STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU GENERAL INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellant,

v

HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff,

and

SHANNON PITCHER, Personal Representative of the Estate of PERCY FRANK, Deceased, and EDGAR FRANK, d/b/a GBS CEMENT & BLOCK,

Defendants/Cross-Defendants-Appellees.

UNPUBLISHED
March 25, 2008

No. 272930
Genesee Circuit Court
LC No. 05-081070-CK

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals as of right the trial court's orders granting summary disposition to defendant Shannon Pitcher, the personal representative of the estate of Percy Frank (hereinafter "the estate"), pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm the decisions of the trial court.

Plaintiff issued a business liability insurance policy to defendant Edgar Frank, d/b/a GBS Cement & Block, an unlicensed contractor. Edgar was hired to replace a collapsed basement wall in a residential home, but was not properly licensed to perform such work. Edgar's father, decedent Percy Frank, was present at the work site helping another worker clean mortar joints in the completed wall while Edgar was backfilling the excavation on the other side of the wall. The wall collapsed, killing Percy. The Michigan Occupational Safety and Health Administration

("MIOSHA") issued Edgar a citation for backfilling the excavation site without bracing the basement wall, and for using an improper backfilling method.

The estate brought a wrongful death action against Edgar. Plaintiff brought the instant action, seeking a declaratory judgment that it had no duty to defend or indemnify Edgar pursuant to criminal acts and negligent supervision exclusions in its insurance policy.[1] Plaintiff's policy contained the following exclusions, which provided that its duty to defend and indemnify did not apply:

> 21. to bodily injury, personal injury, or property damage arising out of and/or resulting from any actual or alleged negligent hiring, training, and/or supervising of any former or current employee of any insured or any volunteer worker, subcontractor, or any person under the direction and control of any insured[.]
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> 25. to bodily injury of property damage resulting from a criminal act of an insured regardless of whether an insured person is actually charged with, or convicted of, a crime[.]

"Criminal act" is defined in the policy as "any act or omission or number of actions or omissions that constitute a felony or misdemeanor crime prohibited by statute or ordinance."

The parties filed cross-motions for summary disposition concerning the applicability of these exclusions. The trial court determined that there was no genuine issue of material fact that the exclusions did not apply and, accordingly, granted summary disposition in favor of the estate.

I.

We review a trial court's decision on a summary disposition motion de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed*, *supra*. If the proffered evidence fails to establish a genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, summary disposition is properly granted. *Id.*

Insurance policies are subject to the same principles of contract interpretation that apply to other kinds of contracts. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App

[1] Plaintiff also alleged that coverage was barred by other exclusions in the policy, but the other exclusions are not at issue on appeal.

708, 714; 706 NW2d 426 (2005), citing *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Accordingly, the contractual language must be given its ordinary and plain meaning, and every word, clause, and phrase must be given effect. *Royal Prop Group, supra* at 715. The court should avoid a construction that would render any part of the contract surplusage or nugatory. *Id.* If a provision is clear and unambiguous, its terms must be understood in their plain, ordinary, and popular sense. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). Exclusions in insurance policies are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). The insurer bears the burden of proving that an exclusion applies. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

II.

Plaintiff first argues that the policy's criminal acts exclusion bars coverage for the estate's claim against Edgar because Percy's death arose from Edgar's criminal conduct. Plaintiff asserts that if Edgar had been a licensed builder, he would have known of the inherent risks invoked by the construction methods he used to put up the wall. Hence, plaintiff argues, because Edgar did not have the proper training that a licensed builder would have, the resulting death was more than incidental to the criminal violation.

The criminal acts exclusion clearly provides that plaintiff is not required to defend or indemnify the insured with respect to "bodily injury or property damage resulting from a criminal act of an insured[.]" It is not disputed that Edgar's conduct in constructing the basement wall without a builder's license constituted a misdemeanor pursuant to MCL 339.601(3). See also MCL 339.2403 and MCL 339.2404. However, contrary to plaintiff's argument on this issue, the pertinent issue is whether Percy's death was an injury "resulting from a criminal act" within the meaning of the exclusion.[2] Relying on *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006), plaintiff argues that "resulting from" is the equivalent of "arising out of," and therefore requires only a causal relationship that is "more than incidental." Thus, plaintiff argues, while the criminal act needs to be more than incidental to the resulting injury or loss, it need not be the proximate cause of the resulting injury or loss.

The issue in *Johnson* involved the proper construction of MCL 777.41, which required a sentencing court to score offense variable points for the number of criminal sexual penetrations "arising out of" the sentencing offense. *Id.* at 99-101. The Court held that the phrase "arising out of" referred to "a causal connection between two events of a sort that is more than

[2] Plaintiff's argument that "but for" Edgar's lack of training the accident would not have occurred invites this Court to engage in speculative, attenuated fact-finding. In order to find that a question of fact exists as to whether there was a causal connection between Edgar's criminal act and Percy's death we must first assume that Edgar would have been properly trained in order to obtain a proper building license. Then we must assume that because Edgar was a licensed- rather than an unlicensed builder-he would always adhere to his training. Given the remoteness of plaintiff's assertions we decline their invitation to engage in speculative fact-finding.

incidental." *Id.* at 101. At issue here, however, is not the meaning of "arising out of" in the context of a criminal sentencing statute, but rather the meaning of "resulting from" as used in the policy exclusion.

In *Robinson v Detroit*, 462 Mich 439, 456-457; 613 NW2d 307 (2000), our Supreme Court considered the meaning of the phrase "resulting from" as used in the motor vehicle exception to the governmental immunity act, MCL 691.1405. The Court stated: "Because there is no case law that has previously examined the phrase 'resulting from' we turn to the dictionary. *The American Heritage Dictionary, 2nd College Ed*, p 1054, defines 'result' as: 'To occur or exist as a consequence of a particular cause[;] To end in a particular way[;] The consequence of a particular action, operation or course; outcome.'"[3] In *Robinson*, the plaintiff was the passenger in a car being pursued by the defendant police officer. The driver of the car attempted to flee from the police, and crashed the car in flight, causing injury to the passenger. The issue presented was whether the accident "resulted from" the use of a motor vehicle pursuant to MCL 691.1405, which provides an exception to governmental immunity for injury resulting from a governmental agent's negligent use of a government-owned vehicle. *Id.* at 444, 447-448. The Court concluded that the plaintiff's accident did not result from the police officer's use of a motor vehicle because the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object. *Id.* at 457. Thus, even though the plaintiff alleged that the pursuing officer failed to operate his vehicle in a safe, prudent, and reasonable manner, because the police vehicle did not collide with the fleeing car or force the fleeing car to collide with another vehicle or object, the plaintiff's pleadings were insufficient to invoke the motor vehicle exception. *Id*. at 456.

Based on our Supreme Court's definition and analysis of the required nexus in the phrase "resulting from" as set forth in *Robinson, supra*, we concur with the trial court that there is no genuine issue of material fact that Percy's death did not "result from" Edgar's criminal acts. Although Edgar's undertaking of work for which he had not obtained a license constitutes a criminal offense, that act alone is insufficient to establish a question of fact as to whether Percy's death resulted from the criminal act.

Percy's death was not a consequence of Edgar's failure to obtain a license before building a vertical wall. Rather, the facts clearly establish that Percy's death was a consequence of Edgar's chosen method of bracing the wall, coupled with his use of an improper backfilling method. Plaintiff cannot establish any fact pattern that could lead the trial court or this Court to conclude that a question of fact existed as to whether Edgar's status as a licensed or unlicensed builder was a cause for Percy's death. Therefore, because plaintiffs cannot establish a question of fact that Percy's death resulted from Edgar's criminal actions in undertaking construction work without the requisite license, the criminal acts exclusion does not apply.

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[3] *Random House Webster's College Dictionary* (2d ed), p 1108, defines the verb "result" as "to arise or proceed *as a consequence of actions*, premises, etc.; be the outcome." (Emphasis added.)

Plaintiff argues that this Court has previously applied insurance policy exclusions in circumstances involving acts that were even more attenuated from the injury than in the instant case. In *State Farm Fire & Cas Co v Huyghe*, 144 Mich App 341; 375 NW2d 442 (1985), this Court considered whether a motor vehicle exclusion in a homeowner's policy precluded coverage where the defendant insured tried to drive his truck below a clothes line that was attached to the house by a cleat. The truck hit the line and the cleat tore free from the house and struck the victim in the head. *Id.* at 343-344. The plaintiff insurer contended that it had no obligation to defend or indemnify the insured under the policy, because the motor vehicle exclusion precluded coverage for injuries arising out of the ownership or use of a motor vehicle. The defendants argued that the victim's injuries resulted from the negligent placement of the clotheslines, not from the use of a motor vehicle. *Id.* at 346-347. This Court disagreed, holding that any risk created by the placement of the clothesline was the result of the truck being driven in that area. *Id.* at 347.

Huyghe does not provide support for plaintiff's position. The clothesline in *Huyghe* did not pose any threat of harm to anyone until the driver drove his truck in the area. It was the motor vehicle, not the location of the clothesline, that set into motion the chain of events that resulted in personal injury. *Id.* at 347. In contrast, Edgar's conduct in building a wall without the required license did not set into motion the chain of events that resulted in Percy's death; rather, it was his negligent construction methods that led to the fatality.

Plaintiff also relies on *Allstate Ins Co v Fick*, 226 Mich App 197; 572 NW2d 265 (1997), in which the insurer sought to apply a criminal acts exclusion where the defendant insured illegally procured a prescription medication and administered it to the decedent, who suffered a fatal adverse reaction. *Id.* at 198-199. This Court held that the exclusion applied because there was "no dispute that [the defendant's] actions constituted a criminal act." *Id.* at 202. *Fick* is clearly distinguishable from the instant case, because the defendant's illegal conduct was not attenuated from the decedent's death. Rather, the illegal conduct directly involved procuring the medication that caused the decedent's death.

Contrary to what plaintiff argues, the trial court did not effectively rewrite the insurance contract by requiring a causal connection between Edgar's criminal conduct and Percy's death, but rather, properly applied the "resulting from" language in the criminal acts exclusion.

Plaintiff also argues that Edgar's false advertisement was a criminal act that precluded coverage under the criminal acts exclusion. The advertisement represented that GBS Cement & Block is licensed and performed a variety of jobs including basement work. Although Edgar held a license for "flatwork" or sidewalk work, he was not licensed to do all the types of projects listed in the advertisement. Accordingly, the advertisement is misleading and may constitute a misdemeanor under MCL 750.33. Nonetheless, Percy's death did not result from the misleading advertisement any more than it resulted from Edgar's lack of licensure. Thus, the trial court properly granted summary disposition in favor of the estate with respect to this issue.

III.

Plaintiff also argues that the trial court erred in granting summary disposition for the estate with respect to the negligent supervision exclusion, which provides that coverage is excluded for losses related to injury or property damage "arising out of and/or resulting from any

actual or alleged negligent hiring, training, and/or supervising of any former or current employee of any insured or any volunteer worker . . . ." Plaintiff argues that negligent supervision is the only basis for Edgar's liability in the underlying complaint, because Edgar's duty to protect Percy from jobsite hazards arose solely from his supervisory responsibilities. While defendants assert that plaintiff failed to raise this issue in its pleadings, we are convinced that this issue was properly brought before the trial court and this Court. Accordingly, we consider the merits of the issue.

A plaintiff in a negligence action must prove the elements of duty, breach of duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A person engaged in the prosecution of any undertaking bears an obligation to use due care, or to govern his actions to avoid unreasonably endangering other persons. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 15; 596 NW2d 620 (1999). A well-established corollary to this principle is that a contractor owes a duty of care to every person lawfully present on a jobsite. *Clark*, *supra* at 251; *Cipri*, *supra* at 15. Accordingly, Edgar owed Percy a duty of care based on Percy's lawful presence at the jobsite, independent of any duty that arose from a supervisor-supervisee relationship. Thus, the negligent supervision exclusion precludes coverage only if Percy's death arose out of or resulted from negligent supervision.

Plaintiff implies that the negligent supervision exclusion applies because Edgar was negligent in allowing Percy and another worker to work in front of the wall while he was backfilling the excavation behind the wall. This premise is flawed because Edgar's negligent work, not his supervisory decisions, created the hazard that caused Percy's death. The evidence established that the basement wall collapsed because Edgar failed to brace it during backfilling, and because Edgar used an improper backfilling method. The estate's underlying action is premised on Edgar's faulty construction methods, not his supervision of Percy. Edgar's role as supervisor was merely incidental to the cause of Percy's death. Accordingly, the trial court did not err in ruling that the negligent supervision exclusion did not apply to the underlying complaint, thus entitling the estate to summary disposition with respect to this exclusion.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering