

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN WHITTLE,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 195435
Oakland Circuit Court
LC No. 95-504088-CK

Before: Corrigan, C.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

In this declaratory action, plaintiff appeals by right the order granting summary disposition in favor of defendant under MCR 2.116(I)(2) because defendant did not have a duty to defend plaintiff in the underlying tort action. We affirm.

This case arises from a dispute between plaintiff and his neighbor, George Vidu, over the location of a rock on a neighborhood lake access lot. Plaintiff moved the rock closer to Vidu's property line so that he could mow the lot with his new riding lawnmower. The next evening, plaintiff observed Vidu's wife moving the rock. Plaintiff approached Vidu's wife in order to ask her to reposition the rock. Vidu emerged from his house and confronted plaintiff. During the ensuing argument, Vidu either punched or attempted to punch plaintiff on three separate occasions. Each time, plaintiff pushed Vidu, twice causing Vidu to fall to the ground.

Vidu commenced an action against plaintiff for assault and battery. Plaintiff tendered his defense to defendant, his insurer. Defendant denied coverage on the grounds that plaintiff intended to push and injure Vidu and the altercation was not an occurrence within the scope of the policy. Plaintiff subsequently initiated this action for a declaratory ruling that defendant had a duty to defend in the tort action. Plaintiff then moved for partial summary disposition under MCR 2.116(C)(10) regarding defendant's duty to defend. The court denied the motion, and granted summary disposition in favor of defendant under MCR 2.116(I)(2) because Vidu's injuries fell within the policy's intentional acts exclusion.

We reject plaintiff's initial argument that defendant is estopped from asserting the applicability of the intentional acts exclusion because defendant did not state the defense when it denied coverage. As a general rule, an insurer who denies coverage and states its defenses is estopped from asserting new defenses. *Lee v Evergreen Regency Cooperative*, 151 Mich App 281, 285; 390 NW2d 183 (1986). However, in this case, defendant stated the defense in its denial of coverage letter. Further, plaintiff abandoned his additional argument that an insurer may not support its denial of coverage with discovery materials produced after it sent its insured a notification letter because he cited no authority for the proposition. A party may not leave it to this Court to search for authority to sustain or reject the party's position. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).

Plaintiff next argues that the trial court erred in granting summary disposition because he pushed Vidu in self-defense. We disagree. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Horn v Dep't of Corrections*, 216 Mich App 58, 66; 548 NW2d 660 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim and permits summary disposition when, except for the amount of damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. When deciding the motion, the court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in a light most favorable to the opposing party. *Ladd v Ford Consumer Finance Co*, 217 Mich App 119, 124-125; 550 NW2d 826 (1996). The court also may render judgment in favor of the opposing party if it appears that that party is entitled to judgment. MCR 2.116(I)(2).

Defendant's policy does not cover claims against an insured to recover for:

- a. bodily injury or property damage:
 - (1) which is either expected or intended by an insured; or
 - (2) to any person or property which is the result of willful and malicious acts of an insured.

There is no self-defense exception to this intentional acts exclusion. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 385; 565 NW2d 839 (1997). The *Harrington* Court determined that "[t]o except injurious action take in self-defense from the intentional-acts exclusion would impermissibly disregard the clear language of the exclusion in the contract between insurer and insured." *Id.* at 386. As in *Harrington*, the language "expected or intended" in the instant policy is clear and unambiguous, and requires that the court make a "subjective inquiry into the intent *or expectation* of the insured." *Id.* at 383.

[T]his "intended or expected" language bars coverage for injuries caused by an insured who acted intentionally despite his awareness that harm was likely to follow from his conduct. . . . "In other words coverage is precluded if the insured's claim that he did not intend or expect injury 'flies in the face of all reason, common sense and experience.'" [*Id.* at 384 (citations omitted).]

In this case, the trial court properly granted summary disposition because defendant had no duty to defend plaintiff against Vidu's claim. Plaintiff admitted that he intended to push Vidu, knowing that the elderly Vidu had recently undergone an angioplasty procedure. Plaintiff also acknowledged that falling is a natural result of being pushed. On these facts, plaintiff was aware that harm was likely to follow from intentionally pushing Vidu. Therefore, defendant's policy does not cover Vidu's claim against plaintiff because the claim falls within the intentional acts exclusion. Defendant had no duty to defend plaintiff because the allegations in Vidu's complaint do not even arguably fall within the scope of coverage. *Harrington, supra* at 386.

In light of our determination that the intentional acts exclusion applies, we decline to address plaintiff's argument that the policy would otherwise apply because an "occurrence" led to Vidu's injuries.

Affirmed.

/s/ Maura D. Corrigan
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra