STATE OF MICHIGAN

COURT OF APPEALS

HOME-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v

ELIAS CHAMMAS, CHAMMAS, INC. d/b/a PARADISE MINI MART, and COREY PARKS,

Defendants-Appellees.

UNPUBLISHED
October 18, 2011

No. 299412
Genesee Circuit Court
LC No. 09-092739-CK

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order denying plaintiff's motion for summary disposition brought pursuant to MCR 2.116(C)(10). Because the bodily injury in this case was not the result of an "occurrence" as defined by the unambiguous language of the insurance policy at issue, the trial court erred in finding the existence of an issue of material fact, and therefore we reverse and remand for further proceedings.

This case arises out of an altercation that occurred at the Paradise Mini-Mart in Flint, Michigan. Elias Chammas, the owner and operator of the Paradise Mini Mart, refused to serve Christopher Jones after noticing on surveillance footage that an individual who had entered the store with Jones earlier that evening had stolen a case of beer. Jones returned to his apartment and informed his brother, Corey Parks, that Chammas had kicked him out of the store and called him a racial slur. Parks, who had consumed several beers, went to the Paradise Mini Mart to confront Chammas. Parks and Chammas engaged in a heated verbal confrontation.

Parks left the store and lingered outside as Chammas observed him on a security camera. Parks kicked over some milk crates outside the store and threw one in the direction of Chammas's car. Chammas walked outside toward the parking lot, where security camera footage shows him pulling out a handgun and firing two shots. Both shots hit Parks, the first shattering Parks's femur just above the knee and the second getting lodged in his wallet. Some evidence indicated that the second bullet might have hit Parks on a ricochet. Chammas maintained that he did not intend to shoot Parks, but only wanted to get him off the property.

In separate a criminal action, Chammas pleaded guilty to careless, reckless, or negligent use of a firearm resulting in death or injury to a person, MCL 752.861. Parks filed a civil suit against Chammas and Chammas, Inc. Plaintiff, as insurer for both Chammas individually and

Chammas, Inc., moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff had no duty to defend or indemnify the insured parties. Plaintiff asserted that no issue of material fact existed regarding whether the shooting was a covered "occurrence" under the language of the insurance policy, nor was there any issue of material fact regarding whether the injury was "expected or intended" under the language of the policy.

On June 28, 2010, the trial court held a hearing on plaintiff's motion for summary disposition. The trial court found in favor of Chammas, holding that an issue of material fact existed regarding whether Chammas intended to harm Parks. The trial court entered an order denying plaintiff's motion for summary disposition on July 12, 2010. It is from this order that plaintiff now appeals.

First, plaintiff alleges that the shooting of Parks was not an "occurrence" under the language of the policy, and therefore is excluded from coverage. We review a decision on a motion for summary disposition de novo. *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). "When reviewing a motion for summary disposition based on MCR 2.116(C)(10), our task is to determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Morales v Auto owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). We must "'consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Id*., quoting *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

When interpreting an insurance policy, we attempt to give effect to the intent of the parties by reviewing the policy language. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). When the language is clear and unambiguous on its face, we apply the terms as written. *Id*. at 567. Section I, 1b(1) of the insurance policy reads as follows:

> b. This insurance policy applies to "bodily injury" and "property damage" only if:
>
> > (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

The policy defines an "occurrence" as an "accident," but the term "accident" is not further defined. In *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114-117; 595 NW2d 832 (1999), our Supreme Court adopted a framework for evaluating the term "accident."

The *Frankenmuth* Court specifically adopted the analysis contained in Justice Griffin's plurality opinion in *Auto Club v Marzonie*, 447 Mich 624; 527 NW2d 760 (1994), overruled in part on other grounds by *Frankenmuth*, 460 Mich at 117 n 8. Justice Griffin found:

> "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." [*Marzonie*, at 649 (Griffin, J.) emphasis in original; footnote omitted).]

Therefore, even in the absence of intent to cause bodily injury, an injury cannot be deemed to be caused by an accident if the insured's intentional acts created a direct risk of harm.

Here, there is no question that Chammas intentionally fired two shots in Parks's direction, hitting him twice and causing bodily injury. Because Chammas fired intentionally and both shots clearly created a direct risk of harm or bodily injury, the shooting cannot be deemed an "accident," even if Chammas could establish a lack of subjective intent to cause injury. Furthermore, because the shooting is not an "accident" under the language of the policy, it cannot be deemed an "occurrence," and therefore is not covered by the policy. For that reason, we conclude that the trial court erred in finding a genuine issue of material fact with regard to Chammas's intent at the time he shot Parks.

Plaintiff also argues in the alternative that coverage is excluded under the "Expected or Intended Injury" exclusion of the policy. Because of our resolution of the issue that the claim against Chammas individually does not arise from an "occurrence" under the analysis adopted by our Supreme Court in *Frankenmuth*, we similarly need not decide the "Expected or Intended Injury" exclusion to the policy. *Frankenmuth*, 460 Mich at 117.

Finally, in the lower court defendants raised the issue of whether plaintiff was required to defend and indemnify Chammas, Inc. d/b/a Paradise Mini Mart, as a named insured to the policy under an alter ego theory. The trial court denied plaintiff's motion for summary disposition on other grounds, and declined to address this issue. Section IV, 7 of the insurance policy reads as follows:

> Except with respects to the Limits of Insurance, any rights or duties specifically assigned to this Coverage Part to the first Named Insured, this insurance applies
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each Insured against whom claim is made or 'suit' is brought.

Because the policy requires separate application to each insured, and the trial court did not address this issue as it relates to Chammas, Inc., we remand to the trial court because the record is insufficient for us to make a determination on the alter ego theory advanced by plaintiff. We decline to address this issue and remand it back to the trial court for further factual development of the record and ultimately a decision on the merits.

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

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio