STATE OF MICHIGAN

COURT OF APPEALS

HOMETOWNE BUILDING COMPANY, L.L.C.,

Plaintiff,

and

NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Intervening Plaintiff-Appellant/Cross-Appellee,

v

AMERISURE MUTUAL INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
October 13, 2009

No. 287336
Oakland Circuit Court
LC No. 07-087244-CK

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

North American Specialty Insurance Company (NACIS) appeals as of right the grant of summary disposition in favor of Amerisure Mutual Insurance Company (Amerisure). Amerisure cross-appeals the trial court's grant of a right to intervene to NACIS. We affirm.

This action comprises a claim for breach of contract involving coverage under commercial general liability policies issued by Amerisure to Hometowne Building Company, L.L.C. (Hometowne). Amerisure issued commercial general liability insurance policies to Hometowne covering the period November 25, 2003, to December 1, 2007. There is no issue or dispute pertaining to the payment of premiums on the policies. However, NASIC contends Amerisure had a duty to reimburse it for a settlement payment and defense expenses incurred on behalf of Hometowne in a lawsuit filed by Barbara and Andrew Neller (Nellers) involving claims against Hometowne for damages and faulty workmanship in the construction of their new home.

The Nellers contracted with Hometowne in 2002 for the construction of a new residential home in South Lyon, Michigan. Construction was completed and a closing occurred on June 16, 2003. In the spring of 2004, the Nellers began to experience problems with water incursion,

odors in the home and the development of visible mold. Several investigations were conducted and Hometowne attempted to remediate the problem on more than one occasion. Unfortunately, the problems were recurrent and increasing in severity. Despite several attempts to correct the identified problems involving various aspects of the home construction and remediation of the mold, water and odor infiltrations, the Nellers initiated litigation to recover damages. Hometowne tendered defense of this underlying action to Amerisure and to NASIC, which provided Hometowne's commercial general liability coverage during the construction of the Nellers' residence. Amerisure denied coverage based on exclusions contained in their policies. NASIC provided a defense to Hometowne in the underlying action.

Despite NASIC's provision of a defense, Hometowne filed a third-party complaint in the Nellers lawsuit, claiming coverage under all commercial general liability policies issued by Amerisure. The third-party complaint was severed from the underlying action with the only issue being whether any of the insurance policies issued by Amerisure provide coverage to Hometowne. NASIC successfully sought to intervene in the action, asserting a right as Hometowne's subrogee. Amerisure brought a motion seeking summary disposition pursuant to MCR 2.116(C)(10), asserting they had no duty to defend or indemnify under the policies due to specific exclusions and lack of coverage. The trial court granted summary disposition in favor of Amerisure on August 6, 2008, finding that either an "accident" or "occurrence" existed, which triggered coverage for Hometowne but that the pollution and mold exclusions contained in the policies applied to damages from odors and wet/deteriorating building materials related to mold damage. In addition, the trial court determined that the "business risk" exclusions eliminated coverage for all remaining incidental or consequential losses alleged, which were related to defective construction.

This Court reviews de novo a trial court's summary disposition ruling. *Walsh v Taylor,* 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). The de novo standard of review is also applicable to the extent that this Court must interpret and apply an insurance contract. *Archambo v Lawyers Title Ins Corp,* 466 Mich 402, 408; 646 NW2d 170 (2002). However, a trial court's decision on a motion to intervene is reviewed for an abuse of discretion. *Vestevich v West Bloomfield Twp,* 245 Mich App 759, 761; 630 NW2d 646 (2001).

On appeal, NACIS contends the trial court erred in granting summary disposition in favor of Amerisure because the contract of insurance required Amerisure to defend Hometowne against the Nellers' claims. Specifically, NASIC asserts Amerisure was required to reimburse it for a settlement payment and defense expenses incurred on behalf of Hometowne in the underlying lawsuit filed by the Nellers.

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington,* 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners v Churchman,* 440 Mich 560, 566; 489 NW2d 431 (1992). When a dispute arises between parties to an insurance contract regarding the meaning of the policy language, a reviewing court "must determine what the agreement is and enforce it." *Radenbaugh v Farm Bureau Gen Ins Co of Michigan,* 240 Mich App 134, 138; 610 NW2d 272 (2000). In

undertaking this analysis, a reviewing court is required to view the contract as a whole and to confer meaning with regard to all of its terms. *Harrington, supra* at 381. Further, the terms contained in an insurance policy are to be interpreted consistent with the definitions provided in the contract, or, if not provided, consistent with their "common usage." *Cavalier Mfg Co v Employers Ins of Wausau (On Remand),* 222 Mich App 89, 94; 564 NW2d 68 (1997). The burden of proving coverage is on the insured, while it is incumbent upon the insurer to prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). "It is well settled that 'if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured.'" *Radenbaugh, supra* at 137.

The first step in interpreting an insurance policy requires a determination of whether coverage exists according to the terms of the agreement. *Harrington, supra* at 382. The underlying complaint, initiated by the Nellers, asserted two types of damages were incurred: (a) physical damage to the structure of the residence caused by water intrusion and subsequent mold and (b) personal injury and damage to personal property from the resultant mold. There is no evidence to suggest that the physical damage to the structure was caused by anything other than defects and problems with the construction.

The insurance contract specifically indicates, "This insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory.'" An "occurrence" is defined in the policy to mean "an accident, including continuous or repeated exposure in substantially the same general harmful conditions." While the term "accident" is not defined in the policy, Black's Law Dictionary (8th ed) provides the following: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, it is not an accident; the means or cause must be accidental." In accordance with this Court's ruling in *Radenbaugh, supra* at 147, "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." (Internal quotations and citations omitted.) As such, defective workmanship, standing alone, does not constitute an occurrence.[1] *Hawkeye-Security Ins Co v Vector Const Co,* 185 Mich App 369, 378; 460 NW2d 329 (1990).

To be construed as an "occurrence," the defective workmanship must have resulted in damage to persons or to property other than the work product of the insured. *Radenbaugh, supra* at 145-146; see also *Hawkeye-Security, supra* at 377-378. Although NACIS points to language contained in the trial court order assessing damages against Hometowne for non-mold related claims, this does not indicate the existence of liability pursuant to the policy with Amerisure. A review of the transcripts clearly indicates that the non-mold related damages referenced in the

[1] To the extent the trial court found the existence of an accident or occurrence sufficient to trigger coverage under Amerisure's policy, we find that it is restricted solely to injuries and damages claimed separate from physical damage to the structure of the residence.

order pertain to construction issues regarding the physical structure of the residence, which comprise the work product of Hometowne, and are not subject to coverage. Hence, damages claimed with regard to the physical structure of the residence, being solely attributable to problems or deficiencies in the insured's workmanship, do not comprise an "occurrence" and are not covered pursuant to the policy language.

NACIS also contends that Amerisure was liable and had a duty to defend for those damages, which arose involving claims of bodily injury or damage to items of personal property. NACIS is correct in its assertion that, in order to constitute an occurrence, instances of defective workmanship must result in damage to persons or property *other than* the work product itself. *Radenbaugh, supra* at 147. Specifically, "when an insured's defective workmanship results in property damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy." *Id.* However, under the circumstances of this case liability is still precluded due to exclusions contained within the contract.

"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). Exclusions that are specific and unambiguous must be given effect to preclude an insurance company from incurring liability for a risk it did not undertake to assume. *McGuirk v Meridian Mut Ins Co*, 220 Mich App 347, 353; 559 NW2d 93 (1996). It cannot be legitimately disputed that the bodily injuries and personal property damages claimed by the Nellers are directly attributable to the development of mold within the home and the costs and efforts incurred in remediating the effects of the mold. The assertion of NACIS regarding odors within the structure as being non-mold related is contrary to the trial court's determination that the odors were the direct and traceable result of the mold infestation.

The contract at issue specifically excludes from coverage or liability:

> **Fungi Or Bacteria**
>
> a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
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> b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

The term "fungi" are defined within the contract to mean, "any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi." Based on this unambiguous language, the trial court correctly granted summary disposition as the injuries and damages claimed were attributable to mold, which was specifically excluded from coverage.

Based on our determination regarding the propriety of the trial court's grant of summary disposition in favor of Amerisure, it is unnecessary to address the issue presented on cross-appeal regarding the right of NACIS to intervene pursuant to MCR 2.209(A)(3), as it is rendered moot.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly