STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

JACOB DEMPSEY, and DEBORAH D. HARRIS, Personal Representative of the ESTATE OF JOSEPH L. HARRIS, Deceased,

Defendants-Appellees.

UNPUBLISHED
November 22, 2005

No. 253373
Wayne Circuit Court
LC No. 03-312396-CK

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

In this declaratory action, plaintiff appeals as of right the circuit court's order denying its motion for summary disposition and granting summary disposition to defendants. We affirm the circuit court's denial of plaintiff's motion for summary disposition, vacate the grant of summary disposition to defendants, and remand for further proceedings.

While at a friend's party, and after exchanging words, defendant Jacob Dempsey struck Joseph Harris just above his left eye.[1] Dempsey maintained that he thought Harris was about to

[1] Dempsey and Harris were friends, and had lived together after Dempsey's divorce. The relationship became strained, however, after Harris apparently made comments to Dempsey about Dempsey's ex-wife. Dempsey had begun dating his ex-wife again and testified that his ex-wife asked him to talk to Harris because he, Harris, had been bothering her. On November 18, 2001, Joe Utter, a mutual friend of Dempsey and Harris, celebrated his twentieth birthday with a party at his house.

Dempsey testified that he was at the party for several hours before Harris arrived. Dempsey testified he first saw Harris just as he was at the door, and said to him "hey, we need to talk" and then led Harris out the door and started walking down toward the driveway, with Utter following somewhere behind.

It was early morning and dark when Harris and Dempsey walked down Utter's driveway, being a rural area with no street lights. Dempsey said they walked and talked about Harris and his behavior toward Dempsey's ex-wife. Dempsey claimed that once he voiced his ex-wife's

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strike him, and that he threw the punch defensively to prevent being struck. Harris fell and hit the back of his head on the ground. He died the following day. Defendant Deborah Harris, personal representative of Joseph Harris' estate, brought the tort suit underlying this action against Dempsey (and others).

At pertinent times, Dempsey was insured under a homeowner's insurance policy plaintiff issued. Plaintiff provided a defense to Dempsey in the tort litigation under a reservation of rights. Plaintiff then filed the instant declaratory judgment action and filed a motion for summary disposition, asserting that there was no "occurrence" under the policy, and that the intentional acts exclusion barred coverage. The circuit court denied plaintiff's motion and granted defendants summary disposition, concluding that under *Allstate Ins Co v McCarn* (*McCarn I*), 466 Mich 277; 645 NW2d 20 (2002), a question of fact remained whether Dempsey's striking of Joseph Harris was an accident.[2] This appeal ensued.

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concerns to Harris, Harris became belligerent, started swearing a lot, stopped walking, and turned and looked at Dempsey and asked him if he wanted to hit him. Dempsey claimed that he declined to hit Harris and that he said, "I'm not going to fight you, I'm not going to do whatever." In the meantime, Dempsey claimed that Utter, who was standing nearby, told Harris to stop swearing because it was loud enough to upset the neighbors.

Dempsey claimed it was at this point, when Harris and Dempsey were standing on the driveway in the dark, and Harris had stopped yelling but was still talking belligerently toward Dempsey, that Dempsey thought Harris was going to strike him. Dempsey said that he was "taken aback by the fact that I was being yelled at by him for this situation" and as he contemplated that, he was staring away, looking at the ground to his right, when he heard "the gravel or the dirt road underneath [Harris'] feet and saw movement from [Harris]" and, just after that, Harris said to him, "Do you want to throw blows? Do you want to throw blows?" Dempsey claimed that he thought the sounds of movement he heard from Harris indicated that Harris was about to strike him, so Dempsey turned and threw a punch at Harris. Dempsey claimed he had no intention of hurting Harris. Dempsey's blow struck Harris in the head, just above his left eye. Dempsey claimed he saw Harris fall backward, then turned and walked away, not wanting any further confrontation with Harris.

Dempsey claimed that he first heard that Harris was "knocked out" when he reached the house and was concerned because he had never knocked anyone out before and did not "know how that exactly works." Dempsey eventually went back outside and saw that a woman from the party was tending to Harris. He also saw Harris coughing, sitting upright, and apparently squeezing the woman's hand in response to her holding it. After that, Harris was apparently moved to a service station, where he was met by an ambulance and taken to a hospital.

Joseph Harris died at the hospital the next day, November 19, 2001. Bader Cassin, chief medical examiner for Washtenaw County, opined that the cause of Harris' death was two blows to the head – one blow to the left side of his head, and another blow to the back of his head against a fixed object. Cassin determined that the blow to the left side of Harris' head was consistent with a punch and that it was likely that that blow came before the blow to the back of the head.

