STATE OF MICHIGAN

COURT OF APPEALS

WALTER HILDERBRANDT, Personal Representative of the ESTATE OF MICHAEL WALTER HILDERBRANDT, as same, and as assignee of ENGINEERING TECHNOLOGIES CORPORATION,

Plaintiff-Appellee,

v

RUMSEY & SONS CONSTRUCTION,

Defendant / Third-Party Plaintiff,

and

DAVID CHAPMAN AGENCY, INC.,

Defendant / Cross-Plaintiff /Third-Party Defendant,

and

DAVID CHAPMAN,

Defendant,

and

WESTFIELD INSURANCE COMPANY,

Defendant-Appellant,

and

TRAVELERS CASUALTY & SURETY COMPANY, f/k/a AETNA CASUALTY & SURETY COMPANY,

Defendant / Third-Party Defendant / Cross-Defendant.

UNPUBLISHED
June 5, 2001

No. 220340
Livingston Circuit Court
LC No. 95-014384-CK

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant Westfield Insurance Company (defendant) appeals as of right the circuit court's grant of summary disposition and entry of judgment in plaintiff estate's favor in this insurance coverage dispute between plaintiff's assignor, Engineering Technologies Corporation (ETC), and ETC's general liability insurer, defendant. The circuit court concluded that defendant wrongfully refused to defend ETC in an underlying wrongful death action, and that defendant was obligated to indemnify against a consent judgment negotiated in that case. We reverse.

I

Plaintiff's decedent, Michael Hilderbrandt, was an employee of Rumsey & Sons Construction, Inc., (Rumsey) the general contractor on a water main replacement project for the City of Howell, when he was fatally injured on a job site of that project on June 29, 1992, after a trench collapsed on him. Hilderbrandt was twenty-seven years old. ETC, an engineering firm that did consulting and contract work for the City, designed the water main project for the City, assisted in preparation of the bidding documents, and recommended to whom the bid should be awarded. The City of Howell and Rumsey entered into a written contract, portions of which are quoted *infra*. There was no written agreement between ETC and the City of Howell, but they had an oral agreement that ETC would serve as the consulting engineer and inspector to monitor Rumsey for the purpose of ensuring compliance with the contract.

ETC had a commercial general liability (CGL) policy with defendant, and did not have a professional liability policy at the time. Defendant initially undertook ETC's defense of plaintiff's underlying wrongful death action without reservation, but later withdrew its defense,[1] stating that all allegations against ETC fell within the CGL policy's "professional services" exclusion.

In the underlying wrongful death action, plaintiff estate and ETC entered into a settlement that included the entry of judgment against ETC for $750,000 and an assignment to plaintiff by

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[1] Defendant's appellate brief states that ETC "timely tendered its defense to defendant, who retained defense counsel without reserving any rights. As a result of information learned during discovery, however, Westfield issued a letter to [ETC] on September 27, 1994, reserving its right to deny coverage under the professional services exclusion." Defendant's brief further states that it tendered ETC's defense to Rumsey and Rumsey's insurance carrier, Aetna, and that Rumsey had a duty under its contract with the City of Howell to indemnify both the City and ETC against any claims arising out of the project, and Rumsey had a duty to name both the City and ETC as additional named insureds in its insurance policy for the project. Both Rumsey and Aetna refused to accept ETC's tender of defense.

Defendant's brief states that after determining that coverage under its policy was excluded by the professional services exclusion and exhausting all other options for the tender of ETC's defense, defendant wrote to ETC on November 18, 1994 and advised that it would withdraw its defense after ETC had opportunity to retain counsel. Defendant states that it continued to provide ETC a defense until substitute counsel filed an appearance in April 1995.

ETC of any claims that ETC had against all possible defendants involved in this action, including Westfield. The estate covenanted not to enforce the judgment against ETC beyond $10,000, in return for ETC's assignment of rights. After the underlying wrongful death action was settled, the estate, standing in ETC's shoes in this action, commenced a garnishment action against defendant.

On the parties' cross-motions for summary disposition, the court denied plaintiff's motion and granted summary disposition to defendant based on MCR 2.116(I). However, on plaintiff's motion for reconsideration, the circuit court granted summary disposition in plaintiff's favor and ultimately entered judgment against defendant.[2] The parties agree that the sole remaining controversy is whether defendant breached its duty to defend ETC in the underlying wrongful death action.

II

Defendant argues that the circuit court erred as a matter of law in finding that it breached its duty to defend ETC in the wrongful death action because the claim arose out of ETC's rendering or failure to render supervisory, inspection or professional engineering services and thus fell under the CGL policy's "professional services" exclusion.

Plaintiff's appellate brief argues in response that ETC's failure to advise Rumsey of MIOSHA violations, as alleged in the underlying complaint against ETC, did not involve the rendering or the failure to render "professional services," and was separate and distinct from any of the professional services performed by ETC in connection with the Howell project. Plaintiff relies on testimony of ETC's President, Kenneth Cousino, who testified that one need not be a professional engineer to recognize a violation of MIOSHA; that one need not recognize violations of MIOSHA to be licensed as a professional engineer; that Ed Loescher, the ETC representative at the construction site, was not trained to recognize violations of MIOSHA standards; and that Loescher was assigned to the site primarily to perform services that did not require a professional engineering degree or license.

In its reply brief on appeal, defendant more clearly defines its challenge:

> It is undisputed that [ETC] designed a water main project for the City of Howell and assisted the city in its preparation of the bidding documents. It is undisputed that the project was awarded to Rumsey & Sons as the general contractor who assumed the responsibility for the means, methods, techniques, sequences and procedures of construction. It is undisputed that [ETC] was hired by the City of Howell as the "project engineer" to monitor Rumsey & Sons for the purpose of ensuring compliance with contract specifications.

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[2] A final judgment for $577,456 was entered in plaintiff's favor against Westfield, representing the $740,000 settlement, apparently reflecting a credit for $10,000 paid by ETC, less $310,000 paid by codefendants, plus pre- and post-judgment interest totaling $147,456.

> The issue before the Court is whether the project engineer's monitoring of a water main project, which it designed, to ensure compliance with contract specifications, which it helped develop, amounts to a "professional service" within the meaning of a standard commercial general liability contract exclusion.

A

We review a circuit court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). The construction and interpretation of an insurance contract is a question of law we review de novo. *Henderson v State Farm Mutual Ins,* 460 Mich 348, 353; 596 NW2d 190 (1999).

An insurer's duty to defend is broader than the duty to indemnify. *GAF Sales & Service, Inc v Hastings Mut Ins Co,* 224 Mich App 259, 261; 568 NW2d 165 (1997). An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 137; 610 NW2d 272 (2000). To determine whether there is a duty to defend, "this Court looks to the language of the insurance policy and construes its terms to find the scope of the coverage of the policy." *GAF Sales, supra* at 261. There is a duty to defend if the allegations of the underlying suit arguably fall within the coverage of the policy. *Id.*

"[T]he 'insured bears the burden of proving coverage, while the insurer must prove that an exclusion to coverage is applicable.'" *Heniser v Frankenmuth Mut Ins,* 449 Mich 155, 161 n 6; 534 NW2d 502 (1995), quoting *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 424-425; 531 NW2d 168 (1995) (Boyle, J., concurring).

B

The allegations in the underlying wrongful death action as to ETC that are most particularly at issue in this appeal are:

> 20. That the Defendant, Engineering Technologies Corporation, was guilty of the following acts of negligence and gross negligence:
>
> (h) Failing to advise the employees of Defendant, Rumsey & Sons Construction, Inc., and specifically the decedent, Michael Walter Hilderbrandt, of violations of safety standards with regard to excavation, trenching and shoring;
>
> (i) Failing to advise the supervisors of Defendant, Rumsey & Sons Construction, Inc., of violations of safety standards with regard to excavation, trenching and shoring.[3]

[3] The underlying complaint also alleged negligence and gross negligence with respect to ETC:

(continued…)

The professional services exclusion at issue is contained in an endorsement to ETC's CGL policy issued by defendant, entitled "Exclusion–Engineers, Architects or Surveyors Professional Liability," and states:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART.
>
> This insurance does not apply to "bodily injury," "property damage," "personal injury" or "advertising injury" arising out of the rendering or failure to render any professional services by or for you, including:
>
> 1. The preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; and
>
> 2. Supervisory, inspection or engineering services.

C

(…continued)

> (a) Failing to provide adequate safety supervision of the excavated trench in which the decedent [] was working;
>
> (b) Failing to provide adequate safety inspections of the excavated trench in which the decedent [] was working;
>
> (c) Failing to personally train the supervisors and employees of Defendant, Rumsey & Sons Construction, Inc., in adequate safety measures for excavating, trenching and shoring;
>
> (d) Failing to report to the Defendant, City of Howell, clear violations of excavating, trenching and shoring standards being committed by Defendant, Rumsey & Sons Construction, Inc.;
>
> (e) Failing to employ safety inspectors with sufficient training to understand and evaluate violations of safety standards as they relate to excavating, trenching and shoring;
>
> (f) Failing to properly supervise their employees to ensure that they were properly performing their responsibilities in the inspection and safety supervision of excavating, trenching and shoring;
>
> (g) Failing generally to make reasonable supervision and reasonable safety inspections of the excavating, trenching and shoring portion of the Defendant, Rumsey & Sons Construction, Inc., project;

Although Kenneth Cousino, ETC's founder and president and a licensed professional engineer, and Terry Wilson, the City of Howell's Public Service Director, asserted that ETC had no obligations regarding safety on the project,[4] plaintiff relied on Howell's contract with Rumsey which included the following provisions:

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[4] Documentary evidence submitted below included Cousino's affidavit, which stated:

> 7. Based upon my understanding of the role of the consulting engineer and the contract provisions, [ETC] was not authorized and was not responsible for safety inspection, safety supervision, nor training of the contractor and its employees regarding safety. ETC also was not responsible under the Contract for reporting safety violations to the City. Furthermore, as the consulting engineer, ETC was not authorized nor responsible for employing safety inspectors or for supervising the contractor's employees.
>
> 8. [ETC] also acted as the Inspector for the City of Howell and was authorized by the contract to inspect for quality of workmanship and materials. Workmanship was inspected periodically to determine the quality of the labor and the completed product.

Excerpts of Cousino's two depositions were submitted below as well. Cousino testified:

> Q What was your understanding as to ETC's agreement with the City of Howell regarding Mr. [Loescher's] position on the site?
>
> A Ed was on site to inspect the quality of the completed construction so that it would conform to the city's specifications that were issued for the construction of the project. Referring to, you know, the pipe was installed properly and the joints were made up tight and it didn't leak when they did pressure testing.
>
> * * *
>
> Q Did ETC have any on-job site responsibilities on this City of Howell project with regards to safety inspections of work done by the contractors?
>
> A No.
>
> Q No duties, for example, to make sure that the trenches were a certain width at the top or that they were properly shored or trench boxes are used or anything of that nature?
>
> A No. No. It was the quality of the completed construction is what we were there to inspect.

(continued…)

1. DEFINITIONS OF TERMS

1.2 Whenever the term "Contractor" is used herein, it shall be understood to refer to the parties contracting to perform the work to be done under this Contract or to his legal representatives.

1.3 Whenever the term "Engineer" is used herein, it shall be understood to refer to an individual, firm or corporation, or their representatives who were responsible for the design of the project and provide the plans and specifications by which also evaluate [sic] the work of this project as the work is constructed.

1.4 Whenever the term "inspector" is used herein, it shall be understood to refer to an individual, firm or corporation, or their representatives employed by the City for the purpose of inspecting the various operations of construction and pass upon the suitability of the material to be used in the construction, on or off the site.

2. *ENGINEERING SUPERVISION*

2.1 The *Engineer and the Inspector shall have authority* to inspect all materials and workmanship entering into the work, to furnish all instructions and information regarding the plans and specifications that may be necessary, to supply supplementary or additional plans or specifications as he may deem expedient, and *to point out to the Contractor any disregard of any provisions of this Contract;* but the right of final acceptance or condemnation of the work will not be waived at any time during its progress.

* * *

25. SAFETY REGULATIONS

The Contractor shall obey and abide by all laws of any other unit of government relating to safety of employees and working conditions and other personnel on the job site. [Emphasis added.]

(…continued)

Wilson, the City of Howell's Public Service Director, testified that his understanding of the oral agreement between ETC and the City of Howell with regard to ETC's job responsibilities on the 1992 water main project was that ETC had no responsibility for: safety or supervision of the excavated trench; safety inspections of excavating, trenching, shoring and the excavated trench; training or supervising Rumsey employees with regard to adequate safety measures for excavating, trenching and shoring; reporting violations of excavating, trenching and shoring standards by Rumsey; employing safety inspectors with sufficient training to understand and evaluate violations of safety standards; or advising Rumsey supervisors of violations of safety standards with regard to excavation, trenching and shoring.

Defendant argues that, assuming ETC had a duty to monitor and advise Rumsey of MIOSHA violations, "any duty to report safety violations necessarily involves inspection and supervision, both of which are activities excluded from coverage under this policy." Defendant notes that ETC's purported failure to report MIOSHA violations "is a failure to report some event connected to its performance of its engineering agreement with the city," and that the professional services exclusion unambiguously precludes coverage for claims arising out of such a failure.

Defendant further argues that plaintiff's "approach is to segregate each allegedly wrongful act and determine whether, standing alone, it amounts to a professional activity." Defendant asserts that although some courts have followed this approach,[5] Michigan has clearly rejected that kind of analysis and instead analyzes a claim of negligence in its entirety, citing in support *Centennial Ins Co v Neyer, Tiseo & Hindo, Ltd,* 207 Mich App 235; 523 NW2d 808 (1994), *Bernthal Aetna Casualty & Surety Co,* 195 Mich App 501; 491 NW2d 236 (1992), nullified 444 Mich 1216 (1994),[6] and *American Fellowship Mutual Ins Co v Insurance Co of*

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[5] Defendant cites *Erie Ins Group v Alliance Environmental, Inc,* 921 F Supp 537 (SD IN), aff'd 102 F3d 889 (CA 7, 1996), to support its argument that even where courts "follow plaintiff's more narrow approach of examining particular conduct to determine whether it is professional in nature, the consensus appears to be that if the activity was being performed in furtherance of the terms of the professional agreement, any claims arising out of that activity will be subject to the professional services exclusion." *Erie*'s lengthy analysis includes discussion of many cases, none of which defendant discusses.

[6] *Bernthal, supra,* has no precedential effect, as it was nullified by the Supreme Court after the parties settled and stipulated to dismiss the appeal pending before that Court. See 444 Mich 1216-1217 (1994). The policy at issue in *Bernthal* was a "general insurance policy covering plaintiff's business premises," that "excluded coverage for accidents or injuries caused by rendering or failing to render a 'professional service.'" 195 Mich App at 502. The underlying suit was brought by a patient of the plaintiff eye doctor, who fell after the examination chair she attempted to sit in rotated. The circuit court determined that the term "professional service" was ambiguous because it was not defined in the policy. This Court reversed, concluding that the term "professional service" is unambiguous:

> [W]e believe the term "professional service" has a plain meaning and that judicial construction was unnecessary. See *Friske v Jasinski Builders, Inc,* 156 Mich App 468, 472-473; 402 NW2d 42 (1986).
>
> Secondly, the insurance policy excludes coverage for injuries arising from the rendering of or the failure to render a professional service. We believe it is clear that plaintiff was rendering a professional service when Hugaert was injured. We find the authority cited by defendant in this regard, especially *American Policyholders Ins Co v Michota,* 156 Ohio St 578; 103 NE2d 817 (1952), to be persuasive. In *Michota,* the Ohio Supreme Court included in the definition of the term "professional services" the maintenance, in a safe condition, of a metal hydraulic chair because the maintenance of the hydraulic chair was part of the chiropodist's "professional service."

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North America, 90 Mich App 633; 282 NW2d 425 (1979). Defendant also relies on *Atlantic Mutual Ins Co v Continental National American Ins Co*, 123 NJ Super 241; 302 A2d 177 (1973).[7]

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> In the underlying action, Hugaert was injured when the examination chair rotated as she was attempting to sit down to have her eyes examined by plaintiff. The examination chair was a piece of specialized equipment used by plaintiff in examining his patients. We believe that, as in *Michota*, the safe operation of the examination chair was part of plaintiff's professional service. Therefore, Hugaert's injuries arose from the rendering of or failure to render a professional service. Because the insurance policy excluded coverage for such injuries, defendant is under not obligation to indemnify plaintiff for losses incurred in the underlying action. [*Bernthal, supra* at 503-504.]

[7] *Atlantic Mutual* was a declaratory action to decide which of two insurance carriers was responsible for a previously agreed on settlement. In an underlying action, two employees of a general contractor injured when a trench collapsed brought suit against a professional engineering firm, Killam Associates, and their employer. Atlantic Mutual had issued a CGL policy to the engineering firm, and Continental had issued a professional liability policy to the engineering firm. The professional engineering firm had contracted with a township to

> "furnish general supervision of the work of the contractor as the construction progresses, to assist in a correct interpretation of the plans and specifications and to safeguard the Township against defects and deficiencies on the part of the contractor." [*Id.* at 243.]

Two employees of the contractor performing the sewer work referred to in defendant's contract with the township were injured when the sewer trench they were working in collapsed. The injured employees brought suit against the professional engineering firm and their employer. *Id.* The employees' complaint alleged that the professional engineering firm "negligently and carelessly supervised, controlled and directed" the contractor's work; that the engineering firm maintained a supervisory engineer at the job site and was thus in actual control of the work being done, that the engineering firm approved an unsafe method of excavation and permitted the employees to descend into the excavation. The CGL policy had an endorsement titled "Exclusion of Malpractice and Professional Services" that stated:

> It is agreed that as respects any classification stated above (Architect and Engineering, Draftsman) . . . the policy does not apply to injury . . . due to the rendering of or failure to render Any professional service.

The lower court held that the engineering firm's acts were in the nature of professional services excluded under the CGL, but covered under the professional liability policy. The superior court affirmed. The court stated that "[t]he bracing used in the trench violated the New Jersey Construction Safety Code and it was the express responsibility of [the engineering firm] to advise

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the township of any such deviation." *Id.* at 244. In addressing the "key question" whether the engineering firm's alleged acts were in the nature of professional services specifically excluded under the CGL policy, the court noted:

> A standard test as to what does fall within the meaning of a professional act is set forth in 7A Appleman, Insurance Law and Practice s 4504.3 (1972 Supp. at 77).
>
> > Professional services, in its usual connotation, means services performed by one in the ordinary course of the practice of his profession, on behalf of another, pursuant to some agreement, express or implied, and for which it could reasonably be expected some compensation would be due.
>
> The contract herein reads:
>
> > The supervision by the Engineer contemplated by this contract shall be that normally provided by a Consulting Engineer. The Engineer shall watch and report on the progress of the work and shall promptly report to the Township any substantial deviations from the contract.
>
> The supervision by Killam Associates which both parties contracted for is predominantly mental or intellectual. It required observation and constant evaluation of the work being done. The main thrust of the original plaintiffs' cause of action was the alleged failure of Killam Associates to observe that the contractor was violating the New Jersey State Construction Safety Code as to the manner in which the trench was fortified. The acts of Killam Associates in this respect clearly required the specialized knowledge and mental skill of a professional engineer.
>
> The service performed herein was within the ordinary practice of Killam Associates as professional engineers. It was done on behalf of another, the township, pursuant to a contract which provided Killam Associates with monetary compensation. It is generally held that under statutes relating to the licensing of professional engineers, the field of engineering involves the making of plans and designs as well as the supervision of construction. [Citations omitted.]
>
> It is the decision of this court that Killam Associates was derelict in providing professional services specifically excluded from coverage under the Atlantic Mutual Insurance Company policy. The full amount of the settlement of $68,500 is to be paid by the Continental National American Insurance Company which under its policy specifically covered this type of professional activity. [*Id.* at 246-248.]

Another case supporting defendant's position is *Sheppard, Morgan & Schwaab v United States*
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Centennial, supra, was a suit between a general liability insurer and a professional liability insurer to determine which insurer was responsible for indemnifying the insured, an engineering consulting firm, for its negligence. The policy of the professional liability insurer, Imperial, covered "professional services," and the general liability insurer, Centennial, excluded such services in its policy. *Id.* at 236.

In *Centennial*, a hospital contracted with an architectural firm for various improvements. The architectural firm contracted with the insured, an engineering consulting firm (Neyer, Tiseo) to perform a soils investigation. Neyer, Tiseo contracted with West Michigan Drilling to conduct the soil sampling. The architectural firm supplied Neyer, Tiseo with site location and plans, which did not show subsurface telephone lines. Two Neyer, Tiseo employees, a senior engineering technician and a staff engineer, neither of whom was licensed by the state, were on site on the day of the incident. The senior engineering technician tried to locate subsurface utility lines by consulting the site plans and checking the manhole and concluded there were no utility lines in the area of the first boring. Neither Neyer, Tiseo nor its subcontractor, West Michigan Drilling, had contacted "Miss Dig," a statutorily mandated organization created to receive notice of proposed excavation. *Id.* at 237. West Michigan Drilling began drilling and encountered an obstruction. The Neyer, Tiseo senior engineering technician determined that the obstruction was fill and drilling continued. The drilling damaged a Michigan Bell cable and Michigan Bell sent notice of a claim for damages. Neyer, Tiseo sought coverage from Centennial, its general liability insurer, asserting that "the damage occurred during the drilling of holes in the field, not during the performance of professional services." Centennial responded and asked that Imperial be put on notice because Michigan Bell's allegations against Neyer, Tiseo were for negligence and for identifying the drilling location. It was agreed that Centennial would defend the suit without prejudicing the rights of the parties in a subsequent declaratory judgment action, which would decide liability for the full amount of the assessment. *Id.* at 237-238. After both insurers and the insured filed motions for summary disposition, the circuit court granted Centennial's motion and denied the others. On Imperial's appeal, this Court affirmed:

> In this case, "professional services" are within the terms of coverage of Imperial's policy and are specifically excluded by Centennial's policy. Centennial's exclusion encompasses "preparation or approval of maps, plans, opinions, reports, surveys, designs or specifications," and "supervision, inspection or engineering services." Imperial argues that the failure to call "Miss Dig" did not involve a professional service, and Neyer, Tiseo contends that Centennial's exclusion clause is ambiguous. We do not agree. *The challenged terms have plain meanings and judicial construction is unnecessary.* See *Friske v Jasinski Builders, Inc*, 156 Mich App 468, 472-473; 402 NW2d 42 (1986).
>
> An application for leave to appeal this Court's decision in *Bernthal v Aetna Casualty & Surety Co*, 195 Mich App 501, 504-504; 491 NW2d 236 (1992), was dismissed by stipulation of those parties, and the Court of Appeals decision was

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Fidelity and Guaranty, 44 Ill App 3d 481; 358 NE2d 305 (1976).

> declared by the Supreme Court to have no precedential force or effect, 444 Mich 1217 (1994). Nonetheless, we find the reasoning in *Bernthal* persuasive. See also *American Policyholders Ins Co v Michota*, 156 Ohio St 578; 103 NE2d 817 (1952). *The decision in this case to drill for soil samples before calling "Miss Dig" was preliminary to, and part of, the "professional service" of conducting a soil investigation.* [*Centennial, supra* at 238-239. Emphasis added.]

In *American Fellowship Mutual, supra,* the plaintiff insurer (AFM) was sued in an underlying action by a woman who had been attacked in a parking lot in which she rented space. The underlying suit was for negligence and breach of contract against AFM, and alleged that the mechanical gate to the parking lot had been damaged two months earlier by an auto driven by an insured of AFM, and that the attackers thus got access to the lot because of AFM's failure to have the gate timely repaired. *Id.* at 634. AFM had an "office building" insurance policy issued by the defendant (INA) that insured AFM's office building, but did not insure the building adjacent to the parking lot at issue. AFM asked INA to take over AFM's defense. Clause "n" of the insurance policy excluded personal injury due to "the rendering of or failure to render . . . . any professional service." *Id.* at 635.

The circuit court granted INA's motion for summary disposition, concluding that AFM's adjusting services were professional services within the meaning of the insurance contract. On AFM's appeal, this Court affirmed, noting that the sole question was whether INA's insurance contract covered liability arising out of the alleged negligent operation of AFM's business. *Id.*

> Although one might argue in the abstract whether the services of an insurance adjustor could be deemed a "professional service", in reviewing the surrounding exclusions as stated in clause "n" of the policy, it is clear that services such as those performed by plaintiff were intended to be excluded from coverage.
>
> This same interpretation has been given to similar exclusions in other jurisdictions. An "owners', landlords' and tenants'" insurance policy issued to a beauty shop operator and covering, as the court put it, "ordinary risks of dwellings and commercial buildings", was involved in *Knorr v Commercial Casualty Ins Co*[, 171 Pa Super 488; 90 A2d 387 (1952)]. An exclusion specifically provided that the policy did not apply to the rendering of any "professional services" by any person, including any physician, surgeon, dentist, optician, nurse, barber, manicurist, masseur, chiropodist, or other attendants. The injury occurred when a customer seated under a hair dryer was struck on the head when the machine unexplainedly fell forward and downward. Holding that the drying of a customer's hair in the beauty parlor by means of a mechanical hair dryer constituted professional services and, thus, came within the exclusion of the policy, the court said that since the policy was issued specifically to cover a beauty parlor, it was clear that the term "professional services" referred to the technical work performed by beauticians and hairdressers.
>
> In *Multnomah County v Oregon Automobile Ins Co*, [256 Or 24; 470 P2d 147 (1970)], plaintiff sued the county for the failure of prison authorities to give a prisoner a necessary shot of insulin. The court, in interpreting an exclusion for a

"professional act or service" within a liability policy that excluded "(2) injury, sickness . . . due to the rendering of or failure to render any professional service", *found that a jail medical technician was rendering a "professional service"* and stated:

> "In determining whether a particular act or omission is of a professional nature, *the act or omission itself must be looked to and not the title or character of the party who performs or fails to perform the act*. *Marx v Hartford Accident and Indemnity Company*,[183 Neb 12; 157 NW2d 870 (1968)]. The decision to give or to withhold insulin *required the application of special learning which the medical attendant lacked* and Barendrecht [the prisoner] was therefore deprived of a professional service which, if given, would have resulted in the required injection.
>
> "5. The County also contends that the provision is ambiguous and can be construed as being applicable only to a set of facts which involve a direct and immediate failure of a licensed physician to act or to act properly in relation to a patient. In effect, *the contention is that the exception contemplates only a set of facts which would substantiate an action of medical malpractice against a physician. We cannot so construe it.* It excepts from coverage *the insured's* failure to render a professional service.' 256 Or 24, 28-29.

In the case at bar, the trial court did not err in determining that the "professional services" exclusion, as used in the life [sic] insurance contract, refers to any business activity conducted by plaintiff insurance company. [90 Mich App at 636-638. Emphasis added.]

To the extent that defendant argues that plaintiff incorrectly focuses on the specific activity involved, we disagree. Application of the exclusion requires an examination of the nature of the act or omission involved, rather than the title or character of the person who performed or failed to perform the act. *Id.* Thus, the issue is whether the failure to advise Rumsey and its employees of safety violations was a failure to render a professional service. It is also the case, however, that the fact that Loescher was not himself an engineer is not controlling.

We agree with defendant that although one must look to the act or omission involved, the Michigan cases reveal a broad view of the term "professional services," and that it is not dispositive that one need not be an engineer to recognize a MIOSHA violation in trenching. Assuming ETC had a duty to recognize and advise regarding such a violation, the failure to do so involves a failure to render the professional inspection and supervision services assumed under the contract. The recognition of such a violation involves some specialized knowledge and expertise in the area of trenching for water main replacement, which was allegedly to have been provided by ETC under the contract. We conclude that under Michigan case law the exclusion is

not ambiguous, and the circuit court erred in concluding that the allegations in the underlying complaint did not fall within the exclusion.[8]

Reversed.

/s/ Henry William Saad
/s/ Helene N. White
/s/ Joel P. Hoekstra

[8] We are aware that there are cases that have held that allegations of failure to supervise with respect to safety violations do not constitute allegations regarding "the performance of professional services." *CBM Engineers, Inc v Transcontinental Ins Co*, 460 So2d 745, 747 (La Ct App, 1984), and *Gregoire v AFB Const, Inc*, 478 So2d 538, 541 (La Ct App, 1985), held that an engineering firm's breach of its duty to warn of unsafe conditions could be found to be outside of the "professional" or "supervisory" services it contracted to provide and that a general liability insurer had a duty to defend. Additionally, at oral argument before this Court, plaintiff cited *Camp Dresser & McKee, Inc v Home Ins Co*, 30 Mass App Ct 318; 568 NE2d 631 (1991), which affirmed the lower court's determination that the defendant insurer had breached its duty to defend the plaintiff, an international consulting engineering firm under contract with the City of Detroit to provide services with regard to Detroit's water pollution control system and its wastewater treatment plant.

However, the Louisiana cases seem to be based on a general duty regarding the work place, not a duty assumed under a contract to perform professional services, and the *Camp-Dresser* case included allegations of negligence concerning the insured's actual management and control of a waste treatment plant.