

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

DANIEL GRANGER, LAURIE ROSS
GRANGER, RICHARD D. GRANGER, and
TEINA TALLARIGO, as Next Friend of JODI
TALLARIGO, a Minor,

Defendants-Appellees.

UNPUBLISHED
September 9, 2003

No. 236753
Wayne Circuit Court
LC No. 99-920856-CK

Before: Judge Zahra, P.J., and Talbot and Owens, J.J.

PER CURIAM.

In this declaratory judgment action, Allstate Insurance Company appeals as of right from the trial court's order granting summary disposition in favor of defendants. We reverse.

I. Facts and Procedural History

In the negligence case being submitted with this appeal, *Jodi Tallarigo v Daniel Granger*, (Docket No. 237469), Jodi Tallarigo, a minor, alleged that eighteen-year-old Daniel Granger failed to protect her from the criminal sexual conduct of eighteen-year-old Robbie Cooper, a social guest. Allstate, the insurer of a homeowner's insurance policy covering Granger and his parents, filed this declaratory action to seek a ruling on the insurance coverage available to Granger and his parents. Allstate claimed that Tallarigo's alleged injuries did not arise from an "occurrence" and did not meet the criteria of "bodily injury" as defined by the Grangers' homeowners insurance policy. Allstate also claimed that the insurance policy excluded from coverage the criminal conduct that Cooper committed against Tallarigo. The trial court ruled that the issue of insurance coverage depended on whether the jury found Granger negligent in failing to protect Tallarigo from Cooper's criminal conduct. After the jury determined that Granger was negligent and that his negligence was a proximate cause of Tallarigo's injuries, the court entered an order denying Allstate's motion and granting summary disposition in favor of defendants.

II. Standard of Review

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The construction and interpretation of the language of an insurance contract presents an issue of law that is reviewed de novo. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140; 655 NW2d 260 (2002).

III. Analysis

Allstate argues that the trial court erred when it concluded that Allstate must indemnify Granger for not protecting his child social guest from the criminal acts of another social guest when the terms of the homeowner's insurance policy expressly excluded from coverage any intentional or criminal act or an act of omission. We agree.

An insurance contract "must be enforced in accordance with its terms" and an insurance company will not be held liable for a risk that it did not assume. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). When deciding whether an insurance policy covers a particular act, the court must perform a two-part test. *Fire Ins Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996), overruled in part on other grounds, *Wilkie v Auto-Owners Insurance Co*, ___ Mich ___; 664 NW2d 776 (Docket No. 119295, decided July 16, 2003), citing *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 172; 534 NW2d 502 (1995). First, the court must review the "occurrence" section of the policy to determine if it includes the particular act. Second, if the particular act is included in the "occurrence" section, the court must then review the "exclusion" section of the policy to determine whether coverage is denied under any of the policy's exclusions. *Id.*

Here, the policy provides for liability coverage for bodily injuries or property damage caused by an "occurrence." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage." The word "accident" is not defined in the policy. Therefore, it will be interpreted in accordance with its commonly used meaning. *Allstate Insurance Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). Our Supreme Court has repeatedly defined "accident" to mean "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." *Id.* at 281. "Accidents are evaluated from the standpoint of the insured, not the injured party." *Id.* at 282. "[I]f both the act and the consequences were intended by the insured, the act does not constitute an accident." *Id.*

Granger admitted in his deposition that Tallarigo's friend, Nicole Ciccarelli, had called him at the beginning of the school year to express her interest and the interest of her friends to have sex with Granger and his friends. Granger admitted that he had had sex with girls in his house on previous occasions. Granger did not deny that his visitors were drinking that evening. He testified that Tallarigo sat on his lap and sucked his fingers in a sexual manner. Afterward, she left the room. Granger also testified that he assumed that Cooper was having sex with Tallarigo in the basement, and he headed to the basement with the intention of performing a sexual act with her. Tallarigo testified that she performed fellatio on Cooper in the basement and

after he left, Granger walked in and allegedly forced Tallarigo to perform fellatio on him.¹ Thus, the evidence establishes that Granger intended to open his house for the sexual relations to occur.

The next question is whether Granger “reasonably should have expected the consequences.” *McCarn, supra* at 283. This Court addressed a similar factual situation in *Allstate Insurance Co v JJM*, 254 Mich App 418; 645 NW2d 20 (2002). In *JJM*, the defendant opened her house to minors for parties and supplied them with alcohol. The minor victim was raped when she passed out after consuming alcohol. *Id.* at 419. This Court held that the defendant reasonably should have expected that giving minors enough alcohol to allow them to pass out would result in harm. *Id.* at 422.

This Court looks to the underlying cause of the injury and not the theory of liability in determining coverage. *Gorzen v Westfield Ins Co*, 207 Mich App 575, 578; 526 NW2d 43 (1994). The underlying cause of fourteen-year-old Tallarigo’s injury was her act of fellatio on Cooper, an adult social guest who was allowed on the premises by Granger, an insured adult. Granger’s failure to protect Tallarigo from such conduct was Tallarigo’s specific theory of negligent liability but it is not the cause of her injury. Her injury was caused by Cooper’s criminal act. For purposes of civil liability insurance, when an adult sexually assaults a child, this Court has inferred the intent to injure as a matter of law. *State Mut Ins Co v Russell*, 185 Mich App 521, 526-527; 462 NW2d 785 (1990). The inferred-intent-to-injure approach on the part of adults who engage in sex acts with minors is based on public policy, not an interpretation of an insurance policy. *Weekley v Jameson*, 221 Mich App 34, 38; 561 NW2d 408 (1997). Our Legislature, by criminalizing sexual relations with minors, determined that harm results to underage persons who engage in sexual intercourse whether they consent to the act or not. *Linebaugh v Berdish*, 144 Mich App 750, 761-762; 376 NW2d 400 (1985). Thus, Granger reasonably should have expected that opening his house to his adult friends to have criminal sexual relations with minors would result in harm. Because Granger intended to facilitate the criminal activity and by law, intended the harm, his act was not an accident and it did not constitute an occurrence as defined in the homeowner policy.

Because Tallarigo’s claim is not covered in the “occurrence” section of the policy, we need not look to the “exclusion” section of the policy. *Fire Ins Exchange, supra*. Accordingly, the trial court erred in denying Allstate summary disposition.

Reversed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens

¹ In the case submitted on appeal with this case (Docket No. 237469), Tallarigo raised a claim of assault and battery against Granger that was separate from the issue of his duty of care to protect her from Cooper’s acts. The jury found no cause of action with respect to the assault and battery claim.