

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT S. OLMAN, as Next Friend of ROBERT
DRAKE OLMAN,

UNPUBLISHED
June 13, 2006

Plaintiff/Garnishee-Plaintiff-
Appellee,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

SHANE PATRICK HOWARD,

Defendant-Appellee,

and

FARM BUREAU GENERAL INSURANCE
COMPANY,

Garnishee-Defendant-Appellant.

No. 258582
Grand Traverse Circuit Court
LC No. 02-022178-NO

ROBERT S. OLMAN, as Next Friend of ROBERT
DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-
Appellant,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

No. 258991
Grand Traverse Circuit Court

SHANE PATRICK HOWARD,

LC No. 02-022178-NO

Defendant,

and

FARM BUREAU GENERAL INSURANCE
COMPANY,

Garnishee-Defendant-Appellee.

ROBERT S. OLMAN, as Next Friend of ROBERT
DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-
Appellee,,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

No. 259385
Grand Traverse Circuit Court
LC No. 02-022178-NO

SHANE PATRICK HOWARD,

Defendant-Appellant,

and

FARM BUREAU GENERAL INSURANCE
COMPANY,

Garnishee-Defendant-Appellee.

ROBERT S. OLMAN, as Next Friend of ROBERT
DRAKE OLMAN,

Plaintiff/Garnishee-Plaintiff-
Appellee,

and

DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

SHANE PATRICK HOWARD,

Defendant-Appellee,

and

FARM BUREAU GENERAL INSURANCE
COMPANY,

Garnishee-Defendant-Appellant.

No. 259998
Grand Traverse Circuit Court
LC No. 02-022178-NO

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff¹ appeals by leave granted in Docket No. 258991 the circuit court's December 4, 2003, order granting garnishee-defendant Farm Bureau General Insurance Company's (Farm Bureau's) first motion for summary disposition. In Docket No. 259385, defendant Shane Patrick Howard also appeals by leave granted from that order. In Docket No. 258582, Farm Bureau appeals by leave granted from the circuit court's October 1, 2004, order granting plaintiff's motion for relief from its original order, and in Docket No. 259998, Farm Bureau appeals by leave granted from the circuit court's December 21, 2004, order denying its second motion for summary disposition. We reverse the December 21, 2004, order and dismiss the garnishment action.

These consolidated appeals arise from the loss of plaintiff's eye when he was struck by a BB that Shane Howard fired at him. When he was struck, eight-year-old plaintiff was throwing snowballs at seventeen-year-old Howard and his car from the roof of a nearby woodshed. Howard first shouldered his BB gun and repeatedly shot at the underside of the shed to spook plaintiff, but then he dropped the gun to his hip and his second shot from that position hit plaintiff in the eye. Defendant was charged with felonious assault, but pleaded to the lesser charge of careless discharge of a firearm. Plaintiff filed suit against defendant, alleging that defendant was negligent in failing to use good judgment and in carelessly discharging his BB gun at plaintiff. The litigation was forwarded to Farm Bureau, the insurer of defendant's parents, for coverage under their homeowner's policy, but Farm Bureau denied coverage and refused to

¹ Although Robert Drake Olman's claims were filed on his behalf by his next friend, we will refer to him directly as the sole plaintiff for the sake of convenience and clarity.

defend against plaintiff's claim. Plaintiff and defendant then stipulated to entry of a consent judgment exceeding \$300,000.

After entry of the judgment, plaintiff sought to garnish Farm Bureau, asserting that it was responsible for payment of the judgment under the homeowner's policy. In response, Farm Bureau moved for summary disposition, asserting in relevant part that the criminal acts and intentional acts provisions in Farm Bureau's policy excluded coverage for plaintiff's injuries. Relying on this Court's decision in *Auto Club Group Ins Co v Daniel*, 254 Mich App 1; 658 NW2d 193 (2002), the trial court initially granted Farm Bureau's motion for summary disposition, concluding that the policy's criminal-acts exclusion applied to plaintiff's injury.

However, on September 2, 2004, plaintiff moved for relief from judgment under MCR 2.612(C)(1)(e) and (f), seeking to vacate the circuit court's summary disposition order on the basis that our Supreme Court's decision in *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283; 683 NW2d 656 (2004), repudiated the case law that the trial court relied on when it granted Farm Bureau's motion. The trial court agreed, granted plaintiff's motion for relief, and vacated its order granting Farm Bureau summary disposition. The trial court subsequently denied a second motion for summary disposition filed by Farm Bureau.

Because these appeals hinge on whether the trial court correctly denied summary disposition in its most recent final order, we first review that ruling. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When presented with a contract dispute, the court must determine the terms of the parties' agreement and enforce them. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105, 107; 583 NW2d 484 (1998). If an insurance contract's language is clear, its construction is a question of law for the court. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Although terms of an insurance contract are strictly construed in the insured's favor, *id.* at 354, we enforce clear exclusions. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001).

Here, the parties' contract excludes from the insured's personal liability coverage "bodily injury or property damage arising out of a criminal act of an insured" A "criminal act" is defined as one that is "criminal in nature," and the parties do not dispute that Howard was "an insured" under the policy. In *Daniel*, we held that a guilty plea for careless discharge of a firearm sufficed to satisfy a policy's "criminal act" element, and further held that the plain application of the criminal act exclusion prevented coverage. *Daniel, supra* at 4. Such exclusions are reasonable and do not contravene public policy, because they prevent criminals from looking to insurance contracts for relief from the natural consequences of their criminal acts. *Id.* at 5. Because an insurer may reasonably exclude injuries caused by an insured's criminal acts, policies containing the exclusions are not void as contracts of adhesion. *Id.*

Nevertheless, Howard and plaintiff argue that *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283; 683 NW2d 656 (2004), prevents the application of the criminal acts exclusion because Howard could not have reasonably anticipated that shooting the bottom of the shed would result in the injury to plaintiff's eye. However, *McCarn* is not binding precedent, *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973), so it does not alter the application of *Daniel* to this case. MCR 7.215(J)(1). Furthermore, *McCarn* is distinguishable from the case at

bar. In *McCarn, supra* at 290, the policy excluded injuries that “were the reasonably expected result of an insured’s intentional or criminal act.” Here, all injuries “arising out of” the insured’s criminal acts are excluded. Contrary to the trial court’s findings, “arising out of” is not an ambiguous phrase, and it clearly applies to the relationship between Howard’s careless use of his firearm and plaintiff’s eye injury. Moreover, Howard was sober, knew that his gun was loaded, and knew that he was aiming in plaintiff’s direction, so the subjective knowledge affecting his reasonable expectations was more extensive than the intoxicated shooter in *McCarn*. Here, a reasonable person would expect that carelessly aiming the gun in plaintiff’s direction and shooting it could result in a BB hitting plaintiff’s eye, causing the consequent damage. Under these facts, the trial court correctly granted Farm Bureau summary disposition on the basis of *Daniel* and erroneously reopened the case and denied its second motion for summary disposition.

The December 21, 2004, order denying Farm Bureau’s motion for summary disposition is reversed. The remaining appeals are dismissed as moot.

/s/ Peter D. O’Connell

/s/ Kurtis T. Wilder