STATE OF MICHIGAN

COURT OF APPEALS

MEDCO HEALTH SERVICES INC, d/b/a TEMPORARY HEALTH CARE SERVICES,

Plaintiff–Appellant,

v

EMPLOYERS INSURANCE OF WAUSAU,

Defendant–Appellee.

UNPUBLISHED

September 3, 1996

No. 176852
LC No. 94-472685 CZ

Before: Taylor, P.J., and Murphy and E. J. Grant,* JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition for defendant pursuant to MCR 2.116(C)(10) in this declaratory judgment action to determine defendant's duty to defend plaintiff. We reverse.

Plaintiff provides health care aides to persons requiring such assistance on a temporary basis. On June 4, 1992, Allen Meyers called plaintiff and requested that a health care aide be sent to his apartment to massage his legs. Plaintiff sent one of its employees to Meyers' apartment. When Meyers asked the aide to massage his groin area, the aide became offended and left. Four days later, the aide reported the incident to her supervisor, who in turn reported it to her supervisor. The second supervisor called Meyers to discuss the incident. Meyers neither admitted nor denied that the incident occurred but gave assurances that nothing like that would ever occur again. Satisfied with Meyers' assurances, another employee, Patricia McLaughlin, was dispatched to Meyers' apartment.

When McLaughlin arrived at Meyers' apartment, she sat him down on a bed and began massaging his legs. After an hour of massaging Meyers' legs, thighs, groin area, and stomach, Meyers became aroused and removed one of McLaughlin's breasts from her bra. McLaughlin asked Meyers to keep things on a professional basis and continued the massage. When McLaughlin stood up to take

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

a break from massaging Meyers' body, Meyers pulled down McLaughlin's underpants and panty hose, pushed her onto his bed, and ejaculated on her stomach.

On September 30, 1993, McLaughlin sued plaintiff, claiming that it was negligent in sending her to Meyers' apartment knowing that Meyers had attacked another woman in the past. Plaintiff submitted the claim to defendant, which had issued a worker's compensation and employer's liability insurance policy covering "bodily injury by accident or bodily injury by disease." When defendant denied coverage, plaintiff filed this declaratory judgment action to determine whether defendant had a duty to defend it against McLaughlin's lawsuit.

On appeal, plaintiff asserts that the trial court erred in concluding that the injuries claimed in the underlying lawsuit were not the result of an accident and were not covered by defendant's worker's compensation and employer's liability insurance policy. We agree.

An insurance policy must be enforced according to its terms. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 402; 531 NW2d 168 (1995). In the present case, the term "accident" is not defined in defendant's insurance policy. Thus, the commonly used meaning of that term is controlling. *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). An accident has been defined 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." *Arco Industries Corp, supra at* 404-405; *Rynerson v National Casualty Corp*, 203 Mich App 562, 567; 513 NW2d 436 (1994). Accidents are to be evaluated from the standpoint of the insured, not the injured person. *Arco Industries Corp, supra at* 405. Thus, in the instant case we evaluate the accident from the standpoint of plaintiff, not McLaughlin.

Meyers' attack of McLaughlin was an undesigned contingency, not anticipated, and not naturally to be expected. Even though plaintiff was told about another incident four days before McLaughlin was molested, it was impossible for plaintiff to know that Meyers would attack McLaughlin. This is especially true in light of the fact that Meyers neither admitted nor denied that the previous incident had occurred, and had specifically assured plaintiff that nothing like that would ever occur in the future. Plaintiff could not have foreseen that Meyers would molest McLaughlin simply because Meyers had made a sexual request to an aide a few days earlier.

Whether an insurance carrier has a duty to defend its insured in an underlying tort action depends on the allegations in the complaint. *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995). However, it is the substance rather than the form of the allegations that determines whether a duty to defend exists, and a trial court must focus on the cause of the injury in making this determination. *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989). Because the cause of McLaughlin's injuries was accidental, defendant had a duty to defend plaintiff against the allegations contained in McLaughlin's complaint.

Contrary to defendant's argument on appeal, it makes no difference that McLaughlin's sole remedy against plaintiff, assuming plaintiff is unable to establish an intentional tort, is worker's compensation benefits pursuant to MCL 418.131(1); MSA 17.237(131). An insurer's duty to defend

differs from the duty to provide coverage. *American Bumper & Mfg Co v Hartford Ins Co*, 207 Mich App 60, 66; 523 NW2d 841 (1994). The duty to defend extends to allegations that even arguably come within the policy coverage, *Allstate*, *supra* at 662, and extends to claims that may be groundless or frivolous. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994).

Defendant contends that since it's insurance policy excludes from coverage "bodily injury intentionally caused by [plaintiff]" it has no duty to defend plaintiff against McLaughlin's claims. The trial court never reached this issue. The question of insurance coverage, however, is a question of law and the facts necessary for resolving this issue were presented below. Therefore, the issue is reviewable. *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

The clause in defendant's insurance policy that excludes from coverage "bodily injury intentionally caused by [plaintiff]" requires both an intentional act and an intentionally caused injury before an insurer is relieved of its duty to defend or provide coverage." *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 335; 535 NW2d 583 (1995). In contrast, the intentional tort exclusion to the Worker's Compensation Disability Act (WDCA), MCL 418.131(1); MSA 17.237(131), allows an employee to bring suit against an employer where the employer committed a deliberate act, specifically intending injury (described in *Cavalier* as a true intentional tort), or where the employer "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* at 342-343. Thus, the WDCA's intentional tort exclusion actually encompasses two types of intentional torts while the insurance policy only precludes coverage for true intentional torts. When the policy exclusion and the language of the WDCA are placed side by side and compared, it is clear that an employee's injury may fall within the WDCA intentional tort exclusion and outside the policy exclusion. *Id.* at 343.

McLaughlin's complaint alleges facts that fall within the intentional tort exclusion to the WDCA. McLaughlin's allegations do not allege that plaintiff committed a "true intentional tort" or that plaintiff specifically intended an injury to McLaughlin, or that plaintiff "harbored an intent to injure" McLaughlin. *Id.* at 340. Rather, McLaughlin's artfully pleaded complaint simply alleges that plaintiff had actual knowledge that an injury was certain to occur if she were sent to Meyers' apartment, and that plaintiff willfully disregarded that knowledge, resulting in her injury. "Thus, the insurance policy exclusion overlaps only partially with the residual tort liability recognized for purposes of the exclusive remedy of worker's compensation." *Id.* at 341. The allegations in McLaughlin's complaint, therefore, arguably "fall within the WDCA intentional tort exclusion and outside the policy exclusion." *Id.* at 343. In this situation, defendant has a duty to defend plaintiff against the allegations made by McLaughlin. The intentional acts exclusion in defendant's insurance policy is inapplicable.

Finally, defendant claims that it is relieved of the duty to defend plaintiff against McLaughlin's claims because its insurance policy excludes from coverage "any obligation imposed by a worker's compensation" law. We disagree. McLaughlin did not rely on the worker's compensation statute for relief. Rather, she relied on an exception to the WDCA. Because McLaughlin was relying on an exception to the worker's compensation statute, her claim would not be based on an "obligation

imposed by a worker's compensation law." For this reason, this exclusion in defendant's insurance policy is also inapplicable.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Edward J. Grant