

STATE OF MICHIGAN
COURT OF APPEALS

OAK CREEK APARTMENTS, LLC,
Plaintiff-Appellee,

UNPUBLISHED
March 21, 2013

v

MANUEL GARCIA, d/b/a MANUEL ROOFING,
AUTO-OWNERS INSURANCE COMPANY, and
HOME OWNERS INSURANCE COMPANY,

No. 308256
Macomb Circuit Court
LC No. 2011-001991-CK

Defendants,

and

HASTINGS MUTUAL INSURANCE
COMPANY,

Defendant-Appellant.

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In this insurance coverage dispute, defendant Hastings Mutual Insurance Company appeals by right the trial court's opinion and order denying its motion for summary disposition under MCR 2.116(C)(10). Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

The basic facts of this case are not in dispute. Plaintiff Oak Creek Apartments, LLC hired defendant Manuel Garcia, who does business as Manuel Roofing, to repair the roof on one of its apartment buildings in 2010. Under the contract's terms, Manuel Roofing had to secure the open areas of the roof against inclement weather at the end of each work day. During the repair project, the building suffered extensive interior damage, including mold damage, which Oak Creek alleged resulted from Manuel Roofing's failure to properly secure the roof against inclement weather. The building's residents had to be relocated while the interior was demolished and rebuilt. At the time, Hastings Mutual insured Manuel Roofing under a commercial general liability policy.

In addition to the repair and remediation work, the municipality required Oak Creek to bring the building into compliance with the current code; the repairs to bring the building into compliance cost approximately \$75,000 in excess of the direct mitigation, mold remediation, and general construction work to repair the water damage. Oak Creek's property insurer asserted its policy limit and authorized payment of \$25,000 for work related to the code compliance. Oak Creek then sought coverage for the remaining costs to bring the building into compliance from Manuel Roofing's insurer, Hastings Mutual, but Hastings Mutual refused to cover the loss.

Oak Creek sued Manuel Roofing for the damages arising from the additional repairs required by the municipality to bring the building into compliance. Oak Creek also sought a declaratory judgment that Hastings Mutual was obligated under the terms of the general liability policy to cover the additional costs of the repairs to bring the building into compliance. Oak Creek did not seek compensation for the water damage, mold remediation, or the costs of replacing and repairing the roof.¹

Hastings moved for summary disposition under MCR 2.116(C)(10). It argued that it was not obligated under its policy because the damage was not caused by an "occurrence" under the terms of the general liability policy. Alternatively, Hastings argued that certain exclusions applied to bar coverage. The trial court denied Hastings Mutual's motion, concluding that the damages arose out of an "occurrence," thereby triggering coverage under the policy, and that the relevant exclusions did not negate coverage.

Hastings Mutual then appealed to this Court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Hastings Mutual argues on appeal that the trial court erred when it determined that Oak Creek's costs to bring the building into compliance with the municipal code was a covered loss under the terms of the general liability policy that Hastings Mutual issued to Manuel Roofing. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of an insurance contract. *Clark v Daimler Chrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005).

¹ Manuel Roofing and Oak Creek accepted the case evaluation award and stipulated to the dismissal of Manuel Roofing from the suit.

B. THE COMMERCIAL GENERAL LIABILITY POLICY

In interpreting insurance policies such as the general liability policy at issue, courts will interpret and apply them like any other contract:

An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. This Court cannot create ambiguity where none exists.

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. [*Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992) (quotations and citations omitted).]

Hastings Mutual first argues that the trial court erred when it determined that the property damage to the building was caused by an "occurrence." Specifically, it contends that an "occurrence" cannot exist where the underlying complaint alleges that the damage arose from the insured's faulty work. Determining whether a commercial general liability policy covers a particular loss is generally a two-step inquiry: courts must first determine whether there was a covered occurrence and then must determine whether an exclusion applies to bar coverage. See *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

The commercial general liability policy provides coverage for "property damage" only if it is caused by an "occurrence." The policy defines "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, but this Court analyzed identical language and determined that "an accident is an undersigned 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 v Farm Bureau Gen Ins Co*, 240 Mich App 134, 147; 610 NW2d 272 (2000) (quotation marks and citations omitted); see also *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369, 374; 460 NW2d 329 (1990).

In *Radenbaugh*, this Court considered whether an insured's faulty workmanship can constitute an "occurrence" within the meaning of a general liability policy and concluded that, where the damages alleged are "broader than mere diminution in value of the insured's product caused by alleged defective workmanship," there was an "occurrence" and the insurer had a duty to indemnify the insured. *Radenbaugh*, 240 Mich App at 144-148. 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 Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435, 438 (ED Mich, 1992).² That is, an “accident” exists within the meaning of a general liability policy “when an insured’s defective workmanship results in damage to the property of others.” *Radenbaugh*, 240 Mich App at 147 (quotations and citation omitted).

Here, the trial court correctly applied *Radenbaugh* to the undisputed facts of this case when it concluded that the loss was an “occurrence” or “accident” within the meaning of the general liability policy. The damage to the building resulting from Manuel Roofing’s failure to adequately or properly secure the open roof area, which allegedly led to rainwater intrusion, was not confined to the insured’s work product. *Id.* It is undisputed that the scope of Manuel Roofing’s work was limited to the roof of the building, yet the building sustained damage beyond the roof, including extensive water and mold damage to its interior and its contents. Accordingly, the insured’s defective workmanship resulted in damage that was clearly not confined to the insured’s work product and injured property other than the insured’s work, and thus the damage was “accidental.” *Id.* at 145-147. The property damage was “broader than the mere diminution in value of the insured’s product caused by alleged defective workmanship, breach of contract, or breach of warranty,” and thus, constituted an “occurrence” or “accident” within the meaning of the policy. *Id.* at 144-148. The trial court did not err in concluding that the damage to the building, excluding the repair or replacement costs of the roof, were caused by an “occurrence” under the general liability policy.

We cannot agree with Hastings Mutual’s claim that an “occurrence” or “accident” cannot exist where the underlying complaint, as here, alleges that the damage arose out of the insured’s breach of its contract with the injured party. In *Radenbaugh*, the insurer raised a similar argument—that the general liability policy at issue did not insure the policyholder for breach of contract, breach of warranty claims, and shoddy workmanship claims—and this Court rejected it:

Were the underlying complaint limited to claims relating solely to the insured’s product, we would agree with defendant. However, it is clear 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. [*Radenbaugh*, 240 Mich App at 141.]

² This Court has recognized that there is a split of authority on the proper construction of the term “occurrence” as used in commercial general liability policies. See *Groom v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272840) (stating that, were the Court writing on a clean slate, it would enforce the plain meaning of the term accident and “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.”).

Further, as this Court has explained, damage resulting from negligence or breach of warranty constitutes an occurrence triggering the policy's liability coverage if "the damage in question extended beyond the insured's work product." *Liparoto Construction, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 38; 772 NW2d 801 (2009). Accordingly, the proper focus in determining whether an "occurrence" exists within the meaning of a general liability policy where the insured performs faulty work is on the nature and extent of the property damage at issue, not on the theories of liability alleged. See *Radenbaugh*, 240 Mich App at 147. The property damage to the building's interior and its contents was broader than the "mere diminution in value of the insured's product," that is, the roof, which it had a contractual duty to repair, and thus, there was an "occurrence" or "accident." *Id.* at 141. This is true even though Oak Creek may have framed its complaint as one for breach of contract. See *Calvert*, 807 F Supp at 438-439; *Radenbaugh*, 240 Mich App at 147.

We also do not agree with Hastings Mutual's contention that it is not obligated to provide coverage for the costs to bring the building into compliance with the municipal code because that cost did not constitute "property damage" caused by an "occurrence" or "accident" within the meaning of the policy. The need for additional code compliance work arose from the "occurrence" or "accident" in this case. Oak Creek would not have had to comply with the new code provisions, but for the storm damage caused by Manuel Roofing's failure to properly secure the roof. Thus, the additional work arose from the "occurrence" or "accident" at issue. As the trial court aptly noted, compliance with the current code "only became an issue after the building had sustained water damage that was allegedly caused by Manuel Roofing's failure to protect the roof from rain."

Similarly, the policy provides that Hastings Mutual will pay "those sums that the insured becomes legally obligated to pay as damages *because of* . . . 'property damage' to which this insurance applies." (Emphasis added.) The additional costs required to bring the building into compliance with the municipal code clearly were incurred "because of" the covered "property damage." Hastings Mutual, therefore, has an obligation to cover the additional costs to bring the building into compliance in the absence of an exclusion that bars coverage.

"[E]xclusionary clauses limit the scope of coverage provided under the insurance contract[.]" *Hawkeye-Security*, 185 Mich App at 384. "[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Churchman*, 440 Mich at 567. "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 NW2d 846 (2008).

Hastings Mutual argues that the exclusion for "property damage" to "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations" applies to the facts of this case and the trial court erred when it determined otherwise. In construing a contract, we must, if possible, give effect to every word. *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 110; 77 NW2d 384 (1956). Construing the exclusion broadly, as Hastings Mutual argues, does not give effect to the term "particular" as used in this exclusion. The term limits the exclusion's application to only the *specific* part of the real property that the insured is working on—it does not apply generally to the area of the real

property that the insured is working on. Here, the specific part of the real property at issue was the roof. The trial court, therefore, did not err when it determined that this exclusion applied only to damage to the roof at issue.

Hastings Mutual also contends that the “your work” exclusion negates coverage for “property damage” to “[t]hat particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.” The policy clearly defines the term “[y]our work” to mean “[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” and includes “warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work.’” It is undisputed that Manuel Roofing’s “work” was limited to the roof.

Giving every word in the clause effect, *Associated Truck Lines*, 346 Mich at 110, the exclusion negates coverage for only the damage to the particular property on which the insured performed incorrect or faulty operations—here, the roof. Construing the exclusion broadly to negate coverage for all the damage to the building, as Hastings argues, effectively ignores the limiting phrase “*on it*,” referring to the “particular part of any property” on which the faulty work was performed. Under the exclusion, therefore, any repair or replacement of property that must be completed due to the incorrect performance of the insured’s work on “that particular part of property” is excluded from coverage. “Where a contractor’s workmanship is faulty, the faulty workmanship exclusion unambiguously excludes coverage as to damage to the particular part of property with regard to which the workmanship was faulty.” *Underwriters at Interest v SCI Steelcon*, 905 F Supp 441, 444 (WD Mich, 1995) (interpreting a similar exclusion). “But it does not exclude coverage as to damages to property other than the particular part of the property with regard to which the workmanship was faulty.” *Id.*

Lastly, we decline to consider whether coverage for the mold and mold remediation is precluded under the policy’s “fungi exclusion” because the trial court did not decide the issue. It is undisputed that Oak Creek did not seek coverage for such damages. Therefore, it is “unnecessary to the ultimate resolution” of the case. *Heydon v MediaOne of Southeast Michigan, Inc*, 275 Mich App 267, 278-279; 739 NW2d 373 (2007). Moreover, we do not agree that collateral estoppel or res judicata might apply to preclude Hastings from raising this issue in the event of a subsequent lawsuit for subrogation. See *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990); *Twp of Chestonia v Twp of Star*, 266 Mich App 423, 429; 702 NW2d 631 (2005).

There were no errors warranting relief.

Affirmed. As the prevailing party, Oak Creek may tax its costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra