STATE OF MICHIGAN

COURT OF APPEALS

FRANKENMUTH MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v

DAVID A. SCHMIDT d/b/a SCHMIDT INDUSTRIES, INC.,

Defendant-Appellant,

and

TINA GAGE, ANTHONY GAGE, and GAIL STAUDACHER,

Defendants.

UNPUBLISHED
July 21, 2000

No. 215698
Wayne Circuit Court
LC No. 98-003057-CZ

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant David A. Schmidt, d/b/a Schmidt Industries, Inc., appeals as of right challenging the trial court's order granting plaintiff Frankenmuth Mutual Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(10) in this declaratory action. The trial court held that Frankenmuth had no duty to defend or indemnify Schmidt for liability arising out of suits two his former employees, Tina Gage[1] and Gail Staudacher, filed against him for sexual harassment under the Civil Rights Act, MCL 37.2103 *et seq*.; MSA 3.548(103) *et seq*. We reverse.

[1] Anthony Gage is Tina Gage's husband and his claims are purely derivative. Thus, when we refer to "Gage" in this opinion, we mean Tina Gage.

I. Basic Facts And Procedural History

According to Gage, in early March 1994, she and Schmidt were discussing a wage increase of one dollar per hour when Schmidt said that he had a "proposition" for her. He then reportedly said, "If you work closer with me, I will give you an additional ten thousand dollars a year and a larger Christmas bonus." Gage said that she "didn't know what he meant. So I asked him to explain. And he said that if I spent one or two days a week with him, he would give me this extra ten thousand dollars a year and a Christmas bonus and that he would wear a condom." Gage quit working for Schmidt following this incident.

Staudacher's claims arise from three incidents. When she went into the office on the first Saturday in January 1993 to do extra work, after she had asked for and received permission from Schmidt to go into the office that day, she was surprised to see Schmidt there. Then, according to Staudacher, after she had been working at her desk Schmidt came into her office and

> put his arms around me and said, how did you like your Christmas bonus?
>
> And then he started kissing me. And he put his arm around me. And I was pushing on his shoulders and I told him no. No. Stop.
>
> And he said, didn't you like your Christmas bonus; wasn't it enough.
>
> And I was saying, no. Stop. He was kissing me and he stuck his tongue in my mouth. And he grabbed at the front of my shirt and I kept pushing on him.
>
> And he is my employer. I didn't think he was at all entitled to do any of this. So I was just pushing him away and he laughed. And he started walking out.

Staudacher also alleged that, in February 1993, Schmidt intentionally touched her breasts with his hands while grabbing for a locket that she was wearing on a chain around her neck and that during an April 1993 power outage he put his arm around her neck, as if in a headlock, and said "there is not much you can do when the power is out." Having been rebuffed, Staudacher averred, Schmidt began criticizing her job performance and eventually fired her.

Both Staudacher and Gage sued Schmidt. Staudacher alleged sexual harassment, termination without just cause, severe emotional distress, and intentional interference with an employment relationship. Gage made the same claims and additionally asserted that Schmidt constructively discharged her. Both women alleged that Schmidt manufactured "false and malicious claims regarding [their] job performance," but did not specifically state whether Schmidt's representations were slander or libel. Schmidt then sought indemnification from Frankenmuth, although the policies in question, an umbrella policy and a general liability policy, did not expressly cover sexual harassment claims by employees. Frankenmuth denied coverage relying on contractual exclusions for personal and bodily injuries.

Frankenmuth then brought this action seeking a declaratory judgment that neither its general liability nor its umbrella policy afforded Schmidt coverage for Gage and Staudacher's suits. Specifically, Frankenmuth claimed that there was no genuine issue of material fact that either claimant suffered a "bodily" or "personal" injury as a result of any sexual harassment. Moreover, Frankenmuth argued, in the event that one of the above injuries occurred, the suit would still be barred by an exclusion.

The trial court's October 1998 opinion and order granting Frankenmuth summary disposition pursuant to MCR 2.116(C)(10) found:

> (1) All relevant policies issued by plaintiff to Schmidt Industries were substantially similar *except* that the General Liability policy effective 01/04/94 thru 01/04/95 contains an "Employment-Related-Practices Exclusion" not found in the other policies. Said exclusion excludes coverage for "bodily injury" and "personal injury" arising out of "coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions." Furthermore, said exclusion was in place only during the incident alleged by defendant Gage.
>
> (2) There were three (3) distinct policy periods which cover the events alleged by defendants Gage and Staudacher:

NAME	**DATE OF INCIDENT**	**POLICY PERIOD**
Staudacher	January 2, 1993	01/04/92 - 01/04/93
Staudacher	February, 1993	01/04/93 - 01/01/94
Staudacher	April 6, 1993	01/04/93 - 01/04/94
Gage	March 8, 1994	01/04/94 - 01/04/95

The trial court noted that there was coverage only for Gage's and Staudacher's claims that Schmidt made false and malicious representations about their job performances because those injuries fit with the definition of "personal injury." However, those claims fell under an exclusion for "personal injuries" in the general liability policy. Therefore, the trial court held that Frankenmuth had no duty to defend Schmidt. The trial court also held that David Schmidt and Schmidt Industries did not have separate interests under the language of the policy.

II. Standard Of Review

This Court reviews de novo a trial court's order granting summary disposition pursuant to MCR 2.116(C)(10). *Professional Rehabilitation Ass'n v State Farm Mutual Automobile Ins Co (On Remand)*, 228 Mich App 167, 170; 577 NW2d 909 (1998). Likewise, the interpretation of contractual language is an issue of law that is reviewed de novo on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

III. Legal Standards

The appellate court, like the trial court, must view the depositions, affidavits and documentary evidence in a light most favorable to the nonmoving party and must make all legitimate inferences in favor of the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). When the nonmoving party has the burden of proof at trial, that party may not rest on mere allegations or denials in the pleadings. MCR 2.116(G)(4). Rather, the party must come forward with documentary evidence setting forth specific facts showing that there is a genuine issue for trial. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989).

As for construing the insurance agreement itself, we take our guidance from the plain language of the insurance policy and attempt to enforce it as written. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 402; 531 NW2d 168 (1995). We interpret the words of the policy "in accordance with their 'commonly used meaning,'" and "take into account the reasonable expectations of the parties." *Id*. at 403.

IV. Coverage Generally

Generally speaking, whether an insurance company must provide a defense in an underlying tort action depends on the allegations in the complaint and extends to allegations that even arguably come within the policy coverage. *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). Yet, "the duty to defend and the duty to provide coverage are not synonymous." *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 506; 362 NW2d 767 (1984).

> [I]t is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists. Inasmuch as the insurer must look beyond the precise wording of the allegations in a third party's complaint against its insured to determine whether coverage is possible, so must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint. [*Id.* at 507.]

As Frankenmuth notes, in *Allstate Insurance v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989), the Michigan Supreme Court stated that "the proper construction of a contract requires that we first determine whether coverage exists, and then whether an exclusion precludes coverage."

V. "Occurrences"

This case involves an umbrella policy, a general liability policy, and an "employment-related practices" exclusion to the general liability policy that is only relevant if the general liability policy would otherwise provide coverage for Gage's suit.[2] Coverage under the general liability and the umbrella policy hinges on whether there was an "occurrence" resulting in "bodily injury" or "personal injury."

[2] This exclusion was only in effect during 1994, when Schmidt allegedly harassed Gage, and does not apply to Staudacher's claims. Nor does it affect, to any extent, whether the umbrella policy covers either woman's claims.

Schmidt apparently has never claimed coverage for a "bodily injury," but instead claims that the alleged "occurrence" in this case resulted in a potential "personal injury" to Gage or Staudacher. The question, then, is whether there were one or more "occurrences" resulting in a "personal injury" to Gage or Staudacher as defined by the policy and without exclusion.

VI. The General Liability Policy

The general liability policy broadly defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The general liability policy does not, however, define an "accident." Because Frankenmuth argues that it "is hard to imagine" that Schmidt made statements to or touched Gage and Staudacher in the ways that they claimed he did, it suggests that our analysis should focus on the "injury-causing act" and that the injury-causing act here "certainly was not done 'accidentally.'" Gage and Staudacher both claimed, when describing Schmidt's conduct, that Schmidt acted "intentionally." It is indeed difficult to imagine that such conduct, if it occurred, was unintentional.

The Michigan Supreme Court recently discussed whether an intentional act can be considered an accident in *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999). Quoting the concurrence in *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 527 NW2d 760 (1194) and referring to the dissent in *Frankenmuth Mut Ins Co v Piccard*, 440 Mich 539; 489 NW2d 422 (1992), the Court noted that "'an insured need not act unintentionally' in order for the act to constitute an 'accident' and therefore an 'occurrence.'" *Id*. at 115. Thus, an intentional act may still constitute an "accident" and therefore an "occurrence." The *Masters* Court, however, carefully distinguished between an intentional act with an unintended, harmful result and an intentional act that leads to leads to an intended, harmful result. *Id*. at 115-117.

Applying the law to the facts of the case, the *Masters* Court found that the underlying act, a fire caused by arson to a clothing store that spread to adjacent buildings, resulted from an act intended to damage the property. *Id*. at 107, n 1. The Court concluded that the underlying intentional act could not be characterized as an "accident," which it had previously defined 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.'" *Id*. at 114, quoting *Arco*, *supra* at 404-405. Therefore, there was no "occurrence" for purposes of coverage. *Id.* at 116.

We give Schmidt the benefit of every reasonable doubt as the nonmovant and do not assume that Gage and Staudacher will be able to prove that he committed the conduct alleged, including that it was "intentional." *Quinto, supra* at 362. However, if they do prove that he committed the conduct as alleged, we see no reasonable way to construe the harmful results of that conduct as unintentional. Consequently, there is no factual basis in the record from which to conclude that the incidents in the underlying were "accidents," as is relevant to the definition of the term "occurrence." Having failed to come forward with any evidence of a triggering event under the general liability policy, Schmidt cannot claim that Frankenmuth had a duty to defend or indemnify him under that policy.

VII. The Umbrella Policy

Although similar in many ways, the umbrella policy is different from the general liability policy in that it defines an occurrence in the context of a "personal injury" as "the commission of any of the offenses included within" the definition of a "personal injury." We acknowledge that the umbrella policy does refer to "accidents" when defining an "occurrence" that results in "bodily injury." However, as we stated above, this case does not involve "bodily injury." Thus, in order to conclude whether the umbrella policy covers Schmidt, we must determine if any of the underlying allegations fit within the umbrella policy's definition of a "personal injury," which is:

> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. Wrongful entry into or eviction of a person from, [sic] a room, dwelling or premises that the person occupies;
>
> d. Oral or written publication or material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication of material that violates a person's right of privacy;
>
> Arising out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you.

Quite clearly, neither Gage nor Staudacher's allegations involve any of the conduct described in parts (a) through (c), or (e). What is not perfectly certain is whether Gage and Staudacher's claims that Schmidt maligned their job performance fits within part (d) because his statements slandered or libeled their "services." Part of the problem is the vague nature of their claims, which makes them vulnerable to a motion for summary disposition under MCR 2.116(C)(8) in the underlying actions. Though these allegations are vague, Frankenmuth has not come forward with any evidence to suggest that the facts surrounding the allegations are so settled that Schmidt's alleged conduct cannot, in any circumstance, fit within the "personal injury" definition in part (d). As we said in *Detroit Edison*, *supra* at 142, "The duty to defend cannot be limited by the precise language of the pleadings." In this case, this rule may be restated to the effect that the duty to defend cannot be limited by the *imprecise* language of the pleadings. The insurer still has a duty to look at the substance of the claims, which, in this case, appear to be some sort of libel or slander. *Id*. Accordingly, the umbrella policy does appear to provide coverage.

The next question is whether any of the express exclusions for personal injuries apply here. The umbrella policy states it does not apply to "personal injury":

> (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

(2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

(3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or

(4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

Because Frankenmuth goes down what we consider to be the wrong path in arguing that the exclusions for *bodily* injuries apply in this case, it has not identified which of these provisions it would contend excuse it from indemnifying or defending Schmidt in a suit involving personal injuries. The only exclusion that we see that might fit in this case is part (1). Yet, as Schmidt points out in his brief on appeal, there is no record evidence from which we could conclude that any of his allegedly false or malicious representations about Gage or Staudacher were made while Schmidt knew they were false. Again, part of the problem with producing evidence on this issue is the vagueness of Gage and Staudacher's allegations. However, that only suggests that Frankenmuth will have little problem defending against those allegations, or little probability of being in a position where it will have to indemnify Schmidt because of liability for those allegations.

The absence of evidence on this issue does not lead to any presumption that the exclusion applies. Although applied as clearly written, courts construe exclusions strictly against the insurer. See *Farm Bureau Mut Ins Co v Moore*, 190 Mich App 115, 118; 475 NW2d 375 (1991). Furthermore, Frankenmuth, as the movant, clearly had the burden of providing evidence that would settle the facts showing that this exclusion *did* apply before the trial court could grant summary disposition in its favor. Accordingly, we conclude that the trial court erred when it determined that Frankenmuth does not have to defend or indemnify Schmidt in the underlying actions.

Reversed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Donald S. Owens