 'sub' allegations of the homeowners' breach of contract claim. As a result, the Court cannot fairly construe this language to state a separate independent cause of action for negligence." In Hawaii, it is well established that a cause of action founded on negligence requires an assertion that a defendant has breached "[a] duty or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Dairy Road Partners,* 992 P.2d at 114 (citations omitted).

[15] Though certain allegations in the homeowners' counterclaim are couched in terms of negligence, it is undisputed that Oceanic had entered into a contract to construct a home for the homeowners. The counterclaim then alleges that Oceanic breached its *contractual duty* by constructing a residence "substantially inferior to the standard of care and quality which had been agreed." Other than a breach of that contractual duty, the facts in this case do not reflect a breach of an independent duty that would otherwise support a negligence claim. In Hawaii, an occurrence "cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions." *Hawaiian Holiday Macadamia Nut,* 872 P.2d at 234 (citing *AIG Hawaii Ins. Co.,* 851 P.2d at 329). If Oceanic breached its contractual duty by constructing a substandard home, then facing a lawsuit for that breach is a reasonably foreseeable result. Our reading comports with the rationale underlying a CGL policy:

> General liability policies ... are not designed to provide contractors and developers with coverage against claims their work is inferior or defective. The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer. Rather liability coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work or products.

***949** *Anthem Elec., Inc. v. Pac. Employers Ins. Co.,* 302 F.3d 1049, 1057 (9th Cir.2002). Allowing recovery for disputes between parties in a contractual relationship over the quality of work performed would convert this CGL policy into a professional liability policy or a performance bond.

Likewise, our holding is consistent with the line of cases from the District of Hawaii that hold that contract and contract-based tort claims are not within the scope of CGL policies under Hawaii law. In *WDC Venture v. Hartford Accident and Indem. Co.,* 938 F.Supp. 671 (D.Haw.1996), the district court considered whether, under Hawaii law, claims for breach of contract and tortious breach of contract were within the scope of coverage under a standard-form CGL. Noting that "there are no cases in Hawaii that are directly on point regarding the issue of insurance recovery for contract-based claims," the court looked to case law from other jurisdictions. *Id.* at 677–78. The court first looked to California law, which at the time held that a CGL policy did not cover contractual claims or tort claims arising from contractual relationships. The court then concluded, "[i]t is clear from the record that all of the claims in the underlying actions have a contractual basis.... Since [the insured] seeks recovery here for tort and contract claims *that arise from the contractual relationship,* the court finds that the underlying lawsuits are outside the scope of policy coverage in this case." *Id.* at 679 (citing *Stanford Ranch, Inc. v. Maryland Cas. Co.,* 883 F.Supp. 493 (E.D.Cal.1995) (emphasis in original)).

As a second basis for its holding, the court explained:

> [P]olicy coverage of such contractual-based allegations would be contrary to public policy. 'There is simply no reason to expect that such liability would be covered under a comprehensive liability policy which has, as its genesis, the purpose of protecting an individual or entity from liability for essentially accidental injury to another individual, or property damage to another's possessions, even if, perhaps, coverage of the policy has been expanded to cover other non-bodily injuries that sound in tort.'

Id. at 679 (quoting *Toombs NJ Inc. v. Aetna Cas. & Sur. Co.,* 404 Pa.Super. 471, 591 A.2d 304, 306 (1991)).

In a subsequent case from the District of Hawaii, *CIM Ins. Corp. v. Masamitsu,* 74 F.Supp.2d 975 (D.Haw.1999), the district court, citing *WDC Venture,* held that claims of fraud, misrepresentation, promissory estoppel, and breach of contract did not trigger a duty to defend as they were contract or contract-based claims and not within the scope of coverage. *Id.* at 986. Then, in *CIM Ins. Corp. v. Midpac Auto Center, Inc.,* 108 F.Supp.2d 1092 (D.Haw.2000), the district court was again presented with the question of whether an insurer was required to defend allegations including breach of contract, tortious breach of contract, negligent misrepresentation, and mental anguish. *Id.* at 1099–1100. Analyzing each count separately, the district court held that the insurer had no duty to defend these claims because they were either based on the contract or premised on the existence of the contractual relationship between the parties. *Id.* at 1100–03.

Oceanic contends that *WDC Venture* no longer accurately represents Hawaii law because the California case upon which *WDC Venture* relied, *Stanford Ranch, Inc. v. Maryland Cas. Co.,* 883 F.Supp. 493 (E.D.Cal.1995), has been implicitly overruled by *Vandenberg v. Superior Court,* 21 Cal.4th 815, 88 Cal.Rptr.2d 366, 982 P.2d 229 (1999). In *Vandenberg,* the Supreme Court of California overruled *International Surplus Lines Ins. Co. v. Devonshire* ***950** *Coverage Corp.,* 93 Cal.App.3d 601, 155 Cal.Rptr. 870 (1979), the case which *Stanford Ranch* relied upon. *Vandenberg,* 88 Cal.Rptr.2d 366, 982 P.2d at 246.

Oceanic further argues that because *Vandenberg* was the basis of our holding in *Anthem Elec., Inc. v. Pac. Employers Ins. Co.,* 302 F.3d 1049 (9th Cir.2002), Burlington owes a duty to defend. We disagree.

Oceanic reads too deeply into *Vandenberg. Vandenberg* involved damage to a parcel of land that the insured had leased under an agreement to operate an automobile sales and service facility. *Vandenberg,* 88 Cal.Rptr.2d 366, 982 P.2d at 234. When the property reverted back to the landowners after the business was discontinued, the owners discovered that the soil and groundwater underlying the property had been contaminated. *Id.* at 234–35. The owners filed suit alleging breach of contract and negligence. The insured tendered defense of that claim to its insurers under its CGL policies. *Id.* at 235. Those policies provided coverage to the insured for sums the insured was "legally obligated to pay as damages." The issue before the California Supreme Court was whether this policy language precluded coverage for losses pleaded as contractual damages. *Id.* at 243. The insurers argued that the phrase, "legally obligated to pay as damages," referred only to tort liability and not contractual liability, citing *International Surplus* and a line of cases holding that any liability arising *ex contractu* (from a contract) as opposed to *ex delicto* (from a tort), was not covered under a CGL policy. *Id.* at 244. The reasoning behind those cases was that the phrase was intended to describe liability based on a breach of a duty imposed by law, i.e., tort, rather than by contract. *Id.*

The California Supreme Court disagreed and "reject[ed] the ex contractu/ex delicto distinction," explaining that "the *International Surplus* rationale, distinguishing contract from tort liability for purposes of the CGL insurance coverage phrase 'legally obligated to pay as damages,' is incorrect." *Id.* at 244. It held that the insurers "cannot avoid coverage for damages awarded against [the insured] solely on the grounds the damages were assessed on a contractual theory." *Id.* at 246.

The basis for the California Supreme Court's holding, however, was not that a breach of contract could constitute an occurrence under a CGL policy. Instead, the court's focus was on the policy phrase, "legally obligated to pay as damages." While the phrase was broad enough to include damages for breach of contract or tort, the court stressed that its interpretation of the phrase did not extend to "limitations imposed by other terms of the coverage agreement (e.g. bodily injury and property damage *caused by an occurrence.*)" *Id.* at 246 (citation omitted) (emphasis added). The court's rationale was that:

> the arbitrariness of the distinction between contract and tort in the

> *International Surplus* line of cases is evident when we consider the same act may constitute both a breach of contract and a tort. Predicating coverage upon an injured party's choice of remedy or the form of action sought is not the law of this state.... Instead courts must focus on the nature of the risk and the injury, in light of policy provisions, to make that determination.

Id. at 245 (citations omitted). But that is already the standard under Hawaii insurance law. *See Dairy Road Partners,* 992 P.2d at 112 (cautioning Hawaii courts to carefully examine a complaint to "ensure that plaintiffs could not, through artful pleading, bootstrap the availability of insurance coverage under an insured defendant's policy by purporting to state a claim for negligence based on facts that, in reality, ***951** reflected manifestly intentional, rather than negligent conduct."); *see also Bayudan,* 957 P.2d at 1069.

Oceanic's reliance on *Anthem Electronics* is also misplaced. That case involved a contract where Anthem Electronics had agreed to supply KLA Instruments Corp. with circuit boards to be incorporated into scanners that KLA then sold. *Anthem,* 302 F.3d at 1052. When some of these scanners failed once in use by KLA's customers, it was discovered that the circuit boards that Anthem had supplied had latent defects due to manufacturing flaws. KLA was forced to replace the defective scanners and incurred other costs related to the loss of use of the scanners. *Id.* KLA filed suit in California state court to recoup these costs alleging causes of action against Anthem for breach of contract and negligence. Anthem tendered the complaint to its two CGL insurers and requested defense of the suit. *Id.* at 1052–53. We were thus faced with the issue of whether, under California law, the Anthem complaint established the possibility of a covered occurrence. In holding that the complaint raised a possibility of coverage and therefore triggered a duty to defend, we stated:

> [The insurers] argue against an occurrence where, as here, a supplier simply breaches a contract and supplies defective goods. But this argument seeks to revive a wooden distinction recently rejected by the California Supreme Court between contractual claims and insurance claims. *See Vandenberg,* [982 P.2d at 245].... So long as the [insured] can show that the circuit boards failed unexpectedly and caused property damages, it is well on its way to a *prima facie* case even though a breach of contract may be involved.

Id. at 1056.

Unlike California however, Hawaii has not rejected the distinction between contract and tort-based claims, and Oceanic fails to cite authority that would suggest otherwise. To the contrary, the Hawaii Supreme Court has stated that allowing tort recovery based on a breach of contract "unnecessarily blurs the distinction between—and undermines the discrete theories of recovery relevant to—tort and contract law." *Francis,* 971 P.2d at 708. We therefore conclude that changes in California law do not affect our application of Hawaii law.

Oceanic also argues that because the issue of whether a claim for a negligent breach of contract can constitute an occurrence is one of first impression in Hawaii, *Sentinel Ins. Co. v. First Ins. Co.,* 76 Hawai'i 277, 875 P.2d 894 (1994), applies to trigger coverage. In *Sentinel,* the insured, a corporation which had developed an apartment complex, faced claims of liability after water had infiltrated and damaged the property of unit owners. *Id.* at 901. The corporation had been insured under two policies issued by different insurers covering separate periods of time, and a dispute arose between the insurers as to when the property damage first occurred. *Id.* at 902–03. One insurer, First Insurance Company of Hawaii, refused to defend while the other, Sentinel Insurance Company, undertook defense of the underlying claim under a reservation of rights. After the parties in the underlying suit settled, Sentinel filed an action for declaratory relief, seeking to recover sums paid for defense and settlement from First Insurance on the theory that First Insurance had breached its duty to defend its insured. *Id.* at 903. The two insurance companies disputed when property damage occurred for purposes of coverage under a CGL policy—whether insurance coverage was triggered when damage actually manifested itself, or whether it was continuously ***952** triggered while the property was exposed

to the damage causing agent, even if the damage did not become apparent until later. Noting that there was "significant conflict among jurisdictions" and "[n]o reported Hawaii appellate court decision" as to which rule should apply, the court explained, "[t]he mere fact that the answers to those questions in this jurisdiction were not then and are not presently conclusively answered demonstrates that, based on the allegations in the underlying action, it was *possible* that the [insured] would be entitled to indemnification." *Id.* at 906–07 (emphasis in original). As a result, the court held that First Insurance had a duty to defend its insured, which it breached. *Id.* at 907.

Oceanic contends *Sentinel* stands for the proposition that where a case presents a legal uncertainty in Hawaii law, such that there is at least a possibility that the insurance company would have a duty to indemnify under the policy, that uncertainty itself triggers coverage under the policy and liability on the part of the insurer. Oceanic thus argues that because Hawaii has not rejected a negligent breach of contract theory, it was possible at the time the underlying suit was tendered that Oceanic would be insured for such a claim.

Sentinel is not so broad. The relevant portion of *Sentinel* concerned only the insurer's duty to defend. It was that duty which First Insurance was held to have breached in that case. The court clearly noted elsewhere in the *Sentinel* decision that "the duty to provide coverage and the duty to defend on the part of an insurer are separate and distinct." *Id.* at 908. Even a breach by an insurer of the duty to defend does not necessarily mean that the insurer is liable for indemnification. The court in *Sentinel* remanded that case for further proceedings to determine whether First Insurance was liable for indemnification, based upon its breach of the duty to defend. *See id.* at 914.

[16] The insurance company in the current case did not breach any duty to defend, even if it is assumed that there was such a duty. Unlike the insurer in *Sentinel,* Burlington provided a defense to the underlying lawsuit, under a reservation of rights. Then, while providing that defense, Burlington proceeded with this declaratory relief action to adjudicate its actual obligations under the CGL insurance policy. Nothing in *Sentinel* says that an insurance company is not permitted to provide a defense under a reservation of rights and simultaneously seek a declaration that under the given circumstances there is no coverage under the policy. A "declaratory judgment" is a "binding adjudication that establishes the rights and other legal relations of the parties" where those rights are in doubt. BLACK'S LAW DICTIONARY 846 (7th ed.1999). Actions for declaratory relief are authorized under federal law, *see* 28 U.S.C. § 2201, *et seq.* (the Declaratory Judgment Act); FED. R. CIV. P. 57, and under Hawaii law, *see* HAW REV. STAT. § 632–1. If the insurer obtains a declaratory judgment that there is no coverage, then there is no longer "legal uncertainty," and thus no basis to impose a continuing obligation on the insurer under *Sentinel,* even under Oceanic's reading of that decision.

There is, in addition, reason to doubt that the Hawaii Supreme Court intended that *any* degree of "legal uncertainty" or "legal ambiguity"—that is, any quantum of a possibility that the insured would be held entitled to coverage under Hawaii law—would itself establish coverage. Oceanic argues that because there was not a specific Hawaii Supreme Court case on point regarding issues raised here, there was legal uncertainty such that, under *Sentinel,* the district court should have held that ***953** there was coverage on that basis alone. Noting the lack of any subsequent ruling by the Hawaii Supreme Court applying *Sentinel* in the manner suggested by Oceanic, the district court concluded that the Hawaii Supreme Court did not intend such a result. As the district court explained in *Masamitsu:*

> A fundamental principle that should underlie any statement of Hawaii insurance law is that a plaintiff is the master of its claim. The underlying complaint against an insured defines the scope of the action, and, at least initially, of the insurer's investigation. A plaintiff for any number of plausible reasons may choose purposely not to assert certain facts or causes of action. The [insured's] interpretation of *Sentinel's* 'legal ambiguity' theory would mean that novel and remotely-possible claims (claims [not] addressed in Hawaii law) would trigger coverage over an otherwise non-covered action. An insurer would be defending against phantom claims. Given a constantly evolving common law, this Court in applying Hawaii law is unwilling to read as much into *Sentinel.*

Masamitsu, 74 F.Supp.2d at 991. We agree that *Sentinel* does not stand for the proposition that the absence of controlling Hawaii caselaw does not by itself establish sufficient legal uncertainty to trigger coverage. The observation by the court in *Sentinel* that it was "possible" that the insured would be entitled to indemnification under the insurance policy referred to more than a theoretical possibility. The court specifically pointed to "a notable dispute nationwide" and "significant conflict among jurisdictions" regarding the coverage question at issue there. *Sentinel,* 875 P.2d at 907. The level of uncertainty here is not the same.

Accordingly, we conclude that under Hawaii law, the homeowners' "other acts" allegation is not a covered occurrence under the policy.

B. Negligent Infliction of Emotional Distress

[17] Oceanic argues that the policy potentially covers the homeowners' claim of negligent infliction of emotional distress. That claim reads in part:

> FOURTH CAUSE OF ACTION
>
> *Emotional Distress*
>
> [Homeowners] reallege paragraphs 1–21 above as though fully set forth herein.
>
> 22. At all times material to this Counterclaim, [Han] was acting as an agent on behalf of[homeowners] and had direct meetings with [Oceanic] and/ or entities as yet unnamed and/or unidentified whom [Oceanic] had a duty to supervise.
>
> 23. [Oceanic] through its principal, Jensen Wong, and/or through the conduct of ... entities under the supervision of [Oceanic], intentionally or negligently inflicted emotional distress upon [Han].
>
> 24. As a direct and proximate result of the intentional or negligent infliction of emotional distress, [Han] has suffered bodily injury, pain and suffering, severe emotional distress....

The district court concluded that the emotional distress claim did not trigger the duty to defend because it was a contract-based tort claim which arose only out of the contractual relationship between Oceanic and the homeowners.

Oceanic argues that the district court erred because homeowner Han's emotional distress could have been inflicted in the absence of a contractual relationship and should therefore trigger Burlington's duty to defend. Burlington concedes that in the absence of a contractual relationship, an ***954** emotional distress claim would be covered under the policy. Burlington argues, however, that the counterclaim indicates that Han's emotional distress claim arose out of her meetings with a principal of Oceanic, and therefore, the claim could only have arisen as part of the contractual relationship. Burlington buttresses this argument by pointing to language used in the counterclaim where the homeowners reallege earlier paragraphs of their counterclaim, which according to Burlington, served to reallege the contractual setting. Incorporating preceding allegations into subsequent counts, however, is a common form of pleading and should not serve to transform tort claims into contract claims. The more difficult question, then, is whether the allegations present an independent tort claim for negligent infliction of emotional distress that would constitute an occurrence under the policy.

[18] In Hawaii, as discussed above in Section II.A, damages for emotional distress in the employment context are recoverable under a contract only if the alleged conduct "(1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract." *Francis,* 971 P.2d at 708. Oceanic argues that the language of the Fourth Cause of Action supports its contention that the emotional distress claim is independent of the contractual relationship. Oceanic specifically points to paragraph 22 of the counterclaim, where homeowner Han alleges that she had direct meetings with Oceanic or entities Oceanic had a "duty to supervise." Oceanic argues that because Han does not identify the source of the "duty to supervise" she asserts was imposed on Oceanic, the counterclaim raises a possibility of coverage. Oceanic further contends that this duty could not have arisen from Oceanic's status as a general contractor on the construction project, as the homeowners allege, because Oceanic denied responsibility for construction beyond that specifically set forth in the contract, and maintained that it was not the general contractor. In addition, Oceanic argues that a tort could conceivably arise out of a contractual relationship under different circumstances, e.g., if Oceanic's employees had accidentally injured one of the homeowners on the job, or, if Oceanic, in its anger over the homeowners' failure to pay, published an advertisement in the newspaper falsely accusing the homeowners of a crime.

Oceanic overlooks the undisputed facts of this case, however. Claims alleging the above situations may well constitute occurrences under a CGL policy, but no such facts were alleged here. According to Oceanic's complaint for breach of contract filed in Hawaii state court:

> 9. [Oceanic] and Defendant Han ultimately agreed on a modified scope of work and total contract price, thereby creating a binding agreement between Oceanic and Defendant Han, and agreed on a payment schedule as follows:
>
> 1st $45,000.00 Due on start-up; November, 1997
>
> 2nd 26,000.00 December 20, 1997, or upon completion of rough electrical & plumbing
>
> 3rd 40,000.00 January 30, 1998, or upon completion of roofing and window installation
>
> 4th 39,500.00 February 30, 1998, or upon completion of drywall and exterior
>
> 5th 39,000.00 March 30, 1998, or upon completion of painting, installation of fixtures
>
> 6th 30,000.00 30 days after completion of final inspection and all liens released

This language indicates that the agreement was for Oceanic to receive final payment after it had completed construction ***955** of the *entire residence.* Although Oceanic continues to deny its status as a general contractor, in its answer to the homeowners' counterclaim, Oceanic admitted the homeowners' allegation that "[homeowners] contracted with[Oceanic] on or about December 1, 1998 for the construction *and supervision* of the Poola Street residence." The duty to supervise, therefore, was imposed under the contract and was not here an independent duty, as Oceanic suggests. [7]

7 Even if we were to assume that the "duty to supervise" is "independently recognized by principles of tort law," Hawaii law allows recovery of damages for emotional distress arising out of a breach of contract in only two exceptional situations. *Francis,* 971 P.2d at 713. "In the first situation, the emotional distress will usually accompany a bodily injury," e.g., a claim for medical malpractice. *Id.* The second situation exists "where the contract is of such a kind that serious emotional disturbance is a particularly foreseeable result of a breach," e.g., breach of a promise to marry; breach of a contract where a mortician agrees to prepare a body for burial in a certain manner. *Id.* Here, Han alleges that she suffered bodily injury as "a direct and proximate result of" Oceanic's infliction of emotional distress—not that she suffered emotional distress due to bodily injury inflicted by Oceanic, as in a medical malpractice claim. Likewise, the construction contract at issue does not fall into the category of cases where emotional distress is the foreseeable result of a breach of that contract.

We therefore agree with the district court that, under the given facts of this case, "but for the contractual relationship between Oceanic and the homeowners, the homeowners would not have a claim for negligent infliction of emotional distress." Accordingly, the homeowners' emotional distress claim cannot be read to constitute a covered occurrence under the policy at issue. *See Dairy Road Partners,* 992 P.2d at 112.

C. Negligent Misrepresentation Claim

[19] As a third basis for potential coverage, Oceanic contends that the homeowners have asserted a negligent misrepresentation and/or negligent recommendation claim included within the "other acts and omissions amounting to misfeasance, malfeasance and nonfeasance" allegation in paragraph 10(*l*) of the counterclaim. *See supra* Section II.A. As support for its argument, Oceanic cites a memorandum in opposition to summary judgment filed by the homeowners in the underlying case in Hawaii state court. According to the memorandum, the homeowners claim that Oceanic "recommended an unlicensed and unqualified mason to do the excavation and structural fill for the project," which, according to Oceanic, clarifies the "other acts" allegation to include a claim for negligent recommendation.

[20] As Burlington correctly notes, however, the homeowners filed the memorandum more than three years after they filed the counterclaim, not in opposition to a motion brought by Oceanic, but in opposition to a motion for summary judgment filed by a third party defendant in the underlying lawsuit. In Hawaii, the duty to defend is determined at the time suit is brought or at the latest, when defense is tendered. *See Commerce & Indus. Ins. Co.,* 832 P.2d at 736; *Dairy Road Partners,* 992 P.2d at 108–09. Oceanic's claim that the "other acts" allegation includes a negligent recommendation claim therefore fails.

Even if we were to assume that the homeowners' counterclaim asserts a claim for negligent recommendation, that claim rests on Oceanic's breach of its contractual duty to construct and supervise the homeowners' residence, a duty Oceanic

itself has acknowledged. *See supra* Section ***956** II.B. Accordingly, the homeowners' claim is not a covered occurrence under the policy.

III. CONCLUSION

For the foregoing reasons, we conclude that because the homeowners' counterclaim does not allege causes of action that would constitute occurrences under the CGL policy at issue, they are not within the scope of coverage. Accordingly, we affirm the district court's grant of Burlington's motion for summary judgment and denial of Oceanic's motion for summary judgment.

AFFIRMED.

All Citations

383 F.3d 940, 04 Cal. Daily Op. Serv. 8262, 2004 Daily Journal D.A.R. 11,125

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by Lamar Homes, Inc. v. Mid-Continent Cas. Co., Tex., August 31, 2007

268 Neb. 528
Supreme Court of Nebraska.

AUTO–OWNERS INSURANCE COMPANY, appellee,
v.
HOME PRIDE COMPANIES, INC., appellant,
and
Appletree Apartments, Inc., et al., appellees.

No. S–03–352.
|
Aug. 6, 2004.

Synopsis

Background: Commercial general liability (CGL) insurer brought action against roofing contractors for a declaratory judgment that the policy did not cover alleged liability faulty installation of shingles. The District Court, Douglas County, Stephen A. Davis, J., entered summary judgment in favor of insurer. Insured contractor appealed.

Holdings: The Supreme Court, Gerrard, J., held that:

[1] as a matter of first impression, alleged damage to roof structures and buildings as result of faulty workmanship was caused by occurrence;

[2] coverage was not barred by exclusion applicable to cost to repair or replace insured's work; and

[3] the structures and buildings allegedly damaged by faulty installation of shingles were not impaired property.

Reversed and remanded with directions.

West Headnotes (17)

[1] Judgment
Existence or non-existence of fact issue
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) Existence or non-existence of fact issue
Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

1 Cases that cite this headnote

[2] Appeal and Error
Summary Judgment
30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3950 Summary Judgment
30k3951 In general
(Formerly 30k934(1))
In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2 Cases that cite this headnote

[3] Appeal and Error
Insurers and insurance
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3771 Trade, Business, and Finance
30k3774 Insurers and insurance
(Formerly 30k842(8))
The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.

8 Cases that cite this headnote

[4] Insurance

Risks Covered and Exclusions

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2097 In general

In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.

6 Cases that cite this headnote

[5] Insurance

Intention

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1812 In general

In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made.

5 Cases that cite this headnote

[6] Contracts

Language of Instrument

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 In general

Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.

4 Cases that cite this headnote

[7] Insurance

Common Exclusions

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(1) In general

Exception to exclusion in commercial general liability (CGL) insurance policy was incapable of providing coverage; the exception was irrelevant without initial grant of coverage and operation of the exclusion to preclude coverage.

3 Cases that cite this headnote

[8] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

An "accident" within the meaning of liability insurance contracts includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.

1 Cases that cite this headnote

[9] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Faulty workmanship, standing alone, is not an "occurrence" and, therefore, is not covered under a standard commercial general liability (CGL) insurance policy because it is not a fortuitous event.

14 Cases that cite this headnote

[10] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

An accident caused by faulty workmanship is a covered "occurrence" within the meaning of a commercial general liability (CGL) insurance policy.

8 Cases that cite this headnote

[11] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Although a standard commercial general liability (CGL) insurance policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists.

23 Cases that cite this headnote

[12] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Alleged damage to roof structures and buildings as result of faulty workmanship by insured's subcontractor in installing shingles was caused by "occurrence" within the meaning of commercial general liability (CGL) insurance policy; the alleged damage was an unintended and unexpected consequence of the alleged faulty workmanship beyond damage to the contractors' own work product.

25 Cases that cite this headnote

[13] Insurance

Burden of proof

217 Insurance
217XV Coverage—in General
217k2114 Evidence
217k2117 Burden of proof

The burden to prove that an exclusionary clause applies rests upon the insurer.

1 Cases that cite this headnote

[14] Insurance

Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Generally, the "your work" exclusions operate to prevent commercial general liability (CGL) policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business.

4 Cases that cite this headnote

[15] Insurance

Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

The rationale behind the "your work" exclusions in a commercial general liability (CGL) insurance policy is that they discourage careless work by making contractors pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond.

2 Cases that cite this headnote

[16] Insurance

Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Coverage for alleged damage to roof structures and buildings as result of allegedly faulty workmanship in installation of shingles was not barred by commercial general liability (CGL) policy exclusion applicable to cost to repair or replace insured's work; the alleged damage extended beyond the cost to simply reshingle the roofs.

7 Cases that cite this headnote

[17] Insurance
Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Roof structures and buildings allegedly damaged by faulty installation of shingles were not "impaired property" within the meaning of commercial general liability (CGL) policy exclusion of coverage for cost to repair or replace impaired property; the damage could not be repaired or restored by simply reshingling the apartment roofs.

4 Cases that cite this headnote

****573** *Syllabus by the Court*

***528** 1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.

4. **Insurance: Contracts.** In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.

5. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.

6. **Insurance: Contracts: Words and Phrases.** An accident within the meaning of liability insurance contracts includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.

7. **Insurance: Contracts: Liability.** Faulty workmanship, standing alone, is not covered under a standard commercial general liability policy.

8. **Insurance: Contracts: Liability: Damages.** Although a standard commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists.

9. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause applies rests upon the insurer.

10. **Insurance: Contracts: Liability.** Generally speaking, the "your work" exclusions in a commercial general liability policy operate to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business.

11. **Insurance: Contracts: Contractors and Subcontractors: Liability.** The rationale behind the "your work" exclusions in a commercial general liability policy is that they discourage careless work by making contractors

pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond.

Attorneys and Law Firms

***529** Andrew J. Wilson, Omaha, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

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Thomas M. Locher, Omaha and Douglas W. Krenzer, Council Bluffs, of Locher, Cellilli, Pavelka & Dostal, L.L.C., and Roger W. Warren and Jeffrey C. Baker, of Sanders, Conkright & Warren, L.L.P., Overland Park, KS, for appellees Certain ****574** Teed Corporation and G.S. Roofing Products Co.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER–LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Auto–Owners Insurance Company (Auto–Owners) instituted this declaratory judgment action to determine its obligations to its insured, Home Pride Companies, Inc. (Home Pride). The district court determined that the policy issued by Auto–Owners to Home Pride did not cover Home Pride's claim and granted summary judgment in favor of Auto–Owners. The main issue on appeal is whether a standard commercial general liability (CGL) insurance policy covers an insured contractor for the faulty workmanship of a subcontractor that it hired.

FACTUAL AND PROCEDURAL BACKGROUND

Because this action is based upon an underlying action filed in April 2002, we digress to trace the history of the original action. Appletree Apartments, Inc. (Appletree), is a wholly owned subsidiary of J.A. Peterson Enterprises, Inc. (Peterson). Appletree and Peterson entered into a contract with JT Builders, Inc., to install new shingles on a number of Appletree's apartment buildings. Thereafter, JT Builders subcontracted with Craig Industries, Inc., to do the work. After becoming dissatisfied with Craig Industries' work, JT Builders terminated its contract with Craig Industries and subcontracted the work to Home Pride. Home Pride then entered into a subcontract with Ron ***530** Hansen, doing business as Ron Hansen Construction, to install the shingles.

Sometime in 1996, Ron Hansen Construction completed the project. Soon thereafter, Appletree began to notice problems with the roof. Appletree notified Home Pride of the problems, and after receiving what it believed to be an unsatisfactory response, Appletree and Peterson filed suit against Home Pride, JT Builders, and Craig Industries. In their petition, Appletree and Peterson claimed that the aforementioned parties failed to install the shingles in a workmanlike manner and that such faulty workmanship caused substantial and material damage to the roof structures and buildings. Appletree and Peterson also alleged that the shingles were defective and included in the action the manufacturer of the shingles, Certain Teed Corporation, and G.S. Roofing Products Co., a company that merged with Certain Teed Corporation after Appletree purchased the shingles.

After the suit was filed, Home Pride made a claim to its insurer, Auto–Owners, for coverage under its CGL policy. Pursuant to a reservation of rights, Auto–Owners assumed the defense of Home Pride. Thereafter, Auto–Owners instituted this declaratory judgment action against Home Pride, Appletree, Peterson, JT Builders, Craig Industries, Certain Teed Corporation, G.S. Roofing Products Co., and Ron Hansen, doing business as Ron Hansen Construction. Essentially, Auto–Owners claimed that the insurance policy did not provide coverage because the faulty workmanship of a subcontractor is not an "occurrence" under a CGL policy.

Both Auto–Owners and Home Pride moved for summary judgment. The district court determined that any alleged property damage was not caused by an "occurrence" and granted summary judgment in favor of Auto–Owners. Home Pride filed a timely notice of appeal.

****575** ASSIGNMENT OF ERROR

Home Pride assigns that the district court erred in determining that its CGL policy did not provide coverage.

STANDARD OF REVIEW

[1] **[2]** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine ***531** issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Keys v. Guthmann,* 267 Neb. 649, 676 N.W.2d 354 (2004). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Broadly speaking, this appeal requires us to determine whether damage caused by faulty workmanship is covered under a standard CGL insurance policy. Although this issue has been frequently examined by a number of courts, it is a matter of first impression in Nebraska.

[3] **[4]** **[5]** **[6]** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Poulton v. State Farm Fire & Cas. Cos.,* 267 Neb. 569, 675 N.W.2d 665 (2004). In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved. *Id.* In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Id.*

As relevant here, Home Pride's policy states:

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies....

....

b. This insurance applies to "bodily injury" and "property damage" only if:

***532** **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"....

....

2. Exclusions.

This insurance does not apply to:

....

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

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.

[7] As an initial matter, we note that Home Pride appears to argue that coverage exists because the policy contains a subcontractor exception to the "your work," or "1," exclusion found in section 2. We disagree. The provision Home Pride relies on is merely an exception to an exclusion and, therefore, incapable of providing coverage. See, *Auto Owners Ins. Co. v. Travelers Cas. & Surety,* 227 F.Supp.2d 1248 (M.D.Fla.2002); *Hawkeye–* ****576** *Security Ins. Co. v. Davis,* 6 S.W.3d 419 (Mo.App.1999); *Lassiter Const. v. American States Ins.,* 699 So.2d 768 (Fla.App.1997). Stated otherwise, the exception contained within exclusion "l" is irrelevant until two conditions precedent are met: (1) There is an initial grant of coverage and (2) exclusion "l" operates to preclude coverage. See, *L–J, Inc. v. Bituminous Fire and Marine,* 350 S.C. 549, 567 S.E.2d 489 (S.C.App.2002); *Kalchthaler v. Keller Const. Co.,* 224 Wis.2d 387, 591 N.W.2d 169 (Wis.App.1999). If, and only if, these two conditions are met may the subcontractor exception to the exclusion be applicable.

In order to determine if coverage exists, we must first determine if there was "property damage" caused by an "occurrence." On both accounts, Auto–Owners contends that there is not. As to the former, the policy states that "property damage" is "[p]hysical injury to tangible property, including all resulting loss of use of that property" as well as "[l]oss of use of tangible property that is not physically injured."

In their amended petition, Appletree and Peterson alleged that shingles were breaking apart and falling off the roofs at Appletree's apartments, resulting in ***533** substantial and material damage to the roof structures and buildings. Such allegations state a cause for physical injury to tangible property and, therefore, "property damage" under the policy. See, *American Family Mut. v. American Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65 (2004); *Kalchthaler v. Keller Const. Co., supra; Maryland Cas. Co. v. Reeder,* 221 Cal.App.3d 961, 270 Cal.Rptr. 719 (1990).

[8] At the core of Auto–Owners' appellate argument is its contention that faulty workmanship does not constitute an "occurrence" under the policy. The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While the term "accident" is not defined in the policy, we have previously stated that "an accident within the meaning of liability insurance contracts includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby." *Farr v. Designer Phosphate & Premix Internat.,* 253 Neb. 201, 206, 570 N.W.2d 320, 325 (1997). See, also, *Sullivan v. Great Plains Ins. Co.,* 210 Neb. 846, 851, 317 N.W.2d 375, 379 (1982) (accident is " 'an unexpected happening without intention or design,' " quoting 45 C.J.S. *Insurance* § 829 (1946)); *City of Kimball v. St. Paul Fire & Marine Ins. Co.,* 190 Neb. 152, 154, 206 N.W.2d 632, 634 (1973) ("[t]he word 'accident' as used in liability insurance is a more comprehensive term than 'negligence' and in its common signification the word means an unexpected happening without intention").

Whether faulty workmanship fits within the aforementioned definition of accident is a difficult question, and courts have answered it in a variety of ways. For example, a relatively small number of courts have determined that the damage that occurs as a result of faulty or negligent workmanship constitutes an accident, so long as the insured did not intend for the damage to occur. See, *Fidelity & Deposit of Maryland v. Hartford Cas.,* 189 F.Supp.2d 1212 (D.Kan.2002); *Joe Banks Drywall v. Transcont. Ins. Co.,* 753 So.2d 980 (La.App.2000); *Erie Ins. Exchange v. Colony Dev. Corp.,* 136 Ohio App.3d 406, 736 N.E.2d 941 (1999).

However, the majority of courts have determined that faulty workmanship is not an accident and, therefore, not an occurrence. See, e.g., ***534** *Lenning v. Commercial Union Ins. Co.,* 260 F.3d 574, 583 (6th Cir.2001) ("there is no 'occurrence' to the extent [a] complaint alleges property damage arising out of defective or faulty ****577** craftsmanship"); *J.Z.G. Resources, Inc. v. King,* 987 F.2d 98 (2d Cir.1993) (defective workmanship, standing alone, is not occurrence); *Pursell Const. v. Hawkeye–Security Ins.,* 596 N.W.2d 67, 71 (Iowa 1999) ("defective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence under a CGL policy"); *L–J, Inc. v. Bituminous Fire and Marine,* 350 S.C. 549, 556, 567 S.E.2d 489, 493 (S.C.App.2002) ("faulty workmanship, standing alone, does not constitute an 'accident' and cannot therefore be an 'occurrence' "); *State Farm Fire and Cas. Co. v. Tillerson,* 334 Ill.App.3d 404, 409, 777 N.E.2d 986, 991, 268 Ill.Dec. 63, 68 (2002) ("[w]here the defect is no more than the natural and ordinary consequences of faulty workmanship, it is not caused by an accident"); *Radenbaugh v. Farm Bureau,* 240 Mich.App. 134, 610 N.W.2d 272 (2000); *Heile v. Herrmann,* 136 Ohio App.3d 351, 736 N.E.2d 566 (1999); *U.S. Fidelity & Guar. v. Advance Roofing,* 163 Ariz. 476, 788 P.2d 1227 (Ariz.App.1989).

[9] Although it is clear that faulty workmanship, standing alone, is not covered under a standard CGL policy, it is important to realize that there are two different justifications for this rule. On the one hand, the rule has been justified on public policy grounds, primarily on the long-founded notion that the cost to repair and replace the damages caused by faulty workmanship is a business risk not covered under a CGL policy. See, *Nas Sur. Group v. Precision Wood Products, Inc.,* 271 F.Supp.2d 776 (M.D.N.C.2003); *LaMarche v. Shelby Mut. Ins. Co.,* 390 So.2d 325 (Fla.1980). Today, the business risk rule is part of standard CGL policies in the form of "your work" exceptions to coverage. Therefore, the business risk rule does not serve as an initial bar to coverage, but, rather, as a potential exclusion, via the "your work" exclusions, if an initial grant of coverage is found. See, *American Family Mut. v. American Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65 (2004); *Erie Ins. Exchange v. Colony Dev. Corp., supra.*

On the other hand, rather than relying on the business risk rule, a majority of courts have determined that faulty workmanship, standing alone, is not covered under a CGL policy because, ***535** as a matter of policy interpretation, "[t]he fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *McAllister v. Peerless Ins. Co.,* 124 N.H. 676, 680, 474 A.2d 1033, 1036 (1984). See, also, *J.Z.G. Resources, Inc. v. King, supra; Pursell Const. v. Hawkeye–Security Ins., supra; Heile v. Herrmann, supra; R.N. Thompson & Associates v.*

Monroe Guar., 686 N.E.2d 160 (Ind.App.1997); *Indiana Ins. Co. v. Hydra Corp.,* 245 Ill.App.3d 926, 185 Ill.Dec. 775, 615 N.E.2d 70 (1993); *U.S. Fidelity & Guar. v. Advance Roofing, supra.* Because the majority rule is based on an actual interpretation of policy language, as opposed to a mere exposition of policy, and comports with our prior definitions of the term "accident," we believe that it represents the better rule. See *id.* Consequently, we conclude that faulty workmanship, standing alone, is not covered under a standard CGL policy because it is not a fortuitous event.

[10] **[11]** Important here, although faulty workmanship, *standing alone,* is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence. See, e.g., *J.Z.G. Resources, Inc. v. King,* 987 F.2d 98 (2d Cir.1993); *Wm. C. Vick Const. Co. v. Pennsylvania Nat. Mut.,* 52 F.Supp.2d 569 (E.D.N.C.1999); *Pursell Const. v. Hawkeye–Security Ins.,* 596 N.W.2d 67 (Iowa 1999); *High Country Assocs. v. N.H. Ins.* ****578** *Co.,* 139 N.H. 39, 648 A.2d 474 (1994); *L–J, Inc. v. Bituminous Fire and Marine,* 350 S.C. 549, 567 S.E.2d 489 (S.C.App.2002); *Radenbaugh v. Farm Bureau,* 240 Mich.App. 134, 610 N.W.2d 272 (2000); *Heile v. Herrmann,* 136 Ohio App.3d 351, 736 N.E.2d 566 (1999); *Kalchthaler v. Keller Const. Co.,* 224 Wis.2d 387, 591 N.W.2d 169 (Wis.App.1999); *Auto Owners Ins. v. Tripp Const., Inc.,* 737 So.2d 600 (Fla.App.1999); *Pekin Ins. v. Richard Marker Associates,* 289 Ill.App.3d 819, 682 N.E.2d 362, 224 Ill.Dec. 801 (1997); *U.S. Fidelity & Guar. v. Advance Roofing,* 163 Ariz. 476, 788 P.2d 1227 (Ariz.App.1989). Stated otherwise, although a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists. See, *High Country Assocs. v. N.H. Ins. Co., supra;* ***536** *L–J, Inc. v. Bituminous Fire and Marine, supra; Radenbaugh v. Farm Bureau, supra; Kalchthaler v. Keller Const. Co., supra.*

For example, in *L–J, Inc. v. Bituminous Fire and Marine, supra,* a subcontractor was hired to clear, grub, grade, and construct the subbase for a road construction project. The subcontractor failed to remove a number of tree stumps in the roadbed and moisture seeped into the road base, deteriorating the road. After stating the general rule that "faulty workmanship, standing alone, does not constitute an 'accident' and cannot therefore be an 'occurrence,' " the court noted faulty workmanship that causes an accident is covered under a standard CGL policy. *Id.* at 556, 567 S.E.2d at 493.

> [H]ad the pavement not failed and [the developer] brought an action to recover the cost of removing the tree stumps from the roadbed, the defective work, standing alone, would not have been "property damage" or an "occurrence" under the policy. The damages, however, extend beyond the cost of removing the tree stumps because the failure to properly compact the roadbed led to property damage, namely, the failure of the road surfaces. These remote damages were an "accident" not expected or intended by the insured.

Id. at 556–57, 567 S.E.2d at 493.

Similarly, in *High Country Assocs. v. N.H. Ins. Co., supra,* a homeowners' association sued the builders of a number of condominiums for negligently constructing the condominiums' exterior walls. Initially, the court noted the rule that claims for faulty workmanship, standing alone, do not constitute an "occurrence" within the meaning of a CGL policy. *Id.* The court then went on to point out that the homeowners' association's petition not only requested compensation to repair and replace the poorly constructed exterior walls, but also requested compensation for the water damage that allegedly occurred as a result of the builders' faulty workmanship, including decay of the sheathing, harm to the structural studding, loss of structural integrity, and damage to the vertical siding. *Id.* Determining that these consequential damages constituted accidental damage to property other than the insured's own work product, the court held that the homeowners' association had made out a claim for property damage caused by an occurrence and that therefore, the ***537** insurer was obligated to provide coverage for the insured builder. *Id.*

[12] In the instant case, Appletree and Peterson alleged that JT Builders, through its subcontractors Craig Industries and Home Pride (hereinafter contractors), negligently installed shingles on a number of apartments, which caused the shingles to ****579** fall off. Additionally, the amended petition alleged that as a consequence of the faulty work, the roof structures and buildings have experienced substantial

damage. This latter allegation represents an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product. Therefore, the amended petition properly alleged an occurrence within the meaning of the insurance policy.

[13] Because Appletree and Peterson's amended petition alleges property damage caused by an occurrence, the policy provides an initial grant of coverage. Therefore, we now turn to the policy exclusions. Under established law, the burden to prove that an exclusionary clause applies rests upon the insurer. See *Farmers Mut. Ins. Co. v. Kment,* 265 Neb. 655, 658 N.W.2d 662 (2003). On appeal, Auto–Owners contends that coverage is excluded by exclusions "n(2)" and "n(3)." These exclusions state:

> **SECTION I—COVERAGES**
>
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> ....
>
> **2. Exclusions.**
>
> This insurance does not apply to:
>
> ....
>
> **n.** Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> ....
>
> **(2)** "Your work"; or
>
> **(3)** "Impaired property";
>
> if such ... work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

[14] **[15]** ***538** Generally speaking, the "your work" exclusions, of which "n(2)" is one, operate to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business. See, *American Family Mut. v. American Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65 (2004); *Employers Mut. Cas. Co. v. Pires,* 723 A.2d 295 (R.I.1999); *Knutson Const. Co. v. St. Paul Fire & Marine Ins.,* 396 N.W.2d 229 (Minn.1986); *Weedo v. Stone–E–Brick, Inc.,* 81 N.J. 233, 405 A.2d 788 (1979); *Sapp v. State Farm Fire & Cas. Co.,* 226 Ga.App. 200, 486 S.E.2d 71 (1997). Essentially, the rationale behind the "your work" exclusions is that they discourage careless work by making contractors pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond. See, *Fireguard Sprinkler Systems v. Scottsdale Ins.,* 864 F.2d 648 (9th Cir.1988); *Knutson Const. v. St. Paul Fire & Marine Ins., supra; Weedo v. Stone–E–Brick, Inc., supra; U.S. Fidelity & Guar. v. Advance Roofing,* 163 Ariz. 476, 788 P.2d 1227 (Ariz.App.1989); *C.D. Walters Const. Co. v. Fireman's Ins. Co.,* 281 S.C. 593, 316 S.E.2d 709 (S.C.App.1984).

[16] In the instant case, exclusion "n(2)" does not serve to exclude Appletree and Peterson's damage claim because their claim extends beyond the cost to simply repair and replace the contractors' work, i.e., to reshingle the roofs. As previously noted, Appletree and Peterson alleged that the contractors' faulty workmanship resulted in substantial damage to the roof structures and buildings. Therefore, their claimed damages to the roof structure and buildings fall outside of the exclusion. See, *Standard Fire Ins. Co. v. Chester O'Donley,* 972 S.W.2d 1 (Tenn.App.1998) ****580** (noting that "your work" exclusion does not apply to claims involving losses resulting from failure of insured's work); *Glens Falls Ins. v. Donmac Golf Shaping,* 203 Ga.App. 508, 417 S.E.2d 197 (1992).

[17] Similarly, in regard to exclusion "n(3)," the policy states that property is not "impaired" unless it is capable of being restored by the "repair, replacement, adjustment or removal of ... 'your work'; or ... [y]our fulfilling the terms of the contract or agreement." Therefore, because damage to the roof structures and buildings cannot be repaired or restored by simply reshingling ***539** the apartment roofs, they are not "impaired property" within the meaning of exclusion "n(3)." See, *Federated Mut. Ins. Co. v. Grapevine Excavation,* 197 F.3d 720 (5th Cir.1999). Consequently, exclusion "n(3)" is inapplicable.

CONCLUSION

For the foregoing reasons, we conclude that Auto–Owners has a duty to defend Home Pride, and to the extent that Home Pride may be found liable for the resulting damage to the roof structures and the buildings, Auto–Owners is

obligated to provide coverage. The district court erred in granting summary judgment in favor of Auto–Owners and in not granting summary judgment in favor of Home Pride. The judgment entered in favor of Auto–Owners and against Home Pride is reversed, and the district court is directed to enter judgment in favor of Home Pride consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

All Citations

268 Neb. 528, 684 N.W.2d 571

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by K & L Homes, Inc. v. American Family Mut. Ins. Co., N.D., April 5, 2013

329 Or. 620
Supreme Court of Oregon.

OAK CREST CONSTRUCTION COMPANY, Petitioner on Review,
v.
AUSTIN MUTUAL INSURANCE COMPANY, a Minnesota corporation, Respondent on Review.

(CC 93C13423; CA A84861; SC S42855)
|
Argued and Submitted May 7, 1999.
|
Decided Feb. 17, 2000.

Synopsis
Insured, a general contractor on custom-built home, sued its commercial liability insurer when insurer refused to reimburse costs of removing and replacing subcontractor's interior painting work that had failed to cure properly. The Circuit Court, Marion County, Albin Norblad, J., entered summary judgment in favor of insurer, and insured appealed. The Court of Appeals affirmed, 137 Or.App. 475, 905 P.2d 848. Allowing review, the Supreme Court, Gillette, J., held that costs incurred by insured in replacing subcontractor's work did not arise from an "accident" within meaning of commercial liability policy.

Judgment of Court of Appeals affirmed.

West Headnotes (2)

[1] Appeal and Error
To sustain judgment appealed from

30 Appeal and Error
30XVI Review
30XVI(C) Persons Entitled to Assert Arguments on Review
30XVI(C)1 In General
30k3087 Assertion by Appellee, Respondent, or Defendant in Error
30k3090 Particular Rulings, Objections, and Contentions
30k3090(2) To sustain judgment appealed from
(Formerly 30k878(4))

Requirement that respondent to an appeal make cross-assignment of error in order to challenge a trial court ruling is not implicated when respondent embraces the ruling and seeks only to challenge the trial court's reasoning. Rules App.Proc., Rule 5.57.

5 Cases that cite this headnote

[2] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Costs incurred by general contractor during construction of custom home, in removing and replacing subcontractor's interior painting work that had failed to cure properly, did not arise from an "accident" within meaning of general contractor's commercial liability policy; damage from subcontractor's work amounted solely to a breach of contract, not a breach of any duty to act with due care.

25 Cases that cite this headnote

**1254 *620 On review from the Court of Appeals. *

* Appeal from Marion County Circuit Court. 137 Or.App. 475, 905 P.2d 848 (1995).

Attorneys and Law Firms

J. Michael Alexander, of Burt, Swanson, Lathen, Alexander, McCann & Smith, Salem, argued the cause and filed the brief for petitioner on review.

Carl Amala, of Harris, Wyatt & Amala, Salem, argued the cause and filed the brief for respondent on review.

Before CARSON, Chief Justice, and GILLETTE, VAN HOOMISSEN, DURHAM, and KULONGOSKI, Justices. **

** Leeson and Riggs, JJ., did not participate in the consideration or decision of this case.

Opinion

***622** GILLETTE, J.

This is an action for breach of a standard commercial liability insurance contract. Plaintiff, a general contractor, filed the action when its insurer refused to reimburse it for the cost of removing and replacing a subcontractor's painting work that had been applied during the construction of a custom home and had failed to cure properly. The trial court granted the insurer's motion for summary judgment. The Court of Appeals affirmed, holding that plaintiff's claim did not fall within the coverage terms of the policy, because the damage at issue had not been "caused by an occurrence," as the insurance contract required. *Oak Crest Const. Co. v. Austin Mut. Ins. Co.,* 137 Or.App. 475, 479–80, 905 P.2d 848 (1995). Plaintiff sought review by this court. We allowed review to consider whether the event at issue is one covered by the commercial liability policy. We conclude that it is not and affirm.

At the time of the relevant events, plaintiff was insured under a commercial liability policy issued by defendant. The policy contained two coverage provisions that plaintiff asserts are relevant. Coverage L, providing ****1255** coverage for bodily injury and property damage liability, stated in part:

> "We pay all sums which an insured becomes legally obligated to pay as damages due to bodily injury or *property damage* to which this insurance applies. The bodily injury or *property damage* must be caused by an *occurrence.*"

(Emphasis added.) Coverage N, providing coverage for products and completed work, stated:

> "We pay all sums which an insured becomes legally obligated to pay as damages due to bodily injury or *property damage* arising out of the Products/*Completed Work Hazard* to which this insurance applies. The bodily injury or *property damage* must be caused by an *occurrence.*"

(Emphasis added.) The policy also included the following definitions:

> "Occurrence—This means an accident and includes repeated exposure to similar conditions.
>
> ***623** "Property damage—This means:
>
> "a. physical injury or destruction of tangible property; or
>
> "b. the loss of use of tangible property whether or not it is physically damaged.
>
> "Completed Work Hazard means bodily injury or property damage arising out of your work. It does not include work that has not been completed, or that has been abandoned."

Finally, the policy also included the following exclusions:

> "We do not pay for bodily injury or property damage liability which is assumed under a contract or an agreement. [1]
>
> "* * * * *
>
> "We do not pay for property damage to work performed by you if the damage is caused by the work or a part of the work and included in the Products/Completed Work Hazard. This exclusion does not apply if damage to the work or the part of the work out of which the damage arises is performed by a subcontractor on your behalf." [2]

1 This exclusion appears in a section of the policy entitled "Exclusions that Apply to all Coverages."

2 This exclusion appears in a section of the policy entitled "Additional Exclusions that Apply to Property Damage Liability."

While the foregoing policy provisions were in force, plaintiff entered into a contract to build a custom home and hired a subcontractor to paint the cabinets and other interior woodwork. After the subcontractor had completed the painting work, plaintiff turned the home over to the owners. It became apparent, at that time, that the paint that the subcontractor had used had not cured properly and that the deficiency would have to be corrected. Plaintiff

thereafter expended approximately $10,000 for stripping and refinishing the cabinets and woodwork.

Plaintiff submitted a claim to defendant, seeking reimbursement of the $10,000 spent on the cabinets and woodwork. When defendant refused to pay, plaintiff filed the present action, alleging breach of the insurance contract and ***624** seeking $10,240.00 in damages, together with attorney fees. Defendant answered, denying that plaintiff's claim was covered by the policy.

Defendant moved for summary judgment, appending a copy of the insurance policy and arguing, in rather general terms, that the policy did not allow for the recovery of plaintiff's costs in repairing the defective painting work. Plaintiff also moved for summary judgment, arguing that the repair costs were covered under the Completed Work Hazard provisions of Coverage N. In responding to plaintiff's motion, defendant argued, among other things, that plaintiff's costs in repairing the defective paint did not arise from an "accident," but, instead, arose from the requirements of its contract with the homebuyers:

> "Basically, plaintiff * * * has alleged that because of its building contract with the [owners], it was necessary for the plaintiff to repair or replace defective painting work caused by its subcontractor. Plaintiff *does not,* and in good faith *cannot,* ****1256** allege that this work was made necessary because of 'an accident.' " [3]

3 Defendant also made a related argument that plaintiff's claim was excluded under the policy exclusion for "liability * * * assumed under a contract," set out above.

(Emphasis in original.) In reply, plaintiff cited the definition of "accident" that appears in *Finley v. Prudential Ins. Co.,* 236 Or. 235, 388 P.2d 21 (1963), and argued that, because the result in this case was unintended by the insured, it was accidental. [4]

4 *Finley* states that an "accident" is "an incident or occurrence that happened by chance, without design and contrary to intention and expectation." *Finley,* 236 Or. at 245, 388 P.2d 21.

The trial court granted summary judgment for defendant. In a letter opinion to the parties, the court stated that there had been an "occurrence" under the facts of the case, but agreed with defendant that coverage was excluded because plaintiff's liability for the cost of repairing the defective paint was based in contract, rather than tort:

> "This liability [for which plaintiff is seeking reimbursement from defendant] would [a]rise under a contract. * * * ***625** Plaintiff's liability is based upon contract and not tort or statute."

In the context of the arguments that preceded it, it appears that the trial court was speaking to the exclusion for "liability * * * assumed under a contract." [5]

5 We need not decide whether that exclusion might have been the wrong one on which to focus. The trial court's ruling on this summary judgment record was correct for the reasons discussed below.

Plaintiff appealed, arguing that its claim was covered under the policy's "completed work" provisions and that the various exclusions asserted by defendant, including the exclusion for "liability * * * assumed under a contract," were inapplicable. In response, defendant argued that the claimed damage was not "caused by an occurrence" within the meaning of the policy, because it did not result from accidental *means*. Defendant also continued to press its original point—that plaintiff's costs in fulfilling its obligations under its contract were not covered:

> "[P]laintiff Oak Crest repainted the woodwork in the [owners'] new home to comply with the interior 'painting' requirement of its building contract with the [owners]. * * * Plaintiff Oak Crest is not entitled to have the insurer pay for plaintiff's costs in simply completing its construction agreement with the [owners]."

In reply, plaintiff argued that defendant's "means/results" argument should not be considered, because defendant had failed to cross-assign that portion of the trial court's ruling as error. Plaintiff did not reply to defendant's latter argument.

As noted, the Court of Appeals affirmed. That court based its decision on defendant's contention that there was no "occurrence," because the damage at issue did not arise from accidental means. In deciding the case on that ground, the court rejected plaintiff's suggestion that a challenge to the trial court's "occurrence" conclusion was precluded in light

of defendant's failure to cross-assign error with respect to it. In that regard, the court noted that, under ORAP 5.57, a trial court's rulings, and not the various reasons that it gives in support of a ruling, are assignable as error. Defendant's "occurrence" argument, the court concluded, was ***626** merely an argument that the trial court was right for the wrong reason which, for the reasons discussed in *Artman v. Ray,* 263 Or. 529, 532–34, 501 P.2d 63 (1972), does not require a cross-assignment of error. *Oak Crest,* 137 Or.App. at 478 n. 2, 905 P.2d 848.

Plaintiff challenges the Court of Appeals' decision on two grounds: First, plaintiff argues that the court had no authority to consider defendant's "occurrence" argument, because defendant failed to cross-assign as error the trial court's determination to the contrary. Second, plaintiff argues that the court erroneously focused on whether the cause of the damage, rather than the damage itself, was accidental.

[1] Concerning plaintiff's first argument, we agree with the Court of Appeals: The requirement of cross-assignment in ****1257** ORAP 5.57 applies to *rulings*[6] and is not implicated when the respondent embraces the ruling and seeks only to challenge the trial court's *reasoning*.

6 ORAP 5.57 provides:

> "(1) A respondent must cross-assign as error any trial court ruling described in subsection (2) in order to raise the claim of error in the appeal.
> "(2) A cross assignment of error is appropriate:
> "(a) If, by challenging the trial court ruling, the respondent does not seek to reverse or modify the judgment on appeal; and
> "(b) If the relief sought by the appellant were to be granted, respondent would desire reversal or modification of an intermediate ruling of the trial court."

[2] As noted, plaintiff's second argument is directed at the means/results rationale used by the Court of Appeals to conclude that the asserted damage was not "caused * * * by an occurrence." We conclude, however, that we need not consider the correctness of that particular rationale because a different rationale—one that defendant has pressed from the beginning—supports the Court of Appeals' affirmance and its conclusion that the events at issue in this case did not amount to an "accident."

This court has indicated that there can be no "accident," within the meaning of a commercial liability policy, when the resulting damage is merely a breach of contract. In *Kisle v. St. Paul Fire & Marine Ins.,* 262 Or. 1, 495 P.2d 1198 (1972), the plaintiff, a rancher, contracted with a company to ***627** repair his sprinkler system. The repair company failed to perform the repairs in a timely manner; plaintiff's alfalfa crop was damaged as a result. The defendant had issued a commercial liability policy to the repair company that contained a definition of "occurrence" that was analogous to the one at issue in the present case. When the plaintiff sued the repair company, the company tendered the defense to the defendant, which refused it. The plaintiff settled his action against the repair company and took an assignment of the company's claim against the defendant. The trial court entered judgment for the plaintiff.

In *Kisle,* this court considered whether, and when, an "accident" might arise out of a failure to perform a contract. The court first acknowledged that, in some circumstances, property damage that results from the negligent performance of a contract can qualify as being "caused by accident." But, as the court explained, " 'accident' has a tortious connotation" and exists only when damage results, in some sense, from a tort, *i.e.,* a breach of some duty imposed by law. *Id.* at 7, 495 P.2d 1198. The court then explained that, although negligent performance of a contract might cause damage by "accident," there is no tort and no "accident" when the damage results solely from the complete failure of timely performance of a contract, generally actionable only as a breach of contract:

> "We find [that] there is a significant distinction between negligent performance of a contract and a complete failure of timely performance. We hold that damage caused by the latter is not caused by accident.
>
> "We do not need to definitely define 'accident'; however, we do hold that 'accident' has a tortious connotation. Damage solely caused by failure to perform a contract is not recoverable in tort. A tort is a breach of a duty created by law and not necessarily by the agreement of the parties. * * * Damage caused by the negligent performance of a contract can in certain instances be recoverable in tort. * * * This is because by contract the parties have entered into a relationship in which the law requires, apart from any obligation assumed by contract, that the obligor act with due care. For example, if a physician contracts to treat a patient and treats the patient negligently, he is liable in tort ***628** because the law, apart from contract, imposes a duty upon the physician to treat patients with due care. * * * [However], [d]amages caused by a failure to perform

'amount to mere breaches of contract, for which no tort action will lie.' "

Id. at 6–7, 495 P.2d 1198 (citations omitted). [7]

7 Courts in other jurisdictions have made similar observations in terms of the risks covered by commercial liability policies. *See, e.g., Knutson Const. v. St. Paul Fire & Marine Ins.,* 396 N.W.2d 229, 235–37 (Minn.1986) (distinguishing faulty workmanship that causes business expense of repairing work from faulty workmanship that results in tort liability); *Weedo v. Stone–E–Brick,* 81 N.J. 233, 405 A.2d 788 (1979) (same). See also the following much quoted passage from Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know,* 50 Neb. L. Rev. 415, 441 (1971):

> "The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."

We recognize, as we did in *Kisle,* that the same conduct might be actionable under both ****1258** tort and contract theories. However, applying the foregoing principle to the facts in the summary judgment record in the present case, we conclude that, as alleged, plaintiff's claim arose solely from a breach of contract and, therefore, is not covered by the policy. Although the record establishes that plaintiff spent approximately $10,000 for the repair of a subcontractor's "deficient" painting work, it cannot support a conclusion that the problem with the cabinetry and woodwork painting resulted from the subcontractor's breach of a duty to act with due care. [8] ***629** Had the facts demonstrated that the claimed problem with the cabinets and woodwork was the result of that kind of breach, or that plaintiff might be liable to the owners in tort for other damage, that might have qualified as an "accident" within the meaning of the commercial liability policy. But plaintiff here failed to establish that a question of fact existed in that regard, as plaintiff was required to do to show that there had been a covered event under the policy. For the foregoing reasons, we conclude that the Court of Appeals correctly held that the problem with the cabinetry and woodwork painting work at issue in this case was not "caused by accident" within the meaning of plaintiff's commercial liability policy.

8 We draw our conclusion from the affidavit filed by plaintiff's principal. The affidavit recites that plaintiff's subcontractor painted cabinets and other woodwork in the home, and that the following events then occurred:

> "Thereafter, for a period of approximately 2–3 weeks the remaining construction was completed, and the home [was] turned over to the [owners], who moved in. At that time any work that would have been remaining would have only been such tasks necessary to correct or repair any defect or deficiency in the construction.
>
> "After the [owners] took possession of the home it became apparent that the painting work performed by [subcontractor] was not properly curing, and would require additional expense to correct any deficiency. I therefore incurred expense in the amount of $10,240.00 to correct the deficiencies in the work."

Attached to the affidavit was a bill that showed that those work "deficiencies" were corrected by stripping and refinishing the cabinets and woodwork.

The same reasoning defeats plaintiff's alternative argument that it was entitled to be indemnified under the policy's "completed work" provision: The property damage covered by that provision must have arisen out of an "accident." There is no proof of an accident in the record of this case on summary judgment. The trial court's grant of summary judgment to defendant therefore was proper.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

All Citations

329 Or. 620, 998 P.2d 1254

998 P.2d 1254

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Sheehan Const. Co., Inc. v. Continental Cas. Co., Ind., September 30, 2010

163 Ariz. 476
Court of Appeals of Arizona,
Division 1, Department D.

UNITED STATES FIDELITY & GUARANTY CORPORATION, a Maryland corporation, Plaintiff–Appellee,
v.
ADVANCE ROOFING & SUPPLY CO., INC., an Arizona corporation, Defendant–Appellant.

No. 1 CA–CV 88–003.
|
Dec. 14, 1989.
|
Review Denied April 17, 1990. *

* Feldman, V.C.J., of the Supreme Court, recused himself and did not participate in the determination of this matter.

Synopsis
Insurer filed action seeking declaration that it had no duty to defend action filed against its insured. The Supreme Court of Maricopa County, Cause No. C–609525, Marilyn A. Riddel, J., granted insurer's motion for summary judgment, and insured appealed. The Court of Appeals, Levi Ray Haire, J., Retired, held that: (1) complaint did not allege claim for property damage within coverage of comprehensive general liability policy, and (2) faulty workmanship was not an "occurrence" within policy definition.

Affirmed.

West Headnotes (6)

[1] Insurance
Property Damage
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property Damage
(Formerly 217k435.24(2.1), 217k435.24(2))
Breach of contract claim against roofer alleging failure to complete work and failure to perform work in good and workmanlike manner did not allege claim for "property damage" within meaning of roofer's comprehensive general liability policy.

11 Cases that cite this headnote

[2] Insurance
Matters Beyond Pleadings
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 Matters Beyond Pleadings
(Formerly 217k514.9(1), 217k514.8)
Insurer may make reasonable investigation of facts in order to avoid duty to defend ostensibly imposed by allegations of complaint.

10 Cases that cite this headnote

[3] Declaratory Judgment
Insurance
118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(G) Written Instruments and Contracts
118AII(G)2 Insurance
118Ak161 In General
Filing of declaratory judgment action is appropriate method to determine insurer's duties when insurer has reason to believe that policy does not cover insured for events alleged.

3 Cases that cite this headnote

[4] Judgment
Personal Knowledge or Belief of Affiant
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(3) Personal Knowledge or Belief of Affiant
Insured could not resist insurer's motion for summary judgment by its attorney's affidavit which contained hearsay.

1 Cases that cite this headnote

[5] Insurance

Accident, Occurrence or Event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, Occurrence or Event
(Formerly 217k435.24(6))

Faulty workmanship did not constitute an "occurrence" within coverage of roofer's comprehensive general liability policy.

33 Cases that cite this headnote

[6] Insurance

Accident, Occurrence or Event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, Occurrence or Event
(Formerly 217k433.1, 217k433(1))

Definition of "occurrence" in comprehensive general liability policy was not modified or rendered ambiguous by excepting language to an exclusion, such as would require construction of the policy to cover faulty workmanship.

34 Cases that cite this headnote

Attorneys and Law Firms

****1228** ***477** Jennings, Kepner & Haug by Craig R. Kepner and Michael J. Raymond, Phoenix, for plaintiff-appellee.

Campana, Vieh & Strohm, P.C., by Richard L. Strohm and Scott B. Mitchell, Scottsdale, for defendant-appellant.

Opinion

LEVI RAY HAIRE, Judge, Retired.

The issues presented in this appeal concern whether the trial court correctly granted declaratory judgment in favor of an insurer, finding that the insurer had no duty to defend an action filed against its insured. The insurer (USF & G) had issued its comprehensive general liability policy covering appellant Advance Roofing & Supply Co., Inc. (Advance Roofing) for "all sums which the *Insured* shall become legally obligated to pay as damages because of ... *property damage* to which this insurance applies, caused by an occurrence...." (emphasis in original.)

The coverage issues involved in this appeal arise out of a contract entered into between Advance Roofing and Villas West IV Homeowners Association (Homeowners Association), pursuant to which Advance Roofing contracted to replace all the roofs of 250 units in a housing complex governed by the Homeowners Association. In consideration of Advance Roofing's undertaking to replace the 250 roofs, the Homeowners Association agreed to pay Advance Roofing the total sum of $253,360.00. Upon the alleged breach of that contract by Advance Roofing, the Homeowners Association filed a complaint alleging, among other claims, a breach of contract claim against Advance Roofing.

The Homeowners Association's complaint named as defendants the individual members of its own board of directors as well as four other defendants who had entered into various contracts with the Homeowners Association. The complaint contained 14 separate claims for relief, and in essence alleged that one member of its board of directors had wrongfully and fraudulently diverted and disposed of funds of the Homeowners Association by entering into certain contracts with the four other defendants, leading to personal ****1229** ***478** profit and gain on that member's part. The complaint sought recovery of the monies paid to these four other defendants pursuant to their contracts with the Association. Claims were asserted against the other members of the board of directors based on negligent breach of fiduciary relationship. Claims against all of the four defendants other than the members of the Association's board of directors were asserted for breach of contract and unjust enrichment, with claims for civil racketeering being asserted against defendants other than Advance Roofing.

Against this background we now focus on the specific claim asserted against Advance Roofing. The fourth claim for relief was entitled "Breach of Contract by Advance." It alleged that Advance Roofing had agreed to replace the 250 roofs in consideration of the Association's promise to pay the sum of $253,360. It was further alleged that:

> "Defendant Advance has failed and refused to perform its obligations under the contract. Upon information and belief, Defendant Advance replaced only 40 roofs, some of which were not replaced as required under the terms of Contract. The work that was performed by Defendant Advance was not completed in accordance with the contract requirements and was not performed in a good and workmanlike manner."

Although from the above quoted allegations of the complaint it appears that Advance Roofing had replaced only 40 of the 250 roofs, and did faulty work on those, it further appears that notwithstanding this almost total lack of performance on Advance's part, Advance had been paid the full amount due under the contract, $253,360. Accordingly, the breach of contract claim against Advance alleged that as a direct and proximate result of Advance Roofing's breach of contract, the Homeowners Association had sustained damages in the full amount of the contract price, $253,360.

The only other claim asserted against Advance Roofing was entitled "Unjust Enrichment." That claim sought recovery of the contract amount, asserting that the Homeowners Association had paid the $253,360 to Advance, and that accordingly Advance had been unjustly enriched at the expense of the Association.

The Homeowners Association's complaint against Advance Roofing and the various other defendants was filed in July, 1986. In October, 1986, Advance Roofing requested that USF & G defend Advance against the claims asserted by the Homeowners Association. USF & G refused to do so, contending that under its policy, it had no obligation to defend or indemnify Advance concerning the claims asserted in the complaint. In order to resolve the controversy concerning its policy obligations, USF & G then filed this action for declaratory judgment, naming both Advance Roofing and the Homeowners Association as defendants.

Some ten months after the filing of the complaint for declaratory judgment, USF & G filed a motion for summary judgment. USF & G contended that there were no disputed issues of material fact and that it was entitled to judgment as a matter of law. Its motion presented three separate grounds for the entry of judgment in its favor. First, USF & G urged that based on certain exclusions in its policy (business risk exclusions), the policy provided no coverage for property damage liability which Advance Roofing might have incurred for property damages arising out of Advance's performance of its contract with the Homeowners Association.

USF & G's second argument was that even if the business risk exclusions were inapplicable, its policy provided liability coverage for bodily injury and property damages only, and that no such damages were sought in the claims alleged against Advance in the Homeowners Association's complaint. USF & G's third argument, somewhat related to its second argument, was that in any event coverage under its policy was limited to property damages *caused by an occurrence,* and that the complaint did not present a claim based on an occurrence as defined in the policy.

****1230** ***479** In granting USF & G's motion for summary judgment, the trial judge did not find it necessary to consider USF & G's first argument based on the business risk exclusions in the policy. Rather, the summary judgment was based upon USF & G's second and third arguments that the complaint did not seek property damages, and that if property damages were sought, they were not the result of an occurrence as defined in the policy. The trial judge's minute entry order granting summary judgment stated, in pertinent part:

> "Counsel agree that the policy does NOT cover Count 8, the unjust enrichment count and further agree that the policy does not cover economic losses in Count 4 which is breach of contract seeking damages in the anticipated benefit of the bargain measure.
>
> "A careful reading of the underlying complaint in C 586297 does not disclose a claim for property damages as a result of an occurrence. In an answer to an interrogatory there is suggested that there was some water damage to some homeowner's property (furniture) but that is not alleged nor have any invoices, etc. been made part of the record. In addition, there is no claim that the Homeowner's Assn. has any right to sue for such property damage.
>
> "There being no genuinely contested issue of material fact and the law favoring the position of plaintiff, ORDERED granting plaintiff's Motion for Summary Judgment and

denying defendant Advance Roofing's Cross Motion for Summary Judgment."

THE BUSINESS RISK EXCLUSIONS

Although the parties have devoted a substantial part of their briefs in this appeal to USF & G's contention that the provisions in its policy relating to the business risk exclusions preclude any possibility of coverage, we find it unnecessary to consider that issue. First, as we have previously noted, the trial court did not consider that issue in granting summary judgment in favor of USF & G. More importantly, even though USF & G has presented strong arguments in favor of its position on that issue, it is our opinion that the Arizona Supreme Court's decision in *Federal Insurance Co. v. P.A.T. Homes, Inc.,* 113 Ariz. 136, 547 P.2d 1050 (1976), precludes our adoption of the policy interpretation urged by USF & G. We therefore turn to the other issues presented on appeal.

THE DAMAGE ALLEGATIONS

[1] Advance Roofing first argues that, contrary to USF & G's contentions, the Homeowners Association's complaint does allege a claim for property damages against Advance. To support this contention, Advance points solely to the allegation in the breach of contract claim that: "the work that was performed by Defendant Advance was not completed in accordance with the contract requirements and was not performed in a good and workmanlike manner." We reject Advance's contention that this can be considered as constituting a claim for property damage in the context of the breach of contract claim filed by the Homeowners Association.

Obviously the complaint does not expressly allege property damage. The claim against Advance is denominated "breach of contract" and the Homeowners Association seeks damages equal to the original contract price which the Association had paid in full to Advance prior to Advance's breach. The only damage complained of was that Advance had replaced only 40 of the 250 roofs, "some of which were not replaced as required under the terms of the contract" and that the work that was performed by Advance "was not completed in accordance with the contract requirements and was not performed in a good and workmanlike manner." Immediately following these allegations is the following:

> "Plaintiff has demanded that the services promised under the contract be performed as agreed. Despite such demand, Defendant has failed and refused, and continues to fail and refuse, to perform such services pursuant to the terms and conditions of the contract."

This allegation is followed by the assertion that as a direct and proximate result of ****1231 *480** the breach of contract by Advance, the Homeowners Association has suffered damages in the amount of the contract price.

The term "property damage" is defined in the policy. The term includes *loss of use* of tangible property under certain circumstances, none of which is urged as being pertinent to the issues presented in this litigation. The primary definition, other than that relating to loss of use, is:

> "*Property Damage* means: (1) physical injury to or destruction of tangible property which occurs during the policy period...."

After careful review of the allegations of the complaint against Advance, we agree with the trial court's conclusion that the complaint does not allege or put USF & G on notice that in its complaint the Homeowners Association is seeking property damages as defined in the policy.

DUTY TO INVESTIGATE

Advance Roofing urges that even if the complaint did not allege a claim for property damages on its face, USF & G had a duty to make a reasonable, good faith investigation into the factual basis of the complaint's allegations before declining Advance's tender of defense.

The leading Arizona decision relating to an insurer's duty to defend is *Kepner v. Western States Fire Insurance Co.,* 109 Ariz. 329, 509 P.2d 222 (1973). In *Kepner,* although

the allegations of the complaint would have imposed on the insurer a duty to defend, the insurer contended that facts not alleged showed that there was no coverage under the policy and that it had no duty to defend. Opposing this view, the insured contended that the duty to defend must be determined solely from the allegations of the complaint. In this context, the Arizona Supreme Court concluded that the duty to defend should focus on the facts rather than solely upon the allegations of the complaint, and that there was no duty to defend where "... the alleged facts ostensibly bring the case within the policy coverage but other facts which are not reflected in the complaint plainly take the case outside the policy coverage." 109 Ariz. at 331, 509 P.2d at 224. *See also, Salvatierra v. National Indemnity Co.,* 133 Ariz. 16, 648 P.2d 131 (App.1982).

[2] Although the Arizona decisions clearly give an insurer the right to make a reasonable investigation of the facts in order to avoid a duty to defend ostensibly imposed by the allegations of the complaint, we have found no Arizona authority defining the extent of an insurer's duty to investigate facts outside the allegations of the complaint where, as in this case, those allegations would not impose a duty to defend. This question has been addressed by the Minnesota Supreme Court in *Johnson v. Aid Insurance Company of Des Moines, Iowa,* 287 N.W.2d 663 (Minn.1980), as follows:

> "[W]hile a liability insurer may initially rely on the allegations of the underlying complaint to determine whether it must provide its insured with a defense, it may not rely on that determination, without investigating the facts, once the insured has come forward and made some factual showing that the suit is actually one for damages resulting from events which do fall into policy terms."

We find the Minnesota court's formulation of the insurer's duty to investigate sound and in accord with the standard applied by the trial court in this case. We now turn to the summary judgment proceedings to determine whether the insured came forward with a sufficient factual showing.

[3] USF & G filed its declaratory judgment action in November 1986, after Advance had tendered the defense of the Homeowners action to USF & G in October, 1986. The filing of a declaratory judgment action is an appropriate method to determine an insurer's duties when the insurer has reason to believe that the policy does not cover the insured for events alleged. *See, Kepner,* 109 Ariz. at 331, 509 P.2d at 225.

USF & G's motion for summary judgment was filed some ten months after the filing of the declaratory judgment action, ****1232** ***481** and approximately 14 months after the filing of the Homeowners' complaint. Prior to the filing of the motion, USF & G served interrogatories on Advance, requesting that Advance disclose all facts in support of its allegation that USF & G was obligated to provide Advance with a defense in the Homeowners' action. Advance's response referred to the complaint itself, erroneously contending that the complaint alleged that the Homeowners Association suffered property damages caused by leaking roofs. The response to the interrogatories was neither signed nor verified by Advance.

[4] After the filing of USF & G's motion for summary judgment, Advance did not come forward with any competent evidence that the Homeowners Association's complaint sought property damages. [1] In its response, Advance relied upon its unsigned, unverified and erroneous answer to the interrogatory discussed above, and also on its attorney's affidavit. That affidavit contained a hearsay statement to the effect that the attorney had been told by counsel for the Homeowners Association that the Homeowners Association was seeking recovery of property damages sustained by various homeowners as a consequence of leaks in roofs allegedly repaired or replaced by Advance.

1 USF & G moved for summary judgment against both Advance and the Homeowners Association. The Association filed a late response which included an affidavit of its attorney indicating that the Association had paid $500 to settle claims for water damages resulting from work performed by Advance. The trial judge apparently did not consider the Association's late response. Advance neither referred to nor relied on the Association's response in the motion proceedings in the trial court nor in its briefs filed in this appeal. The Homeowners Association did not appeal from the granting of USF & G's motion for summary judgment against it, and it is not a party to this appeal.

Faced with this record, the trial court ruled that Advance had not presented a factual record demonstrating that the Homeowners Association was seeking property damages

in its breach of contract claim against Advance Roofing. We agree. A party may not resist a motion for summary judgment by general statements or allegations of its counsel, *Matter of the Estate of Kerr,* 137 Ariz. 25, 667 P.2d 1351 (App.1983), nor are affidavits based on hearsay sufficient, *Jabczenski v. Southern Pacific Memorial Hospitals, Inc.,* 119 Ariz. 15, 579 P.2d 53 (App.1978); *Madsen v. Western American Mortgage Company,* 143 Ariz. 614, 694 P.2d 1228 (App.1985). Here, USF & G properly proceeded to determine its obligations by filing a declaratory judgment action when faced with its insured's request for a defense. Although the Homeowners Association's action had been pending for over 14 months, and USF & G's declaratory judgment action had been pending for approximately 10 months, Advance did not come forward and appropriately demonstrate that the Homeowners Association was seeking damages within the coverage of USF & G's policy.

"OCCURRENCE"

USF & G also contends, and the trial court found, that there was no allegation or showing that the damages sought by the Homeowners Association resulted from an "occurrence" as defined in the policy. Because Advance's arguments on this issue appear to overlap its arguments concerning property damages, we now proceed to discuss that issue.

The policy defines "occurrence" as follows:

> "*Occurrence* means an accident, including continuous or repeated exposure to conditions, which results in *bodily injury* or *property damage* neither expected nor intended from the standpoint of the *Insured.*" (Emphasis in original.)

Advance urges that faulty workmanship is itself an occurrence within the policy definition, and that therefore the complaint's allegations are sufficient in that regard. Advance's argument focuses on prior Arizona decisions construing standard "business risk" exclusion clauses as requiring coverage for faulty workmanship. *See, Federal Insurance Co. v. P.A.T. Homes, supra; Custom Roofing Co. v. Transamerica Insurance Co.,* 120 Ariz. 196, 584 P.2d 1187 (App.1978). However, the decisions ****1233** ***482** in those cases addressed only the interpretation of the "business risk" exclusions to coverage, and did not address the threshold question of whether property damage was alleged which would fall within the policy coverage in the absence of the business risk exclusions. These are separate questions, and even though the business risk exclusions are held inapplicable, the alleged "faulty work" must nevertheless amount to an occurrence resulting in property damages before coverage can be found. This point is well demonstrated by the decisions of the New Hampshire court, which, like Arizona, has rejected USF & G's interpretation of the business risk exclusion provisions. *See, McAllister v. Peerless Insurance Co.,* 124 N.H. 676, 474 A.2d 1033 (1984).

As previously noted, the complaint does not explicitly allege property damage, but does allege faulty workmanship. Advance does not address whether the damages resulting from faulty workmanship may not necessarily be property damages, but rather ignores this question in advancing its faulty workmanship arguments. Advance argues that faulty workmanship constitutes an "occurrence", and therefore is covered under the policy, citing *Colard v. American Family Mutual Insurance Co.,* 709 P.2d 11 (Colo.App.1985). *Colard* holds that faulty workmanship creating exposure to continuous unexpected conditions which result in property damage is an occurrence within the meaning of a similarly worded policy. The *Colard* decision furnishes no factual detail regarding the facts constituting the faulty workmanship nor the nature of resulting damages.

Advance also relies on *Ohio Casualty Insurance Co. v. Terrace Enterprises, Inc.,* 260 N.W.2d 450 (Minn.1978), in support of its argument that faulty work in and of itself constitutes an occurrence. However, Advance misconstrues the holding and rationale of the court. In that case, the court held that the *settling of a building* as a result of faulty workmanship was the occurrence.

Nevertheless, we recognize that there are some authorities that appear to conclude that the mere showing of faulty work is sufficient to bring a claim for resulting damages (of whatever nature) within policy coverage. *See, e.g., Sterilite Corporation v. Continental Casualty Company,* 17 Mass.App. 316, 458 N.E.2d 338 (1984); *Yakima Cement Products Co. v. Great American Insurance Co.,* 22 Wash.App. 536, 590 P.2d 371 (1979), rev'd. on damages grounds, 93 Wash.2d 210, 608 P.2d 254. In our opinion these authorities disregard the fundamental nature of a comprehensive general liability

policy of the type involved in this litigation, and ignore the policy requirement that an occurrence be an accident. If the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured's performance of the contract, and the policy takes on the attributes of a performance bond. We find these authorities unpersuasive.

[5] In our opinion, the better reasoned authorities hold that mere faulty workmanship, standing alone, cannot constitute an occurrence as defined in the policy, nor would the cost of repairing the defect constitute property damages. This precise issue was addressed by the New Hampshire court in *McAllister.* In discussing the insured's contention that faulty work constituted an occurrence resulting in property damages, the court noted:

> "[The insured] did not claim that such defects had caused damage to any other property than the work product, *nor did he claim any damage to the work product other than the defective workmanship.*" (Emphasis added.)

The court then emphasized that there was no policy coverage for a claim merely to correct a defect in workmanship, citing its prior decision in *Hull v. Berkshire Mutual Insurance Company,* 121 N.H. 230, 427 A.2d 523 (1981), stating:

> "[In Hull] we held that defective work, standing alone, did not result from an occurrence, and indeed was not property damaged within the meaning of the policy."

****1234** ***483** The New Hampshire court distinguished its prior decision in *Commercial Union Assurance Companies v. Gollan,* 118 N.H. 744, 394 A.2d 839 (1979), in which it had held under similar circumstances that a policy's business risk exclusions did not preclude coverage, noting that in *Gollan* the parties had stipulated that the only issue was whether the business risk exclusion negated coverage. Accordingly, the court in *Gollan* was not concerned with whether in the absence of such exclusions, there was an occurrence and resulting property damage so as to initially bring the claim within policy coverage. *See also, St. Paul Fire & Marine Insurance Company v. Coss,* 80 Cal.App.3d 888, 145 Cal.Rptr. 836 (1978); *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.,* 508 F.2d 417 (7th Cir.1975).

[6] Advance's final argument is that even if there has been no occurrence resulting in property damages, USF & G's policy gives the insured the impression that it covers faulty workmanship, and therefore it must be construed to grant such coverage. Advance urges that "the reasonable expectation is still that exclusion (a) preserves coverage for faulty workmanship." [2] Advance's rationale appears to be that because the Arizona Supreme Court held in *P.A.T. Homes* that exclusion (a) renders the business risk provisions of the policy ambiguous, the same result applies when exclusion (a) is read in conjunction with the definition of "occurrence" contained in the policy. We reject that analysis.

2 The language of exclusion (a) relied on by Advance is actually an exception to exclusion (a) of USF & G's policy:
"This insurance does not apply:
(a) to liability assumed by the *Insured* under any contract or agreement except an *incidental contract;* but this exclusion does not apply to a warranty of fitness or quality of the *named insured's products* or a warranty that work performed by or on behalf of the *named insured* will be done in a workmanlike manner." (Emphasis in original.) This exclusion is primarily pertinent to Advance's arguments relating to the business risks exclusions, which we have accepted for the purposes of this opinion.

The policy exclusions, including exclusion (a), merely subtract from coverage already granted. The excepting language to exclusion (a) merely excepts certain circumstances from the scope of exclusion (a). It does not purport to refer to or modify in any way the policy's definition of "occurrence", granting coverage only in situations involving an occurrence as so defined.

Advance relies on *Commercial Union Assurance Co. v. Gilford,* 119 N.H. 788, 408 A.2d 405 (1979) in support of its argument on this issue. Although we do not find the court's analysis persuasive, we note that the issue involved in *Gilford* was whether a "care, custody and control" exclusion could be given effect in view of the *Gilford* court's holding negating the business risk exclusions in the policy. The decision does not involve the question of whether the policy's

definition of "occurrence" is rendered ambiguous as it relates to any "reasonable expectation of coverage" engendered by exclusion (a). Directly in point, however, is a later decision of that same court involving the same definition of occurrence and the same exclusion (a) as in this case. In *McAllister v. Peerless Insurance Company, supra,* the New Hampshire court stated:

> "The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship [referring to the exception to exclusion (a)]. *Hull v. Berkshire Mutual Insurance Co.,* 121 N.H. 230, 427 A.2d 523 (1981); *Tinker, Comprehensive General Liability Insurance—Perspective and Overview,* 25 Fed'n.Couns.Q. 217, 231 (1975). The master therefore rightfully concluded that the declarations in the underlying action allege no occurrence. *Despite proper deference then to the reasonable expectations of the policyholder, Town of Epping v. St. Paul Fire & Marine Ins.,* 122 N.H. 248, 252, 444 A.2d 496 (1982), *we are unable to find in the quoted language a reasonable basis to expect coverage for defective workmanship.*" 474 A.2d at 1036. (Emphasis added.)

As previously noted in this opinion, the *McAllister* court then proceeded to hold ****1235** ***484** that defective work, standing alone, does not result from an occurrence, and is not "property damage" within the coverage of the policy.

For the reasons stated in this opinion, the judgment in favor of USF & G is affirmed. USF & G is awarded its attorney fees incurred in the defense of this appeal in an amount to be determined pursuant to Rule 21, Arizona Rules of Civil Appellate Procedure.

GERBER and SHELLEY, JJ., concur.

NOTE: The Honorable Levi Ray Haire, a retired judge of a court of record, was authorized to participate in this matter by the Chief Justice of the Arizona Supreme Court, pursuant to Ariz. Const. art. VI, § 20.

All Citations

163 Ariz. 476, 788 P.2d 1227

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by McBride v. Acuity, 6th Cir.(Ky.), January 7, 2013

448 F.3d 693
United States Court of Appeals,
Fourth Circuit.

James H. FRENCH, assignee of the claims of Jeffco Development Corporation; Kathleen B. French, assignee of the claims of Jeffco Development Corporation, Plaintiffs–Appellants,
v.
ASSURANCE COMPANY OF AMERICA; United States Fire Insurance Company, Defendants–Appellees,
and
The Aetna Casualty and Surety Company, now known as Travelers Casualty and Surety Company, Defendant.
National Association of Home Builders, Amicus Supporting Appellants.

No. 05–1356.
|
Argued: March 14, 2006.
|
Decided: April 27, 2006.

Synopsis

Background: Homeowners, as assignees of general contractor's claims against its commercial general liability (CGL) insurers arising out of damage to home caused by subcontractor's defective cladding of home's exterior with synthetic stucco system, sued insurers in state court, asserting claims for, inter alia, declaratory judgment, breach of contractual duty to indemnify, and breach of implied covenant of good faith and fair dealing. After insurers removed action, the United States District Court for the Eastern District of Virginia, James C. Cacheris, Senior District Judge, granted insurers' motion for summary judgment. Homeowners appealed.

Holdings: The Court of Appeals, Hamilton, Senior Circuit Judge, held that:

[1] under Maryland law, subcontractor's defective application of synthetic stucco system to exterior of home was not "accident," and thus was not "occurrence," under CGL policies;

[2] under Maryland law, standard 1986 CGL policy form provides general contractor with liability coverage for property damage to contractor's otherwise nondefective work-product caused by subcontractor's defective workmanship; and

[3] moisture intrusion resulting from defective exterior was "accident," and thus "occurrence," under policies' initial grant of coverage, and coverage was not defeated by exclusion for damage expected or intended by insured.

Affirmed in part, vacated in part, and remanded.

West Headnotes (14)

[1] Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
Under Maryland law, an act of negligence constitutes an "accident" under a liability insurance policy when the resulting damage takes place without the insured's actual foresight or expectation.

2 Cases that cite this headnote

[2] Federal Courts
Failure to mention or inadequacy of treatment of error in appellate briefs
Federal Courts
Lack or inadequacy of citations to record
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3733 Failure to mention or inadequacy of treatment of error in appellate briefs
(Formerly 170Bk915)
170B Federal Courts

170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3734 Lack or inadequacy of citations to record
(Formerly 170Bk915)

Failure to comply, with respect to a particular claim, with the specific dictates of federal rule of appellate procedure requiring argument section of appellant's opening brief to contain appellant's contentions and reasons for them, with citations to authorities and parts of the record upon which appellant relies, triggers abandonment of that claim on appeal. F.R.A.P.Rule 28(a)(9)(A), 28 U.S.C.A.

[3] Federal Courts
Failure to mention or inadequacy of treatment of error in appellate briefs

Federal Courts
Lack or inadequacy of citations to record

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3733 Failure to mention or inadequacy of treatment of error in appellate briefs
(Formerly 170Bk915)
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3734 Lack or inadequacy of citations to record
(Formerly 170Bk915)

Appellants abandoned claim alleging breach of implied covenant of good faith and fair dealing when they mentioned claim in procedural history portion of opening brief on appeal and then never mentioned it again in opening brief, and thus failed to comply with rule requiring that argument section of appellant's opening brief contain appellant's contentions and reasons for them, with citations to authorities and parts of the record upon which appellant relies. F.R.A.P.Rule 28(a)(9)(A), 28 U.S.C.A.

[4] Insurance
Application of rules of contract construction

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1806 Application of rules of contract construction

Under Maryland law, insurance policy is interpreted in the same manner as any other contract.

12 Cases that cite this headnote

[5] Insurance
Favoring Insureds or Beneficiaries; Disfavoring Insurers

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1831 In general

Maryland courts do not follow the rule that an insurance policy must be strictly construed against the insurer.

[6] Contracts
Intention of Parties

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) In general

Principal rule in the interpretation of contracts, under Maryland law, is to effect the intentions of the parties.

8 Cases that cite this headnote

[7] Contracts
Presumptions and burden of proof

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k175 Evidence to Aid Construction
95k175(1) Presumptions and burden of proof

Under Maryland law, when a contract's wording is clear, the court will presume that the parties intended what they expressed, even if the expression differs from the parties' intentions at the time they created the contract.

[8] Contracts

Construction as a whole

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 Construction as a whole

Under Maryland law, if it is reasonably possible, effect must be given to every clause and phrase of a contract, so as not to omit an important part of the agreement.

[9] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Maryland law, subcontractor's defective application of synthetic stucco system to exterior of home was not an "accident," and thus not an "occurrence," under general contractor's commercial general liability (CGL) policies, inasmuch as obligation to repair exterior itself was not unexpected or unforeseen under terms of construction contract, such that repair costs represented economic losses not triggering duty to indemnify under policies.

12 Cases that cite this headnote

[10] Insurance

Intentional Acts or Injuries; Crimes and Abuse

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(2) Intentional Acts or Injuries; Crimes and Abuse
217k2278(3) In general

General contractor's obligation to provide homeowners with defect-free exterior was known to contractor at the time it entered into contract to construct home, and therefore exclusion in contractor's commercial general liability (CGL) policies for "property damage expected or intended from the standpoint of the insured" applied to defeat coverage for synthetic stucco exterior defectively installed by subcontractor.

10 Cases that cite this headnote

[11] Insurance

Products and completed operations hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2296 Products and completed operations hazards

Under Maryland law, standard 1986 commercial general liability (CGL) policy form published by national insurance policy drafting organization provides general contractor with liability coverage for cost to remedy unexpected and unintended property damage to contractor's otherwise nondefective work-product caused by subcontractor's defective workmanship, assuming no other policy exclusion applies.

30 Cases that cite this headnote

[12] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Maryland law, moisture intrusion into nondefective structure and walls of home as a result of subcontractor's defective installation of synthetic stucco system on home's exterior was "accident," and thus "occurrence," under initial grant of coverage under general contractor's commercial general liability (CGL) policies, and coverage was not defeated by express exclusion for damage that was expected or intended from

standpoint of insured, given absence of evidence that general contractor subjectively expected or intended that nondefective structure and walls would suffer damage from moisture intrusion.

16 Cases that cite this headnote

[13] Insurance

Products and completed operations hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2296 Products and completed operations hazards

Under Maryland law, standard 1986 commercial general liability (CGL) policy form published by national insurance policy drafting organization does not provide liability coverage to general contractor to correct defective workmanship performed by subcontractor.

12 Cases that cite this headnote

[14] Federal Courts

In general; necessity

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BXVII(D)1 In General
170Bk3391 In general; necessity
(Formerly 170Bk611)

General rule is that a federal appellate court does not consider an issue not passed upon below.

6 Cases that cite this headnote

Attorneys and Law Firms

***695 ARGUED:** David Hilton Wise, Waters & Wise, P.L.L.C., Fairfax, Virginia, for ***696** Appellants. Thomas Sykes Schaufelberger, Wright, Robinson, Osthimer & Tatum, Washington, D.C., for Appellees. **ON BRIEF:** Paul V. Waters, Waters & Wise, P.L.L.C., Fairfax, Virginia, for Appellants. Edward E. Nicholas, Wright, Robinson, Osthimer & Tatum, Washington, D.C., for Appellee United States Fire Insurance Company; Robert Edward Worst, Kalbaugh, Pfund & Messersmith, Fairfax, Virginia, for Appellee Assurance Company of America. David S. Jaffe, National Association of Home Builders, Washington, D.C., for Amicus Supporting Appellants.

Before WILKINSON and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by published opinion. Senior Judge HAMILTON wrote the opinion, in which Judge WILKINSON and Judge MICHAEL joined.

OPINION

HAMILTON, Senior Circuit Judge:

This appeal presents two separate, but related, insurance coverage questions in the construction context: (1) Whether, under Maryland law, a standard 1986 commercial general liability policy form published by the Insurance Services Office, Incorporated (ISO) provides liability coverage to a general contractor to correct defective workmanship performed by a subcontractor; and (2) Whether, under Maryland law, the same policy form provides liability coverage for the costs to remedy unexpected and unintended property damage to the contractor's otherwise nondefective work-product caused by the subcontractor's defective workmanship. We answer the first question in the negative and the second question in the affirmative. Accordingly, we affirm in part and vacate in part the judgment below in favor of the insurance company defendants and remand for further proceedings.

I.

The following relevant facts are undisputed. In 1993, James and Kathleen French (the Frenches) contracted with Jeffco Development Corporation (Jeffco) for the construction of a single-family home in Fairfax County, Virginia. Pursuant to the construction contract, and via a subcontractor, the exterior of the home was clad with a synthetic stucco system known as Exterior Insulating Finishing System (EIFS). Following the completion of construction, building officials issued a Certificate of Occupancy for the Frenches' home in December 1994. Nearly five years later, in late 1999, the Frenches discovered extensive moisture and water damage to the otherwise nondefective structure and walls of their home resulting from the defective cladding of the exterior of their

home with EIFS. The Frenches have since spent in excess of $500,000 to correct the defects in the EIFS exterior of their home and to remedy the resulting damage to the otherwise nondefective structure and walls of their home.

On November 29, 1999, the Frenches filed suit (the Underlying Suit) against Jeffco in Virginia state court alleging multiple claims, including breach of contract, and seeking damages to cover the costs to correct the construction defects with respect to the EIFS exterior of their home and to remedy the resulting damage to the otherwise nondefective structure and walls of their home.

For certain time periods (some overlapping) during the entire time period relevant to the Underlying Suit, Jeffco had commercial general liability coverage through four different commercial general liability insurance carriers: Assurance Company of America (Assurance), United ***697** States Fire Insurance Company (U.S.Fire), Ohio Casualty Insurance Company (Ohio Casualty), and Aetna Casualty and Surety Company n/k/a Travelers Casualty and Surety Company (Travelers). All parties agree that for purposes of resolving the issues presented in the present appeal, the commercial general liability policies issued to Jeffco by appellees Assurance and U.S. Fire consisted of the 1986 version of the standard commercial general liability policy form drafted by the ISO [1] and widely used in the insurance industry. *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 772, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms."). From henceforth, we will refer to these policies as the 1986 ISO CGL Policies. Of relevance in the present appeal, the 1986 ISO CGL Policies provided:

1 The ISO is "a national insurance policy drafting organization." *State Auto Prop. and Cas. Ins. Co. v. Travelers Indem. Co. of Am.,* 343 F.3d 249, 255 n. 9 (4th Cir.2003).

> **SECTION I—COVERAGES**
>
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> 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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for ... "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result....
>
> * * *
>
> b. This insurance applies to ... "property damage" only if:
>
> (1) The ... "property damage" is caused by an "occurrence"....

(J.A. 157). The 1986 ISO CGL Policies applied to completed operations, as defined in said policies under "Products-completed operations hazard." (J.A. 168). This term is defined, in relevant part, as follows:

> 14. "Products-completed operations hazard":
>
> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Id.

The 1986 ISO CGL Policies contained several exclusions that limit the insurance ***698** carriers' duty to provide coverage to Jeffco. The following two of those exclusions are relevant to the issues on appeal:

> **2. Exclusions**
> This insurance does not apply to:
>
> a. **Expected or Intended Injury**
>
> "... [P]roperty damage" expected or intended from the standpoint of the insured.
>
> * * *
>
> (J.A. 157).
>
> l. **Damage to Your Work**
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> 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.
>
> (J.A. 160).

[1] The 1986 ISO CGL Policies define the term "[o]ccurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (J.A. 168). While the 1986 ISO CGL Policies do not define the term "accident," controlling Maryland case law provides that an act of negligence constitutes an "accident" under a liability insurance policy when the resulting damage takes place without the insured's actual foresight or expectation. *Sheets v. Brethren Mut. Ins. Co.,* 342 Md. 634, 679 A.2d 540, 548 (1996) (adopting subjective test from standpoint of the insured regarding whether act of negligence constitutes an "accident" under liability insurance policy); *see also Cole v. State Farm Mut. Ins. Co.,* 359 Md. 298, 753 A.2d 533, 541 (2000). The test is a subjective one, because, according to Maryland's highest court, "[i]f we were to adopt an objective standard and hold that the term 'accident' as used in liability insurance policies excludes coverage for damage that should have been foreseen or expected by the insured, such insurance policies would be rendered all but meaningless." *Sheets,* 679 A.2d at 549.

Also of relevance here, the 1986 ISO CGL Policies define "[p]roperty damage" as "Physical injury to tangible property, including all resulting loss of use of that property." (J.A. 169).

Jeffco notified Assurance, U.S. Fire, Ohio Casualty, and Travelers of the Underlying Suit and requested to be defended. Assurance and U.S. Fire undertook to defend Jeffco pursuant to a reservation of rights letter. Ohio Casualty also undertook to defend Jeffco, but Travelers refused to provide any defense. Assurance, U.S. Fire, and Ohio Casualty jointly retained the law firm of Sinnott, Nuckols, and Logan to represent Jeffco in the Underlying Suit.

On July 28, 2003, the date of trial in the Underlying Suit, the only count remaining alleged breach of contract. However, that same day, Jeffco and the Frenches reached a settlement agreement (the Settlement Agreement). Although Ohio Casualty consented to the Settlement Agreement, Assurance and U.S. Fire did not.

Pursuant to the Settlement Agreement: (1) Jeffco agreed to confess judgment to the Frenches for $450,000; (2) Jeffco and Ohio Casualty would only be responsible to collectively pay the Frenches $45,000 of the $450,000 confessed judgment; (3) the judgment would be marked "paid and satisfied" upon the Frenches' receipt of the $45,000, (J.A. 111); and (4) Jeffco would assign the Frenches all rights, claims, and interest it has or may have against Assurance and U.S. Fire in connection with the allegations in the Underlying Suit. Jeffco and Ohio Casualty fulfilled their obligations under the Settlement Agreement and, by order entered September 2, 2003, the state court marked the $450,000 judgment ***699** "fully paid and satisfied in accordance with the settlement agreement." (J.A. 122).

On April 1, 2004, the Frenches, as assignees of Jeffco's rights, claims, and interest against Assurance and U.S. Fire in connection with commercial general liability coverage for the allegations in the Underlying Suit, filed the present civil action in Virginia state court against Assurance and U.S. Fire (from henceforth, collectively, Insurance Defendants). The complaint alleged counts for declaratory judgment; breach of contractual duty to indemnify; breach of contractual duty to defend; breach of the implied covenant of good faith and fair dealing; and unjust enrichment. Insurance Defendants permissibly removed the case to federal court based upon diversity jurisdiction. All parties agreed below and continue to agree on appeal that Maryland substantive law controls the coverage disputes presented in the present action.

On January 21, 2005, the Frenches filed a motion for partial summary judgment, and the Insurance Defendants filed a motion for summary judgment. The Frenches subsequently voluntarily dismissed their counts alleging breach of express duty to defend and unjust enrichment. This left the counts for declaratory judgment, breach of contractual duty to indemnify, and breach of the implied covenant of good faith and fair dealing. "The Frenches sought summary judgment on the basis that there was no genuine issue of material fact that the property damage to their home was caused by an occurrence during [the Insurance Defendants' respective] policy periods and that they were entitled to judgment as a matter of law for $450,000 in direct damages." (Frenches' Opening Br. at 4).

The district court granted summary judgment in favor of the Insurance Defendants and denied the Frenches' motion for partial summary judgment. Relying on the Maryland Court of Special Appeals' decision in *Lerner Corp. v. Assurance Co. of Am.,* 120 Md.App. 525, 707 A.2d 906 (1998), the district court concluded that no coverage existed under the 1986 ISO CGL Policies pursuant to the express exclusion of coverage for property damage expected or intended from the standpoint of the insured.

II.

[2] **[3]** On appeal, the Frenches seek reversal of the district court's grant of summary judgment in favor of the Insurance Defendants with respect to their claims for declaratory judgment and breach of contract with respect to the express duty to indemnify.[2] The Frenches base both claims upon their assertion that the 1986 ISO CGL Policies provide Jeffco liability coverage for the cost to correct their home's defective EIFS exterior and to remedy the resulting moisture damage to the home's otherwise nondefective structure and walls. The Insurance Defendants urge affirmance based upon the reasoning ***700** of the district court. Alternatively, the Insurance Defendants suggest affirmance on three separate and independent grounds they asserted below, but which the district court did not address.[3] *See infra* at 20–21.

2 Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of an appellant's opening brief contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies...." *Id.* "Failure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal." *Edwards v. City of Goldsboro,* 178 F.3d 231, 241 n. 6 (4th Cir.1999).
Here, the Frenches did not comply with the specific dictates of Federal Rule of Appellate Procedure 28(a)(9)(A) with respect to their claim alleging breach of the implied covenant of good faith and fair dealing, and therefore, such claim is abandoned on appeal. While the Frenches mention their claim alleging breach of the implied covenant of good faith and fair dealing in the procedural history portion of their opening brief, they never refer to it again in their opening brief.

3 These alternative arguments appear at pages 24 through 30 of the Insurance Defendants' appellate brief filed in response to the Frenches' opening appellate brief.

[4] **[5]** **[6]** **[7]** **[8]** We review *de novo* the district court's grant of summary judgment. *Williams v. Staples, Inc.,* 372 F.3d 662, 667 (4th Cir.2004). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Edell & Assocs. v. Law Offices of Peter G. Angelos,* 264 F.3d 424, 436 (4th Cir.2001). Thus, the overarching issue that we must decide *de novo* is whether there is no genuine issue of material fact and the Insurance Defendants are entitled to judgment as a matter of law. To answer this question, we apply, as the parties agree, Maryland's substantive law regarding the interpretation of an insurance policy, which law provides in general as follows:

> [a]n insurance policy is interpreted in the same manner as any other contract. Maryland courts do not follow the rule that an insurance policy must be strictly construed against the insurer. The principal rule in the interpretation of contracts is to effect the intentions of the parties. When a contract's wording is clear, the court will presume that the parties intended what they expressed, even if the expression differs from the parties' intentions at the time they created the contract. If reasonably possible, effect must be given to every clause and phrase of a contract, so as not to omit an important part of the agreement.

Nationwide Ins. Co. v. Rhodes, 127 Md.App. 231, 732 A.2d 388, 390–91 (1999) (internal quotation marks and citations omitted).

A.

We will first address the reasoning of the district court. The district court relied heavily upon the Maryland Court of Special Appeals' opinion in *Lerner Corp. v. Assurance Co. of Am.,* 120 Md.App. 525, 707 A.2d 906 (Md.Ct.Spec.App.1998), in ruling in favor of the Insurance Defendants. The Insurance Defendants also argue that *Lerner* is dispositive in their favor. Accordingly, a thorough discussion of *Lerner* is in order. However, before we undertake such a discussion, we deem it helpful to provide some background information regarding relevant provisions of the 1986 ISO CGL Policies.

Prior to 1986, the ISO had not significantly revised its standard commercial general liability form since 1973. Ernest Martin, Jr., Daniel T. Mabery, Erika L. Blomquist & Jeffrey S. Lowenstein, *Insurance Coverage for the New Breed of Internet–Related Trademark Infringement Claims,* 54 SMU L.Rev.1973, 1987–88 (2001) ("ISO frequently makes minor revisions to its CGL form, but rarely undertakes a major, substantive overhaul.... The standard ISO form in existence before the 1986 revision was promulgated in 1973....").

" 'In the 1973 version of the [ISO's CGL policy form], the work performed exclusion precluded coverage for "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." ' "[4] *Kvaerner Metals Division* ***701** *of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 825 A.2d 641, 656 (Pa.Super.Ct.2003) (some internal quotation marks omitted) (internal citations omitted) (quoting *Collett v. Ins. Co. of the West,* 64 Cal.App.4th 338, 341, 75 Cal.Rptr.2d 165 (Cal.Ct.App.1998)); *see also* 21 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d,* § 132.9 at 152 (Matthew Bender, Inc.2002). The "on behalf of" language was interpreted to mean that no coverage existed for damage to a subcontractor's work, or for damage to the insured's own work for damage resulting from a subcontractor's work. *Kvaerner Metals,* 825 A.2d at 656; *Maryland Casualty Co. v. Reeder,* 221 Cal.App.3d 961, 972, 270 Cal.Rptr. 719 (Cal.Ct.App.1990); Steven Plitt, Daniel Maldonado & Joshua D. Rogers, *Couch on Insurance 3d* § 129:18 (1995); *Holmes' Appleman on Insurance 2d,* § 132.9 at 153.

4 In the 1973 version, this was exclusion (*o*). F. Malcolm Cunningham, Jr. & Amy L. Fischer, *Insurance Coverage in Construction–The Unanswered Question,* 33 Tort & Ins. L.J. 1063, 1092 n. 152 (1998).

"Many contractors were unhappy with this state of affairs, since more and more projects were being completed with the help of subcontractors." *American Family Mut. Ins. Co. v. American Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65, 82–83 (2004). *See also Couch on Insurance 3d* § 129:18 ("Due to the increasing use of subcontractors on construction projects, many general contractors were not satisfied with the lack of coverage provided under [the 1973 ISO CGL] commercial general liability policies where the general contractor was not directly responsible for the defective work."). In response to this unhappiness, beginning in 1976, an insured under the 1973 ISO CGL policy form could pay a higher premium to obtain a broad form property damage endorsement (the BFPD Endorsement) which effectively eliminated the "on behalf of" language and excluded coverage only for property damage to work performed by the named insured. *Kvaerner Metals,* 825 A.2d at 656; *Reeder,* 221 Cal.App.3d at 972, 270 Cal.Rptr. 719; *Couch on Insurance 3d* § 129:18; *Holmes' Appleman on Insurance 2d,* § 132.9 at 153. Thus, liability coverage was extended to the insured's completed work when the damage arose out of work performed by a subcontractor. *Kvaerner Metals,* 825 A.2d at 656; *Reeder,* 221 Cal.App.3d at 972, 270 Cal.Rptr. 719; *Couch on Insurance 3d* § 129:18; *Holmes' Appleman on Insurance 2d,* § 132.9 at 153.

In 1986, as part of a major revision, the subcontractor exception aspect of the BFPD Endorsement was added directly to the body of the ISO's CGL policy in the form of an express exception to the "Your Work" exclusion. *Limbach Co. LLC v. Zurich Am. Ins. Co.,* 396 F.3d 358 (4th Cir.2005); *American Family Mut. Ins. Co.,* 673 N.W.2d at 83. Thus, under the 1986 ISO CGL Policies, the "Your Work" exclusion, *i.e.,* exclusion (*l*), specifically states that it "does not apply if the damaged work *or the work out of which the damage arises was performed on [the insured contractor's] behalf by a subcontractor.*" (J.A. 160) (emphasis added).

One other distinction between the 1973 ISO CGL policy and the 1986 ISO CGL Policies is the definition of "[o]ccurrence." Rather than containing a separate exclusion from coverage for property damages "expected or intended from the standpoint of the Insured," as does the 1986 version of the ISO CGL

policy, *i.e.,* exclusion (a), the 1973 version includes the same language within its definition of occurrence. " 'Occurrence' is defined by the 1973 [ISO CGL] policy as 'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the Insured.' " *Lerner,* 707 A.2d at 909.

With this background in mind, we now turn to a thorough discussion of *Lerner.* In *Lerner,* the Maryland Court of Special ***702** Appeals addressed the issue, in the construction context, of what damages are "expected" from the standpoint of the insured under the terms of a 1973 ISO CGL policy and a 1986 ISO CGL policy. In *Lerner,* the plaintiffs were a developer and the firm that provided the developer with construction management services in regard to the construction of an office building in Rockville, Maryland. *Id.* at 907. A third party acted as the general contractor and all construction work on the building was performed by subcontractors. *Id.*

The plaintiffs sold the building to the United States. *Id.* at 907–08. The contract of sale provided that acceptance of the work performed under the contract was deemed to be final except as to latent defects. *Id.* Following the actual sale of the building, the General Services Administration (GSA) discovered latent defects in the building's marble and stone exterior facade. *Id.* at 908. There was no damage to other parts of the building resulting from such defects.

The plaintiffs undertook to repair the defective facade and then sued their commercial general liability insurers for indemnity. *Id.* at 908. The defendant general liability carriers defended on the ground that the policies did not provide coverage for the plaintiffs' economic losses arising out of breach of contract and, in addition, that any alleged damages were specifically excluded under the provisions of the policy. *Id.* at 907.

The trial court granted summary judgment in favor of the defendant insurance carriers on the ground that the damages alleged by the plaintiffs arose out of a breach of contract and therefore, were not covered. *Id.* The plaintiffs appealed. *Id.*

On appeal, Maryland's Court of Special Appeals affirmed, holding that the plaintiffs' liability to correct the building's defective facade did not result from "the happening of an 'accident' " but resulted "simply from its failure to satisfy its obligation under their contract," and therefore, did not constitute an "occurrence" under any of the CGL policies at issue. *Id.* at 911. The court reasoned that "[i]f the damages suffered relate to the satisfaction of the contractual bargain, it follows that they are not unforeseen. In other words, and in the context of this case, it should not be unexpected and unforeseen that, if the Building delivered does not meet the contract requirements of the sale, the purchaser will be entitled to correction of the defect." *Id.* at 912. The *Lerner* court went on to opine in *dicta,* however, that "if the defect causes unrelated and unexpected ... property damage to something other than the defective object itself, the resulting damages, subject to the terms of the applicable policy, may be covered. For example, if a collapse of the veneer had injured a user of the facility or damaged property other than the veneer itself, these may well be covered." *Id.*

In the case before us, the district court held that coverage to correct the defective EIFS exterior of the Frenches' home and to remedy the resulting damage to the nondefective structure and walls of such home was excluded pursuant to the express exclusion in the 1986 ISO CGL Policies for property damage that was expected from the standpoint of the insured. [5] Relying on *Lerner Corp. v. Assurance Co. of Am.,* 120 Md.App. 525, 707 A.2d 906 (1998), the district court held that "the property damage to the residence was 'expected' from the standpoint of Jeffco," and therefore, no coverage existed for the Frenches' breach of contract claim. (J.A. 211).

5 There is no contention that the property damage at issue was intended by anyone.

***703** In our view, the district court is partly right and partly wrong. Under the 1986 ISO CGL Policies, the Insurance Defendants agreed to defend and, if necessary, indemnify Jeffco for "property damage" caused by an "occurrence," unless such "property damage" was otherwise excluded by the terms of the policies. An "[o]ccurrence" is defined by the 1986 ISO CGL Policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (J.A. 168). "Property damage" is defined as "Physical injury to tangible property, including all resulting loss of use of that property." (J.A. 169). Thus, our initial inquiry is whether the property damage to the Frenches' home falls within the initial grant of coverage in the 1986 ISO CGL Policies.

For analytical purposes, we deem it necessary to divide the property damage to the Frenches' home into two categories. The first category is the defective EIFS exterior. The second

category is the damage to the nondefective structure and walls of the Frenches' home directly resulting from moisture intrusion through the defective EIFS exterior.

[9] **[10]** With respect to the first category, *Lerner* unequivocally answers the question. We hold that just as the defective application of the building's stone facade in *Lerner* did not constitute an "accident," and, therefore, not an "occurrence" under the materially similar CGL policies at issue in *Lerner,* so does the defective application of the EIFS exterior to the Frenches' home not constitute an "accident," and therefore, not an "occurrence" under the 1986 ISO CGL Policies.[6] *Lerner,* 707 A.2d at 912–13. As the *Lerner* court reasoned: "[T]he obligation to repair the facade itself is not unexpected or unforeseen under the terms of the sales contract. Therefore, the repair or replacement damages represent economic loss and consequently would not trigger a duty to indemnify under a CGL policy." *Id.* at 911–12.

6 Similarly, as the district court held in the case before us, Jeffco's contractual obligation to provide the Frenches with a defect-free EIFS exterior was known to Jeffco at the time that it entered into the contract to construct the Frenches' home, and therefore, the exclusion for " 'property damage' expected or intended from the standpoint of the insured," (J.A. 157), operates to defeat coverage.

However, despite the position of the district court and the Insurance Defendants, *Lerner* does not answer the question with respect to the second category of damage claimed by the Frenches—*i.e.,* damage to the nondefective structure and walls of the Frenches' home caused by moisture intrusion through the defectively installed EIFS exterior. Unlike the undisputed factual situation in the case before us, factually, *Lerner* did not involve property damage to otherwise nondefective parts of the building. This is a significant distinction, and one which brings into play the subcontractor exception to the "Your Work" exclusion in the 1986 ISO CGL Policies.

[11] Thus, the question only referenced by *Lerner* in *dicta,* and not answered by any other controlling Maryland authority, is whether, under Maryland law, the 1986 ISO CGL Policies provide a general contractor liability coverage for the cost to remedy property damage to the contractor's otherwise nondefective work-product caused by a subcontractor's defective workmanship? The Supreme Court of Wisconsin's thoughtful opinion in *American Family Mutual Insurance Company v. American Girl, Inc.,* 268 Wis.2d 16, 673 N.W.2d 65 (2004) and *dicta* in *Lerner* conclusively persuade us that the answer to this question is yes.

***704** In *American Family,* the Supreme Court of Wisconsin considered a materially analogous set of facts. The court found coverage under the 1986 version of the ISO CGL policy to indemnify a general contractor for the costs to remedy property damage to a warehouse (*i.e.,* the sinking of the building's foundation and buckling and cracking of the building's structure necessitating the building being declared unsafe and torn down) caused by faulty site-preparation advice by a soil engineering subcontractor. *Id.* 69–71. With respect to the initial grant of coverage, the court held that the property damage to the warehouse was the result of an accident, *i.e.,* the settling of the soil, and therefore, an "occurrence" within the meaning of the 1986 ISO CGL policy form. *Id.* at 78.

Moreover, in *American Family,* the liability carrier, like the Insurance Defendants here, asserted, *inter alia,* that the "expected or intended" exclusion, *i.e.,* exclusion (a), applied to defeat coverage in full. *Id.* at 79. Specifically, the liability carrier argued that given poor soil conditions at the site and the insured general contractor's recognition that special measures were required to prepare the soil to carry the weight of the warehouse, the insured general contractor expected that some settlement would occur, and thus, the exclusion applied. *Id.* The court held the exclusion was not triggered because the liability carrier was not arguing that property damage was expected or intended by the general contractor, but only that some degree of settlement must have been expected under the circumstances. *Id.*

Additionally, the insurance carrier in *American Family* also argued that coverage to remedy the property damage caused by the faulty site-preparation advice by one of the insured general contractor's subcontractors was defeated by the "Your Work" exclusion, *i.e.,* exclusion (*l*). After recounting the history of the ISO's inclusion of the subcontractor exception to the "Your Work" exclusion in the 1986 ISO CGL policy form, the Supreme Court of Wisconsin reiterated that the 1986 revision restored otherwise excluded coverage for damage caused to construction projects by subcontractor negligence. *Id.* at 83. The court also admonished against applying case law involving the 1973 ISO CGL policy form to cases involving the 1986 ISO CGL policy form. *Id.*

[12] With respect to the costs to remedy the property damage to the structure and walls of the Frenches' home,

the case before us appears to be on all fours with *American Family.* Here, there is no evidence that Jeffco subjectively expected or intended that the nondefective structure and walls of the Frenches' home would suffer damage from moisture intrusion. Indeed, there does not appear even to be an allegation that Jeffco either expected or intended that its subcontractor (Coronado Stucco & Stone) would defectively install the EIFS exterior on the Frenches' home. Accordingly, as was the case of the sinking soil in *American Family,* the moisture intrusion into the nondefective structure and walls of the Frenches' home was an accident, and therefore, an "occurrence" under the initial grant of coverage of the 1986 ISO CGL Policies, which coverage is not defeated by the express exclusion for coverage of damage which is expected or intended from the standpoint of the insured.

Critically, we emphasize that the record contains no evidence, and there appears to be no allegation, that upon completion of the Frenches' home, and the issuance of the Certificate of Occupancy for the home in December 1994, any defect existed with respect to the structure and walls of the Frenches' home. The nondefective structure and walls were damaged over a period of nearly five years when the defective ***705** EIFS exterior allowed harmful moisture and water penetration. Thus, to the extent the Frenches, standing in the shoes of Jeffco, seek coverage for the costs to remedy the property damage to the otherwise nondefective structure and walls of their home, our holding in favor of such coverage does not act as a source of warranty for contractually provided workmanship. As delivered per the construction contract, the structure and walls of the Frenches' home were defect-free.

At oral argument, counsel for Insurance Defendants candidly and correctly acknowledged that had a portion of the defective EIFS exterior on the Frenches' home fallen outwardly onto an automobile or inwardly onto a painting hanging on an interior wall or on furniture in the home, the 1986 ISO CGL Policies would have provided Jeffco liability coverage for damages to the automobile, the painting, and the furniture. In this same vein, it is illogical to contend that had the defective EIFS exterior on the Frenches' home failed and caused damage to the flooring inside the home or to the structural members of the house, neither of which was defective at completion of construction and certification for occupancy, coverage would not have been provided under the 1986 ISO CGL Policies. This aspect of coverage is inherently different from coverage to correct the defective EIFS exterior on the Frenches' home. As we have already held, coverage to correct the defective EIFS exterior is not provided under the 1986 ISO CGL Policies, as opposed to damage to other nondefective parts of the home, *i.e.,* the interior and structural members of the home, which were not damaged or defective upon completion of construction, certification for occupancy and delivery of the home, but may have sustained damage as the result of the failure of the EIFS exterior.

Maryland's Court of Special Appeals makes the same point in *dicta* in *Lerner.* There, the court distinguished between the cost to correct a defect in work performed under a construction contract, for which no coverage under the 1986 ISO CGL policy form exists, and "property damage to something other than the defective object itself...." *Lerner,* 707 A.2d at 912. "For example, if a collapse of the veneer had injured a user of the facility or damaged property other than the veneer itself, these may well be covered." *Id.* That is exactly the situation here. The defective EIFS exterior on the Frenches' home allowed moisture intrusion into the structure and walls of the Frenches' home, which constitutes damage to property other than to the defective EIFS exterior itself. This *dicta* in *Lerner* strongly suggests that, if faced with the facts before us in the present appeal, Maryland's highest court would find in favor of coverage for the costs to remedy the property damage to the otherwise nondefective structure and walls of the Frenches' home.

Finally and significantly, our holding today that, under Maryland law, coverage exists under the 1986 ISO CGL Policies for the costs to remedy the damage to the nondefective structure and walls of the Frenches' home, unlike that of the district court and the position of the Insurance Defendants, gives effect to the subcontractor exception to the "Your Work" exclusion in these policies. As Maryland's highest court has continually reiterated: "It is a recognized rule of construction that a contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause or phrase so that a court does not cast out or disregard a meaningful part of the writing." *Bausch & Lomb, Inc. v. Utica Mutual Ins. Co.,* 330 Md. 758, 625 A.2d 1021, 1033 (1993). The very existence of the "Your Work" exclusion and the history of subcontractor exception to ***706** that exclusion provide us solid confirmation that our holding with respect to the nondefective structure and walls of the Frenches' home is correct. As the Court of Appeals of Kansas expressly quoted with approval:

> "If the policy's exclusion for damage to the insured's work contains a

> proviso stating that the exclusion is inapplicable if the work was performed on the insured's behalf by a subcontractor, it would not be justifiable to deny coverage to the insured, based upon the absence of an occurrence, for damages owed because of property damage to the insured's work caused by the subcontractor's work. Reading the policy as a whole, it is clear that the intent of the policy was to cover the risk to the insured created by the insured's use of a subcontractor. Moreover, if coverage were never available for damage to the insured's work because of a subcontractor's mistake, on the theory that there was no occurrence even under those circumstances, the foregoing subcontractor proviso to the exclusion for damage to the insured's work would be meaningless, and if possible, policies should not be interpreted to render policy provisions meaningless."

Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 33 Kan.App.2d 504, 104 P.3d 997, 1003 (2005) (quoting Windt, *Insurance Claims and Disputes* § 11.3, Supp. p. 48 (4th ed.2001)).

The 1986 ISO CGL Policies, like the ISO liability policies before them, are structured such that express exclusions, like the "Your Work" exclusion, limit an initial grant of coverage. Then exceptions to exclusions, such as the subcontractor exception to the "Your Work" exclusion, restore otherwise excluded coverage. *See, e.g., Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.,* 33 Kan.App.2d 504, 104 P.3d 997, 1003 (2005) (concluding that damage caused to structure of home as a result of continuous exposure to moisture due to subcontractor's defective materials and work was an occurrence triggering indemnity provisions of ISO CGL policy containing subcontractor exception to "Your Work" exclusion); *American Family,* 673 N.W.2d at 83–84 ("There is coverage [to remedy damage to warehouse resulting from subcontractor's faulty site-preparation advice] under the insuring agreement's initial coverage grant. Coverage would be excluded by the business risk exclusionary language, except that the subcontractor exception to the business risk exclusion applies, which operates to restore the otherwise excluded coverage."); *O'Shaughnessy v. Smuckler Corp.,* 543 N.W.2d 99 (Minn.Ct.App.1996) (recognizing that 1986 amendments to "Your Work" exclusion changed standard CGL policy so as to provide coverage for property damage to a contractor's work when that damage is caused by a subcontractor's defective work), *abrogated on other grounds by Gordon v. Microsoft Corp.,* 645 N.W.2d 393 (Minn.2002). In sum, our holding is consistent with the intent and structure of the 1986 ISO CGL Policies and Maryland law.

[13] To be clear, we will reiterate our holdings. We hold that, under Maryland law, a standard 1986 commercial general liability policy form published by the ISO does not provide liability coverage to a general contractor to correct defective workmanship performed by a subcontractor. We also hold that, under Maryland law, the same policy form provides liability coverage for the cost to remedy unexpected and unintended property damage to the contractor's otherwise nondefective work-product caused by the subcontractor's defective workmanship. With respect to this last holding, we assume *arguendo* that no other policy exclusion applies.

Based upon these holdings, we: (1) affirm the district court's grant of summary ***707** judgment in favor of the Insurance Defendants with respect to the Frenches' claims for declaratory judgment and breach of the express duty to indemnify to the extent those claims seek coverage under the 1986 ISO CGL Policies to correct the defective EIFS exterior on the Frenches' home; (2) vacate the district court's grant of summary judgment in favor of the Insurance Defendants with respect to the Frenches' claims for declaratory judgment and breach of the express duty to indemnify to the extent those claims seek coverage to remedy the damage to the otherwise nondefective structure and walls of the Frenches' home; and (3) remand for further proceedings consistent with this opinion.

B.

[14] Because the district court did not address the Insurance Defendants' three alternative arguments and each appears to involve at least one underlying factual dispute, we adhere to the general rule that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not

consider an issue not passed upon below."). On remand, the district court is free to consider the three alternative arguments raised by the Insurance Defendants both below and in the present appeal, which arguments the district court did not previously pass upon.

If none of the Insurance Defendants' alternative arguments defeat coverage to remedy the damage to the otherwise nondefective structure and walls of the Frenches' home, the district court should conduct proceedings to apportion any damages due the Frenches between the costs to correct the defective EIFS exterior and the costs to remedy the damage to the otherwise nondefective structure and walls of the Frenches' home. Following such apportionment, the district court should enter an appropriate judgment in favor of the Frenches with respect to their declaratory judgment claim and their claim for breach of the duty to indemnify for an amount equal to the amount apportioned for remedying the damage to the otherwise nondefective structure and walls of the Frenches' home.

III.

For the reasons stated, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

All Citations

448 F.3d 693

Employers Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153 (2010)

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by PersonalWeb Technolgies, LLC v. NEC Corporation of America, Inc., E.D.Tex., March 21, 2013

618 F.3d 1153
United States Court of Appeals,
Tenth Circuit.

EMPLOYERS MUTUAL CASUALTY COMPANY, an Iowa corporation,
Plaintiff–Appellee/Cross–Appellant,
v.
BARTILE ROOFS, INC., a Utah corporation,
Defendant–Appellant/Cross–Appellee.

Nos. 08–8064, 08–8068.
|
Sept. 7, 2010.

Synopsis

Background: Insurer brought action against roofing subcontractor, seeking declaratory judgment on duty to defend or indemnify subcontractor as to underlying suit involving hotel construction. The United States District Court for the District of Wyoming, William F. Downes, J., granted in part and denied in part insurer's motion for summary judgment. Parties cross-appealed.

Holdings: The Court of Appeals, Holmes, Circuit Judge, held that:

[1] court had specific personal jurisdiction over subcontractor;

[2] venue of action was proper;

[3] district court did not err in denying transfer of venue;

[4] no material conflict existed between laws of Wyoming and Utah governing dispute; and

[5] insurer had no right to recoup costs of defending subcontractor.

Affirmed.

West Headnotes (31)

[1] Federal Courts
Purpose, intent, and foreseeability; purposeful availment

Federal Courts
Related contacts and activities; specific jurisdiction

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2722 Factors Considered in General
170Bk2724 Contacts with Forum
170Bk2724(3) Purpose, intent, and foreseeability; purposeful availment
(Formerly 170Bk76.10)
170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2722 Factors Considered in General
170Bk2726 Connection with Litigation
170Bk2726(3) Related contacts and activities; specific jurisdiction
(Formerly 170Bk76.10)

Plaintiff satisfies minimum contacts standard for specific personal jurisdiction by showing that: (1) defendant has purposefully availed itself of privilege of conducting activities or consummating transaction in forum state, and (2) litigation results from alleged injuries that arise out of or relate to those activities.

86 Cases that cite this headnote

[2] Federal Courts
Purpose, intent, and foreseeability; purposeful availment

Federal Courts
Related contacts and activities; specific jurisdiction

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2722 Factors Considered in General
170Bk2724 Contacts with Forum

170Bk2724(3) Purpose, intent, and foreseeability; purposeful availment
(Formerly 170Bk76.10)
170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2722 Factors Considered in General
170Bk2726 Connection with Litigation
170Bk2726(3) Related contacts and activities; specific jurisdiction
(Formerly 170Bk76.10)

For purposes of specific personal jurisdiction, "purposeful availment" requires actions by defendant which create substantial connection with forum state.

34 Cases that cite this headnote

[3] Federal Courts
Insurers and insurance

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2737 Particular Contexts and Causes of Action
170Bk2749 Insurers and insurance
(Formerly 170Bk76.30)

Roofing subcontractor purposefully availed itself of privilege of conducting business in Wyoming, for purposes of establishing court's specific personal jurisdiction in action brought by insurer seeking declaratory judgment on duty to defend or indemnify subcontractor as to underlying suit involving hotel construction; subcontractor negotiated and entered into work order for construction of hotel in Wyoming, and subcontractor subsequently worked on project for almost three years.

5 Cases that cite this headnote

[4] Federal Courts
Related contacts and activities; specific jurisdiction

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2722 Factors Considered in General
170Bk2726 Connection with Litigation
170Bk2726(3) Related contacts and activities; specific jurisdiction
(Formerly 170Bk76.10)

In assessing specific personal jurisdiction, court must determine whether nexus exists between defendant's forum-related contacts and plaintiff's cause of action.

57 Cases that cite this headnote

[5] Federal Courts
Insurers and insurance

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2737 Particular Contexts and Causes of Action
170Bk2749 Insurers and insurance
(Formerly 170Bk76.30)

Action brought by insurer against roofing subcontractor, seeking declaratory judgment on duty to defend or indemnify as to underlying suit involving Wyoming hotel construction, arose out of subcontractor's activities in Wyoming forum, for purposes of establishing court's specific personal jurisdiction in action, since subcontractor's allegedly negligent work on hotel was relevant to merits of action.

2 Cases that cite this headnote

[6] Constitutional Law
Personal jurisdiction in general

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3963 Personal jurisdiction in general

To determine whether exercising personal jurisdiction would offend traditional notions of fair play and substantial justice, as required to comport with due process, court must analyze whether such exercise is reasonable in light of circumstances surrounding case. U.S.C.A. Const.Amend. 5.

Employers Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153 (2010)

47 Cases that cite this headnote

[7] Constitutional Law

Non-residents in general

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 Non-residents in general

In determining whether exercising personal jurisdiction would offend traditional notions of fair play and substantial justice, as required to comport with due process, court weighs: (1) burden on defendant; (2) forum state's interest in resolving dispute; (3) plaintiff's interest in receiving convenient and effective relief; (4) interstate judicial system's interest in obtaining most efficient resolution of controversies; and (5) shared interest of several states in furthering fundamental social policies. U.S.C.A. Const.Amend. 5.

45 Cases that cite this headnote

[8] Constitutional Law

Non-residents in general

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 Non-residents in general

In assessing reasonableness of personal jurisdiction, as required to comport with due process, court takes into account strength of defendant's minimum contacts with forum state. U.S.C.A. Const.Amend. 5.

77 Cases that cite this headnote

[9] Constitutional Law

Non-residents in general

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 Non-residents in general

In determining whether forum state is most efficient place to litigate dispute, as element of due process analysis for personal jurisdiction, court considers location of witnesses, where wrong underlying lawsuit occurred, which forum's substantive law governs case, and whether jurisdiction is necessary to prevent piecemeal litigation. U.S.C.A. Const.Amend. 5.

23 Cases that cite this headnote

[10] Federal Courts

Insurers and insurance

170B Federal Courts
170BXI Location of Forum; Venue in General
170BXI(B) Grounds; Factors Considered
170Bk2822 Factors Concerning Claim or Cause of Action
170Bk2825 Particular Claims or Causes of Action
170Bk2825(13) Insurers and insurance
(Formerly 170Bk89)

Action brought by insurer against roofing subcontractor, seeking declaratory judgment as to duty to defend or indemnify, was brought in Wyoming judicial district in which substantial part of events or omissions giving rise to claims occurred, as required for proper venue; although action pertained to interpretation of commercial general liability (CGL) policy, acts and omissions that allegedly triggered coverage occurred in part in Wyoming, stemming from subcontractor's work on hotel. 28 U.S.C.A. § 1391(a)(2).

49 Cases that cite this headnote

[11] Federal Courts

Events or Omissions Giving Rise to Claim; Where Claim Arose; Transactional Venue

170B Federal Courts
170BXI Location of Forum; Venue in General
170BXI(B) Grounds; Factors Considered
170Bk2822 Factors Concerning Claim or Cause of Action
170Bk2824 Events or Omissions Giving Rise to Claim; Where Claim Arose; Transactional Venue
170Bk2824(1) In general
(Formerly 170Bk87.5)

Substantiality requirement for establishing proper venue is satisfied upon showing of acts and omissions within forum district that have

close nexus to alleged claims. 28 U.S.C.A. § 1391(a)(2).

34 Cases that cite this headnote

[12] Federal Courts

Contracts; insurance; sales

170B Federal Courts
170BXII Change or Transfer of Venue
170BXII(A) In General; Venue Laid in Proper Forum
170Bk2907 Particular Determinations
170Bk2911 Contracts; insurance; sales
(Formerly 170Bk109)

District court did not abuse its discretion in denying transfer of venue as to action brought by insurer against roofing subcontractor, seeking declaratory judgment on duty to defend or indemnify; insurer had chosen forum, there were no issues regarding accessibility of witnesses, sources of proof and costs of making necessary proof, and docket in chosen forum was less congested than that in transferee forum. 28 U.S.C.A. § 1404(a).

90 Cases that cite this headnote

[13] Federal Courts

In general; convenience, fairness, and interest of justice

170B Federal Courts
170BXII Change or Transfer of Venue
170BXII(A) In General; Venue Laid in Proper Forum
170Bk2904 Factors Considered
170Bk2905 In general; convenience, fairness, and interest of justice
(Formerly 170Bk101)

To demonstrate inconvenience of forum as to potential witnesses, movant for transfer of venue must: (1) identify witnesses and their locations; (2) indicate quality or materiality of their testimony; and (3) show that any such witnesses were unwilling to come to trial, that deposition testimony would be unsatisfactory, or that use of compulsory process would be necessary. 28 U.S.C.A. § 1404(a).

108 Cases that cite this headnote

[14] Federal Courts

Grounds; Factors Considered

170B Federal Courts
170BXI Location of Forum; Venue in General
170BXI(B) Grounds; Factors Considered
170Bk2811 In general
(Formerly 170Bk73)

In diversity action, courts prefer action to be adjudicated by court sitting in state that provides governing substantive law.

30 Cases that cite this headnote

[15] Federal Courts

Local actions

170B Federal Courts
170BXI Location of Forum; Venue in General
170BXI(B) Grounds; Factors Considered
170Bk2826 Actions Concerning Property
170Bk2829 Local actions
(Formerly 170Bk93)

When merits of action are unique to particular locale, courts favor adjudication by court sitting in that locale.

25 Cases that cite this headnote

[16] Action

What law governs

13 Action
13II Nature and Form
13k17 What law governs

Under Wyoming law, courts engage in choice-of-law analysis only if laws of Wyoming actually conflict with those of another state.

2 Cases that cite this headnote

[17] Action

What law governs

13 Action
13II Nature and Form
13k17 What law governs

Under Wyoming law, existence of conflict can only be determined in context of specific law applied to specific issue.

1 Cases that cite this headnote

[18] Action

What law governs

13 Action
13II Nature and Form
13k17 What law governs

Under Wyoming law, when there is no conflict of law, court applies law of forum.

16 Cases that cite this headnote

[19] Insurance

Pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

Under Wyoming and Utah law, courts determine scope of insurer's duty to defend by comparing language of insurance policy with allegations of complaint.

6 Cases that cite this headnote

[20] Insurance

In general; standard

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 In general; standard

Under Wyoming and Utah law, insurer is obligated to afford defense as long as alleged claim rationally falls within policy coverage.

1 Cases that cite this headnote

[21] Insurance

Matters beyond pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 Matters beyond pleadings

Under Utah law, extrinsic evidence is not admissible if parties make duty to defend dependent on allegations against insured.

3 Cases that cite this headnote

[22] Insurance

Matters beyond pleadings

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 Matters beyond pleadings

Under Utah law, extrinsic evidence is admissible if parties make duty to defend dependent on whether there is actually covered claim or suit.

2 Cases that cite this headnote

[23] Insurance

Liability Insurance

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1091 Particular Applications of Rules
217k1091(3) Liability Insurance
217k1091(4) In general

No material conflict existed between laws of Wyoming and Utah governing admissibility of extrinsic evidence in determining scope of insurer's duty to defend, for purposes of insurer's action against roofing subcontractor, seeking declaratory judgment as to duty to defend or indemnify; laws of both jurisdictions prohibited consideration of extrinsic evidence with respect to duty to defend under commercial general liability (CGL) policies.

6 Cases that cite this headnote

[24] Insurance

Liability Insurance

217 Insurance
217III What Law Governs
217III(A) Choice of Law
217k1086 Choice of Law Rules
217k1091 Particular Applications of Rules
217k1091(3) Liability Insurance
217k1091(4) In general

No material conflict existed between laws of Wyoming and Utah governing definition of "accident" with respect to commercial general liability (CGL) policies; although Wyoming law focused on unexpectedness of event while Utah law focused on unexpectedness of result or injury, such distinction did not impact coverage issue in instant case.

3 Cases that cite this headnote

[25] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Wyoming law, "accident" for insurance purposes contemplates unforeseen event that is neither intended nor expected.

1 Cases that cite this headnote

[26] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under Wyoming and Utah law, natural results of insured's negligent and unworkmanlike construction do not constitute "occurrence" triggering coverage under commercial general liability (CGL) policy.

6 Cases that cite this headnote

[27] Insurance

Insurer's options in general

Insurance

Nonwaiver agreements and reservation of rights

Insurance

Defense costs

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 Insurer's options in general
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 Nonwaiver agreements and reservation of rights
217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

Under Wyoming law, courts disfavor insurer's attempts to defend insureds while retaining right to deny coverage and recoup defense costs at later date.

1 Cases that cite this headnote

[28] Insurance

Assent of parties

217 Insurance
217XIII Contracts and Policies
217XIII(J) Modification of Policies
217k1872 Assent of parties

Under Wyoming law, insurer is not permitted to unilaterally modify and change policy coverage.

1 Cases that cite this headnote

[29] Insurance

Nonwaiver agreements and reservation of rights

Insurance

Defense costs

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 Nonwaiver agreements and reservation of rights
217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

Under Wyoming law, reservation of rights letter does not create contract allowing insurer to recoup defense costs from its insureds.

2 Cases that cite this headnote

[30] Insurance

Insurer's options in general

Insurance

Defense costs

217 Insurance
217XXIII Duty to Defend

217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 Insurer's options in general
217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

Under Wyoming law, if insurance carrier believes that no coverage exists, it should deny its insured defense at beginning instead of defending and later attempting to recoup from its insured costs of defending underlying action.

[31] Insurance

Nonwaiver agreements and reservation of rights

Insurance

Defense costs

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 Nonwaiver agreements and reservation of rights
217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

Insurer lacked right to recoup costs of defending roofing subcontractor under Wyoming law; commercial general liability (CGL) policies at issue contained no provisions reserving insurer's recoupment rights, and subsequent reservation of rights letter was unilateral attempt either to modify existing policies or to create new contract authorizing recoupment.

2 Cases that cite this headnote

Attorneys and Law Firms

***1156** Jack W. Reed, Peterson Reed Warlaumont & Stout, Salt Lake City, UT, for Defendant–Appellant/Cross–Appellee.

Robert C. Evans, Evans & Co., Durango, CO, for Plaintiff–Appellee/Cross–Appellant.

Before MURPHY and HOLMES, Circuit Judges, and POLLAK, District Judge. *

* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion

HOLMES, Circuit Judge.

This appeal arises out of an insurance dispute involving the construction of a luxury hotel in the vicinity of Jackson Hole, Wyoming. Employers Mutual Casualty Co. ("EMC") brought a diversity action in federal district court, pursuant to 28 U.S.C. §§ 1332 and 2201, requesting a declaratory judgment as to its duty to defend or indemnify Bartile Roofs, Inc. ("Bartile"), against claims pending in California state court. EMC also sought to recoup the costs it had incurred in defending Bartile in the underlying state-court action. ***1157** After denying Bartile's motion to dismiss and motion to transfer venue, the district court granted in part, and denied in part, EMC's motion for summary judgment. Specifically, the district court concluded that EMC owed no duty to defend Bartile, but it refused to allow EMC to recoup its defense costs.

On appeal, Bartile challenges the district court's order denying its motion to dismiss and motion to transfer venue, as well as the choice-of-law determination in the summary judgment order. EMC cross-appeals the order denying its motion for summary judgment with respect to the recoupment of defense costs. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm the district court's orders.

BACKGROUND

EMC is an insurance company organized under the laws of Iowa and has its principal place of business in Des Moines, Iowa. Bartile is organized under the laws of Utah and has its principal place of business in Centerville, Utah. Between 2001 and 2003, EMC issued three commercial general liability ("CGL") insurance policies to Bartile, providing coverage in the aggregate from November 1, 2001, to November 1, 2004. Although Bartile renewed the CGL policy each year, the policies provided liability insurance via a standard coverage form and contained the same language in all relevant terms, conditions, and definitions. [1] These CGL

policies were negotiated in Utah, underwritten in Colorado, and executed in Utah.

1 The CGL policies applied to "property damage" that "is caused by an 'occurrence,' " that "t[ook] place in the 'coverage territory,' " and that "occur[red] during the policy period." Aplt.App. at 727, 740, 785, 850. Under the CGL policies, an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 738, 798, 863. The CGL policies also contained the following "duty-to-defend" clause:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for ... 'property damage' to which this insurance does not apply.

Id. at 727, 740, 785, 850. A "suit" is "a civil proceeding in which damages because of ... 'property damage' ... to which this insurance applies are alleged." *Id.* at 739, 799, 864.

In mid–2001, FS Jackson Hole Development Company, LLC (the "Owner"), hired Jacobsen Construction Company ("Jacobsen") to construct the Four Seasons Resort Jackson Hole in Teton Village, Wyoming. As the general contractor, Jacobsen subcontracted the roofing work for this luxury hotel to Bartile. Bartile began work on the construction project in November 2002 and substantially completed its activities in February 2004. Bartile finished all of its work on the hotel in October 2005.

On March 11, 2004, Jacobsen filed a civil action against the Owner in California state court. The Owner countered with a cross-complaint against Jacobsen, alleging various defects in the construction. On October 4, 2004, Jacobsen filed a cross-complaint against Bartile and other subcontractors.[2] The project architect also filed a cross-complaint against Bartile on April 27, 2006, which was amended on July ***1158** 24, 2007, alleging essentially the same claims as Jacobsen.[3]

2 In a Third Amended Cross–Complaint, filed on September 22, 2006, Jacobsen alleged claims against Bartile and other subcontractors for (1) implied and equitable indemnity; (2) contribution; (3) breach of contract; (4) express indemnity; (5) breach of contract (failure to defend); (6) breach of implied warranties; (7) breach of express warranties; (8) declaratory relief regarding the duty to defend; and (9) declaratory relief regarding the duty to indemnify.

3 On August 21, 2007, St. Paul Fire & Marine Insurance Co., Jacobsen's surety, filed a separate complaint against Bartile. Nothing in the record indicates that Bartile demanded or received a defense against the surety's claims.

On November 22, 2004, Bartile requested defense and indemnification against these claims, pursuant to the relevant CGL policies. On October 25, 2005, EMC agreed to provide a defense. However, EMC reserved its right to investigate the claims further and "to deny coverage for part or all of the claimed damage." Aplt.App. at 691; *accord id.* at 692; Aplee. Opening Br. at 4. On August 17, 2007, EMC issued a second letter to Bartile in which it announced that the claims "[we]re not covered by [the] policy." Aplt.App. at 1272. Although EMC stated that it would "continue to defend Bartile in this litigation," EMC reserved the right "to enforce any rights it may have to recoup defense costs from Bartile should it be determined that EMC had no duty to defend Bartile in this litigation." *Id.*

On August 20, 2007, EMC filed a declaratory judgment action in the U.S. District Court for the District of Wyoming. EMC argued that it was not obligated to defend or indemnify Bartile for the claims and damages asserted in the underlying state-court action. EMC also sought to recoup the costs it had incurred in defending Bartile against those claims. On December 21, 2007, EMC moved for summary judgment. On the same day, Bartile moved to dismiss the federal claims for lack of personal jurisdiction and improper venue and, in the alternative, asked the district court to transfer the action to the U.S. District Court for the District of Utah.

On March 4, 2008, the district court denied the motion to dismiss and the motion to transfer venue. On August 6, 2008, the district court granted the motion for summary judgment in part and denied it in part. Although the district court held that the underlying state-court action did not trigger EMC's duty to defend Bartile, it denied EMC's request for recoupment of the defense costs.

Bartile now appeals the district court's orders denying its motion to dismiss and motion to transfer venue. Bartile also challenges the district court's grant of partial summary judgment in favor of EMC. EMC cross-appeals the order denying its motion for summary judgment on the recoupment of defense costs.

DISCUSSION

On appeal, Bartile contends that the district court (1) erred in exercising personal jurisdiction in this declaratory-judgment action; (2) erred in denying Bartile's motion to dismiss this action for improper venue; (3) abused its discretion in declining to transfer venue to the District of Utah; and (4) erred in applying Wyoming law to the analysis of EMC's duty to defend.[4] On cross-appeal, EMC contests the ***1159** denial of its request to recoup the costs of defending Bartile in the underlying state-court action.

4 Bartile also requested leave to supplement the record on appeal with the "Fourth Amended Cross–Complaint of Jacobsen Construction Company, Inc. Against Bartile Roofs, Inc.," which was filed in the underlying state-court action. In general, Federal Rule of Appellate Procedure 10 limits the record to materials before the district court. Fed. R.App. P. 10(a); *see United States v. Kennedy,* 225 F.3d 1187, 1191 (10th Cir.2000). Although Rule 10(e) authorizes the supplementation of the record when (1) a dispute exists regarding "whether the record truly discloses what occurred in the district court"; or (2) "anything material ... is omitted from or misstated in the record by error or accident," Fed. R.App. P. 10(e)(1)–(2), this rule " 'does not grant a license to build a new record.' " *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1110 n. 11 (10th Cir.2010) (quoting *Shooting Star Ranch, LLC v. United States,* 230 F.3d 1176, 1177 n. 2 (10th Cir.2000)). In this action, Rule 10(e) does not permit the supplementation of the record because the Fourth Amended Cross–Complaint was not before the district court and was not omitted from the record by error or accident.

We also decline to exercise our "inherent equitable authority" to supplement the record on appeal to include the Fourth Amended Cross–Complaint. *See Kennedy,* 225 F.3d at 1191 (internal quotation marks omitted). Although we have relied on this inherent authority in certain circumstances, *see, e.g., United States v. Balderama–Iribe,* 490 F.3d 1199, 1202 n. 4 (10th Cir.2007) (exercising inherent authority to add a letter from the prosecutor that corrected his misstatement at the pretrial hearing and noting that the defendant had not objected in the district court), the exercise of this inherent authority is a "rare exception to Rule 10(e)." *Kennedy,* 225 F.3d at 1192.

In this action, Bartile relies on cases in which an appellate court permitted the supplementation of the record to correct misrepresentations by the prevailing party, to demonstrate the mootness of the controversy, or to raise an issue for the first time on appeal. *See Morganroth & Morganroth v. DeLorean,* 213 F.3d 1301, 1309 (10th Cir.2000) (mootness); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.,* 988 F.2d 61, 63 (8th Cir.1993) (misrepresentation); *United States v. Aulet,* 618 F.2d 182, 185–87 (2d Cir.1980) (new issue). Unlike those cases, however, Bartile never alleges misrepresentation or mootness and does not raise an issue for the first time on appeal. Bartile also fails to satisfy any of the factors recognized by other courts. *See* 16A Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Catherine T. Struve, *Federal Practice and Procedure* § 3956.4, at 677–80 (4th ed.2008) (compiling a list of reasons for granting permission to supplement the record on appeal); 20 James Wm. Moore et al., *Moore's Federal Practice* § 310.10[5] (3d ed.2010) (same).

I. PERSONAL JURISDICTION

"We review *de novo* the district court's decision to exercise personal jurisdiction over [Bartile]." *Pro Axess, Inc. v. Orlux Distribution, Inc.,* 428 F.3d 1270, 1276 (10th Cir.2005). "Where a district court considers a pre-trial motion to dismiss for lack of personal jurisdiction without conducting an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction to defeat the motion." *AST Sports Sci., Inc. v. CLF Distribution Ltd.,* 514 F.3d 1054, 1056–57 (10th Cir.2008). The plaintiff may carry this burden "by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.,* 488 F.3d 1282, 1286 (10th Cir.2007) (internal quotation marks omitted). "All factual disputes are resolved in favor of the plaintiff[ ] when determining the sufficiency of this showing." *Rusakiewicz v. Lowe,* 556 F.3d 1095, 1100 (10th Cir.2009). "[T]o defeat a prima facie showing of jurisdiction, the defendant must demonstrate that the presence of some other considerations would render jurisdiction unreasonable." *TH Agric. & Nutrition,* 488 F.3d at 1286 (internal quotation marks omitted).

"To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is legitimate under the laws of the forum state and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Id.* at 1286–87 (internal quotation marks omitted). The Wyoming long-arm statute authorizes jurisdiction to the full extent of the federal constitution. Wyo. Stat. Ann. § 5–1–107(a). Thus, we need not conduct a statutory analysis apart from the due process

analysis. *Kuenzle v. HTM Sport–Und Freizeitgerate AG,* 102 F.3d 453, 455 (10th Cir.1996).

The due process analysis consists of two steps. First, we consider "whether the defendant has such minimum contacts with ***1160** the forum state 'that he should reasonably anticipate being haled into court there.' " *OMI Holdings, Inc. v. Royal Ins. Co. of Can.,* 149 F.3d 1086, 1091 (10th Cir.1998) (quoting *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). This minimum-contacts standard may be satisfied by showing general or specific jurisdiction. *See id.* Because the parties agree that Bartile is not subject to "general" personal jurisdiction, [5] we proceed to the issue of "specific" personal jurisdiction. *Pro Axess,* 428 F.3d at 1276. Second, if the defendant has minimum contacts within the forum state, we determine "whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice.' " *OMI Holdings,* 149 F.3d at 1091 (quoting *Asahi Metal Indus. Co. v.Super. Ct. of Calif.,* 480 U.S. 102, 105, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (plurality opinion)). This analysis is fact specific. *TH Agric. & Nutrition,* 488 F.3d at 1287, 1292.

5 "[A] court may maintain general jurisdiction over a nonresident defendant, based on the defendant's continuous and systematic general business contacts with the forum state." *Trujillo v. Williams,* 465 F.3d 1210, 1218 n. 7 (10th Cir.2006) (internal quotation marks omitted).

A. Minimum Contacts

[1] Under the specific-jurisdiction requirement, a plaintiff satisfies the minimum-contacts standard by showing that (1) the defendant has "purposefully availed itself of the privilege of conducting activities or consummating a transaction in the forum state," *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,* 514 F.3d 1063, 1071 (10th Cir.2008) (emphasis omitted) (internal quotation marks omitted); and (2) " 'the litigation results from alleged injuries that arise out of or relate to those activities,' " *TH Agric. & Nutrition,* 488 F.3d at 1287 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

1. Purposeful Availment

[2] "Purposeful availment requires actions by the Defendant which create a substantial connection with the forum state." *OMI Holdings,* 149 F.3d at 1092 (internal quotation marks omitted). "[W]e must examine the quantity *and* quality of Defendant's contacts with [the forum state]...." *Id.* (second emphasis omitted). The purpose of this requirement is to "ensure[ ] that a defendant will not be subject to the laws of a jurisdiction solely as the result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *AST Sports Sci.,* 514 F.3d at 1058 (internal quotation marks omitted); *accord Rusakiewicz,* 556 F.3d at 1101.

[3] In this action, Bartile purposefully availed itself of the privilege of conducting business in Wyoming. Bartile negotiated and entered into a subcontract work order with Jacobsen to perform roofing work for the construction of a luxury hotel in Jackson Hole, Wyoming. Bartile subsequently worked on this construction project for almost three years. Thus, these contacts were not "random, fortuitous, or attenuated." *AST Sports Sci.,* 514 F.3d at 1058 (internal quotation marks omitted).

2. Arise Out of or Relate to Forum Activities

[4] We also must "determine whether a nexus exists between the Defendant ['s] forum-related contacts and the Plaintiff's cause of action." *TH Agric. & Nutrition,* 488 F.3d at 1291 (brackets omitted) (internal quotation marks omitted). When analyzing this issue, courts generally follow one of three approaches: (1) proximate cause; (2) "but-for" causation; or (3) substantial ***1161** connection. [6] *See Dudnikov,* 514 F.3d at 1078–80. Although we have rejected the substantial-connection approach outright, *id.* at 1078, we have not expressly "pick[ed] sides" (i.e., exclusively made an election) between the proximate-cause and the but-for-causation approaches, *id.* at 1079. [7] Proximate cause is the most restrictive approach and requires courts to analyze "whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *Id.* at 1078 (internal quotation marks omitted); *see O'Connor,* 496 F.3d at 318–19 (noting that the cause of action must arise out of the defendant's in-forum conduct). "But-for" causation is less restrictive and supports the exercise of personal jurisdiction based on "any event in the causal chain leading to the plaintiff's injury." *Dudnikov,* 514 F.3d at 1078.

6 The "substantial connection" approach is the least restrictive of the three approaches and merely requires

"the tie between the defendant's contacts and the plaintiff's claim [to be] close enough to make jurisdiction fair and reasonable." *O'Connor v. Sandy Lane Hotel Co.,* 496 F.3d 312, 318–20 (3d Cir.2007).

7 In contract actions, we have consistently applied the more-restrictive proximate-cause approach. *See, e.g., TH Agric. & Nutrition,* 488 F.3d at 1292 ("THAN's claims arise out of the Insurer's contact with [the forum state]"); *Pro Axess,* 428 F.3d at 1279 ("Pro Axess's breach of contract claims arose from ... Sporoptic's contacts with [the forum state]."); *OMI Holdings,* 149 F.3d at 1095 ("Plaintiff's claim clearly arose out of Defendants' forum-related activity.").

[5] We also need not elect in this case between the proximate-cause and but-for-causation approaches. Under either, the declaratory judgment action "results from alleged injuries that arise out of or relate to" Bartile's contacts with Wyoming. The proximate-cause approach is satisfied because Bartile's allegedly negligent work is relevant to the merits of the declaratory judgment action. In the declaratory judgment action, EMC seeks to avoid having to defend or indemnify Bartile for injuries arising out of the allegedly negligent work on the luxury hotel in Wyoming. The but-for causation approach is satisfied because Bartile's allegedly negligent work was an event in the causal chain leading to the request for a declaratory judgment.

B. Traditional Notions of Fair Play and Substantial Justice

[6] If the defendant has minimum contacts with the forum state, "we must still determine whether exercising personal jurisdiction would offend traditional notions of fair play and substantial justice." *AST Sports Sci.,* 514 F.3d at 1061 (internal quotation marks omitted). We must analyze "whether a district court's exercise of personal jurisdiction ... is reasonable in light of the circumstances surrounding the case." *Id.* (internal quotation marks omitted). The defendant bears the burden of "present[ing] a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Dudnikov,* 514 F.3d at 1080 (internal quotation marks omitted).

[7] **[8]** This reasonableness analysis requires the weighing of five factors:

> (1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental social policies.

Pro Axess, 428 F.3d at 1279–80 (internal quotation marks omitted). "In assessing the reasonableness of jurisdiction, we also take into account the strength of a defendant's minimum contacts." *TH Agric. &* ***1162** *Nutrition,* 488 F.3d at 1292. "[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contacts, the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Id.* (brackets omitted) (internal quotation marks omitted). Based upon our consideration of each factor, we conclude that the exercise of personal jurisdiction would be reasonable.

1. Burden on Defendant of Litigating in the Forum

"The burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction." *AST Sports Sci.,* 514 F.3d at 1061 (brackets omitted) (internal quotation marks omitted). But "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174 (internal quotation marks omitted). This factor weighs strongly in favor of EMC because the burden is "relatively slight" for Bartile, a Utah resident, to litigate in the adjacent state of Wyoming. *See Benally v. Amon Carter Museum of W. Art,* 858 F.2d 618, 626 (10th Cir.1988). Bartile also has not identified any burden that would arise from defending the action in Wyoming. [8] *Dudnikov,* 514 F.3d at 1081 (noting that "one side must bear the inconvenience of litigating on the road" and "defendants have not indicated that their defense of this case would be hindered by the territorial limits on the [forum's] power to subpoena relevant witnesses, or indeed hampered in any other significant way" (internal quotation marks omitted)).

8 In the transfer of venue section of the opening brief, Bartile argues that "[l]itigating in Wyoming is more expensive ... than litigating in Salt Lake City." Aplt.

Opening Br. at 20. Because Bartile neglected to raise this argument in the personal-jurisdiction section of its opening brief, it has waived this argument on appeal. *Bronson v. Swensen,* 500 F.3d 1099, 1104 (10th Cir.2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."); *see* Fed. R.App. P. 28(a)(9)(A) (requiring an appellant's opening brief to identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

2. Forum State's Interest in Adjudicating the Dispute

"States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors." *AST Sports Sci.,* 514 F.3d at 1062 (internal quotation marks omitted). "Although less compelling, a state may also have an interest in adjudicating a dispute between two non-residents where the defendant's conduct affects forum residents." *OMI Holdings,* 149 F.3d at 1096. "The state's interest is also implicated where resolution of the dispute requires a general application of the forum state's laws." *Pro Axess,* 428 F.3d at 1280 (internal quotation marks omitted).

This factor weighs in favor of Bartile because Wyoming has only a tenuous interest in adjudicating this action. Although Wyoming law ultimately applies to this action, *see* discussion *infra* Part III; *Pro Axess,* 428 F.3d at 1280, neither Bartile nor EMC is a Wyoming resident. *AST Sports Sci.,* 514 F.3d at 1062. The dispute also has minimal impact on Wyoming residents because nothing in the record indicates that Bartile or EMC employs any Wyoming residents or that a Wyoming resident has attempted to recover from EMC for Bartile's conduct. *OMI Holdings,* 149 F.3d at 1096. Even though EMC claims that Wyoming has an interest ***1163** in adjudicating the action because the construction of the hotel has an economic impact on the tourism industry, that interest is too speculative and remote to support personal jurisdiction in this action. Finally, the CGL policies were negotiated, underwritten, and executed outside of Wyoming.

3. Plaintiff's Interest in Convenient and Effective Relief

"This factor hinges on whether the plaintiff may receive convenient and effective relief in another forum." *AST Sports Sci.,* 514 F.3d at 1062 (brackets omitted) (internal quotation marks omitted). When applying this factor, courts note that it "may weigh heavily in cases where a Plaintiff's chances of recovery will be greatly diminished by forcing [it] to litigate in another forum because of that forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit." *TH Agric. & Nutrition,* 488 F.3d at 1294 (internal quotation marks omitted); *accord Benton v. Cameco Corp.,* 375 F.3d 1070, 1079 (10th Cir.2004).

This factor also weighs in favor of Bartile. Although EMC claims that it "has an interest in having this litigation resolved quickly and efficiently," Aplee. Opening Br. at 11, nothing in the record suggests that EMC's "chances of recovery will be greatly diminished by forcing [it] to litigate in another forum." *TH Agric. & Nutrition,* 488 F.3d at 1294 (internal quotation marks omitted). The application of Utah law would not prejudice EMC because Wyoming and Utah law are the same in every material respect regarding this declaratory judgment action. *See* discussion *infra* Part III; *see also OMI Holdings,* 149 F.3d at 1097 (finding that this factor weighs in favor of the defendant because the same law governs the terms of the insurance policies, regardless of the forum).

EMC also would not be foreclosed from pursuing the declaratory judgment action because of the burden of litigating in Utah. The record contains only vague assertions regarding the location of potential witnesses. Even if these assertions were concrete enough to demonstrate a burden on EMC, they would not indicate that the burden was overwhelming. *TH Agric. & Nutrition,* 488 F.3d at 1295–96.

4. Interstate Judicial System's Interest in Efficiency

[9] "This factor asks whether the forum state is the most efficient place to litigate the dispute." *AST Sports Sci.,* 514 F.3d at 1062 (internal quotation marks omitted). "Key to this inquiry are the location of the witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation." *TH Agric. & Nutrition,* 488 F.3d at 1296 (internal quotation marks omitted).

This factor slightly favors EMC because the record is insufficient to determine whether Wyoming or Utah is "the most efficient place to litigate the dispute." *AST Sports Sci.,* 514 F.3d at 1062 (internal quotation marks omitted). For example, neither party has identified any potential witnesses to the declaratory judgment action. Although the CGL

policies were negotiated and executed in Utah, *see OMI Holdings,* 149 F.3d at 1097, Bartile performed the allegedly negligent work on the luxury hotel in Wyoming, *see TH Agric. & Nutrition,* 488 F.3d at 1296; *Benton,* 375 F.3d at 1080. Furthermore, as noted *infra* Part III, Utah and Wyoming law are not in actual conflict regarding the issues relevant to this action. *OMI Holdings,* 149 F.3d at 1097.

Finally, personal jurisdiction in Wyoming avoids some piecemeal litigation. Although the underlying state-court action ***1164** was filed in California, the District of Wyoming has ruled on an insurance claim arising from the same construction project. *See Great Divide Ins. Co. v. Bitterroot Timberframes of Wyo., LLC,* No. 06–CV–020–WCB, 2006 WL 3933078, 2006 U.S. Dist. LEXIS 94826 (D.Wyo. Oct.20, 2006). Therefore, irrespective of whether the District of Wyoming is actually the most efficient place to litigate this dispute, we conclude that it has some litigation-related advantages over the District of Utah as a forum, and this factor slightly favors EMC.

5. States' Interest in Substantive Social Policies

This factor "focuses on whether the exercise of personal jurisdiction ... affects the substantive social policy interests of other states." *AST Sports Sci.,* 514 F.3d at 1062 (internal quotation marks omitted). This factor weighs in favor of EMC because Bartile has not identified how the litigation of this action in Utah would advance any fundamental substantive social policy. Even though Bartile is a Utah corporation, the exercise of personal jurisdiction would not interfere with Utah's sovereign interest in interpreting its laws because Wyoming law applies to this action. *See* discussion *infra* Part III.

In sum, the district court properly exercised personal jurisdiction over Bartile. Bartile had minimum contacts with Wyoming. Although certain traditional notions of fair play and substantial justice favored Bartile, it failed to establish a "compelling case" that personal jurisdiction would be unreasonable.

II. VENUE

Bartile also contends that the district court (1) erred in denying the motion to dismiss for improper venue, and (2) abused its discretion in refusing to transfer the action to the U.S. District Court for the District of Utah.

A. Improper Venue

We review de novo the district court's decision not to dismiss an action for improper venue.[9] *See Ballesteros v. Ashcroft,* 452 F.3d 1153, 1160 (10th Cir.2006) ***1165** (noting that "the question of whether a litigant has brought an action in the proper court is a question of law"); *cf. Pierce v. Shorty Small's of Branson Inc.,* 137 F.3d 1190, 1191 (10th Cir.1998) ("The district court's determination of where the action may be brought involves an interpretation of the venue statute and is, therefore, a question of law subject to de novo review."). The district court held that "[v]enue is proper in Wyoming," pursuant to § 1391(a)(2), because "[t]he events giving rise to this litigation all concern [Bartile's] actions in [Wyoming]." Aplt.App. at 1651. For the following reasons, we agree.

9 As an initial matter, we consider *sua sponte* our jurisdiction to consider a challenge to the district court's denial of the motion to dismiss for improper venue. A notice of appeal must "designate the judgment, order, or part thereof being appealed." Fed. R.App. P. 3(c)(1)(B). "Our appellate review is limited to final judgments or parts thereof that are designated in the notice of appeal.... [O]ur jurisdiction does not extend to other matters of the judgment that [appellant] may [subsequently] wish to appeal." *Cunico v. Pueblo Sch. Dist. No. 60,* 917 F.2d 431, 444 (10th Cir.1990) (citations omitted).

In the notice of appeal, Bartile "appeals the Court's Order Denying Bartile's Motion to Dismiss for Lack of Jurisdiction and Motion for Change of Venue entered on March 4, 2008." Aplt.App. at 1675. Although the notice of appeal specifically mentioned two of the three issues addressed in the district court's order, *viz.,* personal jurisdiction and transfer of venue, Bartile neglected to raise the denial of its motion to dismiss for improper venue. Thus, Bartile failed to comply with the requirements of Rule 3(c) with respect to the improper-venue issue. *See United States v. Morales,* 108 F.3d 1213, 1222 (10th Cir.1997); *Cunico,* 917 F.2d at 444.

Even though Rule 3(c) is jurisdictional, "the requirements of the rules of procedure should be liberally construed and ... mere technicalities should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 316, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) (internal quotation marks omitted). "We have recognized that a docketing statement or other documents filed within the period allotted for filing a notice of appeal may cure defects in the notice of appeal." *Ayala v. United States,* 980 F.2d 1342, 1344 (10th Cir.1992). Furthermore, we have

liberally construed notices of appeal to raise an issue when the appellant manifested an intent to appeal the issue and did not mislead or prejudice the opposing party. *See Morales,* 108 F.3d at 1222–23; *see also* 20 Moore, *supra* note 4, § 303.21[3][c][v] ("If the appellant mistakenly designated only part of a judgment ... in the notice of appeal, the appellate court may nevertheless review other related parts, if the intent to appeal the related matters is clear from the record as a whole, and the opposing party is not prejudiced."). *But see* 16A Wright, Miller, Cooper & Struve, *supra* note 4, § 3949.4, at 109–10 ("[A] notice of appeal that specifies only part of a final judgment ... will not suffice to appeal other parts of the judgment ..., especially if those omitted are conceptually distinct from those mentioned.").

In this action, Bartile manifested an intent to appeal the district court's denial of its motion to dismiss for improper venue. On September 19, 2008, Bartile filed a docketing statement in which it unambiguously stated its intent to challenge whether "the trial court correctly rule[d] that the case should not be dismissed for improper venue." Docketing Statement at 5, *Employer's Mut. Cas. Co. v. Bartile Roofs, Inc.,* No. 08–8064 (10th Cir. Sept. 19, 2008); *see Morales,* 108 F.3d at 1223. This docketing statement was timely filed under Federal Rule of Appellate Procedure 4(a). Even though Bartile filed the docketing statement more than thirty days after the issuance of the summary judgment order on August 6, 2008, the notice of appeal was not due until February 2, 2009, because the district court had neglected to file a separate judgment in accordance with Federal Rule of Civil Procedure 58(a)(1). Fed. R.App. P. 4(a)(1), (a)(7)(A) (providing that a notice of appeal is not due for 180 days after the entry of the order on the civil docket if the district court neglected to file a separate judgment). Finally, EMC was not misled or prejudiced because Bartile had served it with a copy of the docketing statement. *See* Docketing Statement at 9, *Employer's Mut. Cas. Co. v. Bartile Roofs, Inc.,* No. 08–8064 (10th Cir. Sept. 19, 2008).

In a diversity action, venue lies in

> (1) a judicial district where any defendant resides, ... (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, ... or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a)(1)–(3). The only possible ground for venue at issue here is under § 1391(a)(2).[10] Under that provision, venue is not limited to the district with the *most* substantial events or omissions. *See First of Mich. Corp. v. Bramlet,* 141 F.3d 260, 264 (6th Cir.1998); *Setco* ***1166** *Enters. Corp. v. Robbins,* 19 F.3d 1278, 1281 (8th Cir.1994); *cf. Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.,* 891 F.2d 1473, 1479 (10th Cir.1989) (noting, under a prior version of 28 U.S.C. § 1391, that venue was proper in multiple districts). Section 1391(a)(2) instead "contemplates that venue can be appropriate in more than one district ... [and] permits venue in multiple judicial districts as long as a substantial part of the underlying events took place in those districts." *Gulf Ins. Co. v. Glasbrenner,* 417 F.3d 353, 356 (2d Cir.2005) (internal quotation marks omitted).

10 Venue is not proper in the District of Wyoming under either § 1391(a)(1) or (a)(3). Under § 1391(a)(1), venue is not proper because Bartile is not a resident of Wyoming. Although we will deem a corporate defendant to be a "resident" for purposes of § 1391(a)(1) when the defendant "is subject to personal jurisdiction at the time the action is commenced," 28 U.S.C. § 1391(c), Bartile claims to have ceased all contact with Wyoming approximately two years prior to the filing of this action. *See Mohr v. Margolis, Ainsworth & Kinlaw Consulting, Inc.,* 434 F.Supp.2d 1051, 1060 (D.Kan.2006); *Dyco Petroleum Corp. v. Mesa Operating Co.,* 935 F.Supp. 1193, 1195–96 (N.D.Okla.1996). Under § 1391(a)(3), venue is not proper because EMC could have brought the declaratory judgment action in the District of Utah. *See Algodonera de las Cabezas, S.A. v. Am. Suisse Capital, Inc.,* 432 F.3d 1343, 1345 (11th Cir.2005) ("[V]enue may be predicated on § 1391(a)(3) only when neither § 1391(a)(1) or (2) are satisfied.").

[10] We conduct a two-part analysis when reviewing challenges to venue under § 1391(a)(2). First, we examine the nature of the plaintiff's claims and the acts or omissions underlying those claims. *See id.* at 357; *Jenkins Brick Co. v. Bremer,* 321 F.3d 1366, 1372 (11th Cir.2003); *Cottman Transmission Sys., Inc. v. Martino,* 36 F.3d 291, 295 (3d Cir.1994). In this action, EMC requested a declaratory judgment that the CGL policies imposed no duty to defend or indemnify Bartile against claims pending in California state court. This declaratory judgment action arose from a series of acts and omissions that occurred in Utah, Colorado, and

Wyoming. For example, the record suggests that the CGL policies were negotiated in Utah, underwritten in Colorado, and executed in Utah. Bartile performed allegedly negligent roofing work on the luxury hotel in Wyoming. Bartile also filed a claim through a Utah-based insurance broker to demand that EMC defend it from the state-court action and indemnify it from any adverse judgments. Although EMC sent a letter from Colorado announcing that the CGL policies did not cover the alleged damages, it agreed to provide a defense subject to a reservation of its right to recoup its defense costs.

[11] Second, we determine whether substantial "events material to those claims occurred" in the forum district. [11] *Gulf Ins.,* 417 F.3d at 357; *accord Jenkins Brick Co.,* 321 F.3d at 1372; *Cottman,* 36 F.3d at 295–96. The substantiality requirement is satisfied upon a showing of "acts and omissions that have a close nexus" to the alleged claims. *Jenkins Brick Co.,* 321 F.3d at 1372; *Uffner,* 244 F.3d at 42 ("We look ... not to a single triggering event prompting the action, but to the entire sequence of events underlying the claim."); *see also* 17 James Wm. *Moore et al., Moore's Federal* Practice § 110.04[1] (3d ed.2010) (stating that, when engaging in the substantiality analysis, courts "ought not focus solely on the matters that gave rise to the filing of the action, but rather should look at the entire progression of the underlying claim").

11 When applying the substantiality analysis, courts have disagreed over whether to focus solely on the activities of the defendant or to consider the activities of the plaintiff as well. *Compare, e.g., Jenkins Brick Co.,* 321 F.3d at 1371–72 (relying solely on the relevant activities of the defendant) *and Woodke v. Dahm,* 70 F.3d 983, 985 (8th Cir.1995) (noting that "by referring to events and omissions giving rise to the claim, Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff" (internal quotation marks omitted)), *with Uffner v. La Reunion Francaise, S.A.,* 244 F.3d 38, 42 n. 6 (1st Cir.2001) (declining to limit the review of the events or omissions to the actions of the defendant); *Bramlet,* 141 F.3d at 263–64 (same); *and Cottman,* 36 F.3d at 294 (same). Although we have weighed in on this circuit split in a non-binding order and judgment, *Goff v. Hackett Stone Co.,* No. 98–7137, 1999 WL 397409, at *1 (June 17, 1999), we need not definitively answer this question at this time. Even restricting our focus to Bartile's activities, we conclude that the substantial events material to the claims occurred in the District of Wyoming.

In this action, the substantial events include Bartile's allegedly negligent work on ***1167** the luxury hotel. Courts have held that the alleged damages or loss under an insurance policy may constitute a substantial event for purposes of the venue analysis. *See Uffner,* 244 F.3d at 43 ("[I]n a suit against an insurance company to recover for losses ..., the jurisdiction where that loss occurred is substantial for venue purposes." (internal quotation marks omitted)); *see also Gulf Ins.,* 417 F.3d at 358 (observing, in dicta, that the original injury was a substantial event for purposes of the venue analysis when an insurance company sought a declaratory judgment that the injury was not covered by the insurance policy). Although Bartile contends that the location of the allegedly negligent work is irrelevant to the interpretation of the CGL policies, *Uffner,* 244 F.3d at 43, this work is still part of the "entire sequence of events underlying the claim" because it forms the basis of Bartile's request for a defense and indemnification, *id.* at 42. Thus, venue is proper under 28 U.S.C. § 1391(a)(2).

B. Transfer of Venue

[12] We review the district court's decision not to transfer this action to the District of Utah for a clear abuse of discretion. *Palace Exploration Co. v. Petroleum Dev. Co.,* 316 F.3d 1110, 1121 (10th Cir.2003). Under 28 U.S.C. § 1404(a), a district court may transfer an action "[f]or the convenience of parties and witnesses, [and] in the interest of justice, ... to any other district or division where it might have been brought." [12] In considering a motion to transfer under § 1404(a), we weigh the following discretionary factors:

12 The parties do not dispute that the District of Utah is a district where this action "might have been brought."

> the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and[ ] all other considerations of a practical nature that make a trial easy, expeditious and economical. *Chrysler Credit Corp. v. Country Chrysler, Inc.,* 928 F.2d 1509, 1516 (10th Cir.1991) (internal quotation marks omitted). The "party moving to transfer a case pursuant to

§ 1404(a) bears the burden of establishing that the existing forum is inconvenient." *Scheidt v. Klein,* 956 F.2d 963, 965 (10th Cir.1992) (internal quotation marks omitted). "Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue." *Id.* at 966.

1. Plaintiff's Choice of Forum

The plaintiff's choice of forum weighs against transfer. "[U]nless the balance is strongly in favor of the movant[,] the plaintiff's choice of forum should rarely be disturbed." [13] *Id.* at 965 (internal quotation ***1168** marks omitted). The plaintiff's choice of forum receives less deference, however, if the plaintiff does not reside in the district. *See Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango,* 464 F.Supp.2d 1095, 1098 (D.Colo.2006); *see also Wm. A. Smith Contracting Co.,* 467 F.2d at 664 (examining the location of the plaintiff's principal place of business). Courts also accord little weight to a plaintiff's choice of forum "where the facts giving rise to the lawsuit have no material relation or significant connection to the plaintiff's chosen forum." *Cook v. Atchison, Topeka & Santa Fe Ry. Co.,* 816 F.Supp. 667, 669 (D.Kan.1993).

13 For more than five decades, we have required the movant to demonstrate that the balance of factors "strongly favors" a transfer of venue under § 1404(a). *See, e.g., Scheidt,* 956 F.2d at 965; *Wm. A. Smith Contracting Co. v. Travelers Indem. Co.,* 467 F.2d 662, 664 (10th Cir.1972); *Tex. Gulf Sulphur Co. v. Ritter,* 371 F.2d 145, 147 (10th Cir.1967); *Hous. Fearless Corp. v. Teter,* 318 F.2d 822, 827–28 (10th Cir.1963); *Chi., Rock Island & Pac. R.R. Co. v. Hugh Breeding, Inc.,* 232 F.2d 584, 587 (10th Cir.1956); *Headrick v. Atchison, Topeka & Santa Fe Ry. Co.,* 182 F.2d 305, 310 (10th Cir.1950). Although we apply this standard to motions to transfer venue under § 1404(a), we borrowed the standard verbatim from a case applying the common-law doctrine of *forum non conveniens. Headrick,* 182 F.2d at 310 (quoting *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

The Fifth Circuit has suggested that this standard is too stringent. *In re Volkswagen of Am., Inc.,* 545 F.3d 304, 312–15 (5th Cir.2008). In *Volkswagen,* the Fifth Circuit concluded that the *forum non conveniens* dismissal standard "give[s] inordinate weight to the plaintiffs' choice of venue," *id.* at 314–15, 100 S.Ct. 559, because § 1404(a) " 'permit[s] courts to grant transfers upon a lesser showing of inconvenience,' " *id.* at 313, 100 S.Ct. 559 (quoting *Norwood v. Kirkpatrick,* 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789 (1955)); *see* 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3848, at 161 (3d ed.2007) (noting that courts frequently cite the strongly favor language "without recognizing that the original source of this theory was in connection with the forum non conveniens doctrine and that application of this standard to Section 1404(a) is doubtful"). The Fifth Circuit instead requires a movant to "demonstrate[ ] that the transferee venue is *clearly* more convenient." *Volkswagen,* 545 F.3d at 315 (emphasis added).

There actually may be less disharmony between our approach and that of the Fifth Circuit than a first-blush examination might suggest. We have repeatedly acknowledged that § 1404(a) "was intended to revise ... the common law" and that "[c]ourts therefore enjoy greater discretion to transfer a case pursuant to § 1404(a) than to dismiss the action based upon *forum non conveniens." Chrysler Credit,* 928 F.2d at 1515; *accord Chi., Rock Island & Pac. R.R. Co.,* 232 F.2d at 587 ("By the adoption of [§ 1404(a)] Congress intended to broaden the old doctrine of forum non conveniens...."); *Headrick,* 182 F.2d at 310 (agreeing that "courts may properly utilize the doctrine more freely"). Furthermore, our standard appears to be consistent with the Fifth Circuit's holding in *Volkswagen* because we honor the plaintiff's choice of forum "unless the balance in the defendant's favor is shown by *clear and convincing* evidence." *Headrick,* 182 F.2d at 310 (emphasis added).

This factor weighs against transferring the action. Although EMC is an Iowa corporation that does not reside in Wyoming for purposes of § 1404(a), "the facts giving rise to the lawsuit have [a] material relation or significant connection to" Wyoming. *Id.* These facts include Bartile's allegedly negligent roofing work on the luxury hotel in Wyoming. Although Bartile observes that several district courts have determined that the locus of operative facts in a declaratory action involving insurance coverage is either the site of policy's execution or the site of the decision to deny coverage, *see, e.g., Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Lafarge N.A., Inc.,* 474 F.Supp.2d 474, 485 (S.D.N.Y.2007) (contract execution), *aff'd sub nom. N.Y. Marine & Gen. Ins. Co. v. Lafarge N.A., Inc.,* 599 F.3d 102 (2d Cir.2010); *Evangelical Lutheran Church in Am. v. Atl. Mut. Ins. Co.,* 973 F.Supp. 820, 823 (N.D.Ill.1997) (decision to deny coverage), other courts have found that the location of the alleged damage or loss is "significant" for purposes of analyzing the convenience of a particular venue. *See* discussion *supra* Part II.A; *Uffner,* 244 F.3d at 42; *Gulf Ins.,* 417 F.3d at 358. Besides, the record reveals that Bartile's "locus of operative

facts" approach does not generate a single, alternative venue: the contract was executed in Utah, and the denial of coverage occurred in Colorado.

***1169 2. Accessibility of Witnesses and Sources of Proof**

[13] The accessibility of witnesses and sources of proof weighs against transfer. "The convenience of witnesses is the most important factor in deciding a motion under § 1404(a)." *Cook,* 816 F.Supp. at 669; *see also Palace Exploration Co.,* 316 F.3d at 1121–22 (limiting its consideration of the § 1404(a) factors to the location of the witnesses). To demonstrate inconvenience, the movant must (1) identify the witnesses and their locations; (2) "indicate the quality or materiality of the[ir] testimony"; and (3) "show[ ] that any such witnesses were unwilling to come to trial ... [,] that deposition testimony would be unsatisfactory[,] or that the use of compulsory process would be necessary." *Scheidt,* 956 F.2d at 966 (brackets omitted) (internal quotation marks omitted); *see* 15 Wright, Miller & Cooper, *supra* note 13, § 3851, at 227–28 ("If the moving party merely has made a general allegation that necessary witnesses are located in the transferee forum, ... the application for transferring the case should be denied...."); 17 Moore, *supra,* § 111.13[f][v] ("The materiality of the prospective witnesses [sic] testimony, and not merely the number of prospective witnesses, will determine the extent to which their convenience will be weighed." (citation omitted)). Although Bartile alleges that the majority of potential witnesses are Utah residents and are subject to compulsory process, it has neither identified those witnesses with specificity nor indicated the subject matter of their testimony.

3. Cost of Making Necessary Proof

The cost of making necessary proof weighs against transfer. Bartile contends that litigating the case in Wyoming potentially would exceed the cost of litigating the case in Utah due to the travel expenses of the witnesses. This argument fails to justify a transfer because the record contains no evidence concerning the potential costs of litigating the case in Wyoming. *See Pehr v. Sunbeam Plastics Corp.,* 874 F.Supp. 317, 321 (D.Kan.1995).

4. Difficulties that May Arise from Congested Dockets

The difficulties of court congestion weigh against transfer. When evaluating the administrative difficulties of court congestion, the most relevant statistics are the median time from filing to disposition, median time from filing to trial, pending cases per judge, and average weighted filings per judge. *See REO Sales, Inc. v. Prudential Ins. Co. of Am.,* 925 F.Supp. 1491, 1495 n. 3 (D.Colo.1996); *Hess Oil V.I. Corp. v. UOP, Inc.,* 447 F.Supp. 381, 384 (N.D.Okla.1978). In this action, based on each of these statistics, the District of Wyoming has a substantially less congested docket than the District of Utah. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, *available at* http://www.uscourts.gov/cgi-bin/cmsd2008. pl (2008).

5. Conflict of Laws

[14] The conflict-of-laws factor weighs slightly against transfer. In a diversity action, courts prefer the action to be adjudicated by a court sitting in the state that provides the governing substantive law. *See Tex. E. Transmission Corp. v. Marine Office–Appleton & Cox Corp.,* 579 F.2d 561, 567–68 (10th Cir.1978); *Cook,* 816 F.Supp. at 669. This factor receives less weight when the case involves "relative[ly] simpl[e]" legal issues. *Scheidt,* 956 F.2d at 966 (noting that "the applicability of Florida law is not a significant concern in light of the relative simplicity of the legal issues involved in the common law fraud and breach of contract claims"). This factor also is less significant because federal judges are qualified to apply state law. ***1170** *See Chubb v. Union Pac. R.R. Co.,* 908 F.Supp. 853, 855 (D.Colo.1995). In this diversity action, as explained *infra* Part III, Wyoming provides the governing substantive law. Although this determination favors the retention of this action in Wyoming, this factor is not entitled to great weight because the action does not involve complex legal issues, the substantive laws of Wyoming and Utah are essentially equivalent with respect to the relevant issues, and the judges in each potential forum are qualified to decide the state-law issues.

6. Advantage of Having Local Court Determine Questions of Local Law

[15] This factor weighs slightly against transfer. When the merits of an action are unique to a particular locale, courts favor adjudication by a court sitting in that locale.

See Black & Veatch Constr., Inc. v. ABB Power Generation, Inc., 123 F.Supp.2d 569, 581 (D.Kan.2000) (transferring an action to a federal district court whose substantive state law applied to the contract); *see also Bailey v. Union Pac. R.R. Co.,* 364 F.Supp.2d 1227, 1233 (D.Colo.2005) ("There is a local interest in having localized controversies decided at home." (internal quotation marks omitted)). In this action, the merits involve a dispute over the parameters of the duty to defend and indemnify under CGL insurance policies. Although the CGL policies were negotiated, underwritten, and executed outside of Wyoming, the potentially insured actions consist of allegedly negligent work on a luxury hotel in Wyoming. Furthermore, as explained *infra* Part III, Wyoming state law also governs the interpretation of the CGL policies.

7. Remaining Factors

The remaining factors are either neutral or irrelevant. In particular, Bartile has not identified any obstacles to a fair trial in Wyoming. *Chubb,* 908 F.Supp. at 855. Bartile also has not raised any questions regarding the enforceability of a judgment against it. *Id.; Datasouth Computer Corp. v. Three Dimensional Techs., Inc.,* 719 F.Supp. 446, 450 (W.D.N.C.1989). Finally, Bartile has not claimed that any other practical considerations would make litigation in Utah more easy, expeditious, or economical than litigation in Wyoming.

In sum, the district court did not abuse its discretion in denying Bartile's motion to transfer. More specifically, it did not render an "arbitrary, capricious, whimsical, or manifestly unreasonable" judgment. *Bylin v. Billings,* 568 F.3d 1224, 1229 (10th Cir.2009), *cert. denied,* 559 U.S. 936, 130 S.Ct. 1506, 176 L.Ed.2d 110 (2010).

III. CHOICE OF LAW

[16] **[17]** **[18]** We review the district court's choice-of-law determination de novo. *Moses v. Halstead,* 581 F.3d 1248, 1251 (10th Cir.2009). "In a diversity action, we apply the substantive law of the forum state, including its choice of law rules." *Pepsi–Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.,* 431 F.3d 1241, 1255 (10th Cir.2005) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 495–97, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). Wyoming is the forum state. Under Wyoming law, courts engage in a choice-of-law analysis only if the laws of Wyoming actually conflict with those of another state. *Act I, LLC v. Davis,* 60 P.3d 145, 149 (Wyo.2002). "The existence of a conflict can only be determined in the context of a specific law applied to a specific issue." *Id.* "When there is no conflict, the [c]ourt applies the law of the forum." *Id.* "A federal district court's state-law determinations are entitled to no deference and are reviewed de novo." *Willis v. Bender,* 596 F.3d 1244, 1254 (10th Cir.2010) (brackets omitted) (internal quotation marks omitted).

***1171** In this action, the district court applied Wyoming law because it found no actual conflict between the laws of Wyoming and Utah. On appeal, Bartile argues that the district court should have applied Utah law because the laws of Wyoming and Utah conflict regarding (1) the admissibility of extrinsic evidence in determining the scope of an insurer's duty to defend, and (2) the definition of "accident." Although the laws of Wyoming and Utah undeniably conflict in certain respects, we affirm because this conflict is not *material* and would not produce different outcomes.

A. Extrinsic Evidence

[19] **[20]** The district court properly held that the laws of Utah and Wyoming prohibit the consideration of extrinsic evidence with respect to the CGL policies. In general, under Wyoming and Utah law, courts determine the scope of an insurer's duty to defend by "comparing the language of the insurance policy with the allegations of the complaint." *Fire Ins. Exch. v. Estate of Therkelsen,* 27 P.3d 555, 560 (Utah 2001) (internal quotation marks omitted); *accord Lawrence v. State Farm Fire & Cas. Co.,* 133 P.3d 976, 980 (Wyo.2006) (noting that courts "examine the terms of [the insurance] policy and the allegations contained in the ... complaint" (internal quotation marks omitted)); *Reisig v. Union Ins. Co.,* 870 P.2d 1066, 1069 (Wyo.1994) ("[W]e look *only* to the allegations of the Complaint filed by [the third-party complainant] to see if there is alleged a loss caused by an occurrence as required by the CGL policy." (emphasis added) (internal quotation marks omitted)). "The insurer is obligated to afford a defense as long as the alleged claim rationally falls within the policy coverage." *Shoshone First Bank v. Pac. Emp'rs Ins. Co.,* 2 P.3d 510, 513 (Wyo.2000); *accord Benjamin v. Amica Mut. Ins. Co.,* 140 P.3d 1210, 1214 (Utah 2006) ("The test is whether the complaint alleges a risk within the coverage of the policy." (internal quotation marks omitted)).

[21] **[22]** Even though Wyoming and Utah generally prohibit the consideration of evidence outside of the

complaint to determine the scope of an insurer's duty to defend, Utah law permits a court to consider extrinsic evidence in limited circumstances. Under Utah law, the admissibility of extrinsic evidence depends on the terms of the insurance policy.[14] *Estate of Therkelsen,* 27 P.3d at 561. Extrinsic evidence is not admissible "[i]f the parties make the duty to defend dependent on the *allegations* against the insured." *Id.* By ***1172** contrast, extrinsic evidence is admissible "if ... the parties make the duty to defend dependent on whether there is actually a 'covered claim or suit.' " *Id.* In other words, the key question is whether the duty-to-defend clause "is triggered by the facial language of a complaint or whether the clause is triggered by the actual facts underlying the complaint." *Equine Assisted Growth & Learning Ass'n v. Carolina Cas. Ins. Co.,* 216 P.3d 971, 972 (Utah Ct.App.), *cert. granted,* 221 P.3d 837 (Utah 2009).

14 When determining the scope of an insurer's duty to defend, Wyoming and Utah courts also consider extrinsic evidence in other circumstances. For example, Utah courts appear to examine extrinsic evidence when the insurance policy is ambiguous. *See Gen. Sec. Indem. Co. of Ariz. v. Tipton,* 158 P.3d 1121, 1123 (Utah Ct.App.2007) ("Where there is ambiguity in a written document, the first order of business is to consider any extrinsic evidence which might resolve the ambiguity."); *see also* 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 200:21 (3d ed. 2005) ("In determining the existence of a duty to defend, it has been held that extrinsic facts may be considered where the complaint is ambiguous or inadequate...."). Wyoming courts rely on extrinsic evidence when the insurer has actual knowledge of facts that may result in the claim falling within the policy's coverage. *See Sabins v. Commercial Union Ins. Cos.,* 82 F.Supp.2d 1270, 1275–78 (D.Wyo.2000); *see also* 14 Russ & Segalla, *supra* note 14, § 200:17 ("[S]ome jurisdictions look to actual knowledge of facts ... in addition to the allegations of the complaint, when determining an insurer's duty."); 14 Russ & Segalla, *supra,* § 200:21 ("In addition to the pleadings, some jurisdictions also consider known or discoverable facts ... in determining whether the insurer has a duty to defend."). On appeal, Bartile never argues that the CGL policies were ambiguous or that EMC had actual knowledge of the potential claims.

In this action, EMC issued a series of CGL policies to Bartile, covering the period from November 1, 2001, to November 1, 2004. The CGL policies contained identical duty-to-defend clauses that provided, in relevant part, as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage" *to which this insurance applies.* We will have the right and duty to defend the insured against any "*suit* " seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for ... "property damage" to which this insurance does not apply.

Aplt.App. at 727, 740, 785, 850 (emphasis added). Under the CGL policies, the term "suit" is defined as "a civil proceeding in which damages because of ... 'property damage' ... to which this insurance applies are *alleged*." *Id.* at 739, 799, 864 (emphasis added).

[23] We conclude that the CGL policies here preclude the admission of extrinsic evidence to determine the scope of EMC's duty to defend. Accordingly, insofar as the mandates of Wyoming and Utah law are not conterminous concerning the admission of extrinsic evidence, this inconsistency is not material in that it does not generate on the facts of this case an actual conflict of law.

In each of the CGL policies, EMC assumes the duty to defend against any "suit" seeking "damages because of ... property damage." *Id.* at 727, 740, 785, 850. The term "suit," in turn, refers to civil proceedings in which a party "allege[s]" the existence of damages within the coverage of the applicable CGL policy. *Id.* at 739, 799, 864. Although Bartile contends that the duty to defend allows the consideration of extrinsic evidence because the phrase "to which this insurance applies" is the equivalent of "covered claim," the definition of the term "suit" indicates that the duty to defend depends on the "allegati[on][of] liability within the coverage afforded by the policy" rather than on a determination that the suit is actually covered by the policy. *Estate of Therkelsen,* 27 P.3d at 561.

Indeed, when interpreting identical or substantially similar duty-to-defend clauses under Utah law, courts have rejected the use of extrinsic evidence. *See, e.g., Mid–Am. Pipeline Co. v. Mountain States Mut. Cas. Co.,* No. 2:05–CV–153, 2006 WL 1278748, at *2, 2006 U.S. Dist. LEXIS 30245, at *7–8

(D.Utah May 8, 2006) (prohibiting extrinsic evidence when the policy stated that the insurer will "defend any suit seeking those damages to which this insurance applies" (internal quotation marks omitted)); *H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.,* 248 F.Supp.2d 1079, 1087 (D.Utah 2002) (prohibiting extrinsic evidence when the policy stated that the insurer will "defend the insured against any 'suit' " that seeks "damages because of ... 'property damage' to which this insurance applies"); *see also Rosas v. Eyre,* 82 P.3d 185, 189–90 (Utah Ct.App.2003) (prohibiting extrinsic evidence when the policy stated that the insurer "will ... provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent," against any claim or suit seeking "damages because of ... property ***1173** damage caused by an occurrence to which this coverage applies"). [15]

15 Before considering extrinsic evidence, courts have required the insurance policy to use the phrase "covered by" or to necessitate the finding of objective facts. *See e.g., Westport Ins. v. Ray Quinney & Nebeker,* No. 2:07–CV–236–TC, 2009 WL 2474005, at 13 & n. 6, 2009 U.S. Dist. LEXIS 69203, at *39 & n. 6 (D.Utah Aug. 7, 2009) (allowing extrinsic evidence when the policy stated that the insurer has the duty "to defend any claim for loss against any insured *covered by* [the policy], even if such claim is groundless, false or fraudulent" (emphasis added) (internal quotation marks omitted)); *Equine Assisted Growth & Learning Ass'n,* 216 P.3d at 972 (allowing extrinsic evidence when the policy stated that the insurer has the duty to defend claims made "by, on behalf of, or in the right of [the insured]" because this duty is triggered by "objective facts, the truth or falsity of which are not determined solely by the allegations" of the complaint (internal quotation marks omitted)).

Thus, the district court properly held that Wyoming and Utah law are not in actual conflict regarding the admissibility of extrinsic evidence in this action, even though they employ slightly different tests to decide whether to consider extrinsic evidence in determining an insurer's duty to defend.

B. Definition of "Accident"

[24] The district court properly held that Wyoming and Utah law are not in actual conflict regarding their definitions of "accident" with respect to these particular CGL policies. Under these CGL policies, EMC assumes the duty to defend against any suits seeking damages for property damage caused by an "occurrence" within the coverage territory. Aplt.App. at 727, 740, 785, 850. An "occurrence," in turn, is defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 738, 798, 863. Because the CGL policies do not define "accident," we turn to state law to define this term. *See Estate of Therkelsen,* 27 P.3d at 559; *Reisig,* 870 P.2d at 1069–70.

[25] Based on a review of the relevant case law, Wyoming and Utah define the term "accident" differently when interpreting CGL policies. Under Wyoming law, courts define the term "accident" as:

> [A] fortuitous *circumstance, event, or happening,* an *event* happening without any human agency, or if happening wholly or partly through human agency, an *event* which under the circumstances is unusual or unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for *event, happening or occurrence; ...* chance or contingency; fortune; mishap; some sudden and unexpected *event* taking place without expectation, upon the instant, rather than something which continues, progresses or develops....

Reisig, 870 P.2d at 1069–70 (emphasis added) (quoting *Wright v. Wyo. State Training Sch.,* 71 Wyo. 173, 255 P.2d 211, 218 (1953)). "By its very nature an accident contemplates an unforseen event that is neither intended nor expected." *Great Divide Ins.,* 2006 WL 3933078, at *8, 2006 U.S. Dist. LEXIS 94826, at *21 (emphasis added).

By contrast, under Utah law, courts define the term "accident" as:

> [T]he word [accident] is descriptive of means which produce *effects* which are not their natural and probable consequences.... An *effect* which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by

> accidental means. It is either the result of actual design, or it falls under the maxim that every man ***1174** must be held to intend the natural and probable consequence of his deeds.

Nova Cas. Co. v. Able Constr., Inc., 983 P.2d 575, 579 (Utah 1999) (emphasis added) (quoting *Richards v. Standard Accident Ins. Co.,* 58 Utah 622, 200 P. 1017, 1023 (1921)). The Utah Supreme Court recently clarified that "harm or damage is not accidental if it is the natural and probable consequence of the insured's act or should have been expected by the insured." *N.M. ex rel. Caleb v. Daniel E.,* 175 P.3d 566, 569 (Utah 2008) (emphasis added). Thus, Wyoming law focuses on the unexpectedness of the *event,* while Utah law focuses on the unexpectedness of the *result or injury.* [16]

16 Bartile unsuccessfully attempts to draw other distinctions between the definitions of "accident" under Wyoming and Utah law. For example, Bartile observes that Utah "focus[es] on whether an occurrence caused property damage, not how the remedy for that damage was pled in legal papers." Aplt. Opening Br. at 23. The case law illustrates, however, that Wyoming and Utah both consider "the facts alleged in the complaint" rather than "the label counsel applied to a particular cause of action." *Matlack v. Mountain W. Farm Bureau Mut. Ins. Co.,* 44 P.3d 73, 78 (Wyo.2002); *accord Great Am. Ins. Co. v. Woodside Homes Corp.,* 448 F.Supp.2d 1275, 1285–86 (D.Utah 2006) ("Utah law looks to the substance of a particular claim not its form"); *First Wyo. Bank, N.A. v. Cont'l Ins. Co.,* 860 P.2d 1094, 1099 (Wyo.1993).
Bartile also notes that Utah expressly disclaimed a "foreseeability" test for ascertaining the existence of an "accident." Aplt. Opening Br. at 22–23. Although the Utah Supreme Court indicated that "the test is not whether the result was foreseeable, but whether it was expected," *N.M. ex rel. Caleb,* 175 P.3d at 571 (internal quotation marks omitted), the court was concerned that importing the meaning of "foreseeability" from tort law would "render[ ] coverage completely illusory," *id.* at 571 n. 7. But Wyoming has not imported the definition of "foreseeable" from tort law and, like Utah, uses the concept of "expected" in its definition of "accident." *See Reisig,* 870 P.2d at 1069–70; *see also Great Divide Ins.,* 2006 WL 3933078, at *8, 2006 U.S. Dist. LEXIS 94826, at *21.

[26] Despite this definitional difference, Wyoming and Utah law are not in actual conflict because the difference is immaterial to the alleged claims. *Act I,* 60 P.3d at 149. In this action, even though the underlying complaints plead claims under several labels, the claims all arise out of Bartile's allegedly negligent roofing work and its alleged breach of its contractual duties to perform roofing work, indemnify the general contractor, and obtain insurance for the general contractor. Under Wyoming and Utah law, "the natural results of [an insured's] negligent and unworkmanlike construction do not constitute an occurrence triggering coverage under a[CGL] policy." [17] *Great Divide Ins.,* 2006 WL 3933078, at *8, 2006 U.S. Dist. LEXIS 94826, at *23 (holding that an event is not an "accident" under Wyoming law if defendant breached the underlying construction contract and the damages are "the natural and foreseeable result" of an insured's ***1175** negligent construction work); *accord Great Am. Ins.,* 448 F.Supp.2d at 1281 ("[A]n insured's own faulty or negligent work is not fairly characterized as an occurrence under a[CGL] policy."); *H.E. Davis,* 248 F.Supp.2d at 1084 (holding that the insured's negligent work was not an "accident" under Utah law because the consequences of such work were "natural, expected, or intended"). [18]

17 EMC contends that—as a categorical matter—insurers have no duty to defend against breach-of-contract claims under Wyoming or Utah law. We disagree. It is true that under Wyoming law, a breach of contract never constitutes an "accident." *See Great Divide Ins.,* 2006 WL 3933078, at *8, 2006 U.S. Dist. LEXIS 94826, at *30; *First Wyo. Bank,* 860 P.2d at 1099; *Action Ads, Inc. v. Great Am. Ins. Co.,* 685 P.2d 42, 43–44 (Wyo.1984). However, Utah courts "ha[ve] not adopted wholesale the notion that [CGL] policies confine the insurer's liability to tort actions alone." *Great Am. Ins.,* 448 F.Supp.2d at 1285. However, as discussed in the text *supra,* on the facts presented here, this point of difference is not material to the choice-of-law issue. Concerning the question that these facts place at issue—*viz.,* whether the natural results of an insured's unworkmanlike or negligent construction can constitute an occurrence (i.e., accident) triggering coverage under a CGL policy—the law of Wyoming and Utah is in agreement, answering in the negative.

18 Bartile complains that the district court improperly relied on *H.E. Davis.* Because *H.E. Davis* used the term "foreseeable" in finding that the negligent action was not an "accident," Bartile claims that *H.E. Davis* was effectively overruled by *N.M. ex rel. Caleb.* Aplt. Opening Br. at 21–23; Aplt. Reply Br. at 7–8. As discussed *supra* note 16, however, the Utah Supreme Court was concerned with importing the meaning of

"foreseeability" from tort law. *N.M. ex rel. Caleb,* 175 P.3d at 571 n. 7. Furthermore, *H.E. Davis* is consistent with *N.M. ex rel. Caleb* because it found that the negligent results of the construction were not "expected." *H.E. Davis,* 248 F.Supp.2d at 1084. The district court also did not err in omitting *N.M. ex rel. Caleb* from its discussion in this case because the Utah Supreme Court followed its own precedent in defining the term "accident" for purposes of a CGL policy.

In sum, the district court properly found that Wyoming and Utah would apply the same law to this action regarding the admissibility of extrinsic evidence and the definition of the term "accident." The district court also correctly applied the law of the forum.

IV. RECOUPMENT OF COSTS

"We review the district court's grant of summary judgment de novo, using the same legal standard applied by the district court." *Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co.,* 593 F.3d 1188, 1192 (10th Cir.2010). Summary judgment should be granted if "there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). When applying this standard, "[w]e examine the factual record and draw all reasonable inferences in the light most favorable to the nonmoving party." *City of Herriman v. Bell,* 590 F.3d 1176, 1181 (10th Cir.2010).

The district court denied EMC's motion for summary judgment with respect to the request to recoup the costs of defending Bartile in the underlying action. EMC argues that it undertook this defense subject to a reservation of rights. Because the district court concluded that EMC did not have a duty to defend Bartile against the allegations, EMC contends that it is entitled to recoup those defense costs.

[27] **[28]** **[29]** **[30]** Under Wyoming law,[19] courts disfavor insurer's attempts to defend insureds while retaining the right to deny coverage and recoup defense costs at a later date. *Shoshone First Bank,* 2 P.3d at 515–16; *see Am. States Ins. Co. v. Ridco, Inc.,* No. Civ. 95CV158D, 1996 WL 33401184, at *3 (D.Wyo. Feb.8, 1996). "The insurer is not permitted to unilaterally modify and change policy coverage." *Shoshone First Bank,* 2 P.3d at 515. Furthermore, " '[a] reservation of rights letter does not create a contract allowing an insurer to recoup defense costs from its insureds.' " *Id.* at 516 (quoting *Ridco*, 1996 WL 33401184, at *3). " 'If an insurance carrier believes that no coverage exists, then it should deny its insured a ***1176** defense at the beginning instead of defending and later attempting to recoup from its insured the costs of defending the underlying action.' " *Id.* (quoting *Ridco,* 1996 WL 33401184, at *3).

19 We have not engaged in a choice-of-law analysis with respect to the recoupment of costs. In denying EMC's motion to recoup costs, the district court applied Wyoming law. Although EMC attempts to distinguish the Wyoming case law on appeal, it limits its challenge to the merits of the denial. Neither party disputes the application of Wyoming law.

[31] In this action, EMC has no right to recoup its costs of defending Bartile. As an initial matter, the CGL policies contain no provisions reserving EMC's right to recoup defense costs from Bartile. Although EMC subsequently issued a reservation-of-rights letter, this letter constituted a unilateral attempt either to modify the existing CGL policies or to create a new contract authorizing recoupment. Neither attempt succeeds. As *Shoshone First Bank* instructs, EMC should have denied Bartile a defense at the outset of the underlying action instead of defending against the action for several years and only now attempting to recoup its defense costs.

EMC attempts to distinguish *Shoshone First Bank* on its facts. In particular, EMC notes that *Shoshone First Bank* addressed an insurer's request to recoup its defense costs in a case involving an amalgam of covered and non-covered claims. By contrast, EMC explains that it seeks to recover defense costs in a case involving only non-covered claims. In reaching its conclusion in *Shoshone First Bank,* however, the Wyoming Supreme Court favorably cited "a very clear and incisive articulation of the problem" with reservation-of-rights letters. 2 P.3d at 516 (referencing *Ridco,* 1996 WL 33401184, at *3). As noted *supra,* the problem is that "[a] reservation of rights letter does not create a contract" and is therefore unenforceable. *Id.* This "articulation" constitutes a strong indication of how the Wyoming Supreme Court would rule on this matter where only non-covered claims are at issue. Finally, despite EMC's requests, we decline to reverse the district court merely because Wyoming follows the minority position on the recoupment-of-costs issue.[20]

20 In its reply brief, EMC argues that the court should enforce the reservation-of-rights letter. First, EMC contends that the letter is enforceable absent an express agreement because it "timely and explicitly reserve[d] its right to recoup the costs" and "provide[d] specific and adequate notice of the possibility of reimbursement." Aplee. Reply Br. at 3. Second, EMC claims that the letter

Employers Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153 (2010)

is enforceable because it was an implied-in-fact contract. Third, EMC asserts that the letter is enforceable because "[t]he defense was offered and provided under the reservation of rights, not under obligations established by the [CGL] polic[ies]." *Id.* at 6. Nevertheless, EMC waived these arguments by failing to raise them before the district court, *see Cummings v. Norton,* 393 F.3d 1186, 1190 (10th Cir.2005) ("[I]ssues not raised below are waived on appeal."), and in its opening brief, *see* Fed. R.App. P. 28(a)(9)(A); *Bronson,* 500 F.3d at 1104.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's orders denying the motions to dismiss, denying the motion to transfer, and granting summary judgment in favor of EMC on the duty-to-defend issue, and denying summary judgment to EMC on the recoupment-of-costs issue.

All Citations

618 F.3d 1153

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Zurich American Insurance Company v. Electricity Maine, LLC, 1st Cir.(Me.), June 17, 2019

772 F.3d 960
United States Court of Appeals,
First Circuit.

LYMAN MORSE BOATBUILDING, INC. and Cabot Lyman, Plaintiffs, Appellees, Cross–Appellants,
v.
NORTHERN ASSURANCE COMPANY OF AMERICA, Defendant, Appellant, Cross–Appellee.

Nos. 14–1380, 14–1438.
|
Dec. 2, 2014.

Synopsis

Background: Insureds, a boat building company and its controlling owner, brought action against commercial general liability (CGL) insurer, seeking to recover costs and attorney fees that they incurred in defending arbitration proceeding relating to claim that luxury yacht constructed by company had numerous defects. The United States District Court for the District of Maine, D. Brock Hornby, J., ruled that insurer had a duty to defend owner, but not company, and awarded owner 50 percent of the attorney fees that owner and company jointly incurred in defending the arbitration proceeding. Parties cross-appealed.

Holdings: The Court of Appeals, Lynch, Chief Judge, held that:

[1] insurer was not obliged to defend company, and

[2] insurer was not obliged to defend owner.

Affirmed in part, reversed in part, and remanded.

West Headnotes (9)

[1] Federal Courts
Insurers and insurance
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3619 Substantive Matters
170Bk3634 Trade, Business, and Finance
170Bk3634(5) Insurers and insurance
District court's conclusion on an insurer's duty to defend is reviewed de novo.

[2] Insurance
Pleadings
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings
To determine whether an insurer owes its insured a duty to defend, Maine courts apply the "comparison test," which involves a comparison of the allegations in the underlying complaint with the provisions of the insurance policy to determine if the claims alleged are within the coverage of the policy.

3 Cases that cite this headnote

[3] Insurance
In general; standard
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 In general; standard
Under Maine law, an insurer must provide a defense if there is any potential that facts ultimately proved could result in coverage.

[4] Insurance
In general; standard
Insurance
Matters beyond pleadings
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 In general; standard
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 Matters beyond pleadings

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

Under Maine law, because the duty to defend is broad, any ambiguity in a policy regarding the insurer's duty to defend is resolved against the insurer, and policy exclusions are construed strictly against the insurer; at the same time, courts may not speculate about causes of action that were not stated in the complaint.

2 Cases that cite this headnote

[5] **Insurance**
Property damage
Insurance
Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Under Maine law, commercial general liability (CGL) insurer was not obliged to defend boat building company against arbitration complaint alleging that luxury yacht constructed by company had numerous defects; complaint did not allege actual damage to property, but rather, sought damages for replacing defective workmanship, which was a business risk specifically excluded from the policy.

[6] **Insurance**
Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Under Maine law, commercial general liability (CGL) insurer was not obliged to defend controlling owner of boat building company against arbitration complaint alleging that luxury yacht constructed by company had numerous defects; policy's "your product" exclusion, which excluded from coverage property damage to "your product" arising out of it or any part of it, applied to owner as well as company.

[7] **Insurance**
Intention

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1812 In general

In interpreting an insurance contract under Maine law, the court's task is to effect the parties' intentions construed with regard for the subject matter, motive, and purpose of the agreement, as well as the object to be accomplished.

[8] **Insurance**
Construction as a whole
Insurance
Plain, ordinary or popular sense of language

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 Construction as a whole
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

In interpreting an insurance contract under Maine law, the court must examine the entire agreement, giving the language its plain meaning.

[9] **Insurance**
Accident, occurrence or event
Insurance
Property damage
Insurance

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

Products and Completed Operations Hazards

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Under Maine law, commercial general liability (CGL) policies are designed to cover "occurrence of harm risks" but not "business risks"; an "occurrence of harm risk" is a risk that a person or property other than the product itself will be damaged through the fault of the insured, whereas a "business risk" is a risk that the insured will not do his job competently, and thus will be obligated to replace or repair his faulty work.

1 Cases that cite this headnote

Attorneys and Law Firms

***962** James D. Poliquin, with whom Norman, Hanson & DeTroy, LLC was on brief, for appellant/cross-appellee Northern Assurance Company of America.

Robert C. Hatch, with whom Leonard W. Langer, Hillary J. Bouchard, and Thompson & Bowie, LLP were on brief, for appellees/cross-appellants Lyman Morse Boatbuilding, Inc. and Cabot Lyman.

Before LYNCH, Chief Judge, STAHL and KAYATTA, Circuit Judges.

Opinion

LYNCH, Chief Judge.

Lyman Morse Boatbuilding, Inc. (LMB) of Maine contracted to build a luxury yacht for Russ Irwin. Unhappy with the completed yacht, in 2011 Irwin brought an arbitration proceeding against LMB and Cabot Lyman, the controlling owner of LMB, alleging that the vessel had numerous defects. LMB and Cabot Lyman tendered defense of the arbitration complaint to their insurer, Northern Assurance Company of America, but Northern Assurance refused to defend the insureds. So the insureds filed this federal suit in 2012 seeking to recover the costs and attorneys' fees that they incurred in the arbitration proceeding.

The district court held that Northern Assurance had a duty to defend Cabot Lyman, the individual, but not LMB, the corporation; it then awarded to Cabot Lyman 50 percent of the attorneys' fees incurred during the arbitration by the two insureds together. Each side was unhappy and we are faced with appeals and cross-appeals. We conclude that on the pertinent facts Northern Assurance owed neither insured a defense under Maine law. Thus, we affirm in part, reverse in part, and remand for entry of judgment in favor of Northern Assurance.

I.

A. *The Arbitration Demand*

On July 22, 2011, Irwin filed an arbitration complaint against LMB and Cabot Lyman, claiming damages related to the allegedly defective construction of a 52–foot custom sailing vessel.[1] Irwin alleged that LMB and Cabot Lyman had agreed to build the vessel "with the 'best practices for quality yacht construction' using the 'highest quality materials' " for a price of $2,155,000. However, there were cost overruns, and Irwin eventually ended up paying over $3,400,000 for the completed vessel. Moreover, upon LMB's delivery of the vessel to Irwin, Irwin allegedly discovered multiple defects, which necessitated a series of rejections and repairs. As of the date of filing of the arbitration complaint, the quality of the vessel was still unsatisfactory to Irwin.

1 The "Yacht Construction Contract" applicable to the transaction contains an arbitration clause providing that "[a]ny dispute arising from this agreement will be resolved via binding arbitration."

That complaint alleged eight causes of action: intentional fraud, negligent misrepresentation, constructive fraud, breach of contract, rejection and revocation of acceptance under the

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

Uniform Commercial ***963** Code, breach of the implied warranty of fitness for a particular purpose, breach of the implied warranty of merchantability, and violations of Maine's unfair trade practices laws. Irwin requested rescission of the agreement and a refund and damages for the time he spent and the expenses he incurred during the period when he repeatedly rejected the yacht because of its defects, as well as "the return ... of the amounts overpaid to [LMB and Cabot Lyman] and the difference between the value of the 'highest quality' version of the Vessel that [LMB and Cabot Lyman] represented that [Irwin] would receive and the actual version [Irwin] received." He also requested punitive damages, attorneys' fees and costs, interest, and "such other and further relief as the Court deems just and proper."

The arbitration complaint contained two paragraphs naming Cabot Lyman. First, Irwin alleged that Cabot Lyman, the controlling owner of LMB, was the alter ego of the corporation, and alleged that "[a] unity of interest exists between [Cabot] Lyman and [LMB] and injustice and fraud can only be avoided by piercing the corporate veil" and holding Cabot Lyman jointly and severally liable for the wrongs alleged.

Second, in the course of alleging violations of Maine's unfair trade practices laws, the complaint stated that LMB and Cabot Lyman

> made further repeated representations and promises to [Irwin] about "best practices" and "highest quality" construction that they guaranteed for the completion of the Vessel ...; for example, [Cabot] Lyman expressly represented to [Irwin] that he had extensive experience sailing worldwide including in the Caribbean and he was aware of the most common problems [Irwin] would encounter during his travels in tropical and other varying conditions ...; as such he assured the Vessel would be completed to withstand these issues.

After the insurer refused their request for defense, LMB hired a law firm, Thompson & Bowie, LLP, to represent both it and Cabot Lyman in the arbitration. That firm then filed this lawsuit on behalf of the insureds, seeking to recover from Northern Assurance the costs and attorneys' fees incurred in the arbitration.[2] LMB and Cabot Lyman also brought a claim for unfair claims settlement practices, contending that Northern Assurance had not made a coverage decision in a timely manner.

2 The district court found that LMB paid or reimbursed all of Cabot Lyman's attorneys' fees.

B. *The CGL Insurance Policy*

On January 4, 2008, Northern Assurance had issued a package insurance policy to LMB and Cabot Lyman. The named insureds listed in the Declarations of the policy are "Lyman Morse Boatbuilding Co., Inc." and "Cabot & Heidi Lyman ATIMA." "ATIMA" stands for "as their interests may appear." Section III of the package policy provides the insureds with Commercial General Liability (CGL) insurance. It states in relevant part as follows:

> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy....
>
> ....
>
> a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" ***964** to which this insurance applies. We will have the right and duty to defend the Insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply....
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence"....

"Property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not physically injured." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." " 'Suit' means a civil proceeding in which damages because of ... 'property damage' ... to

which this insurance applies are alleged," and includes "[a]n arbitration proceeding in which such damages are claimed and to which the Insured must submit."

Importantly, the policy excludes from coverage " '[p]roperty damage' to 'your product' arising out of it or any part of it." This exclusion, common to CGL policies, is generally called the "your product" exclusion. "Your product," in turn,

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

C. *The Proceedings in the District Court*

On cross-motions for summary judgment, the district court held that Northern Assurance had no duty to defend LMB, but that it did have an obligation to defend Cabot Lyman in the arbitration proceeding. *Lyman Morse Boatbuilding, Inc. v. N. Assurance Co. of Am., Inc.,* No. 2:12–cv–313–DBH, 2013 WL 5435204, at *1 (D.Me. Sept. 27, 2013) [hereinafter *Lyman I*]. The court held that the "your product" exclusion excused Northern Assurance from any duty to defend LMB because the only "property damage" alleged by the arbitration demand was to the yacht built by LMB. *Id.* at *4. "There is no suggestion" in the arbitration demand, the court explained, "that somehow the yacht's defects damaged *other* property." *Id.*

However, the court determined that Northern Assurance did have a duty to defend Cabot Lyman, the individual, notwithstanding the "your product" exclusion, because "[t]he yacht was the boatyard's product, not Cabot Lyman's product." *Id.* ***965** at *5. [3]

3 The court also held that Irwin's claims for economic loss were not covered by the policy, *see Lyman I,* 2013 WL 5435204, at *2, *4 & n. 10, and that Northern Assurance was entitled to summary judgment on the insureds' claim of unfair claims settlement practices, *see id.* at *5–6. Those rulings are not at issue on appeal.

In a separate order on the issue of damages, the district court held that Cabot Lyman was entitled to recover 50 percent of the attorneys' fees that LMB and Cabot Lyman jointly incurred in defending the arbitration proceeding. *Lyman Morse Boatbuilding, Inc. v. N. Assurance Co. of Am., Inc.,* No. 2:12–cv–313–DBH, 2014 WL 901445, at *1, *4 (D.Me. Mar. 6, 2014) [hereinafter *Lyman II*]. Reasoning that "[b]oth the corporation and the individual needed a defense, [and that] the nature of their defenses overlapped substantially, albeit not entirely," the court concluded that an equal division of fees between the corporation and the individual was appropriate. *Id.* at *3–4.

D. *This Appeal*

Northern Assurance has appealed, arguing that it did not owe a duty to defend Cabot Lyman in the arbitration proceeding, and LMB and Cabot Lyman have cross-appealed, arguing that Northern Assurance did owe a duty to defend LMB. Both parties contend that the district court's ruling on the duty to defend and the damages issue was error.

II.

[1] "The district court's conclusion on the duty to defend is reviewed de novo." *Metro. Prop. & Cas. Ins. Co. v. McCarthy,* 754 F.3d 47, 49 (1st Cir.2014) (citing *Bucci v. Essex Ins. Co.,* 393 F.3d 285, 290 (1st Cir.2005)); *see also Mitchell v. Allstate Ins. Co.,* 36 A.3d 876, 879 (Me.2011) (analysis of insurer's duty to defend under Maine law is a pure question of law reviewed de novo).

[2] **[3]** **[4]** The parties agree that Maine law applies to this dispute. To determine whether an insurer owes its insured a duty to defend, Maine courts apply the "comparison test," which involves a "comparison of the allegations in the

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

underlying complaint with the provisions of the insurance policy" to determine if the claims alleged are within the coverage of the policy. *Mitchell,* 36 A.3d at 879. "[A]n insurer must provide a defense if there is any *potential* that facts ultimately proved could result in coverage." *Id.; accord Howe v. MMG Ins. Co.,* 95 A.3d 79, 81 (Me.2014) (quoting *Cox v. Commonwealth Land Title Ins. Co.,* 59 A.3d 1280, 1283 (Me.2013)). "Because the duty to defend is broad, any ambiguity in the policy regarding the insurer's duty to defend is resolved against the insurer, and policy exclusions are construed strictly against the insurer." *Mitchell,* 36 A.3d at 879 (citations omitted). At the same time, courts may "not speculate about causes of action that were not stated" in the complaint. *York Golf & Tennis Club v. Tudor Ins. Co.,* 845 A.2d 1173, 1175 (Me.2004).

[5] We first address whether Northern Assurance had a duty to defend LMB in the arbitration proceeding. LMB concedes that "the 'your product' exclusion serves to exclude coverage for any property sold, handled, distributed or disposed of by" LMB, which includes the allegedly defective yacht. But, LMB argues, Northern Assurance nonetheless owed a duty to defend it in the arbitration proceeding because "the allegations in the Arbitration Complaint provide a basis for Russ Irwin to prove damage to his own or others' personal property, which would fall within ***966** the ambit of coverage under the Policy as unexcluded 'property damage.' "

This argument fails. As the district court correctly observed,

> [Irwin's] Arbitration Demand is strident, but simple. It complains about the failure to build the yacht as promised, as well as overbilling.... [T]he claims for economic damage.... all have to do with what the buyer paid, the difference in value between the yacht as promised and actually delivered, and the value of the buyer's time, expense and burdens in dealing with the boatyard while trying to obtain satisfaction. There is no suggestion that somehow the yacht's defects damaged *other* property. There is no suggestion, for example, that the buyer put cushions and equipment on the yacht that were damaged on account of defects.

Lyman I, 2013 WL 5435204, at *4. Thus the complaint did not allege any facts that even suggest the potential for a covered claim.

Plaintiffs resist this conclusion, pointing out that, in the course of alleging constructive fraud, Irwin alleged that LMB and Cabot Lyman "breached the trust and confidence which [Irwin] entrusted with them in the failed construction and completion of the Vessel and in putting [Irwin]'s life, limb and property and those of his family and loved ones at risk on the oceans and at sea." But this passing reference to a "risk" to property is not sufficient to trigger a duty to defend under Maine law.

In *Baywood Corp. v. Maine Bonding & Casualty Co.,* 628 A.2d 1029 (Me.1993), the Maine Law Court found that a complaint alleging that the insured inadequately designed a sewer system for a condominium complex did not fall within the coverage of a CGL policy because it sought only "the cost to replace or upgrade the [sewer] system." *Id.* at 1031. Although "the complaint refer [red] generally to property damage," the Law Court explained, it "allege[d] no physical damage to the [condominium] units." *Id.* Thus, the insurer had no duty to defend. *Id.*

So it is here. While referring generally to a "risk" to personal property, Irwin's arbitration complaint did not allege any damage to such property or request any relief for personal property damage. Instead, the complaint requested several specific items of relief related to the damage sustained by the defective vessel itself and the expense that Irwin went to in discovering and attempting to rectify its defects. "[B]ecause [Irwin's] complaint d[id] not allege actual damage to property but rather s[ought] damages for replacing defective workmanship, which is a business risk specifically excluded from the policy, [Northern Assurance] ha[d] no obligation to defend the underlying action." *Id.*

Plaintiffs erroneously argue that because the arbitration complaint did not *foreclose* the possibility that Irwin's personal property was damaged, LMB was entitled to a defense. That is not a correct statement of the law. If plaintiffs' articulation of the duty to defend were correct, that would make the duty virtually limitless. [4] More specifically, it would run afoul of the Maine Law Court's admonition that courts

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

adjudicating the duty to defend may "not speculate about causes of action that were not stated" in the complaint. *York Golf & Tennis Club,* 845 A.2d at 1175.

4 The same goes for plaintiffs' contention at oral argument that Northern Assurance owed a duty to defend based on the complaint's request "[f]or such other and further relief as the Court deems just and proper." If an insurer were required to defend simply because a complaint includes a catchall request for all "just and proper" relief, the duty to defend would be triggered in virtually every case, contrary to the contours of Maine law.

***967** The cases upon which plaintiffs rely do not in fact support plaintiffs' overly broad articulation of the duty to defend. They are readily distinguishable from this case. In *Auto Europe, LLC v. Connecticut Indemnity Co.,* 321 F.3d 60 (1st Cir.2003), the underlying complaint alleged that Auto Europe had fraudulently overcharged its customers in violation of the Maine Unfair Trade Practices Act (UTPA). *Id.* at 63, 66–67. The court held that Auto Europe was entitled to a defense from its insurance company notwithstanding a policy exclusion for "willfully dishonest or fraudulent acts" because the Maine UTPA "permit[ted] liability in the absence of an intent to deceive," so "it [was] possible ... that the facts as developed at trial would reveal an improper practice that was unaccompanied by an intent to deceive." *Id.* at 67–68. Similarly, in *Mitchell,* the Maine Law Court held that Mitchell was entitled to a defense against a complaint that alleged that he converted lobster fishing equipment, notwithstanding a policy exclusion for intentional acts, because the complainant, Ames, could have established that Mitchell committed conversion by "accidentally interfer[ing] with Ames's rights." 36 A.3d at 880–81. Finally, in *Howe,* the Law Court held that the insurer had a duty to defend a nuisance and negligence lawsuit arising out of the conduct of the insured condominium owner's dog because the complaint alleged that the dog had "bitten people" and that other "unit owners ha[d] been assaulted" by the dog, and thus alleged "bodily injury" potentially covered by the insurance policy. *See* 95 A.3d at 81.[5] Thus, in *Auto Europe, Mitchell*, and *Howe,* the court found a duty to defend because there was a theory of liability under a cause of action *actually pleaded* that would have afforded insurance coverage. Here, in contrast, Irwin's complaint—while specifying in considerable detail the relief sought—made no claim whatsoever for damage to personal property. The district court correctly found that Northern Assurance had no duty to defend LMB.

5 Counsel for LMB stated at oral argument that, in *Howe,* the Law Court determined that "there was a duty to defend because it [was] possible, though never alleged in the complaint, that the dog could have done property damage to [condominium] Association property." This was an argument that Howe's counsel made in her brief, *see Howe,* 95 A.3d at 81, but the court did not explicitly accept (or reject) it. The court explicitly found a duty to defend because the complaint "outline[d] a claim of *bodily injury* for which Howe might be answerable to the [condominium] Association, depending on the facts developed as the case proceeds." *Id.* (emphasis added).

[6] We conclude otherwise as to the court's ruling that Northern Assurance did have a duty to defend Cabot Lyman in the arbitration proceeding because the "your product" exclusion did not apply to him. We find that the exclusion does apply to Cabot Lyman and thus hold that Northern Assurance had no duty to defend him in the arbitration proceeding.

[7] **[8]** In interpreting this insurance contract, our task is to " 'effect the parties' intentions ... construed with regard for the subject matter, motive, and purpose of the agreement, as well as the object to be accomplished.' " *State v. Murphy,* 861 A.2d 657, 661 (Me.2004) (alteration in original) (quoting *Handy Boat Serv., Inc. v. Prof'l Servs., Inc.,* 711 A.2d 1306, 1308 (Me.1998)). We must examine the entire agreement, giving the language its plain meaning. *Id.* (citing *Am. Prot. Ins. Co. v. Acadia Ins. Co.,* 814 A.2d 989, 993–94 (Me.2003)).

The insurance policy defines "your product" as "goods or products ... manufactured, ***968** sold, handled, distributed or disposed of by ... [y]ou." The term "[i]ncludes ... [w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product.' " "[T]he words 'you' and 'your' refer to the Named Insured" listed on the policy, and those Named Insureds are LMB, Cabot Lyman, and Heidi Lyman. Thus, the "your product" exclusion, by its plain terms, applies to the products of LMB, Cabot Lyman, or Heidi Lyman, and to damages arising out of warranties or representations made "with respect to the fitness, quality, durability, performance or use" of such products. *Cf. Am. First Credit Union v. Kier Constr. Corp.,* 314 P.3d 1055, 1059 (Utah Ct.App.2013) (holding that "your product" exclusion in CGL policy on which Broberg was the named insured was properly read to "exclude[ ] coverage for '[p]roperty damage to [Broberg's] product arising out of it or any part of it' " (second and third alterations in original) (internal quotation marks omitted)). The term "your

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

product" includes the yacht (because it is LMB's product) and the allegedly fraudulent misrepresentations made by Cabot Lyman as president and officer of LMB (because they concerned the quality of the yacht).

Northern Assurance argues that the "your product" exclusion is "not insured-specific"—the operation of the exclusion does not depend on the identity of the insured against whom the suit is brought. It adds that this must at least be true here, where the other insured, as a corporate officer, has allegedly acted as an alter ego of the corporation that designed the product, and the policy explicitly precludes coverage for representations made with respect to the quality of the corporate insured's products. [6] The provision does not exclude property damage to "the insured's product"; it excludes property damage to "your product," a term that, on these facts, includes the yacht even with respect to the suit against Cabot Lyman.

6 We need not address whether the "your product" exclusion would preclude coverage for a claim against an individual officer that is not explicitly included in the policy's definition of "your product."

Cabot Lyman and LMB cite no case or policy language that refutes that interpretation of the insurance contract on the facts here. Instead, they rely on the rule that ambiguities in insurance contracts should be resolved against the insurer. That rule is inapplicable. The "your product" exclusion is not ambiguous in its application here. Irwin's complaint alleged damages to the yacht; the policy excludes damages to "your product"; "you" is defined as, *inter alia,* LMB; the yacht is LMB's product; thus, the policy unambiguously excludes the allegations of the complaint. Accordingly, on these facts, we find that Northern Assurance had no duty to defend Cabot Lyman in the arbitration proceeding.

[9] To hold otherwise would undercut the well-recognized purpose of CGL insurance policies, as articulated by the Maine Law Court. CGL policies are designed to cover "occurrence of harm risks" but not "business risks." *Peerless Ins. Co. v. Brennon,* 564 A.2d 383, 386 (Me.1989). As the Law Court explained,

> [a]n "occurrence of harm risk" is a risk that a person or property other than the product itself will be damaged through the fault of the [insured]. A "business risk" is a risk that the [insured] will not do his job competently, and thus will be obligated to replace or repair his faulty work. The distinction between the two risks is critical to understanding a CGL ***969** policy. A CGL policy covers an occurrence of harm risk but specifically excludes a business risk.

Id. (quoting Note, *Baybutt Construction Corp. v. Commercial Union Insurance Co.: A Question of Ambiguity in Comprehensive General Liability Insurance Policies,* 36 Me. L.Rev. 179, 182 (1984)). The type of harm alleged in Irwin's complaint is, by contrast, a "business risk" that is excluded under the terms of the CGL policy Northern Assurance issued to LMB and Cabot Lyman. There is no principled reason why that result would change because Irwin named Cabot Lyman as a defendant on an alter ego theory and for representations he made as a director and president of LMB about a yacht manufactured by LMB. As was recognized in *Cle Elum Bowl, Inc. v. N. Pac. Ins. Co.,* 96 Wash.App. 698, 981 P.2d 872 (1999), "an insured director and officer ... is subject to the same exclusions that deny coverage to the corporation." *Id.* at 877.

We note that a contrary holding would also create perverse incentives when plaintiffs sue a corporation for defective workmanship. If these plaintiffs could trigger a duty to defend on the part of the corporation's CGL insurer not otherwise obligated to provide a defense by simply adding a corporate officer or employee as a defendant, they would often have the incentive to do so in order to add another pocket to the other side of the negotiating table. As a consequence, the "your product" exclusion, long a staple of CGL policies, would be rendered a dead letter. We decline to read the policy to allow such a result, absent any evidence, of which there is none, that this was the parties' intent.

III.

We hold that Northern Assurance did not owe a duty to defend LMB or Cabot Lyman in the underlying arbitration proceeding. The decision of the district court is affirmed in part and reversed in part. We remand for entry of judgment in favor of Northern Assurance. Costs are awarded to Northern Assurance Company of America.

Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of America, 772 F.3d 960 (2014)

All Citations

772 F.3d 960

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National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Const. Co., 119 A.D.3d 103 (2014)
986 N.Y.S.2d 74, 2014 N.Y. Slip Op. 03607

119 A.D.3d 103
Supreme Court, Appellate Division,
First Department, New York.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Plaintiff–Respondent,
v.
TURNER CONSTRUCTION COMPANY, et al., Defendants–Appellants,
GSJC 30 Hudson Urban Renewal, LLC, Defendant.

May 15, 2014.

Synopsis

Background: Liability insurer brought declaratory judgment action against general contractor, subcontractor, and building owner, seeking declaration that commercial general liability (CGL) and umbrella policy did not cover building owner's claims against contractor and subcontractor, arising from incident in which piece of exterior wall of building fell to the street from eighth-story level, and seeking reimbursement of defense costs incurred in building owner's action. The Supreme Court, New York County, Shirley Werner Kornreich, J., granted insurer's motion for summary judgment, and contractor and subcontractor appealed.

Holdings: The Supreme Court, Appellate Division, Saxe, J., held that:

[1] amended definition of "occurrence" in policy did not encompass faulty workmanship, and

[2] policy precluded reimbursement of defense costs.

Affirmed as modified.

West Headnotes (10)

[1] Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under both New York and New Jersey law, construction defects such as faulty design, fabrication or installation do not constitute "occurrences" under a commercial general liability (CGL) insurance policy.

1 Cases that cite this headnote

[2] Insurance
Insured's liability for damages
Insurance
Risks and Losses
Insurance
Bodily injury
Insurance
Property damage
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2269 Insured's liability for damages
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2274 In general
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2276 Bodily injury
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

The general rule under New York and New Jersey law is that a commercial general liability (CGL) insurance policy does not afford coverage for breach of contract, breach of fiduciary duty, or breach of warranty, but rather for bodily injury and property damage.

1 Cases that cite this headnote

[3] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Under New Jersey law, commercial liability insurance does not provide coverage for faulty workmanship that results in damage to the insured's work; a commercial general liability (CGL) policy does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.

2 Cases that cite this headnote

[4] Insurance

Accident, occurrence or event

Insurance

Property damage

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

There is no "occurrence" under a commercial general liability (CGL) policy where faulty construction only damages the insured's own work and faulty workmanship by subcontractors hired by the insured does not constitute covered "property damage" caused by an occurrence for purposes of coverage under CGL policies issued to the general contractor, since the entire project is the general contractor's work.

3 Cases that cite this headnote

[5] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Negotiated amendment of the definition of "occurrence" in commercial general liability (CGL) policy, which provided coverage for property damage caused by an occurrence, to include an "accident, event, or happening, including continuous or repeated exposure to substantially the same general harmful conditions" did not expand the definition so as to encompass faulty workmanship by general contractor or subcontractor, and thus policy did not provide coverage to contractors for building owner's breach of contract and poor workmanship claims arising from incident in which piece of building's exterior wall fell from eighth-story level.

2 Cases that cite this headnote

[6] Insurance

Accident, occurrence, or event

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2101 Accident, occurrence, or event

The requirement of a fortuitous loss is a necessary element of insurance policies based on either an "accident" or "occurrence."

[7] Insurance

Defense costs

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

New Jersey law permits reimbursement of costs incurred by insurer in defending claims against insured that are later determined not to be covered.

1 Cases that cite this headnote

[8] Insurance

Defense costs

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance

217k3506(2) Defense costs

Under New Jersey law, where an insurer, having honored its duty to defend, sought reimbursement from an insured for those fees incurred in defending uncovered claims, the right of reimbursement exists because the insured would be unjustly enriched in benefitting by, without paying for, the defense of a non-covered claim.

1 Cases that cite this headnote

[9] Insurance

Defense costs

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

An insurer's entitlement to recoup its defense costs from its insured must not contravene the terms of the policy, since courts must determine the rights and obligations of parties under an insurance contract based on the policy's specific language.

[10] Insurance

Defense costs

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3506 Liability Insurance
217k3506(2) Defense costs

Commercial general liability (CGL) insurance policy endorsement, which provided that liability insurer agreed not to "take action or recourse against any insured for loss paid or expenses incurred because of any claims made against this policy," precluded reimbursement of costs incurred in defending general contractor and subcontractor in action by building owner, alleging breach of contract and poor workmanship, arising from incident in which piece of building's exterior wall fell from eighth-story level, even though claim submitted by contractor and subcontractor was ultimately not covered under policy, where nothing in policy's language differentiated between covered and uncovered claims.

1 Cases that cite this headnote

Attorneys and Law Firms

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LUIS A. GONZALEZ, P.J., PETER TOM, DAVID FRIEDMAN, RICHARD T. ANDRIAS, DAVID B. SAXE, JJ.

Opinion

SAXE, J.

***104** This declaratory judgment action involving insurance coverage arises out of an underlying action brought by a building owner against its contractors after a piece of the exterior wall of its 42–story office building under construction in Jersey City fell to the street from the eighth-story level.

***105** Defendant GSJC 30 Hudson Urban Renewal, LLC (GSJC) is the owner of the Jersey City property. GSJC retained defendant Turner Construction to serve as ****76** general contractor for a construction project on the property, and Turner subcontracted with defendant Permasteelisa North America Corporation to design and build the exterior wall, known as the "curtain wall," which consisted of granite and glass, with an attached network of decorative horizontal and vertical pipe rails.

On January 25, 2010, a segment of the pipe rail system fell to the street from the eighth floor of the building. The outside consultant hired by GSJC to investigate and inspect the curtain wall determined that more than 20% of the pipe rail connections surveyed did not conform to the building plans. It reported additional problems: inconsistencies in the

method of rail attachment; loose shear block connections; missing, sheared, or otherwise variably-sized screws; cracked or deformed shear block screw chases; an inability of some rails to accommodate thermal and building movements; bent brackets on the pipe rail system; cracked glass louvers; cracked glass panels; and water infiltration.

GSJC sued Turner and Permasteelisa in New Jersey Superior Court for breach of contract, breach of warranty, and negligence, based on allegations of "defects in the design, fabrication and/or installation of components of the Pipe–Rail Network," which was responsible for the damage to the building façade and the continuing danger that the remainder of the pipe rail system would fall to the street.

The project was insured by plaintiff, National Union Fire Insurance Company of Pittsburgh, PA, through an Owner Controlled Insurance Program (OCIP), under which the construction project owner procures insurance on behalf of all parties performing work on the project or site. The insurance covered the owner, GSJC, the general contractor, Turner, and on-site project subcontractors, including Permasteelisa. Under the OCIP, National Union issued commercial general liability insurance policies and an umbrella policy (referred to hereafter collectively as the policy).

The policy, as amended by an endorsement, defines "[o]ccurrence" as "an accident, event, or happening, including continuous or repeated exposure to substantially the same general harmful conditions." The policy contains various exclusions, including one for professional services, also known as a professional liability exclusion.

***106** Turner and Permasteelisa tendered notice of the underlying action to National Union, which agreed to provide a defense, subject to a reservation of rights, based on several policy provisions that could preclude or limit insurance coverage, including the fact that the policy provides coverage only for property damage caused by an "occurrence" and that the claim of defective design and workmanship does not constitute "property damage."

National Union commenced this action for a judgment declaring that the policy did not cover the underlying claims against Turner and Permasteelisa, and for reimbursement of defense costs paid on Turner's and Permasteelisa's behalf. It then moved for summary judgment declaring that there was no coverage as a matter of law, because (1) GSJC's claims did not constitute "property damage" or an "occurrence" within the meaning of the policy; (2) the CGL policy did not cover the claims for breach of contract, breach of warranty, or breach of fiduciary duty; (3) Turner and Permasteelisa had breached the notice provision of the policy; and (4) there was no coverage for defective design-related claims because of the professional liability exclusion.

****77** In opposition, Permasteelisa and Turner argued that the parties had negotiated an "expanded" version of the definition of "occurrence," and that, based on dictionary definitions of the terms "event" and "happening," the subject loss should be covered.

The motion court held that the policy did not cover GSJC's claims against Turner and Permasteelisa, granted the requested declaration, and directed that National Union be reimbursed the costs and fees it paid for its defense of Turner and Permasteelisa in the underlying action.

Discussion

Initially, it is undisputed that the law of New Jersey governs this action, which turns on insurance policy interpretation, and that New Jersey and New York law are consistent as to the issues in dispute here.

[1] **[2]** Under both New York and New Jersey law, construction defects such as those asserted in the underlying action—faulty design, fabrication or installation—do not constitute "occurrences" under a commercial general liability insurance policy (*see Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co.,* 387 N.J.Super. 434, 445, 904 A.2d 754, 760 [N.J.App.Div.2006]; ***107** *George A. Fuller Co. v. United States Fid. & Guar. Co.,* 200 A.D.2d 255, 260–261, 613 N.Y.S.2d 152 [1st Dept.1994], *lv. denied* 84 N.Y.2d 806, 621 N.Y.S.2d 515, 645 N.E.2d 1215 [1994]). The general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, breach of fiduciary duty, or breach of warranty, but rather for bodily injury and property damage (*see Grand Cove II Condominium Assn., Inc. v. Ginsberg,* 291 N.J.Super. 58, 72, 676 A.2d 1123, 1130 [N.J.App.Div.1996]; *Fuller,* 200 A.D.2d at 259–260, 613 N.Y.S.2d 152).

[3] Under New Jersey law, commercial liability insurance does not provide coverage for faulty workmanship that results in damage to the insured's work; a commercial general liability policy "does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident" (*Weedo v. Stone–E–Brick, Inc.,* 81 N.J. 233,

249, 405 A.2d 788, 796 [1979]). "While *Weedo* addressed 'business risk' in the context of whether certain exclusions applied, the *Weedo* principle has been extended to the threshold issue of whether the risk was within the scope of the standard insurance clause" (*Firemen's Ins. Co.,* 387 N.J.Super. at 443, 904 A.2d at 759).

[4] There is no "occurrence" under a commercial general liability policy where faulty construction only damages the insured's own work (*see Pennsylvania Gen. Ins. Co. v. Menk Corp.,* 2011 WL 5864109, *4–5 [D.N.J. Nov. 21, 2011]), and faulty workmanship by subcontractors hired by the insured does not constitute covered property damage caused by an "occurrence" for purposes of coverage under commercial liability insurance policies issued to the general contractor, since the entire project is the general contractor's work (*see Firemen's Ins. Co.,* 387 N.J.Super. at 446, 449, 904 A.2d at 760–761, 762–763). In *Baker Residential v. Travelers Ins. Co.,* 10 A.D.3d 586, 587, 782 N.Y.S.2d 249 (1st Dept.2004), where a developer delivered and installed defective structural beams that deteriorated from water penetration due to improper installation, flashing and waterproofing, this Court held that the damages sought by the developer did not arise from an "occurrence" resulting in damage to third-party property distinct from the developers' own "work product." And in *Direct Travel v. Aetna Cas. & Sur. Co.,* 214 A.D.2d 484, 485, 625 N.Y.S.2d 221 [1st Dept.1995]), this Court explained that ****78** "[s]ince the claims asserted in the underlying action were for economic loss resulting from the plaintiff's purported breach of contract, coverage was also properly disclaimed under the umbrella policy which covered only 'damages because of 'bodily injury' [or] 'property damage' ... [c]aused by an 'occurrence' " (*see also Pavarini Constr. Co. v. Continental Ins. Co.,* 304 A.D.2d 501, 502, 759 N.Y.S.2d 56 [1st Dept.2003]).

[5] ***108** Despite the foregoing settled case law, Turner and Permasteelisa argue that with the expansion of the definition of "occurrence" to include "an accident, event, or happening," the policy covers GSJC's claims against them, or, at least, that the amended definition of "occurrence" in the policy is ambiguous. We disagree, and hold that the motion court was correct in concluding that the negotiated amendment of the definition of "occurrence" in the subject commercial liability policies to include the words "event, or happening" along with the word "accident" did not expand the definition so as to encompass faulty workmanship.

[6] "[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence' " (*Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 220, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]; Insurance Law § 1101[a][1]; *see also Victory Peach Group, Inc. v. Greater New York Mut. Ins. Co.,* 310 N.J.Super. 82, 87, 707 A.2d 1383, 1385 [1998]). As the motion court recognized, the addition of "event" or "happening" to the definition of "occurrence" did not alter the legal requirement that the "occurrence" triggering the coverage must be fortuitous. "[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence' " (*Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 220, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]; *see also Victory Peach Group, Inc. v. Greater New York Mutual Ins. Co.,* 310 N.J.Super. 82, 87, 707 A.2d 1383, 1385 n. 1 [N.J.App.Div.1998]). "[A] claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident" (9A Couch On Insurance § 129:4 [3d ed. 2008]; *Pennsylvania Natl. Mut. Cas. Ins. Co. v. Parkshore Dev. Corp.,* 2008 U.S. Dist. LEXIS 71318, 2008 WL 4276917, at *4 [D.N.J.2008], *affd.* 403 Fed.Appx. 770 [3d Cir.2010]).

In *Uniroyal, Inc. v. Home Ins. Co.,* 707 F.Supp. 1368, 1381 (E.D.N.Y.1988), the United States District Court for the Eastern District of New York explained that a definition of "occurrence" that includes a "happening" or "event" as well as an "accident" was developed by the insurance industry "to provide clearly for coverage of gradual, continuous, and prolonged events that might have been excluded by the instantaneous connotation of 'accident.' " Thus, the addition of "happening" or "event" to the definition of "occurrence" does not change the fact that fortuity is still an essential consideration under New Jersey and New York law when determining whether there is coverage under such a policy, and a claim for faulty workmanship simply does not involve fortuity.

We decline defendants' suggestion that instead of applying the foregoing New Jersey and New York case law, we apply the ***109** reasoning adopted in other jurisdictions under which faulty work may be treated as an "occurrence." Adopting the definition of "occurrence" propounded by Turner and Permasteelisa to cover the breach of contract and poor workmanship claims against them would essentially transform National Union's policy into a surety or

performance ****79** bond. That is not the nature of the coverage GSJC obtained.

We therefore affirm the grant of summary judgment declaring that National Union is not obligated to defend or indemnify Turner and Permasteelisa in the underlying action.

Having granted summary judgment on the coverage issue, the motion court also, without discussion, directed that National Union be reimbursed the cost of defending these claims, which additional relief, although asked for in National Union's complaint, was not mentioned in its motion.

[7] **[8]** New Jersey law permits reimbursement of costs incurred in defending claims that are later determined not to be covered. Where "an insurer, having honored its duty to defend, sought reimbursement from an insured for those fees incurred in defending uncovered claims, ... the right of reimbursement exists because the insured would be unjustly enriched in benefitting by, without paying for, the defense of a non-covered claim" (*see Hebela v. Healthcare Ins. Co.,* 370 N.J.Super. 260, 279, 851 A.2d 75, 86 [N.J.App.Div.2004], citing *Buss v. Superior Court,* 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 939 P.2d 766, 776–778 [1997]).

[9] However, an insurer's entitlement to recoup its defense costs from its insured must not contravene the terms of the policy, since "[c]ourts must determine the rights and obligations of parties under an insurance contract based on the policy's specific language" (*Pepper v. Allstate Ins. Co.,* 20 A.D.3d 633, 634, 799 N.Y.S.2d 292 [3d Dept.2005]; *see Webb v. Witt,* 379 N.J.Super. 18, 33, 876 A.2d 858, 866 [N.J.App.Div.2005]).

[10] Policy endorsement MS # 00004 provides, "This policy is primary coverage and the insurance carrier agrees not to take action or recourse against any insured for loss paid or expenses incurred because of any claims made against this policy." The insurer argues that this provision only precludes it from seeking to recoup from its insured the cost of defending against *covered* claims. However, there is nothing in the endorsement's language that differentiates between covered and uncovered claims; the endorsement precludes the insurer from seeking "recourse against any insured for ... expenses incurred because of *any claims* made against this policy," without ***110** reference to whether those claims were ultimately found to be covered by the policy. Therefore, we hold that the reimbursement of defense costs sought by the insurer is unambiguously precluded by the policy, and the provision of the order on appeal that directs the reimbursement of those costs is vacated.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 19, 2012, which granted plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendants Turner Construction Company and Permasteelisa North America Corporation in the underlying action, and directed Turner and Permasteelisa to reimburse plaintiff the defense fees and costs it paid in that action, should be modified, on the law, to vacate the direction to reimburse plaintiff its defense costs, and otherwise affirmed, without costs.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 19, 2012, modified, on the law, to vacate the direction to reimburse plaintiff its defense costs, and otherwise affirmed, without costs.

All concur.

All Citations

119 A.D.3d 103, 986 N.Y.S.2d 74, 2014 N.Y. Slip Op. 03607

215 A.3d 1010
Superior Court of Pennsylvania.

PENNSYLVANIA MANUFACTURERS INDEMNITY COMPANY
v.
POTTSTOWN INDUSTRIAL COMPLEX LP, The Pride Group, Inc. and Liberty Mutual Insurance Co. Appeal of Pottstown Industrial Complex, LP

No. 3489 EDA 2018
|
Argued June 27, 2019
|
Filed July 22, 2019
|
Reargument Denied September 16, 2019

Synopsis

Background: Commercial general liability (CGL) insurer brought declaratory judgment action against insured building owner seeking declaratory judgment that insurer had no obligation to defend or indemnify insured on ground that underlying action did not allege an "occurrence." Insurer filed motion for judgment on the pleadings. The Court of Common Pleas, Montgomery County, Civil Division, No. 2017-09855, Jeffrey S. Saltz, J., granted insurer's motion, and insured appealed.

[Holding:] The Superior Court, No. 3489 EDA 2018, Colins, J., held that underlying liability action by third-party tenant against insured constituted an "occurrence" within meaning of CGL insurance policy.

Reversed and remanded.

West Headnotes (13)

[1] Declaratory Judgment
Appeal and Error
118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak392.1 In general
Order providing declaratory judgment in favor of commercial general liability (CGL) insurer following motion for judgment on the pleadings was properly before appellate court as an appealable interlocutory order, in action by insurer against insured building owner seeking declaratory judgment that insurer had no obligation to defend or indemnify insured on ground that underlying action, although order was not final by virtue of fact that subsequent CGL insurer involved in action did not move for judgment on the pleadings on its counterclaim against insured, where declaratory judgment order fully resolved insured's claim for declaratory relief and entire declaratory judgment dispute between insurer and insured. Pa. R. App. P. 311(8).

[2] Insurance
Questions of law or fact
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 Questions of law or fact
The interpretation of an insurance policy is a question of law.

[3] Appeal and Error
Insurers and insurance
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3771 Trade, Business, and Finance
30k3774 Insurers and insurance
Appellate court's review of the trial court's order interpreting an insurance policy is plenary and de novo.

[4] Insurance
Insurer's Duty to Indemnify in General
Insurance
Pleadings
217 Insurance
217XVII Coverage--Liability Insurance

217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2268 In general
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

In determining whether an insurance policy provides coverage for a suit brought against the insured, a court must compare the terms of the insurance policy to the allegations of the complaint filed against the insured.

[5] Insurance
Construction or enforcement as written
Insurance
Ambiguity, Uncertainty or Conflict
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1809 Construction or enforcement as written
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) In general

Where insurance policy terms are clear and unambiguous, courts must give effect to the policy's language; policy terms that are ambiguous must be construed in favor of the insured.

[6] Insurance
In general; standard
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 In general; standard

The insurer's duty to defend is broader than its duty to indemnify.

[7] Insurance
Pleadings
Insurance
Termination of duty; withdrawal
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings
217 Insurance
217XXIII Duty to Defend
217k2930 Termination of duty; withdrawal

If a complaint against the insured pleads facts that are potentially within the scope of the policy's coverage, the insurer has a duty to defend the action until all covered claims are removed from the action.

[8] Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

A claim for damages from the insured's improper performance of contractual obligations does not allege an "occurrence" where the only property damaged is the product or property that the insured supplied or on which it worked or where the damages sought are for the insured's failure to deliver the product or perform the service it contracted to provide.

[9] Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Faulty workmanship itself does not constitute an "occurrence" in context of commercial general liability (CGL) insurance.

[10] Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General

217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Underlying liability action by third-party tenant against insured building owner for water damage to tenant's inventory due to flooding during rainstorms constituted an "occurrence" within meaning of commercial general liability (CGL) insurance policy; action alleged damages to third-party property stored in building owned by insured, damages were caused by distinct event, namely, flooding, and action sought damages for destruction of tenant's property, not cost of repairing insured's inadequate roofing that allegedly gave rise to flooding.

[11] Insurance
Accident, occurrence or event

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Flooding of a commercial building with water cascading through the premises, was an unexpected and undesirable event, and thus an "accident," falling within the definition of the term "occurrence" under commercial general liability (CGL) insurance policy.

[12] Insurance
Accident, occurrence or event

Insurance
Pleadings

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 Pleadings

Factual allegations of underlying complaint by third-party against insured, not label of underlying cause of action, determined whether claims fell within coverage of commercial general liability (CGL) insurance policy, and thus, fact that underlying action asserted only breach of contract cause of action did not preclude conclusion that flooding giving rise to damage to third-party's property constituted occurrence potentially within scope of insurer's coverage, in action by insurer seeking declaratory judgment that insurer had no obligation to defend or indemnify insured against third-party action.

[13] Insurance
Contractual liabilities

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(8) Contractual liabilities

Commercial general liability (CGL) insurance policy did not exclude all otherwise-covered property damage claims simply because they were based on insured's duties under contract; although separate coverage had an exclusion for "breach of contract" that excluded claims "arising out of a breach of contract," property damage liability section only excluded claims in which insured was obligated to pay damages by reason of assumption of liability via third-party contract, but such exclusion did not apply to liability for damages assumed in insured contracts, and lease of premises was considered insured contract.

***1012** Appeal from the Order Entered November 5, 2018, In the Court of Common Pleas of Montgomery County, Civil Division at No(s): 2017-09855. Jeffrey S. Saltz, J.

Attorneys and Law Firms

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BEFORE: BENDER, P.J.E., GANTMAN, P.J.E., and COLINS, * J.

* Retired Senior Judge assigned to the Superior Court.

Opinion

OPINION BY COLINS, J.:

This is an appeal from an order granting a declaratory judgment in favor of an insurer, Pennsylvania Manufacturers Indemnity Company (PMA), in a declaratory judgment action that PMA brought against its insured, Pottstown Industrial Complex LP (Insured). The trial court's order granted PMA's motion for judgment on the pleadings and issued a declaratory judgment that PMA has no obligation to defend or indemnify Insured with respect to an action brought against Insured by Insured's tenant, The Pride Group, Inc. (Pride Group), for water damage to Pride Group's inventory (the Underlying Action). For the reasons set forth below, we reverse.

The complaint in the Underlying Action alleges that the premises that Pride Group leased from Insured were flooded during rainstorms on four occasions between July 2013 and June 2016 and that these floods damaged and rendered worthless over $700,000 in inventory that Pride Group stored on the premises. Pride Group Second Amended Complaint ¶¶16-20, 39-43, 61, 65, 67, 70. The first of these floods occurred on July 22, 2013, when "extensive amounts of rainwater infiltrated from the roof area and into the [p]remises, cascading across" and destroying inventory worth over $397,000; the other three floods occurred in 2015 and 2016. ***Id.*** ¶¶16-20, 39, 61, 67.

Pride Group alleges that the water entered the premises due to roof leaks, that Insured was responsible under the lease for keeping the roof "in serviceable condition and repair," and that the floods were caused by Insured's failure to properly maintain and repair the roof. Pride Group Second Amended Complaint ¶¶1, 7-8, 15-16, 23-34, 39, 44-48, 53-54, 57, 60-63, 66-69, 74-75 & Ex. A at 18 ¶14(a). Pride Group pleads these claims as a single cause of action for breach of contract. ***Id.*** ¶¶1, 71-77. The complaint, however, also specifically pleads that Insured was negligent in its maintenance of and repairs to the roof. ***Id.*** ¶¶1, 14-15, 74-75. The conditions of the roof that Pride Group alleges contributed to the floods include poor caulking of the roof, gaps and separations in the roofing membrane, undersized drain openings, and accumulated debris and clogged drains. ***Id.*** ¶¶30-31, 45-48 & Exs. F & I.

PMA provided commercial general liability (CGL) insurance coverage to Insured under CGL Policy No. 301201-03-93-89-2 (the PMA Policy). PMA Declaratory Judgment Complaint ¶2 & Ex. 2; Insured's Answer ¶2. The PMA Policy provided coverage to Insured for the period November 1, 2012 to November 1, 2013, the time period in which the July 2013 flood of ***1013** Pride Group's leased premises occurred. PMA Policy, Declarations at 1. PMA did not provide CGL coverage to Insured after November 1, 2013. Liberty Mutual Fire Insurance Company (Liberty Mutual) issued CGL insurance policies covering Insured for the periods November 1, 2013 to November 1, 2014, November 1, 2014 to November 1, 2015, and November 1, 2015 to November 1, 2016 (the Liberty Mutual Policies).

The PMA Policy provides coverage of $1 million per "occurrence" to Insured for bodily injury and property damage liability during the policy period, with an aggregate limit of liability of $2 million. PMA Policy, Declarations at 2. The PMA Policy states with respect to this coverage:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply....
>
> * * *
>
> b. **This insurance applies to "bodily injury" and "property damage" only if:**
>
> (1) **The "bodily injury" or "property damage" is caused by an "occurrence"** that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage" occurs during the policy period ....

Id., CGL Coverage Form at 1 (emphasis added). The PMA Policy defines "property damage" and "occurrence" as follows:

> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> * * *
>
> 17. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.
>
> For the purposes of this insurance, electronic data is not tangible property.

Id., CGL Coverage Form at 14-15.

Pride Group served the Underlying Action on Insured on April 8, 2016. On April 12, 2016, Insured notified PMA of the Underlying Action and requested that PMA provide a defense and indemnity. On April 25, 2016, PMA sent Insured a letter advising Insured that it was defending Insured under a reservation of rights. PMA Declaratory Judgment Complaint, Ex. 3. On May 15, 2017, PMA filed the instant declaratory judgment action. PMA also named as defendants Pride Group and Liberty Mutual because their interests could be affected by the declaratory relief that it sought against Insured. On August 21, 2017, Liberty Mutual filed a counterclaim against Insured seeking a declaratory judgment that Insured is not entitled to coverage under the Liberty Mutual Policies. After the pleadings were closed, PMA filed a motion for judgment on the pleadings seeking a declaratory judgment that PMA has no obligation to defend or indemnify Insured on the ground that the Underlying Action does not allege an "occurrence."

[1] On November 5, 2018, the trial court entered an order granting PMA's ***1014** motion and the requested declaratory relief, holding that the allegations of inadequate roof repairs in the Underlying Action are claims for faulty workmanship and faulty workmanship does not constitute an "occurrence" under ***Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co.***, 589 Pa. 317, 908 A.2d 888 (2006), and ***Millers Capital Insurance Co. v. Gambone Brothers Development Co.***, 941 A.2d 706 (Pa. Super. 2007). Insured timely filed the instant appeal. [1]

1 Liberty Mutual did not move for judgment on the pleadings on its counterclaim against Insured and the trial court's order did not dispose of that claim. The trial court's order is therefore not a final order under Pa.R.A.P. 341(b)(1). This appeal, however, is properly before this Court as an appealable interlocutory order under Pa.R.A.P. 311 because the trial court's order fully resolved PMA's claim for declaratory relief and the entire declaratory judgment dispute between PMA and Insured. Pa.R.A.P. 311(8) ("An appeal may be taken as of right and without reference to Pa.R.A.P. 341(c) from ... [a]n order that is made final or appealable by statute or general rule, even though the order does not dispose of all claims and of all parties"); 42 Pa.C.S. § 7532 (declaratory judgment "shall have the force and effect of a final judgment or decree"); ***Pennsylvania Manufacturers' Association Insurance Co. v. Johnson Matthey, Inc.***, 188 A.3d 396, 399-400 (Pa. 2018); ***Nationwide Mutual Insurance Co. v. Arnold***, 214 A.3d 688, 697–99, 2019 PA Super 213, *7-*8 (2019); ***Tuscarora Wayne Insurance Co. v. Hebron, Inc.***, 197 A.3d 267, 270-71 (Pa. Super. 2018); ***see also*** Pa.R.A.P. 341 Note.

Insured raises three issues for our review:

> Did the trial court err in extending ***Kvaerner***'s "faulty workmanship" analysis in a matter of first impression to claims against a commercial landlord by its tenant for tenant personal property damage caused by the purported defective condition of the landlord's property?
>
> Did the trial court err in ruling that the Policy's exceptions to the contractual liability exclusions are "immaterial" to its determination of whether the Underlying Complaint constitutes an "occurrence" in contravention of well-established tenets of insurance law requiring that the Policy be viewed as whole, and read so that no provisions are superfluous?
>
> Did the trial court err in holding that it did not need to defer determination for discovery into the party's competing interpretations of "occurrence" based upon the parties' course of performance, reasonable expectations, and evidence of trade usage?

Appellant's Brief at 7. We conclude that trial court erred in holding that PMA has no duty to defend or indemnify Insured under ***Kvaerner*** and ***Gambone Brothers***. We therefore do not address Insured's second and third issues.

[2] **[3]** The interpretation of an insurance policy is a question of law. ***Donegal Mutual Insurance Co. v. Baumhammers***, 595 Pa. 147, 938 A.2d 286, 290 (2007); ***Kvaerner***, 908 A.2d at 897; ***Gambone Brothers***, 941 A.2d at 712. Our review of the trial court's order holding that the PMA Policy does not provide Insured coverage with respect to the Underlying Action is therefore plenary and *de novo*. ***American & Foreign Insurance Co. v. Jerry's Sport Center, Inc.***, 606 Pa. 584, 2 A.3d 526, 532-33 (2010); ***Baumhammers***, 938 A.2d at 290.

[4] **[5]** In determining whether an insurance policy provides coverage for a suit brought against the insured, a court must compare the terms of the insurance policy to the allegations of the complaint filed against the insured. ***Jerry's Sport Center, Inc***., 2 A.3d at 541; ***Kvaerner***, 908 A.2d at 896; ***1015** ***Indalex Inc. v. National Union Fire Insurance Co. of Pittsburgh***, 83 A.3d 418, 421 (Pa. Super. 2013). Where the policy terms are clear and unambiguous, the courts must give effect to the policy's language; policy terms that are ambiguous must be construed in favor of the insured. ***Baumhammers***, 938 A.2d at 290; ***Kvaerner***, 908 A.2d at 897; ***Indalex***, 83 A.3d at 420-21; ***Gambone Brothers***, 941 A.2d at 712.

[6] **[7]** The insurer's duty to defend is broader than its duty to indemnify. ***Jerry's Sport Center, Inc.***, 2 A.3d at 540; ***Kvaerner***, 908 A.2d at 896 n.7; ***Penn-America Insurance Co. v. Peccadillos, Inc.***, 27 A.3d 259, 265 (Pa. Super. 2011). If a complaint against the insured pleads facts that are potentially within the scope of the policy's coverage, the insurer has a duty to defend the action until all covered claims are removed from the action. ***Jerry's Sport Center, Inc.***, 2 A.3d at 541-42; ***Indalex***, 83 A.3d at 421; ***Peccadillos, Inc.***, 27 A.3d at 265. The complaint in the Underlying Action plainly asserts claims for property damage against Insured that occurred while the PMA Policy's coverage was in effect, as it seeks over $397,000 for damage to Pride Group's inventory in the July 2013 flood. The critical issue here is whether, under the allegations in that complaint, the property damage was "caused by an 'occurrence.' " PMA Policy, CGL Coverage Form at 1.

[8] **[9]** A claim for damages from the insured's improper performance of contractual obligations does not allege an "occurrence" where the only property damaged is the product or property that the insured supplied or on which it worked or where the damages sought are for the insured's failure to deliver the product or perform the service it contracted to provide. ***Kvaerner***, 908 A.2d at 898-900; ***Erie Insurance Exchange v. Abbott Furnace Co.***, 972 A.2d 1232, 1237-39 (Pa. Super. 2009); ***Gambone Brothers***, 941 A.2d at 713-14; ***Snyder Heating Co. v. Pennsylvania Manufacturers' Association Insurance Co.***, 715 A.2d 483, 486-87 (Pa. Super. 1998). Faulty workmanship itself does not constitute an "occurrence." ***Kvaerner***, 908 A.2d at 900.

These precedents, however, do not hold that the fact that liability is based on failure to properly perform contractual duties precludes the existence of an "occurrence" where the claim is for damage to property not supplied by the insured and unrelated to what the insured contracted to provide. In ***Kvaerner***, the underlying action alleged only damage to the coke oven battery that the insured built and sought as damages the cost of replacing the coke oven battery or the difference between the defective coke oven battery and what the insured had warranted that it would deliver. 908 A.2d at 891. The Court held that there was no allegation of an "occurrence" that could trigger CGL insurance coverage because the CGL policies defined "occurrence" as "an accident," and faulty workmanship that damaged only the work product that the defendant supplied does not constitute an accident. ***Id.*** at 897-900. The Court held that treating claims of faulty workmanship that damaged only the insured's work product itself as an "occurrence" would convert CGL insurance into a performance bond guaranteeing the insured's work. ***Id.*** at 899. The Court specifically noted that the purpose of the requirement of an "occurrence" in CGL policies is to limit the risk insured to "the possibility that the goods, products or work of the insured, once relinquished and completed, will cause bodily injury or damage to property other than to the completed work itself and for which the insured [ma]y be found liable" and to exclude coverage "for economic loss because the product or completed work is not ***1016** that for which the damaged person bargained." ***Id.*** at 899 n.10 (quoting Henderson, Insurance Protection for Products Liability and Completed Operations; What Every Lawyer Should Know, 50 Neb. L. Rev. 415, 441 (1971)).

Gambone Brothers, ***Abbott Furnace***, and ***Snyder Heating*** likewise involved claims that the insured's faulty workmanship damaged the insured's product or the project on which the insured worked, not claims for damages to other property completely distinct from and unconnected to the insured's contract. In ***Gambone Brothers***, this Court held that claims for water damage to houses that the insured had constructed did not allege an "occurrence" and were therefore

not covered by its liability insurance policies. 941 A.2d at 708, 713-14. The Court held that the claims for damage to the houses were indistinguishable from the type of claim in ***Kvaerner*** because they alleged faulty workmanship and damage to the insured's products themselves, the houses. ***Id.*** at 713.

In ***Abbott Furnace***, this Court held that there was no liability insurance coverage where the underlying complaint alleged that the furnace that the insured supplied was inadequate and did not properly perform the manufacturing operation for which it was purchased and the purchaser sought to recover the cost of repairing and partially replacing the furnace. 972 A.2d at 1234-35, 1237-39. The only other property that the purchaser claimed was damaged consisted of product manufactured using the furnace, which was damaged by the furnace's inadequate performance; there was no claim of any leak, explosion, or other event causing damage to other property outside the furnace. ***Id.***

In ***Snyder Heating***, the underlying claims were that the insured had not properly performed its boiler maintenance contract and that the boilers were damaged as a result. 715 A.2d at 486. This Court held that those claims did not satisfy the requirement of an "occurrence" because the complaint simply alleged that the insured did not satisfy its contractual obligations and "fails to allege any active malfunctioning on Snyder's part." 715 A.2d at 487 (emphasis omitted). The Court explained:

> "General liability insurance policies are intended to provide coverage where the insured's product or work causes personal injury or damage to the person or property of another." ... These types of insurance policies involve risks that are limited in nature; they are not the equivalent of a performance bond on the part of the insurer.

Id. (quoting ***Ryan Homes, Inc. v. Home Indemnity Co.***, 436 Pa.Super. 342, 647 A.2d 939 (1994)) (citations omitted).

In contrast, where the underlying claims allege that the insured's faulty work caused personal injury or an event that damaged other property, this Court has concluded that there was an "occurrence" and that the insurer had a duty to defend. ***Indalex***, 83 A.3d at 425-26. In ***Indalex***, the underlying actions alleged that the insureds supplied windows and doors that "were defectively designed or manufactured and resulted in water leakage that caused physical damage, such as mold and cracked walls, in addition to personal injury" and asserted claims based on strict tort liability, negligence, breach of warranty, and breach of contract. ***Id.*** at 419-20. This Court distinguished ***Kvaerner*** and ***Gambone Brothers*** on the ground that those cases involved coverage for damage to the product that the insured supplied, not personal injury or damage to other property, and held that because the underlying actions alleged "property loss, to property other than [the insureds'] products, and personal injury," the claims were ***1017** for damages caused by an "occurrence." ***Indalex***, 83 A.3d at 422-23, 426.

[10] Here, the Underlying Action alleges damage to other property, Pride Group's inventory stored on the premises, caused by a distinct event, flooding, and seeks damages for the destruction of that other property, not for the cost of repairing or replacing the defective item that Insured supplied, the inadequate roof. The allegations in the Underlying Action are therefore comparable to those in ***Indalex*** and unlike ***Kvaerner***, ***Gambone Brothers***, and the other decisions rejecting coverage. Holding that such claims are covered by a CGL policy is consistent with the rationale of ***Kvaerner*** that the term "occurrence" must not be interpreted so broadly that it converts the policy into a performance bond, as this construction does not provide coverage for loss of the value of the insured's performance. Rather, it construes the policy as providing insurance for a risk that CGL policies are intended to cover, damage that the insured causes to another person's property. ***Kvaerner***, 908 A.2d at 899 n.10; ***Snyder Heating***, 715 A.2d at 487. [2]

2 PMA also relies on a number of federal cases interpreting Pennsylvania law. Most of these cases are plainly inapplicable here, as they involved only claims that the insured's inadequate performance of a contract resulted in damage to the item that it constructed or participated in constructing or claims that the insured's product failed to satisfy the buyer's contractual expectations, not claims that the insured damaged other unrelated property. ***See Specialty Surfaces International, Inc. v. Continental Casualty Co.***, 609 F.3d 223, 227-28, 238-39 (3d Cir. 2010) (damage was to insured's work and work of other contractor on the project); ***Lenick Construction, Inc. v. Selective Way Insurance Co.***, 737 Fed. Appx. 92, 93-95 (3d Cir. 2018) (claim was for damage to condominium units caused by insured's work in construction of the units); ***Westfield Insurance Co. v. Bellevue Holding Co.***, 856 F. Supp. 2d 683, 686-90, 701 (E.D. Pa. 2012) (damage was to houses constructed by the insured); ***Roman Mosaic & Tile Co. v. Liberty Mutual Insurance Co.***, 2012 WL 1138587 at *1-*2 (E.D. Pa., No. 11-6004, Apr. 5, 2012) (damage was to condominium on which

insured was a subcontractor); ***Peerless Insurance Co. v. Brooks Systems Corp.***, 617 F.Supp.2d 348, 351 (E.D. Pa. 2008) (claim was for damage to equipment designed and constructed by insured); ***Nationwide Mutual Insurance Co. v. CPB International, Inc.***, 562 F.3d 591, 594 (3d Cir. 2009) (component supplied by insured was unfit for use in buyer's product); ***Atain Insurance Co. v. East Coast Business Fire, Inc.***, 2018 WL 637579 at *1 (E.D. Pa., No. 17-2545, Jan. 31, 2018) (claim was for failure of fire suppression system to perform, not for damage from event caused by insured's work or product). Moreover, none of the federal decisions is binding on this Court. ***Bochetto v. Piper Aircraft Co.***, 94 A.3d 1044, 1050 (Pa. Super. 2014); ***Mutual Benefit Insurance Co. v. Goschenhoppen Mutual Insurance Co.***, 392 Pa.Super. 363, 572 A.2d 1275, 1278 (1990). To the extent that any of the federal decisions suggest that claims against an insured for damage to another's property that is unconnected to the insured's contract cannot arise out of an "occurrence" simply because the insured is alleged to have negligently performed a contractual obligation, we conclude that they are neither persuasive nor an accurate statement of Pennsylvania law.

[11] Moreover, such coverage is not based on treating Insured's contractual performance as an "occurrence." Although Insured's liability is based on its performance of its duties under the lease, the "occurrence" that is alleged to have caused the property damage is a flood. As noted above, the PMA Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." PMA Policy, CGL Coverage Form at 14. An "accident," in turn, is " '[a]n unexpected and undesirable event,' or 'something that occurs unexpectedly or unintentionally.' " ***Kvaerner***, 908 A.2d at 897-98. The flooding of a building with water "cascading" through the premises, Pride Group ***1018** Second Amended Complaint ¶16, is an "unexpected and undesirable event" and therefore falls within the definition of the term "occurrence" under the PMA Policy.

[12] The fact that the Underlying Action asserts only a breach of contract cause of action does not change our conclusion that it alleges an "occurrence" that is potentially within the scope of the PMA Policy's coverage. It is the factual allegations of the underlying complaint that determine whether the claims are within the coverage of an insurance policy, not the label of the cause of action selected by the underlying plaintiff. ***Mutual Benefit Insurance Co. v. Haver***, 555 Pa. 534, 725 A.2d 743, 745 (1999). The complaint in the Underlying Action pleads that Insured was negligent in its maintenance of and repairs to the roof. Pride Group Second Amended Complaint ¶¶1, 14-15, 74-75. PMA does not claim that those negligence allegations have been dismissed from the Underlying Action.

[13] In addition, the PMA Policy does not exclude all otherwise-covered property damage claims simply because they are based on duties under a contract. A separate coverage in the PMA Policy for personal and advertising injury liability has an exclusion for "breach of contract" that excludes claims "arising out of a breach of contract." PMA Policy, CGL Coverage Form at 6. No such exclusion appears in the bodily injury and property damage liability coverage section of the PMA Policy. ***Id.***, CGL Coverage Form at 2-6. Rather, the PMA Policy's only contract exclusion from its bodily injury or property damage coverage is limited to claims that "the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," and provides that

> [t]his exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement....

Id., CGL Coverage Form at 2. "Insured contract" is defined as including "[a] contract for a lease of premises." ***Id.***, CGL Coverage Form at 13. Thus, even if this assumed liability exclusion were construed as applying to claims based on the insured's own conduct,[3] it would be inapplicable here, as the contractual obligations alleged in the Underlying Action are under a lease.

3 As PMA itself argues, it appears that this assumed liability exclusion has no applicability to claims, such as those here, based on the insured's own breach of duties assumed under a contract. ***See Brooks v. Colton***, 760 A.2d 393, 395-96 (Pa. Super. 2000) (exclusion for assumption of liability in a contract applies to and excludes from coverage only liability based on indemnity agreements under which the insured assumes liability for damages caused by another party).

Because the Underlying Action alleges damage to other property, not property that Insured contracted to provide, and that the damage was caused by an accident, a flood, it includes claims for property damage caused by an "occurrence." We

therefore reverse the trial court's judgment that PMA has no duty to defend or indemnify Insured with respect to the Underlying Action.

Order reversed. Case remanded for further proceedings consistent with this opinion. Jurisdiction relinquished.

All Citations

215 A.3d 1010, 2019 PA Super 223

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Ohio Northern University v. Charles Construction Services, Inc., 155 Ohio St.3d 197 (2018)
120 N.E.3d 762, 364 Ed. Law Rep. 1183, 2018 -Ohio- 4057

155 Ohio St.3d 197
Supreme Court of Ohio.

OHIO NORTHERN UNIVERSITY, Appellee,
v.
CHARLES CONSTRUCTION SERVICES, INC., Appellee, et al.;
Cincinnati Insurance Company, Appellant.

No. 2017-0514
|
Submitted June 12, 2018
|
Decided October 9, 2018

Synopsis

Background: University initiated lawsuit against insured general contractor, alleging breach of contract and other claims arising from alleged deficient construction of inn and conference center. General contractor filed third-party complaints against several subcontractors. Commercial general liability (CGL) insurer intervened, seeking declaratory judgment that it had no duty to defend general contractor. The Court of Common Pleas, Hancock County, No. 2012 CV 00564, entered summary judgment for insurer. University and general contractor appealed. The Court of Appeals, 77 N.E.3d 538, reversed and remanded. The Supreme Court accepted insurer's appeal for review.

[Holding:] The Supreme Court, French, J., held that property damage allegedly caused by subcontractor's faulty work was not "occurrence" under policy, and thus damage did not fall within exception to exclusion for damage caused by subcontractors.

Reversed.

O'Connor, C.J., and Kennedy, J., concurred in judgment only.

West Headnotes (10)

[1] Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
Property damage caused by a subcontractor's faulty work is not an "occurrence" under a commercial general liability (CGL) policy defining occurrence an "accident, including continuous or repeated exposure to substantially the same general harmful conditions," because it cannot be deemed fortuitous; hence, the insurer is not required to defend the CGL policy holder against suit by the property owner or indemnify the insured against any damage caused by the insured's subcontractor.

[2] Contracts
Intention of Parties
95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) In general
When the Supreme Court faces an issue of contractual interpretation, its role is to give effect to the intent of the parties to the agreement.

4 Cases that cite this headnote

[3] Insurance
Construction as a whole
Insurance
Presumptions
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 Construction as a whole
217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1857 Evidence
217k1860 Presumptions
Supreme Court reviews an insurance contract as a whole and presumes that its language reflects the parties' intent.

2 Cases that cite this headnote

[4] Appeal and Error

De novo review

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)13 Summary Judgment
30k3554 De novo review

Supreme Court applies the de novo standard of review to a decision granting or denying a motion for summary judgment based on an insurance contract.

1 Cases that cite this headnote

[5] Insurance

Plain, ordinary or popular sense of language

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 Plain, ordinary or popular sense of language

Supreme Court honors the plain meaning of an insurance policy's language unless another meaning is clearly apparent from the contents of the policy.

2 Cases that cite this headnote

[6] Contracts

Language of contract

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) Language of contract

When a written contract's language is clear, the Supreme Court looks no further than the writing itself to determine the parties' intent.

1 Cases that cite this headnote

[7] Insurance

Accident, occurrence or event

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event

Commercial general liability (CGL) policy is not intended to insure business risks that are the normal, frequent, or predictable consequences of doing business and which businesses can control and manage.

[8] Insurance

Risks and Losses

Insurance

Premises and operations hazards

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2274 In general
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2295 Premises and operations hazards

A commercial general liability (CGL) insurance policy does not insure an insured's work itself; rather, it insures consequential damages that stem from that work.

[9] Insurance

Accident, occurrence or event

Insurance

Property damage

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 Property damage

A commercial general liability (CGL) policy may provide coverage for claims arising out of tort, breaches of contract, and statutory liabilities, as long as the requisite accidental occurrence and property damage are present.

[10] Insurance

Accident, occurrence or event

Insurance

Products and Completed Operations Hazards

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Water-related property damage to university's inn and conference center allegedly caused by subcontractor's faulty work was not an "occurrence" under commercial general liability (CGL) insurance policy providing coverage for property damage due to an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and thus did not fall within policy's products-completed operations-hazard (PCOH) clause, which provided exception to exclusion for general contractor's faulty workmanship and covered damages "arising out of completed operations" for work performed by subcontractors; unless there was an "occurrence," PCOH language had no effect, and subcontractor's faulty work could not be deemed fortuitous, but rather was ordinary business risk.

****763** APPEAL from the Court of Appeals for Hancock County, No. 5-16-01, 2017-Ohio-258.

Attorneys and Law Firms

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Cavitch, Familo & Durkin Co., L.P.A., and Gregory E. O'Brien, Cleveland, urging reversal for amicus curiae Counsel for Ohio Insurance Institute.

Opinion

French, J.

***197** ****764** **{¶ 1}** In 2012, we held that an insurance claim filed by a contractor under its commercial-general-liability ("CGL") insurance policy for property damage caused by the contractor's own faulty workmanship does not involve an "occurrence" such that the CGL policy would cover the loss. *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, syllabus. That decision turned on the CGL policy's definition of "occurrence" as an " 'accident, including continuous or repeated exposure to substantially the same general harmful conditions.' " *Id.* at ¶ 12, quoting the policy. Because the CGL policy did not define "accident," we looked to the word's common meaning and concluded that an "accident" involves "fortuity." *Id.* at ¶ 14. We held that under the language of the CGL policy, property damage caused by a contractor's own faulty work is not accidental and is therefore not covered. *Id.* at ¶ 11-14, 19.

{¶ 2} This appeal concerns a general contractor's CGL policy that is nearly identical to the one considered in *Custom Agri*.

But here, the question is whether the general contractor's CGL policy covers claims for property damage caused by a *subcontractor's* faulty work. To answer that question, we must address the effect of additional portions of the CGL policy, including a products-completed operations-hazard ("PCOH") clause, which covers damages "arising out of completed operations," and terms that specifically apply to work performed by subcontractors.

[1] **{¶ 3}** To resolve this matter, we need only apply the holding of *Custom Agri*. Property damage caused by a subcontractor's faulty work is not an "occurrence" under a CGL policy because it cannot be deemed fortuitous. Hence, the insurer is not required to defend the CGL policyholder against suit by the property owner ***198** or indemnify the insured against any damage caused by the insured's subcontractor. We therefore reverse the judgment of the court of appeals.

****765 FACTS AND PROCEDURAL BACKGROUND

{¶ 4} In 2008, appellee Ohio Northern University ("ONU") contracted with appellee Charles Construction Services, Inc., to build the University Inn and Conference Center, a new luxury hotel and conference center on ONU's campus. Charles Construction promised to perform all the work itself or through subcontractors. The contract required Charles Construction to maintain a CGL policy that included a PCOH clause.

{¶ 5} Charles Construction obtained from appellant, Cincinnati Insurance Company ("CIC"), a CGL policy that included a PCOH clause and terms specifically related to work performed by subcontractors. The general-liability maximum payout under the CGL policy was $2 million. The separate maximum payout for the PCOH clause was also $2 million. Charles Construction paid an additional premium for the PCOH coverage.

{¶ 6} The project's estimated cost was $8 million. In September 2011, after work was completed, ONU discovered that the inn had suffered extensive water damage from hidden leaks that it believed were caused by the defective work of Charles Construction and its subcontractors. In the course of repairing the water damage, ONU discovered other serious structural defects. ONU estimated its repair costs at approximately $6 million.

{¶ 7} In October 2012, ONU sued Charles Construction in the Hancock County Common Pleas Court for breach of contract and other claims related to the inn's damage. Charles Construction answered and filed third-party complaints against several of its subcontractors. ONU filed its second and final amended complaint in February 2014. Charles Construction submitted to CIC a CGL-policy claim and asked CIC to defend it in court and indemnify it against any damages. CIC intervened in order to pursue a declaratory judgment against Charles Construction and to submit jury interrogatories related to insurance coverage. CIC explained that it would defend Charles Construction while reserving its right to argue that the CGL policy did not cover ONU's claim.

{¶ 8} After CIC intervened, it sought a declaratory judgment that it did not have to defend or indemnify Charles Construction under the CGL policy. In January 2015, CIC filed a motion for summary judgment relying on *Custom Agri*, which it characterized as holding that "claims for defective workmanship are not claims for 'property damage' caused by an 'occurrence.' " ONU filed a cross-motion for summary judgment arguing, in part, that the PCOH clause and subcontractor-specific terms distinguished this case from *Custom Agri*. Charles ***199** Construction filed a memorandum supporting ONU's position. The trial court issued judgments in favor of CIC, reasoning that this court's decision in *Custom Agri* "constrained" it and that consequently, CIC could deny Charles Construction's claim and had no duty to defend Charles Construction.

{¶ 9} Charles Construction and ONU appealed to the Third District Court of Appeals. The majority determined that *Custom Agri* remains good law as applied to construction defects caused by the insured's own work. 2017-Ohio-258, 77 N.E.3d 538, ¶ 38. But the Third District read *Custom Agri* narrowly and noted that it did not address any PCOH or subcontractor-specific CGL-policy terms. *Id.* at ¶ 34-40. It found the CGL policy language to be ambiguous as to whether it covers claims for property damage caused by subcontractors' defective work, and because ambiguous language is construed against the insurer, it reversed the judgment of the trial court. *Id.* at ¶ 41.

****766** **{¶ 10}** We accepted CIC's appeal on two propositions of law:

> 1. *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712 [979 N.E.2d 269] remains applicable to claims of defective construction or workmanship by a subcontractor included within

the "products-completed operations hazard" of [sic] commercial general liability policy.

2. The contractual liability exclusion in the general liability policy precludes coverage for claims for defective construction/workmanship.

151 Ohio St.3d 1452, 2017-Ohio-8842, 87 N.E.3d 221. CIC withdrew its second proposition of law during briefing.

ANALYSIS

Standard of review

[2] [3] [4] [5] [6] {¶ 11} This case involves basic contract interpretation. When we face an issue of contractual interpretation, our role "is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11, citing *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). We review an insurance contract as a whole and presume that its language reflects the parties' intent. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. "We apply the de novo standard of review to a decision granting or denying a motion for summary judgment based on an insurance contract." *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, 948 N.E.2d 931, ¶ 12. We honor the plain meaning of the policy's language "unless another meaning is clearly apparent from the contents of the policy." *Galatis* at ¶ 11, citing ***200** *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. And when a written contract's language is clear, we look no further than the writing itself to determine the parties' intent. *Alexander* at paragraph two of the syllabus.

Custom Agri

{¶ 12} In *Custom Agri*, we answered a certified question from the United States Court of Appeals for the Sixth Circuit concerning a defective-construction lawsuit involving a property owner and a general contractor for faulty construction of a steel bin. 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, at ¶ 2. The contractor filed a third-party complaint against Custom Agri, the subcontractor who was responsible for building the defective steel bin.

{¶ 13} Custom Agri had obtained a CGL policy from Westfield Insurance Company. Westfield intervened and sought a declaratory judgment that it had no duty to defend or indemnify Custom Agri under the CGL policy because Custom Agri's claims did not involve "property damage" caused by an "occurrence." *Id.* at ¶ 3.

[7] [8] [9] {¶ 14} We noted that the general principle underlying CGL policies is that they are not intended to protect business owners from ordinary business risks. *Id.* at ¶ 10, citing *Heile v. Herrmann*, 136 Ohio App.3d 351, 353, 736 N.E.2d 566 (1st Dist.1999). " 'Courts generally conclude that the policies are intended to insure the risks of an insured causing damage to other persons and their property, but that the policies are not intended to insure the risks of an insured causing damage to the insured's own work.' " *Custom Agri* at ¶ 10, quoting *Heile* at 353, 736 N.E.2d 566. " 'In other words, the policies do not insure an insured's work itself; rather, the policies generally insure consequential risks that ****767** stem from the insured's work.' " *Custom Agri* at ¶ 10, quoting *Heile* at 353, 736 N.E.2d 566.

> [A] CGL policy is not intended to insure business risks that are the normal, frequent, or predictable consequences of doing business and which businesses can control and manage. * * * A CGL policy does not insure the insured's work itself; rather, it insures consequential damages that stem from that work. * * * As a result, a CGL policy may provide coverage for claims arising out of tort, breaches of contract, and statutory liabilities as long as the requisite accidental occurrence and property damage are present.

Custom Agri at ¶ 10, quoting *ACUITY v. Burd & Smith Constr., Inc.*, 2006 ND 187, 721 N.W.2d 33, ¶ 12.

{¶ 15} We noted that all the claims against which Westfield was asked to defend and indemnify Custom Agri were related to Custom Agri's own work. ***201** *Id.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, at ¶ 11. But we continued to analyze the CGL policy's specific terms and considered

whether Custom Agri's faulty work could still be considered "property damage" caused by an "occurrence" under the policy. *Id.*

{¶ 16} As in this case, the CGL policy in *Custom Agri* defined "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions," *id.* at ¶ 12. But the CGL policy did not define "accident." *Id.* We determined that we had to give the word its " 'natural and commonly accepted meaning.' " *Id.*, quoting *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347 (1982).

{¶ 17} We noted that we had previously defined "accidental" as " 'unexpected, as well as unintended.' " *Custom Agri* at ¶ 13, quoting *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 666, 597 N.E.2d 1096 (1992). And we agreed with our sister court in Kentucky that in the context of a CGL policy, " '[i]nherent in the plain meaning of "accident" is the doctrine of fortuity.' " *Custom Agri* at ¶ 13, quoting *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 74 (Ky.2010). We added that " ' "[t]he fortuity principle is central to the notion of what constitutes insurance." ' " *Custom Agri* at ¶ 13, quoting *Cincinnati Ins. Co.* at 74, quoting 46 Corpus Juris Secundum, Insurance, Section 1235 (2009); *see also Indiana Ins. Co. v. Alloyd Insulation Co.*, 2d Dist. Montgomery No. 18979, 2002-Ohio-3916, 2002 WL 1770491, ¶ 27, quoting Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 Torts & Ins.L.J. 785, 785-787 (1994) (" 'faulty workmanship claims generally are not covered, except for their consequential damages, because they are not fortuitous. In short, contractors' "business risks" are not covered by insurance, but derivative damages are. The key issues are whether the contractor controlled the process leading to the damages and whether the damages were anticipated' ").

{¶ 18} We concluded that "claims for faulty workmanship, such as the one in the present case, are not fortuitous in the context of a CGL policy like the one here." *Custom Agri*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, at ¶ 14. Therefore, they "are not claims for 'property damage' caused by an 'occurrence' under a [CGL] policy such as the one in the present case." *Id.* at ¶ 19.

The CGL policy

[10] **{¶ 19}** As in *Custom Agri*, our decision here depends on the specific ****768** terms of the CGL policy, including the PCOH and subcontractor-specific language. CIC submits that we considered in *Custom Agri*, at least indirectly, the same contractual language before us now, because Custom Agri was a subcontractor and had hired subcontractors. But while the CGL policy in *Custom Agri* may ***202** have included PCOH and subcontractor clauses, we did not address them directly and must do so here.

{¶ 20} The CGL policy in this case states the following regarding general liability:

> COMMERCIAL GENERAL LIABILITY COVERAGE FORM
>
> * * *
>
> SECTION I—COVERAGES
>
> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. *We will pay those sums that the insured becomes legally obligated to pay as damages because of* "bodily injury" or *"property damage"* to which this insurance applies. *We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for* "bodily injury" or *"property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence"* and settle any claim or "suit" that may result. But:
>
> * * *
>
> b. *This insurance applies to* "bodily injury" and *"property damage" only if*:
>
> (1) *The* "bodily injury" or *"property damage" is caused by an "occurrence"* that takes place in the "coverage territory * * *."

(Capitalization sic and emphasis added.)

{¶ 21} In "Section V—Definitions," the CGL policy defines "occurrence" and "property damage" as follows:

> 16. "Occurrence" means:

a. An accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

20. "Property damage" means:

a. Physical injury to or destruction of tangible property including all resulting loss of use. All such loss of use shall be deemed to occur at the time of the physical injury or destruction that caused it; or

b. *Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it*.

***203** (Emphasis added.)

{¶ 22} By its terms, the CGL policy emphasizes that only "an occurrence" can trigger coverage for property damage. It states that CIC agrees to "pay those sums that the insured becomes legally obligated to pay as damages because of * * * 'property damage' to which this insurance applies." But the damage must be due to an "occurrence," which is defined as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions." There is no question that the damage to the inn was "property damage" that was discovered after work was completed. But without an "occurrence" as defined in the CGL policy, there is no coverage for any property damage.

{¶ 23} Nevertheless, appellees argue, and the court below held, that the CGL ****769** policy's subcontractor-specific terms and the PCOH clause show that the parties intended for the policy to cover the damages here. Those provisions state the following:

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

* * *

2. Exclusions:

This insurance does not apply to:

* * *

j. Damage to Property

"Property damage" to:

* * *

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

* * *

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

{¶ 24} In "Section V—Definitions," the CGL policy defines "products-completed operations hazard" as follows:

19. "Products-completed operations hazard":

a. Includes * * * "property damage" occurring away from premises you own or rent and arising out of * * * "your work" except:

* * *

***204** (2) Work that has not yet been completed or abandoned.

{¶ 25} The CGL policy then lists the instances in which "your work" is deemed completed. The parties do not dispute that work on the inn was completed by the time that the water-related damage was discovered. Still, the CGL policy's definition of "your work" must be considered:

29. "Your work":

a. Means:

(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.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance, or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

{¶ 26} Finally, the CGL policy provides the following *exclusion* for "property damage" to "your work," which includes an *exception to the exclusion* when a subcontractor performs the work:

> 2. Exclusions
>
> This insurance does not apply to:
>
> * * *
>
> l. Damage to Your Work:
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> 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.

*****770 Under the CGL policy's plain language, property damage caused by a subcontractor's faulty work does not meet the definition of "occurrence" because faulty work is not fortuitous***

{¶ 27} Again, we concluded in *Custom Agri* that "claims for faulty workmanship, such as the one in the present case, are not fortuitous in the context of a CGL policy." 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, at ¶ 14. We made that determination because these claims "are not claims for 'property damage' caused by an 'occurrence' under a [CGL] policy" because faulty work is ***205** not fortuitous. *Id.* at ¶ 19. Here, we similarly hold that a subcontractor's faulty work does not meet the definition of "occurrence" because it is not based in fortuity.

{¶ 28} The language within the Coverage A portion of the CGL policy is critical to the policy's overall effect. It states that CIC agrees to pay for property damage under certain circumstances. But the damage must be due to an "occurrence," which the policy defines as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions." Again, there is no question that the water-related damage to the inn was "property damage" and was discovered after work had been completed. But unless there was an "occurrence," the PCOH and subcontractor language has no effect, despite the fact that Charles Construction had paid additional money for it.

{¶ 29} If the subcontractors' faulty work were fortuitous, the PCOH and subcontractor-specific terms would require coverage. But as we explained in *Custom Agri*, CGL policies are not intended to protect owners from ordinary "business risks" that are normal, frequent or predictable consequences of doing business that the insured can manage. *Custom Agri* at ¶ 10. Here, we cannot say that the subcontractors' faulty work was fortuitous.

{¶ 30} Charles Construction, ONU, and their amici curiae assert that parties to a construction contract understand that contractors buy coverage for defects discovered after completion through the PCOH clause and that CGL policies and PCOH clauses have changed over time to assure that subcontractor work is covered. In support, they note that over the past several years, courts have agreed with their arguments.

{¶ 31} We acknowledge that our reasoning in this case contrasts with recent decisions of other courts. *See, e.g.*, *Black & Veatch Corp. v. Aspen Ins. (UK), Ltd.*, 882 F.3d 952, 965-966 (10th Cir.2018) *cert. denied*, —— U.S. ——, 139 S.Ct. 151, 202 L.Ed.2d 35 (2018) (analyzing history of CGL policies and holding that definition of "occurrence" encompasses damage to the insured's own work arising from faulty subcontractor workmanship); *Natl. Sur. Corp. v. Westlake Invests., L.L.C.*, 880 N.W.2d 724, 740 (Iowa 2016) ("we interpret the insuring agreement in the modern standard-form CGL policy as providing coverage for property damage arising out of defective work performed by an insured's subcontractor unless the resulting property damage is specifically precluded from coverage by an exclusion or endorsement"); *Cypress Point Condominium Assn. v. Adria Towers, L.L.C.*, 226 N.J. 403, 428-429, 143 A.3d 273 (2016) ("because the result of the subcontractors' faulty workmanship here—consequential water damage to the completed and nondefective portions of Cypress Point—was an 'accident,' it is an 'occurrence' under the policies and is therefore covered so long as the other parameters set by the policies are met"); French, ***206** ****771** *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, 19 U.Pa.J.Bus.L. 101, 122-123 (2016) ("In the past five years * * * there has been near unanimity by the courts that have addressed the issue. They have held that construction defects can constitute occurrences and contractors have coverage under CGL policies at least for the unexpected property damage caused by defective workmanship done by subcontractors"). But the language requiring that "property damage" be caused by an

Ohio Northern University v. Charles Construction Services, Inc., 155 Ohio St.3d 197 (2018)

"occurrence" remains a constant in the policies. And under our precedent, faulty workmanship is not an occurrence as defined in CGL polices like the one before us.

{¶ 32} Regardless of any trend in the law, we must look to the plain and ordinary meaning of the language used in the CGL policy before us. *See Alexander v. Buckeye Pipe Line*, 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146 (1978). When the language of a written contract is clear, we may look no further than the writing itself to find the intent of the parties. *Id.* at paragraph two of the syllabus.

{¶ 33} In deciding *Custom Agri*, we adopted the Arkansas Supreme Court's reasoning in *Essex Ins. Co. v. Holder*, 372 Ark. 535, 261 S.W.3d 456 (2008). In *Essex*, a homebuilder demanded that his insurance provider defend him under his CGL policy after the homeowners sued him during the construction of their house for damages caused in part by his use of incompetent subcontractors. *Id.* at 457. The Arkansas court concluded that the insurance provider had no such duty because "[f]aulty workmanship is not an accident; instead it is a foreseeable occurrence." *Id.* at 460. The court relied, in part, on a federal district court's decision that had applied the Arkansas court's definition of "accident": "[T]he contractor's obligation to repair or replace its subcontractor's defective workmanship could not be deemed unexpected on the part of the contractor, and therefore, failed to constitute an 'event' for which coverage existed under the policy." *Id.* at 459, citing *Nabholz Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 354 F.Supp.2d 917, 923 (E.D.Ark.2005).

{¶ 34} After that decision, the Arkansas legislature enacted Ark.Code Ann. 23-79-155(a)(2), which states that a CGL policy offered for sale in Arkansas shall define "occurrence" to include "[p]roperty damage * * * resulting from faulty workmanship." If it were so inclined, the Ohio General Assembly could take similar action in response to our opinion today.

CONCLUSION

{¶ 35} We hold that property damage caused by a subcontractor's faulty work is not fortuitous and does not meet the definition of "occurrence" under a CGL policy. CIC was not required to defend Charles Construction against ONU's ***207** lawsuit or indemnify Charles Construction against any damages. We reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Judgment reversed.

O'Donnell, Fischer, DeWine, and DeGenaro, JJ., concur.

O'Connor, C.J., and Kennedy, J., concur in judgment only.

All Citations

155 Ohio St.3d 197, 120 N.E.3d 762, 364 Ed. Law Rep. 1183, 2018 -Ohio- 4057

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Z & R ELECTRIC SERVICE, INC, Plaintiff-Appellant,
v.
CINCINNATI INSURANCE COMPANY, Defendant-Appellee.

No. 226605.
|
June 5, 2001.

Before: SAWYER, P.J., and SMOLENSKI and WHITBECK, JJ.

Opinion

PER CURIAM.

***1** Plaintiff Z & R Electric Service, Inc., appeals of right an order granting summary disposition to defendant Cincinnati Insurance Company ("CIC") pursuant to MCR 2.116(C)(10) in this breach of contract action. We affirm, although for different reasons than those stated by the trial court.

I. Basic Facts And Procedural History

In 1993, Z & R contracted with Mead Paper Corporation to build a synchronous condenser system to conserve electricity in its manufacturing facilities. The specific details of the contract between Z & R and Mead are not clear to us because the record does not include a complete copy of this contract. In any event, according to a detailed "formal purchase order," Z & R, in turn, contracted with the Louis Allis Company to design and build the motor that would drive the condenser system. According to photographs, this motor is an extremely large and complex piece of machinery.

Z & R finished installing the condenser system, including the motor, in spring 1995. In April 1995, the system failed when the motor malfunctioned because an internal component separated at a soldered joint. Two months later, the system again failed for the same reason. Fortunately, the physical damage caused in these two incidents was limited to the motor itself and, by making extensive repairs over several months, Z & R was able to prevent this problem from recurring. These repairs cost Z & R between $29,000 and $31,000 in labor. Fred Bieti, Z & R's president, wrote to Z & R's insurance agent asking for assistance in filing a claim with CIC to cover the actual cost of repairing the motor. Subsequently, in a somewhat confusing letter that cited various sections of the insurance policy without explaining how they applied to Z & R's claim for coverage, CIC denied its claim.

After Z & R instituted this action to recover solely for the actual costs it sustained when repairing the motor, CIC moved for summary disposition, presumably under MCR 2.116(C)(10), asserting that the motor's failure was not an "occurrence" the commercial general liability policy covered. CIC also invoked policy exclusion I(A)(1)(k) ("exclusion k"), which precludes coverage for " 'property damage' to 'your product' arising out of it or any part of it." In Z & R's response to the motion for summary disposition, it maintained that the motor failures were "occurrences" and that exclusion k did not apply to its claim because the motor was Louis Allis' product under the policy's definition of "your product" as "any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by you." In concluding the response to the motion for summary disposition, Z & R asked the trial court to deny CIC's motion and, instead, to enter summary disposition in its favor. The trial court ruled that the motor failure was an "occurrence," but that CIC was not liable under exclusion k because the damage arose from Z & R's "product."

***2** On appeal, Z & R contends that the insurance policy is, at best ambiguous with respect to whether exclusion k applies rather than the exclusion in section I(A)(1)(l) ("exclusion l"), which applies to "your work." Z & R relies on this argument because exclusion 1 includes an exception for a subcontractor's work. Z & R does not raise a specific argument concerning whether the motor malfunction was an "occurrence" under the policy, probably because the trial court ruled in its favor on this issue and it simply asserts that the malfunction was an "occurrence." However, when disputed as in this case, the first logical question that a court must resolved in any case involving an insurance claim is whether a triggering event identified in the policy happened. Because we determine that there was no "occurrence" under the policy, we need not reach Z & R's arguments concerning the exclusions and exceptions that might otherwise apply.

II. Standard Of Review

We review de novo a trial court's order granting or denying motions for summary disposition. [1]

1 *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998).

III. Legal Standards

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests a claim's factual basis other than an amount of damages, which requires the deciding court to consider all the evidence, affidavits, pleadings, admissions, and other information available in the record. [2] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, which must be given the benefit of every reasonable doubt. [3] Black letter law provides that if an insurance contract is unambiguous "and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." [4] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary. [5] In other words, a plaintiff must show that there is a genuine issue of material fact regarding each element of the prima facie case to survive a motion for summary disposition under MCR 2.116(C)(10). [6]

2 MCR 2.116(G)(5); *Smith v. Globe Life Ins Co,* 460 Mich. 446, 454; 597 NW2d 28 (1999).

3 *Atlas Valley Golf & Country Club, Inc v Village of Goodrich,* 227 Mich.App 14, 25; 575 NW2d 56 (1998).

4 *Henderson v State Farm Fire & Casualty Co,* 460 Mich. 348, 353; 596 NW2d 190 (1999).

5 MCR 2.116(G)(4); *Etter v. Michigan Bell Telephone Co,* 179 Mich.App 551, 555; 446 NW2d 500 (1989).

6 See *Richardson v. Michigan Humane Society,* 221 Mich.App 526, 527-528; 561 NW2d 873 (1997).

In order to carry out our analysis of the evidence on the record, we keep in mind the well-known rules of interpretation that apply to insurance contracts:

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity.
>
> While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured. The fact that a policy does not define a relevant term does not render the policy ambiguous. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism. [7]

7 *Henderson, supra* at 354-355 (citations omitted).

IV. Occurrence

***3** CIC's commercial general liability coverage form states that it will pay for property damage that results from an "occurrence," defining an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy does not define what the word "accident" means, but the common meaning ascribed to the word in the *Random House Webster's College Dictionary* (2d ed) is "an undesirable or unfortunate happening that occurs unintentionally and usu[ally] results in injury, damage, or loss." The Michigan Supreme Court adopted a substantially similar definition of "accident" in the insurance context almost thirty years ago:

> "An 'accident,' within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby-that is, takes place without the insured's foresight or expectation and without design or intentional causation

on his part. In other words, an accident is an undesigned 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." [8]

8 *Guerdon Industries, Inc v. Fidelity & Casualty Co,* 371 Mich. 12, 18-19; 123 NW2d 143 (1963), quoting Couch on Insurance, 2d ed, § 41:6, p 27.

Further, whether an accident occurred must be viewed from the insured's perspective. [9]

9 *Frankenmuth Mut Ins Co v. Masters,* 460 Mich. 105, 114; 595 NW2d 832 (1999).

With these definitions and proper perspective in mind, there really is no debate in the record that Z & R did not expect the motor it purchased from Louis Allis to malfunction soon after installing it, constituting the sort of unforeseen event resulting in damage that fits the ordinary definition of an "accident." However, CIC contends, this malfunction was not an "accident" because it was the natural result of Z & R's own defective product. As authority for this proposition, CIC cites the reasoning in a number of cases, including *Calvert Ins Co v Herbert Roofing & Insulation Co,* [10] which this Court recently adopted in *Radenbaugh v Farm Bureau General Ins Co of Michigan,* [11] and *Hawkeye-Security Ins Co v. Vector Const Co,* [12] distinguishing this case from *Bundy Tubing Co v. Royal Indemnity Co.* [13] The *Radenbaugh* Court gave a lengthy synthesis of *Calvert, Vector,* and *Bundy,* making it unnecessary for us to repeat that effort here. [14]

10 *Calvert Ins Co v Herbert Roofing & Insulation Co,* 807 F Supp 435 (ED Mich, 1992).

11 *Radenbaugh v Farm Bureau General Ins Co of Michigan,* 240 Mich.App 134, 148; 610 NW2d 272 (2000).

12 *Hawkeye-Security Ins Co v. Vector Const Co,* 185 Mich.App 369; 460 NW2d 329 (1990).

13 *Bundy Tubing Co v. Royal Indemnity Co,* 298 F.2d 151 (CA 6, 1962).

14 *Radenbaugh, supra* at 144-148.

In short, *Calvert* holds that "when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy." [15] We agree with Z & R's argument that Louis Allis was its subcontractor and that Louis Allis, not Z & R, defectively designed and manufactured the motor. Yet, we note the parallels between the facts of this case and the facts of *Vector,* on which *Calvert* relied.

15 *Calvert, supra* at 439.

In *Vector,* the insured purchased cement from a third-party, which it then used to construct a water treatment plant. [16] The municipality that owned the plant discovered that the concrete was defective. [17] To remedy the problem, the insured had to remove 13,000 yards of the defective concrete and replace it with concrete that met the project's standards. [18] When the insured submitted a claim for the costs it incurred in undertaking this extensive repair effort, the insurer denied its claim on the basis that there had been no "occurrence" under the insurance policy. [19] The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured...." [20] The trial court granted the insurer's motion for summary disposition. [21] On appeal, this Court interpreted *Bundy, supra,* to mean that "an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by 'accidents' where the insured's faulty work product *damages the property of others."* [22] Consequently, this Court held that there had been no occurrence within the meaning of the policy because the defective concrete damaged nothing but the insured's work product. [23]

16 *Vector, supra* at 371.

17 *Id.*

18 *Id.* at 371-372.

19 *Id.* at 372.

20 *Id.* at 373.

21 *Id.* at 372.

22 *Vector, supra* at 377 (emphasis added).

23 *Id.* at 378.

***4** The insured in *Vector* was no more responsible for making the defective concrete than Z & R was responsible

here for the defective design and manufacture of the motor. In each case, a third party caused the problem in the materials the insured used, which ultimately failed. However, critically, unlike the damage to other individuals' property at issue in *Bundy,* [24] *Calvert,* [25] and *Radenbaugh,* [26] the record here does not include evidence that the motor's failure damaged any other part or aspect of the Mead facility. The malfunction merely made the system inoperative in the same way that the defective concrete made the water treatment plant in *Vector* unusable, with the defects in both cases requiring massive repair and replacement efforts.

24 *Bundy, supra* at 151-152, 154 (insured manufactured defective tubing used for radiant heating, which evidently damaged buildings and their contents when the tubing leaked).

25 *Calvert, supra* at 436, 438-439 (insured installed roof on school that leaked, damaging contents of building, as well as walls and the foundation).

26 *Radenbaugh, supra* at 136, 142, 144 (insured provided faulty schematics to contractors who constructed homeowner's foundation, causing damage to the foundation and the home itself).

Though the trial court erroneously concluded that there had been an "occurrence" under the policy, summary disposition under MCR 2.116(C)(10) was proper because there is no dispute in the record that the damages at issue in this case were confined to the condenser system Z & R designed and installed, of which the motor was an integral part. The magnitude of the repairs in this case makes the impulse to seek insurance coverage understandable. Nevertheless, to paraphrase *Calvert,* this insurance policy protects Z & R from bearing the cost of liability for tortious damage it causes to others or their property, not the costs it might sustain in remedying a breach of its contract to construct an operational condenser system for Mead. [27] Thus, we have no reason to reverse. [28]

27 *Calvert, supra* at 438, n 1.

28 *Taylor v. Laban,* 241 Mich.App 449, 458; 616 NW2d 229 (2000).

Affirmed.

All Citations

Not Reported in N.W.2d, 2001 WL 619973

2005 WL 1522169
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

AUTO OWNERS INSURANCE COMPANY, Plaintiff-Appellee,
v.
LONG'S TRI-COUNTY MOBILE HOME, INC., Defendant-Appellant,
and
Jeff SCOTT and Laura Scott, Defendants.

No. 252580.
|
June 28, 2005.

Before: OWENS, P.J., and CAVANAGH and NEFF, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant Long's Tri-County Mobile Home, Inc., appeals as of right an order granting declaratory judgment in favor of plaintiff. We affirm.

Defendant argues that the trial court erred in granting judgment in favor of plaintiff and holding that defendant's claim was not a covered loss under the terms of the commercial general liability insurance policy it secured with plaintiff. We disagree.

Here, both parties moved for summary disposition according to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Kefgen v. Davidson,* 241 Mich.App 611, 616; 617 NW2d 351 (2000). The construction and interpretation of an insurance policy and whether an ambiguity remains for the factfinder are questions of law that are reviewed de novo on appeal. *Henderson v. State Farm Fire & Cas Co,* 460 Mich. 348, 353; 596 NW2d 190 (1999).

Defendant's claim is not an insurable loss because it is not an "occurrence" as defined by the policy of insurance. "Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage. This Court has held that an insurance policy provision is valid 'as long as it is clear, unambiguous and not in contravention of public policy.' " *Auto-Owners v. Harrington,* 455 Mich. 377, 382; 565 NW2d 839 (1997) (citations omitted). Resolution of the first issue before the Court turns on our interpretation and application of the definition of "occurrence" in the "insuring agreement" section of the policy.

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Id.* at 381, quoting *Auto-Owners Ins Co v. Churchman,* 440 Mich. 560, 566; 489 NW2d 431 (1992). Thus, "the court looks to the contract as a whole and gives meaning to all its terms." *Harrington, supra.* An unambiguous contract must be construed according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall,* 228 Mich.App 101, 107; 577 NW2d 188 (1998). It is the insured's burden to prove that coverage exists. *Heniser v. Frankenmuth Mut Ins Co,* 449 Mich. 155, 161 n 6; 534 NW2d 502 (1995). Any doubt regarding insurance coverage must be resolved in the insured's favor. *American Bumper & Mfg Co v. Hartford Fire Ins Co,* 452 Mich. 440, 448; 550 NW2d 475 (1996). If the insurance contract contains definitions, they must be used when interpreting the policy language. *Cavalier Mfg Co v Employers Ins of Wausau (On Remand),* 222 Mich.App 89, 94; 564 NW2d 68 (1997).

The policy in question is one for casualty loss which provides coverage for "property damage" that was "caused by an 'occurrence .' " "Occurrence" is defined by policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While the term accident is not defined in the policy, the Supreme Court has defined an accident as "an undesigned 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." *Frankenmuth Mutual Ins Co v. Masters,* 460 Mich. 105, 114; 595 NW2d 832 (1999).

***2** The trial court noted that the damages in this case were caused by the faulty backfilling performed by a subcontractor hired by defendant. The subcontractor's faulty work caused

the basement walls of the manufactured home sold and delivered by defendant to crack and settle. An arbitrator found defendant responsible as the general contractor for the installation of the manufactured home. In ruling from the bench in favor of plaintiff the Court relied on *Hawkeye-Security Insurance Company v Vector Construction,* 185 Mich.App 369; 460 NW2d 329 (1990), for the proposition that the defective workmanship of the subcontractor was not an unforeseeable accident and therefore could not be considered an occurrence under plaintiff's policy.

In *Vector,* the insured purchased cement from a third-party, which it then used to perform all the concrete work in an improvement project at a water treatment plant. *Id.* at 371. The owner of the plant discovered that the concrete was defective, and to remedy the problem, the insured had to remove the defective concrete and replace it with concrete that met the project's standards. *Id.* at 371-372. When the insured submitted a claim for the costs it incurred for the repairs, the insurer denied its claim on the basis that there had been no "occurrence" under the insurance policy. *Id.* at 372. Similar to the instant case, the policy defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured...." *Id.* at 373. The trial court granted the insurer's motion for summary disposition. *Id.* at 372.

On appeal, this Court found *Bundy Tubing Co v. Royal Indemnity Co,* 298 F.2d 151 (CA 6, 1962) to be persuasive authority, and interpreted that case to mean that "an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by 'accidents' where the insured's faulty work product *damages the property of others." Vector, supra* at 377 (emphasis added). Thus, this Court held that there had been no "occurrence" within the meaning of the policy because the defective concrete damaged nothing but the insured's work product. *Id.* at 378.

In *Radenbaugh v. Farm Bureau Gen Ins Co,* 240 Mich.App 134; 610 NW2d 272 (2000), the insured brought an action for breach of a commercial general liability policy, and the defendant insurer and the plaintiff insureds cross-appealed orders issued on cross-motions for summary disposition. *Id.* at 136-137. The underlying action in *Radenbaugh* arose out of the sale of a double-wide mobile home by the insured. *Id.* at 136. The purchasers alleged that the insured provided erroneous schematics and instructions to contractors hired by the purchasers of the home for the construction of the home's basement foundation and erection of the home on its basement, which caused damage to the home and basement. *Id.* Similar to the instant case, the insured sought a defense and indemnification under its insurance policy, which the insurer refused based on policy language substantially similar to the instant case. *Id.* at 137, 141.

***3** *Radenbaugh* looked to *Vector* and *Bundy,* and noted, "*Bundy* and *Vector* can be reconciled by focusing on the property damage at issue in each case." *Id.* at 147. The Court continued, holding, "these cases stand for the proposition that when an insured's defective workmanship results in damages to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy." *Id.* at 147. The Court held:

Consistent with *Bundy* and contrary to the facts in *Vector,* the underlying action alleged more than damage to the insured's own product. In particular, it was alleged that because of plaintiffs' defective instructions to the basement contractor, Leelanau Redi-Mix, the basement of the mobile home was improperly constructed and the mobile home was incorrectly erected. As a result of defendant's faulty instructions, the basement was rendered unusable because "water is seeping into and condensing on basement walls, constituting a threat of rot, causing mildew and mold and other health hazards." [*Radenbaugh, supra at* 144-145.]

Thus, the rule is clear: where an insured cannot show damage to anything more than his defective product, there is no "occurrence" under the terms of the policy. Here, the damaged portions of the Scotts' property-the manufactured home-that needed to be repaired, replaced or restored as a result of defective workmanship by defendant's subcontractor was limited to defendant's own product (the basement and manufactured home). The record is devoid of any evidence that there was any damage to anything other than the product manufactured, sold and installed by defendant. The trial court correctly granted plaintiff's motion for summary disposition based on its reading that defendant's claim was not an "occurrence" under the terms of the policy.

The trial court went on to hold that even if the damages sustained were the result of an occurrence under the policy, two policy provisions clearly exclude coverage. While it is unnecessary for us to address or decide the applicability of the exclusions to coverage, we note that we agree with the trial court's ruling in this regard.

Affirmed.

All Citations

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End of Document

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

MARK A. REENDERS CONSTRUCTION, INC, Plaintiff-Appellant,
v.
CINCINNATI INSURANCE CO and Shoreline Insurance Agency, Defendants-Appellees.

No. 256592.
|
Jan. 24, 2006.

Before: ZAHRA, P.J., and MURPHY and NEFF, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals as of right from the grant of defendants' motions for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff, a general contractor, was covered by commercial general liability and umbrella policies issued by defendant Cincinnati procured through defendant Shoreline. Plaintiff was the general contractor of two buildings on which it perfected construction liens. When plaintiff sought to foreclose the liens, the building owners brought counterclaims against plaintiff. The counterclaims alleged breach of contract for failing to perform work in a workmanlike and timely manner. Cincinnati declined plaintiff's demand to appear and defend the counterclaims. Plaintiff then filed this declaratory action seeking a judgment that its policies afforded coverage and that defendant Cincinnati owed it a duty to defend. Additionally, plaintiff alleged defendant Shoreline breached its contract and agency relationships by failing to investigate its claims.

The standard of our de novo review applied to summary dispositions under MCR 2.116(C)(8) is succinctly set out in *Farmers Ins Exchange v. Kurzmann,* 257 Mich.App 412, 417; 668 NW2d 199 (2003).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v. Henderson,* 465 Mich. 124, 129; 631 NW2d 308 (2001). When reviewing such a motion, a court must base its decision on the pleadings alone. *Id.* "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(8) if a party has failed to state a claim on which relief could be granted and further factual development would not justify recovery. *Beaudrie, supra* at 129-130.

A motion under MCR 2.116(C)(8) may be granted only where the alleged claims are clearly so unenforceable as a matter of law that no factual development could possibly justify recovery.

More specifically, we review de novo a trial court's decision in regard to a motion for summary disposition in a declaratory judgment action. *Unisys Corp v. Comm'r of Ins,* 236 Mich.App 686, 689; 601 NW2d 155 (1999). The interpretation of clear contractual language is an issue of law that is reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc,* 468 Mich. 459, 463, 469; 663 NW2d 447 (2003).

Plaintiff's policies provided coverage for "property damage" caused by an "occurrence." An "occurrence" is defined by the policy as an accident. The trial court relied on *Radenbaugh v. Farm Bureau Gen Ins,* 240 Mich.App 134; 610 NW2d 272 (2000), for its finding because the damages claimed in the underlying counter claims were to plaintiff's own work product and that there was, therefore, no "occurrence" to trigger coverage. In *Radenbaugh,* this Court adopted the analysis of the federal district court in, *Calvert Ins Co v Herbert Roofing & Insulation Co,* 807 F Supp 435 (ED Mich, 1992), which examined whether there is an "occurrence" when defective workmanship is the nature of the claim. The district court found that the focus of the inquiry is on whether the insured's defective workmanship resulted in damage to the property of others or only to the insured's work product. *Calvert, supra* at 438.

***2** All damage alleged in the underlying actions in this case was to the insured's own work product. Plaintiff's argument that the property of others would be damaged if the defective work complained of were replaced, is without merit. Further,

plaintiff's assertion on appeal that the underlying counter claims contained allegations of moisture damage is simply untrue. In order to constitute damage to the property of others, plaintiff's defective work product must have caused some additional or resultant damage to property that stems from, but does not include, that defective work product. In the underlying counter claims at issue here, there is no allegation of damage that stems from but does not include plaintiff's faulty workmanship or defective work product. We agree with the trial court that based on the pleadings, [1] there was no "occurrence" for purposes of coverage under the policy and hold that summary disposition was properly granted.

1 Plaintiff attached copies of the counter claims in the underlying cases to its complaint in this case and we consider them part of the pleadings.

Plaintiff also argues that the fact that this work was performed by subcontractors has some bearing on the result here. Plaintiff has supplied no authority for its contention and "[a] party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer,* 159 Mich.App 288, 294; 406 NW2d 217 (1987). Additionally, the existence of an "occurrence" is dependent on the nature of the act, not on who performs it. Therefore, there is no "occurrence" under plaintiff's policies here and the grant of summary disposition to defendant Cincinnati Insurance was appropriate.

Plaintiff's other issue on appeal is that defendant Shoreline breached its contract and agency relationship because it failed to investigate its claims. Plaintiff has failed to cite any authority or precedent for his claims that defendant Shoreline owed a duty to investigate its claim. Our Supreme Court has stated, "[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v. Detroit,* 355 Mich. 182, 203; 94 NW2d 388 (1959). Additionally, "[f]ailure to brief a question on appeal is tantamount to abandoning it." *Id.* A cursory statement with little or no citation of supporting authority is insufficient to bring before this Court. *Wilson v. Taylor,* 457 Mich. 232, 243; 577 NW2d 100 (1998). Therefore, plaintiff has abandoned this issue on appeal.

Affirmed.

All Citations

Not Reported in N.W.2d, 2006 WL 167700

KeyCite Yellow Flag - Negative Treatment
Appeal Granted by Hastings Mut. Ins. Co. v. Mosher, Dolan, Cataldo & Kelly, Inc., Mich., May 23, 2007

2006 WL 1360404
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

HASTINGS MUTUAL INSURANCE COMPANY, Plaintiff-Appellant,
v.
MOSHER, DOLAN, CATALDO & KELLY, INC., Defendant-Appellee,
and
Lisa Feinbloom and David Feinbloom, Defendants, On Reconsideration.

Docket No. 265621.
|
May 18, 2006.

Oakland Circuit Court; LC No. 04-056508-CK.

Before: DAVIS, P.J., CAVANAGH and TALBOT, JJ.

ORDER

PER CURIAM.

***1** The Court orders that the motion for immediate consideration is GRANTED.

The motions for reconsideration and for leave to file a reply brief are also GRANTED.

This Court's opinion issued March 28, 2006, is hereby VACATED. A new opinion is attached to this order.

[UNPUBLISHED]

Plaintiff appeals as of right from the trial court's order granting judgment in favor of defendant Mosher, Dolan, Cataldo & Kelly, Inc. ("Mosher"). We reverse.

Plaintiff argues that the trial court erred by granting summary disposition in Mosher's favor. We agree. Both parties moved for summary disposition under MCR 2.116(C)(10). This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents,* 468 Mich. 609, 613; 664 NW2d 165 (2003). Interpretation and construction of insurance contracts are also questions of law that this Court reviews de novo. *Shefman v. Auto-Owners Ins Co,* 262 Mich.App 631, 636; 687 NW2d 300 (2004).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v. Detroit Bd of Ed,* 470 Mich. 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v. Harrington,* 455 Mich. 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v. Churchman,* 440 Mich. 560, 566; 489 NW2d 431 (1992). When confronted with a dispute between the parties to an insurance contract over the meaning of the policy, the reviewing court "must determine what the agreement is and enforce it." *Radenbaugh v Farm Bureau Gen Ins Co of Michigan,* 240 Mich.App 134, 138; 610 NW2d 272 (2000). In making that determination, the reviewing court must look to the contract as a whole and confer meaning on all its terms. *Harrington, supra* at 381. When an insurance policy contains ambiguous terms, this Court will construe the terms of the policy in favor of the insured. *Nabozny v. Burkhardt,* 461 Mich. 471, 477 n 8; 606 NW2d 639 (2000). However, "[t]his Court cannot create ambiguity where none exists." *Churchman, supra* at 567. Where there is no ambiguity, the terms of the contract must be construed according to their plain and ordinary meanings. *St Paul Fire & Marine Ins Co v. Ingall,* 228 Mich.App 101, 107; 577 NW2d 188 (1998). Moreover, the terms of an insurance contract are to be interpreted in accordance with the definitions in that contract, or, if no definitions are provided, are to be given a meaning according to their "common usage." *Cavalier Mfg Co v Employers Ins of Wausau (On Remand),* 222 Mich.App

89, 94; 564 NW2d 68 (1997). An insured bears the burden of proving coverage; however, it is the insurer that must prove that an exclusion to coverage is applicable. *Heniser v. Frankenmuth Mut Ins,* 449 Mich. 155, 161 n 6; 534 NW2d 502 (1995).

***2** "Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage. This Court has held that an insurance policy provision is valid 'as long as it is clear, unambiguous and not in contravention of public policy." ' *Harrington, supra* at 382 (citations omitted). The first step of this Court's inquiry, therefore, is to determine whether coverage exists according to the general insurance agreement. *Id.* In order to do so, we must first decide which commercial general liability ("CGL") policies, if any, apply to Mosher's claim in this case. Mosher argues that the 2001 policy applies to its "visible mold" claim because the framing of the house in 2001 caused the mold. Mosher further argues that the 2001 and 2002 policies cover its "other losses" for defective work claims, and that the 2003 policy does not apply to any of its claims. Plaintiff does not discuss these issues, but simply contends that the policies contain identical terms and provisions. Regardless of which policy is used, however, the relevant policy language, contained in all three CGL policies, provides:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1). The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2). The "bodily injury" or "property damage" occurs during the policy period.
>
> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> 17. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Thus, according to the policy language, before we inquire into whether the property damage at issue occurred during a particular policy period, we must first determine whether it was caused by an "occurrence" within the meaning of the policies.

The policies in question provide coverage for "bodily injury" or "property damage" that was "caused by an 'occurrence." ' "Occurrence" is defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because the term "accident" is not defined in the policy, we must define that term according to its common usage. *Cavalier Mfg Co, supra* at 94. Our Supreme Court has found that the term "accident," as is it commonly used, means "an undesigned 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." *Frankenmuth Mut Ins Co v. Masters,* 460 Mich. 105, 114; 595 NW2d 832 (1999).

***3** The damages at issue here include visible mold found on the sub-floor material and joists above the basement ceiling, for which the arbitrator found Mosher liable. The arbitrator also found Mosher liable for "other" deficiencies, including: (1) the mason subcontractor failed to properly install the Michigan fieldstone by leaving "unfilled cavities in two locations," (2) Mosher failed to satisfy applicable building code requirements regarding "brick ties" by installing 28-gauge anchors rather than 22-gauge as required by code, (3) Mosher failed to satisfy the code that requires flashing and weeps over lintels and below sills on all of the windows, (4) Mosher failed to install flashing at various miscellaneous locations, (5) Mosher failed to install additional ductwork for combustion air large enough to satisfy code requirements, and (6) Mosher failed to install sleeves in the exterior wall of the residence for several pipe penetrations in violation of code requirements. Mosher provided an affidavit from John Kelly that confirmed that subcontractors completed all of these projects. As discussed below, we find that these damages are not "accidents" within the meaning of the policies.

Of particular import to our resolution of this issue is *Hawkeye-Security Ins Co v. Vector Const,* 185 Mich.App 369; 460 NW2d 329 (1990), involving an insured who allegedly

performed defective concrete work for an improvement project at a waste water treatment plant. When the owner of the plant discovered that the concrete installed by Vector, which, incidentally, was provided by a subcontractor, did not meet project specifications, Vector was forced to remove and repour approximately 13,000 yards of concrete. *Id.* at 371-372. Vector sought indemnity from its insurance carrier pursuant to the terms of a CGL policy. [1] *Id.* at 372. The court held that "the defective workmanship of Vector, *standing alone,* was not the result of an occurrence within the meaning of the insurance contract." *Id.* at 378 (emphasis added).

1 The policy in *Vector, supra,* is substantially similar to the policies at issue in this action.

The *Vector* Court discussed with approval *Bundy Tubing Co v. Royal Indemnity Co,* 298 F.2d 151 (CA 6, 1962), which involved an insured's defective workmanship that caused damage to the property of others, but distinguished *Bundy* on its facts. In *Bundy,* the insured was the manufacturer of radiant heat tubing installed in the concrete floors of buildings. *Id.* at 151. A defect in the tubing caused it to leak, which in turn caused damage to certain furnishings inside the buildings. *Id.* at 152. In order to replace the defective tubing, portions of the concrete floors had to be removed and repoured. *Id.* at 153. The owners of several of the buildings brought suit against the insured alleging breach of warranty and negligence. *Id.* at 151-152. The insurer agreed to indemnify only for the cost of replacing various damaged furnishings, and the insured brought suit to recover for the other alleged damages, including the costs of removing and repouring the concrete floors. *Id.* at 153.

***4** The Sixth Circuit held that the insurer was required to indemnify the insured for the costs of removing the defective tubing and the costs of installing new tubing, but not for the costs of the new tubing itself, clearly ruling that the broader duty to defend was mandated. *Id.* at 154. The property damage that was not confined to the insured's own work product was deemed to be "unforeseen, unexpected and unintended" and therefore an "accident," *id.* at 153, which would qualify as an occurrence under the terms of the policy at issue in the present case. The *Bundy* court, moreover, rejected the argument that an "accident," or "occurrence," cannot arise on the basis of the insured's negligence or breach of warranty. *Id.*

Further, in *Radenbaugh, supra,* the plaintiffs alleged breach of contract against their insurance carrier for breach of its duty to defend and indemnify plaintiffs in an underlying cause of action that arose out of the sale of a doublewide mobile home. *Radenbaugh, supra* at 136. In conjunction with the sale, the plaintiffs provided erroneous schematics and instructions to contractors hired by the purchaser of the home for the construction of the home's basement foundation and erection of the home on its basement. *Id.* The homeowner alleged that the plaintiffs' defective instructions to the basement contractor caused the basement of the mobile home to be improperly constructed and the home improperly erected. *Id.* at 136-137. As a result of the alleged faulty instructions, the basement was rendered unusable because water seeped into and condensed on the walls, causing mildew and mold. *Id.* at 142. The plaintiffs filed suit against their insurance carrier seeking to enforce its duty to defend and indemnify the plaintiffs pursuant to a CGL policy. *Id.* at 136-137.

This Court in *Radenbaugh* acknowledged the holdings of both *Vector* and *Bundy:*

> At first blush, the result in *Bundy* appears to be inconsistent with the result in *Vector.* Whereas the *Vector* court held there was no coverage for damage arising out of the insured's defective workmanship, in *Bundy,* the Sixth Circuit held that the insured was required to pay for damage arising out of the insured's defective workmanship.
>
> The holdings in *Bundy* and *Vector* can be reconciled by focusing on the property damage at issue in each case. In *Vector,* the insured's defective workmanship resulted only in damage to the insured's work product. In *Bundy,* the insured's defective workmanship resulted in damage to the property of others. *Taken together, these cases stand for the proposition that when an insured's defective workmanship results in damages to the property of others, an "accident" exists within the meaning of the standard comprehensive liability policy.* This construction is supported by the definition of "accident" adopted by the Michigan Supreme Court . [2] [*Radenbaugh, supra* at 146-147, quoting *Calvert Ins Co v Herbert Roofing & Insulation Co,* 807 F Supp 435 (ED Mich.1992), (emphasis and footnote added).]

2 The *Radenbaugh* Court cited *Vector, supra* at 374, quoting *Guerdon Industries, Inc v. Fidelity & Cas Co,* 371 Mich. 12, 18-19; 123 NW2d 143 (1963), for the definition of "accident" as "an undesigned 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." *Radenbaugh, supra* at 147.

***5** The *Radenbaugh* Court, further relying on analogous federal decisions, found that, because the defendant's defective work had caused damage to the plaintiff's property that was not part of defendant's work product, an "occurrence" had occurred under the terms of the policy. *Radenbaugh, supra* at 147. It should be noted that the definition of "occurrence" in *Radenbaugh* was identical to the definition of "occurrence" in the present case. *Radenbaugh, supra* at 140. In interpreting this policy language, this Court held that CGL policies do not cover damages that consist of a mere diminution in value of the insured's work product caused by alleged defective workmanship, breach of contract, or breach of warranty. *Id.* at 140-141. Accordingly, the rule is clear:

> [W]hen an insured's defective workmanship results in property damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy.... However, when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy. [*Id.* at 147]

In the present case, the arbitrator found that all the defects in the Feinblooms' home resulted from Mosher's poor workmanship or installation of defective materials, constituting both a breach of contract and a breach of the implied warranty of habitability. Further, the arbitrator found that all the defects could be remedied by either replacing the defective materials or repairing the defective work. The arbitrator specifically rejected the Feinblooms' contention that Mosher's defective work had caused damage to other property in the home, such as the Feinblooms' furniture, that was not part of defendants' work product. Thus, there is no evidence indicating that either the visible mold or the "other losses" went beyond Mosher's liability to repair or replace its own defective products. Therefore, the damages from the visible mold and the "other losses" are excluded from coverage because they are not "occurrences" according to the general insurance agreement. *Radenbaugh, supra* at 147; *Harrington, supra* at 382.

With regard to the "other losses," the trial court erroneously distinguished *Vector* on its facts, stating:

> The construction company distinguishes *Vector Construction* on grounds that it applies where "an insured's defective workmanship ... results solely in damage to the insured's work product" and not to situations where "a subcontractor's work damages the insured's property." All of the problems with the home in this case were the result of work done by subcontractors and, therefore, coverage is available. See *Calvert Ins Co v Herbert Roofing and Insulation Co,* 807 F Supp 435 (ED Mich.1992) (distinguishing *Vector* and providing coverage on this basis).

***6** The Court agrees that this is the proper analysis, and that *Vector Construction* can be distinguished on grounds that the defects are attributable to the subcontractors. Therefore, Hastings can avoid coverage only if the policies' exclusions apply.

The trial court erroneously relied on *Calvert, supra,* as support for its holding. In *Calvert,* the defendant roofing company installed a roof at a school. Shortly after completion of the project, the roof leaked and "caused damage to the interior of the school building (e.g., ceiling tiles, light fixtures, lockers, flooring, etc.), the exterior of the building (e.g., walls and foundation), and to various articles of personal property of school district employees and students." *Calvert, supra* at 436. The federal district court, interpreting policy language nearly identical to that in the instant case, wrote, "the Court gleans three elements that must be established in order to establish coverage: (1) an accident, (2) resulting in bodily injury or property damage, (3) which is neither expected nor intended from the standpoint of the insured." *Id.* at 437. Nowhere in *Calvert* did the Court distinguish *Vector* on its facts or indicate that *Vector* does not apply to situations in which a subcontractor's work damages the insured's property. In fact, as noted above, Boichot Concrete Company, a subcontractor, supplied the defective concrete that Vector installed. *Vector, supra* at 371.

Finally, in applying the policy language to the specific facts of this case to determine coverage, as we are required to do, we find that Mosher's argument and the trial court's holding cannot stand in light of the rule explained in *Radenbaugh,*

supra. Specifically, the policy language defines Mosher's work as follows:

> 21. "Your Work" means:
>
> a. Work or operations performed by you *or on your behalf;* and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.
>
> "Your Work" includes:
>
> a. Warranties or representations made at any time with respect to the fitness qualify, durability, performance or use of "your work", and
>
> b. The providing of or failure to provide warnings or instructions. [3] [Emphasis and footnote added.]

[3] This language is found verbatim in the 2001 and 2002 CGL policies. The 2003 CGL policy contains the substantially identical wording, but is it found in Section V(22), and it is listed slightly differently.

According to the plain language of the policies, Mosher's "work" includes work performed by subcontractors. Additionally, the existence of an "occurrence" is dependent on the nature of the act, not on who performs it. The defects in Mosher's and its subcontractor's work are, therefore, not "occurrences" within the meaning of any of the CGL policies, and, thus, not covered losses. In light of this finding, it is unnecessary to apply any of the exclusions to any of the CGL policies. *Harrington, supra* at 382.

The trial court erred by granting summary disposition in favor of Mosher and in denying summary disposition for plaintiff with regard to plaintiff's duty to indemnify. The CGL policy, however, also created a duty to defend against claims for covered damages. "It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify." *Radenbaugh, supra* at 139.

> ***7** The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. [*Smorch v. Auto Club Ins Co,* 179 Mich.App 125, 128; 445 NW2d 192 (1989).]

Where there is doubt concerning whether the complaint "alleges liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Radenbaugh, supra* at 138 (citation omitted). The insurer owes the duty to defend until such time as the insurer has confined the claims against the insured to those theories that the policy would not cover. *American Bumper and Mfg Co v. Hartford Fire Ins Co,* 207 Mich.App 60, 67; 523 NW2d 841 (1994). "Until that point, the allegations must be regarded as coming arguably within the liability policy, thus resulting in a duty to defend." *Id.*

Because the Feinblooms' complaint in arbitration alleged damages to property other than Mosher's work-product, i.e., household furniture, this damage was arguably covered by the policy; therefore, plaintiff had a duty to defend Mosher. The arbitrator's later determination that Mosher is not liable for those damages does not affect plaintiff's initial duty to defend against the Feinblooms' claims. *Smorch, supra.* However, once the Feinblooms claims are limited to only damages that fall outside the scope of the policy, i.e., Mosher's own work-product, plaintiff's duty to defend ends. *American Bumper, supra.* On remand, it is therefore necessary to determine at what point in time, if any, plaintiff can confine the Feinblooms' claims against Mosher to those theories that the policy would not cover, and to determine the extent of plaintiff's liability for the cost of Mosher's defense until that point.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Cynthia K GROOM, Plaintiff-Appellant,
v.
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellee.

Docket No. 272840.
|
April 19, 2007.

Ottawa Circuit Court; LC No. 05-053144-CZ.

Before: SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ.

Opinion

PER CURIAM.

***1** In this insurance coverage dispute, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm in part, reverse in part and remand.

This dispute arises out of an earlier lawsuit between plaintiff and defendant's insured Knoll Construction, Inc. (Knoll). In 2000, plaintiff purchased a newly constructed condominium from Knoll. Sometime after she moved into the condominium, plaintiff discovered that the roof leaked. Plaintiff then sued Knoll for the costs associated with repairing the defective roof and the damage caused by water intrusion, which included the costs associated with eliminating mold. Plaintiff also sought compensation for personal injuries caused by her exposure to the mold. In 2004, after a trial on the merits, the jury returned a verdict in plaintiff's favor and found that Knoll was liable for $80,000 in property damage and $16,000 in personal injuries. In addition, the trial court awarded plaintiff more than $51,000 in attorney fees and costs.

After the entry of judgment in favor of plaintiff, defendant notified plaintiff that it would not pay the judgment against Knoll. As a result, plaintiff initiated the present declaratory action. Before the trial court, the parties did not dispute that Knoll became legally obligated to pay plaintiff for property damage and bodily injury arising out of activities that occurred during the policy period and in the coverage territory. In addition, defendant conceded that the policy covered Knoll's obligation to pay for plaintiff's bodily injuries. However, defendant contended that the property damage at issue was not caused by an occurrence within the meaning of the commercial general liability (CGL) policy issued to Knoll. Defendant noted that the term "occurrence," as used in CGL policies, has been judicially defined to refer only to damage caused to the property of others, as opposed to damage to an insured's work product. Because the property damage was to Knoll's work product alone (i.e., the condominium), defendant further argued, it did not constitute damage caused by an occurrence within the meaning of the policy. The trial court agreed with defendant and granted its motion for summary disposition under MCR 2.116(C)(10).

This appeal followed.

I. Standards of Review

This Court reviews de novo a trial court's decision to grant summary disposition. *Hamade v. Sunoco (R & M), Inc,* 271 Mich.App 145, 153; 721 NW2d 233 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v. Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law ."

The proper interpretation of a contract is also a matter of law that this Court reviews de novo. *Clark v. DaimlerChrysler Corp,* 268 Mich.App 138, 141; 706 NW2d 471 (2005). Where a contract is unambiguous, it is not open to judicial construction and must be enforced as written. *Rory v. Continental Ins Co,* 473 Mich. 457, 468; 703 NW2d 23 (2005).

II. Faulty Workmanship as an "Occurrence" under the Policy

***2** Plaintiff first argues that the trial court erred when it concluded that the property damage at issue was not caused by an occurrence within the meaning of the CGL policy. We disagree.

Under the terms of the CGL policy issued to Knoll, defendant agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." However, the policy also provided that,

This insurance applies to "bodily injury" and "property damage" only if:
(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

Further, the policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In interpreting CGL policies that use substantially the same language as the present policy, courts have split into two main lines on the question whether coverage is triggered by poor workmanship that causes injury to the work product itself. In both lines of cases, the focus is on the proper interpretation of the term "accident."

In one line of cases, the term "accident" is interpreted to exclude damage caused by faulty workmanship to the work product itself. See *Kvaerner Metals Div of Kvaerner US, Inc v. Commercial Union Ins Co,* 589 Pa 317; 908 A.2d 888, 899 (2006); *Monticello Ins Co v. Wil-Freds Const, Inc,* 277 Ill App 3d 697, 705-706; 661 N.E.2d 451 (1996); *United States Fidelity & Guaranty Corp v. Advance Roofing & Supply Co,* 163 Ariz 476; 788 P.2d 1227 (Ariz App, 1989); *McAllister v. Peerless Ins Co,* 124 NH 676; 474 A.2d 1033 (1984). The decision in *McAllister* exemplifies the reasoning behind this line of cases.

The plaintiff in *McAllister* was a landscaper who had been hired to landscape a property and construct a leach field. The customer later sued the plaintiff for faulty workmanship and breach of contract. *McAllister, supra* at 678. The customer did not claim that the plaintiff's faulty workmanship "caused damage to any other property than the work product, nor did he claim any damage to the work product other than the defective workmanship." *Id.* The plaintiff then brought a declaratory action to determine coverage for the liability asserted in the underlying complaint. *Id.* In examining the issue, the court in *McAllister* noted that the policy defined an " 'occurrence' in the standard fashion as 'an accident, including continuous or repeated exposure to conditions, which results in property damage.' " *Id.* at 680. It then concluded that the "fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Id.* For this reason, the court concluded that the policy at issue did not include coverage for a claim of defective workmanship. *Id.*

***3** Under an alternate line of cases, courts have held that faulty workmanship constitutes an occurrence as long as the insured did not intend for the damage to occur. See *Lennar Corp v. Great American Ins, Co,* 200 SW 3d 651, 668-669 (Tex App, 2006) (noting that business risks are normally eliminated through exclusions-not through the occurrence requirements of the insuring agreement); *American Family Mutual Ins Co v. American Girl, Inc,* 268 Wis 2d 16; 673 NW2d 65, 78 (2004); *Fidelity & Deposit Co of Maryland v. Hartford Casualty Ins Co,* 189 F Supp 2d 1212, 1219 (D Kan, 2002); *Erie Ins Exch v. Colony Dev Corp,* 136 Ohio App 3d 406; 736 NE 2d 941 (1999).

In *American Girl,* the court interpreted a CGL policy issued to a general contractor hired to build a warehouse for American Girl. *American Girl, supra* at 28. The general contractor hired a soil engineer to analyze the proposed construction site and provide advice on its preparation. The general contractor then prepared the site according to the soil engineer's advice. *Id.* After the warehouse was completed in 1994, it began to settle. *Id.* By 1997, "the settlement approached one foot, the building was buckling, steel supports were deformed, the floor was cracking, and sewer lines had shifted." *Id.* at 29. Eventually, engineers determined that the building was not safe for occupancy and the building was dismantled. *Id.* The insurer then initiated an action seeking a declaration concerning the coverage provided by the CGL policy. *Id.* at 30.

In examining whether the policy covered the loss of the warehouse, the court in *American Girl* first recognized that the policy covered property damage that resulted from an occurrence. *Id.* at 38. It then turned to the proper interpretation of the term "occurrence."
"Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policy. The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." *Webster's Third New International Dictionary of the English Language* 11 (2002).

Black's Law Dictionary defines "accident" as follows: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." *Black's Law Dictionary* 15 (7th Ed.1999). [*Id.*]

After examining the ordinary meaning of the term "accident," the court explained that,

> No one seriously contends that the property damage to the [warehouse] was anything but accidental (it was clearly not intentional), nor does anyone argue that it was anticipated by the parties. The damage to the [warehouse] occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. [The soil engineer's] inadequate site-preparation advice was a cause of this exposure to harm. Neither the cause nor the harm was intended, anticipated, or expected. [*Id.*]

***4** For this reason, the court concluded that the faulty preparation of the site constituted an "occurrence" within the meaning of the policy. *Id.* at 39.

The court further rejected the insurer's argument that breach of contract and warranty claims can never be an "occurrence," because CGL policies are not intended to cover contract claims arising out of the insured's defective work or product. The court explained,

> We agree that 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 actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law. [*Id.*]

Hence, the court enforced the plain and ordinary meaning of the term "accident" rather than read into it an exclusion for claims based on defective work products.

Were we writing on a clean slate, we would follow the reasoning of *American Girl* and apply the general coverage provisions of the CGL policy at issue according to its plain and ordinary meaning. Hence, we would conclude that faulty workmanship constitutes an occurrence within the meaning of the CGL policy as long as the insured did not intend for the damage to occur. However, we are not writing on a clean slate.

This Court considered whether defective workmanship constituted an occurrence within the meaning of a CGL policy in *Hawkeye-Security Ins Co v. Vector Const Co,* 185 Mich.App 369; 460 NW2d 329 (1990). In that case, Vector was hired to perform concrete work on a project. *Id.* at 371. After Vector completed the improvements, it learned that the concrete that it had ordered from a third-party did not comply with the project specifications. *Id.* As a result, the concrete had to be removed and replaced. *Id.* at 371-372. The general contractor sued Vector and Vector filed a claim with its insurer. The insurer denied the claim and sought a declaratory judgment concerning the coverage provided by the CGL policy. *Id.* at 372. In determining that the policy did not cover damage to the insured's own work product, the court in *Hawkeye* adopted the reasoning and conclusion stated in *McAllister, supra,* and concluded that "the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract." *Id.* at 377-378.

A decade later, this Court again examined the conditions under which faulty workmanship may give rise to a claim under a CGL policy. In *Radenbaugh v. Farm Bureau General Ins Co,* 240 Mich.App 134, 136; 610 NW2d 272 (2000), the plaintiffs sold a double-wide mobile home to purchasers. As part of the sale, the plaintiffs provided the purchasers with erroneous schematics and instructions that were used in the construction of a basement for the home. *Id.* As a result, the home and basement suffered damage. *Id.* The purchasers sued the plaintiff, but the defendant refused to defend or indemnify the plaintiff. After settling with the purchasers, the plaintiff sued defendant for breach of the CGL policy. *Id.*

***5** Relying on *Hawkeye,* the defendant argued that it was not required to defend the plaintiff because the underlying claims for damage were not the result of an occurrence. *Id.* at 140. The court disagreed, noting that the underlying complaint alleged damages "broader than mere diminution in value of the insured's product caused by alleged defective workmanship, breach of contract, or breach of warranty." *Id.* at 141. Relying on *Calvert Ins Co v. Herbert Roofing & Insulation Co,* 807 F Supp 435 (ED Mich, 1992), the court in *Radenbaugh* concluded that, where defective workmanship results in damage to the property of others, an accident exists within the meaning of the CGL policy. *Radenbaugh, supra* at 145-148. However, where the " 'damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy.' " *Id.* at 147, quoting *Calvert, supra* at 438. Because the defective workmanship resulted in damage to the basement, which was the property of others, the court concluded that the defendant was obligated to defend and indemnify the plaintiff. *Radenbaugh, supra* at 149.

Based on the holdings in *Hawkeye* and *Radenbaugh* it is clear that Michigan follows the line of cases that hold that defective workmanship by itself does not constitute an occurrence. See *Hawkeye, supra* at 378. Rather, in order to constitute an occurrence, the defective workmanship must result in damage to persons or to property other than the work product itself. *Radenbaugh, supra* at 147. Hence, we must examine the nature of the damages resulting from the faulty workmanship to determine whether the faulty workmanship constitutes an "accident" and, therefore, an "occurrence" within the meaning of the CGL policy.

In the present case, Knoll was responsible for constructing a condominium with a defective roof. The defective roof allowed water to leak into the condominium, which in turn damaged other parts of the condominium. The condominium itself was Knoll's work product. Because the property damage caused by the defective roof was limited to the condominium, the faulty workmanship does not constitute an occurrence within the meaning of the CGL policy. *Radenbaugh, supra* at 147. Therefore, the trial court did not err when it concluded that the CGL policy at issue did not cover property damage to the condominium.

III. Products-Completed Operations

Plaintiff next contends that the trial court erred by failing to address whether the "completed operations" provisions in the CGL policy provided coverage for the property damage at issue independently of the general coverage provisions. Because the completed operations coverage provides coverage for faulty workmanship, plaintiff further argues, she is entitled to summary disposition in her favor. We disagree.

***6** The CGL policy at issue provides coverage for three broad categories of injuries. "Coverage A" insures against bodily injury and property damage liability, "Coverage B" insures against personal and advertising injury liability, and "Coverage C" insures against medical payments. At no point does the policy provide independent coverage for "products-completed operations." Rather the policy defines "products-completed operations hazard" to include "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work'...." Further, the policy specifically provides that the "Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of 'bodily injury' and 'property damage' included in the 'products-completed operations hazard.' " Hence, under the plain terms of the policy, the products-completed operations hazard describes a type of bodily injury and property damage insured under Coverage A and subject to the scope of coverage provided by Coverage A. Therefore, the property damage must be the result of an occurrence in order to be covered by the CGL policy. We have already determined that the property damage to the condominium was not caused by an occurrence within the meaning of the CGL policy. Consequently, the trial court did not err by declining to grant summary disposition in favor of plaintiff on this basis.

IV. Attorney Fees

Finally, plaintiff argues that the trial court erred when it determined that the policy did not cover the award of attorney fees in the underlying suit. We agree.

The CGL policy at issue provides that the insurer will "pay those sums that the insured becomes legally obligated to pay as *damages* .... " (emphasis added). Further, the policy specifically disclaims any liability to pay sums other

than damages except as "explicitly provided for under supplementary payments coverages A and B." (emphasis removed). The section dealing with supplementary payments coverages A and B does not provide for the payment of attorney fees taxed against the insured. However, it does provide that the insurer will pay "costs taxed against the insured in the 'suit.' " Hence, defendant will only be obligated to pay the award of attorney fees, if the award constitutes either "damages" or "costs," as those terms are used in the CGL policy.

"In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory, supra* at 464. Under its plain and ordinary meaning, the term "damages" refers to "the estimated money equivalent for loss or injury sustained." *Random House Webster's College Dictionary* (1992). Because the term "damages" refers to the loss or injury sustained, and attorney fees are not part of the loss or injury, we conclude that the term "damages," as used in the CGL policy, does not include an award of attorney fees.

***7** Although the term "costs," as a legal term of art, does not normally include attorney fees, see *Nemeth v. Abonmarche Development, Inc,* 457 Mich. 16, 42; 576 NW2d 641 (1998), because the CGL policy at issue does not define what constitutes costs, we must give the word its "plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory, supra* at 464. The ordinary meaning of the term "Costs" is "money awarded to a successful litigant for legal expenses, charged against the unsuccessful litigant." *Random House Webster's College Dictionary* (1992). This understanding of the ordinary meaning of the term "costs" is also supported by our Supreme Court's decision in *Macomb Co Taxpayer's Ass'n v. L'Anse Creuse Public Schools,* 455 Mich. 1, 10; 564 NW2d 457 (1997). In that case, our Supreme Court had to determine whether an award of "costs" to a party prevailing in an action under the Headlee Amendment, Const 1963, art 9, § 29, included attorney fees. *Id.* at 2. In examining the issue, the Court noted that the Michigan Constitution must be interpreted according to the meaning that the great mass of the people would give the term. *Id.* at 7. Based on this rule of construction, the Court refused to give the term "costs" its technical meaning under the so-called American rule for awarding costs. *Id.* at 8. Instead, the Court concluded that the common understanding of the term "costs" includes all expenses arising from the conduct of litigation. *Id.* at 10. Hence, the ordinary understanding of the term "costs" includes an award of attorney fees.

The trial court erred when it concluded that the term "costs" should be given its technical legal meaning, as understood in light of the American-rule for awarding costs, instead of the ordinary meaning that "would be apparent to a reader of the instrument." *Rory, supra* at 464. Therefore, under the plain and ordinary understanding of the term "costs," as used in the CGL policy, defendant is obligated to pay an award of attorney fees as a cost "taxed against the insured in the 'suit.' " For this reason, we reverse the trial court's grant of summary disposition to the extent that it determined that the CGL policy did not cover the award of attorney fees and remand for entry of summary disposition in favor of plaintiff on this issue.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

James PROKES, as Subrogee of Water-Tite Company, Plaintiff-Appellant,
v.
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee,
and
Great American Alliance Insurance Company, Defendant.

Docket No. 278321.
|
Sept. 25, 2008.

West KeySummary

1 Insurance
Accident, Occurrence or Event
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, Occurrence or Event
An insurer was not required to indemnify or defend its insured because defective workmanship resulting in a leaky roof did not constitute an "accident" under the terms of the policy. The policy provided that insurance applied if property damage was caused by an "occurrence" with occurrence further being defined as an "accident." The term "accident" was not defined by the policy.

Oakland Circuit Court; LC No. 07-008583-AV.

Before: BORRELLO, P.J., and MURRAY and FORT HOOD, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals by leave granted the circuit court's May 11, 2007 order affirming the district court's January 9, 2007 order granting defendants' motion for summary disposition. Plaintiff argues that the district court and circuit court both erred in granting summary disposition in Auto-Owners Insurance Company's (AOIC) favor, finding that AOIC did not have to defend or indemnify Water-Tite Company (WTC) because, under the terms of AOIC's policy, the damage in the lawsuit against WTC was not caused by an "occurrence." We affirm, as under the policy the complained of property damage was not caused by an "occurrence," and thus AOIC was not required to indemnify or defend WTC (or plaintiff).

The underlying factual history relevant to the disposition of this appeal is undisputed. John Casey and his wife, Mary Lou Butcher, discovered a water intrusion in Casey's third level office in their newly constructed home in January 2000. The leakage became more extensive in 2002, eventually leaking down to the second level great room, staining the walls and causing mold. After hiring a troubleshooting team (Principal Construction), Casey and Butcher discovered that their water problems were a result of missing "flashing" and shingles from the roof, as well as an improperly constructed drainage system on their "roof walkout" (above Casey's office). Casey and Butcher's insurer, Great Northern Insurance Company (GNIC), paid to have the problems fixed.

GNIC, as subrogee of Casey and Butcher, subsequently filed suit against Jonna Construction Company (JCC), the general contractor who built the home in 1997-1998, seeking $626,001.39 for alleged defects in the home that caused "extensive water damage and resultant mold due to roof leakage and leaks of the third level walkout." On March 22, JCC filed a third-party complaint naming as third party defendants all of the subcontractors who worked on the house, including WTC, who according to JCC, only did the waterproofing of the basement (first level), which indisputably was not damaged.

In turn, WTC submitted claims to AOIC, who insured it under successive commercial liability policies that provided coverage from July 1, 1999 to July 1, 2002, and Great American Alliance Insurance Company (GAAIC), who had issued a commercial liability policy covering the period of October 1, 1998 to July 1, 1999. AOIC initially undertook

to defend WTC, but eventually withdrew its coverage in a February 25, 2005 letter stating, "any occurrence as defined under the insurance policy contract did not occur during the policy period."

Plaintiff, the former owner of WTC, subsequently settled the third-party complaint for $6,500. Shortly thereafter, plaintiff filed the suit before us, seeking to recover the settlement amount, as well as the $5,808.50 that he paid in attorney fees. Both insurance companies and plaintiff subsequently moved for summary disposition. At the December 20, 2006, hearing on the insurance companies' and plaintiff's respective motions for summary disposition, the district court initially noted (and all parties agreed) that the original lawsuit really had nothing to do with WTC, and it "just got pulled in" because JCC added all subcontractors to the suit in its very general third party complaint. The district court granted GAAIC's motion for summary disposition based on its finding that the damage occurred in January 2000, which was outside of GAAIC's period of coverage. The district court granted AOIC's motion for summary disposition based on its finding that "[p]laintiff has not put forth any evidence that shows the factual situation at hand is covered by the policy." An order was entered to this effect on January 9, 2007. In a written opinion dated May 11, 2007, the circuit court affirmed the district court's January 9, 2007, order, likewise finding that "defective workmanship does not constitute an 'occurrence' under the terms of the policy," and given that the claims brought against plaintiff were for defective workmanship, AOIC was not obligated to defend or indemnify plaintiff. We subsequently granted plaintiff's application for leave to appeal.

I. Standard of Review

***2** We review de novo a trial court's decision to grant or deny a motion for summary disposition, *Dressel v. Ameribank,* 468 Mich. 557, 561, 664 N.W.2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v. Detroit Bd. of Ed.,* 470 Mich. 274, 278, 681 N.W.2d 342 (2004). "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v. Nat'l Auction Group,* 466 Mich. 453, 461, 646 N.W.2d 455 (2002). Furthermore, the construction and interpretation of an insurance contract is a question of law that we likewise review de novo. *Henderson v. State Farm Fire & Casualty Co.,* 460 Mich. 348, 353, 596 N.W.2d 190 (1999).

II. Analysis

In reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms in accordance with Michigan's well-established principles of contract construction. *Arco Industries Corp. v. American Motorists Ins. Co.,* 448 Mich. 395, 402, 531 N.W.2d 168 (1995), abrogated on other grounds by *Frankenmuth Mut. Ins. Co. v. Masters,* 460 Mich. 105, 595 N.W.2d 832 (1999). We must enforce an insurance contract in accordance with its terms, not creating ambiguities where the terms of the contract are clear and precise. *Upjohn Co. v. New Hampshire Ins. Co.,* 438 Mich. 197, 207, 476 N.W.2d 392 (1991). While we construe the contract in favor of the insured if an ambiguity is found, *Auto Club Ins. Ass'n v. DeLaGarza,* 433 Mich. 208, 214, 444 N.W.2d 803 (1989), this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured, *Upjohn Co, supra* at 208, n. 8, 476 N.W.2d 392. The fact that a policy does not define a relevant term does not render the policy ambiguous. *Auto Club Group Ins. Co. v. Marzonie,* 447 Mich. 624, 631, 527 N.W.2d 760 (1994), abrogated on other grounds by *Frankenmuth Mut Ins Co, supra.* Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins. Co. of Michigan v. Czopek,* 440 Mich. 590, 596, 489 N.W.2d 444 (1992).

Under the terms of AOIC's policy, it is required to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies[,]" as well as "defend any 'suit' seeking those damages." Assuming [1] that a legal obligation to pay existed, pursuant to the terms of AOIC's policy, it was required to "defend" WTC, and is now required to indemnify plaintiff if it is found that "this insurance applies."

1 Generally, a legal obligation "requires either a judicial determination of liability or a settlement between *the insurer, insured and the claimant." Coil Anodizers, Inc. v. Wolverine Ins. Co.,* 120 Mich.App. 118, 122, 327 N.W.2d 416 (1982) (emphasis added). Here, it was never judicially determined that WTC was required to pay damages, nor did AOIC agree to the terms

> of a settlement. However, in this instance, AOIC was considered "legally obligated" because it refused to defend an action brought against its insured, and thus waived the requirement that it participate in or approve any settlement in order for there to be coverage. *Id.* at 122, 124, 327 N.W.2d 416.

AOIC's policy provides that "[t]his insurance applies to 'bodily injury' and 'property damage' only if" the "property damage is caused by an 'occurrence' that takes place in the 'coverage territory' and ... occurs during the policy period." The parties do not dispute the lower court's findings that the property damage took place in the "coverage territory" and "during the policy period." Therefore, AOIC's policy is applicable if the complained of property damage was caused by an "occurrence."

***3** The policy defines an "occurrence" as "an accident." The term "accident" is not defined by the AOIC policy. However, using the common meaning of the term, our Supreme Court has repeatedly held that "an accident is an undesigned 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." *Frankenmuth Mut Ins Co, supra* at 114, 595 N.W.2d 832. When determining whether property damage was caused by an accident, we must consider (from the standpoint of the insured), *the insured's injury-causing act or event* and its relation to the resulting property damage. *Id.* at 114-115, 595 N.W.2d 832.

Here, the circuit court affirmed the district court's order based on its finding that the district court did not err when it found that defective workmanship cannot constitute an accident/occurrence, and given that "the water damage in question was caused in fact by faulty workmanship," there was not "an 'occurrence' under the terms of the policy." Plaintiff properly notes that both of the lower courts' general statements that "faulty workmanship" cannot constitute an accident/occurrence are flawed. In *Radenbaugh v. Farm Bureau Insurance Co. of Michigan,* 240 Mich.App. 134, 147, 610 N.W.2d 272 (2000), where a policy with language similar to the policy in the case at bar was being disputed, the Court concluded that "faulty workmanship" that results in property damage to the property of *others* can be an accident/occurrence:

> When *an insured's defective workmanship* results in property damage to the property of *others,* an 'accident' exists within the meaning of the standard comprehensive liability policy.... However, when the damage arising out of the *insured's defective workmanship* is confined to the *insured's own work product,* the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy. [(Emphasis added.)]

Although the alleged damage here was not to the insured's work product,[2] since water cannot flow up, the alleged damage was also not a result of the "insured's defective workmanship." Thus, viewing the alleged damages from the standpoint of the insured, under the terms of AOIC's policy the complained of property damage was not caused by an "occurrence." *Masters, supra* at 114-115, 595 N.W.2d 832; *Radenbaugh, supra* at 147, 610 N.W.2d 272. According to the plain language of AOIC's policy, its policy was therefore not applicable, and it was not required to indemnify or defend WTC (or plaintiff). *Upjohn Co, supra* at 207, 476 N.W.2d 392.[3]

2 It is undisputed that WTC only waterproofed the basement (first level), and that the alleged damage was to the second and third levels of the constructed home.

3 Despite AOIC's unambiguous policy language that it is only required to defend a suit seeking damages to which its insurance is applicable, plaintiff contends that because an insurer's duty to defend is broader than its duty to indemnify, *Shefman v. Auto-Owners Ins. Co.,* 262 Mich.App. 631, 637, 687 N.W.2d 300 (2004), AOIC should have had to defend WTC because, at the very least, the allegations of the underlying suit *arguably* fell within the coverage of the policy, *Radenbaugh, supra* at 137, 610 N.W.2d 272. Even if we were to look past the unambiguous language of AOIC's policy and conclude that AOIC had a duty to defend allegations that even "arguably" fell within its policy, we would nonetheless conclude that AOIC was not required to defend WTC. The complained of property damage was not a result of any of WTC's actions, the allegations of the underlying suit could not even "arguably" fall within AOIC's policy.

Affirmed.

All Citations

Not Reported in N.W.2d, 2008 WL 4367523

End of Document

2009 WL 3276509
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

HOMETOWNE BUILDING COMPANY, L.L.C., Plaintiff,
and
North American Specialty Insurance Company, Intervening Plaintiff–Appellant/Cross–Appellee,
v.
AMERISURE MUTUAL INSURANCE COMPANY, Defendant–Appellee/Cross–Appellant.

Docket No. 287336.
|
Oct. 13, 2009.

West KeySummary

1 **Insurance**
Common Exclusions
Insurance
Particular exclusions
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(1) In general
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities
217k2362 Particular exclusions
A commercial general liability insurer did not have a duty to defend an insured contractor against homeowner's action to recover for injuries and damages attributable to mold in the residence. The policy specifically excluded from coverage or liability for bodily injury or property damage which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any fungi or bacteria on or within a building or structure. The policy defined fungi to mean any type or form of fungus, including mold or mildew.

1 Cases that cite this headnote

Oakland Circuit Court; LC No. 07–087244–CK.

Before: TALBOT, P.J., and WILDER and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** North American Specialty Insurance Company (NACIS) appeals as of right the grant of summary disposition in favor of Amerisure Mutual Insurance Company (Amerisure). Amerisure cross-appeals the trial court's grant of a right to intervene to NACIS. We affirm.

This action comprises a claim for breach of contract involving coverage under commercial general liability policies issued by Amerisure to Hometowne Building Company, L.L.C. (Hometowne). Amerisure issued commercial general liability insurance policies to Hometowne covering the period November 25, 2003, to December 1, 2007. There is no issue or dispute pertaining to the payment of premiums on the policies. However, NASIC contends Amerisure had a duty to reimburse it for a settlement payment and defense expenses incurred on behalf of Hometowne in a lawsuit filed by Barbara and Andrew Neller (Nellers) involving claims against Hometowne for damages and faulty workmanship in the construction of their new home.

The Nellers contracted with Hometowne in 2002 for the construction of a new residential home in South Lyon, Michigan. Construction was completed and a closing occurred on June 16, 2003. In the spring of 2004, the Nellers began to experience problems with water incursion, odors in the home and the development of visible mold. Several investigations were conducted and Hometowne attempted to remediate the problem on more than one occasion. Unfortunately, the problems were recurrent and increasing in severity. Despite several attempts to correct the identified problems involving various aspects of the home construction

and remediation of the mold, water and odor infiltrations, the Nellers initiated litigation to recover damages. Hometowne tendered defense of this underlying action to Amerisure and to NASIC, which provided Hometowne's commercial general liability coverage during the construction of the Nellers' residence. Amerisure denied coverage based on exclusions contained in their policies. NASIC provided a defense to Hometowne in the underlying action.

Despite NASIC's provision of a defense, Hometowne filed a third-party complaint in the Nellers lawsuit, claiming coverage under all commercial general liability policies issued by Amerisure. The third-party complaint was severed from the underlying action with the only issue being whether any of the insurance policies issued by Amerisure provide coverage to Hometowne. NASIC successfully sought to intervene in the action, asserting a right as Hometowne's subrogee. Amerisure brought a motion seeking summary disposition pursuant to MCR 2.116(C)(10), asserting they had no duty to defend or indemnify under the policies due to specific exclusions and lack of coverage. The trial court granted summary disposition in favor of Amerisure on August 6, 2008, finding that either an "accident" or "occurrence" existed, which triggered coverage for Hometowne but that the pollution and mold exclusions contained in the policies applied to damages from odors and wet/deteriorating building materials related to mold damage. In addition, the trial court determined that the "business risk" exclusions eliminated coverage for all remaining incidental or consequential losses alleged, which were related to defective construction.

***2** This Court reviews de novo a trial court's summary disposition ruling. *Walsh v. Taylor,* 263 Mich.App. 618, 621, 689 N.W.2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v. Gen. Motors Corp.,* 469 Mich. 177, 183, 665 N.W.2d 468 (2003). The de novo standard of review is also applicable to the extent that this Court must interpret and apply an insurance contract. *Archambo v. Lawyers Title Ins. Corp.,* 466 Mich. 402, 408, 646 N.W.2d 170 (2002). However, a trial court's decision on a motion to intervene is reviewed for an abuse of discretion. *Vestevich v. West Bloomfield Twp.,* 245 Mich.App. 759, 761, 630 N.W.2d 646 (2001).

On appeal, NACIS contends the trial court erred in granting summary disposition in favor of Amerisure because the contract of insurance required Amerisure to defend Hometowne against the Nellers' claims. Specifically, NASIC asserts Amerisure was required to reimburse it for a settlement payment and defense expenses incurred on behalf of Hometowne in the underlying lawsuit filed by the Nellers.

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto–Owners Ins. Co. v. Harrington,* 455 Mich. 377, 381, 565 N.W.2d 839 (1997), quoting *Auto–Owners v. Churchman,* 440 Mich. 560, 566, 489 N.W.2d 431 (1992). When a dispute arises between parties to an insurance contract regarding the meaning of the policy language, a reviewing court "must determine what the agreement is and enforce it." *Radenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan,* 240 Mich.App. 134, 138, 610 N.W.2d 272 (2000). In undertaking this analysis, a reviewing court is required to view the contract as a whole and to confer meaning with regard to all of its terms. *Harrington, supra* at 381, 565 N.W.2d 839. Further, the terms contained in an insurance policy are to be interpreted consistent with the definitions provided in the contract, or, if not provided, consistent with their "common usage." *Cavalier Mfg. Co. v. Employers Ins. of Wausau (On Remand),* 222 Mich.App. 89, 94, 564 N.W.2d 68 (1997). The burden of proving coverage is on the insured, while it is incumbent upon the insurer to prove that an exclusion to coverage is applicable. *Heniser v. Frankenmuth Mut. Ins.,* 449 Mich. 155, 161 n. 6, 534 N.W.2d 502 (1995). "It is well settled that 'if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured .' " *Radenbaugh, supra* at 137, 610 N.W.2d 272.

The first step in interpreting an insurance policy requires a determination of whether coverage exists according to the terms of the agreement. *Harrington, supra* at 382, 565 N.W.2d 839. The underlying complaint, initiated by the Nellers, asserted two types of damages were incurred: (a) physical damage to the structure of the residence caused by water intrusion and subsequent mold and (b) personal injury and damage to personal property from the resultant mold. There is no evidence to suggest that the physical damage to the structure was caused by anything other than defects and problems with the construction.

***3** The insurance contract specifically indicates, "This insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage

territory.' " An "occurrence" is defined in the policy to mean "an accident, including continuous or repeated exposure in substantially the same general harmful conditions." While the term "accident" is not defined in the policy, Black's Law Dictionary (8th ed) provides the following: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, it is not an accident; the means or cause must be accidental." In accordance with this Court's ruling in *Radenbaugh, supra* at 147, 610 N.W.2d 272, "when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy." (Internal quotations and citations omitted.) As such, defective workmanship, standing alone, does not constitute an occurrence. [1] *Hawkeye–Security Ins. Co. v. Vector Const. Co.,* 185 Mich.App. 369, 378, 460 N.W.2d 329 (1990).

1 To the extent the trial court found the existence of an accident or occurrence sufficient to trigger coverage under Amerisure's policy, we find that it is restricted solely to injuries and damages claimed separate from physical damage to the structure of the residence.

To be construed as an "occurrence," the defective workmanship must have resulted in damage to persons or to property other than the work product of the insured. *Radenbaugh, supra* at 145–146, 610 N.W.2d 272; see also *Hawkeye–Security, supra* at 377–378, 460 N.W.2d 329. Although NACIS points to language contained in the trial court order assessing damages against Hometowne for non-mold related claims, this does not indicate the existence of liability pursuant to the policy with Amerisure. A review of the transcripts clearly indicates that the non-mold related damages referenced in the order pertain to construction issues regarding the physical structure of the residence, which comprise the work product of Hometowne, and are not subject to coverage. Hence, damages claimed with regard to the physical structure of the residence, being solely attributable to problems or deficiencies in the insured's workmanship, do not comprise an "occurrence" and are not covered pursuant to the policy language.

NACIS also contends that Amerisure was liable and had a duty to defend for those damages, which arose involving claims of bodily injury or damage to items of personal property. NACIS is correct in its assertion that, in order to constitute an occurrence, instances of defective workmanship must result in damage to persons or property *other than* the work product itself. *Radenbaugh, supra* at 147, 610 N.W.2d 272. Specifically, "when an insured's defective workmanship results in property damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy." *Id.* However, under the circumstances of this case liability is still precluded due to exclusions contained within the contract.

***4** "While exclusionary clauses in insurance contracts are strictly construed in favor of the insured, clear and specific exclusions must be enforced as written." *Tenneco Inc. v. Amerisure Mut. Ins. Co.,* 281 Mich.App. 429, 468, 761 N.W.2d 846 (2008). Exclusions that are specific and unambiguous must be given effect to preclude an insurance company from incurring liability for a risk it did not undertake to assume. *McGuirk v. Meridian Mut. Ins. Co.,* 220 Mich.App. 347, 353, 559 N.W.2d 93 (1996). It cannot be legitimately disputed that the bodily injuries and personal property damages claimed by the Nellers are directly attributable to the development of mold within the home and the costs and efforts incurred in remediating the effects of the mold. The assertion of NACIS regarding odors within the structure as being non-mold related is contrary to the trial court's determination that the odors were the direct and traceable result of the mold infestation.

The contract at issue specifically excludes from coverage or liability:

Fungi Or Bacteria

a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

The term "fungi" are defined within the contract to mean, "any type or form of fungus, including mold or mildew and

> any mycotoxins, spores, scents or byproducts produced or released by fungi." Based on this unambiguous language, the trial court correctly granted summary disposition as the injuries and damages claimed were attributable to mold, which was specifically excluded from coverage.

Based on our determination regarding the propriety of the trial court's grant of summary disposition in favor of Amerisure, it is unnecessary to address the issue presented on cross-appeal regarding the right of NACIS to intervene pursuant to MCR 2.209(A)(3), as it is rendered moot.

Affirmed.

All Citations

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End of Document

2010 WL 446543
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

AHRENS CONSTRUCTION, INC., Plaintiff–Appellant,
v.
AMERISURE INSURANCE COMPANY, Defendant–Appellee.

Docket No. 288272.
|
Feb. 9, 2010.

Kalamazoo Circuit Court; LC No. 08–000164–CK.

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue here is whether defendant Amerisure Insurance Company ("Amerisure") had a duty to defend its insured, plaintiff Ahrens Construction, Inc. ("Ahrens"), in the underlying breach of contract suit, *Miller–Davis Co. v. Ahrens Constr., Inc.,* 285 Mich.App 289; —— NW2d —— (2009). [1]

1 In *Miller–Davis Co.,* this Court reversed the trial court's judgment for the plaintiff, holding that the statute of repose at issue, MCL 600.5839, had expired and the suit was not timely filed. *Miller–Davis Co.,* 285 Mich.App at 313.

Ahrens subcontracted to build the roof of a natatorium; Miller–Davis Company ("Miller–Davis") was the general contractor on the project. After the project was completed, the roof trapped condensation and had to be rebuilt by Miller–Davis. In the underlying suit, Miller–Davis sued Ahrens for breach of contract; Amerisure, Ahrens's commercial liability insurance carrier, investigated and determined that there was no coverage. Accordingly, Amerisure declined to defend Ahrens in the underlying suit. However, some of the expenses ultimately awarded to Miller–Davis were costs to repair property in the natatorium that was not installed or constructed by Ahrens, i.e., costs arising from damage to the property of others. For example, the condensation dripped onto and stained the pool, pool deck, walls, light fixtures, and sidewalks—none of which were part of the allegedly defective work performed by Ahrens. These expenses, argues Ahrens, were covered by the policy and thus Amerisure should have defended the suit.

The underlying suit involved two counts against Ahrens, breach of construction contract and breach of express contract indemnification. Only the first of these is involved here. Relevant to that count, Miller–Davis alleged Ahrens breached its contract by failing to complete the roofing project in conformance with the project specifications and failed to correct the defective work to make it conform to project specifications. Miller–Davis alleged it was damaged by having to substantially remove, replace, and reinstall the roof at its own expense. There was no count for negligence and no allegation that Ahrens's breach of the construction contract caused Miller–Davis to incur expenses for anything other than replacing the roof. Nonetheless, the trial court awarded Miller–Davis all of its expenses related to fixing the defective roof and resulting damage, $348,851.50.

Ahrens then sued Amerisure, alleging that it had a duty to defend in the underlying suit because some of the expenses Miller–Davis was awarded resulted from an "occurrence" under the policy. Ahrens argued that under *Radenbaugh v. Farm Bureau Gen. Ins. Co.,* 240 Mich.App 134; 610 NW2d 272 (2000), damage to the property of others that resulted from the insured's shoddy workmanship is considered an "occurrence" for which coverage is owed. Amerisure moved for summary disposition under MCR 2.116(C)(10), arguing that the award entered in the underlying suit was for Miller–Davis's costs to repair and replace Ahrens's shoddy workmanship. Under *Hawkeye–Security Ins. Co. v. Vector Constr. Co.,* 185 Mich.App 369, 378; 460 NW2d 329 (1990), defective workmanship is not an "occurrence."

***2** The trial court agreed with Amerisure. [2] The court stated that the policy "does not provide coverage for the costs of damages arising out of the replacement of Ahrens' [sic] work." The court also concluded that, "the

insurance agreement contemplates that damages caused by the plaintiff are not covered under the insurance contract. An examination of the language shows that the parties did not intend to provide coverage for claims arising out of the defect of plaintiff's product."

2 The trial court judge assigned to this case was also assigned to the underlying suit.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v. Sweebe,* 474 Mich. 151, 154; 712 NW2d 708 (2006).

An insurer has a duty to defend its insured " 'if the allegations of the underlying suit arguably fall within the coverage of the policy.' " *Radenbaugh,* 240 Mich.App at 137, quoting *Royce v. Citizens Ins. Co.,* 219 Mich.App 537, 543; 557 NW2d 144 (1996). The policy provides coverage for property damage arising from an "occurrence":

> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory".... [Policy, § I(A)(1)(b).]

The policy also provides a definition for the term "occurrence":

> 12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. [Policy, § V(12).]

Further, there is little dispute that damages arising solely from faulty workmanship are not considered as resulting from an "occurrence." *Hawkeye–Security,* 185 Mich.App at 378; *Radenbaugh,* 240 Mich.App at 141 ("Were the underlying complaint limited to claims relating solely to the insured's product, we would agree with defendant [that there was no coverage]"). [3]

3 This Court in *Radenbaugh,* 240 Mich.App at 145–148, cited favorably and adopted as its own the reasoning from *Calvert Ins. Co. v. Herbert Roofing & Insulation Co.,* 807 F.Supp. 435, 437–439 (E.D.Mich., 1992). Quoting *Calvert,* this Court stated:

> "[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....
>
> * * *
>
> However, when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy." [*Radenbaugh,* 240 Mich.App at 147 (citation omitted).]

To begin with, we make it clear that this suit does not challenge the trial court's award itself, but only Amerisure's refusal to defend against the complaint filed by Miller–Davis. To determine whether coverage was due, Amerisure looked at the allegations of the underlying complaint. These stated, in relevant part:

> 22. Because of the nature and extent of Ahrens' [sic] defective and nonconforming work and Ahrens' failure and refusal to perform, Miller–Davis found it necessary, at the demand of the Project owner and the Project Architect, to perform corrective work ("Corrective Work") which included substantially the removal, replacement and reinstallation of Roof System at great cost and expense to Miller–Davis.
>
> * * *
>
> 41. The defective and non-conforming work that Ahrens performed is a substantial and material breach of the Contract between Miller–Davis and Ahrens.
>
> 42. In order to fulfill its responsibility as the Construction Manager on the Project, Miller–Davis was required to have the defective and/or non-conforming work performed and Ahrens' defective work corrected at Miller–Davis' [sic] cost and expense.

***3** As can be seen, the damages sought in the complaint relate solely to Ahrens's breach and failure to properly construct the roof, requiring Miller–Davis to perform corrective work on the roof at its own cost and expense. There is nothing in the complaint about having expenses arising from the cost of repairing or replacing other property.

That is, even if Miller–Davis's award included expenses for damage to the other property, such as the pool, wall, etc., *the allegations in the complaint did not seek such expenses.* Any error by the trial court in awarding expenses beyond those sought is properly raised in the appeal of the underlying suit. Amerisure did not breach its insurance contract by refusing to defend in the underlying suit where the only damages claimed (as relevant here) arose directly from having to correct Ahrens's defective work, as compared to damages related to the property of others. No "occurrence" giving rise to coverage was alleged in the complaint.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

KENT COMPANIES, INC., Plaintiff–Appellant,
v.
WAUSAU INSURANCE COMPANIES, Defendant–Appellee.

Docket No. 295237.
|
May 3, 2011.

West KeySummary

1 Insurance
Accident, occurrence or event
217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 Accident, occurrence or event
Contractor was not entitled to reimbursement from commercial general liability insurer for the cost of removing and replacing concrete slab that contractor installed incorrectly. The insurance contract provided for coverage only if an accident caused the property damage. It was undisputed that contractor was attempting to recover expenses incurred for replacing its own product due to its own defective work and not as a result of an accident.

Kent Circuit Court; LC No. 08–009637–CK.

Before: METER, P.J., and SAAD and WILDER, JJ.

Opinion

PER CURIAM.

***1** Plaintiff performed concrete work on a construction project and incurred additional expenses when a concrete slab that it had installed and some brick pavers installed by another contractor had to be removed and replaced because of damage caused by plaintiff's work to some snow-melt tubing under the concrete slab installed by plaintiff. Plaintiff submitted a claim for the additional expenses to defendant, its insurer under a commercial general liability policy, but defendant denied the claim. Plaintiff then filed this declaratory judgment action to determine its rights under the policy. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). The trial court granted defendant's motion and denied plaintiff's motion. The trial court also denied plaintiff's motion for reconsideration and denied plaintiff's motion to supplement the record to allow plaintiff to file an affidavit to clarify a factual matter. Plaintiff appeals as of right. We affirm.

Plaintiff's complaint for declaratory relief alleged that it was a subcontractor on a construction project at the JW Marriott Hotel in Grand Rapids. Plaintiff installed a concrete slab above some snow-melt tubing that was installed by another contractor. A different contractor then installed brick pavers above the concrete slab installed by plaintiff. Plaintiff alleged that it was notified by the general contractor that it failed to properly create weep holes in the concrete slab that it had installed, thereby causing damage to the snow-melt tubing. As a result, the snow-melt tubing had to be replaced, and plaintiff assumed responsibility for the cost of removing and replacing the original concrete slab and the brick pavers. Plaintiff submitted a claim to defendant for those expenses, but defendant denied the claim. It is undisputed that plaintiff's claim did not involve the cost of the damage to the snow-melt tubing.

Plaintiff argues that the trial court erred in determining that defendant's insurance policy did not provide coverage for the expenses associated with the removal and replacement of the concrete slab and brick pavers. We disagree.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v. Dep't of Transp.,* 456 Mich. 331, 337, 572 N.W.2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v. Robertson,* 212 Mich.App. 45, 48, 536 N.W.2d 834 (1995). Interpretation

of an insurance policy is also reviewed de novo as a question of law. *Royal Prop. Group, LLC v. Prime Ins. Syndicate, Inc.,* 267 Mich.App. 708, 713–714, 706 N.W.2d 426 (2005).

Insurance policies are construed in accordance with this state's well-established rules of contract construction. *Liparoto Constr., Inc. v. Gen. Shale Brick, Inc.,* 284 Mich.App. 25, 35, 772 N.W.2d 801 (2009). The policy must be enforced in accordance with its terms and a court may not hold an insurer liable for a risk it did not assume. *Id.* When interpreting an insurance contract, this Court reads it as a whole and accords its terms their plain and ordinary meaning. *State Farm Mut. Auto. Ins. Co. v. Descheemaeker,* 178 Mich.App. 729, 731, 444 N.W.2d 153 (1989).

***2** The trial court relied on the following exclusion in defendant's insurance policy when it initially granted defendant's motion for summary disposition:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **m. Damage To Impaired Property Or Property Not Physically Injured**
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Later, however, when denying plaintiff's post-judgment motion, the court explained that defendant was also entitled to summary disposition because there was no "occurrence" under the policy.

We agree that coverage was not available for the expenses associated with the removal and replacement of the concrete slab that plaintiff originally installed because those expenses did not arise from an "occurrence" as defined in the policy. The policy provides, in pertinent part:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"....
>
> * * *
>
> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The undisputed facts show that plaintiff is attempting to recover the expenses it incurred for replacing its own product due to its own defective work. As explained in *Hawkeye–Security Ins. Co. v. Vector Constr. Co.,* 185 Mich.App. 369, 377–378, 460 N.W.2d 329 (1990), plaintiff's defective workmanship does not involve an "occurrence" as defined in defendant's policy. See also *Liparoto,* 284 Mich.App. at 38–39, 772 N.W.2d 801. Although the snow-melt tubing had been damaged, and plaintiff's complaint premised its insurance claim on the damage to the snow-melt tubing, plaintiff was not seeking reimbursement for the cost of the damage to the snow-melt tubing itself; the contractor who installed it assumed that expense. Thus, it is immaterial whether the damage to the snow-melt tubing could be considered an "accident" under the definition of "occurrence." Accordingly, defendant was entitled to summary disposition on this issue.

Further, we conclude that any coverage for the expenses associated with the removal and replacement of the brick pavers is excluded by the exclusion in ¶ 2.m.(1). The brick pavers were not actually physically damaged. They were required to be removed and replaced only so that the concrete slab and snow-melt tubing could be replaced. Although the parties disputed whether plaintiff's contract with the general contractor required plaintiff to create the weep holes in the concrete slab with PVC pipe, as opposed to a metal rod, plaintiff did not establish a genuine issue of material fact with respect to whether its deficient installation of the concrete slab caused the damage to the snow-melt tubing, which in turn required the removal and reinstallation of the brick pavers. Regardless of whether the contract permitted plaintiff to use a metal rod to create the weep holes, plaintiff did not dispute defendant's evidence that it was plaintiff's deficient creation of the weep holes that caused the damage to the snow-melt

tubing. Thus, there was no genuine issue of material fact that the expenses associated with the removal and replacement of the brick pavers arose out of a defect or deficiency with plaintiff's own work. Accordingly, defendant was also entitled to summary disposition with respect to these expenses.

***3** Given the foregoing analysis, it is unnecessary to consider whether other policy exclusions or defenses might also apply to preclude coverage for plaintiff's claims.

Plaintiff also argues that the trial court erred in denying its motion to supplement the record after the trial court had denied its motion for reconsideration. We disagree.

"Evidentiary rulings are, in general, reviewed for an abuse of discretion." *DOT v. Frankenlust Lutheran Congregation,* 269 Mich.App. 570, 575, 711 N.W.2d 453 (2006). Plaintiff's motion sought leave to file an affidavit from one of its employees to dispute defendant's claim that plaintiff's contract with the general contractor required plaintiff to use PVC pipe to create the weep holes in the concrete slab. As explained previously, however, it is immaterial whether the contract required plaintiff to use PVC pipe to create the weep holes or permitted plaintiff to create the holes with some other tool. Regardless of any contract requirement concerning the use of a specific tool, there was no genuine issue of material fact that plaintiff's deficient creation of the weep holes caused the damage to the snow-melt tubing, which resulted in the additional expenses incurred by plaintiff. Thus, even if the trial court abused its discretion in denying plaintiff's motion to supplement the record, appellate relief would not be not warranted. Nonetheless, we agree with the trial court that plaintiff was on notice of the potential issue concerning the contract requirements, which was relevant to the applicability of the exclusion in ¶ 2.m.(2), and that plaintiff failed to provide a persuasive reason for why it could not have timely filed the affidavit earlier. Thus, we find no error.

Affirmed.

All Citations

Not Reported in N.W.2d, 2011 WL 1687676

End of Document

2011 WL 2462676
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

CHRISTMAN COMPANY, Plaintiff–Appellant,
v.
RENAISSANCE PRECAST INDUSTRIES, L.L.C., Defendant–Third Party Plaintiff–Appellee,
and
Ohio Casualty Insurance Company, a/k/a West American Insurance Company, and Scottsdale Insurance Company, Defendants–Appellees,
and
Sirko Associates, Inc., Strand Constructors, Inc., and URS Corporation, Third Party Defendants.

Docket No. 296316.
|
June 21, 2011.

Emmet Circuit Court; LC No. 09–001744–CK.

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

Opinion

PER CURIAM.

***1** Plaintiff Christman Company (Christman) appeals by leave granted from an order granting summary disposition to defendant Scottsdale Insurance Company (Scottsdale) pursuant to MCR 2.116(C)(10), and from an order granting summary disposition to defendant Ohio Casualty Insurance Company, also referred to as West American Insurance Company (West American), pursuant to MCR 2.116(C)(10). We affirm.

Christman entered into a construction contract with Northern Michigan Hospital Emergency and Heart Center (the Hospital) to build a parking deck. It subcontracted part of the work to Renaissance Precast Industries, L.L.C. Renaissance was insured by Scottsdale. Christman was an additional insured on this policy. Renaissance in turn entered into a contract with Sirko Associates, Inc. to design precast concrete, and with Strand Constructors, Inc. to erect the precast parking deck. Strand was insured by West American. Christman was identified as an additional insured on the certificate of liability insurance.

The Hospital notified Christman that there was a concrete failure at the parking structure. Repairs were undertaken, and Christman looked to Scottsdale and West American for payment and, when they declined, commenced this lawsuit. Scottsdale and West American moved for summary disposition. The trial court granted summary disposition based on the "voluntary payment" and "no action" clauses. We affirm the summary disposition on the alternative ground the insurance companies presented to the trial court, i.e., that there was no "occurrence." See *Adell Broadcasting Corp v. Apex Media Sales,* 269 Mich.App 6, 12; 708 NW2d 778 (2005) (This Court may affirm a summary disposition on alternative grounds, if those grounds were presented to the trial court). We decline to address the other issues raised in the parties' briefs.

Preliminarily, Christman argues that Scottsdale did not support its motion for summary disposition with affidavits, depositions, admissions or other admissible evidence. [1] MCR 2.116(G)(3)(b). We disagree. Scottsdale attached a picture of the damage, a copy of the invoice with supporting receipts, and the insurance policy. While there are no affidavits establishing that these documents are authentic, plaintiff did not challenge the authenticity of the policy below and has not done so on appeal. Because its authenticity is not in dispute, the documentation attached to Scottsdale's motion was sufficient to allow the court to rule on the motion for summary disposition.

1 Christman also challenges the grant of summary disposition to West American on grounds that there was a genuine issue of material fact regarding consent. Because consent is not necessary to a determination that there was no "occurrence," we need not address this issue.

We review de novo a trial court's ruling on a motion for summary disposition and the interpretation of language in an insurance contract. *Klapp v. United Ins. Group Agency, Inc.,* 468 Mich. 459, 463; 663 NW2d 447 (2003). In ruling on a(C)(10) summary disposition motion, we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is

entitled to judgment as a matter of law." *Brown v. Brown,* 478 Mich. 545, 551–552; 739 NW2d 313 (2007).

***2** Scottsdale's policy provides coverage for "bodily injury" or "property damage" caused by an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." "Property damage" is defined in pertinent part as "[p]hysical injury to tangible property, including all resulting loss of use of that property." West American's policy language, in essence, is identical. The policies do not define "accident."

In *Liparoto Constr, Inc. v. Gen. Shale Brick, Inc.,* 284 Mich.App 25, 35; 772 NW2d 801 (2009), the Court held:

> An insurance policy is construed in accordance with Michigan's well-established principles of contract construction. *Citizens Ins. Co. v. Pro–Seal Service Group, Inc.,* 477 Mich. 75, 82; 730 NW2d 682 (2007). The policy must be enforced according to its terms, and a court may not hold an insurer liable for a risk it did not assume. *Id.* A court may not create an ambiguity in a policy if the terms are clear and unambiguous, and the failure to define a relevant term does not render the policy ambiguous. *Id.* at 82–83. Rather, reviewing courts must interpret the terms of the policy in accordance with their commonly used meanings. *Id.* at 83.

In *Hawkeye–Security Ins. Co. v. Vector Constr Co.,* 185 Mich.App 369; 460 NW2d 329 (1990), Vector had to remove and repour 13,000 yards of concrete because the initial concrete failed to comply with project specifications. *Id.* at 371–372. In holding that there was no coverage, the Court interpreted contract language that was essentially identical to the contract language at issue here. *Id.* at 373. Initially, the Court recited the definition of "accident" that was set forth in *Frankenmuth Mut. Ins. Co. v. Kompus,* 135 Mich.App 667, 678; 354 NW2d 303 (1984):

> " 'An "accident," within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby—that is, takes place without the insured's foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned 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.' " *Guerdon Indus., Inc. v. Fidelity & Cas Co. of New York,* 371 Mich. 12, 18–19; 123 NW2d 143 (1963), quoting 10 Couch on Insurance (2d ed), § 41:6, p. 27. [*Hawkeye Ins.,* 185 Mich.App at 374.]

Christman relies on this definition in arguing that the failure of the portion of the parking structure was an accident because it was unanticipated, unforeseen and unexpected. However, the Court in *Hawkeye Ins* held that Vector's defective workmanship—use of the inferior concrete—did not constitute an accident/occurrence within the meaning of the contract. The Court distinguished *Bundy Tubing Co v. Royal Indemnity Co,* 298 F.2d 151 (CA 6, 1962), which it concluded stood for the proposition that "an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by 'accidents' where the insured's faulty work product damages the property of others," i.e., customers' homes. *Hawkeye Ins,* 185 Mich.App at 377. This Court then adopted the reasoning of *McAllister v. Peerless Ins. Co.,* 124 NH 676, 680; 474 A.2d 1033 (1984), in which the court stated:

> ***3** *The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship* .... Despite proper deference, then, to the reasonable expectations of the policyholder, ... we are unable to find in the quoted policy language a reasonable basis to expect coverage for defective workmanship. [Emphasis added.]

Hawkeye Ins noted that *McAllister* "went on to hold that a general grant of coverage contained in a general coverage provision does not give rise to coverage for the cost of correcting defective work." *Id.* at 378, citing 124 NH at 680–681. The Court concluded that "the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract." *Id.* [2]

2 Case law from other jurisdictions may undermine the *Hawkeye Ins* rationale. See *Sheehan Const Co, Inc v. Continental Cas Co,* 935 N.E.2d 160, 165–172 (Ind, 2010), and cases cited therein, mod on other grounds 938 N.E.2d 685, 688–690 (Ind, 2010).

In *Radenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan,* 240 Mich.App 134; 610 NW2d 272 (2000), the Court elaborated on this concept. It concluded, as in *Bundy,* that where the underlying complaint alleges "damages broader than mere diminution in value of the insured's product caused by alleged defective workmanship," there is a duty to defend and indemnify. *Id.* at 140–141. In *Radenbaugh,* the insured's instructions to contractors resulted in defective workmanship relative to the foundation of a basement. This resulted in damage to the basement and the customer's home. The Court adopted the reasoning of *Calvert Ins. Co. v. Herbert Roofing & Insulation Co.,* 807 F.Supp. 435 (ED Mich, 1992), to hold that the underlying complaint alleged an occurrence. *Id.* at 144–148. Because the damage at issue did not relate *solely* to the insured's product, there was coverage for this damage.

In *Liparoto,* 284 Mich.App at 28, the general contractor used brick that discolored. The Court concluded that the discoloration was not an "occurrence" under the policy. *Id.* at 39. The policy definition of "occurrence" was, in essence, the same as that in *Hawkeye Ins* and the same used in the two policies at issue here—" 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.' " *Id.* at 35. The Court held, "Here plaintiff did not allege, and presented no evidence, that there was damage beyond its own work product. Accordingly, the trial court did not err by concluding that plaintiff failed to establish an occurrence within the meaning of the policy." *Id.* at 38–39.

In the present case, the damage at issue was damage to the components of the parking structure itself. There were no damages beyond this work product. According to *Hawkeye Ins* and *Liparato,* property damage that is confined to the insured's work product will not be deemed an occurrence or an accident. Summary disposition was appropriate in this case, because the damage to the parking structure was not an "occurrence" within the meaning of the insurance policies.

Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Gerald T. HEATON and Jonna Heaton, Plaintiffs/Garnishee Plaintiffs–Appellants,
v.
PRISTINE HOME BUILDERS, L.L.C., Daniel J. Bonawitt, Benton Construction Corp., d/b/a Great Lakes Superior Walls, Craig's Home Design Service and Craig Thornton, Defendants,
and
Auto–Owners Insurance Co., Garnishee Defendant–Appellee.

Docket No. 305305.
|
Oct. 25, 2012.

Shiawassee Circuit Court; LC No. 06–003972–CK.

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

Opinion

PER CURIAM.

***1** Plaintiffs are home owners who won a jury verdict against several contractors involved in the construction of their home. Defendant Pristine Home Builders, L.L.C. did not pay its share of the jury award and plaintiffs sought a writ of garnishment against Auto–Owners Insurance Co., Pristine's commercial general liability insurer. Because the insurance policy does not provide coverage under the circumstances, we affirm the trial court's summary dismissal of the garnishment action.

I. BACKGROUND

Pristine served as the general contractor on plaintiff's home construction project and hired subcontractor, Great Lakes Superior Walls, to install "precast concrete foundation walls" at the site. *Heaton v. Benton Constr. Co.,* 286 Mich.App 528, 530–531; 780 NW2d 618 (2009). These foundation walls shifted during construction, damaging the entire structure. Plaintiffs secured a jury verdict, finding both contractors negligent and assigning Great Lakes a 60% share of the liability and Pristine a 40% share. The jury awarded plaintiffs $272,500 in damages. *Id.* In a prior published opinion, this Court affirmed the negligence judgment and reversed a trial court order remitting the damages award. *Id.* at 530.

Thereafter, Great Lakes paid in full its 60% obligation for the jury award. Pristine did not pay and plaintiffs filed a "request and writ for garnishment" against Auto–Owners as Pristine's commercial general liability insurer. Auto–Owners fought the garnishment, arguing that the negligent construction was not an "occurrence" as anticipated in the policy and therefore was not covered. In the alternative, Auto–Owners contended that Pristine's negligence was excluded from policy coverage because Pristine's incorrectly performed work required the restoration, reparation or replacement of the damaged property. Plaintiffs sought summary disposition of their garnishment claim under MCR 2.116(C)(10), but the trial court found no coverage and granted summary disposition in Auto–Owners' favor instead.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Allen v. Bloomfield Hills Sch. Dist.,* 281 Mich.App 49, 52; 760 NW2d 811 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Liparoto Constr. Inc. v. Gen. Shale Brick, Inc.,* 284 Mich.App 25, 29; 772 NW2d 801 (2009). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v. Barton Malow Co.,* 480 Mich. 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

We also review de novo the interpretation of an insurance contract. *American Home Assurance Co. v. Mich. Catastrophic Claims Ass'n.,* 288 Mich.App 706, 717; 795 NW2d 172 (2010). "The rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v. Allstate Ins. Co.,* 290 Mich.App 434, 439; 802 NW2d 619 (2010). "The language of insurance contracts should be read

as a whole and must be construed to give effect to every word, clause, and phrase." *Id.* Language should be given its ordinary and plain meaning, and technical and strained constructions should be avoided. *Radenbaugh v. Farm Bureau Ins. Co. of Mich.,* 240 Mich.App 134, 138; 610 NW2d 272 (2000).

III. APPLICATION

***2** The "Commercial General Liability Form" issued by Auto–Owners to Pristine provides:

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

The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

This Court analyzed nearly identical commercial general liability insurance policy language defining a covered "occurrence" as an "accident" in *Radenbaugh v. Farm Bureau Gen. Ins. Co. of Mich,* 240 Mich.App 134; 610 NW2d 272 (2000). " ' "[A]n accident," ' " *Radenbaugh* explained, " ' "is an undesigned 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." ' " *Id.* at 147, quoting *Calvert Ins. Co. v. Herbert Roofing & Insulation Co.,* 807 F.Supp 435, 438 (ED Mich, 1992), quoting *Guerdon Indus, Inc v. Fidelity & Cas Co.,* 371 Mich. 12, 18–19; 123 NW2d 143 (1963). A covered accident is found " 'when an insured's defective workmanship results in damage to the property of others.' " " 'When the damage ... is confined to the insured's own work product the insured is the injured party, and the damage cannot be viewed as accidental....' " *Radenbaugh,* 240 Mich.App at 147, quoting *Calvert,* 807 F.Supp at 438, citing *Bundy Tubing Co. v. Royal Indemnity Co,* 298 F.2d 151 (CA 6, 1962), and *Hawkeye–Security Ins. Co. v. Vector Constr. Co.,* 185 Mich.App 369; 460 NW2d 329 (1990).

Pristine was the general contractor at plaintiffs' home construction site. According to its insurance policy, any work performed on its behalf by a subcontractor was attributable to Pristine. The policy defines "your work" as:

> a. Work or operations performed by you *or on your behalf;* and
>
> b. Materials, parts or equipment furnished in connection with such work or operations. [Emphasis added.]

As a result of the shifting of the negligently constructed foundation walls, the entirety of the structure that had been constructed to that point had to be razed and rebuilt. All of the work that had been affected had been done by Pristine or its subcontractors. As "the damage ... [was] confined to the insured's own work product the insured [was] the injured party, and the damage cannot be viewed as accidental." *Radenbaugh,* 240 Mich.App at 147. The trial court therefore correctly concluded that this was not a covered "occurrence" under the policy.

Plaintiffs raise several arguments for the first time on appeal in an attempt to force this square peg into the round coverage hole. First, plaintiffs contend that the damage caused by the shifting foundation walls was the result of gravity and therefore was an accident and a covered occurrence. Gravity was not the accepted cause of damage at the jury trial, however. Rather, plaintiffs' evidence at trial showed that Great Lakes negligently designed and installed the foundation walls and Pristine exacerbated the problem by failing to construct "shearing walls" and by "backfilling" an excessive weight of dirt against the outside of the foundation walls. As determined by the jury, the cause of the foundation shift was negligence, not simply gravity. "A [jury] verdict will not be disturbed so long as it is within the fair range of testimony." *Merkur Steel Supply Inc. v. Detroit,* 261 Mich.App 116, 137–138; 680 NW2d 485 (2004).

***3** Plaintiffs also contend:

> Auto Owners [sic] may attempt to argue that because Pristine is a general contractor, the entire house is the work product of Pristine and therefore, the damage was not the result of an "accident" as defined by *Radenbaugh. Radenbaugh,* however, should be narrowly construed to

> pertain only to those areas of the home that failed as the result of defective workmanship, or, in the case at hand, the foundation itself. Giving *Radenbaugh* such a broad interpretation essentially eliminates protection for general contractors who build homes because any part of the home could arguably be considered the work product of the general contractor, even though a specific portion of the home may have failed due to an event that would otherwise be considered an occurrence.

Plaintiffs may be correct that the precedent of this state has harshly left general contractors open to personal liability without coverage. However, we are bound by this precedent. And the answer to this problem lies in potential insurance purchasers negotiating the type of coverage they need and passing on policies that so broadly preclude liability protection.

Plaintiffs then claim that *Radenbaugh* actually supports coverage in the current case because the *Radenbaugh* Court found coverage where a faulty foundation damaged the entire structure. This simplistic analysis ignores the important distinctions between *Radenbaugh* and the current case. In *Radenbaugh,* the damages were caused by negligence on the part of a mobile home dealer. The dealer provided the homeowner with "erroneous schematics and instructions" to install a basement under the mobile home. The homeowner then hired contractors to install the basement and erect the mobile home. The entire mobile home was damaged because it was installed atop an inadequate basement and foundation. *Radenbaugh,* 240 Mich.App at 136. In *Radenbaugh,* the mobile home dealer was the insured and its negligence in providing erroneous schematics and instructions did result in damage to the property of others. The mobile home dealership was in no way connected to the contractor who installed the basement and after selling the mobile home, had no interest in the property. Therefore, the damages caused by its negligence affected only the property of others.

Because Pristine's negligence is not a covered "occurrence" under this insurance policy, it is unnecessary to consider whether any policy exclusions apply.

Affirmed. Auto–Owners, as the prevailing party, may tax costs. MCR 7.219.

SHAPIRO, P.J., concurring.
I concur in the result only.

All Citations

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

DAVE COLE DECORATORS, INC., Plaintiff–Appellant,
v.
WESTFIELD INSURANCE COMPANY, Defendant–Appellee.

Docket No. 313641.
|
March 25, 2014.

Kent Circuit Court; LC No. 12–004808–CK.

Before: GLEICHER, P.J., and HOEKSTRA and O' CONNELL, JJ.

Opinion

PER CURIAM.

***1** The circuit court summarily dismissed plaintiff Dave Cole Decorators, Inc. (DCD)'s breach of contract action against its commercial general liability insurer, Westfield Insurance Company. The damages for which DCD sought coverage did not arise from an "occurrence" under its insurance policy. We therefore affirm.

I. BACKGROUND

A.J. Veneklasen hired DCD to paint the steel components of a building that was under construction. DCD contracted the work out to a third party. Veneklasen later notified DCD that the paint did not properly adhere to the steel, causing some components to rust and the drywall installed over the steel to "pop." DCD repainted the defective areas at a cost of $28,617. It did not repair the damaged steel and drywall or pay for those repairs.

DCD subsequently submitted a claim to Westfield for reimbursement of its costs for the repainting job. Westfield denied the claim and DCD filed suit. The circuit court summarily dismissed DCD's claim, ruling that because DCD failed to adequately prove damage to anything other than its own defective work product, no "occurrence" existed under the policy terms and Michigan law. In the alternative, the circuit court found that coverage would be precluded by several exclusionary provisions in the policy. This appeal followed.

II. ANALYSIS

We review de novo a circuit court's decision on a motion for summary disposition. *BC Tile & Marble Co, Inc v. Multi Bldg Co, Inc,* 288 Mich.App 576, 583; 794 NW2d 76 (2010). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Id.* In relation to a(C)(10) motion, we must consider the evidence in the light most favorable to the nonmoving party. *Id.* "Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

We also review de novo issues of contract interpretation. *American Home Assurance Co v. Mich. Catastrophic Claims Ass'n,* 288 Mich.App 706, 717; 795 NW2d 172 (2010). When determining the parties' rights under a contract, a court is to read the contract as a whole and give meaning to all the terms contained within the policy. *Radenbaugh v. Farm Bureau Gen Ins Co of Michigan,* 240 Mich.App 134, 138–139; 610 NW2d 272 (2000). A court may not create an ambiguity in a policy if the terms are clear and unambiguous. *Citizens Ins Co v. Pro–Seal Service Group, Inc,* 477 Mich. 75, 83; 730 NW2d 682 (2007).

The Westfield policy issued to DCD provides, in relevant part:

SECTION I—COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies ...
>
> > **b.** This insurance applies to "bodily injury" and "property damage" only if:

> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"

***2** The policy defines an "occurrence" as "an accident," but does not define the term "accident." This Court analyzed nearly identical commercial general liability insurance policy language defining a covered "occurrence" as an "accident" in *Radenbaugh,* 240 Mich.App 134. "[A]n accident," *Radenbaugh* explained, "is an undesigned 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." *Id.* at 147 (quotation marks and citations omitted). A covered accident is found "when an insured's defective workmanship results in damage to the property of others." "When the damage ... is confined to the insured's own work product the insured is the injured party, and the damage cannot be viewed as accidental...." *Id.* (quotation marks and citations omitted). See also *Hawkeye–Security Ins Co v. Vector Const Co,* 185 Mich.App 369, 378; 460 NW2d 329 (1990).

DCD does not dispute the applicable law. Instead, it argues that the circuit court failed to give adequate consideration to the evidence of rusting and drywall "popping" that occurred to the building as a result of the defective paint job. DCD asserts that this represents "damage to the property of others," sufficient to constitute an "occurrence." It is undisputed that DCD incurred no additional costs in relation to the damage to Veneklasen's property, however. The record is devoid of evidence or allegations that DCD replaced any steel beams or drywall or paid for those repairs. There is no indication that Veneklasen ever filed suit against DCD to recover for these damages. Because there were no "damages beyond the mere diminution in value of the insured's product caused by alleged defective workmanship," *Radenbaugh,* 240 Mich.App at 141, no "occurrence" existed and Westfield was not obligated to reimburse DCD for the cost of repainting.

DCD alternatively suggests that a separate policy provision —the "products/completed operations aggregate limit"— affords coverage for the costs incurred in repainting. This provision merely sets forth the highest limit of insurance under the policy. It applies only if there is a covered occurrence as defined elsewhere in the policy. As the defective paint job was not an "occurrence" under the policy, the "aggregate limit" provision was not triggered. [1]

1 As no covered occurrence was present in this case, we need not consider the circuit court's alternate ruling that coverage could have been denied based on an exclusionary provision in the policy.

We affirm.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

MICHIGAN INSURANCE COMPANY, Plaintiff–Appellee,
v.
CHANNEL ROAD CONSTRUCTION, INC., d/b/a Construction Services, Inc., of Drummond Island, Defendant–Appellant,
and
Citizens Insurance Company and Frankenmuth Mutual Insurance Company, Defendants–Appellees,
and
Mark Wenger and Cynthia Wenger, Defendants.
Michigan Insurance Company, Plaintiff–Appellee,
v.
Channel Road Construction, Inc., d/b/a Construction Services, Inc., of Drummond Island, Defendant,
and
Citizens Insurance Company and Frankenmuth Mutual Insurance Company, Defendants–Appellees,
and
Mark Wenger and Cynthia Wenger, Defendants–Appellants.

Docket Nos. 315837, 315859.
|
Oct. 21, 2014.

Chippewa Circuit Court; LC No. 12–012243–CK.

Before: MURPHY, C.J., and SAWYER and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** In this consolidated case, defendants Channel Road Construction and Mark and Cynthia Wenger appeal as of right from an order of the circuit court granting summary disposition according to MCR 2.116(C)(10) (no genuine issue of material fact), in favor of plaintiff Michigan Insurance Company, and defendants Citizens Insurance Company and Frankenmuth Mutual Insurance Company. [1] We affirm.

1 The trial court granted summary disposition under MCR 2.116(I)(2), judgment to the party opposing the moving party, after the Wengers moved for summary disposition under MCR 2.116(C)(10). Frankenmuth Mutual Insurance also filed for summary disposition according to MCR 2.116(C)(10). Citizens Insurance moved for summary disposition according to MCR 2.116(C)(10) and MCR 2.116(I)(2).

Defendant Channel Road Construction assembled a log home for defendants Mark and Cynthia Wenger on their property on Drummond Island. In 2011, about five years after moving in, the Wengers discovered that water had intruded into the home causing damage. The Wengers stated that they paid $65,000 to repair the damage and expected to pay an additional $10,600. The Wengers obtained a home inspection by Thomas Pendry, who concluded that defendant Channel Road Construction's failure to install metal flashing above windows and failure to angle the window sill down from the window allowed water behind the exterior finish of the home. Plaintiff's home inspector, John Cuth, concluded that defendant Channel Road Construction's failure to install metal flashing and proper window sills caused water damage around seven windows and a wall beneath adjoining roof sections.

The Wengers filed a complaint against defendant Channel Road Construction, alleging that it failed to properly install window sills and failed to install metal flashing around the windows, causing gradual water damage to their home. Plaintiff provided insurance to defendant Channel Road Construction Company beginning December 31, 2007, until at least December 31, 2011. Plaintiff asserted that Citizens Insurance provided insurance to Channel Road Construction through December 31, 2005, and that Frankenmuth Mutual provided insurance to defendant Channel Road Construction from December 31, 2005, to December 31, 2007. Plaintiff filed a complaint for declaratory judgment. A provision of the policy stated that plaintiff insured property damage caused by an "occurrence," which as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy excluded from coverage property damage to property "that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The policy also excluded property damage arising out of a "defect, deficiency, inadequacy, or dangerous condition in 'your product' or 'your work.' " Plaintiff requested the

trial court to find that plaintiff's policy for Channel Road Construction did not apply because damage to the Wenger's home was not an accidental "occurrence" as defined by the policy.

The Wengers moved for summary disposition, arguing that plaintiff's policy covered Channel Road Construction's liability for damages because the damage was caused by water intrusion occurrences and no exclusions applied. Channel Road Construction concurred with the motion. Frankenmuth Mutual moved for summary disposition, arguing that the Wengers took possession of their home prior to the coverage period under its insurance policy, and that the damage was not a result of an "occurrence." Citizens Insurance moved for summary disposition, concurring with the argument made by plaintiff and Frankenmuth Mutual. At a hearing on motions for summary disposition, the insurance companies agreed that no insurance covered Channel Road Construction in its lawsuit with the Wengers. The Wengers argued that the property damage was covered by insurance because of the accidental "occurrence" of water damaging the property from 2005 to 2011 through the defective window finishes. They argued that the policies of plaintiff and Frankenmuth Mutual were in place until the damage was discovered.

***2** The trial court found the damage was caused by the work product of Channel Road Construction, and was not caused by an accident. The trial court found that plaintiff, Frankenmuth Mutual, and Citizens Insurance "had no duty to indemnify or defend Channel Road Construction" for claims arising from the construction of the Wenger home. The trial court also denied defendant Frankenmuth Mutual's motion for attorney fees. The Wengers and Channel Road Insurance argue on appeal that the trial court erred in granting summary disposition because the defective workmanship causing property damage was an "accident" and "occurrence" according to the policy language because the damage was to the "property of others." A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v. Capital Welding, Inc.,* 471 Mich. 45, 52; 684 NW2d 320 (2004).

When reviewing a motion brought under MCR 2.116(C)(10), a court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v. Nat'l. Auction Group, Inc.,* 466 Mich. 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

An insurance policy is a contract between the insurer and the insured, and a court must determine and enforce the meaning of the policy language. *Radenbaugh v. Farm Bureau Gen. Ins. Co. of Mich.,* 240 Mich.App 134, 138–139; 610 NW2d 272 (2000). An insured must prove insurance coverage, while the insurer must prove exclusions to coverage. *Heniser v. Frankenmuth Mut. Ins.,* 449 Mich. 155, 161 n. 6; 534 NW2d 502 (1995). The first step in interpretation of an insurance policy is a determination of coverage according to the general insurance agreement. *Auto–Owners Ins. Co. v. Harrington,* 455 Mich. 377, 382; 565 NW2d 839 (1997).

Here, plaintiff's policy for Channel Road Construction provided, in relevant part as follows: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages." An "occurrence," necessary to trigger insurance coverage, was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[2] This Court has analyzed similar provisions and defined an accident as "an undesigned 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." *Frankenmuth Mut. Ins. Co. v. Masters,* 460 Mich. 105, 114; 595 NW2d 832 (1999) (citations omitted)

2 Channel Road Construction's policy with Frankenmuth Mutual contained an identical provision.

"[T]he purpose and intent of [a general liability] insurance policy is to protect the insured from liability for essentially accidental injury to the person or property of another rather than coverage for disputes between parties to a contractual undertaking." *Lopez & Medina Corp. v. Marsh USA, Inc.,* 667 F3d 58, 67–68 (CA 1, 2012) (citation omitted). In determining whether an insured's intentional act can be classified as an "accident," a court can consider "whether the consequences of the insured's intentional act either were intended by the insured or reasonably should have been expected." *Masters,* 460 Mich. at 115–116. It is not an accident where the insured's intentional acts are intended to cause, or create a direct risk of property damage. *Id.*

***3** The undisputed evidence established that Channel Road Construction's failure to install metal flashing above windows and failure to angle the window sills away from the windows allowed water to accumulate behind the exterior finish of the home, causing water damage around seven windows and a wall beneath adjoining roof sections. The home was built in 2005 and the water damage was discovered in 2011. Damage from defective workmanship is an "occurrence" that triggers an insurance policy's coverage "only if the damage in question extended beyond the insured's work product ." *Liparoto Constr., Inc. v. Gen Shale Brick, Inc.,* 284 Mich.App 25, 38; 772 NW2d 801 (2009), citing *Radenbaughm,* 240 Mich.App at 144. When an insured's defective workmanship results in damage to the property of others, an "accident" occurred according to a standard liability policy; but, when an insured's defective workmanship results in damage confined to the insured's own work product, the insured is the injured party and the damage was not an "accident." *Radenbaugh,* 240 Mich.App at 146–147 (citation omitted).

Here, the damage was confined to Channel Road Construction's work product and, therefore, not an "accident" or "occurrence" within the meaning of the liability policy. Channel Road Construction's contract was to construct the home. The property damage at issue was not to the individual materials supplied by the Wengers, but to areas of the constructed home.

Thus, there was no "occurrence" causing property damage to trigger plaintiff's policy coverage of defendant Channel Road Construction's liability. *Hawkeye Security Ins. Co. v. Vector Constr. Co.,* 185 Mich.App 369, 378; 460 NW2d 329 (1990).

Affirmed.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

AUTO–OWNERS INSURANCE COMPANY, Plaintiff–Appellant,
v.
Lyle Christopher KELLEY and North Arrow Log Homes, Inc., Defendants–Appellees,
and
Steven Prain and Jennafer Prain, Intervening Defendants–Appellees.

Docket No. 319641.
|
July 21, 2015.

Montmorency Circuit Court; LC No. 13–003231–CK.

Before: SAWYER, P.J., and DONOFRIO and BORRELLO, JJ.

Opinion

PER CURIAM.

***1** This insurance coverage dispute arises from the underlying complaint of intervenors Steven and Jennafer Prain against defendants Lyle Kelley and North Arrow Log Homes, Inc. ("North Arrow"). In the underlying complaint, the Prains sued Kelley and North Arrow for damages associated with alleged deficiencies in a log home that Kelley and North Arrow constructed. [1] Plaintiff, the insurer for Kelley and North Arrow, filed the instant action for declaratory relief, seeking a determination that it had no duty to defend or indemnify Kelley and North Arrow in the underlying action. The trial court granted summary disposition in favor of the Prains, and we affirm in part, reverse in part, and remand.

1 Kelley was the president of North Arrow.

The Prains contracted with North Arrow to construct a log cabin home on property they owned in northern Michigan. North Arrow was only responsible for the exterior log shell of the home. The Prains also engaged Sweetwater Homes, a general contractor, and utilized Render Construction for work on the interior of the home. North Arrow was not a subcontractor of Sweetwater Homes.

After the home was completed in December 2006, the Prains noticed structural problems with the home, and although North Arrow apparently attempted to remedy some problems, the problems persisted. The problems included dislodged logs and roof problems such that water and exterior weather elements were able to enter the home, causing damage to the interior of the structure. The Prains filed a nine-count complaint against North Arrow and Kelley (the underlying complaint), alleging the following: I—Breach of Contract, II—Promissory Estoppel, III—Bad Faith and Breach of Covenant of Good Faith and Fair Dealing, IV—Breach of Warranty, V—Negligent Construction, VI—Violation of Residential Builders Act, VII—Professional Malpractice, VIII—Defective and Unsafe Condition of Improvement to Real Property, and IX—Fraud/Misrepresentation/Negligent Misrepresentation/Equitable Estoppel.

Plaintiff filed the instant action for declaratory relief, arguing that there was no "occurrence" under the terms of the policy and that it therefore had no duty to defend or indemnify. Plaintiff then moved for summary disposition. Plaintiff first argued that the alleged defects in the construction did not constitute an "accident" or "occurrence" under the policy, thereby precluding coverage. Plaintiff also argued that policy exclusions "j" and "m" precluded coverage. Finally, plaintiff argued that it was entitled to summary disposition because the underlying complaint alleged "intentional" conduct and exclusion "a" of the policy excluded coverage for expected or intended consequences. In response, the Prains submitted affidavits to the trial court attesting that North Arrow's allegedly negligent construction caused damage to property other than property North Arrow was responsible for, i.e., drywall, carpeting, painting, and other interior work completed by Sweetwater Homes and Render Construction, thereby qualifying as an occurrence or accident.

***2** The trial court first ruled that because "the structural deficiencies caused by North Arrow has led to significant damage to the work product of others," there was an "occurrence" under the policy. The trial court also determined that exclusions "j" and "m" did not apply, but it did not specifically address exclusion "a." As a result, the trial court granted summary disposition in favor of the Prains.

I. STANDARDS OF REVIEW

Even though the trial court cited both MCR 2.116(C)(8) and (10) in its opinion granting summary disposition in favor of the Prains, it is evident that the court relied on materials outside of the pleadings. Consequently, we review its decision as though it had been made under MCR 2.116(C)(10). *Haynes v. Village of Beulah,* 308 Mich.App 465, ——; —— NW2d —— (2014), slip op, p 2. A court's ruling on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Bailey v. Schaaf,* 494 Mich. 595, 603; 835 NW2d 413 (2013); *Dunn v. Bennett,* 303 Mich.App 767, 770; 846 NW2d 75 (2014). Because such a motion "tests the factual sufficiency of the complaint," this Court considers "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v. Rozwood,* 461 Mich. 109, 120; 597 NW2d 817 (1999). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v. Bar–Levav,* 463 Mich. 723, 730; 625 NW2d 754 (2001).

Additionally, the construction and interpretation of an insurance contract is a question of law that we review de novo. *Henderson v. State Farm Fire & Cas Co,* 460 Mich. 348, 353; 596 NW2d 190 (1999). Interpretation of insurance policy terms follows Michigan's established principles of contract construction. *Id.*

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity. [*Id.* at 354 (citations omitted).]

II. DUTY TO INDEMNIFY

The insurance policy at issue provides that plaintiff will only pay North Arrow "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy then states that it only applies to "bodily injury" and "property damage" if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the coverage territory." Under the definition section, the policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

A. DID AN "OCCURRENCE" OR "ACCIDENT" HAPPEN?

***3** Plaintiff first argues that an "occurrence," as defined by its policy, was not alleged in the underlying complaint. Plaintiff acknowledges that this Court has determined that an "accident" or "occurrence" arises "when an insured's defective workmanship results in damage to the property of *others.* " *Radenbaugh v. Farm Bureau General Ins Co of Mich,* 240 Mich.App 134, 147; 610 NW2d 272 (2000), quoting *Calvert Ins Co v. Herbert Roofing & Insulation Co,* 807 F Supp 435, 438 (ED Mich, 1992) (quotation marks omitted; emphasis added).[2] Plaintiff's sole argument on appeal on this matter is that there is no accident or occurrence because the Prains alleged in their underlying complaint that the only damage that happened was to the home structure that North Arrow constructed. In other words, because "the property of others" was not alleged to have been damaged, it was clear that there was no accident or occurrence, and plaintiff had no duty to indemnify or defend. However, in focusing solely on the underlying complaint, plaintiff ignores the documentary evidence that was submitted on the motion for summary disposition. In their response to plaintiff's motion for summary disposition, the Prains presented several affidavits attesting that North Arrow's construction allowed water and weather elements to enter the home, which caused substantial damage to the work done by other contractors. There was no contractual relationship between these other firms and North Arrow. Further, the damaged work was separate and distinct from the exterior log shell for which North Arrow was responsible. This damage included interior walls, drywall, and electrical work. As a result, the Prains carried their burden of responding to plaintiff's arguments

with affidavits outlining the underlying facts. See *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). Plaintiff did not rebut any of these allegations with affidavits or documentary evidence of its own. Therefore, there is no question of fact that the work product of others was damaged, which means that an "occurrence" under the policy happened. [3]

2 Notably, the Court in *Radenbaugh* was dealing with an insurance policy that had the exact same definition of "occurrence" as we have in the instant case. *Radenbaugh,* 240 Mich.App at 140.

3 By focusing only on the allegations in the underlying complaint, plaintiff is taking the court's decision under MCR 2.116(C)(10) and analyzing it under MCR 2.116(C)(8), which tests the *legal* sufficiency of a complaint, where *only* the pleadings themselves are considered (the underlying complaint was attached to the instant complaint). *Gillie v. Genesee Co Treasurer,* 277 Mich.App 333, 344; 745 NW2d 137 (2007).
We also note that even if the complaint in its original form warranted that summary disposition be granted under MCR 2.116(C)(8) in favor of plaintiff, the Prains have since amended their underlying complaint at the trial court to clarify that North Arrow was only responsible for the exterior shell of the home and that the alleged damage occurred to other areas of the home. See MCR 2.116(I)(5) (stating that if summary disposition is to be granted under MCR 2.116(C)(8), (9), or (10), then "the trial court shall give the parties an opportunity to amend their pleadings"). Thus, any error has been rendered moot because the complaint now specifically alleges damage to property of which North Arrow was not responsible.

B. DO ANY POLICY EXCLUSIONS PRECLUDE COVERAGE?

Plaintiff next argues that it is not obligated under the policy because any alleged liability is excluded by two provisions in the policy.

i. Exclusion A

Plaintiff first relies on exclusion "a," which provides that the coverage does not apply to " 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." Plaintiff claims that the Prains' underlying complaint makes several allegations of intentional conduct, which would fall under this exclusion. Specifically, plaintiff relies on the following allegations in the original underlying complaint:

- Kelley intentionally abused North Arrow's corporate form to commit fraud and other wrongs, thereby becoming individually liable by piercing the corporate veil.
- Kelley and North Arrow intentionally and willfully breached the contract.

***4** • Count IX's cause of action for fraud and misrepresentation.

We conclude that plaintiff is reading the scope of exclusion "a" too broadly. The exclusion only applies to *property damage* that was "expected or intended from the standpoint of the insured." None of the allegations listed above *necessarily* relate to Kelley's or North Arrow's expectation or intent to damage property.

First, Kelley's alleged abuse of the corporate form has no bearing on whether he or North Arrow intended to cause the damage at issue here. Piercing the corporate form focuses on whether individuals ignored the corporate form and instead used the corporate form as a mere instrumentality or alter ego for themselves. See *Florence Cement Co v. Vettraino,* 292 Mich.App 461, 469; 807 NW2d 917 (2011).

Next, the Prains' allegation that Kelley and North Arrow intentionally and willfully breached the contract is not enough to show that Kelley and North Arrow actually intended to cause or expected the resulting damage. In fact, from looking at the complaint as a whole, it is not clear what actions supposedly constitute this intentional and willful behavior. Thus, the supposed intentional and willful behavior may only relate to the scope of its own work and have nothing to do with an intentional desire to cause damage to others. [4]

4 For example, a contractor could contract with a homeowner to use certain materials, but the contractor may intentionally breach the contract in using different materials, all with the intent and expectation to still provide a quality product.

Last, plaintiff's reliance on Count IX is misplaced. Count IX, in addition to listing fraud and misrepresentation, also listed negligent misrepresentation. Thus, categorizing this count as being based solely on intentional conduct is not accurate. Therefore, plaintiff being absolved of liability from the entire

complaint or even this count, as plaintiff seems to suggest, would not be warranted.

ii. Exclusion J

Plaintiff also argues that exclusion "j," covering damage to property, precludes liability. In relevant part, that exclusion states that the insurance does not apply to property damage to

> (6) That particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (7) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Plaintiff's argument merely is a repetition of its earlier argument related to its contention that the Prains alleged that nothing other than the exterior shell of the home was damaged. However, for the same reasons provided earlier, this argument is without merit. The Prains responded to plaintiff's motion for summary disposition by providing evidence that there was damage to the interior of the home and not simply to the log shell constructed by North Arrow. As plaintiff acknowledged in its brief on appeal, the instant exclusion pertains only to North Arrow's operation and scope of work and damages (repair, restoration, or replacement) *to its own work.* At oral argument, plaintiff took a different position, however, arguing that the "it" in subsection (7)'s phrase "performed on it," referred only to "any property," which plaintiff claims means that as long as North Arrow worked on "any property," any resulting damage—regardless of what property ultimately was damaged—was excluded from coverage. This argument is untenable. The clear reading of this subsection reveals that "it" refers to the entire preceding noun phrase, "[t]hat particular part of any property that must be restored, repaired or replaced." Consequently, the exclusion pertains to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on that particular part of any property that must be restored, repaired or replaced." Put in more simple terms, the exclusion only applies to property that North Arrow worked on that required restoration, repair, or replacement as a result of its work, and plaintiff has failed to show how there was any error.

C. CLARIFICATION OF
PLAINTIFF'S DUTY TO INDEMNIFY

***5** Even though we understand why the court granted summary disposition in favor of the Prains, we must reverse in part because the order should have clarified that plaintiff would not have to indemnify North Arrow for damages to North Arrow's own work product, which only includes the exterior structure of the home. See *Radenbaugh,* 240 Mich.App at 147. Further, the order should have specified that plaintiff also would not be liable to indemnify North Arrow for any damage that was intentionally caused by North Arrow, as this type of damage is specifically excluded under the terms of the policy. As a result, plaintiff has a duty to indemnify North Arrow, but it ultimately is subject to the jury's findings of fact in the underlying proceeding, the findings of fact in this declaratory proceeding, or the findings of fact made in a consolidated proceeding. [5] On remand, the trial court is to amend its order accordingly.

5 However, as discussed later in footnote 6, our opinion is not to be construed as ruling that all of the Prains' underlying claims would survive any challenge under summary disposition and make it to a jury.

III. DUTY TO DEFEND

With regard to an insurer's duty to defend, Michigan has developed several principles of insurance law that apply in this case. First, where "allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." *Id.* at 137 (quotation marks and citation omitted). "The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third-party's allegations to analyze whether coverage is possible." *Id.* at 137–138. Furthermore, "an insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy, if there are *any* theories of recovery that fall within the policy." *Dochod v. Central Mut Ins Co,* 81 Mich.App 63, 67; 264 NW2d 122 (1978) (emphasis added).

Given the above case law, it is clear that because some of the Prains' allegations in their underlying complaint clearly contemplate covered occurrences, plaintiff has a duty to defend on the entire action. As just one example, the Prains' Count V alleges negligent construction, which if proven

would appear to qualify as an "occurrence" that is covered under the policy. [6] Thus, summary disposition on this aspect was properly granted in favor of the Prains.

6 We note that our opinion today is not to be interpreted as deciding on the ultimate validity of any of the Prains' claims in the underlying suit. Consistent with how the parties and the trial court treated the issues, our review in the instant case is a much more general analysis. As such, the trial court in the underlying proceeding shall not be constrained by our opinion in determining the gravamen of the (amended) underlying complaint, see *Adams v. Adams (On Reconsideration),* 276 Mich.App 704, 710–711; 742 NW2d 399 (2007), or in determining whether any of those claims would survive any motion for summary disposition if any are brought.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, as neither party prevailed in full. MCR 7.219.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

EMPLOYERS MUTUAL CASUALTY COMPANY, Plaintiff/Counter–Defendant–Appellee/ Cross–Appellant,
v.
MID–MICHIGAN SOLAR, LLC, Defendant/Counter–Plaintiff,
and
Nova Consultants, Inc., De fendant/Counter-Plaintiff-Appellant/Cross-Appellee.
Employers Mutual Casualty Company, Plaintiff/Counter–DefendantAppellant,
v.
Mid–Michigan Solar, LLC, Defendant/Counter–Plaintiff,
and
Nova Consultants, Inc., Defendant/Counter–PlaintiffAppellee.

Docket Nos. 325082, 326553.
|
April 19, 2016.

Oakland Circuit Court; LC Nos.2013–138107–CK, 2013–135627–NO, 2013–138107–CK.

Before: JANSEN, P.J., and SERVITTO and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** In Docket No. 325082, defendant Nova Consultants, Inc. (Nova) appeals as of right an opinion and order granting summary disposition to plaintiff, Employers Mutual Casualty Company (EMC), in this declaratory judgment action concerning insurance coverage for an underlying dispute over the defective installation of solar energy equipment. EMC has filed a cross-appeal in Docket No. 325082 asserting alternative grounds for affirming the grant of summary disposition in its favor. In Docket No. 326553, EMC appeals as of right an order denying EMC's motion for sanctions for Nova's alleged failure to admit certain matters. The appeals were consolidated. *Employers Mut Cas Co v. Mid Mich. Solar, LLC,* unpublished order of the Court of Appeals, entered April 1, 2015 (Docket Nos. 325082, 326553). In Docket No. 325082, we affirm the order granting summary disposition to EMC. In Docket No. 326553, we vacate the order denying EMC's motion for sanctions and remand for further proceedings.

I. DOCKET NO. 325082

Nova argues that the trial court erred when it granted summary disposition in favor of EMC. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v. Macomb Co Comm,* 298 Mich.App 311, 315; 826 NW2d 753 (2012). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v. Taylor,* 263 Mich.App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v. Barton Malow Co,* 480 Mich. 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ ." *West v. Gen Motors Corp,* 469 Mich. 177, 183; 665 NW2d 468 (2003). "[T]he proper construction and application of an insurance policy presents a question of law that is reviewed de novo." *Pioneer State Mut Ins Co v. Dells,* 301 Mich.App 368, 376–377; 836 NW2d 257 (2013). "An insurance policy is subject to the same contract interpretation principles applicable to any other species of contract." *Id.* at 377. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v. Continental Ins Co,* 473 Mich. 457, 464; 703 NW2d 23 (2005).

The general liability insurance policy issued by EMC provides coverage for sums that EMC's insured, Mid–Michigan Solar, LLC (MMS), becomes legally obligated to pay as damages because of "bodily injury" or "property

damage" caused by an "occurrence." The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined in the policy as "[p]hysical injury to tangible property, including all resulting loss of use of that property," or "[l]oss of use of tangible property that is not physically injured." The policy does not define the term "accident."

***2** This Court has addressed the circumstances under which an insured's defective workmanship may constitute an "occurrence" that is covered by a general liability insurance policy. In *Hawkeye–Security Ins Co v. Vector Constr Co,* 185 Mich.App 369, 371; 460 NW2d 329 (1990), the defendant, Vector Construction Company (Vector), was contracted to perform concrete work at a wastewater treatment plant. Vector contracted with Boichot Concrete Company (Boichot) to provide the concrete meeting certain project specifications. *Id.* Boichot delivered the concrete to Vector, and Vector used the concrete to construct the roof of a building at the plant. *Id.* After the concrete was poured, testing revealed that the concrete failed to satisfy the project specifications. *Id.* After the owner of the plant demanded corrective measures, Vector removed and repoured 13,000 yards of concrete. *Id.* at 371–372. Vector then sued Boichot for breach of contract, breach of warranties, and negligence, and the general contractor for the project, Barton–Malow Company (Barton–Malow), sued Vector for breach of contract and sued Boichot for negligence, breach of warranties, and breach of contract. *Id.* at 372. Vector's insurer, Hawkeye–Security Insurance Company (Hawkeye), denied coverage and filed a declaratory judgment action on the coverage issue. *Id.* Like the policy at issue in this case, the policy in *Hawkeye* provided coverage for sums that Vector became "legally obligated to pay as damages arising from "bodily injury" or "property damage" caused by an "occurrence.' " *Id.* at 373.

The policy in *Hawkeye* defined "occurrence" in somewhat more detail but in generally the same manner as the policy here. *Hawkeye,* 185 Mich.App at 373. Although the policy in *Hawkeye,* like the policy here, did not define the term "accident," this Court noted that our caselaw has defined that term as used in an insurance policy's definition of "occurrence" in the following manner:

> An accident, within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby—that is, takes place without the insured's foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned 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. [*Id.* at 374 (quotation marks and citations omitted).]

This Court in *Hawkeye* observed that it was an issue of first impression in Michigan whether an insured's allegedly defective workmanship constituted an accident and an occurrence within the meaning of a commercial general liability insurance contract. *Hawkeye,* 185 Mich.App at 374. This Court rejected Vector's reliance on *Bundy Tubing Co v. Royal Indemnity Co,* 298 F.2d 151 (CA 6, 1962). See *Hawkeye,* 185 Mich.App at 375–377. In *Bundy,* the insured, Bundy Tubing Company (Bundy), manufactured tubing that building contractors and plumbers installed in concrete floors for use in radiant heating systems. *Bundy,* 298 F.2d at 151. "Some of the tubing manufactured by Bundy contained defects that caused the tubing to fail and leak. Several parties then sued Bundy to recover damages to property sustained by reason of the defective tubing." *Hawkeye,* 185 Mich.App at 375, citing *Bundy,* 298 F.2d at 151–152. The federal appellate court in *Bundy* held that the failure of the tubing in the heating system was unforeseen, unexpected, and unintended, such that the resulting property damage was caused by an accident. *Bundy,* 298 F.2d at 153. Bundy's insurer was therefore required to indemnify Bundy for the damage to the property, including the cost of removing defective tubing and installing new tubing. *Id.* at 154. In *Hawkeye,* this Court explained that the holding in *Bundy* was inapplicable:

> ***3** We find Vector's reliance on *Bundy* misplaced. *Bundy* stands for nothing more than the proposition that an insurer must defend and may become obligated to indemnify an insured under a general liability policy

> of insurance that covers losses caused by "accidents" where the insured's faulty work product damages the property of others. In the instant case Vector seeks what amounts to recovery for damages done to its own work product, and not damage done to the property of someone other than the insured. [*Hawkeye,* 185 Mich.App at 377.]

This Court therefore held "that the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract. Summary disposition was properly granted on this issue." *Id.* at 378.

In *Radenbaugh v. Farm Bureau Gen Ins Co of Mich,* 240 Mich.App 134, 136; 610 NW2d 272 (2000), the insureds (referred to collectively as Radenbaugh) sold a mobile home to the Tornows (referred to collectively as Tornow) and provided erroneous schematics and instructions to contractors hired by Tornow for the construction of the home's basement foundation, resulting in damage to the home and its basement. Radenbaugh's liability insurer, Farm Bureau General Insurance Company of Michigan (Farm Bureau), refused to defend or indemnify Radenbaugh in an underlying lawsuit filed by Tornow against Radenbaugh. *Id.* The insurance policy in *Radenbaugh* defined an "occurrence" in the same way as the policy at issue here. *Id.* at 140. This Court rejected Farm Bureau's reliance on *Hawkeye* and concluded "that the underlying complaint alleged damages broader than mere diminution in value of the insured's product caused by alleged defective workmanship, breach of contract, or breach of warranty." *Id.* at 141. Radenbaugh did not merely sell the mobile home but also "provided instructions and schematics to contractors hired by Tornow for the construction of the basement and for the erection of the mobile home on its basement." *Id.* The setting of the mobile home on its foundation in accordance with Radenbaugh's instructions was allegedly so defective that the housing inspector refused to issue a certificate of occupancy. *Id.*

This Court in *Radenbaugh* further reasoned as follows:

> Consistent with *Bundy* and contrary to the facts in [*Hawkeye*], the underlying action alleged more than damage to the insured's own product. In particular, it was alleged that because of [Radenbaugh's] defective instructions to the basement contractor, Leelanau Redi–Mix, the basement of the mobile home was improperly constructed and the mobile home was incorrectly erected. As a result of [Radenbaugh's] faulty instructions, the basement was rendered unusable because "water is seeping into and condensing on basement walls, constituting a threat of rot, causing mildew and mold and other health hazards." [*Id.* at 144145.]

This Court in *Radenbaugh* also quoted with approval the following language from *Calvert Ins Co v. Herbert Roofing & Insulation Co,* 807 F Supp 435, 438 (ED Mich, 1992):

> ***4** "The holdings in *Bundy* and [*Hawkeye*] can be reconciled by focusing on the property damage at issue in each case. In [*Hawkeye*], the insured's defective workmanship resulted only in damage to the insured's work product. In *Bundy,* the insured's defective workmanship resulted in damage to the property of others. Taken together, these cases stand for the proposition that when 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 construction is supported by the definition of 'accident' adopted by the Michigan Supreme Court:
>
> '... In other words, an accident is an undesigned 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.'
>
> *Guerdon Industries, Inc v. Fidelity & Casualty Co,* 371 Mich. 12, 18–19; 123 N.W.2d 143 (1963), quoted in [Hawkeye], supra at 374.
>
> ... Thus the property owners in *Bundy* whose homes or offices were damaged by water leaking from the insured's defective tubing were damaged by accident. However, when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy." [*Radenbaugh,* 240 Mich.App at 147, quoting *Calvert,* 807 F Supp at 438.]

In *Liparoto Constr, Inc v. Gen Shale Brick, Inc,* 284 Mich.App 25, 28; 772 NW2d 801 (2009), the plaintiff, a general contractor, was "contracted to build a house for Dorothy and Clayton Ainscough." The defendant, General Shale Brick, Inc., manufactured the bricks that the plaintiff used to build the house. *Id.* After the brickwork was completed,

the bricks became discolored, and the Ainscoughs filed an administrative complaint against the plaintiff. *Id.* The plaintiff contacted its liability insurer, State Auto, which denied the plaintiff's claim for coverage. *Id.* The plaintiff sued State Auto for breach of contract. *Id* . at 29. State Auto sought summary disposition on numerous grounds, including that the discoloration of the bricks did not constitute an "occurrence" within the meaning of the policy. *Id* . The trial court granted summary disposition to State Auto on the ground that the insurance policy was not a bond to secure proper performance of the plaintiff's work. *Id.* The plaintiff filed an appeal. *Id.* The insurance policy in *Liparoto* defined an "occurrence" in the same manner as the policy at issue here. *Id* . at 35. After discussing the analyses in *Bundy, Hawkeye,* and *Radenbaugh,* this Court in *Liparoto* reasoned as follows:

> In this case, "occurrence" is defined in the same manner as it was defined in *Radenbaugh.* The definition of "occurrence" in *Hawkeye* [ ] is more detailed, but is not significantly different in substance. This Court in *Radenbaugh* held that damage resulting from negligence or breach of warranty would constitute an occurrence triggering the policy's liability coverage only if the damage in question extended beyond the insured's work product. Here plaintiff did not allege, and presented no evidence, that there was damage beyond its own work product. Accordingly, the trial court did not err by concluding that plaintiff failed to establish an occurrence within the meaning of the policy. [*Id.* at 38–39.]

***5** In this case, the property damage is confined to the work product of the insured, MMS. Nova contracted with MMS to install two solar photovoltaic systems. Nova alleged that MMS failed to follow detailed plans and specifications for installing the systems. MMS allegedly failed to properly install the support posts or piles and the fill material, causing the solar panel arrays to shift or move from their intended installation locations or orientations, resulting in stress and strain on parts of the system. MMS also purportedly failed to properly install electrical components so that they could pass required inspections. This improper installation endangered the integrity of the system. Nova made efforts to correct the shifting or movement of the system before it failed. Nova claimed that it would incur expenses to repair the electrical components so that they will pass required inspections and that further repairs may be required later. Nova asserted that MMS was negligent in various respects, including: failing to install the photovoltaic systems in a workmanlike manner; failing to install the support posts or piles in such a manner that they would support the photovoltaic systems and not cause shifting or movement that would damage other portions of the system; failing to properly utilize and compile fill material to support the system; and failing to install the electrical components so that they would pass inspections. Nova claimed that as a proximate result of MMS's negligence, Nova sustained damages that include costs to correct the shifting or movement produced by MMS's improper installation, future repair costs, and expenses in remedying the electrical system. It is clear that the damage is confined to the work product itself, i.e., the solar energy system that MMS was contracted to install. There is no allegation or evidence of damage beyond MMS's own work product. Therefore, the alleged property damage did not result from an "occurrence" within the meaning of the insurance policy. See *Liparoto,* 284 Mich.App at 3839; *Radenbaugh,* 240 Mich.App at 147.

Because there was no "occurrence" as required to trigger insurance coverage, EMC was not required to indemnify MMS. Further, there was no violation of EMC's duty to defend MMS.

> The duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy. If the policy does not apply, there is no duty to defend. However, the scope of the two duties is not identical; the duty to defend is broader than the duty to indemnify. If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. This is true even where the claim may be groundless or frivolous. [*American Bumper & Mfg Co v. Hartford Fire*

Ins Co, 452 Mich. 440, 450–451; 550 NW2d 475 (1996) (citations omitted).]

An insurer must provide a defense "if there are any theories of recovery that fall within the policy." *Id.* at 451(citations and quotation marks omitted). The insurer is required to look beyond the pleadings of the underlying action to determine whether coverage is possible. *Id.* at 451–452. As discussed above, the insurance policy does not apply in this case because there was no occurrence. The underlying allegations do not arguably fall within the policy, nor is there any evidence beyond the pleadings suggesting that coverage is possible. Given that the policy does not apply, EMC had no duty to defend MMS.

***6** EMC preserved its right to contest coverage by filing the present declaratory judgment action before the underlying consent judgment was entered. See *Riverside Ins Co v. Kolonich,* 122 Mich.App 51, 58–59; 329 NW2d 528 (1982) (where an insurer is doubtful of liability and wishes to retain its rights, it may file a timely declaratory judgment action to determine if it has a duty to defend the insured). A reservation of rights letter is unnecessary if a timely declaratory judgment action has been filed. See *Security Ins Co of Hartford v. Daniels,* 70 Mich.App 100, 116; 245 NW2d 418 (1976). [1] In light of our resolution of the above issue, we need not address the alternative grounds for affirmance asserted by EMC on cross-appeal.

1 Nova identifies no legal basis to conclude that EMC's initiation of the declaratory judgment action approximately 4 ½ months after the initiation of the underlying lawsuit, and before the entry of the underlying consent judgment, was untimely. See *Fire Ins Exchange v. Fox,* 167 Mich.App 710, 714; 423 NW2d 325 (1988) (concluding that where only four months passed between the initiation of the underlying action and the date that the insurer sent its reservation of rights letter, the insurer was not estopped from denying liability).

II. DOCKET NO. 326553

EMC argues that the trial court abused its discretion when it denied EMC's motion for sanctions on the basis that sanctions were not relevant and on the basis that this Court reverses the trial court "every time" the court grants sanctions. We agree.

A trial court's decision whether to award sanctions against a party for denying a request to admit is reviewed for an abuse of discretion. See *Phinisee v. Rogers,* 229 Mich.App 547, 561562; 582 NW2d 852 (1998). "An abuse of discretion occurs when the decision is outside the range of principled outcomes." *Hardrick v. Auto Club Ins Ass'n,* 294 Mich.App 651, 659–660; 819 NW2d 28 (2011). The interpretation and application of a court rule presents a question of law that is reviewed de novo. *Id.* at 660.

MCR 2.312(A) provides that a party may request that another party admit the truth of a matter relating "to statements or opinions of fact or the application of law to fact." A party answering a request for admission "must specifically deny the matter or state in detail the reasons why the answering party cannot truthfully admit or deny it." MCR 2.312(B)(2). If the answering party objects to the request, the reasons for the objection must be stated. MCR 2 .312(B)(4). The party who requested the admission may move to determine whether the answer or objection is sufficient. MCR 2.312(C). MCR 2.313(C) provides for sanctions if the answering party fails to make an admission:

> If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that
>
> (1) the request was held objectionable pursuant to MCR 2.312,
>
> (2)the admission sought was of no substantial importance,
>
> (3)the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4)there was other good reason for the failure to admit.

"The purpose of MCR 2.312 has been stated as to limit areas of controversy and save time, energy, and expense which otherwise would be spent in proffering proof of matters properly subject to admission." *Richardson v. Ryder Truck Rental, Inc,* 213 Mich.App 447, 457; 540 NW2d 696 (1995) (quotation marks and citation omitted). The fact that a matter was ultimately proved at trial does not by itself establish that the refusal to make the requested admission was unreasonable. *Id.* In general, the elements of a claim are not proper subjects of a request to admit. See *id.* at

457–458. Here, two of the four requests to admit essentially sought conclusions regarding the ultimate legal issues in this declaratory judgment action. In particular, EMC's request for admission # 21 asked Nova to admit that EMC had no duty to defend or indemnify MMS, and EMC's request for admission # 22 asked Nova to admit that EMC was entitled to a declaration that it had no duty to defend or indemnify MMS. Nova objected to these requests as calling for a legal conclusion. We agree that these requests pertained to the elements or ultimate legal issues in this case and thus were not proper subjects of requests for admission. See *Richardson,* 213 Mich.App at 457–458.

***7** The other two requests for admission at issue were more fact-specific. In its request for admission # 19, EMC asked Nova to "admit that MMS's failure to follow the detailed plans and specifications for the installation of the photovoltaic system caused damage only to the goods, products, or work that MMS was to install or perform pursuant to the July 6, 2012 contract you had with it." In its related request for admission # 20, EMC sought an admission "that MMS's failure to follow the detailed plans and specifications for the installation of the photovoltaic systems did not cause damage to any property at the installation site other than MMS's goods, products and/or work." Nova answered both of these requests as follows:

> Nova objects to this request as seeking information which is neither relevant nor likely to lead to admissible evidence, in that Plaintiff received numerous requests to defend Oakland County Case No. 13–135627–NO ("Underlying Case"), but refused to do so. Therefore, it may not look behind the Consent Judgment entered in that Underlying Case because "When an insurer breaches its own policy of insurance by refusing to fulfill its duty to defend the insured, the insurer is bound by any reasonable settlement entered into in good faith between the insured and the third party." *Alyas v. Gillard,* 180 Mich.App 154, 160; 446 NW2d 610 (1989). Without waiving the foregoing, it is admitted that damage was caused to the system itself. It is denied as untrue that the damage was limited to the system, itself, as there were other damages, including, but not limited to, to Nova's reputation, and to the property, itself, due to encumbrances or threatened encumbrances on the property, as well as collapse or waste should the system fail completely. Discovery is ongoing.

The trial court refused to impose sanctions because it did not view the sanctions as "relevant" and because, according to the trial court, this Court reverses the trial court "every time" the court grants sanctions and, in the trial court's view, this Court "doesn't want us to enforce our orders, so the request for sanctions is denied." The trial court's reference to other unspecified cases in which it says this Court has reversed an award of sanctions "every time" has no bearing on whether the court should have imposed sanctions in *this* case. Nor is it proper for the trial court to base its decision whether to grant the sanctions motion in this case on the trial court's generalized speculation about whether this Court "wants" the trial court to enforce its orders. As noted, the trial court has discretion in deciding whether to impose sanctions for denying a request to admit. *Phinisee,* 229 Mich.App at 561–562. A trial court's failure to exercise its discretion when properly called on to do so constitutes an abdication and thus an abuse of discretion. *Loutts v. Loutts,* 298 Mich.App 21, 24; 826 NW2d 152 (2012). The trial court's comments suggest that it failed to exercise its discretion. The court said that it was denying EMC's motion because this Court reverses the trial court's decision "every time" it awards sanctions and because this Court supposedly does not want the trial court to enforce its orders. Therefore, we vacate the trial court's decision and remand the case to the trial court to properly exercise its discretion *in this case* without reference to whether the trial court has been reversed on sanctions issues in *other* unrelated cases.

***8** The trial court also stated that it was denying the sanctions motion because the court did not "think sanctions are relevant in this case." It is not clear what the trial court meant by this comment. As explained, MCR 2.313(C) provides that if a party denies the truth of a matter as requested under MCR 2.312 and the party requesting the admission later proves the truth of the matter, the court shall award sanctions upon request unless the court finds that one of the four exceptions set forth in MCR 2.313(C) is applicable. The requested admissions here pertained to whether property other than MMS's own work product was damaged by MMS's allegedly faulty workmanship. As discussed earlier, the issue of insurance coverage turned on whether there was damage to property other than MMS's own work product, and the trial court ultimately ruled in EMC's favor on this issue when it granted summary disposition to EMC. As explained above, we are affirming the trial court's grant of summary disposition to EMC. Therefore, if the trial court meant to suggest that the subject of requested admissions # 19 and # 20 were of no substantial importance, thereby satisfying the second exception set forth in MCR 2.313(C), such a conclusion seems, at least without further explanation, to be difficult to reconcile with the trial court's own ruling in EMC's

favor on the summary disposition motion. In any event, given the trial court's failure to properly exercise its discretion as explained above, the trial court's order denying EMC's motion for sanctions is vacated and the case is remanded to the trial court to exercise its discretion in ruling on EMC's sanctions motion.

In Docket No. 325082, we affirm the order granting summary disposition to EMC. In Docket No. 326553, we vacate the order denying EMC's motion for sanctions and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2016 WL 1578999

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241 Ariz. 304
Court of Appeals of Arizona, Division 1.

DOUBLE AA BUILDERS, LTD., an Arizona corporation, Plaintiff/Appellee,
v.
PREFERRED CONTRACTORS INSURANCE COMPANY, LLC, a Montana company, Defendant/Appellant.

No. 1 CA–CV 15–0375
|
FILED 12/30/2016

Synopsis

Background: General contractor brought action against roofing subcontractor's commercial general liability (CGL) insurer to recover cost of replacing roof. The Superior Court, Maricopa County, No. CV2013–001403, Lori Horn Bustamante, J., entered summary judgment in favor of contractor. Insurer appealed.

Holdings: The Court of Appeals, Swann, J., held that:

[1] subcontractor exception to "your work" exclusion did not apply, and

[2] endorsements provided no coverage for contractor as additional insured.

Reversed and remanded with instructions.

West Headnotes (3)

[1] Insurance
Products and Completed Operations Hazards
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) In general

Subcontractor exception to "your work" exclusion in roofing subcontractor's commercial general liability (CGL) policy did not apply to general contractor's claim for repairing faulty workmanship; the work was performed by subcontractor acting as a subcontractor, not by a subcontractor acting on the subcontractor's behalf.

1 Cases that cite this headnote

[2] Insurance
Scope of coverage
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities
217k2361 Scope of coverage

Endorsements to roofing subcontractor's commercial general liability (CGL) policy provided no coverage for general contractor as additional insured for liability for repairing roof, since endorsement limited coverage to liability for subcontractor's acts or omissions, subcontractor exception to "your work" exclusion did not apply, and contractor could not have greater coverage than subcontractor.

1 Cases that cite this headnote

[3] Insurance
Scope of coverage
217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities
217k2361 Scope of coverage

"Separation of Insureds" provision of roofing subcontractor's commercial general liability (CGL) policy did not transform general contractor as additional insured into a named insured entitled to coverage for cost to repair roof under subcontractor exception to "your work" exclusion; the provision merely ensured that each insured's coverage was determined separately.

1 Cases that cite this headnote

Appeal from the Superior Court in Maricopa County, No. CV2013–001403, The Honorable Lori Horn Bustamante, Judge. **REVERSED AND REMANDED**

Attorneys and Law Firms

****1278** Holden Willits PLC, Phoenix, By Michael J. Holden, Barry A. Willits, R. Stewart Halstead, Nelson A.F. Mixon, Counsel for Plaintiff/Appellee

Broening Oberg Woods & Wilson PC, Phoenix, By Robert T. Sullivan, Alicyn M. Freeman, Kevin R. Myer, Counsel for Defendant/Appellant

Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge Andrew W. Gould and Judge Patricia A. Orozco joined.

OPINION

SWANN, Judge:

***305** ¶ 1 This is an appeal from the entry of summary judgment in favor of a general contractor that sought recovery from its subcontractor's insurer (under which it was named as an "Additional Insured") for the cost of replacing the subcontractor's faulty work. The superior court held that coverage existed and entered summary judgment in favor of the contractor. We reverse and remand for entry of summary judgment in favor of the insurer. We hold that coverage was unavailable under the policy's "your work" exclusion, and that the "subcontractor exception" to that exclusion does not apply.

FACTS AND PROCEDURAL HISTORY

¶ 2 In 2007, Harkins Theatres hired Double AA Builders, Ltd., to serve as general contractor for the construction of a theater complex. Double AA subcontracted with Anchor Roofing, Inc., to install a Built–Up Roofing ("BUR") system. At the time Anchor performed its work, it was the "Named Insured" under a series of materially identical general commercial liability policies issued by Preferred Contractors Insurance Company, LLC. Double AA, which was itself insured by Westfield Insurance Company, was added to Anchor's Preferred policies as an "Additional Insured."

¶ 3 After the theater project was completed, the BUR began to leak, causing damage to work installed by other subcontractors and causing Harkins to lose business. Harkins asked Double AA to replace the BUR. Double AA did so and filed an action in the superior court seeking indemnification from Westfield, Anchor, and Preferred on the theory that Anchor had not properly installed the BUR. Significantly, Double AA sought to recover only the cost of replacing the BUR, and not the cost of the damage to other property.

¶ 4 Double AA settled with Westfield and obtained a default judgment against Anchor. Preferred and Double AA filed cross-motions for summary judgment on the question whether Double AA's cost of replacing the BUR was a covered loss under the relevant policy. The court denied Preferred's motion and granted Double AA's, concluding that coverage was triggered by an "occurrence" and "property damage," and that a "subcontractor exception" clause removed the claim from the policy's "your work" exclusion provision. The court further concluded that the property damage had begun to manifest before the applicable policy expired and that Double AA's replacement efforts constituted compensable preventative measures.

¶ 5 The court entered an appealable judgment on liability, and Preferred timely appeals.

DISCUSSION

¶ 6 We review summary judgment rulings, and the interpretation of insurance policies, de novo. *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107 (2008); *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7 (2003).

[1] ¶ 7 Double AA prevailed in the trial court based on its arguments that the policy provides coverage for "property damage" caused by an "occurrence" that takes place within the coverage territory during the policy period. But even assuming that Double AA's expenditure could qualify for coverage as "property damage" caused by an "occurrence," coverage was defeated under the policy's terms, specifically the so-called "your work" exclusion and inapplicability of the "subcontractor" exception to that exclusion.

¶ 8 The policy "exclusion" removes from the scope of coverage " '[p]roperty damage' **1279 *306 to 'your work' arising out of it or any part of it and included in the 'products completed operations hazard.' " The "exception" provides that the 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." (Emphases added.) The policy defines "your work" as including "[w]ork or operations performed by you or on your behalf" and "[m]aterials, parts or equipment furnished in connection with such work or operations." "You" and "your" mean "the Named Insured showed in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." "Products completed operations hazard" is defined as "[i]nclud[ing] all ... 'property damage' occurring away from premises you own or rent arising out of ... 'your work,' " with exceptions that do not apply here.

¶ 9 Put simply, the exclusion applies because the case relates only to Anchor's defective work. The exception does not apply because the work was performed by Anchor acting as a subcontractor, not by a subcontractor acting on Anchor's behalf.

¶ 10 In general, a "your work" exclusion "prevent[s] liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business." 9A Steven Plitt et al., *Couch on Insurance* § 129:18 (3d ed. 2016 & Supp. Dec. 2016) [hereinafter "*Couch*"]. The exclusion "discourages the performance of careless work" and "prevents liability insurance from becoming a performance bond." *Id.*

¶ 11 Our opinions concerning coverage do not define the scope of coverage in all cases—they merely interpret the way in which parties choose to allocate risk in private agreements. But we have consistently interpreted Commercial General Liability ("CGL") policy "your work" exclusions to bar coverage for the cost of repairing an insured's faulty work. In a duty-to-defend case, *United States Fidelity & Guaranty Corp. v. Advance Roofing & Supply Co., Inc.*, 163 Ariz. 476, 788 P.2d 1227 (App. 1989), we recognized that "some authorities ... appear to conclude that the mere showing of faulty work is sufficient to bring a claim for resulting damages (of whatever nature) within policy coverage." 163 Ariz. at 482, 788 P.2d 1227. We opted to follow "the better reasoned authorities" that held otherwise. *Id*. We followed this line of authority in *Lennar Corp. v. Auto–Owners Insurance Co*., 214 Ariz. 255, 262, ¶¶ 19–20, 151 P.3d 538 (App. 2007) (holding that faulty workmanship that causes property damage, not just faulty workmanship, constitutes an "occurrence" under the CGL policy) and *Desert Mountain Properties Limited Partnership v. Liberty Mutual Fire Insurance Co*., 225 Ariz. 194, 206, 236 P.3d 421 (App. 2010) (holding that a specific policy exclusion for insured's faulty workmanship does not bar coverage for repair of damage *resulting from* the defective workmanship). Because of this exclusion, we need not reach the question whether the Named Insured's faulty work constitutes an "occurrence" unless an exception to the exclusion applies.

¶ 12 It is undisputed that Double AA sought to recover only the cost of repairing Advance's defective work, which occurred on premises owned or rented by Harkins. Because Double AA does not seek to recover for damage resulting from the defective work, the "your work" exclusion bars Double AA's recovery unless the "subcontractor exception" to the exclusion applies.

¶ 13 We hold that the exception does not apply. The only Named Insured is Anchor, and Anchor performed the defective work itself—not through a subcontractor. The reference in the "subcontractor exception" to work "performed on your behalf by a subcontractor" refers to work performed by a subcontractor of Anchor only—not to Anchor's work performed as a subcontractor of Double AA. *See Couch* § 40:27 ("[B]ecause the policy defines 'you' and 'your' as the named insured, the exception applies when someone else does work as the named insured's subcontractor, not when the named insured is a subcontractor.").

¶ 14 The policy language, though convoluted, leads us to this conclusion. The exception is limited to damage arising from work "performed on *your* behalf by a subcontractor." (Emphasis added.) Under the terms of the **1280 *307 policy, "your" refers to parties that qualify as "Named Insureds."

[2] ¶ 15 Double AA is an "Additional Insured" under the policy, not a "Named Insured." The relevant policy endorsements provide that: (1) an "Additional Insured" is an insured only for "your acts or omissions" or "the acts or omissions of those acting on your behalf, in the performance of your ongoing operations for the additional insured(s)"; and (2) an "Additional Insured" receives "coverage as if [the additional insured] was a Member ... only ... with respect to liability arising out of your ongoing operations performed for the original member listed on the Declarations of the Policy

[i.e., the Named Insured] ... [and] only providing that the Additional Insured performs all obligations required under the Policy."

¶ 16 Under the language of the policy, therefore, an Additional Insured's coverage is limited: an Additional Insured receives coverage for conduct of the Named Insured and certain of those acting on the Named Insured's behalf, and the Additional Insured is itself treated like a Named Insured, with coverage for its own conduct, only if such conduct relates to the Additional Insured's performance of ongoing operations for the original Named Insured. Here, Double AA performed no operations for Anchor. And while Double AA's coverage was coextensive with that of Anchor, it cannot be greater. Indeed, because coverage for Additional Insureds is limited, often no additional premium is required to add a party as an Additional Insured. *Couch* § 40:26. At oral argument in this case, Preferred's counsel acknowledged that no additional premium was paid to add Double AA to Anchor's CGL policy.

¶ 17 In effect, Double AA's argument would require us to hold that an Additional Insured could take advantage of the "subcontractor exception" while the Named Insured could not. Were we to interpret the "Additional Insured" coverage to allow recovery by Double AA for losses for which Anchor was not covered, we would effectively render the "your work" exclusion superfluous while requiring Preferred to accept greater risk with no compensation in the form of additional premiums. Such an interpretation would neither be rational nor consistent with the express language of the policy.

[3] ¶ 18 Double AA's reliance on the policy's "Separation of Insureds" provision to justify treating an Additional Insured on equal footing as a Named Insured is also misplaced. That provision provides that the policy applies "(a) As if each Named Insured were the only Named Insured; and (b) Separately to each insured against whom claim is made or 'suit' is brought." The provision merely ensures that each insured's coverage is determined separately. It does not transform an Additional Insured into a Named Insured.

¶ 19 The "subcontractor exception" to the "your work" exclusion does not apply. The policy, therefore, does not provide coverage to Double AA for repairing Anchor's faulty workmanship. The superior court therefore erred by granting Double AA's motion for summary judgment and denying Preferred's.

CONCLUSION

¶ 20 We reverse the grant of summary judgment for Double AA and remand with instructions that the superior court enter summary judgment in favor of Preferred. *See PNL Asset Mgmt. Co. v. Brendgen & Taylor P'ship*, 193 Ariz. 126, 129, ¶ 10, 970 P.2d 958 ("Where cross-motions have been filed ... the court may remand with instructions that judgment be entered in favor of appellant."). We deny Double AA's request for attorney's fees and costs on appeal. Preferred does not ask for attorney's fees, but it is entitled to recover its costs upon compliance with ARCAP 21.

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