

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UNPUBLISHED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.

JANSEN, J. (*dissenting*).

I respectfully dissent. Vaughan acknowledged that he intentionally made contact with Giovanni, but contended that he simply pushed Giovanni on the right shoulder in order to cause him to concentrate on keeping his balance rather than pursuing the puck. 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 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. He contended that the incident constituted an accident because the consequences were unintended and reasonable minds could not disagree that he could not have expected the injury.

Under the policy in question, an insured need not act unintentionally to render the results of his conduct accidental. If the act was intended but the consequences were not, the act was accidental. However, if the act created a direct risk of harm from which the injurious consequences reasonably should have been expected, the act was not accidental. Whether an injury should have been reasonably expected is an objective inquiry. *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 289-290; 683 NW2d 656 (2004).

Vaughan's deposition testimony established that he intentionally made contact with Giovanni. Vaughan's testimony also established that he had been playing hockey for more than 15 years at the time of the incident. In attempting to make Giovanni lose his balance on the ice, Vaughan reasonably should have expected that Giovanni could have sustained injuries. The fact that the specific resulting harm, Giovanni's broken collarbone, was different from that which could have reasonably been expected, is irrelevant. *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 116; 595 NW2d 832 (1999).

A genuine issue of fact existed as to whether Giovanni's injury was the reasonably expected consequence of Vaughan's intentional act. The trial court erred in determining as a matter of law that the incident constituted an accident. No party was entitled to summary disposition. I would affirm the trial court's denial of Allstate's motion, but reverse and remand with respect to the trial court's grant of summary disposition for Vaughan.

/s/ Kathleen Jansen