STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL REDMER,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE,

Defendant-Appellant,

and

JOHN MERLO, BETH MERLO, DENNIS ENGELHART, and LOTTIE ENGELHART,

Defendants.

UNPUBLISHED
February 15, 2000

No. 213603
Livingston Circuit Court
LC No. 97-015727 CK

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Defendant Auto Owners Insurance (Auto Owners) appeals as of right from the trial court's final order granting plaintiff's motion for summary disposition in this insurance liability case. We affirm.

On September 9, 1994, Dennis and Lottie Engelhart filed a complaint against Tyrone Township, Russell Redmer (plaintiff), and John and Beth Merlo, alleging that a portion of the Merlos' home, which was built by plaintiff and which was next door to the Engleharts' home, encroached approximately six inches into the Engelharts' side yard setback in violation of the township zoning ordinance. The Engelharts asserted that in addition to spatial encroachment, they were burdened with drainage and runoff problems as a direct result of the construction efforts of plaintiff and the Merlos. On March 18, 1996, the Merlos filed a cross-claim against plaintiff for breach of contract, fraud/misrepresentation, breach of express warranty, breach of implied warranty, violation of the Michigan residential builders licensing act, and violations of the Michigan Consumer Protection Act. Many of the Merlos' claims against plaintiff involved allegations of faulty workmanship and failure to use proper material and labor in constructing their home. However, under the breach of contract count, the Merlos also sought damages

in an amount equal to any judgment received by the Engelharts as a result of their claim against the Merlos and costs and attorney fees incurred in defense of that claim.

On March 17, 1997, plaintiff filed a declaratory judgment action against defendant Auto Owners, requesting that Auto Owners be required to defend and indemnify plaintiff with regard to the Merlos' cross-claim. On May 19, 1997, plaintiff moved for partial summary disposition. The court granted plaintiff's motion only as to his claim that defendant was obligated to provide him with a defense to the Merlos' claim for recovery of any damages awarded to the Engelharts for encroachment of the Merlos' home within the side yard setback. The court stated that its ruling did not address any alleged duty on the part of defendant to indemnify plaintiff for any of the claims raised in the Merlos' cross-claim. The court denied a request that defendant's attorneys replace plaintiff's counsel, Gary Collins. Ultimately, both plaintiff and defendant settled with the Engelharts.

On May 13, 1998, plaintiff moved for summary disposition, pursuant to MCR 2.116(C)(10), of its claim that defendant had a duty to pay plaintiff's attorney fees and costs and indemnify plaintiff for the $5,500 he paid to settle with the Engelharts. The court granted plaintiff's motion for summary disposition, in part, and ordered defendant to pay plaintiff's attorney fees in the amount of $8,409.65. However, the court denied plaintiff's motion with regard to his claim for indemnification of the settlement amount.

Defendant first argues that the trial court erred in granting summary disposition in favor of plaintiff with regard to defendant's duty to defend plaintiff because the claims in the Merlos' cross-complaint do not fall within the coverage of plaintiff's insurance policy with defendant. We disagree. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the moving party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co,* 458 Mich 288, 294; 582 NW2d 776 (1998). The interpretation of an insurance contract is a question of law that we also review de novo. *Nabozny v Pioneer State Ins,* 233 Mich App 206, 210; 591 NW2d 685 (1998).

The duty of an insurer to defend the insured depends upon the allegations in the complaint of the third party in its action against the insured. *Smorch v Auto Club Group Ins,* 179 Mich App 125, 128; 445 NW2d 192 (1989). The insurer has a duty to defend if the underlying allegations even arguably come within the policy coverage. *Allstate Ins Co v Fick,* 226 Mich App 197, 202; 572 NW2d 265 (1997). Furthermore, an insurer has a duty to defend even where only some of the theories of liability are covered by the policy. *South Macomb Disposal Authority v American Ins Co (On Remand),* 225 Mich App 635, 691; 572 NW2d 686 (1997).

Here, the Merlos' complaint requested damages for, among other things, attorney fees incurred in defense of the Engelharts' claim against the Merlos. The Engelharts' complaint asserted that, in addition to the problems associated with the spatial encroachment of the Merlos' home on the side yard setback, they experienced drainage and runoff problems as a result of plaintiff's construction of the Merlos' home in violation of the setback requirements, and requested damages for "diminution in use of

their property by virtue of the encroachment," and "other damages not yet appreciated." Defendant contends that because plaintiff's actions do not constitute an "occurrence" within the meaning of plaintiff's insurance contract with defendant, it had no duty to provide plaintiff's defense to the Merlos' lawsuit. When presented with a dispute regarding coverage, a court must determine what the parties' agreement is and enforce it. *Engle v Zurich-American Ins Group (On Remand),* 230 Mich App 105, 107; 583 NW2d 484 (1998).

Plaintiff's insurance policy provides that defendant has the duty to defend its insured in any suit seeking damages because of property damage to which the insurance applies. "Property damage" is defined as

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

The policy also provides that the insurance applies only to property damage that is caused by an "occurrence." "Occurrence" is defined as

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Plaintiff's insurance policy does not define the term "accident." Thus, this Court must interpret the term in accordance with its commonly used meaning. *Nabozny*, supra at 212. The word "accident" is common in most liability policies and should not be construed to exclude all claims involving negligence. *Hawkeye-Security Ins Co v Vector Construction*, 185 Mich App 369, 376; 460 NW2d 329 (1990). Recent court cases have interpreted "accident" to mean:

> 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.*, citing *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 403; 531 NW2d 168 (1995).]

Whether there is an accident should be evaluated from the perspective of the insured. *Nabozny, supra* at 213. Furthermore, it is possible for intentional conduct to result in an unintended and unexpected injury constituting an accident. *Id.* The focus of the inquiry is on the result or consequence of the insured actor's behavior, not the act alone. *Id.* Here, although plaintiff intended to construct the Merlos' home, because he did not do so with the intention of interferring with the Engelharts' use of their property or causing drainage and runoff problems, any property damage was the result of an accident and therefore was an "occurrence" under plaintiff's insurance policy.

Defendant contends that even if the alleged property damage resulted from an "occurrence," coverage was properly denied under exclusions "j" and "n" in plaintiff's insurance policy. An insurance company will not be held liable for a risk that it did not assume. *Arco Industries Corp*, *supra* at 395. Liability exclusion "j" of plaintiff's policy provides that the insurance does not apply to property damage to

> (5) *That 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; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly *performed on it*. [Emphasis added.]

Here, because the only alleged damages caused by an "occurrence" in this case were damages to the Engelharts' property (i.e., drainage, runoff, loss of use), and plaintiff did not perform work on their property, subsections (5) and (6) of exclusion "j" do not apply. Under exclusion "n," the insurance does not apply to

> Damage claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> (1) 'Your product";
>
> (2) 'Your work'; or
>
> (3) 'Impaired property';
>
> *if* such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition upon it. [Emphasis added.]

Here, plaintiff's "product" was not "withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." Therefore, exclusion "n" does not apply.

Because the Engelharts alleged property damage resulting from conduct by plaintiff that constituted an occurrence, and because the alleged property damage did not fall within the exclusion section of plaintiff's insurance policy, the trial court did not err in finding that defendant had a duty to defend plaintiff in the underlying lawsuit and granting summary disposition in favor of plaintiff.

Next, defendant argues that the trial court erred in requiring defendant to pay attorney fees billed by attorney Collins *after* defendant was ordered to assume plaintiff's defense, because there is no basis in the parties' insurance contract for requiring defendant to pay two lawyers. Of the $8,409.65 in

fees billed by Collins that the court required defendant to pay, $6,276 was accrued prior to the court's ruling that Auto Owners must defend plaintiff in the underlying action; $2,133.65 was accrued after.

The transcript of the June 9, 1997, hearing on plaintiff's motion for partial summary disposition does not contain any discussion with regard to Collins remaining on the case, nor does the court's order include that requirement. While it is clear from the context of the hearing on plaintiff's second motion for summary disposition on June 11, 1998, that the court had required Collins to remain on the case, there is no record of any objection by defendant to Collins remaining or any argument, prior to the second hearing, that defendant should not have to pay for fees billed by Collins after defendant was ordered to assume plaintiff's defense. Moreover, defendant does not contest that Collins assisted in plaintiff's defense after defendant was ordered to defend, nor does it contend that the services that Collins rendered were duplicative of those provided by defendant's counsel. Defendant acknowledges that Collins performed adequate legal work and that his fees were appropriate. Thus, it does not appear that the trial court required defendant to pay twice for plaintiff's legal defense. Because defendant has not shown that it expended any more money providing a defense using Collins than it would have without his assistance, we find that the court's action in requiring defendant to pay Collins' fees was not precluded by the broad "duty to defend" language of the parties' insurance contract. See *Palmer v Pacific Indemnity Co*, 74 Mich App 259, 265; 254 NW2d 52 (1977).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins