

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**NOVA CONSULTANTS, INC,  
Plaintiff,**

v.

**Case No. 13-138107-CK  
Hon. James M. Alexander**

**MID-MICHIGAN SOLAR, LLC,  
Defendant,**

and

**EMPLOYERS MUTUAL CASUALTY COMPANY,  
Plaintiff/Counter-Defendant,**

v.

**MID-MICHIGAN SOLAR, LLC, and  
NOVA CONSULTANTS,  
Defendants/Counter-Plaintiffs.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on cross motions for summary disposition filed by Nova Consulting and Employers Mutual Casualty.

Employers issued a Commercial General Liability policy to Mid-Michigan Solar. During the policy's term, Nova contracted for Mid-Michigan to install two solar photovoltaic systems at a third-party's location in Madison Heights. The system included both ground and rooftop systems.

During construction, Mid-Michigan allegedly failed to properly install the systems, including support posts or piles. As a result, Nova alleged that the solar panel arrays have

shifted or moved from their intended installation location or orientation – which causes great stress and strain on the parts of the system. Nova then undertook repair efforts in an attempt to correct the improper installation before the entire system failed.

After Nova notified it of these problems, Mid-Michigan submitted a claim to Employers – seeking coverage for the improper installation. Employers, however, refused to defend or indemnify Mid-Michigan because there was no damage and coverage was sought for the insured’s work product – which was not a covered event under the policy.

In August 2013, Nova filed an underlying action against Mid-Michigan based on negligence, breach of contract, and declaratory counts. While that action was pending, in December 2013, Employers filed the present declaratory action – seeking a determination that it was not obligated to defend or indemnify based on its insured’s poor workmanship.

On January 22, 2014, Nova and Mid-Michigan settled the underlying case via a Consent Judgment for over \$1 million. The Consent Judgment also “assigned any and all causes of action which [Mid-Michigan] may have against . . . [Employers], related in any way, to the events, acts, and/or omissions, alleged in the instant action.” The Judgment further provided that it “may be satisfied only through collectible insurance.”

Nova argues that Employers breached its duty to defend, and it is bound by the Consent Judgment. Employers, on the other hand, seeks a declaration that it had no duty to defend or indemnify Mid-Michigan in the underlying action, and is not liable to pay on the consent judgment.

To their ends, both parties now move for summary disposition under MCR 2.116(C)(10), which tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

An insurance policy is construed in the same manner as any other type of contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Insurance contracts, however, are to be construed in favor of coverage. See *Rory v Continental Ins Co*, 473 Mich 457, 517; 703 NW2d 23 (2005); *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982); and *Shumake v Travelers Ins Co*, 147 Mich App 600, 608; 383 NW2d 259 (1985) (finding “A policy should not be construed to defeat coverage unless the language so requires since the purpose of insurance is to insure.”).

In order for there to be coverage under the policy, there must have been “property damage” caused by an “occurrence.” Employers claims, in relevant part, that it is entitled to summary disposition for three reasons: (1) it preserved its right to contest its duty to defend by filing a lawsuit; (2) it does not have the duty to defend or indemnify because there is no coverage under the policy; and (3) it is not liable for the amount of the January 22, 2014 Consent Judgment.

## 1. Duty to Defend.

Employers first argues that it preserved its right to contest its duty to defend Mid-Michigan by filing its declaratory judgment action before Nova and Mid-Michigan entered their Consent Judgment.

In support, it cites *Riverside Ins Co v Kolonich*, 122 Mich App 51, 58-59; 329 NW2d 528 (1982), which quoted 44 Am Jur 2d, Insurance, § 1408, pp 348-349, for the proposition that:

where the insurer is doubtful about its liability and wishes to retain all its rights and at the same time protect itself against the claim that it has unjustifiably refused to defend a suit against the insured, it may give a so-called 'nonwaiver' notice to the insured or attempt to enter into a 'nonwaiver' agreement with the insured by which it reserves all its rights to assert later the policy noncoverage. *Another remedy available to the insurer is to secure an adjudication of nonliability by way of a declaratory judgment. Such a judgment settles definitely the question of its duty to defend.* (emphasis in original).

Based on the foregoing, Employers was within its rights to file a declaratory action to determine its obligation to defend in the underlying lawsuit.

“The duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy. If the policy does not apply, there is no duty to defend.” *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996), citing *Protective Nat'l Ins Co v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991).

The duty to defend, however, “is broader than the duty to indemnify.” *American Bumper*, *supra* at 450, citing *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980). The *American Bumper* Court further found that: “If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. This is true even where the claim may be groundless or frivolous.” *American Bumper*, *supra* at 450-451.

As a result, disposition on Employers' duty to defend may be resolved through the Court's decision on Employers' duty to indemnify.

## **2. Duty to Indemnify.**

Employers next claims any property damage did not result from an "occurrence." The term "occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined by the policy, but our Supreme Court has defined the term as "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." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999).

In support of its argument, Employers cites *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990) for the proposition that "[t]here cannot be any reasoned dispute . . . that allegations of defective workmanship contained in the [underlying] complaint . . . do not constitute an 'occurrence.'"

In *Hawkeye*, Vector was subcontracted to complete some concrete work on waste-water treatment plant project. After the concrete was poured, Vector learned that the concrete it had ordered from a third-party did not comply with the project's specifications. As a result, 13,000 yards of concrete had to be removed and replaced.

The general contractor then sued the Vector, who submitted a claim to its insurer. The insurer then filed a declaratory action – seeking a determination whether the Vector's own defective work product could constitute an "occurrence" within the meaning of its commercial general liability policy. The *Hawkeye* Court determined that "the defective workmanship of

Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract.” *Hawkeye*, 185 Mich App at 378.

Employers argues that “[t]he ground-mounted solar photovoltaic system was [Mid-Michigan’s] work product” and “[b]ecause any damage resulting from the deficiently installed system was limited to the system itself, [Mid-Michigan’s] faulty workmanship does not constitute an occurrence within the meaning of the EMC policy.”

In response, Nova argues that “damage to property other than the insured’s . . . will constitute an ‘occurrence’ for insurance purposes,” citing *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009).

The *Liparoto* Court examined *Hawkeye, Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962) (a case analyzed by the *Hawkeye* Court), and *Radenbaugh v Farm Bureau General Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000).

In *Bundy*, the plaintiff manufactured thin-walled steel tubing installed in concrete floors for radiant heating systems. Bundy, however, manufactured some of this tubing with defects that caused it to leak. When Bundy was sued by various parties, it submitted the claims to its insurer, Royal. The parties eventually ended up on court about whether the policy covered the claims.

Because the failure of the defective tubing constituted an accident that damaged the property **of others**, the Court ruled the same was covered under the policy. The replacement of the tubing itself, however, was not covered.

The *Hawkeye* Court summarized *Bundy* as follows:

Bundy stands for nothing more than the proposition that an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by “accidents” where the insured’s faulty work product **damages the property of others**. In the instant case Vector seeks what amounts to recovery for damages done to its own work product, and

not damage done to the property of someone other than the insured. *Hawkeye*, 185 Mich App at 377 (emphasis added).

This “property of someone other than the insured” distinction is further explored in *Radenbaugh v Farm Bureau General Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000) – a case heavily relied on by the homeowner Defendants. In *Radenbaugh*, the plaintiffs sold a double-wide mobile home and provided “erroneous schematics and instructions to contractors hired by [the homeowners] for the construction of the home’s basement foundation and erection of the home on its basement.” *Radenbaugh*, 240 Mich App at 136.

As a result of the improper schematics, the home and basement suffered damages. The plaintiffs ultimately settled with the homeowners, but then sought indemnity from their insurer – who refused to provide the same because the underlying claims were not the result of an “occurrence.”

The *Radenbaugh* Court analyzed *Hawkeye* and concluded that the homeowners’ allegations included damages “broader than mere diminution in value of the insured's product caused by alleged defective workmanship, breach of contract, or breach of warranty.” *Radenbaugh*, 240 Mich App at 141.

*Liparoto* then summarized the general law on defective workmanship claims:

The definition of “occurrence” in *Hawkeye-Security* is more detailed, but is not significantly different in substance. This Court in *Radenbaugh* held that damage resulting from negligence or breach of warranty would constitute an occurrence triggering the policy’s liability coverage **only if the damage in question extended beyond the insured’s work product**. Here plaintiff did not allege, and presented no evidence, that there was damage beyond its own work product. *Liparoto*, 284 Mich App at 38-39.

In this case, Mid-Michigan was hired to install the solar arrays. The underlying Complaint alleges that “[Mid-Michigan] failed to properly install the solar photovoltaic system, .

. . . such that the solar panel arrays have shifted/moved from their intended installation location and/or orientation.” This defective workmanship caused Plaintiff damages.

In other words, Nova **only** alleges damages to the solar array resulting from Mid-Michigan’s faulty workmanship. Under the above caselaw, Employers is not required to indemnify because the claimed property damage is limited only to the solar array that Mid-Michigan was hired to construct. As a result, Mid-Michigan’s faulty workmanship does not constitute an occurrence within the meaning of the policy.

Because the Court has held that Employers’ had no duty to indemnify, and the duty to defend flows therefrom, the Court further finds that Employers also had no duty to defend in the underlying action. *American Bumper*, 452 Mich at 450.<sup>1</sup>

### **3. Employers’ liability on the Consent Judgment.**

Finally, Employers argues that it has no liability under the January 22, 2014 Consent Judgment. The Court agrees. Because Employers filed its declaratory action before entry of the Consent Judgment, it properly preserved its right to contest its duty to defend and indemnify. Now that the Court has ruled that Employers had no such duty under these circumstances, Employers likewise has no obligation under the January 22, 2014 Consent Judgment.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

November 26, 2014  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge

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<sup>1</sup> The Court further finds that it need not address the other arguments raised by the parties in support of their respective motions as it has determined that there is no coverage for the events at issue under the faulty workmanship doctrine.