STATE OF MICHIGAN

COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellee,

v

JOEL MATIVA, also known as JOEL METIVA,

Defendant,

and

TAMMY FITZGERALD,

Defendant-Appellant.

UNPUBLISHED
February 10, 2025
10:32 AM

No. 366212
Kent Circuit Court
LC No. 22-005632-NI

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

JOEL MATIVA, also known as JOEL METIVA,

Defendant-Appellant/Cross-Appellee,

and

TAMMY FITZGERALD,

Defendant/Cross-Appellee.

No. 366334
Kent Circuit Court
LC No. 22-005632-NI

Before: BOONSTRA, P.J., and K. F. KELLY and YOUNG, JJ.

PER CURIAM.

In this case, defendant, Joel Metiva placed Michael McWilliams in a headlock after Metiva observed McWilliams getting too close to Metiva's wife.[1] When the two toppled to the ground, they landed on Tammy Fitzgerald, who suffered injuries requiring surgery. The question on appeal is whether the homeowner's insurance policy issued to Metiva by plaintiff, Meemic Insurance Company ("Meemic"), covers the injuries to Fitzgerald. For the reasons stated in this opinion, we affirm the trial court's decision that it does not.

I. FACTUAL AND PROCEDURAL HISTORY

On the evening of November 13, 2021, at the Rogue River Tavern, McWilliams was seated at the bar talking to Metiva's wife. The two were getting very close to each other. When Metiva observed this, he charged at McWilliams, placed him in a headlock, and dragged him to the ground. When the two toppled to the ground, they landed on Fitzgerald, who was walking behind Metiva and McWilliams during the altercation. Fitzgerald suffered fractures to her ankle and required two surgeries as a result. Metiva later testified that he did not intend to hurt or injure McWilliams or Fitzgerald, but that he wanted to "create space" between his wife and McWilliams. The Kent County Prosecutor's office initially authorized an assault charge against Metiva, but the charge was either denied or dismissed after McWilliams stated he did not wish to press charges.

Fitzgerald brought a personal injury lawsuit against Metiva, asserting Metiva negligently injured her while visibly intoxicated. Meemic—Metiva's homeowner's insurance provider—brought its complaint for declaratory relief under MCR 2.605 and MCR 2.111, asserting that its policy did not cover any bodily injury Fitzgerald sustained because the incident at the tavern did not constitute an "occurrence" as defined by the insurance policy, and the incident fell within the policy's intentional-acts exclusion. Meemic moved for summary disposition under MCR 2.116(C)(10) on those bases.

The insurance policy stated it offered coverage for a claim made or if "a suit is brought against [the insured] for damages because of bodily injury, personal injury or property damage caused by an occurrence to which this coverage applies," and defined "occurrence" as "an accident . . . resulting in bodily injury, personal injury or property damage during the term of the policy." The insurance policy also contained several exclusionary provisions. Section (II)(1)(A) of the insurance policy stated that it did not cover:

> bodily injury, personal injury or property damage resulting from . . . an act or omission by a named insured which is intended or could reasonably be expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is different from, or greater than, that which is expected or intended. This exclusion does not apply to anyone other than the person who committed the intentional act resulting in loss under the policy.

In its opinion and order, the trial court expressed skepticism at Meemic's assertion that this incident did not constitute an "occurrence" under the terms of the policy, and under this Court's

[1] Metiva's name is also spelled "Mativa" in the record. However, in the filings before this Court by his own attorney, defendant-appellant's name is spelled "Metiva." Therefore, this opinion shall refer to him as "Metiva."

jurisprudence, because the term "accident" was not defined in the policy. Nevertheless, the trial court declined to reach a conclusion in that regard. The trial court instead found the altercation between Metiva and McWilliams fell under the exclusionary provision in Section (II)(1)(A), concluding "no reasonable minds could differ that the act of putting an individual in a headlock and dragging him or her to the floor could *reasonably be expected* to cause bodily injury." (Emphasis added.) The trial court granted Meemic summary disposition. Fitzgerald and Metiva now appeal as of right in these consolidated cases,[2] and Meemic cross-appeals.

II. STANDARDS OF REVIEW

"This Court reviews de novo a ruling on a motion for summary disposition. Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "Furthermore, the proper construction and application of an insurance policy presents a question of law that is reviewed de novo." *Dells*, 301 Mich App at 376-377.

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of the plaintiff's claim, is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might disagree." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citation omitted). When reviewing the trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10), we consider the parties' documentary evidence in the light most favorable to the party opposing the motion. *Johnson*, 502 Mich at 761. "[R]eview is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

III. CLARIFYING THE TRIAL COURT'S OPINION AND ORDER

Before we consider substantive arguments regarding interpretation of the insurance policy, we must clarify that the trial court correctly relied on admissible evidence to support its very narrow ruling.

A. THE EVIDENCE RELIED UPON

Fitzgerald argues that the trial court impermissibly relied on hearsay evidence (the surveillance footage and the police report) when it reached its conclusions, and absent that hearsay, the remaining evidence about Metiva's intent can be found in his deposition and affidavit, which assert that he did not intend to hurt or injure anyone that night. We agree that the police report

[2] *Meemic Ins Co v Mativa*, unpublished order of the Court of Appeals, entered June 6, 2023 (Docket Nos. 366212 and 366334).

contained inadmissible hearsay, but nonetheless, any error by the trial court in this regard is harmless.

Evidence is admissible if it is relevant unless otherwise prohibited. MRE 402. Hearsay is an out-of-court statement offered for the truth of the matter asserted, and is generally inadmissible unless an exception or exclusion applies. MRE 801(c) and MRE 802. And although a motion for summary disposition must be supported by admissible evidence, that evidence does not need to be in an admissible form. *Latits v Phillips*, 298 Mich App 109, 113; 826 NW2d 190 (2012). Surveillance video evidence is not hearsay because it is not a statement, and generally admissible assuming it is relevant, not otherwise prohibited by law, and is authenticated pursuant to MRE 901.[3] Surveillance footage is merely a recording of what transpired, and, in this instance, it captured the altercation between Metiva and McWilliams without any audio, or any postincident interview footage with eye witnesses. Further, no party in this matter disputes the surveillance footage's authenticity. Metiva authenticated the footage when he stated that he watched the video in preparation for his deposition, and testified about its contents at his deposition. Metiva's affidavit also acknowledged that, although he did not intend to injure McWilliams, he nonetheless placed his hands on McWilliams, thereby authenticating the contents of the video. Because the surveillance footage is not hearsay and was authenticated, the trial court did not err by relying on it when granting Meemic summary disposition.

The same cannot be said for the police report. Police reports may be admissible as business records, as would an officer's observations memorialized in them because that officer could be called to testify at an evidentiary hearing or trial, but secondary hearsay within the reports would not be admissible. *Latits*, 298 Mich App at 114. See also MRE 803(6). In its written opinion, the trial court stated Metiva placed McWilliams in a "headlock." The trial court erred to the extent that it relied on hearsay-within-hearsay statements from the police report to reach that conclusion, specifically the portion of the police report containing eyewitness statements using that very description of the altercation. *Latits*, 298 Mich App at 114; *Maiden v Rozwood*, 461 Mich 109, 124-125; 597 NW2d 817 (1999); *Merrow v Hofferding*, 458 Mich 617, 627-628; 581 NW2d 696 (1998) (where a document admitted under the business-records exception contains hearsay within hearsay, a separate justification must exist for the contested statements to be admissible).

Regardless, the trial court also relied on the surveillance footage to reach its decision. Having reviewed the surveillance footage, we agree that the most apt description of Metiva's action against McWilliams is a "headlock." Because the surveillance footage supports these descriptions, and the trial court could have reached the same conclusion reviewing the surveillance footage alone, any error made in reliance on hearsay-within-hearsay statements in the police report is harmless. MCR 2.613(A).

[3] MRE 901(a) states: "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must provide evidence sufficient to support a finding that the item is what its proponent claims it is."

B. THE TRIAL COURT DID NOT FIND THAT THIS EVENT WAS AN "OCCURRENCE" UNDER THE POLICY

All three parties assert arguments on appeal under the mistaken belief that the trial court concluded the altercation between Metiva and McWilliams constituted an "occurrence" under Meemic's insurance policy, but then concluded that one of the policy's exemptions nonetheless applied. This mistaken belief forms the basis of: (1) Fitzgerald's assertion that the trial court's opinion is contradictory; (2) Metiva's argument that this incident amounted to an "occurrence" under the policy; and (3) Meemic's cross-appeal asserting that the trial court erred by concluding that this matter constituted an "occurrence" under its policy.

The policy defined "occurrence" as an "accident." In its opinion and order, the trial court stated that it "is unconvinced that Metiva's action here [did] not fall within the definition of an 'occurrence' " and that "it is undisputed that Metiva did not intend to injure Fitzgerald when he pursued and engaged with McWilliams," but the trial court explicitly stated that it "declines to hold that Metiva's actions here cannot be considered an 'occurrence.' " The trial court did not otherwise conclude the inverse: that this incident is an "occurrence" within the meaning of the insurance policy. Instead, the trial court concluded that Meemic had not established entitlement to summary disposition on that basis and declined to reach a conclusion. Therefore, the parties' arguments that are based upon a mistaken understanding of the trial court's conclusions, particularly Meemic's cross-appeal, are without merit.

IV. MEEMIC'S POLICY, NAMELY THE INTENTIONAL-ACTS EXCLUSION, WAS NOT ILLUSORY OR AMBIGUOUS

Next, the parties argue Meemic's policy was ambiguous regarding whether the insured's intent matters and whether the policy would cover bodily injury of unintended third parties to assault. "Generally, when reviewing an insurance policy dispute, an appellate court looks to the language of the insurance policy and interprets the terms therein in accordance with Michigan's well-established principles of contract construction." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 518-519; 847 NW2d 657 (2014) (quotation marks and citation omitted; alteration incorporated). "Policy language should be given its plain and ordinary meaning, and this Court must construe and apply unambiguous contract terms as written." *Id*. at 519. "An insurance contract should be viewed as a whole and read to give meaning to all its terms, and conflicts between clauses should be harmonized." *Id*. (quotation marks and citation omitted; alterations incorporated).

"Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. An insurance company is free to limit its liability as long as it does so clearly and unambiguously." *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 4; 658 NW2d 193 (2002) (quotation marks and citations omitted). "If [an insurance] policy is ambiguous, it will be construed in favor of the insured to require coverage." *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997). "Insurance policy language is given its ordinary and plain meaning. Words are considered to be ambiguous when they may be understood in different ways." *Id*. at 203 (citation omitted). However, we must be careful not to read ambiguity into an insurance policy where none exists. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

When deciding an insurance-coverage issue, although "exclusions are strictly construed in favor of the insured, this Court will read the insurance contract as a whole to effectuate the intent of the parties and enforce clear and specific exclusions." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). The insurance company has the burden of demonstrating that an exclusion applies. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

Metiva argues that the intentional-acts exclusion in Meemic's policy, Section (II)(1)(A), is ambiguous regarding injury to third parties. Fitzgerald argues that the trial court erred when it declined to apply our Supreme Court's two-part test adopted in *Allstate Ins Co v McCarn*, 471 Mich 283, 289-290; 683 NW2d 656 (2004) (*McCarn II*) (opinion by TAYLOR, J.), when analyzing whether Section (II)(1)(A) applied. *McCarn II* held that when an insurance policy excludes from coverage bodily injury that was intended by, or should have reasonably been expected by, the insured, the proper test is first whether the insured acted either intentionally or criminally, and second, whether the insured *subjectively* expected the resulting injury. *Id.*[4] Fitzgerald argues that an application of this subjective test results in the inapplicability of the intentional-acts exclusion in the policy because Metiva never intended to injure Fitzgerald. We disagree, and hold the trial court correctly decided the altercation between Metiva and McWilliams fell under the intentional-acts exclusion to bar coverage for Fitzgerald's injuries.

As noted above, Meemic's policy included several exemptions from coverage of various acts committed by the insured. The intentional-acts exclusion relied on by the trial court in granting summary disposition to Meemic, Section (II)(1)(A), states Meemic would not cover:

> bodily injury, personal injury or property damage resulting from . . . an act or omission by a named insured which is intended *or could reasonably be expected* to cause bodily injury or property damage. This exclusion applies *even if the bodily injury* or property damage *is different from, or greater than, that which is expected or intended*. This exclusion does not apply to anyone other than the person who committed the intentional act resulting in loss under the policy.

Although the parties label this the intentional-acts exclusion, it is clear from the language of the provision that intent is not a prerequisite to barring coverage because of the word "or" after the word "intended." Metiva testified and averred he had no intention of hurting McWilliams or anyone at the tavern. But lacking intent does not mean Meemic would automatically indemnify him. The language following the word "or," is clear that if injury could "reasonably be expected" from the insured's act, Meemic also would not indemnify the insured even if the insured lacked intent to injure.

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[4] But see *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 570-572; 80 NW2d 537 (2011) (holding that when the terms of the insurance coverage's criminal-acts exemption state that coverage is denied for bodily injury resulting from "a criminal act or omission committed by anyone," or "an act or omission, criminal in nature, committed by an insured person," thereby *not* considering the intentions of the insured and merely focusing on the insured's actions, then *McCarn II*'s two-prong test is inapplicable).

Further, our Supreme Court clarified after the *McCarn II* holding that "when interpreting insurance contracts" . . . "the use of the term 'reasonably' requires the application of an *objective* standard unless it is used in reference to a particular person's point of view or expectation under certain circumstances." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 161; 802 NW2d 281 (2011) (emphasis added). And, the opinion in *McCarn II* was a plurality opinion, which is not generally considered authoritative or binding under the doctrine of stare decisis. *McCarn II*'s two-part test also does not apply when the "policy exclusion . . . does not contain the reasonable-expectation clause found in *McCarn II* . . . ." *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 613-614; 797 NW2d 695 (2010). Our Supreme Court has not taken occasion to affirm the plurality holding in the *McCarn II* opinion—it has commented on *McCarn II* in subsequent opinions, but has not clarified whether *McCarn II* is precedential authority. See *Krohn*, 490 Mich at 162.

In this case, Meemic's policy does not use the term "reasonably" in reference to a particular person's point of view. We therefore employ an *objective* standard, not *McCarn II*'s *subjective* standard. See *Krohn*, 490 Mich at 161. *Krohn* directs our attention to *Allstate Ins Co v Keillor (On Remand)*, 203 Mich App 36, 39-40; 511 NW2d 702 (1993), where an objective standard was applied to a contractual exclusion for harm that " 'may reasonably be expected to result from the intentional . . . acts of an insured person or which is in fact intended by an insured person.' " *Krohn*, 490 Mich App at 161 n 46.

There is also a meaningful distinction between the policy in *McCarn II* and the policy at issue in this matter. The policy in *McCarn II*, 471 Mich at 289, denied coverage for injury "intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." That portion of the policy was prefaced with the phrase "intended by," referring to the "insured person" and his or her intentions. This is further reinforced by the policy requiring examination of the "intentional or criminal acts" of the insured. Meemic's policy denies coverage for injury resulting from "an act or omission by a named insured which is intended or could reasonably be expected to cause bodily injury or property damage." This portion of Meemic's policy is prefaced with the "act or omission" of the insured. The only aspect of this portion of Meemic's policy that examines an insured's intent is whether the "act" was "intended *or* could reasonably be expected to cause bodily injury." Therefore, if it can be objectively established that the insured's act could reasonably be expected to cause bodily injury, then the insured's intent is immaterial. "Injury is reasonably expected to occur where it is the natural, foreseeable, expected, and anticipated consequence" of the insured's act. *Keillor*, 203 Mich App at 41. As the trial court stated, objectively, Metiva's act of placing someone in a headlock and pulling them to the ground could reasonably be expected to cause bodily injury.

This conclusion is supported by our review of the surveillance footage from the Rogue River Tavern provided by Meemic in its declaratory action, which gives us a very clear understanding of what transpired and which we do our best to describe. At the Rogue River Tavern, McWilliams was seated at the bar talking to another male patron when he saw Metiva's wife sitting with Metiva at a high-top table a few feet away. McWilliams tapped Metiva's wife on the shoulder and she came over to talk to him. Fitzgerald walked over as well, and was chatting at the bar with McWilliams and Metiva's wife. Metiva's wife put her arm around McWilliams and for about one minute, was getting very close to his face. Metiva was still seated at the high-top table, and was on his phone. When Metiva's wife and McWilliams leaned in very close to each other, Metiva left his seat at the high-top table and charged across the bar toward McWilliams.

In his deposition, Metiva says he was only trying to "create space" between McWilliams and his wife. In the surveillance video, he very clearly did this. He pushed McWilliams' and his wife's faces apart. Fitzgerald saw the commotion happening in front of her and tried to step away, positioning herself behind Metiva and closer to the high-top table. But Metiva took things a step further – Metiva then put both hands around McWilliams' neck, placed him in a headlock, and dragged McWilliams in his direction and to the ground. Someone, either McWilliams or Metiva, landed on Fitzgerald and causing her injuries. We conclude the trial court did not err in finding the exemption of Section (II)(1)(A) applied. This is because there can be no genuine dispute of fact, when viewing the evidence in Metiva's favor as both the insured and the nonmoving party, that bodily injury could reasonably be expected from Metiva's act of placing McWilliams in a headlock and dragging him to the ground, even if Fitzgerald was the only injured party. *Heniser*, 449 Mich at 161; *Johnson*, 502 Mich at 761.

Regarding the second sentence of Section (II)(1)(A), stating "[t]his exclusion applies even if the bodily injury or property damage is different from, or greater than, that which is expected or intended," Metiva argues the policy was ambiguous as to whether injury to third-parties would not be covered. His interpretation would conveniently have this exemption from coverage apply to the direct recipient of the act by the insured, i.e. McWilliams, but would not have this exemption apply to third parties injured by the insured's actions, i.e. Fitzgerald. This runs counter to the plain language of the policy, and contrary to plain logic. The intentional-acts exemption contemplates "bodily injury resulting from . . . an act or omission by a named insured . . . even if the bodily injury is different from, or greater than, that which is expected or intended." Further, the policy's personal liability coverage section stated Meemic would pay damages if a claim was brought against the insured, and never contemplated a difference between the claimant being an expected or intended recipient of the bodily injury, or a third-party recipient. See *Auto Club Ins Co v Burchell*, 246 Mich App 468, 483; 642 NW2d 406 (2001) (citation and quotation marks omitted) ("[W]hen 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.").[5] The terms of this portion of the policy are not ambiguous and they exclude coverage for this event.[6]

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[5] The trial court was correct to rely on *Burchell* in its written opinion and order. The dispute in *Burchell* arose out of a bar brawl wherein two women were injured when the insured defendant, Robert Burchell, beat up the first woman, and the second woman was injured a result of trying to defend the first woman. The language of Burchell's homeowner's insurance policy issued by the plaintiff, Auto Club, contained an intentional-acts exclusion identical to the language of the exclusion in Meemic's policy here. In *Burchell*, this Court determined the language of the intentional-acts exclusion was broad, and Burchell was not entitled to coverage from Auto Club where injuries to the women as a result of his drunken rage could reasonably have been expected. *Burchell*, 249 Mich App at 483-484.

[6] Because we affirm based on this section of Metiva's policy, we decline to address the criminal acts exclusion (Section (II)(1)(B)) or the exclusion for violations of the penal code (Section (II)(2)(21)(A)).

Affirmed.

/s/ Mark T. Boonstra
/s/ Kirsten Frank Kelly
/s/ Adrienne N. Young