STATE OF MICHIGAN

COURT OF APPEALS

LARRY CZARNOWSKI,

Plaintiff-Appellant,

v

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 18, 2000

No. 216599
Ottawa Circuit Court
LC No. 98-030086 NO

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

In this insurance liability case, plaintiff appeals as of right from a December 8, 1998, order of declaratory judgment in favor of defendant which ordered that defendant has no duty to indemnify or pay the consent judgment of $65,000 entered into by plaintiff and defendant's insured in an underlying lawsuit. We affirm.

Plaintiff, a police officer, filed suit against Steven Scott for personal injuries sustained when Scott resisted arrest. Scott's insurance company, defendant State Farm, initially retained an attorney to investigate and defend the lawsuit brought against Scott but subsequently denied coverage to defend Scott in the matter. After negotiations between plaintiff and Scott, it was stipulated and agreed upon that judgment shall enter in favor of plaintiff Czarnowski and against defendant Scott in the underlying case in the amount of $65,000.

Plaintiff subsequently filed a complaint against defendant insurance company seeking a declaratory judgment that Scott was insured within the provisions of defendant's policy and that defendant had a duty to pay the $65,000 judgment rendered against Scott. Defendant moved for declaratory judgment, pursuant to MCR 2.605, against plaintiff and plaintiff moved for declaratory judgment against defendant. The court granted defendant's motion for declaratory judgment.

Plaintiff argues that defendant should have been required to provide coverage for the underlying judgment against insured Steven Scott pursuant to defendant's policy of insurance because the action of the insured constituted an "occurrence" within the meaning of the insurance policy. An insurance policy

constitutes a contract between two parties. *Fire Ins Exchange v Diehl,* 450 Mich 678, 683; 545 NW2d 602 (1996). Therefore, the court must review the parties' contract when deciding whether an insurance policy covers a particular act. *Id.* This review requires a two-part process. *Id.* First, the court must review the "occurrence" section of the policy to determine if it includes the particular act. *Id.* 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 contract provides that State Farm will defend and pay for claims made or suits brought against an insured for damages because of bodily injury which is caused by an "occurrence." "Occurrence" is defined in the policy as an "accident."

Since there is no definition of "accident" in this insurance policy, this Court must interpret this term of the policy in accordance with its commonly used meaning. *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 113-114; 595 NW2d 832 (1999). Recent court cases have interpreted "accident" to mean " '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 Industries Corp v American Motorists Ins Co,* 448 Mich 395, 404-405; 531 NW2d 168 (1995). The definition of "accident" must be evaluated from the standpoint of insured rather than from the standpoint of the injured party. *Frankenmuth, supra* at 114. The appropriate focus of the term "accident" must be on both the injury-causing act or event as well as on its relation to the resulting personal injury. *Id.* at 115. It is not mandatory for an insured to act unintentionally in order for the act to constitute an "accident" and thus an "occurrence." *Id.* Therefore, when an insured does act intentionally, problems arise in distinguishing between intentional acts that can be classified as "accidents," and thus "occurrences," and those intentional acts which cannot be classified as such. *Id.* "In such cases, 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. . . . [W]hen an insured's intentional actions create a direct risk of harm, there can be no liability coverage for any resulting . . . injury, despite the lack of an actual intent to . . . injure.' " *Id.*, quoting *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648-649; 527 NW2d 760 (1994).

Applying these principles to the instant case and viewed from the standpoint of the insured, the resisting of arrest, which was the underlying event, was caused by the insured's intentional act. This is substantiated by the following evidence in the case. Scott, the insured, was charged with resisting arrest and this charge was dismissed only after the insured pleaded guilty to operating under the influence of intoxicating liquor, third offense. Plaintiff testified that the insured resisted arrest when plaintiff tried to arrest him. The insured testified that he pulled away from plaintiff when plaintiff tried to arrest him. Also, as the insured and plaintiff were wrestling on the ground, the insured was not subdued until a bystander assisted plaintiff. Even though the insured asserts that he did not intend to injure plaintiff, there is no question that the insured's intentional act of resisting arrest created a direct risk of harm that reasonably should have been expected. Therefore, the insured's act cannot be characterized as an "accident" and, as such, there was no "occurrence" for purposes of the insurance policy.

Because there was no occurrence, declaratory judgment was properly granted on that basis alone. Therefore, we need not address the other two grounds cited by the trial court.

Regarding plaintiff's argument that because defendant breached its duty to defend its insured, it cannot now deny coverage after the judgment has been entered, this issue was not properly raised at trial and is, therefore, waived on appeal. *Napier v Jacobs*, 429 Mich 222, 232-233; 414 NW2d 862 (1987).

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald