STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

ROBERT JAMES CLARKE and JANET M. CARPENTIER, Personal Representative of the Estate of KEVIN LEE SALINAS, Deceased,

Defendants-Appellees.

UNPUBLISHED
September 18, 2007

No. 248934
Kent Circuit Court
LC No. 02-003915-CK

JANET M. CARPENTIER, Personal Representative of the Estate of KEVIN LEE SALINAS, Deceased,

Plaintiff-Appellee,

v

ROBERT JAMES CLARKE,

Defendant-Appellant.

No. 249398
Kent Circuit Court
LC No. 02-001010-NO

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

These consolidated cases arise out of the fatal shooting of Kevin Salinas by Robert Clarke. Janet Carpentier, the personal representative of Kevin Salinas's estate, brought an action against Clarke alleging several theories of liability, including that Clarke was negligent in discharging a gun at Salinas. The trial court dismissed each of Carpentier's claims, except for the negligence claim. In Docket No. 249398, defendant Clarke appeals by leave granted from the trial court's order denying in part his motion for summary disposition of the negligence claim. Allstate Insurance Company, Clarke's insurer under a homeowner's policy, brought a separate declaratory action against Carpentier and Clarke, alleging that the claims in Carpentier's lawsuit against Clarke were not covered under its policy and, therefore, it had no duty to defend Clarke in the underlying tort action. In Docket No. 248934, Allstate appeals by leave granted from the trial court's order denying its motion for summary disposition and requiring it to defend

Clarke in connection with the remaining negligence claim in the underlying tort action. In Docket No. 248934, we reverse the trial court's order denying Allstate's motion for summary disposition. In Docket No. 249398, we reverse the portion of the trial court's order denying Clarke's motion for summary disposition of the negligence claim and remand for further proceedings.

I. Background

These related cases arise from the fatal shooting of Kevin Salinas by Robert Clarke between 3:00 and 4:00 a.m. on November 24, 2001, when Salinas was on Clarke's property. Salinas, who was intoxicated, entered Clarke's backyard. Clarke was awoken by his wife, who heard some rattling doors and believed someone was trying to break into their home. Clarke's wife called 911 while Clarke went outside with a flashlight where he saw Salinas walking toward a garden shed. Clarke told Salinas to "get out of here, the police are coming." According to Clarke, Salinas said, "we've already been through this before" and then Salinas turned toward Clarke, waving his arms all around. Clarke stated that although he did not see Salinas with a weapon, he was afraid of Salinas's bizarre behavior.

Clarke retrieved a loaded gun from his bedroom dresser, keeping it aimed at Salinas's midsection while telling him to "stop" and "sit down." Clarke stated that he saw Salinas try to sneak up to where he was standing near the sliding doors. Salinas had a grin on his face and was making unintelligible sounds as he walked toward Clarke on the deck. Clarke explained that he backed up to the sliding glass doors on his deck, that Salinas growled and lunged at him, and that Clarke shot Salinas once in his midsection from about an arm's length away. Clarke admitted that he intended to shoot Salinas, believing that Salinas posed a threat to himself and his wife and five children inside their house, although he claimed that he did not intend to kill him. Salinas's blood alcohol level at the time of his death was .25.

Clarke was not criminally charged in the matter, but Carpentier brought a multi-count civil complaint against Clarke, alleging that Clarke was liable for the fatal shooting. Allstate accepted defense of the tort suit with reservations. Allstate subsequently brought a declaratory action against both Carpentier and Clarke, seeking a declaration that it had no duty to defend or indemnify Clarke in the underlying tort litigation. Allstate argued that Salinas's injury did not arise from an "occurrence" as defined by the policy and that liability was also excluded under an intentional acts exclusion in the policy.

Allstate moved for summary disposition in its declaratory action and Clarke moved for summary disposition in the underlying tort action. The trial court granted Clarke's motion with respect to all but one claim, believing that a jury could find that Clarke negligently assessed the situation that led to Salinas's shooting death. The trial court therefore determined that the incident could constitute an "accident" under Clarke's homeowner's policy and, accordingly, also denied Allstate's motion and ordered Allstate to defend Clarke in the underlying tort suit.

II. Docket No. 249398

Clarke challenges the trial court's denial of his motion for summary disposition of Carpentier's negligence claim. Because we conclude that there is no genuine issue of material fact that Clarke intentionally shot Salinas, and because there is no cognizable tort for a negligent

assault, we conclude that the trial court erred in allowing Carpentier to amend her complaint to allege a negligent assault and battery, and in denying Clarke's motion for summary disposition with respect to Carpentier's negligence claim.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo by this Court. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 278. Summary disposition under this subrule may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley, supra* at 278. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Carpentier's Negligence Claim and the Trial Court's Ruling

Carpentier alleged in her original complaint that Clarke was negligent because he fired his gun at Salinas, who he knew or should have known was unarmed, helpless, confused, offered no resistance and posed no threat of harm.[1] Despite the wording of her claim, the trial court interpreted Carpentier's claim as alleging that Clarke negligently assessed the situation before him that led to his shooting of Salinas. However, instead of determining whether there were factual issues for trial regarding Clarke's alleged negligence, the court instead focused on the applicability of MCL 600.2955b. That statute states, in pertinent part:

> (1) Except as otherwise provided in this section, the court shall dismiss with prejudice a plaintiff's action for an individual's bodily injury or death and shall order the plaintiff to pay each defendant's costs and actual attorney fees if the bodily injury or death occurred during 1 or more of the following:
>
> (a) The individual's commission, or flight from the commission, of a felony.
>
> (b) The individual's acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony.
>
> (2) If the bodily injury or death described in subsection (1) resulted from force, the court shall not apply subsection (1) to the claim of the plaintiff against a

[1] Carpentier alleged several theories of negligence, but the trial court dismissed the other theories, which are not at issue on appeal.

> defendant who caused the individual's bodily injury or death unless the court finds that the particular defendant did either of the following:
>
> (a) Used a degree of force that a reasonable person would believe to have been appropriate to prevent injury to the defendant or to others.
>
> (b) Used a degree of force that a reasonable person would believe to have been appropriate to prevent or respond to the commission of a felony. In making a finding under this subsection, the court shall not consider the fact that the defendant may not have known that the plaintiff's actions or attempted actions would be the commission of a felony.

The trial court denied Clarke's motion in part because it found that a genuine issue of material fact existed regarding whether Salinas was killed during the commission of a felony and the reasonableness of Clarke's use of force. Therefore, the trial court allowed Carpentier to amend her complaint to more clearly state that her negligence claim referred to Clarke's assessment of the situation that led him to shoot Salinas. In her amended complaint, Carpentier alleged that Clarke negligently discharged the gun at Salinas, who he "knew or should have known was unarmed, helpless and confused, and who offered no resistance or threat of harm."[2]

C. Assault and Battery Versus Negligence

The flaw in the trial court's analysis is that it allowed Carpentier to couch an assault and battery claim as a negligence claim. It is the actor's state of mind that differentiates an intentional tort from ordinary negligence. See *Behar v Fox*, 249 Mich App 314, 319; 642 NW2d 426 (2001). Assault and battery are intentional torts. *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004). Intentional and negligent conduct are separate concepts in the realm of tort. There exists no tort of negligent assault and battery. *Sudul v City of Hamtramck*, 221 Mich App 455, 460-461; 562 NW2d 478 (1997).

Here, there is no dispute that Clarke intended to shoot and injure Salinas. Carpentier's claim of negligence is premised on the reasonableness of Clarke's use of force against Salinas, which cannot transform an intentional tort into one of negligence. *VanVorous*, *supra* at 483. The trial court even recognized that Carpentier's claim, at its core, was one of assault and battery. It allowed Carpentier to amend her complaint to allege that Clarke "committed an assault and battery as a result of a negligent overreaction to the decedent's conduct." However, Clarke's assessment of the situation relates to a possible defense of self-defense to an assault and battery. *Riste v Helton*, 139 Mich App 404, 407; 362 NW2d 300 (1984). To establish such a defense, Clarke would have to prove that "under all the circumstances as they appeared to him at the time, he reasonably believed he was in danger of suffering death or great bodily harm." *Id*. at 407-408.

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[2] The amended complaint simply excised the claims that the trial court dismissed and any reference to Valerie Clarke, who had previously been dismissed by stipulation of the parties.

MCL 600.2955b supports our conclusion that Carpentier's claim, properly characterized, is not one of negligence, but rather assault and battery. Clarke argues that his use of force was reasonable because Salinas attempted to break into his home and attempted to assault him. The statute serves as a defense where the victim of the bodily injury was engaged in a felony or was fleeing from the commission of a felony at the time of his injury. MCL 600.2955b(1). As in this case, however, where the defendant caused the injury by use of force, dismissal is required only if the trial court finds that the defendant's use of force was reasonable to either prevent injury to himself or others, or to prevent or respond to the commission of a felony. MCL 600.2955b(2). Subsection (2) connotes an intentional use of force on the defendant's part, not force unintentionally inflicted through negligence.

Accordingly, the trial court erred when it allowed Carpentier to amend her complaint to restate her negligence claim and denied Clarke's motion for summary disposition with respect to the remaining negligence claim. Carpentier's original claim and amended claim both alleged no more than a negligent assault and battery, a nonexistent tort. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Because there is no genuine issue of material fact regarding Clarke's intent to shoot or injure Salinas, summary disposition of the negligence claim was appropriate under MCR 2.116(C)(10).

MCR 2.116(I)(5) provides that if summary disposition is sought under MCR 2.116(C)(8), (9) or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. In light of our conclusion that, properly characterized, Carpentier's claim is one for assault and battery, and not negligence, we remand to allow Carpentier an opportunity to amend her complaint to properly allege a claim for assault and battery.

D. Instructions on Remand

Clarke also argues on appeal that the trial court erred in considering inadmissible evidence that was submitted by Carpentier in opposition to Clarke's motion for summary disposition, and in characterizing MCL 600.2955b as establishing a cause of action. Because these issues may arise on remand, we will briefly address them.

1. Summary Disposition Motions Under MCR 2.116(C)(10)

When a party moves for summary disposition under MCR 2.116(C)(10), the party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. The opposing party then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Any affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion under subrule (C)(10) "shall only be considered to the extent that the content or substance would be admissible as evidence[.]" MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999).

Clarke objected to the trial court's consideration of police reports and a witness's police statement that Carpentier presented in opposition to Clarke's motion. The trial court determined

that *Maiden* did not prevent it from considering these documents because they would be admissible at trial under MRE 803(8). We disagree.

In *Maiden, supra* at 121, our Supreme Court stated, "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the *substantively* admissible evidence actually proffered in opposition to the motion." (Emphasis added.) Inadmissible hearsay is insufficient to satisfy the court rule. *Marlo v Beauty Supply, Inc, v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (1998). The above-referenced documents are inadmissible hearsay. *Maiden, supra* at 124-125, *Marlo, supra* at 321.

Reports prepared by police officers or their affiliates are not admissible under MRE 803(6), the business records exception, or MRE 803(8), the public records exception, because they are adversarial investigatory reports prepared in anticipation of litigation and thus lack the requisite indicia of trustworthiness. *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003); *Solomon v Shuell*, 435 Mich 104, 130-133; 457 NW2d 669 (1990). Also, although the witness wrote his unsworn police statement, is it still hearsay for which we find no exception applies. See *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

Therefore, the contents of these documents would only be admissible at trial if the authors testified and did so consistent with the documents' content. Carpentier failed to present an affidavit from each document's author to this effect.[3] Because these documents were not admissible at trial, the trial court could not properly consider them.

2. MCL 600.2955b

Contrary to what the trial court stated, MCL 600.2955b does not establish a cause of action. Rather, a plain reading of the statute indicates that it serves to bar recovery of a plaintiff's claim under certain circumstances. Also, the trial court erred when it stated in its opinion denying Clarke's motion for reconsideration that if Clarke's use of force was found to be unreasonable, then he would therefore be liable. Such a finding would only mean that the statute does not bar recovery. Carpentier, as the plaintiff, would still have to affirmatively prove any claim of assault and battery. Clarke could still assert self-defense in the context of Salinas being a trespasser and argue that Salinas was a criminal, rather than civil, trespasser.[4] Finally, we note that MCL 600.2955b(2) specifically states that whether the amount of force used by the

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[3] Instead, Carpentier's attorney, Kenneth Saukas, stated in his own affidavit that "the contents of each exhibit is expected to be verified by direct testimony at trial." But an affidavit submitted in support of or in opposition to a motion must affirmatively show that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. MCR 2.119(B)(1)(c); *Regents of the Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002). Because Saukas could not verify the contents of the documents, his affidavit was insufficient to establish the admissibility of the documents' contents.

[4] MCL 600.2955b only applies where the injured person is involved in a felony. MCL 600.2955b(1). Criminal trespassing is a misdemeanor. MCL 750.552.

defendant was appropriate is a question for the trial court. It is not a question for the jury as the trial court indicated.

III. Docket No. 248934

Allstate moved for summary disposition under MCR 2.116(C)(10), arguing that because Clarke admitted to intentionally shooting Salinas, the act was not an accident and, therefore, did not qualify as an "occurrence" under Clarke's insurance policy. Accordingly, Allstate argued that it had no duty to defend Clarke in the underlying tort lawsuit.

The determination whether an insurer is contractually obligated under its policy to defend certain claims is a question of law requiring interpretation of the insurance contract. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). The interpretation of an insurance policy is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003).

Clarke's homeowner's insurance policy provides coverage for "Family Liability Protection" under Coverage X.

> **Losses We Cover Under Coverage X:**
>
> 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.

An insurance policy is subject to the rules of construction applicable to contracts. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). A policy is enforced according to its terms. *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002).

The insurance policy at issue clearly states that it provides coverage for "bodily injury or property damage arising from an occurrence," which the insured caused. The policy defines an "occurrence" as "an accident . . . resulting in bodily injury or property damage." The policy does not define "accident." If a term is not defined, then it is interpreted according to its commonly used meaning. *Id*. The policy also contains an exclusionary clause for intended acts. However, the question whether an event is covered under the policy must be addressed before considering whether the event is excluded by the policy. *Fire Ins Exch v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003).

In *McCarn*, our Supreme Court considered the meaning of the term "accident" as used in an insurance policy provision identical to the one at issue in this case. Reaffirming its previous interpretations of the term, the Court explained 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. [*Id*. at 282-283.]

The act considered for insurance coverage purposes is the "injury-causing *act* or *event*." *Id.* at 282 (emphasis in original). The Court also stated that whether an occurrence is an accident is determined from the viewpoint of the insured, not the injured party. *Id*. at 282.

Here, Clarke admitted that he intentionally shot Salinas. Although Clarke claimed that he did not intend to kill Salinas, the material question is whether Clarke reasonably should have expected the consequences of his intended act. *Id*. at 283. In *McCarn*, an event was considered an accident where the insured intentionally fired what he believed was an unloaded gun at a friend's head. The gun was actually loaded and the friend died from the gunshot wound. The Court determined that although the insured intended to shoot the gun, he did not reasonably expect the consequences of the act because he thought the gun was not loaded. In this case, Clarke admitted that he intentionally shot Salinas at close range, in his mid-section, with a nine-millimeter handgun that Clarke knew was loaded with hollow-point bullets designed to expand on impact to increase the damage. Although Clarke claimed that he only intended to stop Salinas from moving any farther, reasonable minds could not differ in finding that Salinas's death reasonably should have been expected by Clarke as a direct risk of harm from the gunshot wound. Therefore, Clarke's act did not constitute an accident and there was no "occurrence" entitled to coverage under the homeowner's policy.[5]

The trial court distinguished *McCarn* in part on the basis of its belief that the Supreme Court "did not hold that the antecedent circumstances to the intentional act cannot make that act an accident." The trial court therefore concluded that the facts of this case fit within the *McCarn* Court's definition of an accident. The flaw in the trial court's reasoning is that it equated a finding of negligence in tort as dispositive of whether the insured did not act intentionally for purposes of insurance coverage. The inquiry in determining whether there is insurance coverage is separate. It is possible for a negligent tortious act to be considered intentional for insurance coverage purposes. In determining whether an insurer has a duty to defend, the court must look beyond the mere nomenclature of the claim to the substance of the underlying tort. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2002). An insured cannot avoid the policy implications of an intentional act simply because a complaint refers to negligence. *Id.* at 483. As the *McCarn* Court recognized, the insured in that case could have been negligent in failing to check to see if the gun was loaded before he fired it. But whether he was did not change the fact that he intended to fire the gun. *McCarn*, *supra* at 285, 287. In any event, the trial court's reasoning is irrelevant because, as previously explained in Docket No. 249398, there is no genuine issue of material fact that Carpentier does not have a cognizable claim for negligence.

Accordingly, because reasonable minds could not differ in determining that Clarke's intentional act of shooting Salinas was not an accident and thus, not entitled to coverage under

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[5] Because Clarke's intended act was not an accident, we need not address whether it also falls within the intentional acts exclusion of the homeowner's policy.

the homeowner's policy, Allstate has no duty to defend Clarke in the underlying tort suit because there are no theories of recovery that fall within the policy's coverage. *Burchell, supra* at 481. Even if Carpentier amended her complaint to include an assault and battery claim, the intentional nature of Clarke's action and the reasonably expected consequence of it would not change. Therefore, we reverse the trial court's order denying Allstate's motion for summary disposition.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Talbot