STATE OF MICHIGAN

COURT OF APPEALS

HORACE MANN INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED March 16, 2001
v	No. 221731 Washtenaw Circuit Court
XUE WEN ZHENG, XIU YAN LIU, and ZIQINE YE, Defendants-Appellees.	LC No. 98-009587-CK

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff sought a ruling that it did not owe a duty to defend or indemnify its insured, defendant Ziqine Ye, in an underlying civil action brought against Ye to recover for injuries sustained by a third party, defendant Xue Wen Zheng, during a fight. Plaintiff appeals by leave granted the June 28, 1999, order denying its motion for summary disposition. We reverse.

Review of a motion for summary disposition is de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. This Court's task is to review the record evidence and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

I

Plaintiff argues that the injuries resulting from the fight do not constitute an "occurrence" within the meaning of the policy, and as a matter of law, coverage is not triggered. Additionally, plaintiff argues that the policy's unambiguous exclusion of coverage for injuries resulting directly or indirectly from the insured's intentional acts bars recovery. Thus, based on either of these theories, plaintiff asserts it has no duty to defend its insured, defendant Ye, in the underlying action, and that summary disposition for plaintiff should have been granted.

The insured, defendant Ye, argues that his actions were unintentional and that his conduct did not result in any harm that he expected or intended, and that he was merely trying to defend himself; accordingly, Ye argues, neither the occurrence requirement nor the intentional acts exclusion should operate to bar coverage, and that at the very least there is a genuine issue of material fact regarding whether he was acting in self-defense.

II

We find it unnecessary to address plaintiff's first theory relating to whether the fight was an "occurrence" because this case is controlled by *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 385-386; 565 NW2d 839 (1997)[1], where the Supreme Court held that "[t]o except injurious action taken in self-defense from the intentional-acts exclusion would impermissibly disregard the clear language of the exclusion in the contract between insurer and insured." The Court also made the following pertinent observation:

> Indeed, while the Harringtons argue that acts taken in self-defense are not "intentional" because they are reactionary and a justifiable response to unwarranted aggression, this reasoning fails because the exclusion does not qualify the injuries excluded from coverage with terms such as "wrongful" or "unjustified." [*Id*. at 385.]

The record clearly indicates that defendant Ye acted intentionally during his participation in the fight with defendant Zheng. It is significant that the exclusion in the policy in this case applies when the resulting injuries were intended *or expected*. See *id.* at 384, n 6. In order for an injury to be "expected," it must be the "natural, foreseeable, expected, and anticipatory result of an intentional act by the insured." *Id*. Under *Harrington*, the "intended or expected" language "bars coverage for injuries caused by an insured who acted intentionally despite his awareness that harm was likely to follow from his conduct." *Id*. at 384.

Defendant Ye himself testified that at one point, the fight became a "mutual fight" and that he "probably threw some punches" at Zheng. Ye also testified that he noticed that Zheng's nose "got bloody" and that he "tried to use left elbow, try to knock him out." Thus, even relying solely on Ye's version of events as reflected in his own testimony, it is undisputed that Ye took part in a fight and intentionally punched Zheng and tried to knock him unconscious with his elbow. According to Ye, before the fight outside, a "big argument" had already begun inside the restaurant where the parties had been meeting. Before the physical confrontation began, Ye even handed his glasses to another man, and admittedly said, "this guy really want[s] to fight with me" and expressed his disbelief. Ye could have left the restaurant, he could have called the police, or he could have remained in the restaurant, but instead, he accepted Zheng's offer to fight outside, and the fight, resulting in injury to Zheng, ensued.

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[1] The pertinent portions of the insurance policy at issue in this case are, for all intents and purposes, identical to the policy under consideration in *Harrington.*

Even giving Ye the benefit of the doubt and assuming for purposes of analysis that he acted solely in self-defense, as noted above, the Michigan Supreme Court has rejected the argument that actions taken in self-defense should not be characterized as intentional acts for purposes of exclusions in insurance contracts. See *id.* at 377; There is nothing ambiguous about the wording of the contract at issue, and there is no claim which "even arguably" falls within the policy coverage. See *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980). Given the holding in *Harrington, supra*, it makes no practical difference who threw the first punch. Summary disposition should have been granted to plaintiff.

Furthermore, neither defendants Ye nor Zheng can avoid the implications of the rules regarding "intentional" conduct merely by pointing to language in the complaint disingenuously characterizing defendant Ye's participation in the fight as the negligent flailing of arms. See *Tobin v Aetna Casualty & Surety Co*, 174 Mich App 516, 517-518; 436 NW2d 402 (1988) ("[t]here 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 . . . . The duty to defend is not limited by the precise language of the pleadings.").

III

Plaintiff also argues it has no duty to defend or indemnify regarding civil conspiracy and tortious interference with contractual relations claims because such claims require intentional acts as necessary elements of their commission, which automatically invokes the intentional acts exclusion within the policy. We agree.

Neither civil conspiracy, nor tortious interference, can occur accidentally or unintentionally. *Hutton v Roberts*, 182 Mich App 153, 157; 451 NW2d 536 (1989); *Feaheny v Caldwell*, 175 Mich App 291, 307; 437 NW2d 358 (1989). Thus, both claims are necessarily barred by the intentional acts exclusion. Furthermore, Liu's loss of consortium claim must fail because Zheng and Liu's primary claims fail. In *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996), this Court held that "a derivative claim for loss of consortium stands or falls with the primary claims in the complaint. Because plaintiff's other claims failed, the loss of consortium claim must likewise fail." *Id.* We conclude that because the claims of negligence, tortious interference, and conspiracy fail; therefore the loss of consortium claim must similarly fail.

Reversed and remanded for entry of summary disposition in favor of plaintiff. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Helene N. White