

STATE OF MICHIGAN
COURT OF APPEALS

AHRENS CONSTRUCTION, INC.,

Plaintiff-Appellant,

v

AMERISURE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

February 9, 2010

No. 288272

Kalamazoo Circuit Court

LC No. 08-000164-CK

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

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

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—

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.

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."

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."

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:

² The trial court judge assigned to this case was also assigned to the underlying suit.

(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

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 non-conforming 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

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 (ED 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).]

work performed and Ahrens' defective work corrected at Miller-Davis' [sic] cost and expense.

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.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello