STATE OF MICHIGAN

COURT OF APPEALS

TRIANGLE ASSOCIATES INC,

Plaintiff/Counter-Defendant/Appellant,

v

LI INDUSTRIES d/b/a LYNN MASONRY INC,[1]

Defendant/Cross-Defendant,

and

AMERISURE INC,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Appellee.

UNPUBLISHED
August 13, 2013

No. 307232
Kent Circuit Court
LC No. 10-002667-CK

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

In this declaratory judgment action arising from construction defects, plaintiff Triangle Associates, Inc. appeals as of right the trial court's denial of its motion for summary disposition and grant of summary disposition in favor of defendant Amerisure, Inc. We affirm.

Triangle served as the general contractor for the construction of a building commonly known as Gainey Hall located on the campus of Spring Arbor University in Jackson County. Lynn Masonry entered into a subcontract with Triangle in February 2006 to perform masonry work on the building. Part of the scope of the work required Lynn Masonry to install copings at various locations along the roof of the building. During the week of November 3, 2008, when the building was occupied and classes were in session, several of the copings slid off the roof and fell to the ground. An architecture and engineering firm was hired to investigate the incident and "concluded that the copings fell because they were not installed as required by the construction

[1] LI Industries is not a party to this appeal, having settled its claims with Triangle. LI Industries will be referred to throughout this opinion as Lynn Masonry because that was the d/b/a under which it contracted with Triangle.

plans and specifications." Triangle paid to correct the problems and made formal demands for payment to both Lynn Masonry and Amerisure. When neither made any payment, Triangle filed suit against both companies. Amerisure ultimately filed a counter-complaint against Triangle and a cross-complaint against Lynn Masonry.

In February 2011, Amerisure sought summary disposition against Triangle alleging that, under the language of the policy, there was no "occurrence" within the policy periods alleged by Triangle and that, at the time of the loss, there was no "occurrence" because the only property damage that occurred was to the work performed by Lynn Masonry and the property damage was caused by Lynn Masonry's faulty workmanship. In response, Triangle noted that this case was unlike any of those cited by Amerisure because Triangle was an additional insured, not a named insured, and that there were no binding precedents in Michigan with similar facts.

The trial court denied Amerisure's motion for summary disposition. The trial court noted that the subcontract between Triangle and Lynn Masonry required Lynn Masonry to provide insurance coverage for Triangle in connection with its work on the project and examined the language of the insurance contract between Lynn Masonry and Amerisure, under which Triangle was an additional insured. The trial court found a genuine issue of material fact existed regarding whether Triangle's claims fell outside the coverage provided by the policy. It noted that the insured in this case was Triangle, not Lynn Masonry, and that the record raised multiple reasons why Lynn Masonry's defective work was not necessarily attributable to Triangle. Thus, the record viewed in the light most favorable to Triangle indicated that this was not Lynn Masonry as the insured seeking coverage for its own defective work, but Triangle as the insured seeking coverage for Lynn Masonry's defective work, which claim was not necessarily precluded from being an occurrence under the policy.[2]

After case evaluations occurred, Triangle dismissed Lynn Masonry from the case. Amerisure subsequently filed multiple motions to exclude certain evidence and defenses from trial. Relevant to this appeal, Amerisure filed a motion to exclude evidence or testimony relating to the insurance policies that had expired before the date of loss on the basis that, having expired, they could not possibly provide coverage on the date of loss in 2008. The trial court granted the motion, but gave Triangle the opportunity to amend its pleading.

Triangle filed an amended complaint attaching only the first page of the declarations of policies for four time periods: 2005-2006, 2006-2007, 2007-2008, and 2008-2009, as well as the certificates showing Triangle as an additional insured for the 2005-2006 and 2006-2007 policy periods. Triangle alleged that "an accident, or 'occurrence' as defined by the policies, occurred whereby damages were sustained to the coping stones . . . [and] was caused by a combination of defective installation/faulty workmanship by Lynn, faulty brackets/clips which were intended to hold the stones in place, and/or the freeze/thaw cycles from 2006 to 2008." Triangle also

[2] The trial court denied Amerisure's request for a stay of the proceedings while it sought leave to appeal the trial court's denial of its motion. Amerisure's application for leave to this Court was ultimately dismissed by stipulation of the parties. See *Triangle Associates Inc v LI Industries*, unpublished order of the Court of Appeals, entered December 16, 2011 (Docket No. 303465).

contended that, because the defective work was that of Lynn and not Triangle, the exclusions in the policy did not apply.

Triangle subsequently moved for summary disposition alleging that the unambiguous policy language granted it coverage. Amerisure opposed Triangle's motion and requested summary disposition in its favor on the grounds that the trial court had excluded reference to all policies except the one in force on November 2, 2008 (the 2008 Policy); that Triangle's amended complaint only referenced the date of the falling stones as the "occurrence" triggering coverage; that Triangle was not an additional insured under the 2008 Policy; and that because the only damage was to Lynn Masonry's work, there was no "occurrence" under Lynn Masonry's policy.

The trial court denied Triangle's motion and granted summary disposition in favor of Amerisure. It concluded that Triangle had conceded that it was not an "additional insured" under the 2008 Policy, which was the policy in effect at the time the coping stones fell, and that the only "occurrence" alleged was the faulty work of Lynn Masonry, which by law could not constitute an occurrence. It noted that had Triangle been an additional insured at the time the stones fell, there were sufficient factual issues precluding summary disposition, but that because Triangle was not an additional insured at the time of the incident, there could be no occurrence because Triangle was relying on the defective work product of Lynn Masonry—the insured.

On appeal, Triangle argues multiple reasons why it believes the trial court erred in granting summary disposition to Amerisure. We review de novo a trial court's summary disposition decision. *Liparoto Constr, Inc v General Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Id.* "The court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* "The motion is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 29-30.

We also review de novo the proper interpretation of a contract, such as the insurance contract at issue here. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997); *Clark v Daimler Chrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005). In *Auto-Owners Ins Co v Churchman*, 440 Mich 560; 489 NW2d 431 (1992), our Supreme Court set forth the following guidelines for reviewing the language of an insurance policy:

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. This Court cannot create ambiguity where none exists.
>
> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions

> must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. [*Id.* at 566-567 (quotation marks and citations omitted).]

Accordingly, the "[i]nterpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Harrington*, 455 Mich at 382.

The CGL policies at issue, whether the ones under which Triangle was an additional insured, or the 2008 Policy for which there was no endorsement, provide, in relevant part:

> 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 the insured against any "suit" seeking those damages. However, we will have no duty to defendant the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .
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> * * *
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and]
>
> (2) The "bodily injury" or "property damage" occurs during the policy period[.] [CGL Form, p 1.]

"Occurrence" is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Although accident is not defined in the policy, this Court has analyzed identical language and determined that "an accident is an undesigned contingency, a casualty, not anticipated, and not naturally to be expected." *Radenbaugh v Farm Bureau Gen Ins Co*, 240 Mich App 134, 147; 610 NW2d 272 (2000) (quotation marks and citations omitted). In *Radenbaugh*, this Court considered whether faulty workmanship by the insured can constitute an "occurrence" that would trigger coverage under the insurance policy and concluded that only when the damages alleged are "broader than mere diminution in value of the insured's product caused by alleged defective workmanship" is the duty to indemnify triggered because of potential coverage, *id.* at 144-148, but that where "damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy." *Id.* at 147 (quotation marks

and citation omitted). Thus, under current Michigan jurisprudence, there is no coverage for a claim of faulty workmanship by Lynn Masonry where Lynn Masonry is the insured.[3]

When Amerisure originally moved for summary disposition, Triangle was filing suit for damages caused by Lynn's faulty workmanship as an additional insured under the policy pursuant to the endorsement, making the procedural posture was very different from any Michigan caselaw, binding or otherwise. The trial court recognized and expressly addressed these issues when it originally denied Amerisure's motion for summary disposition. However, once the trial court granted Amerisure's motion to exclude evidence of any policies other than the 2008 Policy, the procedural posture appears to have reverted to the traditional pattern of the insured seeking damages for the insured's own defective work.

The order indicates that the motion was granted for the reasons provided on the record. Because Triangle has not provided a copy of the transcript for this hearing, there is no way to determine how broad or limited this ruling was. It may have been narrow enough to permit consideration of the endorsements from the prior years because there is arguably a question of fact regarding whether the completed operations provisions of the prior policies for which Triangle was an additional insured would cover the 2008 incident. However, it was Triangle's responsibility to provide the transcript of this hearing, *Nye v Gable*, *Nelson & Murphy*, 169 Mich App 411, 414; 425 NW2d 797 (1988), lv den 432 Mich 890 (1989), and "this Court will refuse to consider issues for which the appellant failed to produce the transcript." *PT Today*, *Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006). Furthermore, Triangle has not appealed the trial court's evidentiary ruling. Thus, Triangle's failure to provide the transcript to permit a determination of the breadth of the evidentiary ruling, combined with its failure to appeal the exclusion of the earlier policies for which it is an insured, prevents this Court from considering the earlier policies and endorsements. The result of the trial court's evidentiary ruling limited both the trial court and this Court to viewing the complaint solely from the standpoint of the coverage provided by the 2008 Policy. From that standpoint, there is no dispute that Triangle is not an additional insured under the 2008 Policy or that the alleged occurrence happened in November 2008, when that policy was in effect. As a result, the only cognizable claim remaining was a claim of defective work by Lynn Masonry under the 2008 Policy where it was the only insured. Having reverted to the more traditional procedural posture, the trial court's conclusion that Michigan law held that under such facts there was no occurrence resulting in coverage was correct and it properly granted summary disposition to Amerisure on that basis.

[3] To the extent that Triangle asks this Court to alter current jurisprudence regarding whether faulty workmanship alone can constitute an occurrence, we decline to do so. At least one panel of this Court has already noted that, were it writing on a clean slate, it would decide this issue differently, but that, as it was, it was bound to follow the current binding jurisprudence. *Groom v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272840); see also *Oak Creek Apts, LLC v Garcia*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 2013 (Docket No. 308256) (referencing the *Groom* opinion's statements on the split of authority).

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly