

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

FLOYD GOSS and CHARLES FINDLAY,

Defendants-Appellees.

UNPUBLISHED

December 26, 2000

No. 219955

Saginaw Circuit Court

LC No. 97-017374-CK

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

This declaratory judgment action as to insurance coverage stems from an underlying personal injury case. Plaintiff appeals as of right from a grant of summary disposition by the trial court in favor of defendants, holding that plaintiff must defend and indemnify defendant Goss (defendant) under the terms of a homeowner's policy. We reverse and remand for a trial on the merits.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). The pleadings, affidavits, depositions, and other evidence are considered in the light most favorable to the party against whom summary disposition is entered. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). All reasonable inferences are made in favor of this party. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999). Summary disposition may not be based on findings of disputed facts or credibility determinations. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition is inappropriate. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

Here, we find that there is a genuine issue of material fact as to whether defendant's injuries resulted from plaintiff's intentional act or from an accident. The determination of whether the act was intentional or accidental will determine whether there is insurance coverage. This issue of whether plaintiff must indemnify its insured must therefore be tried by a jury.¹

Plaintiff argues that the governing rule of law is different from that applied by the trial court. Plaintiff is correct. After the trial court entered summary disposition, our Supreme Court overruled the standard which the trial court believed to govern whether to classify an act as intentional or accidental for insurance coverage purposes. That standard was the one set out by this Court in *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206; 591 NW2d 685 (1998), rev'd sub nom *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000). This standard had mandated that "whether there is an accident should be evaluated from the perspective of the insured, not the injured party." *Nabozny*, 223 Mich App at 213. It also held "that it is possible for a cause of action to exist where intentional conduct resulted in unintended and unexpected injuries constituting an accident," noting that "the focus of the inquiry is on the result or the consequence of the insured actor's behavior, not the act alone." *Id.* The trial court relied on this standard in its decision, ruling "that the injury . . . Findlay sustained was neither anticipated nor naturally to be expected from the viewpoint of the insured," and thus held "as a matter of law that the incident that led to . . . Findlay's injuries was an 'accident' for which [p]laintiff provides coverage."

This standard relied on by the trial court was rejected by our Supreme Court in *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999), and in *Nabozny, supra*, 461 Mich at 478-482. In *Masters*, our Supreme Court ruled that whether an event is an accident must "be framed from the standpoint of the insured, not the injured party." *Masters, supra*, 460 Mich at 114. The *Masters* Court noted that an act need not be purely unintentional to be an "accident," and observed that there can be a problem in determining when an intentional act can be said to result in an accident. *Id.* at 115. The correct test, the *Masters* Court ruled, is

whether the consequences of the insured's intentional act "either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly, . . . when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for *any* resulting damage or injury, despite the lack of an actual intent to damage or injure." [*Id.* at 115-116, quoting the concurring opinion of Griffin, J., in *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648-649; 527 NW2d 760 (1994) (italics in original).]

¹ On the other hand, plaintiff has a duty to defend its insured, the duty to defend being a broader one that exists whenever there is even arguable coverage. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994).

Our Supreme Court reaffirmed this standard in *Nabozny, supra* at 475-482. In both *Masters* and *Nabozny*, the Supreme Court held that even if the injuries that occurred were quite different from any intended by the insured when he acted, they still cannot be deemed an accident if the insured intended or could reasonably have expected when he acted that harm of some sort, even if of a very different sort, would occur. *Nabozny, supra* at 481-482; *Masters, supra* at 116-117. On remand, the *Masters* standard must be applied.

Although plaintiff is correct that a different legal standard must be applied than that applied by the trial court, it does not follow, as plaintiff assumes, that the application of the new standard mandates granting summary disposition to it. Summary disposition is inappropriate where there are genuine issues of material fact. There are a number of genuine issues of material fact in this case as to exactly what occurred and how in the events leading up to the fall for which insurance coverage is sought. Although the record before us is somewhat fragmentary, it is sufficient to reveal these disputed factual issues. The insured and the man he allegedly injured give different accounts, for example, of how provocative the conduct of the injured man that led to the altercation between the two was. The insured and his son portray the insured as a peacemaker trying to stop a fight, whereas the allegedly injured man and his son-in-law portray him as being involved in the dispute. A reasonable trier of fact could come to more than one conclusion as to whether the insured was trying to protect the allegedly injured man from an assault, or whether he himself was assaulting him.

The fact that all the witnesses said the insured did not mean to injure the man who fell is not conclusive. This judgment is an opinion based on inference. A jury has the right to make such inferences. *Muylaert v Erickson*, 16 Mich App 167, 171; 167 NW2d 823 (1969). The jury also has the right to make the determinations of witness credibility that affect the inferences it makes. *McCalla v Ellis*, 180 Mich App 372, 384; 446 NW2d 904 (1989). It might agree with the witnesses' inferences, or it might agree with plaintiff that the circumstances support the conclusion that injury was intended.

Even when the *Masters* test is applied, it is impossible to say as a matter of law whether defendant intended or reasonably should have expected that harm of some sort, albeit a different and lesser harm than occurred, would result from his encounter with Findlay. This question must be resolved by the trier of fact.

The entry of summary disposition in favor of defendants is reversed, and this case is remanded for trial as to the duty to indemnify, with instructions to find that plaintiff has a duty to defend its insured.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage