S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

GERALD T. HEATON and JONNA HEATON, Plaintiffs/Garnishee Plaintiffs-Appellants,	UNPUBLISHED October 25, 2012
v PRISTINE HOME BUILDERS, L.L.C., DANIEL J. BONAWITT, BENTON CONSTRUCTION CORP., d/b/a GREAT LAKES SUPERIOR WALLS, CRAIG'S HOME DESIGN SERVICE and CRAIG THORNTON, Defendants, and AUTO-OWNERS INSURANCE CO., Garnishee Defendant-Appellee.	No. 305305 Shiawassee Circuit Court LC No. 06-003972-CK

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs are home owners who won a jury verdict against several contractors involved in the construction of their home. Defendant Pristine Home Builders, L.L.C. did not pay its share of the jury award and plaintiffs sought a writ of garnishment against Auto-Owners Insurance Co., Pristine's commercial general liability insurer. Because the insurance policy does not provide coverage under the circumstances, we affirm the trial court's summary dismissal of the garnishment action.

I. BACKGROUND

Pristine served as the general contractor on plaintiff's home construction project and hired subcontractor, Great Lakes Superior Walls, to install "precast concrete foundation walls" at the site. *Heaton v Benton Constr Co*, 286 Mich App 528, 530-531; 780 NW2d 618 (2009). These foundation walls shifted during construction, damaging the entire structure. Plaintiffs secured a jury verdict, finding both contractors negligent and assigning Great Lakes a 60% share

of the liability and Pristine a 40% share. The jury awarded plaintiffs $272,500 in damages. *Id.* In a prior published opinion, this Court affirmed the negligence judgment and reversed a trial court order remitting the damages award. *Id.* at 530.

Thereafter, Great Lakes paid in full its 60% obligation for the jury award. Pristine did not pay and plaintiffs filed a "request and writ for garnishment" against Auto-Owners as Pristine's commercial general liability insurer. Auto-Owners fought the garnishment, arguing that the negligent construction was not an "occurrence" as anticipated in the policy and therefore was not covered. In the alternative, Auto-Owners contended that Pristine's negligence was excluded from policy coverage because Pristine's incorrectly performed work required the restoration, reparation or replacement of the damaged property. Plaintiffs sought summary disposition of their garnishment claim under MCR 2.116(C)(10), but the trial court found no coverage and granted summary disposition in Auto-Owners' favor instead.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Liparoto Constr Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

We also review de novo the interpretation of an insurance contract. *American Home Assurance Co v Mich Catastrophic Claims Ass'n*, 288 Mich App 706, 717; 795 NW2d 172 (2010). "The rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). "The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase." *Id*. Language should be given its ordinary and plain meaning, and technical and strained constructions should be avoided. *Radenbaugh v Farm Bureau Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000).

III. APPLICATION

The "Commercial General Liability Form" issued by Auto-Owners to Pristine provides:

> a. We will pay those sums that our insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies . . . .
>
> * * *
>
> b. This insurance applies to "bodily injury" and "property damages" only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” . . . .

The policy defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

This Court analyzed nearly identical commercial general liability insurance policy language defining a covered “occurrence” as an “accident” in *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134; 610 NW2d 272 (2000). “““[A]n accident,””” *Radenbaugh* explained, “““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.””” *Id.* at 147, quoting *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435, 438 (ED Mich, 1992), quoting *Guerdon Indus, Inc v Fidelity & Cas Co*, 371 Mich 12, 18-19; 123 NW2d 143 (1963). A covered accident is found “‘when an insured’s defective workmanship results in damage to the property of others.’” “‘When the damage . . . is confined to the insured’s own work product the insured is the injured party, and the damage cannot be viewed as accidental . . . .’” *Radenbaugh*, 240 Mich App at 147, quoting *Calvert*, 807 F Supp at 438, citing *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962), and *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369; 460 NW2d 329 (1990).

Pristine was the general contractor at plaintiffs’ home construction site. According to its insurance policy, any work performed on its behalf by a subcontractor was attributable to Pristine. The policy defines “your work” as:

a. Work or operations performed by you *or on your behalf*; and

b. Materials, parts or equipment furnished in connection with such work or operations. [Emphasis added.]

As a result of the shifting of the negligently constructed foundation walls, the entirety of the structure that had been constructed to that point had to be razed and rebuilt. All of the work that had been affected had been done by Pristine or its subcontractors. As “the damage . . . [was] confined to the insured’s own work product the insured [was] the injured party, and the damage cannot be viewed as accidental.” *Radenbaugh*, 240 Mich App at 147. The trial court therefore correctly concluded that this was not a covered “occurrence” under the policy.

Plaintiffs raise several arguments for the first time on appeal in an attempt to force this square peg into the round coverage hole. First, plaintiffs contend that the damage caused by the shifting foundation walls was the result of gravity and therefore was an accident and a covered occurrence. Gravity was not the accepted cause of damage at the jury trial, however. Rather, plaintiffs’ evidence at trial showed that Great Lakes negligently designed and installed the foundation walls and Pristine exacerbated the problem by failing to construct “shearing walls” and by “backfilling” an excessive weight of dirt against the outside of the foundation walls. As determined by the jury, the cause of the foundation shift was negligence, not simply gravity. “A [jury] verdict will not be disturbed so long as it is within the fair range of testimony.” *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 137-138; 680 NW2d 485 (2004).

Plaintiffs also contend:

> Auto Owners [sic] may attempt to argue that because Pristine is a general contractor, the entire house is the work product of Pristine and therefore, the damage was not the result of an "accident" as defined by *Radenbaugh*. *Radenbaugh*, however, should be narrowly construed to pertain only to those areas of the home that failed as the result of defective workmanship, or, in the case at hand, the foundation itself. Giving *Radenbaugh* such a broad interpretation essentially eliminates protection for general contractors who build homes because any part of the home could arguably be considered the work product of the general contractor, even though a specific portion of the home may have failed due to an event that would otherwise be considered an occurrence.

Plaintiffs may be correct that the precedent of this state has harshly left general contractors open to personal liability without coverage. However, we are bound by this precedent. And the answer to this problem lies in potential insurance purchasers negotiating the type of coverage they need and passing on policies that so broadly preclude liability protection.

Plaintiffs then claim that *Radenbaugh* actually supports coverage in the current case because the *Radenbaugh* Court found coverage where a faulty foundation damaged the entire structure. This simplistic analysis ignores the important distinctions between *Radenbaugh* and the current case. In *Radenbaugh*, the damages were caused by negligence on the part of a mobile home dealer. The dealer provided the homeowner with "erroneous schematics and instructions" to install a basement under the mobile home. The homeowner then hired contractors to install the basement and erect the mobile home. The entire mobile home was damaged because it was installed atop an inadequate basement and foundation. *Radenbaugh*, 240 Mich App at 136. In *Radenbaugh*, the mobile home dealer was the insured and its negligence in providing erroneous schematics and instructions did result in damage to the property of others. The mobile home dealership was in no way connected to the contractor who installed the basement and after selling the mobile home, had no interest in the property. Therefore, the damages caused by its negligence affected only the property of others.

Because Pristine's negligence is not a covered "occurrence" under this insurance policy, it is unnecessary to consider whether any policy exclusions apply.

Affirmed. Auto-Owners, as the prevailing party, may tax costs. MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

COURT OF APPEALS

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Plaintiffs/Garnishee Plaintiffs-Appellants,

v

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Defendants,

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SHAPIRO, P.J. (*concurring*).

I concur in the result only.

/s/ Douglas B. Shapiro