

STATE OF MICHIGAN
COURT OF APPEALS

AUTO CLUB GROUP INSURANCE
COMPANY,

UNPUBLISHED
June 18, 2009

Plaintiff-Appellee,

v

DANIEL WILLIAM MITCHELL, AIMEE LYNN
KING a/k/a AMY KING, Individually and as Next
Friend of MARISSA KING, Minor,

No. 284335
Midland Circuit Court
LC No. 07-002016-CK

Defendants-Appellants.

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendants appeal by right an order granting summary disposition in plaintiff's favor which followed the trial court's determination that plaintiff had no duty to defend or indemnify its insured (defendant Mitchell) in the underlying action brought by defendant King. We affirm.

Defendant Mitchell was an insured under a homeowner's policy issued by plaintiff when Cody, a 15-year-old boy who lived with him, took a rifle and bullets from Mitchell's home. Cody and a friend, Marissa King, went into the woods and, apparently believing the gun to be unloaded, Cody swung the gun around causing the gun to be pointed in King's direction and said "you're lucky this isn't loaded" or "the gun's not working." The gun fired and a bullet struck King in the abdomen. Criminal charges were brought against Cody, including careless, reckless, or negligent use of a firearm causing injury in violation of MCL 752.861. Cody subsequently pleaded nolo contendere to the charge of maiming or injuring by discharge of a firearm pointed or aimed intentionally, without malice, at another in violation of MCL 750.235.

A civil lawsuit against Mitchell for negligent supervision and/or entrustment arising from the shooting followed. Mitchell was advised by plaintiff that his policy would not provide coverage for the shooting, but plaintiff agreed to defend Mitchell under a reservation of rights. Plaintiff then filed this declaratory action and, subsequently, filed a motion for summary disposition under MCR 2.116(C)(10), arguing that, even if the shooting was an "occurrence" under the policy, the "criminal act" and other exclusions precluded coverage. In response, Mitchell argued that the shooting was "accidental," not criminal in nature.

Following oral arguments on the motion, the trial court agreed with plaintiff and granted the dismissal, holding that plaintiff had no duty to defend or indemnify Mitchell in the underlying action. The trial court concluded that reasonable minds could not differ in finding that Cody's actions constituted a "criminal act" within the contemplation of the policy's exclusionary provision. The court noted that the policy did not limit the application of the exclusionary provision to those criminal acts for which one is charged or convicted; instead, it applied to criminal acts or acts or omissions that are criminal in nature. Thus, under the facts of this case, the court concluded that, although there was a question of fact as to whether MCL 750.235 was violated, there was no question that MCL 752.861 was violated. Cody, because of carelessness, recklessness, or negligence, caused or allowed the rifle that was under his immediate control to be discharged so as to injure King. Accordingly, plaintiff had no duty to defend or indemnify Mitchell with regard to the underlying lawsuit and the case was dismissed.

Thereafter, defendants filed a motion for reconsideration. The trial court denied the motion, holding that there was no genuine issue of material fact that Cody's actions were careless in violation of MCL 752.861. Further, the court noted, Cody's actions also violated MCL 750.233, in that he intentionally but without malice pointed the gun at or toward the victim. In conclusion, the court held that the exclusionary provision merely required that a "criminal act," or an "act criminal in nature" be established and, in this case, there was no genuine issue of material fact that Cody's actions were of that nature. This appeal followed.

On appeal, defendants argue that the "criminal acts" exclusionary provision did not apply under the facts of this case. After review de novo of the trial court's decision to grant summary disposition, considering the evidence in the light most favorable to the nonmoving parties to determine whether a genuine issue of material fact exists, we disagree. See MCR 2.116(C)(10); *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004).

The policy at issue provides that it will not cover:

10. bodily injury or property damage resulting from:
 - a. a criminal act or omission committed by anyone;
 - b. an act or omission, criminal in nature, committed by an insured person even if the insured person lacked the mental capacity to:
 - (1) appreciate the criminal nature or wrongfulness of the act or omission; or
 - (2) conform his or her conduct to the requirements of the law; or
 - (3) form the necessary intent under the law.

This exclusion will apply whether or not anyone, including the insured person:

- (a) is charged with a crime;

- (b) is convicted of a crime whether by a court, jury or plea of nolo contendere; or
- (c) enters a plea of guilty whether or not accepted by the court

When deciding an insurance coverage issue, this Court must apply the terms of the policy. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). An insurance company is not liable for a risk it did not assume. *Id.* Unless the policy terms are ambiguous, the Court will enforce the policy as written. *Id.* Here, neither party argues that the terms of the exclusion are ambiguous; thus, we will enforce the policy as written.

Defendant Mitchell generally argues that genuine issues of material fact existed with regard to (a) whether Cody was negligent in violation of MCL 752.861, and (b) whether he intentionally pointed the gun at the victim in violation of MCL 750.233. Defendant King appears to similarly argue that genuine issues of material fact existed with regard to whether Cody's actions violated MCL 752.861 in light of the evidence that the gun malfunctioned. Further, King seems to argue that the trial court inappropriately made the finding of fact that Cody intentionally aimed the gun at the victim in violation of MCL 750.233.

The criminal acts exclusion in the policy states that plaintiff will not provide liability coverage for bodily injury resulting from criminal acts, regardless of whether anyone is charged with or convicted of a crime. Thus, to prevail on its motion for summary disposition, plaintiff had the burden of demonstrating that no genuine issue of material fact existed that the shooting was a criminal act. The trial court held that there was no genuine issue of material fact that Cody's actions violated MCL 752.861, a criminal statute which requires that a firearm be carelessly, recklessly, or negligently discharged causing death or injury. See *People v Lowery*, 258 Mich App 167, 174; 673 NW2d 107 (2003). We agree with the trial court.

The record reveals that on the day of this shooting, Cody took an autoloading rifle without permission. He inserted a magazine into the rifle that he knew had previously been malfunctioning. He continued to load the malfunctioning magazine with an unknown number of bullets even after the magazine malfunctioned, twice, just before this shooting. Despite these circumstances, Cody did not engage the safety and, apparently in a joking manner, swung the gun in the victim's direction while saying "you're lucky this isn't loaded." But the gun was loaded and the victim was shot and seriously injured. We agree with the trial court—there is no genuine issue of material fact that the shooting was a criminal act. At minimum, there was no genuine issue of material fact that MCL 752.861 was violated. A firearm was carelessly, recklessly, or negligently discharged causing injury.

We note and also reject defendants' claim that the firearm was not "negligently" discharged as that term is defined in CJI2d 11.21. CJI2d 11.21(3) defines "ordinary negligence" as:

not taking reasonable care under the circumstances as they were at the time. If someone does something that is usually dangerous, something that a sensible person would know could hurt someone, that is ordinary negligence. If the defendant did not do what a sensible person would have done under the circumstances, then [he] is guilty of ordinary negligence.

Here, Cody knew the magazine was malfunctioning but continued to load it with bullets, twice, shoot the rifle, and allow the rifle to be pointed in the victim's direction. Continuing to operate a gun with a malfunctioning magazine, that had been loaded with an unknown number of bullets twice, while not ensuring that the safety mechanism was engaged, and then allowing that same gun to be pointed at someone is clearly "something that is usually dangerous" and is not something a "sensible person would have done under the circumstances." In light of our conclusion, we need not consider whether MCL 750.233, another criminal statute, was also violated.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly