

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

**AUTO-OWNERS INSURANCE COMPANY,  
Plaintiff,**

v.

**Case No. 15-147545-CB  
Hon. James M. Alexander**

**Q&M PROPERTIES, INC, and  
HM-SD, INC,  
Defendant.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Plaintiff's motion for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

This action involves a coverage dispute for work that Defendant Q&M Properties performed on a commercial development on Highland Road in Waterford. Defendant HM-SD was a tenant building a Sears Hometown store at the location, and non-party Asmar Center was the landlord. Covering the time of the work, Plaintiff issued a Tailored Protection Policy to Q&M.

Q&M worked on two, separate projects at the location. HM-SD contracted Q&M to install flooring and a door at the back of the store. And Asmar contracted Q&M to install a catch basin in the parking lot and a drain near the door to collect rainwater.

On November 8, 2011, Q&M had completed the flooring, but it was still working on the rear emergency egress door. The door was missing the sweep at the bottom, and Q&M was still

working on excavation and installation of a concrete pad and basin outside the rear door. On November 9, 2011, rain fell and water entered the store from under the new rear door.

On October 30, 2014, Sears Hometown filed its underlying Complaint against Q&M alleging damage to the building as a result of Q&M's negligent work. The claim was reported to Plaintiff, who has been defending the underlying action under a reservation of rights.

Plaintiff filed the present case seeking a ruling that it has no duty to defend or indemnify Q&M under the terms of the policy because the underlying Complaint only seeks damages for faulty workmanship.

To this end, Plaintiff now moves for summary disposition under MCR 2.116(C)(8) and (C)(10), which respectively test the legal and 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.”).

“Interpretation 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.” *Auto Owners v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

Plaintiff argues in order for there to be coverage under the policy, there must have been “property damage” caused by 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).

Plaintiff argues that “coverage under a commercial general liability policy does not extend to cover the cost of repairing defective work,” and “such an event does not constitute an occurrence under the policy,” citing *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990).

All parties rely heavily on *Hawkeye* and other cases often cited in “faulty workmanship” coverage cases: *Radenbaugh v Farm Bureau General Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000); *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801

(2009); and *Groom v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272840).

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. The *Hawkeye* Court analyzed *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962) in its reasoning.

In *Bundy Tubing*, Bundy manufactured thin-walled steel tubing installed in concrete floors for radiant heating systems. Bundy ultimately 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).

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.

Finally, *Groom v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272840) does a great job of summarizing the holding in *Radenbaugh* and the general law on “defective workmanship” claims:

the court in *Radenbaugh* concluded that, where defective workmanship results in damage to the property of others, an accident exists within the meaning of the CGL policy. However, where the ““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.”” Because the defective workmanship resulted in damage to the basement, which was the property of others, the court concluded that the defendant was obligated to defend and indemnify the plaintiff.

Based on the holdings in *Hawkeye* and *Radenbaugh* it is clear that Michigan follows the line of cases that hold that defective workmanship by itself does not constitute an occurrence. Rather, in order to constitute an occurrence, the defective workmanship must result in damage to persons or to property other than the work product itself. Hence, we must examine the nature of the damages resulting from the faulty workmanship to determine whether the faulty workmanship constitutes an “accident” and, therefore, an “occurrence” within the meaning of the CGL policy. *Groom, supra* (internal citations omitted).

In *Groom*, the plaintiff purchased a newly constructed condo from Knoll Construction. After she moved in, she discovered that the roof leaked. She then sued Knoll and obtained a judgment. When Knoll’s insurer (Home-Owners) refused to pay the judgment, the plaintiff filed a dec action against it – seeking a determination that the policy covered the leaking roof.

After analyzing *Hawkeye* and *Radenbaugh*, the *Groom* panel concluded that:

Knoll was responsible for constructing a condominium with a defective roof. The defective roof allowed water to leak into the condominium, which in turn damaged other parts of the condominium. The condominium itself was Knoll’s work product. Because the property damage caused by the defective roof was limited to the condominium, the faulty workmanship does not constitute an occurrence within the meaning of the CGL policy. *Groom, supra*.

*Liparoto* also 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, Q&M was hired by two separate entities. First, HM-SD hired Q&M to install flooring and a rear entry door. Second, Asmar hired Q&M to install a catch basin in the parking lot and a drain near the door to collect rainwater.

The underlying Complaint alleges (Oakland County Case No. 14-143813-NZ):

5. On or about November 9, 2011, Plaintiff was a tenant in a commercial strip mall located in Waterford, Michigan and commonly known as 7374 Highland Road, Waterford, Michigan.

6. At said time and place, Defendants were engaged in performing certain maintenance and/or construction work at the backside of the building identified in paragraph 5 immediately above. The maintenance and/or construction activities conducted were performed by Defendants in a negligent manner such that Plaintiff's **premises** were flooded.

7. At said time and place, Defendants had a duty to conduct their maintenance and construction activities with due regard for Plaintiff's property described in paragraph 5 above, and, notwithstanding said duty, violated such duty to Plaintiff.

8. Plaintiff suffered damages as a proximate result of Defendant's breach of duty.

Plaintiff argues that "Q&M did a variety of work at the Sears Hometown Store," and the underlying Complaint, "alleges damage to the VCT floor, Q&M's work." But this is not an accurate summary of said Complaint, which actually, and nonspecifically, alleges water entered HM-SD's "premises" and caused damages. But it's unclear precisely what was damaged.<sup>1</sup>

Both Q&M and HM-SD also respond that HM-SD's claim against Q&M arises out of the alleged negligent work that it performed **for Asmar**, specifically, the installation of a catch basin and drain in its parking lot to stop the flooding that occurred during heavy rainfall in Asmar's parking lot. While Q&M also installed the flooring and door for HM-SD, this was not the work product that led to the HM-SD's damages.

Indeed, Plaintiff's motion takes two logic leaps left unsupported by any undisputed evidence: (1) that Q&M's work **for HM-SD** is the sole cause of the flooding; **and** (2) the damages are limited to Q&M's work product. But these issues implicate several disputed questions of material facts.

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<sup>1</sup> Plaintiff cites to the deposition testimony of Donna Harris to establish that only the flooring was damaged, but Plaintiff's characterization of said testimony is strained. In the Court's reading of the testimony, Ms. Harris did not seem to know with any certainty what exactly was damaged.

Further, assuming arguendo that HM-SD's damages were limited to the flooring that Q&M installed, Plaintiff has still failed to convince the Court of its entitlement to relief. This is so because the Court rejects Plaintiff's argument that all of Q&M's work at **the location** should be viewed as a single project for purposes of a faulty workmanship argument.

Although undisputedly related, Q&M did **separate work for two different entities**. Q&M installed flooring and a door for the tenant. It separately installed a catch basin and drain in its parking lot for the landlord. Q&M's "work product" on the landlord's project **did not include** the flooring and door install for the tenant. These are two separate projects that should be treated as such for purposes of the underlying "faulty workmanship" claim.

If Q&M's faulty workmanship **on the landlord's project** damaged **the tenant's premises**, then it "extended beyond the insured's work product" **on the landlord's project** – subjecting the same to coverage.

Further, Plaintiff's argument that exclusions j.(6), l., and n. apply are improperly founded on the claim that Q&M's "work product" on the Asmar project necessarily includes the HM-SD project's flooring, despite the claim that the alleged faulty workmanship was on a separate project.<sup>2</sup>

Michigan law is clear that "[t]he 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).

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<sup>2</sup> Plaintiff's reliance on *Envision Builders, Inc v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2012 (Docket No. 303559) and *GB Dupont, Inc v Michigan Mutual Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 7, 1996 (Docket No. 167847) is misplaced because these cases involve a single-customer project.

The duty to defend, however, “is broader than the duty to indemnify.” *American Bumper*, 452 Mich 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*, 452 Mich at 450-451.

The Court finds that the allegations contained in underlying Complaint at least arguably come within the policy coverage, which obligates Plaintiff to defend Q&M. But, that said, it is too soon to decide whether Plaintiff owes a duty to indemnify Q&M. This is so because, under *Hawkeye* and *Radenbaugh*, Plaintiff is only required to indemnify Q&M for damages to the property or workmanship of others caused by Defendant. And as stated earlier, questions of fact remain about the cause of the flooding.

If the flooding was caused by Q&M’s work **on the Asmar project**, then Plaintiff is obligated to indemnify for all of HM-SD’s damages (including any work product Q&M performed on the HM-SD project) as “beyond the insured’s work product” on the Asmar project.

But if the flooding was caused by Q&M’s faulty workmanship installing the door **on the HM-SD project**, then Plaintiff is only obligated to indemnify for any damages outside of the scope of work that Q&M performed on said project.

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For the foregoing reasons, Plaintiff's motion for summary disposition is DENIED. The Court, however, finds under MCR 2.116(I)(2) that Plaintiff has the duty to defend Q&M in the underlying litigation because the allegations in the underlying Complaint arguably come within the Policy's coverage.

**IT IS SO ORDERED.**

February 2, 2016  
Date

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