STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE MUTUAL INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED December 10, 2009
v	No. 286677 Oakland Circuit Court
HALL STEEL COMPANY, Defendant/Counter-Plaintiff-Appellant,	LC No. 2007-085003-CK
and CLEVELAND DIE AND MANUFACTURING, INC., Defendant.	

Before: Hoekstra, P.J., Murray and M.J. Kelly, JJ.

PER CURIAM.

Defendant, Hall Steel Company, appeals as of right the court's order granting summary disposition under MCR 2.116(C)(10) in favor of plaintiff in this declaratory judgment action.[1] We reverse and remand for proceedings consistent with this opinion.

I. Background

The trial court's June 26, 2008, opinion and order contains the following concise statement of the case:

[1] Defendant Cleveland Die and Manufacturing, Inc., is not a party to this appeal as the court entered a default judgment against it when it failed to file an answer.

> This is a declaratory action to determine coverage under a commercial general liability insurance policy issued by Plaintiff to Defendant Hall Steel. In the underlying action, Hall Steel filed suit to collect monies allegedly owed by Defendant Cleveland Die for steel supplied pursuant to a Purchase Order. Cleveland Die filed a Counter-Claim alleging that the steel supplied by Hall Steel was an incorrect grade that resulted in defective parts, which led to a recall. The underlying lawsuit was resolved by an Arbitration Award, which specifically found that Hall Steel was responsible for its failure to ship the proper steel to Cleveland Die. Plaintiff Amerisure filed the instant action and Defendant Hall Steel filed the Counter-Claim alleging breach of contract, bad faith and for a declaration on the insurance policy as to Amerisure's duty to defend and indemnify.

As a result of Hall Steel's "failure to ship the proper steel to Cleveland Die," it was determined that Cleveland Die sustained $288,567 in damages. The defective parts at issue were windshield wiper brackets, which Cleveland Die manufactured using the allegedly defective steel supplied by Hall Steel and sold to the Wipers Division of Valeo Electrical Systems, Inc. Valeo asserted that the brackets failed under normal operating conditions because they were manufactured with nonconforming material.

After plaintiff initiated the instant declaratory action, the parties filed cross motions for summary disposition. In ruling in plaintiff's favor, the court found that plaintiff had no duty to defend or indemnify Hall Steel because there was no "occurrence" as defined in the policy, and alternatively policy exclusions (m) and (n) negated coverage.

II. Analysis

A. General policy coverage for an "occurrence"

On appeal, we first examine Hall Steel's assertion that the trial court erred in concluding that there was no "occurrence" under the terms of the policy. We review de novo the grant or denial of a motion for summary disposition. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). In ascertaining the parties' intent, the various parts of a contract should be read together. See, e.g., *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999).

The insurance policy general coverages section begins by stating that plaintiff is responsible for bodily injury or property damage as provided, and continues that the insurance applies to such injury or 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." In interpreting these provisions, the trial court held as follows:

> The Court finds that Plaintiff Amerisure is entitled to summary disposition because the policy specifically precludes coverage for the claims raised. The commercial general liability policy provisions only provide coverage for damages caused by an occurrence as defined by the policy. Michigan case law holds that the grant of coverage under a commercial general liability policy does not extend to cover the cost of repairing defective workmanship, or defective work product. The Court finds that supplying the incorrect grade of steel does not constitute an occurrence under the policy terms. Commercial liability policies do not insure the policyholder for breach of contract, breach of warranty claims and shoddy workmanship claims.

In finding no "occurrence" under the policy, the trial court relied upon *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 377-378; 460 NW2d 329 (1990), which held that where an insured seeks coverage "for damages done to its own work product, *and not damage done to the property of someone other than the insured*. . . . [T]he defective workmanship of [the insured], standing alone, was not the result of an occurrence within the meaning of the insurance contract." (Emphasis supplied.) However, we conclude that *Hawkeye-Security* undermines, rather than supports, the trial court's ruling. Indeed, *Hawkeye-Security* expressly distinguished its holding from the proposition directly applicable to this case – namely, "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." *Id.* at 377, citing *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962).

Hall Steel's supplying of defective steel is precisely the "happening by chance" or something "not anticipated, and not naturally to be expected" that fits the very definition of accident found in *Hawkeye-Security*.[2] *Hawkeye-Security Ins Co*, *supra* at 374. Consequently, as

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[2] The insurance policy at issue fails to define accident. *Hawkeye-Security*, however, defined accident within the context of accident insurance policies as:

> "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." [*Hawkeye-Security Ins Co*, *supra* at 374, quoting *Guerdon*

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the insurance policy defines an "occurrence" as an "accident," there was an "occurrence" under the terms of this policy. See *Id.* at 377, citing *Bundy Tubing Co, supra* at 153 (holding that "property . . . damaged by the installation of defective tubing in a radiant heating system which caused the system to fail and become useless . . . was unforeseen, unexpected and unintended," and that the "[d]amage to the property was therefore caused by accident"); see also, *Calvert Ins Co v Herbert Roofing & Installation Co*, 807 F Supp 435, 438 (ED Mich, 1992) ("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."); *Imperial Cas & Indemnity Co v High Concrete Structures Co*, 858 F2d 128, 136 (CA 3, 1988) (in deciding whether an "occurrence" and "property damage" existed for purposes of insurance coverage, the court held that "if there is property damage, then there is coverage for any loss of use the damage caused."); *Elco Industries, Inc v Liberty Mut Ins Co*, 90 Ill App 3d 1106, 1109; 414 NE2d 41 (1980) ("installation of defective governor regulating pins, necessitating their removal and replacement, was an 'occurrence'" for purposes of the insurance policy).

Additionally, our conclusion is consistent with the parties' intent as construed within the broad context of the insurance policy. *JAM Corp, supra* at 170. In particular, we note that the third policy limitation, "The Products-Completed Operations Limit," caps the amount of damages plaintiff must pay for a "products-completed operations hazard." Importantly, the "products-completed operations hazard" expressly includes "property damage" occurring away from the insured's premises arising out of the insured's product. Thus, a fair reading of this section underscores the propriety of deeming an "occurrence" or "accident" to include liability for wiper brackets that failed because they were made from Hall Steel's allegedly defective product.

Plaintiff counters that because Hall Steel declined the opportunity to purchase an endorsement bringing coverage for product recalls that would have provided the coverage Hall Steel now seeks, the insurance policy should not be interpreted to include such coverage. However, the endorsement plaintiff presents as the one in question is written to indemnify the insured for "any 'loss' due to an event or discovery which establishes or determines 'your product' . . . as the known or suspected defective, deficient, inadequate or dangerous element incorporated into the 'impaired property.'" Because we conclude that the defective wiper brackets underlying this case did not fit the definition of "impaired property," (see pp 8-9, *infra*), Hall Steel's purported rejection of this additional coverage has no bearing on this case.[3]

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Industries, 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.]

[3] Hall Steel emphasizes that because Cleveland Die sued for breach of warranties, the policy expressly provides coverage because it defines the term, "your product" to include breach of warranty. However, "[t]he coverage [provided under a comprehensive liability 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 completed work is not that for which the damaged person bargained." *Calvert Ins Co, supra* at 438 n 1 (quotation marks and citation omitted). In any event, we note that in addition to its warranty claims, Cleveland Die brought a claim of fraud against Hall Steel. And although the arbitrator's wording well comports with the theory of

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B. Policy exclusions (m) and (n)

Because there was an "occurrence" within the meaning of the policy, we now turn to the court's alternative determination that exclusions (m) and (n) barred coverage. While various parts of a contract should generally be construed together, we are to examine exclusions limiting insurance coverage individually. *JAM Corp*, *supra* at 170; *Hawkeye-Security Ins Co*, *supra* at 385.

In finding exclusions (m) and (n) applicable, the court explained:

> Assuming *arguendo* that the policy did provide coverage under the general coverage terms, there are two exclusions in the policy that serve to bar coverage. Section m excludes coverage for property damage to impaired property arising out of a defect, deficiency, inadequacy or dangerous condition in the insured's product or work and section n excludes coverage for damages claimed for any loss, cost or expense incurred by the insured or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of the insured's product, work or impaired property, if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of known or suspected defect, deficiency, inadequacy or dangerous condition in it. Therefore, the Court finds that based on the coverage terms of the policy and the exclusions in the policy, Amerisure had no duty to indemnify Hall Steel in the underlying action.

1. Exclusion (m)

Exclusion (m) excludes from coverage "'[p]roperty damage' to 'impaired property' or property that has not been physically injured, arising out of . . . [a] defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work' . . . ."

Thus, our analysis of exclusion (m) begins with whether there was "'property damage' to 'impaired property.'" The policy defines "Property damage" to include "[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. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." The policy defines "Impaired property" as

> tangible property, other than "your product"[4] or "your work," that cannot be used or is less useful because:

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accident, it does not entirely eliminate the possibility that the "wrong" or deficient steel was sent on purpose. Intentional misconduct is, of course, not accidental. Further, the policy expressly excludes coverage for "'property damage' expected or intended from the standpoint of the insured." Plaintiff's duty to defend and indemnify, then, exists only to the extent that Hall Steel incurred liability through its negligence.

[4] "Your product" means "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by" the insured, along with "[w]arranties or representations (continued…)

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

b. Your fulfilling the terms of the contract or agreement. [Footnote supplied.]

Plaintiff characterizes the defective wiper brackets as impaired property, but they in fact do not fit the definition. Specifically, while the brackets fit the first part of the definition because they are neither Hall Steel's work nor product but instead Cleveland Die's product which incorporated Hall Steel's allegedly defective steel, the second part of the definition cannot be satisfied because the resulting defective wiper brackets are not, in any practical sense, property that could be "restored to use" by "repair, replacement, adjustment or removal" of the deficient steel, or by any latter-day fulfillment of the terms of the purchase contract. Indeed, it requires no expertise in materials or manufacturing to understand that a product made from deficient steel is not going to be repaired, or otherwise restored to usefulness, by extracting and replacing the deficient steel. Nor would any subsequent perfect compliance with Hall Steel's and Cleveland Die's purchase contract remedy the existing, defective, wiper brackets made with the deficient steel. See *Shade Foods Inc v Innovative Products Sales & Marketing, Inc*, 78 Cal App 4th 847; 93 Cal Rptr 2d 364 (2000) (the possibility of salvaging a damaged product that cannot be deconstructed to remove the defective component "is obviously not equivalent to restoring it to use by the repair or replacement of a defective component."). The subject wiper brackets thus cannot satisfy the definition of "impaired property."

This leaves the question of whether the defective wiper brackets constituted "property damage" to "property that has not been physically injured, arising out of . . . [a] defect, deficiency, inadequacy or dangerous condition" in Hall Steel's product. We conclude that this section is inapplicable on its face because the wiper brackets were physically injured at the time of their manufacture. See *Imperial Cas and Indemnity Co v High Concrete Structures, Inc*, 858 F2d 128, 134-136 (CA 3, 1988) (finding similar insurance policy exclusionary language inapplicable where the manufacturer of steel washers incorporated the insured's defective steel into the washers).

Indeed, at issue here was not mere loss of use due to an intangible injury such as the inability to continue normal operations, see *D & D Pipe & Rentals, Inc v Century Exploration New Orleans, Inc*, 10 So 3d 361, 363 (La App, 2009) (the insured's failure to properly inspect pipes causing the cessation of production at an industrial facility constituted property damage to property that has not been physically injured), or a delay in the completion of a project, see

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made at any time with respect to the fitness, quality, durability, performance or use of 'your product'. . . ." Thus, the defective steel constitutes "[y]our product" for purposes of this section.

Milgard Mfg, Inc v Continental Ins Co, 92 Or App 609, 611-613; 759 P2d 1111 (1988) (inadequate window assemblies causing a delay in the completion of an office building constituted the loss of use of tangible physical property that has not been physically injured). Rather, in this case, it was alleged that all wiper brackets were incapable of functioning properly because their very substance – defective steel – was too soft. This can be nothing but the allegation of a physical injury. Therefore, the second part of exclusion (m) is inapplicable. Exclusion (m) does not bar coverage.

2. Exclusion (n)

Exclusion (n), the so-called "sistership" exclusion,[5] excludes from coverage

> [d]amages 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:
>
> (1) "Your product";
>
> (2) "Your work"; or
>
> (3) "Impaired property:'
>
> if such product, 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.

The faulty products underlying this case were wiper brackets, rendered faulty because they were manufactured with Hall Steel's defective steel. Those brackets were not Hall Steel's product, but rather Cleveland Die's product. Nor does delivery of a product, in this case steel, render that product the deliverer's work or operations performed by that deliverer.[6] And, as discussed previously, the defective wiper brackets cannot be considered "impaired property" as that term is defined. Finally, we note our agreement with the weight of authority from other jurisdictions holding that the "sistership" exclusion is inapplicable where a third party, and not the insured, initiates the product recall, see, e.g., *Stark Liquidation Co v Florists' Mut Ins Co*, 243 SW3d 385, 395 (Mo App, 2007); *Aetna Cas & Surety Co v M & S Industries, Inc*, 64 Wash App 916, 924; 827 P2d 321 (1992),[7] or where the product is "withdrawn because it was [itself]

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[5] "This exclusion is called the 'sistership' exclusion because it applies where products are recalled from the market because of known defects in their sister products." *Aetna Cas & Surety Co v M & S Industries, Inc*, 64 Wash App 916, 923 n 3; 827 P2d 321 (1992).

[6] "Your work" means "[w]ork or operations performed by you," including "[m]aterials, parts or equipment furnished in connection with such work or operations" as well as warranties.

[7] Notably, "The 1985 Comprehensive General Liability policy form amended the language of the sistership exclusion, specifically to avoid the confusion surrounding the applicability of the exclusion when a third party recalls a product." *Olympic Steamship Co v Centennial Ins Co*, 117

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damaged by defective construction[,]" *Corn Plus Cooperative v Continental Cas Co*, 444 F Supp 2d 981, 991 (D Minn, 2006). Thus, exclusion (n) also does not bar coverage.[8]

C. Duty to defend and indemnify

This brings us to whether the court erred in holding that the policy imposed no duty upon plaintiff to defend and indemnify Hall Steel. Regarding defense and indemnity, the relevant policy provision clearly states:

> 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.

As our Supreme Court has held, "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; 550 NW2d 475 (1996) (citations omitted). Therefore, given our conclusion that Hall Steel's claim constitutes an "occurrence" under the policy not negated by any exclusion, plaintiff was required to defend and therefore also to indemnify Hall Steel in accordance with the policy.

III. Conclusion

The trial court erred in holding that there was no "occurrence" under the subject insurance policy and that, alternatively, exclusions (m) and (n) barred coverage. We reverse the court's order granting plaintiff's motion for summary disposition and denying Hall Steel's motion for summary disposition and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

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Wash 2d 37, 44 n 3; 811 P2d 673 (1991), citing 2 R Long, Liability Insurance § 11.09[3] (1990).

[8] Hall Steel argues that the damages assessed against Cleveland Die fell far short of the recall costs involved, and thus that the award must have covered only "the value of the damage to Cleveland Die's property (windshield wiper brackets)," as opposed to any of the costs stemming from General Motors's eventual recall. However, the trial court did not reach the question of whether coverage existed in connection with recall expenses as opposed to other damages resulting from the failure of the wiper brackets.