STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

ROBERT DANIEL MCCARN, ERNEST WARD MCCARN, PATRICIA ANN MCCARN and NANCY S. LABELLE, Personal Representative of the Estate of KEVIN CHARLES LABELLE, Deceased,

Defendants-Appellees.

UNPUBLISHED
October 3, 2000

No. 213041
Shiawassee Circuit Court
LC No. 97-000369-CK

Before: Zahra, P.J., and White and Hoekstra, JJ.

WHITE, J. (dissenting).

I respectfully dissent.

I add the following to the majority's recitation of the facts. Robert testified that he met Kevin in September 1995, at school, and that the two saw each other outside of school three times a week. On December 15, 1995, Kevin picked up Robert and they drove to and from school together. After school they drove to the McCarn home, ate a sandwich, drove to visit a friend of Kevin's, drove back to the McCarn home, played with several pets, smoked marijuana, and watched television briefly.

Robert testified his father had given him a .410 shotgun as a gift about a year before the incident at issue, but that the shotgun had always been kept at his grandparents' home in a case under his grandfather's bed, along with his grandfather's guns. Both Robert and his grandfather testified that the shotgun was not normally loaded when it was under the bed. His grandfather kept the ammunition for the shotgun in his dresser drawer. Robert testified that his grandfather taught him how to operate the gun, and that to fire the gun you had to pull back on the hammer and then pull the trigger.

Robert testified that he and Kevin had played or horsed around with shotguns of Kevin's three times, at Kevin's house, and that they had each pointed a gun at the other and pulled the trigger, making the trigger make a clicking sound.

Robert testified that on the day in question, he and Kevin had talked about the .410 shotgun and that Kevin wanted to see it. He testified that both he and Kevin handled the .410 shotgun, and that after Kevin handled it, Robert had it and at some point pointed it at Kevin's face, when Kevin was about a foot away. Robert testified that he believed the gun was unloaded and that at some point he pulled the hammer back, and did not say he was going to pull the trigger but acted like he was, by moving his finger and pretending he was going to pull it. He testified that he was "just playing," that Kevin did not ask him to stop, and that at some point he pulled the trigger, thinking that it would click and that the clicking sound would scare Kevin. The shotgun fired, hitting Kevin in the face and neck, and Kevin died as a result of the shooting.

Robert testified that he had used the shotgun approximately four times before the shooting, once for hunting rabbits during deer-hunting season and the other times for target practice, in his grandparents' back yard. He testified that he had last used the shotgun in the fall of 1995, for target practice, without his grandparents' permission, and that his grandfather found out because he found shells in the back yard. Robert testified that after finding the shells, his grandfather prohibited him from using the shotgun or getting it out from beneath the bed when he was not home. Robert testified that he did not recall how many times he shot the gun when he last used it, did not recall how many shells his grandfather found, did not recall whether he had unloaded the gun after using it, and that he had put the shotgun away in a hurry because he expected his grandparents to be getting home from work. Robert testified that he may have forgotten to unload the gun in his haste to put it away, and that he had no knowledge of anyone else using the shotgun between that time and the shooting in question.[1]

As the majority notes, if undefined in the policy, the common meaning of the term "accident" has been held to be "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." *Nabozny v Burkhardt*, 461 Mich 471, 477; 606 NW2d 639 (2000), quoting *Frankenmuth Mutual Ins Co v Masters*,460 Mich 105, 114; 595 NW2d 832 (1999). The definition of accident should be framed from the standpoint of the insured, not the injured party. *Nabozny*, *supra* at 477, quoting *Masters*, *supra* at 114. "[T]he appropriate focus of the term 'accident' must be on both 'the injury causing *act* or *event* and its relation to the resulting property damage or personal injury.'" *Nabozny*, *supra* at 477, quoting *Masters*, *supra* at 115.

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[1] Robert's grandfather, defendant Edward McCarn, testified that Robert's parents had given Robert the .410 shotgun about two years before Robert moved in with him and his wife, and that it had always been kept at his house because it was bought for hunting, which was done on his property, where there was acreage available. McCarn testified that the guns under his bed were kept in cases and unloaded, and that he kept ammunition in a top dresser drawer. McCarn further testified at deposition that, at the time of the shooting, Robert lived with him and his wife, as did their son, Kenneth, who was twenty-nine years old. He testified that Kenneth had been seriously ill, had moved in with them in November 1995, and shared a room with Robert. McCarn testified that Robert's friend Kevin, the decedent, was at his house about three times a week, and that about two days before the incident, Kevin had told him about new guns he had just bought.

. . . "an insured need not act unintentionally' in order for the act to constitute an 'accident' and therefore an 'occurrence.'"

However, where an insured does act intentionally, a problem arises "in attempting to distinguish between intentional acts that can be classified as 'accidents' and those that cannot." In such cases, 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." [*Masters, supra* at 115-116, quoting *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648-649; 527 NW2d 760 (1994), abrogated in part on other grounds *Masters, supra* at 117 n 8.]

In *Nabozny*, the insured, Burkhardt, had tripped Nabozny intentionally but testified that he did not intend to break Nabozny's ankle. The Supreme Court concluded that because the injury reasonably should have been expected, the injury did not result from an "accident," and liability coverage under the policy was thus precluded. *Nabozny, supra* at 479-482.

> In this case, Mr. Burkhardt apparently did not intend to break Mr. Nabozny's ankle. However, it is plain that in tripping someone to the ground in the course of a fight, Mr. Burkhardt reasonably should have expected the consequences of his acts because of the direct risk of harm created. This precludes a finding of liability coverage under the terms of this policy. In other words, the injury did not result from an "accident."
>
> Moreover, Mr. Burkhardt's testimony that he did not intend to "break any bones" does not assist him. . . .
>
> It is clear from the facts, as stated by the insured, that injury reasonably should have been expected. Therefore, it is irrelevant that the broken ankle was not the specific harm intended by the insured. [*Id.* at 480-481.]

The facts in *Masters, supra*, were that the owner of a clothing store and his son, George Masters, Sr., and George Masters, Jr., intentionally set a fire at the store which extensively damaged the store and spread to nearby businesses. The store was insured by the plaintiff insurer. The two men confessed to the police that their plan had been to start a small fire that would damage inventory and allow them to collect insurance, but denied intending to destroy their building or neighboring buildings. *Masters, supra* at 107-108. The commercial policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," but did not

define "accident." *Id.* at 113. The Court concluded that the act was not an "accident" and there was no "occurrence:"

> . . . viewed from the standpoint of the Masters, the fire, which was the underlying event, was caused by the Masters' intentional act. Also, there is no question that, in perpetrating the intentional act, the Masters intended to do property damage. Thus, the Masters' act cannot be characterized as an "accident," and there was no "occurrence" for purposes of coverage under either policy. It is irrelevant whether the harm that resulted, damage to the clothing store and surrounding businesses, was different from or exceeded the harm intended, minor damage to the clothing inventory. [*Masters, supra* at 116-117.]

An act need not be unintentional in order for it to constitute an "accident" and therefore an "occurrence." *Masters, supra* at 115-116. Both Robert and McCarn, his grandfather, testified at deposition that the guns stored under McCarn's bed were kept unloaded. Robert testified that he believed the shotgun to be unloaded when he pointed it at Kevin and pulled the trigger, and that he did not intend the gun to fire or to harm Kevin. Rather, he intended to play and engage in conduct in which he and Kevin had previously engaged. I agree with the circuit court that the consequences of Kevin's intentional act of pointing the gun at Kevin and pulling the trigger, the shotgun firing and Kevin's death, viewed from Robert's standpoint, were neither intended or reasonably should have been expected, given that he believed the gun was unloaded. See *Nabozny, supra* at 477-478; *Masters, supra* at 115-116. The fact that Robert did not check to confirm that the gun was unloaded does not mean that he should have expected that the gun would fire.

The instant case is different from *Nabozny* and *Masters* in that the insureds in those cases intended to employ the instrumentality used, and intended the consequences of their intentional acts, although not the magnitude of the consequences. Burkhardt intended to trip Nabozny, but not to injure him so severely. The Masters intended to set a fire, but for its scope to be limited. *Here, Robert did not intend to set the instrumentality in motion. He intended to pull the trigger of an unloaded gun. He did not intend to fire the gun and did not intentionally create a direct risk of harm.* I therefore do not agree with the majority's crucial conclusion that "[i]n other words, Robert intended to set in motion a dangerous weapon, but with limited consequences." Slip op at __.

I would affirm.[2]

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[2] Regarding plaintiff's other arguments, I note the following. Plaintiff seems to argue that the Legislature's enactment of MCL 750.329; MSA 28.561 which states

> [a]ny person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, ant any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter

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establishes as a matter of law that there is a substantial probability that injuries could occur when a firearm is aimed at someone and therefore there can be no accident. However, the principles for deciding whether there is coverage under the policy are as set forth in the cases discussed. The criminal provision is relevant only if made relevant by the policy language.

Plaintiff also argues that the circuit court erred in concluding that Robert's conduct was not barred under the policy exclusion which provides:

> Losses We Do Not Cover Under Coverage X:
>
> 1. We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of any insured person. This exclusion applies even if:
>
> a) such insured person lacks the mental capacity to govern his or her conduct;
>
> b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or
>
> c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.
>
> This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

Plaintiff argues that Robert's deposition testimony that he intentionally aimed the gun at Kevin and pulled the trigger establishes that he violated MCL 750.329; MSA 28.561 and that the circuit court erred in ruling that there was no criminal act because the injuries were not reasonably expected. Plaintiff argues that the circuit court erroneously relied on Robert's subjective beliefs in making this determination, instead of viewing Robert's conduct under an objective standard in determining whether the injuries caused by the criminal act would be expected. Plaintiff argues that from an objective standpoint, it is clear that there is a possibility of injury when an individual points a firearm at another and pulls the trigger without first checking to determine whether the weapon is loaded. Plaintiff correctly asserts that an objective standard controls. However, the mere possibility of injury does not trigger the exclusion.

By its terms, the exclusion does not automatically bar coverage for injuries resulting from intentional or criminal acts, but rather, bars coverage for bodily injury which was intended by or which may reasonably be expected to result from the allegedly intentional or criminal act.

Exclusionary clauses in insurance contracts are strictly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996). In *Allstate Ins Co v Freeman*, 432 Mich 656, 709; 443 NW2d 734 (1989), a majority of the Court held that an exclusionary clause similar to the one at issue in the instant caserequired the use of an objective standard, *Diehl, supra* at 684, and

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that application of the exclusion to relieve an insurer of a duty to defend and provide coverage to an insured requires a showing that (1) the insured acted either intentionally or criminally, and (2) the resulting injuries occurred as the natural, foreseeable, expected, and anticipated result of an insured's intentional or criminal acts.

I have found no Michigan cases involving injury caused by discharge of a weapon the shooter believed to be unloaded. In *Freeman, supra* at 686, and *Buczkowski v Allstate Ins*, 447 Mich 669, 677; 526 NW2d 589 (1994), the weapons were known by the shooters to be loaded. In *Freeman*, the shooter left the scene of a fight, reentered her home, reappeared with a loaded gun, and fired it towards a neighbor standing three to six feet away, injuring the neighbor. The Court concluded that the shooter acted either intentionally or criminally and that the injuries were the expected result of the acts. In *Buczkowski, supra*, after an altercation, the shooter went home, retrieved his shotgun and deer slugs, drove to the home of one of the persons with whom he had been arguing, and shot at what he believed to be the person's truck. Rather than hitting the vehicle, the slug went through one of its tires, ricocheted, and injured the person, who, unknown to the shooter, was sitting in the yard behind his house. A majority of the Supreme Court affirmed this Court's reversal of the circuit court's grant of summary disposition to the defendant insurer. Chief Justice Cavanagh's majority opinion agreed with much of the reasoning of Justice Brickley's opinion, 447 Mich at 671, including that "shooting a shotgun in a residential neighborhood in the middle of the night at an unoccupied car does not necessarily lead, as a matter of law, to a reasonable expectation of bodily injury." 447 Mich at 671-672.

The McCarn defendants and defendant LaBelle argue that plaintiff must show more than that the result of Robert's conduct was reasonably foreseeable; plaintiff must show that there was a substantial probability that the result would occur. Defendants rely on the following language in Chief Justice Riley's majority opinion in *Freeman*, also largely quoted in Justice Brickley's concurrence in *Buczkowski, supra*:

> . . . we agree with those courts which have held that '[f]or the purposes of an exclusionary clause in an insurance policy the word 'expected' denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions." *City of Carter Lake v Aetna Casualty & Surety Co*, 604 F2d 1052, 1058-1059 (CA 8, 1979). We also reject defendant's contention that the standard we adopt today will preclude coverage for negligent acts by the insured. As the *City of Carter Lake* court stated, *supra* at 1059, n 4:
>
> > The difference between "reasonably foreseeable" and "substantial probability" is the degree of expectability. A result is reasonably foreseeable if there are indications which would lead a reasonably prudent man to know that the particular results could follow from his acts. Substantial probability is more than this. The indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be

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/s/ Helene N. White

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> sufficient to forewarn him that the results are highly likely to occur.'"
> [*Freeman, supra* at 675; *Buczkowski, supra* at 673.]

Applying this language, Robert's belief that the shotgun was not loaded and the other circumstances surrounding this case lead me to conclude that while a reasonably prudent person would know that a gun which is not checked for ammunition immediately before the trigger is pulled might possibly discharge, there were not indications strong enough to alert a reasonably prudent person that the shotgun was highly likely to discharge when Robert pulled the trigger. *Freeman, supra* at 675.