

STATE OF MICHIGAN
COURT OF APPEALS

ENVISION BUILDERS, INC.,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF
AMERICA, MASSACHUSETTS BAY
INSURANCE COMPANY and HANOVER
INSURANCE COMPANY,

Defendants/Cross-Defendants,

and

SECURA INSURANCE,

Defendant/Cross-Plaintiff-
Appellant.

UNPUBLISHED
July 24, 2012

No. 303652
Macomb Circuit Court
LC No. 2010-001389-CK

ENVISION BUILDERS, INC.,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF
AMERICA,

Defendant/Cross-Defendant-
Appellant,

and

MASSACHUSETTS BAY INSURANCE
COMPANY and HANOVER INSURANCE
COMPANY,

Defendants/Cross-Defendants,

No. 303668
Macomb Circuit Court
LC No. 2010-001389-CK

and

SECURA INSURANCE,

Defendant/Cross-Plaintiff.

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

These consolidated appeals involve an insurance coverage dispute between plaintiff Envision Builders, Inc. on the one hand, and defendants Citizens Insurance Company of America and Secura Insurance on the other hand. The trial court denied Secura and Citizens' joint motion for summary disposition under MCR 2.116(C)(10) and granted summary disposition in favor of Envision under MCR 2.116(I)(2). Secura appeals by leave granted in Docket No. 303652, and Citizens appeals by leave granted in Docket No. 303668. We reverse the trial court's order and remand for entry of an order granting defendants' motions for summary disposition.

"A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), a court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* (citation omitted). Summary disposition may be granted under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citation omitted). The interpretation of an insurance contract is a question of law that is also reviewed de novo. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004).

As with any other contract, "[a]n insurance policy must be enforced in accordance with its terms." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). When construing an insurance contract, a court must examine the contractual language and give it its plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Clear contractual language must be enforced as written unless the provision would violate law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 468, 470; 703 NW2d 23 (2005). "In deciding whether an insured is entitled to insurance benefits, we employ a two-part analysis." *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 24; 800 NW2d 93 (2010). "First, we determine if the policy provides coverage to the insured." *Id.* at 24-25 (quotations and citation omitted). If the policy supplies coverage, "we then ascertain whether that coverage is negated by an exclusion." *Id.* at 25 (quotations and citation omitted). "It is the insured's burden to establish that a claim falls within the terms of the policy." *Id.* (quotations and citation omitted).

Here, the relevant policy provisions provide coverage for "property damage" caused by an "occurrence." "Occurrence" is defined in the policies as "an accident, including continuous

or repeated exposure to substantially the same general harmful conditions.” The policies do not define “accident,” so we turn to the dictionary. *Pugh v Zefi*, 294 Mich App 393, 396; 812 NW2d 789 (2011) (If the contract fails to define a term, “it is appropriate to consult a dictionary to determine the ordinary or commonly used meaning . . .”). “Accident” is defined as “an event occurring by chance or arising from unknown causes.” *Webster’s Ninth New Collegiate Dictionary* (1980). Consistent with this definition, our Court has held that “[a]n ‘accident,’ within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby—that is, takes place without the insured’s foresight or expectation and without design or intentional causation on his part.” *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 374; 460 NW2d 329 (1990) (quotations and citation omitted). “In other words, an accident 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.* (quotations and citation omitted).

Envision seeks to recover for damage to its own work product for negligence committed by its subcontractor, Cougar Contracting. There is no genuine issue of material fact that both insurance policies at issue are standard commercial liability policies covering damages arising from an “occurrence.” The claimed occurrence in this case was the collapse of roof trusses due to wind. Contrary to the trial court’s determination that the contract “did not provide any specific contractual requirements for the temporary bracing,” the construction specifications required Envision to “[f]urnish and install temporary bracing and stiffeners as needed during erection process, in accordance with the most current version of Bracing Wood Trusses published by the Truss Plate Institute” and “[p]rovide complete lateral bracing during erection, and permanent lateral bracing as shown on Drawings, or as required by truss manufacturer.” An investigation – the facts of which are undisputed – revealed that the “the roof trusses . . . collapsed due to lack of adequate temporary bracing.” Specifically, “[w]ind speeds which varied from approximately 10 to 35 miles per hour . . . caused sufficient force to occur on the open structure to loosen and finally pull out enough nailed bracing connections to allow the collapse to occur.” The investigation found that “[n]o diagonal bracing members appear[ed] to be present which would represent the permanent bracing system as depicted on the construction drawing.” Thus, the trial court erred in stating that “[t]he failure to install adequate temporary bracing for the wind speeds does not demonstrate defective workmanship under the contract.” Rather, the evidence showed that there was no genuine issue of material fact that the trusses collapsed due to Cougar’s defective workmanship, i.e., the failure to install trusses as needed during the erection process.

Likewise, the undisputed evidence established that there was no genuine issue of material fact that damage only occurred to the building being constructed by Envision. Envision recovered \$50,000 from Secura under its additional contractors installation coverage for damage to the trusses as covered property “to be installed” “[a]waiting and during installation, or awaiting acceptance by the purchaser.” It is inconsistent, and factually inaccurate, for Envision to also claim that the damaged trusses were the property of the Road Commission of Macomb County (RCMC) because they had already been installed on the RCMC’s property. The evidence showed that the construction project was not complete or turned over to the RCMC at the time of the collapse. A county highway engineer for the RCMC provided undisputed testimony that while title to the property remained with the RCMC, there was no damage to that

property as a result of the collapse and the RCMC did not “accept ownership of the trusses and the connections, materials, at any time prior to . . . accepting ownership of the entire complete building.” While the completed facility would ultimately become a fixture and part of the land owned by the RCMC, the evidence did not show that the collapse harmed the RCMC’s property. The trial court’s determination that the trusses were “incorporated into RCMC’s real property as an improvement” is not supported by the record. Rather, the evidence established that there was no genuine issue of material fact that the collapse did not harm the RCMC’s property.

In sum, the trial court erred in concluding that there was an occurrence triggering coverage. Viewed in a light most favorable to Envision, the undisputed evidence showed that there were no genuine issues of material fact and that Secura and Citizens were entitled to judgment as a matter of law. Accordingly, the trial court erred in denying defendants’ motions for summary disposition.

Even if there was coverage under the contract, we hold that the trial court also erred in determining that the asserted exclusions did not apply to bar Envision’s claimed coverage. The Secura policy excludes “‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” Thus, the Secura policy provides that property damage for which Envision is obligated to pay damages by reason of its assumption of liability in its contract with the RCMC is excluded from coverage. Under the contract, Envision was required to “[f]urnish and install temporary bracing and stiffeners as needed during erection process, in accordance with the most current version of Bracing Wood Trusses published by the Truss Plate Institute” and “[p]rovide complete lateral bracing during erection, and permanent lateral bracing as shown on Drawings, or as required by truss manufacturer.” Further, “[a]ny trusses that are damaged during delivery or erection shall be replaced at no extra cost to the Owner.” Because Envision was obligated to pay damages for property damage by reason of its assumption of liability in its contract with the RCMC, the damage to the trusses is excluded from coverage.

The trial court concluded that the contractual liability exclusion “applie[d] to indemnity agreements.” However, under this language indemnity agreements as well as the assumption of liability in a contract or agreement are excluded, so the trial court was correct in its determination that the contractual liability exclusion applied to indemnity agreements. Nevertheless, the trial court failed to recognize that the contractual liability exclusion also applied to the assumption of liability in a contract like the one between Envision and the RCMC in which Envision assumed liability for damage to the trusses. Further, the trial court erroneously concluded that Envision is “not obligated to pay for the property damage due to any assumption of liability contained in the contract” because the contract specifically provides that “[a]ny trusses that are damaged during delivery or erection shall be replaced at no extra cost to the Owner.” Accordingly, no genuine issue of material fact existed that the contractual liability exclusion precluded coverage in this case.

The Secura and Citizen policies also both exclude damage to “[p]roperty you own, rent or occupy,” so the policies expressly exclude coverage for damage to property that Envision owned, rented, or occupied. As previously noted, while title to the real property remained with the RCMC, the RCMC did not “accept ownership of the trusses and the connections, materials, at any time prior to . . . accepting ownership of the entire complete building.” Thus, during the

course of construction, Envision owned the materials used in the construction and occupied the site on which it was building. That occupation and ownership falls within the exclusions contained in the policies for property owned or occupied by the insured. Accordingly, no genuine issue of material fact existed that the property damage exclusion precluded coverage in this case.

The Secura policy also excludes coverage for damage to “[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the ‘property damage’ arises out of those operations,” and the Citizens policy excludes coverage for damage to “[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the ‘property damage’ arises out of those operations.” The evidence shows that Envision supplied the trusses and other lumber to the job site where it was assembled by Cougar under the subcontract, and that, due to inadequate temporary bracing insufficient to withstand wind speed of 10 to 35 miles per hour, most of the roof framing structure assembled by Cougar collapsed, damaging the wood trusses, rough lumber, and other materials that had already been installed. Thus, the undisputed facts show that Envision and Cougar were performing operations by building the facility and that the damage to the roof trusses arose out of those operations.

The trial court determined that the exclusion does not apply “where the work has been completed and no one is presently performing operations” and that the exclusion does not apply to preclude coverage because “no one was working on the premises at the time of the collapse and the collapse occurred the day after the subcontractor completed installing the trusses.” The trial court improperly read into the contract a literal requirement that actual, physical operations had to be underway at the exact moment of damage for the exclusion to apply. “Clear and unambiguous language may not be rewritten under the guise of interpretation; contract terms must be enforced as written, and unambiguous terms must be construed according to their plain and commonly understood meaning.” *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). “Courts may not create ambiguities where none exist. . . .” *Id.* The undisputed facts show that Envision and Cougar were performing operations by building the salt storage facility and that the damage to the roof trusses arose out of those operations. Accordingly, no genuine issue of material fact existed that property damage while performing operations exclusion precluded coverage in this case.

The Secura and Citizen policies additionally exclude coverage for “[t]hat particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.” “Your work” is defined in the policies to mean work or operations performed by or on behalf of the insured, as well as materials, parts, or equipment furnished in connection with such work or operations. The evidence established that due to the collapse, Envision repaired the property damage, including repairing Cougar’s work, damage to the trusses, rough lumber, and other materials, and damage to other portions of the project caused by the collapse. Thus, the undisputed facts show that the damaged property needed to be restored, repaired, or replaced because Cougar incorrectly performed work on Envision’s behalf by failing to install adequate temporary bracing.

The trial court determined that the exclusion did not apply because “the damages due to the failure of the trusses and inadequate bracing were not the result of any incorrect work by plaintiff and are not excluded from coverage under the policies,” and noted that “[a]lthough the temporary bracing was inadequate for the wind speed, the contract did not provide any specific requirements regarding the temporary bracing.” However, as we previously noted, the construction specifications specifically required Envision to “[f]urnish and install temporary bracing and stiffeners as needed during erection process, in accordance with the most current version of Bracing Wood Trusses published by the Truss Plate Institute” and “[p]rovide complete lateral bracing during erection, and permanent lateral bracing as shown on Drawings, or as required by truss manufacturer.” The trial court also determined that “[t]he record demonstrates the trusses were properly installed and there is no evidence that this work was incorrectly performed,” but, the undisputed facts from the investigation revealed that the “the roof trusses . . . collapsed due to lack of adequate temporary bracing.” Additionally, it was because the trusses were improperly installed that “[w]ind speeds which varied from approximately 10 to 35 miles per hour . . . caused sufficient force to occur on the open structure to loosen and finally pull out enough nailed bracing connections to allow the collapse to occur.” Thus, the trial court’s determination that “the damages due to the failure of the trusses and inadequate bracing were not the result of any incorrect work by plaintiff” is not supported by the evidence. Rather, the unrefuted evidence shows that there was no genuine issue of material fact that the trusses collapsed due to Cougar’s defective workmanship.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction. Defendants may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello