STATE OF MICHIGAN

COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

CAITLYN JULIEN, minor, by and through DAVID JULIEN, Guardian ad litem,

Defendant-Appellant/Cross-Appellee,

and

GILLIAN TERRY, Minor, by and through MELISSA TERRY, Next Friend, ALEXANDRA TERRY, Minor, by and through RICHARD TERRY, Next Friend, and LOGAN EVANS, Minor, by and through LISA EVANS, Next Friend,

Defendants.

UNPUBLISHED
July 6, 2006

No. 266324
Washtenaw Circuit Court
LC No. 05-000151-CK

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

CAITLYN JULIEN, Minor, by and through DAVID JULIEN, Guardian ad litem, GILLIAN TERRY, Minor, by and through MELISSA TERRY, Next Friend, and LOGAN EVANS, Minor, by and through LISA EVANS, Next Friend,

Defendants,

and

ALEXANDRA TERRY Minor, by and through RICHARD TERRY, Next Friend,

No. 266489
Washtenaw Circuit Court
LC No. 05-000151-CK

Defendant-Appellant/Cross-Appellee.

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

No. 266490
Washtenaw Circuit Court
LC No. 05-000151-CK

CAITLYN JULIEN, Minor, by and through DAVID JULIEN, Guardian ad litem, ALEXANDRA TERRY, Minor, by and through RICHARD TERRY, Next Friend, and LOGAN EVANS, Minor, by and through LISA EVANS, Next Friend,

Defendants,

and

GILLIAN TERRY, Minor, by and through MELISSA TERRY, Next Friend,

Defendant-Appellant/Cross-Appellee.

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

No. 266575
Washtenaw Circuit Court
LC No. 05-000151-CK

CAITLYN JULIEN, Minor, by and through DAVID JULIEN, Guardian ad litem, GILLIAN TERRY, Minor, by and through MELISSA TERRY, Next Friend, and ALEXANDRA TERRY, Minor, by and through RICHARD TERRY, Next Friend,

Defendants,

and

LOGAN EVANS, Minor, by and through LISA EVANS, Next Friend,

Defendant-Appellant/Cross-Appellee.

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

In Docket Nos. 266324, 266489, 266490, and 266575, defendants appeal as of right from the circuit court's opinion and order granting plaintiff's motion for summary disposition under MCR 2.116(C)(10).[1] Plaintiff cross-appeals, challenging the circuit court's conclusions that there was an occurrence under the policy and that coverage was not excluded under either the intentional act exclusion or sexual-molestation exclusion of the policy. Because Caitlyn Julien's actions fall within the criminal-acts exclusion of the insurance policy issued by plaintiff, we affirm.

These consolidated appeals arise out of three underlying personal injury actions filed in late 2004 and early 2005 against minor defendant Caitlyn Julien, alleging that she sexually assaulted, battered, and sexually molested minor defendants Gillian Terry, Alexandra Terry, and Logan Evans, while she was babysitting them. Plaintiff, who provided homeowner's insurance to Caitlyn's parents, then filed this declaratory judgment action, requesting that the circuit court find it had no duty to defend or indemnify Caitlyn or pay any damages to the other children. Plaintiff moved for summary disposition, and the trial court granted plaintiff's motion, concluding that coverage was barred under the policy's criminal-acts exclusion.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*.

To determine whether plaintiff must provide coverage in this case, this Court must examine the language of the insurance policy and interpret its terms in accordance with the principles of contract construction. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). "An insurance policy must be enforced in accordance with its terms." *Allstate Ins Co v McCarn* (*McCarn I*), 466 Mich 277, 280; 645 NW2d 20 (2002). The policy's terms are given their commonly used meaning unless clearly defined in the policy. *Id.*

Clear and specific exclusions are to be given effect, but are strictly construed in favor of the insured *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). An insurance company cannot, however, be held liable for a risk it did not assume.

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[1] While plaintiff moved for summary disposition under both MCR 2.116(C)(9) and (10) and the circuit court did not specifically state under which section it was granting plaintiff's motion, we presume it was under (C)(10) because in its opinion and order the court refers to there being genuine issues of material fact for the jury to decide on certain issues. *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997).

Frankenmuth Mut Ins Co v Masters, 460 Mich 105, 111; 595 NW2d 832 (1999). Additionally, determination of the scope of coverage is a separate inquiry from whether coverage is negated by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). Therefore, this Court must first decide whether coverage exists under the policy, and then it can determine whether that coverage is precluded by an exclusion. *Allstate Ins Co v McCarn* (*After Remand*) (*McCarn II*), 471 Mich 283, 287; 683 NW2d 656 (2004).

Plaintiff argues on cross-appeal that the circuit court erred in failing to conclude that Caitlyn's intentional actions cannot constitute an occurrence as a matter of law. We disagree.

Plaintiff's policy provides coverage for bodily injury, personal injury, or property damage caused by an "occurrence." An occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, resulting in **bodily injury**, **personal injury** or **property damage** during the term of the policy (boldface in original)." Although the policy does not define the term "accident," Michigan Courts have defined an accident as "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*, *supra* at 114.

