COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1681 **Cir. Ct. No. 2008CV180**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MANTZ AUTOMATION, INC. AND MANTZ HOLDINGS, LLC,

PLAINTIFFS-APPELLANTS,

V.

NAVIGATORS INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

CONSTRUCTION SPECIALISTS REQUIRED, INC.,

DEFENDANT,

CRAFT MASONRY, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENOR.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 NEUBAUER, P.J. This appeal stems from a contract between Mantz Automation, Inc., and Mantz Holdings, LLC, (collectively "Mantz") and Construction Specialists Required, Inc. (CSR), for the construction of a manufacturing facility. After discovering defects in a cement floor installed by one of CSR's subcontractors, Mantz sued CSR for breach of contract, breach of implied warranty, negligence and misrepresentation. CSR's commercial general liability insurer, Navigators Insurance Company, requested a declaratory judgment that Mantz's claim for property damage did not trigger coverage under its policy and, therefore, it had no duty to defend CSR. The circuit court granted Navigators' motion for summary judgment and Mantz appeals. Because Mantz's claim for property damage is based on faulty workmanship and not an "occurrence" under Navigators' policy, we affirm the circuit court's order for judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 On May 10, 2006, Mantz entered into a contract with CSR for the construction of a manufacturing facility in Hartford, Wisconsin. CSR subsequently entered into a subcontract with Craft Masonry, Inc., to perform masonry work for the facility, including the installation of a concrete floor. Craft contracted with a concrete supplier to prepare and deliver the concrete mix to the job site. Prior to Mantz moving into the building, CSR advised that it was concerned with the look of the floor but after meeting with the mason and others involved with the floor in November 2006, Mantz was assured that the floor was

fine. After Mantz began occupying the facility in December 2006, it discovered that the concrete floor was defective. In late January or early February 2007, CSR and Craft began meeting with Mantz to discuss problems with the floor and possible solutions. In response to interrogatories dated February 4, 2008, Mantz described the alleged defects as follows: "the top layer of the concrete floor is loose, underneath there is a hollow layer and the top is cracking and chipping. These cracks are prevalent through the entire floor, and are getting worse over time. They have begun to create safety hazards, and soon may impede … production."

¶3 Mantz commenced this action on February 7, 2008, naming as defendants CSR, Craft, and their respective insurers, Navigators and West Bend Mutual Insurance Company. In an amended complaint, Mantz incorporated a third-party complaint against the concrete supplier. Mantz sought to recover for the damages related to the defective floor and consequential damages related to its repair and the interruption of manufacturing operations.

¶4 Navigators, which had issued a commercial general liability (CGL) policy to CSR covering the period of construction, denied the allegations against CSR and also raised an affirmative defense denying the existence of coverage for the alleged damage. On May 30, 2008, Navigators filed a motion to bifurcate and stay the insurance coverage issues from the underlying liability and damages action. Navigators stated, "Based on the allegations of the complaint, the Navigators policy does not provide coverage for its own or others defective work." Navigators submitted the policy issued to CSR, the provisions of which provided in relevant part, that the policy applies to "property damage" only if it is caused by an "occurrence" which takes place in the coverage territory. An occurrence is defined by the policy as an "accident." On June 13, 2008, the circuit court granted

Navigators' motion noting the lack of objection from any party and stating, "all proceedings on the merits of [Mantz's] claims are stayed, with proceedings and discovery to move forward on insurance coverage issues."

¶5 Navigators moved for summary judgment on October 23, 2008, requesting the dismissal of Mantz's claims against Navigators based on a holding that Navigators does not have a duty to defend or indemnify CSR because Mantz's claims failed to allege an "occurrence" under Navigators' policy, and coverage was otherwise excluded under the "business risk/your work" exclusions and the "independent contractors" endorsement.

¶6 The court subsequently held two status conferences. At the first, on October 24, 2008, the parties discussed coverage issues. At the second, held on November 17, 2008, the court set a briefing schedule and a hearing date for various coverage motions. There is no indication in the record that either party raised issues pertaining to the scope of discovery or requested additional time to conduct discovery. When it subsequently filed its brief in opposition in January 2009, CSR contended that summary judgment was premature based on the existence of genuine issues of material fact which would prohibit a proper evaluation of Navigators' policy provisions.

¶7 The circuit court held a hearing on summary judgment on April 16, 2009. As an initial matter, CSR raised the issue of discovery and advised the court that, with respect to the type of concrete mix supplied, "there is discovery that needs to be taken on that material fact and whether that leads to an accident that became an occurrence." The court disagreed, stating that the issues in the case were "ripe for determination."

> We bifurcated and stayed general discovery. We did not stay discovery with regards to coverage issues, but this floor was poured in September of 2006. This case has been pending since February 7, 2008. Motions for summary judgment were discussed with the Court on October 24th, 2008. There were separate briefing schedules set on November 27th, and in my mind, that certainly is enough time to develop facts, including expert testimony related to any issues concerning coverage. We all know what those issues are.

After further discussion, the court stated that it was "satisfied that additional discovery at this point in time, two and a half years from the time this floor was completed, would put us in that exact same place."

¶8 The court then went on to address Navigators' motion for summary judgment noting that it agreed with Mantz that the relationship of Craft as a subcontractor of CSR restores coverage under the "your work" exception. However, the court determined that it would not reach the issue of restoration of coverage because there was no grant of initial coverage—there was "simply no accident, no occurrence." The damages alleged relate to the repair or replacement of the concrete floor and the facts on summary judgment established that the defective floor resulted from faulty workmanship which is not covered under a CGL policy. The court granted summary judgment in favor of Navigators.

¶9 Mantz appeals.

DISCUSSION

¶10 We review an order for summary judgment de novo, using the same methodology as the circuit court. ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Although our review is de novo, we benefit from the analysis of the circuit court. *See* ***Yahnke***, 236 Wis. 2d 257, ¶10.

¶11 The interpretation of an insurance contract presents a question of law that we review de novo. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. "Our goal in interpreting insurance contracts is to discern and give effect to the intent of the parties." ***Id.***, ¶16. The language in an insurance contract is generally given its common, ordinary meaning, or in other words, what a reasonable person in the position of the insured would have understood the words to mean. ***Id.***, ¶17. Further, a contract of insurance is not to be rewritten by the court to bind an insurer to a risk that the insurer did not contemplate and for which it has not been paid. ***J.G. v. Wangard***, 2008 WI 99, ¶21, 313 Wis. 2d 329, 753 N.W.2d 475.

¶12 We employ a three-step procedure when interpreting insurance contracts. ***American Family Mut. Ins. Co. v. American Girl***, ***Inc.***, 2004 WI 2, ¶¶23, 24, 268 Wis. 2d 16, 673 N.W.2d 65.

> First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage. If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there. If the claim triggers the initial grant of coverage in the insuring agreement, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain. We analyze each exclusion separately; the inapplicability of one exclusion will not reinstate coverage where another exclusion has precluded it. Exclusions sometimes have exceptions; if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an

> exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies.

Id., ¶24 (citations omitted).

¶13 Consistent with standard CGL policies, *see* ***id.***, ¶27, Navigators' policy covered "those sums that the insured becomes legally obligated to pay as damages because of … 'property damage' … caused by an 'occurrence' which takes place in the coverage territory." An "occurrence" is defined by the policy as an accident. The parties dispute whether the property damage—the defective concrete floor—was caused by an "occurrence" as defined by the policy. Mantz's complaint alleges that the concrete floor is defective and must be replaced as a result of inferior workmanship and/or the use of faulty materials.

¶14 There are three recent cases addressing whether claims of faulty workmanship allege property damage caused by an "occurrence": ***American Girl***, 268 Wis. 2d 16; ***Glendenning's Limestone & Ready Mix Co. v. Reimer***, 2006 WI App 161, 295 Wis. 2d 556, 721 N.W.2d 704; and ***Kalchthaler v. Keller Constr. Co.***, 224 Wis. 2d 387, 591 N.W.2d 169 (Ct. App. 1999). These cases establish that "a CGL policy does not cover faulty workmanship, only faulty workmanship that causes damage to other property." ***Kalchthaler***, 224 Wis. 2d at 395 (citing ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 265, 371 N.W.2d 392 (Ct. App. 1985) ("The policy in question … does not cover an accident of faulty workmanship, but rather faulty workmanship which causes an accident.")).

¶15 In ***Kalchthaler***, the court determined there was a covered "occurrence" when a subcontractor's work resulted in windows that leaked, causing water damage to the interior of a residence. ***Kalchthaler***, 224 Wis. 2d at 391. The "accident" in ***Kalchthaler*** was the window leak. ***Id.*** at 397. The

"occurrence was the leaking of the windows; it was not the faulty workmanship." ***Glendenning's***, 295 Wis. 2d 556, ¶29. The ***American Girl*** court also determined there was a covered "occurrence" resulting from a subcontractor's work. ***American Girl***, 268 Wis. 2d 16, ¶¶3, 38. In ***American Girl***, a general contractor, the CGL policyholder, hired a soil engineering subcontractor to analyze site soil conditions for construction of a warehouse. ***Id.***, ¶¶1, 3. The soil engineer concluded the soil was poor and recommended a process be used to treat the soil. ***Id.***, ¶12. The subcontractor's faulty site preparation advice resulted in excessive settlement of the soil causing multiple structural problems to the building and requiring its eventual dismantling. ***Id.***, ¶¶3, 5, 14, 16. The court determined that the subcontractor's faulty site preparation advice caused an unexpected settling of soil—an "occurrence" under the CGL policy—and, therefore, the insurer was liable for the resulting property damage. ***Id.***, ¶¶5, 38.

¶16 In ***Glendenning's***, a general contractor sought coverage under its CGL policy for breach of contract and implied warranty claims arising out of improvements to a dairy facility. ***Glendenning's***, 295 Wis. 2d 556, ¶¶2, 4. The plaintiffs alleged that the concrete subcontractors had poured and finished concrete cow stalls with an inadequate slope; the cow stalls were not built to specifications and had to be repaired; the contractors improperly installed stall loops and loose, irregular neck bars; manure and urine puddled due to inadequate slopes; a scraper damaged rubber mats installed by the general contractor or his subcontractors; and it took extra labor to clean the cows. ***Id.***, ¶6.

¶17 The court determined that the claim of improperly installed rubber mats, which were damaged by the scraper that cleaned manure from them, alleged an "occurrence." ***Id.***, ¶42. The subsequent unanticipated event—the scraper damaging the mats—constituted an "occurrence." By contrast, the claims of

faulty workmanship associated with the irregularly installed stall loops and neck bars did not allege that this faulty workmanship caused an event or accident that caused property damage. ***Id.***, ¶43. The "only cause alleged for these [problems] is the negligent work of the subcontractors and that … does not, in itself, constitute an 'occurrence.'" ***Id.***

¶18 Here, the only alleged property damage is the defective floor itself, which is undisputedly the result of faulty workmanship. While Mantz contends that, with more discovery, it may be able to establish that the defective floor was caused by an incorrect concrete mixture from the supplier or Craft's failure to handle and cure it correctly,[1] each proffered cause alleges the negligent work of the subcontractor that would not, without more, constitute an "occurrence." There is no contention, much less evidence, that these potential instances of faulty workmanship caused an accident, such as the sinking of soil or the leaking of windows, that caused subsequent property damage. Because faulty workmanship in itself does not constitute an "occurrence" under a CGL policy, there is no grant

[1] In its brief in opposition to summary judgment, Mantz cited the report prepared by CSR's expert, Yaggy Colby Associates, based on its analysis of the floor. Specific possibilities of causation were identified by Mantz as "not covering the concrete during curing, a higher than specified slump, the use of calcium chloride as an accelerator, premature/improper finishing, placing the concrete on a cool subgrade, and prolonged troweling." The Yaggy Colby report indicates that "[a] review of the test results and delivery tickets indicates that the concrete does not meet the project specifications in regards to slump (too high) and the use of Calcium Chloride admixture (should not be used).… [T]he concrete was air entrained, which is not necessary for interior slabs."

of coverage in the first instance.[2] We therefore need not reach Navigators' remaining arguments as to its policy exclusions.

¶19 We do, however, address Mantz's assertion that summary judgment is premature because it has yet to conduct full discovery on the cement mixture provided to and cured by Craft. Mantz contends: "There was simply no evidence in the record as to who caused the damage to the facility floor …. [T]he genuine issue of material fact on causation, i.e., whether there was an accident or occurrence and who caused the damage to the floor, should have prevented summary judgment." We reject Mantz's contention.

¶20 The bifurcation order expressly contemplated that the parties would conduct discovery on the coverage issue. We see nothing in the order for bifurcation and stay that would have precluded Mantz from conducting discovery in an attempt to establish that the claim at issue involves more than faulty workmanship. Moreover, Mantz did not object to the bifurcation order and there is no indication that it raised an issue regarding discovery at either status conference preceding the summary judgment ruling. After Navigators moved for summary judgment pointing to the pleadings and other evidence establishing that Mantz's claim amounted to faulty workmanship only, it was Mantz's burden to come forward with evidence as to whether there was an "accident" or "occurrence." *See* ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 227-28, 522 N.W.2d

[2] Mantz suggests that our analysis should focus on the subcontractor exception to the "your work" exclusion because it alleged that subcontractor error may have caused the flooring defect. However, ***American Girl*** makes clear that "the applicability of an exception will not create coverage if the insuring agreement precludes it." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. Because there is no initial grant of coverage under the insuring agreement, we need not look to the exclusions or exceptions in Navigators' policy.

261 (Ct. App. 1994) (while a party seeking summary judgment must establish a record sufficient to demonstrate that there are no triable issues of fact, the ultimate burden of demonstrating that there is sufficient evidence to go to trial at all is on the party that has the burden of proof on the issue that is the object of the motion); ***Estate of Ermenc v. American Family Mut. Ins. Co.***, 221 Wis. 2d 478, 481, 585 N.W.2d 679 (Ct. App. 1998) (burden of establishing whether there was an "occurrence" is on the insured trying to establish coverage).[3] Finally, as discussed above, the potential causes for the defective floor set forth by Mantz do not amount to more than flawed work.

CONCLUSION

¶21 We conclude that Mantz's property damage claim related to the defective concrete floor alleges "faulty workmanship" only, and therefore, is not a covered "occurrence" under Navigators' policy. We affirm the circuit court's grant of summary judgment in favor of Navigators.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] We acknowledge that Mantz is not the insured; however, Mantz is seeking to establish coverage on behalf of the insured defendant CSR.