[2] The circuit court stated:

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I

We review the circuit court's denial of plaintiff's motion for summary disposition de novo. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Issues involving the proper interpretation of insurance contracts are reviewed de novo." *Allstate Ins Co v McCarn (After Remand)* (*McCarn II*), 471 Mich 283, 288; 683 NW2d 656 (2004). "An insurance policy must be enforced in accordance with its terms." *McCarn I*, *supra*, 466 Mich at 280. The policy's terms are given their commonly used meanings unless clearly defined in the policy. *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). Determination of the scope of coverage is a separate inquiry than whether coverage is negated by an exclusion. *Heniser v Frankenmuth Mutual Ins*, 449 Mich 155, 172; 534 NW2d 502 (1995). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001).

A

The homeowners' policy at issue provides:

> Losses We Cover Under Coverage X:
>
> Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

The policy defines "occurrence" as:

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> Counsel, let me say this for your sake, and I appreciate it: You're making a good argument, but whenever there's a motion for summary disposition and there is some doubt you're suppose[d] to give it to the non-moving party.
>
> I think that they have an argument there. In this factual based on McCarn, given the results there and the results here, not just because there's a death. But, yes, the striking. But then you might even argue—And I really didn't decide this. You might argue that the striking was not intentional because it was in "self-defense" allegedly.
>
> Now maybe that will prove that to be true, that is, that he did not strike out in self-defense because if he did strike out in self-defense and if all the rest of this was unintended and, therefore, accidental and there was no negligence. Maybe Ms. Harris will not be able [sic] against Mr. Dempsey for any reason.
>
> But in the meantime I think that I cannot and won't as a matter of declaration indicate there is no coverage. I think that there is coverage given the McCarn case. And I base my decision on the reasoning of that case.

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage.

The term "accident" is not defined in the policy.

> The intentional acts exclusion in the policy states:
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> Losses We Do Not Cover Under Coverage X:
>
> 1. We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:
>
> > a) such insured person lacks the mental capacity to govern his or her conduct;
> >
> > b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or
> >
> > c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.
>
> This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

B

The policy language at issue is identical to the policy language at issue in *McCarn I, supra*, (and *McCarn II, supra*).[3] The policy at issue here, like the policy in *McCarn*, defines

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[3] The facts in *McCarn, supra*, were that Kevin LaBelle was visiting Robert McCarn. Both boys were sixteen years old and friends. Robert, who lived with his grandparents, had been given a gun a year before by his father. The gun was stored under Robert's grandfather's bed, and was normally stored unloaded. On the day in question, both boys handled the gun. While handling the gun he believed to be unloaded, Robert pointed it at Kevin's face from about a foot away, and pulled the trigger, killing Kevin. See *McCarn,* 471 Mich at 279-280. The Supreme Court reversed this Court's opinion holding that there was no "accident" under the policy. The Supreme Court concluded that Kevin's shooting death was accidental, and an "occurrence" under the policy, reasoning:

> We agree with plaintiff [Allstate] that Robert intended to point the gun at Kevin and pull the trigger. However, Robert believed the gun was not loaded. Robert had no intention of firing a loaded weapon. No bodily injury would have been caused by Robert's intended act of pulling the trigger of an unloaded gun.
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> * * *

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"occurrence" as an "accident. . .", but does not define the term "accident." Following *McCarn I*, we apply the common meaning of the term "accident", i.e., "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."[4] "Accidents are evaluated from the standpoint of the insured, not the injured party."[5] A subjective standard applies to the question whether there was an "accident," and applying that standard involves a determination whether the consequences of Dempsey's intentional act either were intended by him or reasonably should

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> Robert McCarn may have been negligent in failing to see if the gun was loaded before he pulled the trigger, particularly because he was the last person to use the gun weeks earlier for target practice. However, the issue of negligence is not before us. . . . [T]he negligence of the insured in acting as he did is not enough to prevent an incident from being an accident if the consequence of the action (e.g., shot coming from a gun) should not have reasonably been expected by the insured.
>
> While it may be considered quite obvious that Robert's conduct was careless and foolish, it was negligence that simply did not rise to the level that he should have *expected* to result in harm. Otherwise liability insurance coverage for negligence would seem to become illusory. We must be careful not to take the expectation of harm test so far that we eviscerate the ability of parties to insure against their own negligence. [466 Mich at 285, 287-288.]

[4] In *McCarn I,* 466 Mich at 281, the Supreme Court noted:

> In similar cases where the respective policies defined an occurrence as an accident, without defining accident, we have examined the common meaning of the term. In such cases, we have repeatedly stated that "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. [Citations omitted.]

[5] In *McCarn I,* 466 Mich at 282, the Court noted:

> Accidents are evaluated from the standpoint of the insured, not the injured party. [*Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114 n 6; 595 NW2d 832 (1999)]. In *Masters*, we held that "the appropriate focus of the term 'accident' must be on both 'the injury-causing *act* or *event* and its relation to the resulting . . . personal injury." *Id.* at 115, quoting *Marzonie* [*Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648; 527 NW2d 760 (1994)] (Griffin, J., concurring) (emphasis in original).

have been expected by him because of the direct risk of harm intentionally created by his act. As the *McCarn I* Court noted:

> [In *Frankenmuth Mut Ins Co v Masters,* 460 Mich 105, 115; 595 NW2d 832 (1999),] [w]e also stated that "'an insured need not act unintentionally' in order for the act to constitute an 'accident' and therefore an 'occurrence.'" *Id.*
>
> Where an insured does act intentionally, "a problem arises 'in attempting to distinguish between intentional acts that can be classified as "accidents" and those that cannot.'" *Id.*
>
> In *Masters* at 115-116, we applied the following standard from Justice Griffin's concurrence in *Marzonie* at 648-649.
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> > [A] determination must be made 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."
>
> What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured.
>
> As to the perspective from which the analysis should be made, the question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences. . . .
>
> The policy language dictates whether a subjective or objective standard is to be used. However, the policy language here does not indicate whether a subjective or objective standard is to be used. Because "the definition of accident should be framed from the standpoint of the insured . . . ," *Masters* at 114, and because, where there is doubt, the policy should be construed in favor of the insured, *id.* at 111, we conclude that a subjective standard should be used here. [*McCarn I,* 466 Mich at 282-283.]

Defendant Dempsey testified that he struck Joseph Harris in self-defense, believing that Harris was about to assault him, and that he did not intend to harm or injure Harris, but only to defend himself against the anticipated blow, and certainly did not intend that Harris die.

Evaluating the incident from the standpoint of Dempsey, the insured, Dempsey testified that after Harris brought up the issue of coming to blows with Dempsey, Dempsey heard Harris' feet move on the ground, believed Harris was about to assault him, and, in self-defense, threw a single punch to protect himself. See n 1 *supra*. Under these circumstances, we conclude that a question of fact remained whether Dempsey intended or reasonably should have expected the consequences of his single preemptive punch. Neither party was entitled to summary disposition on this question.[6]

II

We next address whether the intentional/criminal acts exclusion bars coverage. With very minor exceptions, the exclusion is worded exactly as was the exclusion in *McCarn*, *supra*. Regarding the intentional acts exclusion, in *McCarn II*, *supra*, issued during the pendency of this appeal, a majority of the Supreme Court agreed that courts should apply a two-pronged test to determine whether the intentional acts exclusion bars coverage: there is no insurance coverage if 1) the insured acted either intentionally or criminally, and 2) the resulting injuries were the reasonably expected result of the insured's intentional or criminal act. 471 Mich at 289-290.

Regarding the second prong of the test, a majority of the *McCarn II* Court agreed that an objective standard applies:

> Answering the second prong of the test, whether the resulting injury was the reasonably expected result of this criminal act, requires this Court to engage in an objective inquiry. *Allstate Ins Co v Freeman*, 432 Mich 656, 688; 443 NW2d 734 (1989) (opinion by RILEY, J.). [*McCarn II*, 471 Mich at 290-291 (Taylor, J., with whom J. Kelly and J. Markman concurred),[7] 297 (Weaver, J., dissenting, with whom Corrigan, C.J., concurred) (noting "Regarding whether it was reasonable to expect injury . . . would result from the intentional or criminal act, it is the consensus of this Court [that] . . . an objective inquiry [applies]"), and 302 (Young., J., dissenting, with whom Corrigan, C.J., concurred) (noting "all members of this Court agree the contract requires application of an objective standard. . .").]

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[6] As the Court noted in *McCarn I*, 466 Mich at 287 n 5:

> * * * A subjective test does not require courts to simply accept uncritically the insured's own assertions regarding his subjective belief. Instead, courts must examine the totality of the circumstances, including the reasonableness or credibility of the insured's assertions, evidence of "other acts," evidence concerning the faculties or the maturity of the insured, evidence concerning relationships between an insured and a victim of an injury, and so forth.

[7] Justice Cavanagh concurred only in the result of Justice Taylor's lead opinion.

In this case, accepting that Dempsey believed he was about to be assaulted in the dark by Harris and threw up his arm in a defensive blow, striking Harris once, we conclude that a question of fact remained whether a reasonable person possessed of the facts Dempsey possessed would expect the resulting injury. See *McCarn II*, 471 Mich at 290-291. We are unable to conclude that death or grievous injury is, as a matter of law, the reasonably expected result of throwing a single defensive punch.

Nor do we accept appellant's argument that subsection b of the exclusion renders it applicable. That subsection refers back to the exclusion itself, and by its terms requires that some bodily injury be intended or reasonably expected, even though it need not be of the same kind or degree as that intended or reasonably expected. Here, there was a question of fact whether any injury was intended or reasonably expected.

We affirm the circuit court's denial of plaintiff's motion for summary disposition. We reverse the court's grant of summary disposition to defendants, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Helene N. White

I concur in result only.

/s/ Peter D. O'Connell