In *McCarn I*, when faced with the same definition of occurrence and no definition of accident, our Supreme Court explained that an accident can result from an intentional act when the insured did not reasonably expect the consequences:

> 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.
>
> 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 I*, *supra* at 282-283 (emphasis in original).]
>
> Applying the standard set forth in *McCarn I* to this case, we conclude that the circuit court did not err in concluding that there is a genuine issue of material fact as to whether Caitlyn's acts constituted an occurrence under the policy because, as a child actor, whether she intended to harm the other children or whether she could even understand the consequences of her actions is a jury question. *Fire Ins Exch v Diehl*, 450 Mich 678, 688; 545 NW2d 602 (1996), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003). In *Diehl*, our Supreme Court determined that a child actor's intent cannot be inferred as a matter of law. *Id*. at 690. It reasoned that

"[c]hildren as a group, do not have the capability to understand the consequences of their sexual acts." *Id.* Therefore, whether Caitlyn's actions constituted an occurrence would also be a question for the jury,[2] and the circuit court thus did not err in concluding that it could not determine that Caitlyn's actions constituted an occurrence as a matter of law.

Defendants argue on appeal that the circuit court erred in concluding that coverage was barred in this case under the policy's criminal-acts exclusion. Again, we disagree.

Plaintiff's policy excludes coverage from acts that are either criminal or criminal in nature as follows:

> C. a criminal act or omission by **you**. This exclusion applies whether or not **you**:
>
> (1) are charged with a crime;
>
> (2) are convicted of a crime by a court, jury or plea of nolo contender; or
>
> (3) enter a plea of guilty whether or not accepted by the court; or
>
> D. an act or omission which is criminal in nature and committed by **you** while lacking the mental capacity to appreciate the criminal nature or wrongfulness of the act or omissions or to conform **your** conduct to the requirements of the law or to form the necessary intent under the law. [Boldface in original.]

Defendants first imply that because Caitlyn was not charged or convicted of a crime, that her acts do not fall within the criminal-acts exclusion. However, the above policy language is clear that all criminal acts are excluded regardless of whether the insured is charged or convicted of a crime.

Defendants also argue that Caitlyn's act of spanking the other children was neither criminal nor criminal in nature for the following reasons: (1) she lacked the necessary intent to commit an assault and was merely experimenting sexually when she spanked the other children and (2) even if the spanking is not considered part of her sexual experimentation, it is still not an

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[2] The *Diehl* Court noted that whether a result is reasonably foreseeable to a child is a jury question to be determined by asking "'whether . . . a child of [like] age, ability, intelligence and experience would reasonably have been expected to [foresee the injury] under like circumstances.'" *Diehl*, *supra* at 688, quoting *Burhans v Witbeck*, 375 Mich 253, 255; 134 NW2d 225 (1965) (alteration by *Diehl* Court).

assault because she was babysitting and could use reasonable force to discipline the other children. However, even if Caitlyn's intent cannot be inferred under *Diehl*, subsection D of the policy precludes coverage for acts criminal in nature, even when the actor does not have the capacity to form the requisite intent. Therefore, subsection D precludes coverage even if Caitlyn did not intend to assault the other children. Additionally, while it is true that a parent or guardian, or other person permitted by law or authorized by the parent or guardian may take steps to reasonably discipline a child, including the use of reasonable force, MCL 750.136b(7), there is no evidence that Caitlyn was so authorized by the other children's parents.

Defendants Terry also contend that Caitlyn's acts cannot be considered "criminal in nature" because this Court has held that juvenile proceedings are not "criminal in nature" and Caitlyn would have to be prosecuted in juvenile proceedings for any crimes stemming from her acts in this case. This argument is without merit. While juvenile *proceedings* are not "criminal in nature" to the extent that juveniles are not afforded the same constitutional protections as adult criminals, *In re Whittaker*, 239 Mich App 26; 607 NW2d 387 (1999), that does not mean that *the acts* committed by juveniles are not crimes or, at minimum, criminal in nature. As pointed out in *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004), an activity can be criminal in nature regardless of whether the violated criminal law is enforced.

Finally, defendants argue that plaintiff's criminal-acts exclusion, which precludes coverage without a charged crime, is overly broad and against public policy because this is the type of situation where parents would expect to be insured. However, this Court has upheld similarly broad criminal-acts exclusions, finding that they are not illusory or against public policy. *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 4; 658 NW2d 193 (2002); *Allstate Ins Co v Fick*, 226 Mich App 197, 203-204; 572 NW2d 265 (1997). And while we note our Supreme Court's recent decision in *McCarn II*, *supra* at 294, which cautions against "eviscerat[ing] the ability of parties to insure against their own negligence[,]" the exclusion here is distinguishable because it does not contain any language regarding reasonable expectation.

As a result, we conclude that the trial court did not err in granting plaintiff's motion for summary disposition because Caitlyn's acts do fall within the criminal-acts exclusion of plaintiff's policy. In light of our conclusion, we decline to address plaintiff's additional policy exclusion arguments raised on cross-appeal.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto