

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

ROBERT DANIEL MCCARN, ERNEST WARD
MCCARN, PATRICIA ANN MCCARN, NANCY
S. LABELLE, Personal Representative of the
Estate of KEVIN CHARLES LABELLE,
Deceased,

Defendant-Appellees.

UNPUBLISHED
November 15, 2002

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

ON REMAND

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

PER CURIAM.

I. Nature of the Case

This case is before us on remand from the Supreme Court to determine whether the insurance policy's criminal acts exclusion negates Allstate's duty to indemnify the insureds. The facts and procedural history of this case are set forth in *Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d (2002), where the Supreme Court reversed this Court¹ and held that Kevin LaBelle's death was an "accident," and thus an "occurrence," covered under the insurance policy. On remand, we conclude that the policy's criminal acts exclusion to coverage applies in this case. We reverse and remand to the lower court for entry of judgment in favor of plaintiff.

¹ *Allstate Ins Co v McCarn*, unpublished opinion per curiam of the Court of Appeals, issued 10/3/00 (Docket No. 213041).

II. Analysis

A. Standard of Review

Issues involving the proper interpretation and application of an insurance contract are reviewed de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001). In reviewing an insurance policy, we must first look to the language of the policy and interpret its terms in accordance with the well-established principles of contract construction. *McCarn, supra* at 280. An insurance policy must be enforced according to its terms. *Id.* at 280. The terms of the insurance policy are given their commonly used meanings. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). The fact that a policy does not define a term does not render that term ambiguous. *Id.* If the terms of the policy are ambiguous, we construe the policy in favor of the insured. *Id.* However, where there is no ambiguity in the terms of the policy, the policy must be enforced as written. *Id.*

B. The Criminal Acts Exclusion

The intentional or criminal acts exclusion of the policy at issue states:

We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:

- a) such insured person lacks the mental capacity to govern his or her conduct.
- b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or
- c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

The trial court held that Robert's conduct was not intentional or criminal within the meaning of the policy. *McCarn, supra* at 280. Plaintiff argues that Robert's act of killing LaBelle by intentionally aiming a shotgun at his face and pulling the trigger without knowing that the shotgun was loaded constituted a criminal act that relieved Allstate of liability under the policy. We find merit in plaintiff's argument.

The exclusionary clause in this case is similar to the exclusionary clause in *Allstate Ins Co v Freeman*, 432 Mich 656, 685; 443 NW2d 734 (1989). *Freeman* establishes a two prong test that may be applied to the exclusionary clause at issue in this case. Such an exclusionary clause relieves the insurer of liability if "(1) the insured acted *either* intentionally *or* criminally, and (2) the resulting injuries occurred as the natural, foreseeable, expected, and anticipated result of an insured's intentional or criminal acts." *Id.* at 660 (emphasis in original).

We conclude Robert acted criminally under the first prong of the test. The elements of manslaughter under MCL 750.329 are:

(1) a death; (2) that the death was caused by an action of the defendant; (3) that the defendant caused the death without lawful justification or excuse; (4) that the death resulted from the discharge of a firearm; (5) that at the time of such discharge the defendant was pointing or aiming the firearm at the decedent; and (6) that at the time of such discharge, the defendant intended to point or aim the firearm at the decedent. [*People v Duggan*, 115 Mich App 269, 271; 320 NW2d 241 (1982).]

MCL 750.329 only requires proof “that the defendant intentionally pointed the gun at the decedent and that the decedent died as a result of the subsequent discharge of the firearm.” *Duggan*, *supra* at 271. “The general rule appears to be that, when a person points a gun at someone as a joke, reasonably believing the gun not to be loaded, and pulls the trigger and the gun discharges and kills the victim, he is guilty of manslaughter.” *People v Maghzal*, 170 Mich App 340, 345; 427 NW2d 552 (1988).

We conclude that Robert’s actions constituted manslaughter under MCL 750.329. As the Supreme Court mentioned, this case does not present a question of fact. *McCarn*, *supra*, 466 Mich 285. The facts in this case show that Robert intentionally pointed the gun at LaBelle’s face and intentionally pulled the trigger, killing him. *Id.* at 279. Under these facts, Robert committed the criminal act of manslaughter under MCL 750.329, regardless of his belief that the gun was unloaded.²

Thus, whether the exclusionary clause relieves plaintiff of liability turns on whether LaBelle’s death was reasonably expected to result from Robert’s criminal act. Injury is reasonably expected when it occurs as the natural, foreseeable, expected, and anticipated result of the criminal act. *Freeman*, *supra* at 660, 687-688. An exclusionary clause such as the one in this case, which contains the words “may reasonably be expected,” is evaluated using an objective standard. *Id.* at 660, 688. In the companion case to *Freeman*, Justice Riley explained that the word “expected” in an exclusionary clause of an insurance policy means that the insured knew or should have known that there was a substantial probability that certain consequences would result from his actions. *Id.* at 675. In order for the result to be reasonably expected, it is not enough that it was reasonably foreseeable. *Id.*

The difference between “reasonably foreseeable” and “substantial probability” is the degree of expectability. A result is reasonably foreseeable if there are indications which would lead a reasonably prudent man to know that the particular results could follow from his acts. Substantial probability is more than this. The indications must be strong

² Robert pleaded nolo contendere to manslaughter in juvenile court. “However, given that such a no-contest plea does not have the effect of an admission for any other proceeding than the one in which it is entered, MCR 2.111(E)(3), that plea has no legal relevance to this case.” *McCarn*, *supra* at 288 n 7.

enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur. [*Id.*, quoting *City of Carter Lake v Aetna Casualty & Surety Co*, 604 F2d 1052, 1059 n 4 (CA 8, 1979).]

We conclude that a person who points a gun at another person's face and intentionally pulls the trigger without checking to see whether the gun is loaded can reasonably expect that injury will result. As we stated in our previous opinion,³ firearms, by their very nature, have an incredible power to injure and kill. Intentionally aiming a firearm at another person and pulling the trigger is an unconscionable abuse of this power. A person should reasonably expect that it is highly likely that injury or death will result from such actions.⁴

III. Conclusion

Robert's act of killing LaBelle by intentionally pointing a gun at his face and pulling the trigger constituted a violation of MCL 750.329. Because Robert committed manslaughter, his actions were criminal. Robert could reasonably expect that his criminal act would result in LaBelle's death. Therefore, the criminal acts exclusion to the insurance policy applies and Allstate is relieved of its obligation to indemnify the insureds. 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

³ *McCarn, supra*, slip op at 4.

⁴ We distinguish the circumstances in this case from the circumstances in *Buczowski v Allstate Ins Co*, 447 Mich 669; 526 NW2d 589 (1994). In *Buczowski*, the insured, who was covered by an insurance policy with an exclusionary clause similar to the exclusionary clause in the instant case, fired a loaded shotgun at a parked car in a residential neighborhood at night, hoping to break out the back window of the car. *Id.* at 674, 677-679. The bullet ricocheted off the car and hit the plaintiff, who, unbeknownst to the insured, was behind a house. *Id.* at 679. A majority of the Supreme Court concluded that a question of fact existed regarding whether the insured could reasonably expect that his actions would result in injury. *Id.* at 671-672 (Cavanagh, C.J.), 676 (Brickley, J.). Such circumstances are very different from those in the instant case. The insured's actions in *Buczowski* were not highly likely to cause injury. *Id.* at 674 (Brickley, J.). On the other hand, we conclude that it was highly likely that injury would result from Robert's act of aiming a gun at LaBelle's face and pulling the trigger.