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HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN NATIONAL ASSURANCE
COMPANY,

Plaintiff,

v.

ROBERT WARGACKI,

Defendant.

CASE NO. #:13-cv-05373-RBL

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

[DKT. #19]

THIS MATTER is before the Court on Plaintiff Western National Assurance Company's Motion for Summary Judgment (Dkt. #19). Western National insured Michael Erb¹ under a homeowner's insurance policy. The policy expressly and indisputably excludes coverage for damages resulting from criminal acts:

¹ Western National mistakenly refers to "Robert Erb," apparently mixing up Robert Wargacki and Michael Erb's names. Dkt. #19 at 1. To clarify, Michael Erb is the decedent insured. Robert Wargacki is Anne-Marie Wargacki's personal representative substitute administrator of Michael Erb's estate.

1 **Coverage L – Personal Liability** – “We” pay, up to “our” limit, all sums
2 for which an “insured” is liable by law because of “bodily injury” or
3 “property damage” caused by an “occurrence” to which this coverage
4 applies. . . .

[Dkt. #1 at 3]

5 12. “Occurrence” means an **accident**, including repeated exposures to
6 similar conditions, that results in “bodily injury” or “property
7 damage” during the policy period.

[*Id.*] (emphasis ours)

8 **Exclusions That Apply to Coverages L and M**—This policy does not apply to:
9 i. “bodily injury” or “property damage”:

- 10 1) which is expected by, directed by, or intended by an “insured”;
11 2) that is the result of a criminal act of an “insured”; or
12 3) that is the result of an intentional and malicious act by or at the direction of an
13 “insured”.

[*Id.*]

14 Erb shot and killed his girlfriend, Anne-Marie Wargacki, and took his own life moments
15 later. Wargacki’s estate² sued Erb’s estate for wrongful death. Erb’s estate tendered the defense of
16 that claim to Western National, which denied coverage and refused to defend. Wargacki obtained
17 a \$7 million judgment and submitted a policy limits demand³ to Western National for partial
18 satisfaction of the judgment.

19 Western National initiated this Declaratory Judgment action, seeking a determination that
20 its policy does not cover the damages Erb’s estate is obligated to pay for Anne-Marie’s death. It
21 now seeks summary judgment on that issue. It claims that Anne-Marie’s shooting was a criminal
22 act and its policy excludes “criminal acts.” Wargacki counters that the shooting may have been
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26 ² For clarity this Order will refer to the estate as “Wargacki” and to the victim as “Anne-
Marie.”

27 ³ It is not clear whether Erb’s estate had assigned its rights under the policy to Wargacki at
28 the time this demand was made. In any event, the demand was denied.

1 accidental, and that the “criminal act” exclusion does not apply to mere negligence. Therefore, it
2 claims, Western National is not entitled to a determination as a matter of law that its policy does
3 not cover the shooting and the judgment. Because there is no genuine dispute that Ann-Marie’s
4 death was an excluded “criminal act,” Western National’s Motion for Summary Judgment⁴ is
5 GRANTED.
6

7 I. BACKGROUND

8 The circumstances of this lawsuit are tragic. Michael Erb was apparently distressed about
9 the direction his life was going; he had lost his job and was worried about his financial situation.
10 Compounding Erb’s financial woes, his girlfriend, Anne-Marie Wargacki, was several months
11 pregnant. In June 2010, Erb shot Ann-Marie in the back of the head at close range with a .45
12 caliber pistol. She died instantly. Erb then turned the gun on himself, taking his own life. There
13 were no witnesses. The Tacoma Police Department investigated the deaths and determined that
14 Ann-Marie’s death was a homicide.
15

16 Wargacki subsequently obtained a \$7 million judgment against Erb’s estate in Pierce
17 County Superior Court. Western National did not defend the lawsuit or indemnify Erb’s estate.
18 Wargacki made a policy limits demand to Western National for partial satisfaction of the
19 judgment, claiming that Erb’s homeowner’s policy covered Anne-Marie’s death. Western National
20 filed this declaratory action, asking the Court whether its policy covered Anne-Marie’s death. The
21 parties agree that Erb’s insurance coverage does not apply to damages that result from a “criminal
22 act” by the insured. *See* Dkt. #19 at 3. The parties’ disagreement boils down to whether the
23 criminal acts exclusion applies in this case.
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26 ⁴ Wargacki has moved to amend its Answer to include counterclaims of bad faith and
27 coverage by estoppel (Dkt. #29). This Order does not purport to address the Motion to Amend or
28 the merits of the proposed bad faith counterclaim.

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8 **II. DISCUSSION**

9 Western National asks for Summary Judgment because, it argues, the undisputed facts
10 show that Anne-Marie’s shooting was an excluded criminal act, whether it was murder or
11 manslaughter. Thus, it claims, its policy does not cover Anne-Marie’s death. Wargacki argues
12 that the shooting might have been accidental, and that coverage for a merely negligent killing is
13 not excluded under the policy. *See* Dkt. #21.⁵

14 **A. Summary Judgment Standard.**

15 Summary judgment is appropriate when, viewing the facts in the light most favorable to
16 the nonmoving party, there is no genuine issue of material fact that would preclude summary
17 judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to
18 summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to
19 interrogatories, or admissions on file, “specific facts showing that there is a genuine issue for trial.”
20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). “The mere existence of a scintilla of evidence
21 in support of the non-moving party’s position is not sufficient.” *Triton Energy Corp. v. Square D*
22 *Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not affect the
23 outcome of the suit are irrelevant to the consideration of a motion for summary judgment.
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, “summary judgment
25 should be granted where the nonmoving party fails to offer evidence from which a reasonable
26 [fact finder] could return a [decision] in its favor.” *Triton Energy*, 68 F.3d at 1220.

27 ⁵ Wargacki also objects to the Motion on other evidentiary and equitable grounds, but the
28 Court does not address them because the undisputed facts and evidence alone are sufficient for
the purpose of this ruling.

1 **B. The “Criminal Acts” Exclusion.**

2 The Motion turns on whether the policy’s “criminal act” exclusion applies: if it does, there is
3 no coverage and the dispute ends. Western National argues that the “criminal acts” exclusion
4 applies even if the shooting was an accident because, at a minimum, Erb’s conduct was criminally
5 negligent as a matter of law. Wargacki argues that criminal negligence is not a “serious enough”
6 offense to trigger the exclusion, and claims that the shooting may have been an accident.
7

8 Under Washington law, if a person acting with criminal negligence shoots and kills
9 another, that person is guilty of felony manslaughter. *See* RCW 9A.32.070. A person is
10 criminally negligent if he “fails to be aware of a substantial risk that a wrongful act may occur and
11 his or her failure to be aware of such substantial risk constitutes a gross deviation from the
12 standard of care that a reasonable person would exercise in the same situation.” RCW
13 9A.08.010(d). Accordingly, despite Wargacki’s argument to the contrary, negligently shooting
14 someone is a sufficiently serious criminal act for triggering a “criminal acts” clause. *See, e.g.,*
15 *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423, 932 P.2d 1244 (1997) (holding that a “criminal
16 acts” exclusion applied to a shooting even though the victim of the shooting agreed that it was
17 accidental). The intent of the shooter is irrelevant as long as his conduct was objectively
18 blameworthy. *Id.* at 429. And unprosecuted criminal conduct is nonetheless covered by “criminal
19 acts” clauses. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 476, 21 P.3d 707 (2001) (“No
20 reasonable insurance purchaser would consider a criminal act somehow less criminal simply
21 because a suicide or some other circumstance prevented its prosecution in a court of law.”). In
22 contrast to negligent or reckless shootings, “[f]or purposes of insurance coverage, an accident is
23 ‘an unusual, unexpected, and unforeseen happening.’” *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11,
24 15, 977 P.2d 617 (1999) (quoting *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 95, 776 P.2d 123
25 (1989)).
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1 Here, the undisputed facts show that regardless of his subjective intent ~~Erb~~ took a loaded
2 gun, pointed it at Anne-Marie's head at close range, and pulled the trigger. This conduct can only
3 be described as "a gross deviation from the standard of care that a reasonable person would
4 exercise in the same situation." See RCW 9A.08.010(d). A reasonable person does not point a
5 loaded gun at someone's head and pull the trigger. And no reasonable person could conclude that
6 Erb's act was "an unusual, unexpected, and unforeseen happening" such that it was an "accident" in
7 the insurance context. See *Brosseau*, 113 Wn.2d at 95. Even ignoring all the disputed evidence,⁶
8 a reasonable trier of fact could only conclude that Erb's act was criminal ~~eminally~~ negligent at
9 least, murderous at most. No evidence, whether existing or discoverable, can change this fact.
10 See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Wargacki's suggestion that the
11 shooting was an accident is pure speculation ~~Wargacki~~ admits there is no way to determine
12 exactly what happened, or why. The "criminal acts" exclusion in Erb's policy clearly applies to
13 Anne-Marie's death. Western National's Motion for Summary Judgment is GRANTED.
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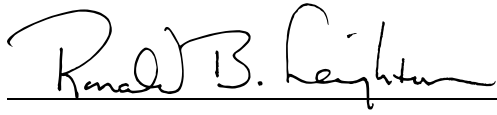
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16 Wargacki has moved to amend its Answer to include counterclaims of bad faith and
17 coverage by estoppel (Dkt. #29). Wargacki claims that Western National acted in bad faith by
18 refusing to defend the Superior Court lawsuit even though the pleading alleged negligence,
19 which it claims is a covered occurrence. Western National has not yet responded to the Motion,
20 but should.
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26 ⁶ This includes documents showing that the Tacoma Police ruled the death a homicide;
27 the common sense fact that the circumstances overwhelmingly suggest a murder-suicide; and
28 that Wargacki itself suggested in the Superior Court trial that Erb murdered Anne-Marie because
she was pregnant.

1 **III. CONCLUSION**

2 Because the shooting was an excluded “criminal act,” Western National’s homeowner’s
3 policy did not cover it. Western National’s Motion for Summary Judgment on this point is
4 GRANTED.
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7 Dated this 31st day of March, 2014.

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10 RONALD B. LEIGHTON
11 UNITED STATES DISTRICT JUDGE
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