STATE OF MICHIGAN

COURT OF APPEALS

GREGORY ALLAN PRAIS,

Plaintiff-Appellee,

and

CHRISTOPHER REMISHOFSKY,

Intervening Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 6, 2008

No. 276510
Oakland Circuit Court
LC No. 2006-071542-CZ

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

Defendant Farm Bureau Mutual Insurance Company ("Farm Bureau") appeals the trial court order that (1) found that Farm Bureau had a duty to defend plaintiff Gregory Allan Prais in an underlying lawsuit against him initiated by intervening plaintiff Christopher Remishofsky and (2) ruled Farm Bureau had a duty to reimburse Prais for defense costs incurred in the underlying litigation. For the reasons stated herein, we reverse and remand.

I. Facts

Plaintiff Gregory Allen Prais is a 35-year-old French and physical education teacher. He has a Bachelor of Arts degree in French from Wayne State University and is pursuing a Master's degree in education at Wayne State. At the time of the events giving rise to this cause of action, he lived alone at 3642 Rockingham Road in Royal Oak, Michigan. Christopher Remishofsky, the intervening plaintiff in this case, is a medical resident at Detroit Medical Center. Messrs.

Prais and Remishofsky had a romantic relationship between March and December 2004, but Prais apparently suspected Remishofsky of infidelity.[1]

On the evening of Saturday, December 11, 2004, Prais and Remishofsky co-hosted a Christmas party at Prais' home. They set out food in the dining room and decorated the dining room table with large Merlot wine glasses containing lit votive candles. Although guests had full reign of the house, they primarily congregated in the basement, which contained a family room and a bathroom. During the party, Prais saw what he believed to be sexual behavior between Remishofsky and another guest, became immediately agitated and demanded an explanation of Remishofsky.

Remishofsky refused to discuss the matter, and soon thereafter, Prais went upstairs, while Remishofsky and other party guests continued to socialize in the basement. About 2:00 a.m., as Prais was tidying the dining room, Remishofsky came upstairs and walked through the dining room to Prais' bedroom to retrieve his things. When Prais saw Remishofsky, he told Remishofsky that he was still upset and asked him to explain the events that transpired earlier in the evening. Remishofsky refused to discuss the incident. Remishofsky walked to Prais' bedroom, grabbed his backpack, turned around, and walked back through the dining room. In the dining room, Remishofsky stopped, placed his bag on the dining room table,[2] and began looking through it, apparently to find his cellular telephone. Prais had been following Remishofsky through the house, but at this point he also stopped and stood at the other end of the dining room table, approximately four to five feet from where Remishofsky stood. Prais again asked Remishofsky if they could discuss the incident. Remishofsky picked up his bag, held it in his hand, turned his back to Prais, and responded, "No, you're an a-----e." At this moment, Remishofsky was facing the kitchen door. The dining room table was immediately to his right and Prais stood behind him.

Prais became very upset on hearing this remark. Prais described the ensuing events as follows:

> He was standing there facing the kitchen just before the end of the dining room table, and I said let's talk about it, and, of course, that's the last thing he said was you're an a-----e. I said if you're not going to talk about it, then our relationship is over with, and he said again you're an a-----e, and I then from that point on, I had picked—I was behind him maybe three feet away. I stepped toward the table, picked up a large wine glass that had a votive candle in it.
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> * * *

[1] Remishofsky described Prais as short tempered and verbally abusive.

[2] Prais had an oval dining room table that was approximately three to four feet wide and five to six feet long. By the time Remishofsky was preparing to leave, the dining room table had been cleared of food. The table was covered with a tablecloth made of either nylon or polyester and held only the wineglass candleholders.

> A votive candle, and I was upset, and I wanted to get his attention and to turn around and talk to me because I was upset, and I threw the glass not intentionally, not intending to throw it at him, near him. It hit—as far as I know it hit the table, and it ricocheted and hit him in the face, and I was very upset and very like, oh, my gosh, not intending to hurt him at all.

Although Prais later testified that he could not remember the manner in which he threw the wineglass, he reiterated that he threw the glass. Prais claimed that when he threw the glass, Remishofsky was standing approximately three feet away with his back to Prais. When asked what caused him to throw the glass, Prais explained that he was upset with Remishofsky's unfaithfulness and refusal to discuss his actions. He threw the glass "to get his attention to stop and listen, let's talk about what's going on."

When asked to explain these events in more detail, Prais claimed that he did not throw the wineglass at Remishofsky. Instead, Prais maintained, he intended to throw the wineglass away from Remishofsky and toward the wall in order to get Remishofsky's attention. Prais specified that he threw the wineglass away from Remishofsky at an approximately 75-degree angle, but the wineglass hit the table, ricocheted, hit a wooden dining chair located next to Remishofsky near the kitchen entrance, shattered, and then hit Remishofsky in the face. Prais denied that he threw the wineglass directly at Remishofsky and denied that he hit Remishofsky with the glass.

Because Remishofsky was facing away from Prais when the wineglass struck him, he did not see whether Prais threw the wineglass or struck him with it. Remishofsky explained that when the wineglass struck him, he felt that he had been "struck with a great force on the side of the face." Remishofsky continued,

> I felt something hit me on the side of the face and actually thought I had been punched 'cause it was quite a significant blow to my face and it knocked me to the floor. And when I opened my eyes and looked down at the the [sic] rug, there was already a pool of blood underneath me.

Remishofsky did not hear the wineglass hit anything or shatter before it hit him in the face. Although Remishofsky initially speculated that Prais threw the wineglass at him, he then stated at his deposition that he believed that the wineglass never left Prais' hand. Remishofsky explained,

> I believe that the glass probably never even left his hand because it hit me with such force. The only way scientifically and medically I can explain what happened to me is to have had enough force behind that glass to smash it onto my skin.

Prais admitted that he knew that the wineglass could shatter and injure Remishofsky if he threw it directly at him. He also admitted that he knew that the wineglass could shatter if he threw it directly at the wall. However, he claimed that he did not know that if he threw the wineglass away from Remishofsky and it hit the table, it could ricochet in the manner that it did and injure Remishofsky. He also claimed that because he was upset when he threw the

wineglass, he did not consider whether the wineglass could shatter and injure Remishofsky when he threw it.

Although guests were still at the party, Prais and Remishofsky were alone in the dining room. Remishofsky screamed when he saw blood coming from his face. The remaining guests, who were in the basement at the time, rushed upstairs when Remishofsky screamed, pulled Prais away from Remishofsky, and called the police. Emergency personnel transported Remishofsky to the hospital to treat the cuts on his face. Remishofsky suffered substantial facial scarring requiring reconstructive surgery. Remishofsky also sought psychological counseling to address the mental trauma that he experienced as a result of this incident.

Prais was arrested and charged with assault with a dangerous weapon ("felonious assault"), MCL 750.82, and with assault and battery, MCL 750.81(1). On May 11, 2005, Prais pleaded no contest to charges of aggravated domestic violence, MCL 750.81a(2), and felonious assault. He was sentenced to one year's probation.

Remishofsky initiated a civil cause of action against Prais in the Oakland Circuit Court, raising allegations of negligence and of assault and battery. Prais and Remishofsky eventually settled this case for $28,000. The parties also agreed that if Prais were successful in obtaining reimbursement for his costs and attorney fees, he would pay Remishofsky an additional $5,000.

The parties do not dispute that at the time of the December 2004 incident, Prais had a homeowner's insurance policy with Farm Bureau.[3] The policy applies to "bodily injury or property damage in Section II, which occurs during the policy period." Further, the policy obligates Farm Bureau to defend Prais in certain lawsuits arising from injuries that occurred in Prais' home. Section II of the policy states, in pertinent part, as follows:

COVERAGE E – PERSONAL LIABILITY

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[3] The parties failed to submit a copy of the policy that was in effect in December 2004 with the trial court. Instead, they submit numerous copies of the renewed policy that was issued to Prais on May 9, 2005, and took effect on June 11, 2005. On the Summary of Changes to Your Homeowner Coverage included with the May 9, 2005, copy of the policy, Farm Bureau noted changes from Prais' 2004-2005 policy, but Farm Bureau did not indicate that it changed any policy provisions at issue in this case. However, Farm Bureau also noted, "Some of the language in the revised policy has been restated and repunctuated for clarity and readability but with no change in coverage intent. This summary does not reference every editorial change made to your policy."

We assume for purposes of this opinion that the copy of the policy included in the lower court record accurately reflects the terms of the policy in effect in December 2004. However, on remand, we instruct the trial court to advise the parties to submit a copy of the policy that was actually in effect in December 2004 and to determine if substantive differences exist between the May 9, 2005, policy and the copy of the policy in effect in December 2004 with regard to the provisions of the policy at issue in this case.

> If a claim is made or a **suit** is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the **suit** is groundless, false, or fraudulent. We may investigate and settle any claim or **suit** that we decide is appropriate. Our duty to settle and defend ends when the amount we pay for damages resulting from the **occurrence** equals our limit of liability.

The insurance policy provides that Farm Bureau's duty to defend is limited to a suit brought against an insured caused by an occurrence to which the coverage applies. The Farm Bureau policy defines an "occurrence" as follows:

> "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
>
> a. **bodily injury**; or
>
> b. **property damage**;
>
> neither expected nor intended from the standpoint of the **insured**.

On January 4, 2006, Prais filed a cause of action against Farm Bureau alleging breach of contract arising from Farm Bureau's refusal to defend him in the lawsuit filed by Remishofsky. The trial court determined that Farm Bureau had a duty to defend Prais in the underlying litigation in initiated by Remishofsky and awarded Prais $25,000 plus interest in defense costs for the underlying suit.

II. Analysis

Farm Bureau contends, and we agree, that it does not have a duty to defend Prais in the underlying litigation because Prais' actions do not constitute an accident and, therefore, any liability arising from his actions were not covered under the terms of the policy. We agree.[4]

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[4] Whether an insurer is obligated under the insurance policy to defend the insured presents a question of law requiring interpretation of the insurance contract. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co of Pittsburgh, PA*, 261 Mich App 367, 375; 683 NW2d 161 (2004). We review de novo issues involving the proper interpretation of insurance contracts. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

An insurance policy must be enforced according to its terms. *Nabozny v Burkhardt*, 461 Mich 471, 476 n 8; 606 NW2d 639 (2000). When we review an insurance policy, we must examine the language of the policy and interpret the policy terms in accordance with established principles of contract construction. *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). When the language of the policy is clear and unambiguous, its construction presents a question of law for the trial court. *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). However, if a term is not defined in the policy, we interpret the term in accordance with its commonly used meaning. *McCarn, supra* at 280.

"If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. This is true even where the claim may be groundless or frivolous." *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996) (internal citations omitted). Our Supreme Court explained:

> An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [*Protective Nat'l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991), quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (internal citations omitted).]

However, an insurance company is not responsible for a risk it did not assume. *Nabozny, supra* at 476 n 8. "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995). Further, the insured has the burden of proving that coverage exists. *Id.* at 161 n 6.

Prais' policy obligates Farm Bureau to defend him "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies . . . ." Again, the policy defines "occurrence" as follows:

> "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
>
> a. **bodily injury**; or
>
> b. **property damage**;
>
> neither expected nor intended from the standpoint of the **insured**.

Farm Bureau argues that Prais' conduct does not constitute an "occurrence" under the terms of the policy because his conduct was not an "accident." "Accident" is not defined in the policy. However, our Supreme Court has held that, under its common and ordinary meaning, "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." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999) (citations omitted).

The Michigan Supreme Court also described the circumstances under which an injury-producing event might be considered an "accident." As our Supreme Court noted in *McCarn*, an insured need not act unintentionally in order for an injury-causing event to be considered an "accident" and, therefore, an "occurrence." *McCarn*, *supra* at 282. Instead, if an insured acts intentionally,

> 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." [*Frankenmuth Mut Ins Co*, *supra* at 115, quoting *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648-649; 527 NW2d 760 (1994).]

Our Supreme Court summarized its test to determine if an injury-producing event is an "accident" and, hence, an "occurrence," as follows:

> 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.
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> 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. Accordingly, an objective foreseeability test should not be used in the present context. Rather, the analysis must be that, to avoid coverage, the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured. [*McCarn*, *supra* at 282-283.]

Accordingly, the test to determine whether an injury-producing event is an "accident" focuses on what the insured should have reasonably expected. *Id.* at 284. "[T]here is no coverage where the consequences of the insured's act were either 'intended by the insured' or 'reasonably should have been expected *by the insured*.'" *Id.*

Prais does not dispute that he intended to throw the wineglass. During his deposition, he repeatedly admitted that he threw the wineglass, and his recitation of facts in his brief on appeal again indicates that he threw the wineglass. Instead, Prais claims that he did not intend the consequences of his action. Specifically, he maintains that he threw the glass away from Remishofsky in order to get his attention, and did not intend for the glass to hit the table, ricochet, hit a chair, shatter, and cut Remishofsky's face. Because Prais has the burden of proving that coverage exists[5], he must establish that his actions constituted an accident. However, Prais provides no testimony, expert or otherwise, to support his highly unlikely version of the events that led to Remishofsky's injuries. Instead, he offers only his self-serving testimony that he threw the wineglass at a 75-degree angle away from Remishofsky, that the glass hit a flat table and, in defiance of basic laws of physics, bounced back towards Remishofsky and either hit him or hit a chair next to him, shattered, and cut Remishofsky's face.

Conversely, more compelling evidence demonstrates that Prais either threw the wineglass at or near Remishofsky or hit him in the face with the wineglass. Even assuming that Prais did not intend to injure Remishofsky when he either threw the wineglass at him or hit him in the face with it, Prais reasonably should have expected the consequences of his actions. Prais is college-educated and is a physical education teacher. Further, Prais admitted that he knew that the wineglass could shatter and injure Remishofsky if he threw it at him.

Accordingly, Prais reasonably should have expected that, when he either hit Remishofsky in the face with the wineglass or threw it at him, the wineglass likely would shatter and injure Remishofsky. Prais' actions created a direct risk of serious harm to Remishofsky and, hence, do not constitute an "accident." Because Prais' actions do not constitute an "accident," they do not constitute an "occurrence" under the terms of the policy. Therefore, Farm Bureau does not have a duty to defend Prais in the underlying litigation commenced by Remishofsky. Prais' conduct is not an accident and he should have reasonably expected that his actions could seriously injure Remishofsky.

Prais argues that "[a]n insurer's duty to defend its insured is solely dependent on whether the language of the allegations in the underlying third party complaint *arguably* falls under the policy coverage." He claims that because Remishofsky raised a claim of negligence in his complaint in the underlying case and Farm Bureau has a duty to defend negligence claims brought against Prais pursuant to the policy terms, Farm Bureau automatically has a duty to defend Prais in the underlying cause of action brought by Remishofsky. We disagree.

In *Tobin v Aetna Cas & Surety Co*, 174 Mich App 516, 519; 436 NW2d 402 (1988), this Court stated, "The duty to defend is not limited by the precise language of the pleadings." The *Tobin* Court also noted, "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." *Id.* at 518.

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[5] *Heniser, supra* at 161 n 6,

In *Tobin*, the plaintiff's brother filed a cause of action against the plaintiff, raising claims of negligence and of assault and battery arising from injuries he received when the plaintiff hit him in the face during a fight over a woman. *Id.* at 517-518. The *Tobin* Court determined that, although the plaintiff's brother raised a claim of negligence in the underlying complaint, the brother's alleged injuries "were the natural, foreseeable, expected, and anticipated result of plaintiff's admittedly intentional act of striking him" and, therefore, the defendant insurer did not have a duty to defend under the policy coverage. *Id.* at 519. Although the complaint in question in *Tobin* alleged negligence on the part of the plaintiff, the tortious conduct alleged was not covered under the terms of the policy and, therefore, the defendant insurer had no duty to defend.

Similarly, although Remishofsky raises a claim of negligence against Prais, this characterization alone is insufficient to trigger coverage. As discussed earlier, Prais failed to provide a factual scenario (besides his self-serving, entirely implausible description of the event) to support his assertion that he is entitled to coverage under the policy terms. Accordingly, Farm Bureau has no duty to defend Prais in the underlying litigation, and the trial court erred when it determined that Farm Bureau had a duty to defend Prais and awarded Prais $25,000, plus interest, to cover defense costs in the underlying proceeding.[6]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski

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[6] Farm Bureau also argues that it has no duty to defend Prais because his actions fall under the criminal act and intentional act exclusions of this policy. However, because we have concluded that Prais' actions do not constitute an "occurrence" and, therefore, do not obligate Farm Bureau to defend him in the litigation brought by Remishofsky, we need not address this issue.