

STATE OF MICHIGAN
COURT OF APPEALS

NORTHERN MUTUAL INSURANCE
COMPANY,

UNPUBLISHED
October 28, 1997

Plaintiff-Appellee,

v

No. 196548
Houghton Circuit Court
LC No. 95-009225-CZ

IAN DANE McLEOD, a minor, by his Next Friend
JOHN McLEOD,

Defendant-Appellant,

and

JERRY ALLEN THOMAS, a minor, by his Next
Friend, SHERRY THOMAS,

Defendant.

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant Ian Dane McLeod appeals as of right from the trial court's grant of summary disposition for plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Defendant Jerry Allen Thomas and another boy, both minors, participated in an assault on defendant McLeod, also a minor. Thomas admitted that he punched and kicked McLeod, and that he knew his conduct would hurt McLeod. He testified, however, that he never kicked McLeod in the stomach. Rather, he claimed that the other assailant pushed him into McLeod and, as he fell, he kneed McLeod in the stomach. A blood clot developed in McLeod's stomach and the clot is the injury at issue in an underlying suit between Thomas and McLeod.

Plaintiff, which had issued a homeowner's insurance policy under which Thomas was an insured, sought a declaratory judgment establishing that the policy did not provide coverage for injuries

resulting from the assault. The trial court granted summary disposition for plaintiff, finding that there had been no “occurrence” to trigger coverage under the insurance policy. The trial court also indicated that the policy’s exclusion of coverage for intentional acts would preclude coverage even if there had been an occurrence. On appeal, McLeod disputes both of these findings.

This Court reviews the trial court’s grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). An insurance policy, like any other contract, is an agreement between the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). As such, the court determines what the agreement was and effectuates the intent of the parties. *Id.*

The policy at issue provided:

We pay, up to our limit, all sums for which an insured is liable by law because of bodily injury or property damage caused by an occurrence to which this coverage applies.

Occurrence is defined simply as "an accident."

When the term "accident" is not defined within a policy, we assign it its common definition: "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 v American Motorists Ins Co*, 448 Mich 395, 404-405; 531 NW2d 168 (1995). In determining whether an accident occurred such that there is coverage under the policy, we must view the incident itself from the standpoint of the insured who caused the injury. *MBPIA v Wasarovich*, 214 Mich App 319, 326-328; 542 NW2d 367 (1995). Based on the language of the policy, we only consider the incident and not the consequences in determining whether there was an occurrence. *Id.* at 328.

Looking at the assault from Thomas' perspective, we hold that there was no occurrence under the policy. Thomas intended to assault McLeod. He willingly participated in the attack, knowing that his actions would cause harm to McLeod. We decline to focus on Thomas' intent with regard to the specific blow that supposedly caused the injury; that being Thomas' kneeing McLeod in the stomach when he was pushed by the other participant to the assault. Instead, we focus on the assault itself from which the injury resulted. Because there was no accident and thus, no occurrence, plaintiff did not have to provide coverage.

The case at hand is unlike *Fire Ins Exchange v Diehl*, 450 Mich 678; 545 NW2d 602 (1996), which is cited by McLeod for the proposition that an assault is an occurrence under an insurance policy unless the insured intended both the act *and* intended the resulting injury. In *Diehl*, the applicable insurance policy defined "occurrence" as follows:

a sudden event, including continuous or repeated exposure to the same conditions, resulting in bodily injury or property damage *neither expected nor intended by the insured*. [*Id.*, 684.]

For purposes of determining whether there was an occurrence, the insurance policy at issue, unlike that in *Diehl*, does not require an inquiry into whether the injury was expected or intended. See *Wasarovich, supra* at 328. Therefore, it does not matter that Thomas claims he did not intend the specific injury. *Diehl* is not applicable to the case at hand.

McLeod also contends that the trial court erred in ruling that the intentional acts exclusion applied to bar coverage. Because the insurance policy did not provide for coverage under the circumstances, it is unnecessary for us to determine whether coverage was excluded by any policy exclusion. We note, however, that were we to address this issue, we would agree with the trial court that coverage would be excluded under the intentional acts exclusion of the policy, which stated:

This policy does not apply to bodily injury or property damage which results directly or indirectly from:

. . . an intentional act of an Insured or an act done at the direction of an insured.

Thomas intended to assault McLeod and the policy does not apply to bodily injury resulting directly or indirectly from an intentional act.

Affirmed. Plaintiff being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Richard A. Bandstra