STATE OF MICHIGAN

COURT OF APPEALS

MARIO KACHO,

Plaintiff,

v

KSK HOSPITALITY GROUP, INC.,

Defendant/Third-Party Plaintiff-Appellant,

and

JAMES GIBBONS,

Defendant/Third-Party Plaintiff,

and

ST. PAUL SURPLUS LINES INSURANCE COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 2, 2010

No. 289012
Oakland Circuit Court
LC No. 2007-084356-NO

Before: Beckering, P.J., and Markey and Borrello, JJ

PER CURIAM.

Defendant KSK Hospitality Group, Inc. ("KSK") appeals as of right the trial court's order granting summary disposition to third-party defendant St. Paul Surplus Lines Insurance Company ("St. Paul"). We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

KSK owns Woody's Diner, where defendant James Gibbons worked as a manager. Plaintiff alleged that he was a customer at Woody's Diner and that Gibbons "negligently and without provocation launched his body at Plaintiff, striking him and knocked Plaintiff to the ground, causing injuries" and "did negligently beat, batter and wound" plaintiff. KSK tendered its defense to its commercial liability insurer, St. Paul, which denied coverage. KSK conceded that coverage was not available under the commercial general liability form, but argued that it was available under the liquor liability protection form. The trial court disagreed, ruling that

plaintiff's injury was not caused by an accident because Gibbons committed an intentional act, and further, plaintiff's complaint did not allege that the injury resulted from the selling, serving, or furnishing of alcoholic beverages, and thus, the liquor liability protection form did not apply.

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that are also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

"An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "The policy application, declarations page of the policy, and the policy itself construed together constitute the contract." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). An insurance contract is to be read as a whole with meaning given to all terms. *Id*. A clear and unambiguous contractual provision is to be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "Clear and unambiguous language may not be rewritten under the guise of interpretation," *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997), and "[c]ourts must be careful not to read an ambiguity into a policy where none exists," *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). "[I]f a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998). However, an insurance contract is ambiguous when the language is subject to more than one reasonable interpretation. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003), citing *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003).

An insurance company's duty to defend its insured arises from the language of the insurance policy. *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 600 n 6; 575 NW2d 751 (1998). The duty to defend is tied to the availability of coverage. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 315; 575 NW2d 324 (1998), mod on other grounds by *Harts v Farmers Ins Exch*, 461 Mich 1, 10-11; 597 NW2d 47 (1999). If coverage is not possible under the policy, the insurer does not have a duty to defend the insured. *Id*.; *Protective Nat'l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991).

An insurer's duty to defend the insured is broader than its duty to indemnify. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996). Whether an insurer has a duty to defend the insured in an underlying tort action depends upon the allegations in the underlying complaint. *Fitch v State Farm Fire & Cas Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995). The duty to defend arises "if the underlying allegations even arguably come within the policy coverage." *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997). Thus, "an insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Dochod v Central Mut Ins Co*, 81 Mich App 63, 67; 264 NW2d 122 (1978). However, the insurer's duty to defend does not depend solely upon the terminology used

in the underlying complaint. *Michigan Ed Employees Mut Ins Co v Karr*, 228 Mich App 111, 113; 576 NW2d 728 (1998). Rather, the court must "focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists." *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984).

The policy at issue contains a liquor liability protection form. The section of the form entitled "**What This Agreement Covers**" provides, in part:

> We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage or loss of support that:
>
> •happens while this agreement is in effect; and
>
> •is caused by an accident that results from your selling, serving or furnishing any alcoholic beverages from a covered location.

The policy also obligates the insurance company "to defend any claim or suit for covered injury or damage made or brought against any protected person." Thus, for KSK to be entitled to a defense, plaintiff's claim must be covered under the liquor liability protection form. For plaintiff's claim to be covered under this provision, it must have been caused by an accident that resulted from KSK's selling, serving, or furnishing alcoholic beverages at the diner.

The term "accident" is defined in the policy as "an unexpected happening without intention or design." The "happening," i.e., occurrence or event, *Random House Webster's College Dictionary* (1997), that caused plaintiff's injury was the alleged attack by Gibbons, which was variously characterized as a shove, a body-slam, or a beating. Regardless of the characterization, such an act is deliberate and intentional. In general, "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." *Allstate Ins Co v McCarn*, 466 Mich 277, 282-283; 645 NW2d 20 (2002). According to the allegations in plaintiff's complaint, he injured his wrist because Gibbons either body-slammed him or beat him up. In either scenario, both the act and consequences could be nothing other than intentional. At the very least, Gibbons reasonably should have expected that plaintiff would suffer some sort of injury by being body-slammed or beaten. The fact that plaintiff alleged that Gibbons "negligently" body-slammed or beat him does not affect our analysis. "There is no duty to defend or provide coverage where a complaint is merely an attempt to trigger insurance coverage by characterizing allegations of tortious conduct as 'negligent' activity." *Tobin v Aetna Cas & Surety Co*, 174 Mich App 516, 518; 436 NW2d 402 (1988) (an allegation that the insured "negligently struck" the plaintiff does not make an injury resulting from a punch to the face unexpected or unintended). Therefore, plaintiff's complaint does not allege that his injury was caused by an "accident."

According to the witnesses' testimony, the manner in which plaintiff was injured was disputed. Plaintiff claimed that Gibbons came running at him and slammed into him with his whole arm and shoulder, causing plaintiff to "[fly] five feet in the air" and land on his left hand as he hit the ground. As with a body-slam or beating, both the act and the consequences could be

nothing other than intentional, and thus, plaintiff's injury was not caused by an accident. According to Gibbons, he deliberately pushed plaintiff away but did not intend to injure him. However, Gibbons offered no testimony indicating that he should not have reasonably expected plaintiff to fall to the ground as a result of the push. Pushing someone creates a direct risk of harm from a fall and, while Gibbons may not have intended that plaintiff be injured, he should have reasonably expected that pushing plaintiff to the ground could result in injury. See *Nabozny v Burkhardt*, 461 Mich 471, 480-481; 606 NW2d 639 (2000) (where the insured deliberately tripped a person but did not intend to cause injury, the injury was not caused by an accident because in tripping someone to the ground, the insured "reasonably should have expected the consequences of his acts because of the direct risk of harm created"). In either scenario, plaintiff's injury was not caused by an accident.

Nonetheless, KSK argues that coverage is available under an exception in the liquor liability protection form. The section of the form entitled "**Exclusions – What This Agreement Won't Cover**" states, in part:

> **Intentional bodily injury or property damage.** We won't cover bodily injury or property damage that's expected or intended by any protected person.
>
> But we won't apply this exclusion to intentional bodily injury or property damage that results from the use of reasonable force to protect people or property.

KSK asserts that in pushing plaintiff, Gibbons used reasonable force to protect a person, and thus, that the policy provides coverage for plaintiff's injury. KSK points to evidence that a man was on the ground fighting with one of plaintiff's friends, and Gibbons' testimony that after plaintiff kicked the man in the head, he pushed plaintiff away "[t]o stop him from crushing that guy's skull."

We acknowledge the rule that exclusionary clauses limit the scope of coverage provided under an insurance contract, and do not grant coverage. *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 384; 460 NW2d 329 (1990) (citing and finding persuasive the logic of *Stillwater Condo Ass'n v American Home Assurance Co*, 508 F Supp 1075, 1079 (D Mont, 1981), aff'd 688 F2d 848 (CA 9, 1982)). An exception to an exclusion operates to preserve coverage despite the exclusionary clause. See *id.* at 384-385. But in this case, when the liquor liability protection form is read as a whole, the "exclusion" and "exception to the exclusion" at issue are susceptible to more than one reasonable interpretation and are, therefore, ambiguous as a matter of law. See *Royal Prop Group*, 267 Mich App at 715; *Kurzmann*, 257 Mich App at 418. The coverage section of the form states that the insurer will "pay amounts any protected person is legally required to pay as damages for covered bodily injury . . . caused by an accident," and defines the term "accident" as "an unexpected happening without intention or design." The exclusion section states that the insurer will not "cover bodily injury . . . that's expected or intended by any protected person." Although this provision is found in the section of the form clearly labeled "**Exclusions**," it does nothing other than restate in the inverse the coverage provided. Therefore, it is possible to read the provision as either an exclusion with an exception or as a restatement of coverage and award of additional coverage.

"Ambiguities in a contract generally raise questions of fact for the jury," but if an insurance contract can be construed according to its terms alone, "it is the court's duty to

interpret the language," and "any ambiguities should be construed against the insurer." *Kurzmann*, 257 Mich App at 418, citing *Klapp*, 468 Mich at 469, 472, 474, 477 n 16. Pursuant to this rule, we must conclude that the provision at issue is, in essence, a restatement of coverage and award of additional coverage. Moreover, courts must give effect, whenever possible, to every word, clause, and phrase of an insurance contract "and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468. Construing the provision at issue as an exclusion with an exception, rather than a restatement of coverage and award of additional coverage, would render the exception nugatory. There would be no circumstance in which the "exception" could apply because an exception to an exclusion operates only to preserve coverage despite the exclusion, not to grant coverage. See *Hawkeye-Security Ins*, 185 Mich App at 384-385. Accordingly, we conclude that the provision includes an award of additional coverage. It provides coverage for "intentional bodily injury or property damage that results from the use of reasonable force to protect people or property."

Given our interpretation of the liquor liability protection form, it is necessary to consider whether plaintiff's injury resulted "from the use of reasonable force to protect people or property." As indicated, there is a discrepancy in the evidence on this issue. Gibbons testified that plaintiff was kicking a man in the head, and that he pushed plaintiff away to stop him from crushing the man's skull. Plaintiff testified that he had not been fighting, and that Gibbons assaulted him when he was several feet away from the man on the ground. Other witnesses offered varying testimony about the incident. Therefore, the question whether plaintiff's injury resulted from Gibbons' use of reasonable force to protect a person involves a material factual dispute that must be submitted to the finder of fact. The trial court erred in granting summary disposition to St. Paul.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. KSK, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello