

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD STEVEN FREDERICK and
INES FREDERICK,

UNPUBLISHED
November 25, 2008

Plaintiffs-Appellants,

v

No. 280629
Wayne Circuit Court
LC No. 06-614142-CZ

FARM BUREAU INSURANCE,

Defendant-Appellee.

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order denying their motion for summary disposition and granting defendant's motion for summary disposition under MCR 2.116(C)(10), finding that defendant had no duty to defend or indemnify plaintiffs in an underlying lawsuit. We affirm the order denying plaintiffs' motion for summary dismissal, reverse the order granting defendant's motion for summary dismissal, and remand for further proceedings.

On May 17, 2006, plaintiffs filed their complaint for declaratory relief against defendant, their homeowner insurance provider, after defendant denied representation and coverage with regard to a lawsuit filed against them by their adjacent neighbors, Larry and Sharon Lundin, for damage plaintiffs' alleged negligence caused to their property. The Lundins claimed that plaintiffs attempted to remedy a flooding problem by negligently adding fill dirt and then not properly grading their property, which caused the Lundins to have a flooding problem and to suffer property damage. On June 15, 2007, plaintiffs filed a motion for summary disposition, arguing that there was no genuine issue of material fact that they had been sued by their neighbors for an "occurrence," as defined by defendant's insurance policy, that was not subject to an exclusionary provision; thus, defendant was obligated to provide a defense and liability coverage with regard to the Lundin matter.

On June 29, 2007, defendant filed its motion for summary disposition, arguing that it was entitled to summary dismissal because there was no "occurrence" as defined by the insurance policy, and because coverage was excluded by the intentional act and/or criminal act exclusions contained in the policy. Defendant argued that plaintiffs intentionally and significantly altered the drainage patterns that existed on their property by having several truckloads of dirt dumped on their property without consideration that their property grade height would be rendered much higher than the grade of the Lundins' property, which subsequently caused flooding.

On August 3, 2007, oral arguments were held on the motions. The trial court rejected defendant's claim that the criminal act policy exclusion applied on these facts. Next the trial court considered whether the intentional act of dumping the dirt, even if plaintiffs did not intend to cause harm, could constitute an "intentional act" under the policy. Plaintiffs' counsel argued that, for the exclusion to apply, the flooding problem had to be intentional, not the act of bringing dirt onto the property. Defendant's counsel argued that the "intentional act" exclusion applied if, under an objective analysis, there was a foreseeable result from the intentional act. Here, under a reasonable man standard, one would know that adding a significant amount of dirt to property was going to change the water drainage patterns on the property which would cause flooding to occur on surrounding properties. The trial court agreed with defendant and held that there was no coverage under the policy. Thereafter, an order granting defendant's motion for summary disposition was entered. This appeal followed.

Plaintiffs argue that summary dismissal was erroneous because defendant had a duty to defend and indemnify them against the Lundins' negligence claims which arose from an "accident" that was not an "intentional act," under the policy terms. After de novo review of the trial court's dismissal decision, considering the evidence in a light most favorable to plaintiffs to determine if a genuine issue of material fact exists, we agree in part. See MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

"Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement, and second, a decision regarding whether an exclusion applies to negate coverage." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997). The duty to defend is separate from the duty to indemnify and is triggered if the allegations in the complaint filed against the insured arguably come within the policy coverage. *Id.* at 386. Although the court will look behind the allegations to determine whether coverage is possible, there is no duty to defend against claims expressly excluded from policy coverage. *Meridian Mut Ins Co v Hunt*, 168 Mich App 672, 677; 425 NW2d 111 (1988). Issues of contract interpretation, including whether an insurer is obligated to defend an insured, are reviewed de novo as a question of law. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001); *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004).

The homeowners insurance policy at issue provides that defendant will defend and indemnify plaintiffs if a suit is brought against them "for property damage caused by an occurrence to which this coverage applies." The term "occurrence" is defined in the policy as follows:

8. "Occurrence" means an accident . . . which results, during the policy period, in:

* * *

- b. property damage;
neither expected nor intended from the standpoint of the insured.

