

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

TODD VAUGHAN and VINCENT GIOVANNI,

Defendants-Appellees.

UNPUBLISHED

October 31, 2006

No. 268908

Oakland Circuit Court

LC No. 05-065547-CK

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff Allstate Insurance Company appeals as of right from the trial court's order denying its motion for summary disposition and granting the motion for summary disposition brought by defendant Todd Vaughan and concurred in by Vincent Giovanni. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The facts underlying this case are simple. Vaughan and Giovanni were playing in a drop-in hockey game, drop-in meaning that the game is not officiated and checking is not allowed. Both players were wearing full protective gear. At one point during the game, while both players skated toward the puck, Vaughan made contact with Giovanni, and Giovanni lost his balance and crashed into the boards, sustaining a broken collarbone. Vaughan acknowledged that he intentionally made contact with Giovanni, stating that he pushed Giovanni on the shoulder to cause him to concentrate on keeping his balance rather than pursuing the puck.

Giovanni filed suit against Vaughan, alleging assault and battery and gross negligence.¹ Vaughan requested that Allstate, his insurer, defend and indemnify him in the case. Allstate filed the instant declaratory action, seeking a judgment that its homeowners' policy relieved it of the duty to defend or indemnify Vaughan in the underlying suit. Allstate's policy provided that it would "pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury** or **property damage** arising from an **occurrence** to which this policy applies, and covered by this part of the policy" (emphasis in original). The policy defined "occurrence" as an "accident." The policy excluded coverage for "**bodily injury** or **property damage** intended by,

¹ *Giovanni v Vaughn*, Oakland Circuit Court Docket No. 04-057850-NO.

or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**,” even if the injury or damage was “of a different kind or degree than that intended or reasonably expected . . .”.

Allstate moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it had no duty to defend or indemnify Vaughan because the incident that resulted in injury to Giovanni did not arise from an occurrence; i.e., did not constitute an accident, and because it fell under the policy’s intentional act exclusion.

Vaughan moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that Allstate was obligated to defend and indemnify him in the underlying action. He contended that the evidence showed that the incident constituted an accident, because while the contact was intended, the consequences were unintended, and reasonable minds could not disagree that he would not have expected the injury to Giovanni. Giovanni concurred in Vaughan’s motion.

The trial court denied Allstate’s motion, but granted Vaughan’s motion. The trial court concluded that reasonable minds could find that Vaughan did not intend to injure Giovanni. Moreover, the trial court determined that reasonable minds could not find that Vaughan reasonably expected the injury to Giovanni. Specifically, the court stated it was “granting Vaughan’s motion given the testimony regarding the nature of the game, including the fact that Giovanni was wearing full protective gear and known to be a good skater. It’s not possible for Vaughan to have reasonably expected the injury.”

We review a trial court’s decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).²

An insurance contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). An insurance contract is clear and unambiguous if it fairly admits of but one interpretation. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). If the language of an insurance contract is clear, its construction is a question of law for the court. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). An insurance contract is ambiguous if, after reading the entire contract, its language can reasonably understood in different ways. *Nikkel, supra* at 566-567. Ambiguities are to be construed against the insurer. *State Farm Mutual Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001).

To determine whether the insurance policy provides coverage, the inquiry is two-pronged, as we must consider both the act and the consequences:

² The trial court did not specify the court rule under which it made its decision. However, the motion was supported by deposition testimony, to which the trial court referred when ruling on the motions. We assume that the trial court relied on MCR 2.116(C)(10). *Detroit News, Inc v Policemen & Firemen Retirement System*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured. *Allstate Ins Co v McCarn*, 466 Mich 277, 282-283; 645 NW2d 20 (2002).

Vaughan's deposition testimony established that he intentionally made contact with Giovanni while they both pursued the puck down the ice. Plainly, Vaughan intended to push Giovanni, so the critical question is whether Vaughan could reasonably have expected this injury to Giovanni to result. The trial court concluded the injury could not reasonably have been anticipated, and we agree.

An injury may reasonably be expected if, applying an objective "reasonable person" standard, it "was the natural, foreseeable, expected, and anticipated result of the intentional or criminal conduct." *Allstate Ins Co v Freeman*, 432 Mich 656, 688; 443 NW2d 734 (1989). "That is, we are to determine whether a reasonable person, possessed of the totality of the facts possessed by [the injurer], would have expected the resulting injury." *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 290; 683 NW2d 656 (2004) (McCarn II).

We find that a reasonable person, aware of all the facts and circumstances here, could not have found that this injury was the expected result of the contact between Vaughan and Giovanni. It is beyond dispute that contact, including rough contact, occurs in hockey. It is also beyond question that both parties to this incident were experienced hockey players.³ Both players were wearing full protective gear; indeed, the venue required all players to wear full protective gear. A reasonable person could not expect incidental contact, even if intentional, to be anything other than part of the game; a reasonable person could not anticipate that an injury would occur where, as here, both players were experienced and were wearing the proper protective equipment.

³ Giovanni stated in his deposition that he was 53 or 54 years of age at the time of the injury, that he had started playing hockey "[a]s a grade school kid," and that he had played "thousands of times." Vaughan stated in his deposition that he was 35 at the time of the incident, and had started playing hockey at the age of 16. Both parties testified that they had participated in some form of hockey training: Giovanni participated in a skills school for approximately four winter sessions in years after 1997, each session including 20-25 meetings of an hour and a half; Vaughan attended one approximately ten-week skating school while in his early 30s.

The trial court correctly determined as a matter of law that the incident constituted an occurrence and that Allstate was obligated to defend and indemnify Vaughan in the underlying suit.

Affirmed.

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello