STATE OF MICHIGAN

COURT OF APPEALS

PIONEER STATE MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

BRYAN ALORE, Personal Representative of the Estate of MARK ALORE, deceased, RICHARD STANLEY-JOHN JANKOWSKI, SHEILA JANKOWSKI, and RICHARD JANKWOSKI,

Defendant-Appellees.

UNPUBLISHED
November 20, 2008

No. 281643
Genesee Circuit Court
LC No. 06-84714-CZ

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In this declaratory judgment case, plaintiff appeals as of right from the trial court's grant of defendant Alore's motion for summary disposition under MCR 2.116(C)(10) and judgment granting declaratory relief. We affirm.

I. Facts

On April 30, 2005 Richard Stanley-John Jankowski ("Jankowski"), then age 17, was at his home with several of his teenage friends drinking alcohol and using cocaine. His parents were not present. Jankowski went to his father's gun safe and retrieved a revolver that holds 6 bullets. The gun was loaded when he took it out of the safe and he opened the cylinder and dumped the bullets into his hand. He put the bullets into his pocket and then closed the cylinder. Thinking the gun was empty, he took the gun downstairs and aimed it at his friend Mark Alore. Jankowski pulled the trigger, but the gun was not empty and he fatally shot Alore. Jankowski reached into his pocket and pulled out the bullets and found that there were only five, not six as he expected. He later pled no contest to involuntary manslaughter and felony firearm.

Plaintiff had issued a homeowner's insurance policy to Mr. and Mrs. Jankowski on the residence where the shooting occurred. The policy provided that Jankowski would be covered unless one of the exclusions to coverage were applicable. Plaintiff filed this action for declaratory relief arguing that it was excluded from covering the shooting of Mark Alore and had no duty to defend Jankowski. Defendants filed a motion for summary disposition. The trial court granted the motion stating that based upon the submitted evidence, there was no genuine

issue of material fact. The trial court entered a judgment for declaratory relief on behalf of defendants requiring that plaintiff defend all three Jankowskis in the case brought by Bryan Alore, and requiring plaintiff to indemnify the Jankowskis. Plaintiff now appeals as of right.

II. Analysis

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition and entering a judgment for declaratory relief for defendants. We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

"An insurance policy must be enforced in accordance with its terms." *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). The policy's terms are given their commonly used meanings unless clearly defined in the policy. *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). "[T]he proper construction of a contract requires that [a court] first determine whether coverage exists, and then whether an exclusion precludes coverage." *Allstate Ins Co v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989). 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).

The determination of whether coverage exists depends on whether there was an accident, or an "occurrence" under the terms of the policy. Plaintiff argues that the trial court never should have reached the question of intent because this was not an "accident" and therefore, it was not an "occurrence" under the policy. The policy in question provides coverage for claims of injury "caused by an occurrence." Our courts broadly construe coverage provisions. *Id.* at 672. Where the policy language does not specify whether a subjective or an objective standard is to be used, "the policy should be construed in favor of the insured [and] a subjective standard should be used." *McCarn, supra*, 466 Mich at 283.

In *McCarn, supra*, 466 Mich at 278, the insurer filed a declaratory action to determine "its obligation to indemnify its insureds in connection with an underlying wrongful death suit stemming from [a] shooting death." Our Supreme Court summarized the underlying facts as the following:

> This case arises out of the death of sixteen-year-old Kevin LaBelle on December 15, 1995, at the home of defendants Ernest and Patricia McCarn, where their grandson, then sixteen-year-old defendant Robert McCarn, also resided. On that day, Robert removed from under Ernest's bed a shotgun Robert's father had given him the year before. The gun was always stored under Ernest's bed and was not normally loaded. Both Robert and Kevin handled the gun, which Robert believed to be unloaded. When Robert was handling the gun, he pointed it at Kevin's face from approximately one foot away. Robert pulled back the hammer and pulled the trigger and the gun fired, killing Kevin. [*Id.* at 279.]

The McCarns' homeowners insurance policy provided in pertinent part:

> Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy. [*Id.* at 280-281.]

This language is very similar to the provision in the present case. In *McCarn* the trial court concluded that "the events constituted an 'occurrence' within the meaning of Allstate's policy. The trial court also held that Robert McCarn's conduct was not intentional or criminal within the meaning of Allstate's policy." *Id.* at 280. On appeal, this Court reversed, concluding that "Robert's intentional actions created a direct risk of harm that precludes coverage," and applying *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000) and *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999). *Id.*, citing *Allstate Ins Co v McCarn*, unpublished opinion of the Court of Appeals, issued October 3, 2000 (Docket No. 213041).

On appeal to our Supreme Court the Court noted that "the 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." *McCarn, supra*, 466 Mich at 282. The Court then explained:

> 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. [*Id.* at 282-283.]

The Court noted that "there is no coverage where the consequences of the insured's act were either 'intended by the insured' or 'reasonably should have been expected by the insured.'" *Id.* at 284. Thus, the Court concluded that "[t]he language, 'by the insured,' indicates that a subjective standard should be used here." *Id.* In that case, our Supreme Court held:

> Kevin LaBelle's death was an "accident," thus an "occurrence," covered under the insurance policy. We agree with plaintiff that Robert intended to point the gun at Kevin and pull the trigger. 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. [*Id.* at 285.]

The Court noted that "Robert should not have reasonably expected the consequences that ensued from his act because his intended act was merely to pull the trigger of an unloaded gun." *Id.* at

290. Here the "occurrence" language is substantially similar to the language used in *McCarn*, and the facts of *McCarn* are substantially similar to the present case. Jankowski could not have reasonably expected that pulling the trigger of what he believed to be an unloaded gun would have created a direct risk of harm to Mark Alore. Thus, we conclude that the trial court properly applied the subjective standard in determining that the shooting in this case constituted an "occurrence" such that the insurance policy applied.

Once the determination has been made that the policy provides coverage, the next step is to determine whether an exclusion applies. Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). Our Supreme Court ruled:

> [A]n "exclusionary clause requires application of a two-part objective test. An insurer may relieve itself of its duty to defend and provide coverage 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. *Freeman, supra* at 700.

That proposition restated by our Supreme Court provided that "[t]here is no insurance coverage if, first, the insured acted either intentionally or criminally, and second, the resulting injuries were the reasonably expected result of an insured's intentional or criminal act." *McCarn, supra*, 471 Mich at 289-290.

The Court concluded that "there was an intentional or criminal act," thereby satisfying the first prong of the test. *Id.* at 290. The second prong was an objective inquiry: "whether the resulting injury was the reasonably expected result of this criminal act." *Id.* at 290. The Court restated the inquiry as "whether a reasonable person, possessed of the totality of the facts possessed by Robert, would have expected the resulting injury." *Id.* Thus, the question hinged on whether "a reasonable person would have expected bodily harm to result when the gun, in the unloaded state Robert believed it to be, was 'fired.'" *Id.* at 290-291. Our Supreme Court determined that one would not, "because, obviously an unloaded gun will not fire a shot." *Id.* at 291. Here, the criminal-act exclusion provided in pertinent part:

> 1. Coverage E- Personal Liability and Coverage F- Medical Payments to Others do not apply to bodily injury or property damages:
>
> a. resulting from any intentional or criminal act or omission which is expected or intended by any insured to cause any harm. This exclusion applied whether or not any insured:
>
> (1) intended or expected the result of his or her act or omission so long as the resulting injury or damage was a natural consequence of the intended act or omission;
>
> (2) was intoxicated . . .

We conclude that because Jankowski believed the gun to be unloaded at the time he fired it, a reasonable person would not have expected bodily harm to result.

Finally, plaintiff argues that the major distinction between this case and *McCarn* is that in *McCarn*, the parties stipulated that the defendant believed the gun was unloaded, whereas here plaintiff contends that it is "absurd" and "unrealistic" to believe Jankowski thought the gun was not loaded. Plaintiff asserts that Jankowski's belief about whether the gun was actually loaded remains an issue of fact. However, as the trial court noted, plaintiff has failed to produce any evidence that contradicts Jankowski's assertion that he believed the gun to be unloaded. Therefore, plaintiff has not provided the necessary support for its position to survive a motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens