STATE OF MICHIGAN

COURT OF APPEALS

SAFECO INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v

TINA MARIE NECKER by her next friend MANIEKA NECKER, and MATTHEW GEORGE CHURCHMAN,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
May 12, 2000

No. 212180
Wayne Circuit Court
LC No. 97-711755-CK

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's grant of summary disposition to plaintiff pursuant to MCR 2.116(C)(10). Plaintiff cross-appeals. We affirm.

I

In July 1995, Tina Necker, then aged fifteen, alleged that she was raped by Matthew Churchman, then aged twenty-one. Plaintiff, the insurer under a homeowner's policy covering Churchman, filed this declaratory judgment action, seeking a determination that it had no duty to defend or extend coverage to Churchman in any suit brought by Necker.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing its homeowner's policy provided no coverage because Churchman's sexual intercourse with Necker was not accidental, and therefore, not an "occurrence" under the policy, that Necker did not suffer the prerequisite bodily injury, and that Churchman's sexual acts constituted an intentional act that barred liability. Citing *Linebaugh v Berdish*, 144 Mich App 750; 376 NW2d 400 (1985), the trial court granted summary disposition, ruling that coverage was barred because the act of sexual intercourse was

not an accident and not an occurrence, and that coverage was barred by the policy's intentional acts exclusion. The trial court ruled, however, that Necker had suffered a bodily injury.

Defendants appeal the court's findings that the intercourse was not an "occurrence" and that liability was barred under the policy's intentional act exclusion. Plaintiff cross-appeals the court's determination that the sexual intercourse constituted a "bodily injury."

II

This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). With regard to a motion under MCR 2.116(C)(10), this Court must review the record evidence to decide whether there was no genuine issue of material fact and the movant was entitled to judgment as a matter of law. *Id*.; *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). All reasonable inferences are to be drawn in favor of the nonmoving party. *Id.*

Defendants argue that the sexual relations between Necker and Churchman constituted an "accident," and therefore, an "occurrence" under the Churchman insurance policy and that coverage was not barred under the policy's intentional acts exclusion. The insurance policy provided personal liability coverage "[i]f a claim is made or a suit is brought against any insured for damages because of bodily injury … caused by an occurrence." The policy defines "bodily injury" as bodily harm, sickness or disease and defines "occurrence" as an accident, including exposure to conditions that results in bodily injury. The policy also contains an exclusion, which specifically provides that personal liability coverage does "not apply to bodily injury … which is expected or intended by any insured or which is the foreseeable result of an act or omission intended by any insured."

A

The word "accident" is not defined in the insurance policy, but in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999), an arson case, our Supreme Court reaffirmed the definition of an accident as 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." The act of sexual intercourse in this case, whether it was forced or consensual, was not an undesigned contingency, or a happening of chance. Churchman admitted having sexual intercourse with Necker; he just did not realize it was against the law (viewing the act with an adult as consensual). Churchman's act had unintended consequences, but it did not affect the nature of the act as non-accidental. *Id*. at 115-116. The trial court did not err in ruling that the sexual intercourse was not an accident for the purposes of insurance coverage.

B

Further, the trial court did not err in ruling that Churchman's actions were barred by the policy's intentional acts exclusion because Michigan courts infer an intent to injure on the part of adults who engage in sex acts with minors. *State Mut Ins Co v Russell*, 185 Mich App 521, 526-528; 462

NW2d 785 (1990); *Linebaugh*, *supra* at 758, 761-762. This inference is based on public policy, not an interpretation of an insurance policy. *Weekley v Jameson*, 221 Mich App 34, 38; 561 NW2d 408 (1997). Our Legislature, by criminalizing sexual relations with minors, determined that harm results to underage persons who engage in sexual intercourse whether they consent to the act or not. *Linebaugh*, *supra* at 761-762. Therefore, it is proper to infer that Churchman intended to injure Necker from the fact that he had sex with her.

While Churchman claims that Necker told him she was eighteen years old, and Necker admitted she told Churchman that she was seventeen years old, mistake or deception is no excuse. In *Auto-Owners Ins Co v Gardipey*, 173 Mich App 711, 713, 715; 434 NW2d 220 (1988), an insured's mental retardation did not preclude the inference of an intent to harm when a retarded adult-insured forced a ten-year-old boy to perform fellatio on him. Neither Gardipey's mental retardation nor Churchman's mistake or failure to ensure his partner's legal age bar the inference.

While defendants cite *Fire Ins Exchange v Diehl*, 450 Mich 678; 545 NW2d 602 (1996), that case is distinguishable because it involved sexual acts between two minors, not an adult and a minor. *Id*. at 681. The Court declined to infer intent to injure only because the assault was perpetrated by another child. *Id.* at 689-690. However, Churchman was an adult at the time of the sexual intercourse. The onus is on the adult to ensure his sex partner is not under the age of consent and to not merely rely on the declarations of the partner.

C

The trial court did not err in ruling that Churchman's sexual intercourse with Necker was not an accident for the purposes of insurance coverage, or in ruling that an intent to injure could be inferred and barred coverage under the policy's intentional act exclusion. Summary disposition was properly granted on this basis.

III

Plaintiff appeals the trial court's determination that Necker suffered a bodily injury as defined in the insurance policy. In light of our above findings, this issue is moot. Therefore, we decline to consider it. *O'Connor v Comm'r of Ins*, 236 Mich App 665, 672; 601 NW2d 168 (1999); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 624; 600 NW2d 66 (1999).

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad