STATE OF MICHIGAN

COURT OF APPEALS

ANIMAL BEHAVIOR INSTITUTE, INC.,	UNPUBLISHED December 9, 2003
Plaintiff-Appellant,	
v	No. 241734 Oakland Circuit Court
AUTO-OWNERS INSURANCE CO.,	LC No. 99-018139-CZ
Defendant-Appellee.	AFTER REMAND

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition. Plaintiff had sought a declaratory judgment that defendant had a duty to defend plaintiff under the terms of a business liability insurance policy. We affirm.

This case generally involves defendant's refusal to defend plaintiff in a nuisance action filed against plaintiff by adjacent landowners, Ronnie and Delia Gipson. The Gipsons sued plaintiff, claiming that plaintiff kenneled dogs on its property and that the dogs' barking deprived them of the quiet enjoyment of their property. The Gipsons further alleged that plaintiff maintained a "manure pile" near their property. Defendant was plaintiff's business liability insurer, and the policy included a duty to defend. Plaintiff filed the instant matter, seeking a declaratory judgment that defendant had a duty to defend plaintiff against the Gipsons' lawsuit.

The trial court initially granted defendant's motion for summary disposition on the grounds that the Gipsons' lawsuit sought only injunctive relief, whereas the policy at issue only covered claims seeking monetary damages. We reversed, ruling that the trial court erred in narrowly construing the Gipsons' complaint as only seeking injunctive relief. But we remanded for consideration of defendant's alternative grounds for summary disposition.

On remand, the trial court again granted defendant's motion for summary disposition. The trial court ruled that the insurance policy only covered fortuitous events, whereas the grounds for the Gipsons' lawsuit did not involve something accidental, unanticipated, or "out of the usual course of things." The trial court also found that the Gipsons did not allege actual property damage.

On appeal, plaintiff challenges the trial court's order granting defendant's motion for summary disposition. Generally, we review de novo a trial court's ruling on a motion for

summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* at 119-120. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 120.

Here, the policy at issue provides that it only covered bodily injury and property damage that was "caused by an 'occurrence.'" As noted above, in granting defendant's motion for summary disposition, the trial court ruled that the Gipsons' complaint did not involve harm that was caused by an "occurrence." An "occurrence" was defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy did not define the term "accident."

In *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999), our Supreme Court provided some background in this area of law. In *Frankenmuth*, the insured started a fire in his clothing store as part of a plan to damage the inventory and collect insurance proceeds. *Id.* at 107. The fire, however, spread beyond the clothing store and damaged neighboring businesses. *Id.* at 107-108. These businesses attempted to recover their losses from the insured, who requested that Frankenmuth, the insurer, indemnify and defend against these claims. *Id.* at 107-108. Frankenmuth sought a declaratory judgment that it did not have to indemnify or defend because the intentionally set fire was not an "occurrence" under the policy. *Id.* at 108.

Like the instant matter, the insurance policy in *Frankenmuth* defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions . . . ." *Id.* at 113. The policy also failed to define "accident." *Id.* at 114. Our Supreme Court noted:

> In recent times, there has been controversy over interpreting the term "accident" in cases such as the instant case, particularly where it is not defined in the insurance policy. When the meaning of a term is not obvious from the policy language, the "commonly used meaning" controls.
>
> In the instant case, the term "accident" is not defined by the Frankenmuth policies. However, using the common meaning of the term, 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." After some debate concerning the issue, we have also held that the definition of accident should be framed from the standpoint of the insured, not the injured party. [*Id.* at 113-115, quoting *Arco Industries v American Motorists Ins Co*, 448 Mich 395, 404-405; 531 NW2d 168 (1995) (other citations omitted).]

Our Supreme Court added that "the appropriate focus of the term 'accident' must be on both 'the injury-causing *act* or *event* and its relation to the resulting property damage or personal injury.'"

Frankenmuth, supra at 115, quoting *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648; 527 NW2d 760 (1994).

Our Supreme Court recognized that "'an insured need not act unintentionally' in order for the act to constitute an 'accident' and therefore an 'occurrence.'" *Frankenmuth, supra* at 115, quoting *Marzonie, supra* at 648. But where an insured does act intentionally, it is necessary to distinguish between "intentional acts that can be classified as 'accidents' and those that cannot." *Frankenmuth, supra* at 115, quoting *Marzonie, supra* at 648. The *Frankenmuth* Court cited what it described as a "useful" example of an intentional, but nevertheless accidental, act:

> Suppose the fire had been started by a faulty electric cord on the insured's coffeemaker. Examining the insured's act for "intent," there is no doubt that he purposely plugged in the coffeemaker and turned on the switch. In that sense he acted intentionally. The fire remains an accident and the act constitutes an occurrence, however, because at the time of the insured's purposeful act he had no intent to cause harm. The act of plugging in the coffeepot is not a sufficiently direct cause of the harm, and the fire in this example is an accident. [*Frankenmuth, supra* at 116, quoting Justice Cavanaugh's dissenting opinion in *Frankenmuth Mutual Ins Co v Piccard*, 440 Mich 539, 558; 489 NW2d 422 (1992).]

Ultimately, the *Frankenmuth* Court opined that liability coverage should be denied where either (i) the insured intended to cause property damage or personal injury or (ii) the insured, despite the lack of an intent to damage or injure, intentionally acted in a manner creating a direct risk of harm. *Frankenmuth, supra* at 115-116. Thus, because the insured in *Frankenmuth* intentionally created the fire, the Court ruled that the resulting harm was not accidental and, therefore, was not an occurrence. *Id.* at 116-117. The Court noted that, although the resulting harm exceeded the intended harm, from the standpoint of the insured, setting the fire was nevertheless intentional. *Id.* at 116-117. Consequently, the *Frankenmuth* Court concluded that the policy did not cover the resulting harm. *Id.* at 117.

Here, plaintiff plainly did not intend to harm the Gipsons. The more difficult question is whether plaintiff "despite the lack of an intent to damage or injure, intentionally acted in a manner creating a direct risk of harm." *Frankenmuth, supra* at 115-116. We note that, unlike the "coffee pot" hypothetical referenced in *Frankenmuth*, the instant matter did not involve an intervening accident that caused the harm. Instead, the nuisance, if any, was dogs barking and creating excrement—direct and natural consequences of an intentional decision to kennel dogs. Thus, plaintiff acted intentionally in a manner creating a direct risk of harm.

An even more analogous case is *Jones v Farm Bureau Mut Ins Co*, 172 Mich App 24, 25-26; 431 NW2d 242 (1988), where a hog farmer challenged his insurer's refusal to defend him against a township's allegation that his hog farm constituted a public nuisance. Like the instant matter, *Jones* involved a policy that only provided coverage for an occurrence, which was defined as an accident (not defined). *Id.* at 27-28. We noted that the hog farm was operated intentionally and that there were no allegations that an accident led to the public nuisance. *Id.* at 28-29. Consequently, we affirmed the trial court's decision granting summary disposition in the insurer's favor. *Id.* at 29.

Here, of course, plaintiff's intentional decision to kennel dogs is very similar to the *Jones* insured's intentional decision to raise hogs. Like the insured in *Jones,* plaintiff did not intend the resulting harm. Similarly, neither case involved an accidental event causing the purported nuisance. Instead, both *Jones* and the instant matter involve third parties objecting to the natural consequences of an insured's business operations. Accordingly, the *Jones* decision also supports the trial court's ruling.

Plaintiff relies on an unpublished decision of this Court: *Redmer v Auto-Owners Ins*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2000 (Docket No. 213603). In *Redmer*, the insured intentionally constructed a home that inadvertently encroached on another person's property. *Id.* at slip op p 1. The insured's policy contained very similar language—limiting indemnification to an "occurrence," defined as "an accident" (not defined). *Id.* at slip op p 3. We concluded that, although the act of constructing the home was intentional, the insured did not intend to encroach on the other person's property. *Id.* at slip op p 3. Thus, the *Redmer* decision facially supports plaintiff's position that the trial court erred.

On the other hand, defendant correctly notes that the insured in *Redmer* accidentally and mistakenly encroached on another's property due to an intentional act, whereas, here, plaintiff did not accidentally or mistakenly engage in any acts. As defendant suggests, *Redmer* would be more analogous if the insured had intentionally constructed the home to encroach on the other person's property, but the mistake arose out of the incorrect assumption that the other person would not care. Here, there is no indication that plaintiff has engaged in any act that did not go as planned. While plaintiff may have been mistaken in concluding that its activities would not bother any adjacent property owners, there is no indication that a *mistake* has caused any harm.[1] Accordingly, the *Redmer* decision is distinguishable.

In sum, both the *Frankenmuth* and *Jones* decisions support a conclusion that plaintiff's intentional act of kenneling dogs was not an "occurrence" under the policy. Accordingly, the trial court did not err in granting defendant's motion for summary disposition.[2]

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

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[1] For example, the dogs did not accidentally escape and trespass on the Gipsons' lawn.

[2] In light of our ruling, plaintiff's remaining contentions of error are moot.