STATE OF MICHIGAN

COURT OF APPEALS

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

v

PATRICK STOUTENBURG,

Defendant-Appellant,

and

JAMES DIMITRIJEVSKI,

Defendant.

UNPUBLISHED
September 3, 2009

No. 286106
Washtenaw Circuit Court
LC No. 07-000665-CK

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

v

JAMES DIMITRIJEVSKI,

Defendant-Appellant,

and

PATRICK STOUTENBURG,

Defendant.

No. 286231
Washtenaw Circuit Court
LC No. 07-000665-CK

Before: Meter, P.J., and Murray and Beckering, JJ.

BECKERING, J. (*concurring*).

I concur in the result reached by my colleagues, and agree that the trial court's order granting summary disposition in favor of plaintiff Liberty Mutual Fire Insurance Company ("Liberty Mutual") should be affirmed. I agree with the majority's conclusion that in applying the Supreme Court's two-part test set forth in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 115; 595 NW2d 832 (1999) to this case, there is no genuine issue of material fact that defendant Patrick Stoutenburg's shooting of interested party defendant James Dimitrijevski was not an "accident," and therefore not an "occurrence" under Stoutenburg's policy.

The Supreme Court in *Masters* stated that "the definition of accident should be framed from the standpoint of the insured" (i.e., from the insured's perspective), and that the "insured need not act unintentionally in order for the act to constitute an accident." *Masters*, *supra* at 114-115 (internal quotations and citations omitted). As the majority points out, *Masters* essentially created a two-part test to determine whether an act is an accident for purposes of insurance coverage. One must first determine whether the insured subjectively intended his or her act. If so, one must next determine whether, viewing the facts from the standpoint of the insured, "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.'" *Id*. at 115 (citation omitted); see also *Allstate Ins Co v McCarn* (*McCarn I*), 466 Mich 277, 282-283; 645 NW2d 20 (2002).[1]

With respect to the first prong of the *Masters* test, I concur with the majority that because Stoutenburg pled guilty to the intentional discharge of a firearm in a dwelling or occupied structure, MCL 750.234b, the prior success model of the doctrine of judicial estoppel is properly applicable, and precludes Stoutenburg from contesting the fact that he intentionally fired the rifle.[2] Consequently, the first prong of the *Masters* test is satisfied. I write separately, however, to point out that the doctrine of judicial estoppel is an exceptional remedy that is to be narrowly

---

[1] In *McCarn I*, our Supreme Court discussed whether a subjective or objective standard should be applied in determining whether the consequences of the insured's intentional act reasonably should have been expected. See *McCarn I*, *supra* at 283-285. The Court held that unless the policy language at issue dictates otherwise, a subjective standard should be applied. *Id*. at 283. In *Allstate Ins Co v McCarn* (*McCarn II*), 471 Mich 283; 683 NW2d 656 (2004), a plurality opinion cited by the majority in the instant case, Justice Taylor stated that determining whether "resulting injuries were the reasonably expected result of an insured's intentional or criminal act" requires an objective inquiry. *McCarn II*, *supra* at 290. But the Court's inquiry in *McCarn II* was limited to whether the criminal-acts exception in the policy at issue precluded coverage. *Id*. at 285, 289. The Court had already determined in *McCarn I* that the injury resulting from the insured's intentional act was accidental under "the requisite subjective test." *Id*.

[2] According to the prior success model of judicial estoppel, "'a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994) (citations omitted). "[T]he mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." *Id*. at 510 (footnote omitted).

applied on a case-by-case basis. It does not, and should not, serve as a preclusive bar to all facts associated with plea-based convictions.[3] As summarized by this Court in *Opland v Kiesgan*, 234 Mich App 352, 363-365; 594 NW2d 505 (1999):

> "The doctrine of judicial estoppel is to be applied with caution." *Paschke, supra* at 523 (GRIFFIN, J., dissenting). Accord *Lowery v Stovall*, 92 F3d 219, 224 (CA 4, 1996) ("Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution.") Judicial estoppel is an "'extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.' . . . It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims . . . ." *Ryan Operations G P v Santiam-Midwest Lumber Co*, 81 F3d 355, 365 (CA 3, 1996), quoting *Oneida Motor Freight, Inc v United Jersey Bank*, 848 F2d 414, 424 (CA 3, 1988) (Stapleton, J., dissenting). It is applied against litigants because of their "deliberate manipulation" of the courts. *Helfand v Gerson*, 105 F3d 530, 536 (CA 9, 1997). Courts apply judicial estoppel to prevent a party "'from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.'" *Griffith v Wal-Mart Stores, Inc*, 135 F3d 376, 380 (CA 6, 1998), quoting *Teledyne Industries, Inc v Nat'l Labor Relations Bd*, 911 F2d 1214, 1218 (CA 6, 1990). The doctrine "is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." *Levinson v United States*, 969 F2d 260, 264 (CA 7, 1992).
>
> Because the purpose of judicial estoppel is to protect the integrity of the judicial process, it is "'an equitable doctrine invoked by a court at its discretion.'" *McNemar v Disney Store, Inc*, 91 F3d 610, 616-617 (CA 3, 1996), quoting *Yanez v United States*, 989 F2d 323, 326 (CA 9, 1993). In deciding whether to apply judicial estoppel, courts consider "'each case . . . upon its own particular facts and circumstances.'" *McNemar*, *supra* at 617, quoting *Scarano v Central R Co of New Jersey*, 203 F2d 510, 513 (CA 3, 1953). Accord, e.g., *Johnson v Oregon*, 141 F3d 1361, 1368 (CA 9, 1998) ("judicial estoppel is an equitable doctrine, invoked by a court at its own discretion, and driven by the specific facts of a case").

Following the January 8, 2006, incident wherein Dimitrijevski was struck in the ankle by a bullet fired from a rifle held by Stoutenburg, Stoutenburg was criminally charged and pled guilty to both intentional discharge of a firearm in a dwelling or occupied structure, MCL 750.234b, and discharge or use of a firearm under the influence, MCL 750.237(3). Of relevance

---

[3] The many reasons why judicial estoppel should, at best, be narrowly applied with respect to plea-based convictions are eloquently addressed in David L. Shapiro's article, *Should a Guilty Plea Have Preclusive Effect?*, 70 Iowa L Rev 27 (1984).

in this case, an essential element of MCL 750.234b is that the defendant intentionally discharged a firearm.[4] Consequently, Stoutenburg's intentional firing of the rifle in this instance was a fact directly and distinctly put in issue.

The factual basis of Stoutenburg's guilty plea was decidedly weak. At the plea hearing, when asked by the court to explain what he did that led him to conclude he was guilty of the charged crimes, Stoutenburg answered, "I had a gun discharge and bounce off the cement floor and hit the guy in the leg." As the court continued to question Stoutenburg regarding the basis of his plea, Stoutenburg uttered a few unsolicited comments, including " . . . I didn't even know it was loaded. Nobody knew it was loaded," and "Sir, I had the gun pointed at the ground and–" whereafter his attorney instructed him to stop speaking. One might assume that Stoutenburg's attorney was concerned that his client's unsolicited comments might jeopardize the court's willingness to accept the guilty plea, in exchange for which three other counts were dismissed. But, his attorney's intentions are irrelevant because Stoutenburg continued to pursue, and the court duly accepted, Stoutenburg's plea of guilty and entered convictions on the above charges.

Notably, Stoutenburg has not contested the underlying plea-based criminal convictions or the sufficiency of the factual basis for his plea. In fact, in both his brief in this matter and in oral argument, Stoutenburg concedes that his guilty plea establishes that "he intentionally fired his rifle while inside the house . . . ." Thus, to allow Stoutenburg to maintain in the pending civil action that he did not intentionally discharge the rifle—which is an essential element of MCL 750.234b and therefore was necessarily relied upon by the convicting court—would indeed be "wholly inconsistent" with his plea. As such, I agree that the doctrine of judicial estoppel applies to prohibit Stoutenburg from contesting his subjective intent to fire the rifle, and the first prong of the *Master's* test is satisfied.[5]

---

[4] Although it is by no means clear that the prosecutor offered him the opportunity, Stoutenburg did not plead guilty to the careless, reckless, or negligent use of a firearm resulting in death or injury to person, MCL 752.861, a crime that does not include intentional discharge as an essential element.

[5] Stoutenburg seeks to frame the first prong of the *Masters* test in terms of his intent to injure. The first prong, however, pertains to the subjective intent to act, not the intended consequences of the act. The consequences of the intended act are addressed in the second prong of the *Masters* test. When Stoutenburg intentionally fired the rifle, under the second prong of *Masters* he became responsible for the consequences he reasonably should have expected because of the direct risk of harm intentionally created by his act, "despite the lack of an actual intent to damage or injure." See *Masters, supra* at 115 (citation omitted).

Because Stoutenburg is precluded from alleging that he did not intentionally fire the rifle, I agree with the majority that the second prong of the *Masters* test is also satisfied. Because Stoutenburg intentionally fired a rifle in a small, enclosed porch in the presence of three other people, there is no genuine issue of material fact that he reasonably should have expected the consequence of injuring someone, including by way of a ricocheted bullet. Consequently, the trial court properly granted summary disposition in favor of Liberty Mutual.

/s/ Jane M. Beckering