Plaintiffs argue that the flooding of the Lundins' property was an "accident" and, thus, constituted an "occurrence" within the meaning of the policy. Plaintiffs contend that, although

they intentionally added fill and graded their own property, they did not expect or intend to damage the Lundins' property.

The policy does not define the term "accident" but our Supreme Court has consistently held that "an accident is 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." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999). When determining whether property damage was caused by an "accident," the insured's injury-causing act or event and its consequences are evaluated from the standpoint of the insured, not the injured party or "a reasonable person." *Allstate Ins Co v McCarn (McCarn I)*, 466 Mich 277, 282-283; 645 NW2d 20 (2002); *Masters, supra* at 114-115. An intentional act can constitute an "accident." "[I]f 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." *McCarn I, supra; Masters, supra*.

Here, the evidence indicates that before this property was purchased in April of 2001, plaintiffs inquired with the building department of Huron Township about a standing water problem. Plaintiffs were allegedly advised, including by its building department director, to bring in dirt and route the water through grading so that it flowed into a ditch, that ran the length of the property line they shared with the Lundin property, and into the Winnie Drain. Plaintiffs were advised that, because their property was less than two acres in size, no permits were required by ordinance. Thereafter, in the late summer of 2001, plaintiffs had a couple of truckloads of dirt dumped and Larry Lundin even helped to spread it with his tractor.

In June of 2003, still experiencing a standing water problem, plaintiffs hired a contractor, A-1 Excavation, to bring in more dirt and to properly grade their property so that the standing water would run into the ditch and then the Winnie Drain. After several truckloads of dirt were dumped, the Lundins complained about the activity to Huron Township and all work was subsequently stopped. The standing water problem on plaintiffs' property remains. The complaint filed by the Lundins against plaintiffs claims that, on January 4, 2004, their property was flooded allegedly as a consequence of plaintiffs' negligence with regard to the addition of the dirt and subsequent grading problems. We conclude on these facts that any flooding that occurred to the Lundins' property after plaintiffs intentionally added fill dirt to their property was not intended by plaintiffs.

Further, we conclude that plaintiffs' acts did not create a direct risk of harm from which the flooding of the Lundin property should reasonably have been expected by them. In brief, at the Township's direction, plaintiffs previously added fill dirt to their property to alleviate a standing water problem. The Lundin property did not flood. Because a standing water problem continued, plaintiffs wanted to add significantly more dirt so they hired a contractor to perform the job. No survey or engineering site plan was required by the Township. The contractor did not advise them of any flooding risk. The fill dirt was supposed to be graded so that standing water was directed to an existing ditch that would feed into the Winnie Drain. Plaintiff Richard Frederick testified that he believed his property was lower in elevation than the Lundin property thus flooding of the Lundin property could not occur. And, in fact, the Lundins' property did not flood until over six months after the fill was added.

Defendant argues on appeal that the intentional act of bringing in truckloads of dirt “created a direct risk of harm from which the consequences should reasonably have been expected by the insured,” *McCarn I, supra*, because it is obvious that such dirt would disrupt the drainage patterns on the property. We disagree. Changing the drainage patterns on their own property so that standing water would be diverted to a ditch that fed into the Winnie Drain did not create a direct risk of harm from which the flooding of the Lundin property should reasonably have been expected by plaintiffs. Under the circumstances as discussed above, we conclude as a matter of law that the flooding of the Lundins’ property was an “accident” which constituted an “occurrence,” within the meaning of the policy’s coverage provision.

However, the policy also contained an “intentional act” exclusion which excluded coverage for “property damage which may be the natural, foreseeable, expected, or anticipated result of the intentional acts of one or more Insureds or which is in fact intended by one or more Insureds, even if the resulting . . . property damage is of a different kind, quality, or degree than initially expected or intended” Thus we turn to the issue of whether this exclusion negates coverage. See *Harrington, supra* at 382. While plaintiffs bore the burden of proving coverage, defendant must prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). The trial court held that defendant conclusively carried that burden. We disagree.

Because we have determined that the flooding of the Lundin property was not intended, the issue here is whether the flooding of the Lundin property on January 4, 2004, was the “natural, foreseeable, expected, or anticipated result” of the intentional act of adding fill dirt to plaintiffs’ property in June of 2003. We conclude that a genuine issue of material fact exists as to whether the exclusion applies. As defendant notes, our Supreme Court has held that the language “natural, foreseeable, expected, or anticipated result” denotes a “reasonably expected result.” *Harrington, supra* at 383-384. The inquiry, then, is whether the flooding of the Lundin property was a reasonably expected result of the intentional act of adding fill dirt to plaintiffs’ property. The policy language used in the exclusion dictates the application of an objective standard as indicated by its failure to reference consideration of the insured’s standpoint or expectation. See *McCarn I, supra* at 283 n 4. Thus we consider “whether a reasonable person, possessed of the totality of facts possessed by [the insured], would have expected the resulting injury.” *Allstate Ins Co v McCarn*, 471 Mich 283, 290-291; 683 NW2d 656 (2004) (*McCarn II*).

Here, the facts possessed by plaintiffs included that they had previously added fill dirt to their property at the Township’s direction, without the use of any site plans or surveys—which were not required by the Township—and no flooding problems to the Lundin property resulted. Thus, when plaintiffs continued to have standing water, they hired a contractor to add significantly more fill dirt and to grade the property so that their standing water would be diverted to a ditch that led to the Winnie Drain. The contractor did not advise them that there would be any flooding problems and plaintiff Richard Frederick believed his property was of lower elevation than the Lundin property. However, the amount of dirt that plaintiffs had dumped was significantly more than the previous time they added fill to their property. Defendant argues that, because of the amount of dirt, it was foreseeable that the drainage patterns on the property would change and cause water to flow onto the Lundin property. While changing the drainage pattern was a reasonably expected result of adding the fill dirt—and in fact was a desired result to alleviate plaintiffs’ standing water problem—flooding the Lundin

property may not have been because the water was supposed to be directed to a ditch. But the ditch itself was between plaintiffs and the Lundins' property. We conclude that a genuine issue of material fact exists as to whether a reasonable person possessed of these facts would have expected the Lundin property to flood.

And we reject defendant's argument on appeal that the trial court erroneously denied its motion for summary dismissal on the ground that coverage was barred by the criminal act exclusion. The "criminal act" exclusion barred coverage for "bodily injury or property damage resulting from a criminal act of an insured, regardless of whether an insured person is actually charged with, or convicted of, a crime." The policy defines a "criminal act" as "any act or omission or number of actions or omissions that constitute a felony or misdemeanor crime prohibited by statute or ordinance." Here, we agree with the trial court and conclude that defendant has failed to prove that the flooding of the Lundin property resulted from a criminal act committed by plaintiffs. See *Heniser, supra*.

In summary, the flooding on the Lundin property was an "accident," and thus an "occurrence" covered under the policy. There is no genuine issue of material fact that plaintiffs did not intend or reasonably expect that adding fill dirt and grading their property would cause damage to the Lundin property. However, a genuine issue of material fact exists as to whether the "intentional act" exclusion negates coverage. Whether the flooding of the Lundin property on January 4, 2004, was a "natural, foreseeable, expected, or anticipated result" of the intentional act of adding fill dirt to plaintiffs' property in June of 2003 must be decided by the finder of fact. Accordingly, because the allegations against plaintiffs arguably came within the scope of the policy coverage and any doubt must be resolved in favor of plaintiffs, defendant had a duty to defend plaintiffs in the underlying suit. See *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-452; 550 NW2d 475 (1996). The issue whether defendant had a duty to indemnify plaintiffs with regard to the Lundins' negligence lawsuit is remanded to the trial court for further proceedings. See *Polkow v Citizens Ins Co of America*, 438 Mich 174, 180-181; 476 NW2d 382 (1991). Thus, the order denying plaintiffs' motion for summary dismissal is affirmed, the order granting defendant's motion for summary dismissal is reversed, and the matter is remanded for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter