STATE OF MICHIGAN

COURT OF APPEALS

PERFECT FENCE COMPANY,

Plaintiff-Appellee,

v

ACCIDENT FUND NATIONAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
June 11, 2020

No. 349114
Grand Traverse Circuit Court
LC No. 2019-034778-CZ

Before: CAMERON, P.J., and BOONSTRA and LETICA, JJ.

PER CURIAM.

Defendant, Accident Fund National Insurance Company (Accident Fund National), appeals an order denying its motion for summary disposition and granting summary disposition in favor of plaintiff, Perfect Fence Company (Perfect Fence). The trial court concluded that Accident Fund National had a contractual duty to provide a defense for Perfect Fence with respect to claims brought by David McQueer, regardless of whether it had to indemnify Perfect Fence for damages that it might be required to pay on McQueer's claims. We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arose after McQueer was injured while working for Perfect Fence. On January 14, 2014, McQueer and his supervisor were installing fence posts. Although the proper method to install the posts was to use an auger or a hand-digger to dig post holes, McQueer's supervisor instead used the bucket of a Bobcat front-loader to hammer the fence posts into the ground. McQueer's supervisor "miscalculated" in lowering the bucket, resulting in a fence post going farther into the ground than anticipated. McQueer, who was underneath the bucket, was struck in the head by it.

In April 2014, McQueer filed a complaint against Perfect Fence, alleging multiple claims of negligence. Accident Fund National, which issued an insurance policy to Perfect Fence, defended Perfect Fence in the action. After discovery commenced, Perfect Fence moved for summary disposition, arguing that McQueer's claims were barred by the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131. McQueer opposed the motion and moved for leave to file an amended complaint to include an intentional tort claim and a breach of contract claim. The trial court granted Perfect Fence's motion for summary disposition, and McQueer was later granted leave to file an amended complaint.[1]

The amended complaint contained intentional tort and breach of contract claims. In relevant part, the allegations included assertions that Perfect Fence had committed an intentional tort with "a continuing operative dangerous condition that [Perfect Fence] or its representatives knew would cause injury[.]" McQueer also alleged that Perfect Fence's failure to withhold employee deductions and its failure to make certain disclosures and contributions required by tax law deprived him of certain economic benefits. Thereafter, Accident Fund National advised Perfect Fence that it no longer had a contractual duty to defend or to indemnify Perfect Fence.

Perfect Fence filed a complaint against Accident Fund National, alleging breach of contract and seeking a declaratory judgment that Accident Fund National had a duty to defend it in the McQueer action. Accident Fund National filed a motion for summary disposition under MCR 2.116(C)(8), arguing that McQueer's intentional tort claim was excluded from coverage. Accident Fund National also argued that it did not have a duty to defend the breach of contract claim because it was "not one for bodily injury by accident or bodily injury by disease" and because McQueer was not seeking "benefits under the WDCA."

Perfect Fence opposed the motion, arguing that summary disposition was improper because the trier of fact in the McQueer action had not yet made a factual determination as to whether McQueer's injuries were caused by an accident or by an intentional act. Although Perfect Fence conceded that there was "no separate duty to defend . . . the breach of contract claim asserted by Mr. McQueer because that claim [did] not seek to recover damages for bodily injury or benefits," Perfect Fence argued that Accident Fund National nonetheless had a duty to defend the breach of contract claim because it had a continuing duty to defend the intentional tort claim. Thus, Perfect Fence argued that Accident Fund National had a continuing duty to defend it against both of the claims asserted in McQueer's amended complaint and that it was entitled to summary disposition under MCR 2.116(I).

[1] The trial court initially denied McQueer's motion for leave to file an amended complaint. After an appeal as of right was filed from the trial court's decision to grant Perfect Fence's motion for summary disposition, in relevant part, this Court held that the trial court abused its discretion by denying McQueer's motion to amend. *McQueer v Perfect Fence Co*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2016 (Docket No. 325619), p 10, rev'd in part by *McQueer v Perfect Fence Co*, 502 Mich 276, 281-285; 917 NW2d 584 (2018).

After oral argument, the trial court denied Accident Fund National's motion for summary disposition, stating that the "duty to provide a defense is broader than the duty to indemnify under the insurance policy" and that "we should err in terms of determining a duty to defend on the side of finding coverage." The trial court held that Accident Fund National had a duty to defend Perfect Fence and granted summary disposition in Perfect Fence's favor under MCR 2.116(I). This appeal followed.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion for summary disposition brought under MCR 2.116(C)(8), the pleadings alone are considered in testing the legal sufficiency of a claim.[2] *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that "no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). Summary disposition is appropriate under MCR 2.116(I)(2) "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment[.]" MCR 2.116(I)(2).

This Court reviews de novo questions of the proper interpretation of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). This Court reviews the interpretation of an insurance contract just like any other contract. *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010).

III. ANALYSIS

Accident Fund National argues that the trial court erred by denying its motion for summary disposition and by instead granting summary disposition in favor of Perfect Fence. We agree.

The duty to defend and the duty to indemnify are separate issues. *Allstate Ins Co v Maloney*, 174 Mich App 263, 268; 435 NW2d 448 (1988). "In determining whether an insurer has a duty to defend its insured, we are required to look at the language of the insurance policy and construe its terms." *Matouk v Michigan Muni League Liability and Prop Pool*, 320 Mich App 402, 409; 907 NW2d 853 (2017), quoting *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997). An insurance policy's terms are given their "commonly used meaning" if not defined in the policy. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112; 595 NW2d 832 (1999) (quotation marks and citation omitted). 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).

[2] Although Accident Fund National relied on McQueer's amended complaint and the insurance policy to argue that summary disposition was proper under MCR 2.116(C)(8), both the amended complaint and the insurance policy were attached to Perfect Fence's complaint. Thus, they became part of the pleadings. See MCR 2.113(C)(1).

"Unambiguous insurance policy language must be enforced as written. If the policy is ambiguous, it will be construed in favor of the insured to require coverage." *Matouk*, 320 Mich App at 409-410 (citation omitted). While an intentional-act exclusion generally will be strictly construed in favor of the insured, *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 383; 565 NW2d 839 (1997), "[c]overage under a policy is lost if any exclusion in the policy applies to an insured's particular claims," *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998). This is the case because "an insurance company cannot be liable for a risk it did not assume." *Matouk*, 320 Mich App at 410.

In *Allstate Ins Co v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989), our Supreme Court stated that "the proper construction of a contract requires that we first determine whether coverage exists, and then whether an exclusion precludes coverage." In this case, the policy provides as follows:

> **A. How This Insurance Applies**
>
> This employers liability insurance applies to bodily injury by accident or bodily injury by disease . . . .
>
> * * *
>
> **D. We Will Defend**
>
> We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.
>
> We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

Thus, the policy obligates Accident Fund National to defend Perfect Fence if McQueer's "bodily injury" was caused "by accident." The policy does not define the term "accident." 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." *Masters*, 460 Mich at 114 (citations omitted). Similarly, the policy provides an exclusion for "[b]odily injury intentionally caused or aggravated by [the insured]" and "bodily injury caused by [the insured's] actual knowledge that an injury was certain to occur and [the insured's] willful disregard of that knowledge." Thus, Accident Fund National would not have been required to defend Perfect Fence if, from the standpoint of Perfect Fence, the bodily injury to McQueer was either intentionally caused or aggravated by Perfect Fence, or if Perfect Fence had actual knowledge that an injury was certain to occur and Perfect Fence willfully disregarded that knowledge.

In order to determine whether this was the case, we must turn to the allegations in the underlying suit. See *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 137; 610 NW2d 272 (2000) (citations omitted). "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, 451; 550 NW2d 475 (1996) (citations omitted). Our Supreme Court has explained:

> 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 Mich Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (citations omitted).]

Therefore, we must consider whether McQueer's intentional tort claim could be covered by the policy, i.e., whether the bodily injuries resulted from an "accident"—an event neither expected nor intended by Perfect Fence—or whether the bodily injuries were intentionally caused or aggravated by Perfect Fence, or whether Perfect Fence had actual knowledge that injury was certain to occur and Perfect Fence willfully disregarded that knowledge.

One of the underlying claims was brought under the intentional tort exception to the WDCA, which provides:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1).]

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996), our Supreme Court construed the first sentence of MCL 418.131(1) as imposing a specific intent requirement, i.e., that "the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee." The *Travis* Court then held that the second sentence was to "be employed when there is no direct evidence of intent to injure, and intent must be proved with circumstantial evidence. It is a substitute means of proving the intent to injure element of the first sentence." *Id*. at 173. The *Travis* Court noted that the second sentence reads: "An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id*. at 172. The *Travis* Court held

> [i]f we read both sentences . . . together, it becomes evident that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id*. at 180.]

In this case, McQueer brought an intentional tort action alleging that he was subjected to "a continuing operative dangerous condition that [Perfect Fence] or its representatives knew would cause injury," and that Perfect Fence "had actual knowledge that an injury to [McQueer] was certain to occur and willfully disregarded that knowledge." McQueer alleged that he was injured while installing fence posts that he held while his supervisor drove the post into the ground with the bucket of a Bobcat front-end loader instead of using an auger or hand tool. The bucket struck one of the fence posts that McQueer was holding, and McQueer was injured when the bucket struck McQueer's head. McQueer alleged that Perfect Fence had "actual knowledge" that the supervisor was installing the posts improperly because "[t]he employer" had visited the work site and did not "stop the work" or "reprimand" the supervisor. Rather, according to the allegations in McQueer's amended complaint, the employer only stated "[y]ou shouldn't do that because somebody's going to get hurt." McQueer alleged that Perfect Fence's owner stated in a deposition that installing fence posts in that manner "guaranteed that someone would get hurt."

Thus, McQueer alleged that Perfect Fence had actual knowledge that an injury was certain to occur as a result of the supervisor's use of the Bobcat and willfully disregarded that knowledge by failing to stop the supervisor from using the Bobcat in that fashion. Because this conduct was excluded from coverage by the policy, Accident Fund National did not have a duty to defend Perfect Fence against the intentional tort claim. Additionally, even if the fact finder was to determine that Perfect Fence was not liable for an intentional tort because McQueer's injuries were caused by an accident, McQueer's claim would be barred under the exclusive-remedy provision of the WDCA.[3] See *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000) ("It is well settled that the exclusive remedy provision applies when an employee is injured by the negligent acts of his employer or by the negligent acts of a coemployee."). Because there is no possibility of coverage under the policy, it reasonably follows that Accident Fund National had no duty to defend Perfect Fence against McQueer's intentional tort action.

McQueer also filed a breach of contract claim. As already stated, Perfect Fence argued before the trial court that, even though breach of contract was not a theory of recovery that fell within the insurance policy, Accident Fund National was nonetheless obligated to defend the breach of contract claim because it was obligated to defend McQueer's intentional tort claim.[4] For the reasons already discussed, because Accident Fund National was not contractually obligated to defend the intentional tort claim, it was also not required to defend the breach of contract claim. See *Auto Club Grp Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2001) (holding that, where "no theories of recovery fall within the policy, an insurer does not have a duty to defend"). Therefore, because summary disposition in favor of Accident Fund National was proper,

[3] Although not dispositive on appeal, we note that this did not occur. After the trial court entered judgment as a matter of law in favor of Perfect Fence in relation to its action against Accident Fund National, a jury found in favor of McQueer on his intentional tort claim.

[4] If the claims of liability are not covered under the insurance policy, "[a]n insurer [nonetheless] has a duty to defend" where "there are any theories of recovery that fall within the policy." *Auto Club Grp Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2001) (citations omitted).

we conclude that the trial court erred by denying Accident Fund National's motion for summary disposition and by granting summary disposition in favor of Perfect Fence.

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

/s/ Thomas C. Cameron
/s/ Mark T. Boonstra
/s/ Anica Letica