

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA K GROOM,

Plaintiff-Appellant,

v

HOME-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 19, 2007

No. 272840

Ottawa Circuit Court

LC No. 05-053144-CZ

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

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

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 A2d 888, 899 (2006); *Monticello Ins Co v Wil-Freds Const, Inc*, 277 Ill App 3d 697, 705-706; 661 NE2d 451 (1996); *United States Fidelity & Guaranty Corp v Advance Roofing & Supply Co*, 163 Ariz 476; 788 P2d 1227 (Ariz App, 1989);

McAllister v Peerless Ins Co, 124 NH 676; 474 A2d 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.*

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.*]

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.*

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.

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.

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.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski