STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Plaintiff-Appellant,

v

MARKIETA BOSWELL, JAMES JOHNSON and PATRICIA JOHNSON,

Defendants-Appellees,

and

SHANNON L. JOHNSON,

Defendant.

UNPUBLISHED
February 19, 1999

No. 206940
Wayne Circuit Court
LC No. 96-608074 CZ

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying its motion for summary disposition and granting summary disposition in favor of defendants, Markieta Boswell, James Johnson and Patricia Johnson, in this declaratory judgment action. We affirm.

On appeal plaintiff argues that its insured, Shannon Johnson,[1] acted intentionally when he shot Boswell. Because the homeowner's insurance policy issued by plaintiff to James Johnson and Patricia Johnson, under the terms of which Johnson is an insured, precludes coverage for intentional acts and the injuries resulting from them, plaintiff argues that it is not obligated to provide coverage for the underlying civil action brought by Boswell for the injuries she sustained when she was shot.

Plaintiff brought its motion for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). The trial court denied plaintiff's motion and granted summary disposition in favor of defendants pursuant

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

to MCR 2.116(C)(10) and (I)(2). This Court reviews de novo an order granting summary disposition. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* MCR 2.116(C)(10) permits summary disposition when, except as to the amount of damages, there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 567. Giving the benefit of doubt to the nonmovant, this Court must independently determine whether the movant would have been entitled to judgment as a matter of law. *Id.* MCR 2.116(I)(2) provides that, "if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Plaintiff first argues that the trial court erred in finding that the shooting was an "accident." We disagree.

The insurance policy issued by plaintiff provides coverage for claims arising out of accidents, but does not define "accident." Therefore, this Court is to give the term its commonly used meaning. *Michigan Basic Property Ins Ass'n v Wasarovich,* 214 Mich App 319, 322-323; 542 NW2d 367 (1995). 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." *Id.* at 323-324.

"In determining whether an accident occurred, we must view the incident itself from the standpoint of the insured actor who caused the injury in question." *Wasarovich, supra*, 214 Mich App 327. Analyzing the incident from the standpoint of the insured, in this case Johnson, we find that the incident was an accident, and therefore, an occurrence covered by the policy.

In contrast to plaintiff's assertion, the evidence presented to the trial court does not establish that Johnson "voluntarily and deliberately pulled the trigger of his loaded shotgun while pointing it in the direction of Ms. Boswell, at point blank range." Rather, in his deposition and at his arraignment and plea,[2] Johnson testified that he believed the gun was unloaded and picked it up to scare Boswell into returning the ring he had given her while they were dating. The mechanism, for some reason unknown to him, was jammed and he was attempting to clear it when the gun discharged. He did not believe that Boswell had been hit until he lifted her shirt and saw the gunshot wound. There is no indication that Johnson planned to fire the gun at all, much less shoot Boswell, but rather that it discharged unexpectedly. As in *Allstate Ins Co v Freeman*, 432 Mich 656, 664; 443 NW2d 734 (1989), we hold that the situation is not so clear cut as to be able to say that it was not an accident. Since Boswell may have been shot by accident, the incident constitutes an occurrence under the policy for which coverage is available. *Id.*

Plaintiff next asserts that the trial court erred in finding that Johnson did not expect or intend to injure Boswell when he shot her with his shotgun. We disagree.

Whether an injury is intended or expected is viewed from the subjective standpoint of the insured. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 384; 565 NW2d 839 (1997). Based on the evidence submitted by the parties, the trial court determined that Johnson did not intentionally

commit the injury causing act—firing the shotgun or shooting Boswell. Since the act was unintentional, Johnson could not have intended or expected the injuries that resulted from it. We agree.

Johnson testified that he believed the gun was unloaded, picked it up to scare Boswell, did not point the gun at Boswell or anywhere in particular, attempted to clear a jam, at which point the gun fired, and did not believe Boswell had been shot. Viewing this evidence in the light most favorable to the nonmoving parties, we hold that the discharge of the gun was unintentional. *Freeman, supra,* 432 Mich 719; *Weisman, supra,* 217 Mich App 566. Accordingly, Johnson could not have expected or intended that Boswell would sustain injuries as a result of the discharge. Because Boswell's injuries were not clearly intended or expected, the policy exclusion does not apply, and plaintiff is obligated to provide coverage. *Freeman, supra,* 432 Mich 719.

Finally, plaintiff argues that Johnson's failure to respond to the declaratory complaint and request for admissions served on him by plaintiff require that the trial court grant summary disposition in its favor. We disagree.

We first note that the default judgment entered against Johnson is not binding on the other defendants. *Allstate Ins Co v Hayes,* 442 Mich 56, 73; 499 NW2d 743 (1993). Moreover, while a matter which is admitted is considered conclusively established, it is only against the party to whom a request for admission has been served that a matter may be deemed admitted. *Employers Mutual Casualty Co v Petroleum Equipment, Inc,* 190 Mich App 57, 62, 67; 475 NW2d 418 (1991).

Johnson's failure to respond to the requests for admissions deems them admitted against him. MCR 2.312. However, these admissions cannot be used as the basis for plaintiff's motion for summary disposition against the other defendants. *Employers Mutual, supra,* 190 Mich App 67. Other than these admissions, there exists no evidence to suggest that Johnson intentionally shot Boswell. Therefore, without the admissions, no genuine issue of material fact exists as to Johnson's intent. Accordingly, we conclude that the trial court properly denied plaintiff's motion for summary disposition and granted summary disposition in favor of Boswell.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

[1] Shannon Johnson is the son of Patricia Johnson and James Johnson. References throughout this opinion to "Johnson" are to Shannon Johnson, only.

[2] At his arraignment, Johnson pleaded guilty to careless discharge of a firearm.