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UNPUBLISHED

No. 176852
LC No. 94-472685 CZ

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

MURPHY, J. (dissenting).

On appeal, we review the trial court's grant of summary disposition de novo. *Borman v State Farm Fire & Casualty Co,* 198 Mich App 675, 678 ; 499 NW2d 419 (1993). Summary disposition is proper under MCR 2.110(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a mater of law.

Whether an insurance carrier has a duty to defend its insured in an underlying tort action depends upon the allegations in the complaint. *Fitch v State Farm Fire & Casualty*, 211 Mich App 468, 471; 536 NW2d 273 (1995). However, the duty to defend and indemnify is not based solely on the terminology used in the pleadings of the underlying action. *Id.* It is necessary to examine the allegations "'to determine the substance, as opposed to the mere form, of the complaint.'" *Allstate Insurance Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989). If the claim even arguably falls within the terms of the policy, defendant has a duty to defend. *Id*. at 662. The insurer owes a duty to defend until the claims against the policy holder are confined to theories outside the scope of coverage under the policy. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich __; __ NW2d __ (Docket Nos. 101808, 101809, 101817-101822, decided July 16, 1996).

In this case, McLauglin's complaint against plaintiff alleges that plaintiff knew that Myers was a dangerous person and had previously assaulted employees of plaintiff, knew there was danger in sending McLaughlin to Myers' apartment, knew that that danger was certain to result in injury to

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

McLaughlin, and required that McLaughlin work in the face of that danger. Our inquiry is now whether this claimed injury falls within the meaning of the terms used in the policy. *Fitch*, *supra*, at 471.

The policy at issue only applies to "bodily injury by accident or bodily injury by disease." The term "accident" is not defined in the policy, but its commonly used meaning has been explored in the case law. "'[A]n accident is 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.'" *Auto Club Ins Co v Marzonie*, 447 Mich 624, 631-632; 527 NW2d 760 (1994). We must view the incident from the standpoint of the insured who caused the injury in question. *Michigan Basic Property Ins Ass'n v Wasarovich*, 214 Mich App 319, 327; 542 NW2d 367 (1995). Thus, in the instant case, although the incident may not have been expected or anticipated from McLaughlin's standpoint, we evaluate the incident from the standpoint of plaintiff.

In this case, McLaughlin is not claiming that plaintiff accidentally sent her into harm's way. The substance of McLaughlin's complaint is that plaintiff required McLaughlin to work in a situation where injury was, from plaintiff's standpoint, a known certainty, i.e., to be anticipated or expected. Such alleged conduct does not, even arguably, fall within the meaning of "accident."

Because McLaughlin confined her claim to a theory of recovery outside the scope of coverage under the policy, defendant had no duty to defend. Defendant was entitled to judgment as a matter of law, and summary disposition was proper.

/s/ William B. Murphy