STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellee and Cross-Appellant,

v

BRONSON PLATING CO.,

Defendant/Counterplaintiff-Appellant and Cross-Appellee,

v

FEDERAL INSURANCE COMPANY, one of the CHUBB GROUP OF INSURANCE COMPANIES, AUTO-OWNERS INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, GREAT SOUTHWEST FIRE INSURANCE COMPANY (now known as VANLINER INSURANCE COMPANY), HARTFORD ACCIDENT & INDEMNITY COMPANY, INDIANA INSURANCE COMPANY, INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, and HAMILTON MUTUAL INSURANCE COMPANY,

Counterdefendants-Appellees and Cross-Appellees.

UNPUBLISHED
June 23, 1998

No. 198018
Branch Circuit Court
LC No. 86-009504 CK

Before: Markman, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In this declaratory judgment action, defendant Bronson Plating Co. appeals the trial court's decision, rendered on summary disposition, that the named insurance carriers in this action do not owe a duty to defend or indemnify Bronson Plating in the environmental remediation actions brought against Bronson Plating by the United States Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources (DNR). We affirm.

I

The trial court properly concluded that the insurance companies have no duty to defend or indemnify Bronson Plating under any of the policies at issue because no "occurrence" took place.

An insurer does not have a duty to defend or indemnify the insured if the policy does not apply. *Protective Nat'l Ins Co of Omaha v City of Woodhaven,* 438 Mich 154, 159; 476 NW2d 374 (1991). The duty to defend is broader than the duty to indemnify, but there is no duty to defend where the claims against the policyholder do not arguably come within the scope of coverage under the policy. *American Bumper & Mfg Co v Hartford Fire Ins Co,* 452 Mich 440, 450-451, 455; 550 NW2d 475 (1996); *City of Woodhaven, supra* at 159-160.

The scope of coverage is limited here by the definition of an "occurrence." *American Bumper, supra* at 449; *Arco Industries Corp v American Motorists Ins Co,* 448 Mich 395, 403-404; 531 NW2d 168 (1995). The policy language regarding what constitutes an "occurrence" is clear and unambiguous, with coverage existing only where an accident occurs that was "neither expected nor intended from the standpoint" of the insured. *Arco, supra* at 404.

Even looking at the facts from Bronson Plating's standpoint, *Id.* at 405, 407, it is clear that no "occurrence" took place. There was no evidence presented by Bronson Plating that any accident occurred, merely speculation that an accident was "possible." However, the mere "possibility" of an accident does not meet Bronson Plating's burden to rebut evidence presented by the insurers that no accident occurred, especially in light of unequivocal testimony from Bronson Plating's own officers and a longtime employee that no accidents or spills had occurred. A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact. *South Macomb Disposal Authority v American Insurance Co (On Remand),* 225 Mich App 635, 675; 572 NW2d 686 (1997). Moreover, chemical contamination was the "natural, foreseeable, expected, and anticipatory result," *Frankenmuth Mut Ins Co v Piccard,* 440 Mich 539, 550-551; 489 NW2d 422 (1992), of decades of deliberate, intentional, and purposeful chemical discharges by Bronson Plating as part of its routine manufacturing processes. See *City of Bronson v American States Ins Co,* 215 Mich App 612, 620-621; 546 NW2d 702 (1996). Like the trial court, we hold that the insurers in this case have no duty to defend or indemnify Bronson Plating Co. because there was no "occurrence," and therefore no coverage, under any of the policies at issue.

II

Coverage is also barred by the pollution-exclusion clause, which is contained in many of the insurance policies. The pollution exclusion does not apply to releases or discharges which are "sudden and accidental." *Auto-Owners Ins Co v City of Clare,* 446 Mich 1, 12; 521 NW2d 480 (1994); *Upjohn Co v New Hampshire Ins Co,* 438 Mich 197, 206; 476 NW2d 392 (1991).

We hold that Bronson Plating's intentional discharge of its plating wastes, which contained chemical contaminants, as part of its normal industrial operation for a period of over thirty years was, as a matter of law, neither "sudden nor accidental." See *Upjohn, supra* at 207-209; *Clare, supra* at 12-15. The required temporal element is simply not present here, and Bronson Plating has presented no evidence that there were any accidents. Therefore, the pollution-exclusion clause applies, and the trial court correctly concluded that Bronson Plating is not entitled to coverage under the policies which have a pollution-exclusion clause.

III

Finally, we hold in accord with the trial court that the excess insurers have no duty to defend or indemnify Bronson Plating. An excess insurer's duty to defend, like that of any other insurer, is defined by the language in the policy. *Frankenmuth Mut Ins Co v Continental Ins Co,* 450 Mich 429, 433, 438; 537 NW2d 879 (1995). The substantive coverage language of the excess insurance policies in this case is identical or virtually identical, and therefore coextensive, with that of the coverage language in the underlying policy contracts. *Id.* at 438. Therefore, to the extent that coverage under the primary insurance contracts is barred by the lack of an "occurrence" and by the pollution exclusion, coverage under the excess insurance policies, as coextensive with that in the primary insurance policies, is likewise barred. Any discussion of the circumstances under or the extent to which the excess insurers would have to defend or indemnify Bronson Plating *if* coverage existed under the policies is moot.

In light of our disposition of the above issues, we find it unnecessary to consider the parties' remaining claims.

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff

I concur in result only.

/s/ Stephen J. Markman