STATE OF MICHIGAN

COURT OF APPEALS

ROCKLAND MCLEOD and JULIE MCLEOD,

Plaintiffs-Appellants,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 17, 1999

No. 210546
Kent Circuit Court
LC No. 97-11327-CZ

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's grant of defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and entry of judgment dismissing plaintiffs' complaint with prejudice. We affirm.

Plaintiffs Rockland McLeod and Julie McLeod filed suit against William A. Barry alleging that Barry sexually assaulted Julie McLeod ("plaintiff"), contrary to MCL 750.520e: MSA 28.7885(5), and that in the course of attempting to persuade her to engage in sexual activities with him, injured her spine and back when he pinned her against a vehicle with his body, pulled up parts of her clothing and touched her person without her consent and against her will. Plaintiffs also asserted that defendant was obligated to defend and indemnify Barry under the terms and conditions of its homeowners' policy issued to Barry. Plaintiffs and Barry attended a settlement conference, wherein defendant was invited to appear but did not, and at a hearing placed on the record in open court, plaintiffs dismissed the sexual assault count against Barry and Barry consented to entry of judgment against him for negligence and negligent infliction of emotional distress in the amount of $75,000. Plaintiffs then filed a complaint against defendant for indemnification of Barry against the consent judgment in the amount of $75,000, plus costs, interest and attorney fees. The court granted defendant's motion for summary disposition on the ground that there was no coverage under the homeowners' insurance policy because there was no "occurrence."

Plaintiffs argue that the trial judge incorrectly held that coverage was excluded under the insurance policy because, under the definition of "occurrence," plaintiff's injury should have been

considered an "accident," and therefore an "occurrence," neither expected nor intended from the standpoint of the insured.

A trial court's grant or denial of summary disposition will be reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion with the benefit of the doubt going to the nonmoving party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). When deciding whether an insurance policy covers a particular act, the court must perform a two-part test. *Fire Insurance Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996). First, the court must review the "occurrence" section of the policy to determine if it includes the particular act. Second, if the particular act is included in the "occurrence" section, the court must then review the exclusion section of the policy to determine if coverage is denied under any of the policy's exclusions. *Id*. In this case, the insurance policy provides for liability coverage for claims made or suits brought against an insured for damages because of bodily injury caused by an "occurrence." The term "occurrence" is defined in the policy as:

> an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Although "accident" is not defined in the policy, its commonly used meaning controls. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 404; 531 NW2d 168 (1995). When not defined in an insurance policy, our Supreme Court has repeatedly stated that an accident is defined as "[A]n undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, or not naturally to be expected. *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999); *Arco*, *supra* at 404-405. Further, the definition of accident should be framed from the standpoint of the insured and not the injured party. *Frankenmuth*, *supra* at 114.

The "neither expected nor intended" language in the insurance policy "bars coverage for injuries caused by an insured who acted intentionally despite his awareness that harm was likely to follow from his conduct." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 383-384; 565 NW2d 839 (1997). Also, our Supreme Court recently reiterated that the term "accident" must focus on both the injury causing act or event and its relation to the resulting property damage or personal injury. *Frankenmuth*, *supra* at 115. In the instant case, Barry admitted to the assaultive act upon plaintiff, in which he backed her against a parked vehicle and pinned her against the vehicle with his body, in an attempt to engage in sexual relations with her. Plaintiff's injury was caused by the assaultive act by the insured. Therefore, the assaultive act of attempting to persuade plaintiff to engage in sexual activities with him against her will, which resulted in injuries to plaintiff's back, was intentional and not an "accident." Because Barry's assaultive act was not an accident, it was not an occurrence, and therefore, the policy barred coverage for the injuries caused to plaintiff by insured.

Further, notwithstanding our determination that the actions of Barry do not constitute an occurrence, we find Barry's actions to fall within a coverage exclusion section of the policy. Liability exclusion No. 7 of the policy states there is no coverage for an injury:

> which may reasonably be expected to result from the intentional or criminal acts of an insured or which is in fact intended by an insured.

Barry admitted to the police that the incident happened in virtually the same manner as how plaintiff reported the incident. In the instant lawsuit, plaintiffs asserted in their amended complaint that Barry's actions were in violation of MCL 750.520e; MSA 28.7885(5). Further, during discovery plaintiffs admitted that Barry's actions constituted a violation of the same criminal statute. Thus, we are convinced that defendant's policy exclusion for criminal acts precludes coverage for the instant actions of Barry and the resulting injury to plaintiff.

Plaintiffs also argue that the court's order granting summary disposition in favor of defendant did not include all genuine issues of material fact upon which reasonable minds could disagree. However, although this issue was stated in plaintiffs' brief, it was not discussed at all in the body of the brief, and therefore, this issue will not be addressed by this Court. MCR 7.212(C).

We do not construe Barry's actions to be an "occurrence" under the terms of defendant's insurance policy. Furthermore, Barry's actions constituted a criminal act not disputed by either party. Therefore, notwithstanding our finding that there was no occurrence triggering coverage, we find that defendant's policy clearly precludes coverage for criminal acts such as the incident in the present lawsuit.

Affirmed.

/s/ Gary R. McDonald
/s/ Michael J. Kelly
/s/ Mark J. Cavanagh