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	UNPUBLISHED November 15, 2002 No. 213041 Shiawassee Circuit Court LC No. 97-000369-CK ON REMAND

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

WHITE, J. (*dissenting*).

Because I conclude that under the case law there is a question of fact regarding whether the criminal acts exclusion of the policy excludes coverage, I respectfully dissent.

The intentional or criminal acts policy exclusion at issue states:

> 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.

In *Allstate Ins Co v Freeman*, 432 Mich 656, 660, 700; 443 NW2d 734, reh denied with addenda to opinion, 433 Mich 1202 (1989), a majority of the Court interpreted a similar exclusion[1] and concluded that it required application of a two-part objective test: "An insurer may relieve itself of its duty to defend and indemnify if (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 acts." The *Freeman* Court noted in discussing the companion case to *Freeman*, *Metropolitan Property & Liability Ins Co v DiCicco*, that:

> [W]e agree with those courts which have held that "[f]or 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:
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> > 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 must also must be sufficient to forewarn him that the results are highly likely to occur.* [432 Mich at 675. Emphasis added.]

Applying *Freeman* to the instant case, Robert's acts of pointing the gun and pulling the trigger were intentional, and possibly criminal, but he did not intend any injury or even to fire a loaded gun. See *Allstate Ins Co v McCarn*, 466 Mich 277, 285; 645 NW2d 20 (2002), in which the Supreme Court stated:

> However, Robert believed the gun was not loaded. Robert had no intention of firing a loaded weapon. No bodily injury would have been caused by Robert's intended act of pulling the trigger of an unloaded gun.

Under the second prong of *Freeman*, the question is whether Kevin's death occurred as the natural, foreseeable, expected, and anticipated result of Robert's intentional or criminal acts; whether Robert knew or should have known that there was a substantial probability, i.e., that it was "highly likely," that Kevin's death would result from his actions.

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[1] The exclusion in *Freeman*, *supra* at 685, provided:

> We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.

In *Buczkowski v Allstate Ins Co*, 447 Mich 669; 526 NW2d 589 (1994), the Supreme Court addressed a policy exclusion similar to the one at issue in the instant case and identical to the exclusion in *Freeman, supra.*[2] The insured in *Buczkowski*, while intoxicated, fired a gun at the plaintiff's car late at night while it was parked in the plaintiff's driveway, intending to hit the vehicle. Unknown to the insured, the plaintiff was sitting at a picnic table behind his house. The bullet ricocheted through the car tire and struck the plaintiff's arm and hand. *Buczkowski, supra* at 678-679. The insured was convicted of reckless use of a firearm and carrying a concealed weapon. A majority of the Supreme Court concluded in *Buczkowski* that

> shooting a gun 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. What is to be reasonably expected is a question of fact, and, as a disputed question of fact, it was improper for the trial court to grant the defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(10). [*Id.* at 671-672 (Cavanagh, C.J., with whom Levin and Mallett, JJ., concurred), 676 (Brickley, J., concurring in result of C.J. Cavanagh's opinion)[3].

As in *Buczkowski*,[4] I conclude that reasonable minds could differ regarding whether Kevin's death occurred as the natural, foreseeable, expected, and anticipated result of Robert's intentional or criminal acts, and I would thus remand to the trial court.

/s/ Helene N. White

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[2] The intentional acts exclusion in *Buczkowski, supra* at 682-683, provided:

> We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.

[3] In his concurring opinion, Justice Brickley stated:

> If an act is highly likely to cause personal injury, performing that act usually should result in somebody getting hurt. This is what the words "highly likely" mean, and what it means when we say that the injury is expected to result from the act. This cannot be said of McKay's actions in this instance, however. McKay used a shotgun to shoot at the back of a car from inside another car on a residential street at night. A person could easily use up a lot of bullets shooting at cars in residential neighborhoods and not hit anyone. [447 Mich at 673-674.]

[4] The majority distinguishes *Buczkowski* by concluding that the insured's actions in *Buczkowski* were not highly likely to cause injury but that it was highly likely that injury would result from Robert's action of aiming a gun at LaBelle's face and pulling the trigger. However, this is only the case if one assumes knowledge that the gun was loaded, and Robert believed the gun was unloaded.