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UNPUBLISHED
October 3, 2000

No. 213041
Shiawassee Circuit Court
LC No. 97-000369-CK

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

PER CURIAM.

Plaintiff insurer brought a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the McCarn defendants in connection with an underlying wrongful death suit filed by defendant LaBelle against the McCarns. Plaintiff maintained that the fatal shooting from which the wrongful death action arose did not constitute an "occurrence" under its homeowners policy, and that coverage was precluded under an exclusionary clause. Plaintiff appeals as of right the circuit court's order granting defendants Ernest and Patricia McCarn partial summary disposition, denying plaintiff's counter-motion for summary disposition, and granting summary disposition in favor of all defendants. We reverse.

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, at which their grandson, sixteen-year-old defendant Robert McCarn, also resided. On that day, Robert removed from under Ernest's bed a shotgun that Robert's father had given Robert about a year before the incident. Normally, the gun was not loaded when stored under the bed. Both Robert and Kevin handled the gun, which Robert believed to be unloaded. At some point thereafter, Robert pointed the gun at Kevin's face from approximately one foot away. Robert was "just playing," but when he pulled back the hammer and pulled the trigger, the gun fired, striking and killing Kevin.

In the underlying action, Nancy S. LaBelle, representing Kevin's estate, brought an action against Robert and his grandparents, Ernest and Patricia McCarn, who had a homeowners insurance policy with plaintiff Allstate. Allstate then brought the present action, seeking a declaratory judgment that it had no duty to defend Robert, Ernest or Patricia. The Allstate policy at issue, a Deluxe Homeowners policy, provides in pertinent part:

> COVERAGE X
> FAMILY LIABILITY PROTECTION
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> Losses We Cover Under Coverage X
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> 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.

The policy defines "occurrence" in pertinent part as: "[A]n accident . . . resulting in bodily injury or property damage." The term "accident" is not defined in the policy.

Interpreting this policy with regard to the present facts, the circuit court concluded that the shooting constituted an "occurrence;" that Robert's conduct "was not intentional or criminal conduct from which it may reasonably be expected that bodily injury would result to Kevin;" and that Robert was an additional insured person under the policy. The court ultimately found that plaintiff owed the McCarns a duty to defend and indemnify them in the wrongful death action. This appeal ensued.

Plaintiff first argues that the circuit court erred in determining that there had been an "occurrence" because if one points a gun and pulls the trigger, without checking whether the weapon is loaded, there is a substantial probability that an injury could result, injury would be anticipated and naturally expected, and therefore there can be no accident and no "occurrence."

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The trial court must consider the pleadings, affidavits, depositions and all other documentary evidence filed or submitted by the parties in the light most favorable to the nonmoving party. *Id.* The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Id.* at 455.

Recently, our Supreme Court has addressed two cases in which insurers refused to indemnify their insureds on the basis that the incidents at issue were not "occurrences" as defined in the respective insurance policies. In both cases, "occurrence" was defined, in part, as an "accident." In the later case, *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000), our Supreme Court analyzed the

facts using the same principles that it applied in its earlier case, *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999). In *Masters*, the Court explained:

> [U]sing the common meaning of the term, we have repeatedly stated that "an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." After some debate concerning the issue, we have also held that the definition of accident should be framed from the standpoint of the insured, not the injured party.
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> We also hold 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."
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> Of course, "an insured need not act unintentionally" in order for the act to constitute an "accident" and therefore an "occurrence."
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> However, where an insured does act intentionally, a problem arises "in attempting to distinguish between intentional acts that can be classified as 'accidents' and those that cannot." In such cases, a determination must be made whether the consequences of the insured's intentional act
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> > 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. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly, ... when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for *any* resulting damage or injury, despite the lack of an actual intent to damage or injure.

[*Masters, supra* at 114-116 (citations and footnotes omitted; emphasis in the original).]

Applying these principles to the facts in the present case, viewed from the standpoint of Robert, the insured, we conclude that Robert's intentional actions created a direct risk of harm that precludes coverage. The shooting of the gun was caused by Robert's intentional act. Although Robert did not intend to fire a bullet into Kevin, he did intend to aim the gun at Kevin's face, to pull back the hammer and to pull the trigger. In other words, Robert intended to set in motion a dangerous weapon, but with limited consequences. Although Robert was merely "playing" with the victim or attempting to frighten

him, far greater harm resulted. It is irrelevant whether the harm that resulted, Kevin's death, was different from or exceeded the harm intended, scaring him. *Masters, supra* at 116-117.[1] Robert reasonably should have expected the consequences of his actions because of the direct risk of harm created by pointing a gun at another human being and pulling the trigger. *Nabozny, supra* at 480-481.[2] Accordingly, we agree with plaintiff that there can be no coverage because Robert's intentional actions created the resulting direct risk of harm.

We disagree with our dissenting colleague that one who operates a firearm without determining whether it is loaded should not reasonably expect that injury will result. Clearly, Robert did not intend to kill his friend. But to label what happened here as an "occurrence" resulting from an "accident," in our view, is untenable. Because firearms, by their very nature, have an incredible power to injure and kill, aiming one at another human being and pulling the trigger, under any circumstances, in our view, is unconscionable. When harm results from such an event, it necessarily must be within the parameters of what reasonable people must reasonably expect.

Because the policy at issue does not provide coverage in this case,[3] we reverse the trial court's grant of summary disposition in favor of defendants and remand for entry of judgment in favor of plaintiff.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Joel P. Hoekstra

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[1] In *Masters, supra*, the owner of a clothing store and his son confessed to intentionally setting a fire at the store that extensively damaged the store and spread to nearby businesses. *Id*. at 107. The Court concluded that the act was not an "accident" and there was no "occurrence" because the Masters intentionally started the fire and intended to cause property damage, and noted that "[i]t is irrelevant whether the harm that resulted, damage to the clothing store and surrounding businesses, was different from or exceeded the harm intended, minor damage to the clothing inventory." *Id.* at 116-117.

[2] In *Nabozny, supra*, the insured, Burkhardt, had tripped Nabozny intentionally but testified that he did not intend to break Nabozny's ankle. *Id*. at 473, 480. The Supreme Court concluded that because the injury reasonably should have been expected, the injury did not result from an "accident," and liability coverage under the policy was thus precluded. *Id.* at 479-482.

[3] In light of our conclusion, it is unnecessary to address plaintiff's other arguments.