

STATE OF MICHIGAN  
COURT OF APPEALS

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AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

HUNTER P. LONG,

Defendant,

and

AUDRA L. ELLIS,

Defendant-Appellant.

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UNPUBLISHED

May 17, 2005

No. 251414

Ingham Circuit Court

LC No. 03-000296-CZ

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant-Appellant Audra Ellis appeals as of right the order granting plaintiff's motion for summary disposition in this declaratory judgment action and thereby holding that plaintiff has no duty to defend or indemnify defendant Hunter Long in the underlying civil action that Ellis brought against him, which is predicated on Long having sexually assaulted her. We affirm. This case is being decided without oral argument under MCR 7.214(E).

This Court reviews a trial court's grant of summary disposition under MCR 2.116(C)(10) *de novo*. *Peden v Detroit*, 470 Mich 195, 200-201; 680 NW2d 857 (2004).

If no theories of recovery asserted against an insured fall within the coverage of the insurance policy, an insurer does not have a duty to defend the insured in the matter. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2001). Here, it is undisputed that the insurance policy at issue only provided coverage for an "occurrence," defined in the policy as "an accident that results in bodily injury . . ." Further, the policy included an exclusion from coverage for "bodily injury . . . reasonably expected or intended by the insured."

Ellis argues that the trial court erred by granting plaintiff's motion for summary disposition because Long testified in his deposition that he intended to have consensual sex with Ellis during the incident and did not intend, and should not reasonably have expected, to injure her. We disagree. Defendant's position is inherently illogical. On the one hand, Ellis relies on Long's deposition testimony that he did not intentionally sexually assault her as establishing

plaintiff's duty to provide insurance coverage on the theory that Long neither intentionally harmed her nor reasonably should have expected to harm her. On the other hand, Ellis' tort claims of assault, battery, and intentional infliction of emotional distress in the underlying suit are necessarily premised on Long having intentionally harmed her or at least having been reckless<sup>1</sup> with regard to whether he harmed her. See *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004), quoting *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991) (civil assault claim requires showing of "intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another"); *VanVorous*, *supra* at 483, quoting *Espinoza*, *supra* at 119 (battery claim requires showing of "wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact"); *VanVorous*, *supra* at 481, quoting *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985) (intentional infliction of emotional distress claim requires showing of intent or recklessness).

Further, Ellis' position simply makes no sense because it is the nature of defendant's claims against Long, not his denial of having committed conduct essential to establishing those claims, that is critical to assessing whether plaintiff has a duty to defend those claims. In other words, regardless of any assertions by Long that he only intended to have consensual sex with Ellis, plaintiff has no possible liability with regard to defendant's claims because the claims are premised on Long having intentionally sexually assaulted her. Accordingly, plaintiff has no obligation to provide insurance coverage for the claims at issue because (1) they are plainly not premised on the occurrence of an "accident" as that term is commonly understood, and (2) coverage is further excluded by the plain language of the policy exclusion for intentionally inflicted bodily injury. Because no theory of liability asserted against Long in that suit falls within the coverage of the insurance policy, plaintiff has no duty to provide coverage in the underlying suit. *Burchell*, *supra* at 480-481.

Affirmed.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Patrick M. Meter

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<sup>1</sup> Reckless misconduct "constitutes the functional equivalent of willfulness in that it shows an "indifference to whether harm will result as to be the equivalent of a willingness that it does.""  
*Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 443-444; 683 NW2d 171 (2004), quoting *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994), quoting *Burnett v Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). Because reckless conduct requires such a degree of indifference to whether harm results as to be the functional equivalent of a willingness that it does, recklessness requires an intentional disregard of a known and substantial risk of harm so that a person who acts recklessly with regard to the possibility of harming another person in a certain way necessarily would reasonably expect that such harm to the other person could result.