STATE OF MICHIGAN

COURT OF APPEALS

SKANSKA USA BUILDING INC.,

Plaintiff-Appellee,

v

M.A.P. MECHANICAL CONTRACTORS, INC.,

Defendant,

and

AMERISURE INSURANCE COMPANY and AMERISURE MUTUAL INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
December 28, 2021

No. 340871
Midland Circuit Court
LC No. 13-009864-CK

SKANSKA USA BUILDING INC.,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

No. 341589
Midland Circuit Court
LC No. 13-009864-CK

ON REMAND

Before: SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

This case returns to us on remand from the Michigan Supreme Court. *Skanska USA Building, Inc v MAP Mechanical Contractors*, 505 Mich 368; 952 NW2d 402 (2020). After review, we vacate the trial court's opinion and order and remand for further proceedings.

In this action regarding a commercial liability coverage dispute, this panel, relying on *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369; 460 NW2d 329 (1990), held that "[i]t is an established principle of law that an 'occurrence' cannot include damages for the insured's own faulty workmanship." *Skanska USA Building, Inc v MAP Mechanical Contractors*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket Nos. 340871 and 341589), p 10. Accordingly, in Docket Nos. 340871 and 341589, we reversed the trial court's order denying defendant Amerisure Insurance Company's ("Amerisure") motion for summary disposition because there was no genuine issue of material fact the only damage was to plaintiff Skanska USA Building, Inc.'s ("Skanska") own work product. *Id*. In an opinion issued on June 29, 2020, the Michigan Supreme Court reversed this Court's decision, holding that "an 'accident' may include unintentionally faulty subcontractor work that damages an insured's work product." *Skanska*, 505 Mich at 390.

The Michigan Supreme Court remanded the case to this Court "for consideration of any remaining issues." *Id*.

I. BASIC FACTS AND PROCEDURAL HISTORY

This Court's earlier opinion describes the parties and their dispute:

> Starting in 2008, plaintiff [Skanska] was the construction manager on a renovation project for Mid-Michigan Medical Center in Midland ("Medical Center" or "MMMC"). Plaintiff subcontracted the heating and cooling portion of the project to defendant M.A.P. Mechanical Contractors ("MAP"). MAP obtained a commercial general liability insurance policy ("CGL policy") from Amerisure. Plaintiff and the Medical Center are named as additional insureds on the CGL policy.
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> In 2009, MAP installed a steam boiler and related piping for the Medical Center's heating system. MAP's installation included several expansion joints, which are designed to accommodate the expansion of the piping caused by the flowing steam. In 2010 the heating system became fully activated, but it did not function properly. Sometime between late December 2011 and late February 2012, plaintiff determined that MAP had installed some of the expansion joints backward. Significant damage to concrete, steel, and the heating system had occurred. Plaintiff notified MAP of the backward joints.
>
> On March 2, 2012, MAP sent a notice of claim to Amerisure. The notice identified the date of occurrence as December 21, 2011, and stated that the "claimant" discovered the backward installation just before Christmas 2011. The

> notice further indicated that the claimant had not reported the problem to MAP until March 2012.
>
> On March 28, 2012, the Medical Center sent a demand letter to plaintiff, asserting that plaintiff must pay for all costs of repair and replacement. The following day, March 29, plaintiff sent a demand letter to MAP, asserting that MAP was responsible for all costs of repair and replacement. Plaintiff proceeded to perform the work of repairing and replacing the damaged property. According to plaintiff, the cost of the repair and replacement work was approximately $1.4 million. Plaintiff submitted a claim to Amerisure on June 6, 2012, seeking coverage as an insured. Plaintiff's claim was denied. [*Skanska*, unpub op at 2-3.]

Plaintiff filed a complaint against MAP and Amerisure in June 2013, seeking compensation for the $1.4 million in repair and replacement work. Before discovery closed, Amerisure sought summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), which the trial court denied. Relying on *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369; 460 NW2d 329 (1990), the trial court reasoned that the language of the CGL policy[1] precluded summary disposition:

> No one has suggested MAP purposefully installed the expansion joints backward. All the parties agree the negligent installation was an unforeseen occurrence and not anticipated by any of the parties to the construction project. Under the plain language of the policy, this unforeseen incident means an "occurrence" may have happened which triggers Amerisure's duty of coverage under the insurance policy.

Amerisure renewed its motion for summary disposition after deposing plaintiff's project manager, who stated that plaintiff performed "warranty work," most of which was within the scope of the construction project. Nevertheless, the trial court denied Amerisure's motion, finding genuine issues of material fact whether an "occurrence" took place.[2] These appeals followed.

This Court reversed the order of the trial court denying Amerisure's motion for summary disposition. We concluded there was "no genuine issue of material fact that plaintiff sought coverage for replacement of its own work product." *Skanska*, unpub op at 6. Like the trial court, we relied on *Hawkeye*, in which the Court determined that an "occurrence" under the CGL policy 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 standpoint of

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[1] The relevant language of the CGL policy states:

> 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 . . .
>
> b. This insurance applies to . . . "property damage" only if:
>
> (1) The . . . "property damage" is caused by an "occurrence" . . .

[2] The trial court also denied plaintiff's request for summary disposition under MCR 2.116(I)(2).

the insured[.]" *Hawkeye*, 185 Mich App at 373. We noted that even though *Hawkeye* analyzed the pre-1986 version of the CGL policy, cases addressing post-1986 versions of the CGL policy also relied on *Hawkeye*. Thus, we considered the matter "well settled" that "an 'occurrence' cannot include damages for the insured's own faulty workmanship." *Skanska*, unpub op at 10. Accordingly, we reversed the trial court's order and remanded for entry of judgment in favor of Amerisure because "coverage was not triggered due to lack of an 'occurrence' " and there is no genuine issue of material fact that the only damage was to plaintiff's own work product (rather, that of its subcontractor)." *Id*.

The Michigan Supreme Court granted plaintiff's application for leave to appeal and reversed this Court's decision. The Court first determined the language of the CGL policy, which excluded from coverage damage to the insured's work product but not damage that arose from the insured's subcontractor, belied Amerisure's interpretation of coverage:

> If faulty workmanship by a subcontractor could never constitute an "accident" and therefore never be an "occurrence" triggering coverage in the first place, the subcontractor exception would be nugatory. Just as with statutory interpretation, courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract nugatory. [*Skanska*, 505 Mich at 379.]

Using the same reasoning, the Michigan Supreme Court found fault with this Court's analysis of the CGL policy, noting that we "accepted that an insured can seek coverage for its damage to a third party's property[,]" but "the policy does not limit the definition of 'occurrence' by reference to the owner of the damaged property." *Id*. at 382-383. Thus, according to the Michigan Supreme Court, we "failed to recognize that an insured's own defective workmanship is excluded from coverage via the explicit exclusions, not in the initial grant of coverage." *Id*. at 384. Concluding *Hawkeye* did not apply to the facts of this case because *Hawkeye* interpreted a different (pre-1986) version of the CGL policy, the Michigan Supreme Court found the reasoning in that case unpersuasive and "limit[ed] its holding to cases involving the pre-1986 CGL policy language." *Skanska*, 505 Mich at 390. Ultimately, the Court held that "an 'accident' may include unintentionally faulty subcontractor work that damages an insured's work product." *Id*. The case was remanded to us "for consideration of any remaining issues." *Id*.

II. DISCUSSION

On remand, Amerisure has raised a number of issues, all of which we conclude are either premature or irrelevant. We therefore vacate the trial court's opinion and remand the case for consideration in light of the Michigan Supreme Court's opinion in *Skanska*.

Amerisure contends there is a distinction between whether the faulty work was performed by a named insured or an additional insured and that the policy must be limited to the subcontractor's (i.e., MAP's) perspective. Amerisure urges us to "follow the majority approach and hold that, while faulty subcontractor work that damages an insured contractor's work product may be an 'accident' per the Supreme Court's Opinion, an insured's own faulty workmanship that damages only its own work product, requiring the product to be repaired or replaced is not."

This argument was not presented to the trial court in the first instance and is, therefore, not properly before us. Both the trial court and this Court analyzed the CGL policy through the lens of *Hawkeye*. The trial court concluded it was "bound by, and must follow, the precedent set by *Hawkeye*, because it has not been overruled or otherwise found to be inaccurate case law interpreting the insurance provision presented in this case." Similarly, we found *Hawkeye* controlling, especially in light of the cases interpreting post-1986 CGL policies. The Michigan Supreme Court has instructed us that *Hawkeye* is not applicable to the post-1986 CGL policy. The issues raised by Amerisure in this issue require factual development that is not before us. Accordingly, we direct the parties to address this issue in the first instance in the trial court, which is then to examine the scope of coverage in light of the Michigan Supreme Court's opinion.

Amerisure also asks us to conclude that the holding in *Skanska* is to be applied prospectively only. According to Amerisure, *Skanska* represents a "sea change" in insurance coverage and, on the basis of what appears to be a reliance argument, Amerisure contends that retroactive application of *Skanska* would be unjust or unfair. While we reject Amerisure's argument that the issue has been properly preserved,[3] the question of prospective or retrospective application is irrelevant. The Michigan Supreme Court did not overrule *Hawkeye*; it determined that *Hawkeye* was not applicable to the facts of this case:

> So what of *Hawkeye*? *Hawkeye* considered whether a 1973 policy provided coverage to a contractor for damages resulting from its own defective work, not the work of its subcontractor. Those differences are significant, and as a result, whether *Hawkeye* was correctly decided is not properly before us. We therefore see no reason to answer that question today. Further, because *Hawkeye* interpreted a 1973 policy that did not cover damage caused by a subcontractor's faulty workmanship, *Hawkeye* is not persuasive. Therefore, we limit its holding to cases involving the pre-1986 CGL policy language. [*Skanska*, 505 Mich at 389-390.]

Accordingly, we do not believe the issue of prospective or retrospective application of *Skanska* is germane. The trial court's task is to determine whether there is coverage (i.e., whether there was an "occurrence") for the damage alleged in the complaint under the language in the CGL policy and, if so, the scope of such coverage.

Lastly, Amerisure asks us to affirm its position on the alternative grounds that coverage was properly denied on the basis of the "Your Work" exclusion contained within the CGL policy. The trial court initially determined that there was a question of fact whether the exclusion applied on the basis of "the extent of the work product and whether damages occurred beyond it." While this may be true, as stated above, the trial court must first determine if coverage applies. The exclusions Amerisure contends are dispositive may or may not apply, depending on whether the trial court determines an "occurrence" took place. Resolution of this issue is premature at this stage.

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[3] Amerisure offers no legal support for the position that an issue is properly preserved when first raised in the Michigan Supreme Court.

We vacate the trial court's opinion and order denying Amerisure's motion for summary disposition, and remand the case to the trial court to determine whether an "occurrence" took place under the CGL policy and, if so, the scope of coverage, in light of the Michigan Supreme Court's decision in *Skanska*. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly