STATE OF MICHIGAN

COURT OF APPEALS

FRANKENMUTH MUTUAL INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED March 9, 2001
v	No. 218392 Wayne Circuit Court
ROBERT ANOLICK and SALVATORE VITALE, d/b/a EAGLE MASONRY, Defendants-Appellants.	LC No. 98-820681-CK

Before: Markey, P.J., and Whitbeck and Marlew*, JJ.

PER CURIAM.

Defendants appeal by right from the trial court order that granted summary disposition to plaintiff in this declaratory action involving insurance coverage. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At issue is whether plaintiff was required to defend and indemnify its insured Eagle Masonry on a construction subcontract and a hold harmless/indemnification clause, that was not completely written until after an Eagle Masonry employee was injured on the job site. To resolve this issue, we must review the insurance contract in this case, which states in relevant part:

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. **Insuring Agreement.**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies. We will have the right and duty to defend any **suit** seeking those damages.

* Circuit judge, sitting on the Court of Appeals by assignment.

* * *

2. **Exclusions.**

This insurance does not apply to :

* * *

b. **Bodily injury** or **property damage** for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an **insured contract,** provided the **bodily injury** or **property damage** occurs subsequent to the execution of the contract or agreement; . . .

SECTION V - DEFINITIONS

* * *

7. "**Insured contract**" means:

* * *

f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for **bodily injury** or **property damage** to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. [Emphasis in original.]

Based on the insurance contract, we conclude that plaintiff had a duty to defend defendants, the insureds: the insurance contract insured defendant for liability for bodily injury. After the insurance was extended, a worker was injured on the job. The insurance contract language quoted above does not require a separate written agreement or contract assuming liability for the exception to the exclusion to apply. Further, the insurance contract does not define the term "execution" of an agreement or contract between an insured and a third party. In this case, although plaintiff claims that the contract between defendants and the third party was not executed until August 29, 1997, when the contract was signed, we find otherwise.

We conclude that either acceptance of the job on August 18, 1997, or performance soon thereafter determined the date of "execution" of the oral contract between defendants and the third party. Any doubt about the meaning of the word "execution" in the insurance contract must be construed in favor of coverage in this case. See *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998) ("If a fair reading leads one to understand there is coverage under particular circumstances and another fair reading leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against the drafter and in favor of coverage."). Thus, regardless of whether "execution" occurred

on August 18, 1997, or when performance began, the execution certainly preceded the employee's injury in this case.

The statement in the August 29, 1997 written agreement that the document was "executed" on August 29, 1997 does not and was never intended to determine the date on which the original oral contract was executed. Rather, it signified the day the writing was signed to formalize that contract. This conclusion is supported by paragraph V, the "Acceptance" portion of the August 29, 1997 written agreement between defendants and the third party, which states that

> [t]his Subcontract and all of the terms, conditions and provisions contained herein shall be accepted by the Subcontractor upon his execution hereof or **upon his commencement of the work** provided for in Article 2 hereof, **whichever shall occur first in time**. [Emphasis supplied.]

Here, there is no dispute that Eagle Masonry commenced work on the project before the written contract was signed and (obviously) before the employee was injured. Accordingly, the hold harmless/indemnity clause was in effect when Eagle Masonry commenced work. Therefore, plaintiff was under a duty to defend its insured Eagle Masonry under this insurance contract.

We reverse and remand to the trial court for further proceedings. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew