

STATE OF MICHIGAN  
COURT OF APPEALS

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ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

MARCELLUS ALLEN PRICE<sup>1</sup> and  
DENISHA BASS,

Defendants-Appellants.

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UNPUBLISHED

September 20, 2007

No. 270599

Oakland Circuit Court

LC No. 2003-054314-CK

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendants Marcellus Allen Price and Denisha Bass appeal as of right a judgment in favor of plaintiff Allstate Insurance Company following a bench trial in this declaratory judgment action. The trial court ruled that Allstate had no obligation as a matter of law to defend or indemnify Price in an underlying suit brought by Bass, finding that Price reasonably should have expected the consequences of his intentional act. We affirm.

This is the second time that this case has been before this Court. See *Allstate Ins Co v Price*, unpublished opinion of the Court of Appeals, issued November 3, 2005 (Docket No 261793). In summary, defendant Price fired several shots from his AK-47 assault rifle into the ground in front of an SUV occupied by several women, including defendant Bass. The bullet ricocheted up and hit Bass, causing severe injuries to one of her legs. Bass brought a negligence action against Price. Allstate, which provided homeowners’ insurance to Price’s parents, filed the present declaratory judgment action, asserting that Price was not entitled to a further defense

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<sup>1</sup> Marcellus Allen Price has been referred to as Marcellus Price Allen in lower court proceedings, and as Marcellus Allen in this Court’s previous unpublished opinion. See *Allstate Ins Co v Price*, unpublished opinion of the Court of Appeals, issued November 3, 2005 (Docket No 261793). Arthur Price testified that his son’s name was “Marcellus Price Allen.” Inexplicably, this case caption, as well as this Court’s previous unpublished opinion’s caption, refers to him as Marcellus Allen Price, as do the captions of the parties’ appellate briefs. For consistency, this Court will follow the caption. He will be referred to as “Price,” and defendant Denisha Bass will be referred to as “Bass” hereafter.

or indemnification in Bass's suit against Price because there was no "occurrence" under the policy and/or because the policy's intentional/criminal acts exclusion applied. The circuit court concluded that the intentional/criminal acts exclusion of the homeowners' insurance policy at issue precluded coverage, and granted summary disposition in Allstate's favor.

On appeal, this Court reversed and remanded, concluding that a question of fact existed with regard to whether there was an "accident" and thus an "occurrence" under the policy; that is, whether Price reasonably should have expected the consequences of his intentional act. This Court also concluded that a question of fact existed with regard to whether the intentional/criminal acts exclusion barred coverage; that is, whether the resulting injuries were the reasonably expected result of the insured's intentional or criminal act.<sup>2</sup>

Following a bench trial on remand, the trial court opined:

The Court has a duty and responsibility on a Declaratory Judgment Act [sic] to make a decision as to whether or not the exclusionary provision of the policy would prohibit the responsibility of the insurance company to represent the Defendant in this action.

The Court, having reviewed all the facts in this case, recognizing Mr. Allen was a mature individual, dropped out of the school in the 10<sup>th</sup> grade, recognizing that he has a good and - - as an old military man, I can tell you he has a good understanding of weapons and what they can do. There is certainly a perplexity as to whether he understood firing into the ground does not nullify the trajectory of a bullet to the extent that it would create the same power of invasively entering that vehicle and causing injury as it did.

I'm satisfied that, on the basis of all the testimony I heard today, that the - - that the critical feature and the focus is the act itself, not the intent. I'm satisfied Mr. Allen, the last thing he wanted to do that night was injure anyone, I'm satisfied that his intent was to get these people out of the way as quickly as possible, that is them voluntarily and safely leaving the area and he did a - - not a very smart thing by bringing his AK 47 out on the streets.

He intentionally fired the weapon, he fired the weapon in the area of where the vehicle was located, he fired it into the ground, but his understanding of weapons and what they can do, I'm satisfied that a reasonable person could have anticipated that the ricochet would have pierced that vehicle and has the potential for injuring someone.

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<sup>2</sup> The dissenting judge (O'Connell, J.) would have affirmed, concluding that "Under the circumstances, a reasonable man shooting an AK 47 at the ground in front of a carload of women (if one can imagine such a paradoxical individual) would expect that someone will catch a stray bullet."

This Court reviews a trial court's factual findings following a bench trial for clear error, but its legal conclusions are reviewed de novo. *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 291-292; 706 NW2d 897 (2005). "Clear error is found only when on review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002). "Issues involving the proper interpretation of insurance contracts are reviewed de novo." *McCarn II*, *supra* at 288.

"[T]he proper construction of a contract requires that [a court] first determine whether coverage exists, and then whether an exclusion precludes coverage." *Allstate Ins Co v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989). Determination of the scope of coverage is a separate inquiry from whether coverage is negated by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995).

The determination of whether coverage exists depends on whether there was an accident, or an "occurrence" under the terms of the policy. It appears from the trial court's statement that "The Court has a duty and responsibility . . . to make a decision as to whether or not the exclusionary provision of the policy would prohibit the responsibility of the insurance company to represent the Defendant in this action" that the trial court did not first determine whether there was an occurrence under the terms of the policy. However, the trial court's finding that "a reasonable person could have anticipated that the ricochet would have pierced that vehicle and has the potential for injuring someone" applies equally as well to the determination of whether an occurrence occurred.

Once again, the parties rely heavily on *Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002) (*McCarn I*); *Allstate Ins Co v McCarn*, 471 Mich 283; 683 NW2d 656 (2004) (*McCarn II*); and *Buczowski v Allstate Ins Co*, 447 Mich 669; 526 NW2d 589 (1994). The policy provisions at issue in *McCarn I* and *McCarn II* are essentially the same as the policy provisions in the present case.

In *McCarn I*, Robert McCarn pointed what he believed was an unloaded revolver at his friend Kevin LaBelle. McCarn pulled the trigger of what turned out to be a loaded weapon, killing LaBelle. *Id.* The insurer filed a declaratory action to determine "its obligation to indemnify its insureds in connection with an underlying wrongful death suit stemming from [a] shooting death." *Id.* at 278. The policy provision at issue was identical to the "Losses We Cover Under Coverage X" provision in the instant action.

The trial court concluded in *McCarn* that "the events constituted an 'occurrence' within the meaning of Allstate's policy . . . [and it] held that McCarn's conduct was not intentional or criminal within the meaning of Allstate's policy." *Id.* at 280. This Court reversed, concluding that "[McCarn's] intentional actions created a direct risk of harm that precludes coverage." *Id.*

On appeal to the Supreme Court, the issue was whether the case involved an "accident." *Id.* at 281. "[T]he 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." *Id.* at 282 (citations omitted). The Court then explained:

What this essentially boils down to is 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.

As to the perspective from which the analysis should be made, the question is not whether a reasonable person would have expected the consequences, but whether the insured reasonably should have expected the consequences. Accordingly, an objective foreseeability test should not be used in the present context. Rather, the analysis must be that, to avoid coverage, the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured. [*Id.* at 282-283.]

The Court noted that “there is no coverage where the consequences of the insured’s act were either ‘intended by the insured’ or ‘reasonably should have been expected by the insured.’” *Id.* at 284.

Kevin LaBelle’s death was an “accident,” thus an “occurrence,” covered under the insurance policy. We agree with plaintiff that Robert intended to point the gun at Kevin and pull the trigger. However, Robert believed the gun was not loaded. Robert had no intention of firing a loaded weapon. No bodily injury would have been caused by Robert’s intended act of pulling the trigger of an unloaded gun. [*Id.* at 285.]

The Court underscored its holding by noting that “Robert should not have reasonably expected the consequences that ensued from his act because his intended act was merely to pull the trigger of an unloaded gun.” *Id.* at 290.

In *Buczowski*, *supra* at 678 (Boyle, J.), after a day of drinking to excess, McKay argued with his girlfriend Lemerand; and there was no resolution to the argument when he dropped her off at her residence. When McKay returned to her residence, he observed Lemerand departing with Buczowski. *Id.* McKay returned to his residence “to retrieve his 20-gauge shotgun” and some ammunition. *Id.* McKay planned on “shooting out the back window” of Buczowski’s truck, which had been parked at Lemerand’s residence. *Id.* When McKay returned to Lemerand’s residence, the truck was gone; so, McKay went to a friend’s residence across the street to consume more alcohol. *Id.* at 679. Later, the friend drove McKay to Buczowski’s residence, where McKay would finally accomplish his goal of shooting Buczowski’s truck. *Id.* Instead of shooting at a truck, McKay shot at a 1975 Mercury Marquis, and the bullet ricocheted and hit Buczowski, who sat “at a picnic table in the yard behind his house.” *Id.*

On appeal, the Supreme Court addressed the issue of whether coverage was precluded by operation of an exclusion provision. While *Buczowski* calls for a different legal analysis, its underlying facts are illustrative. In a plurality opinion, Chief Justice Cavanagh wrote that “shooting a shotgun in a residential neighborhood in the middle of the night at an unoccupied car does not necessarily lead, as a matter of law, to a reasonable expectation of bodily injury.” *Id.* at 671 (Cavanagh, C.J.). A majority agreed that a question of fact remained, requiring resolution

by trial. *Id.* at 672, 676. Chief Justice Cavanagh agreed with much of the analysis of Justice Brickley’s opinion. *Id.* at 671. In applying the standard for exclusionary provisions, Justice Brickley concluded that “[t]he actions at issue in this case were not highly likely to cause personal injury.” *Id.* at 676 (Brickley, J.). In reaching that conclusion, Justice Brickley opined:

If an act is highly likely to cause personal injury, performing that act usually should result in somebody getting hurt. This is what the words “highly likely” mean, and what it means when we say that the injury is expected to result from the act. This cannot be said of McKay’s actions in this instance, however. McKay used a shotgun to shoot at the back of a car from inside another car on a residential street at night. A person could easily use up a lot of bullets shooting at cars in residential neighborhoods and not hit anyone. It is not as if Mr. McKay were shooting into a crowd; most of the places a bullet can go in a residential area simply do not result in personal injury. [*Id.* at 673-674.]

In *Allstate Ins Co v Freeman*, 432 Mich 656, 660, 663; 443 NW2d 734 (1989), a consolidated appeal, DiCicco stabbed Gravenmier during an altercation in a college residence hall, and DiCicco was insured under his parents’ homeowners insurance policy.

[After confrontation in the hallway, DiCicco went to his room and returned with a hunting knife]. Gravenmier observed the knife, put his hands up and told DiCicco in effect that if he were dumb enough or brave enough to use it on Gravenmier's stomach. DiCicco commenced poking at Gravenmier's chest with his left hand repeating the admonition, “don’t mess with me.” He backed Gravenmier against the wall. Gravenmier reacted by grabbing DiCicco by the throat, turning, and pushing DiCicco against the wall. Gravenmier then felt the knife being withdrawn from his stomach.

DiCicco denies any intent to use the knife, claiming that he went to get the knife merely to scare away the other persons he considered to be a threat. No one observed him make a gesture of moving the knife as though to stab Gravenmier. The knife was held in his right hand and the poking was done with his left. DiCicco denies knowledge of in fact stabbing. Immediately following the stabbing, DiCicco looked shocked. Gravenmier obviously did not expect DiCicco would use the knife or he would not have engaged in his act of bravado. [*Id.* at 663-664.]

The insurer argued that there was no coverage because the “policy does not apply to the fighting incident.” *Id.* at 667. There was no preliminary determination as to “whether the fighting incident constituted an ‘occurrence’ within the meaning of the coverage provision of the policy.” *Id.* at 667.<sup>3</sup> The Court explained that “the insured’s ‘intent’ may determine whether the

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<sup>3</sup> Our Supreme Court noted the relevant provision as:

“Metropolitan will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury sustained by  
(continued...)

insured's actions constituted an 'accident,' but it does not necessarily follow that an insured must act unintentionally for an act to be an 'occurrence.'" *Id.* Our Supreme Court concluded that "the present coverage provision must be broadly construed. . . . hold[ing] that the claimed incident constituted an 'occurrence' under the policy." *Id.* at 672. In reaching its conclusion, the Court noted two analogous cases, *Allstate Ins Co v Cannon*, 644 F Supp 31 (1986), and *Frankenmuth Mut Ins Co v Kompus*, 135 Mich App 667; 354 NW2d 303 (1984), that represented situations where there was no "occurrence." *Id.* at 671-672. However, "the claimed incident in the instant case is not clear cut enough to allow us to make a similar determination." *Id.* at 672.

The instant case is clearly distinct from *McCarn I*, *supra* at 285, where "[n]o bodily injury would have been caused by [McCarn's] intended act of pulling the trigger of an unloaded gun." There is also a clear distinction from the *Freeman* case, where Gravenmier was only stabbed in the midst of an escalating melee. *Freeman*, *supra* at 663-664. The instant action is also unlike *Buczowski*, *supra* at 679, where a single shot was fired at an empty car. Here, Price intended to fire his AK-47 towards the ground in the direction of the vehicle with five occupants.

The present case is closer to those cases where courts have concluded that there was no "occurrence." In *Cannon*, *supra* at 33, the trial court concluded that the incident in question was not an "occurrence" under the insurance policy's terms. In that case, the insured handed a loaded rifle to Rutland who just emerged from a fight; Rutland later killed two individuals using the rifle. *Id.* at 32. In reaching its conclusion, the trial court noted:

The operative act is [the insured's] handing a loaded rifle to Rutland. Indeed, [the insured] had custody of the rifle on behalf of Rutland. [The insured] also purchased ammunition for the rifle. Rifles are used for shooting. There is no suggestion in the record Rutland or [the insured] were hunters. These events occurred in an urban location. Rutland had been in a fight and was angry. He left the scene of the fight to get the rifle. [The insured] knew that. [The insured] also knew Rutland was returning to the scene of the fight with the rifle. It is fatuous to argue that the injuries from the shootings were "accidents" as defined by the Michigan Supreme Court. While [one victim's] wounding may have been accidental, certainly the discharge of the rifle was not an accident. Additionally, although I find the "occurrence" clause sufficient to obviate [the insurer's] liability, I note that, under the circumstances, it is sophistry to argue that [the insured] neither intended nor expected there would be bodily injury if [a victim] were still present when Rutland returned to the scene of the fight. [*Id.* at 33.]

In *Kompus*, *supra* at 678, this Court found that the defendant's actions were not accidental, and thus, not an "occurrence" under the insurer's policy. In that case, a doctor was alleged to have sexually assaulted his patients under the guise of medical treatment. *Id.* at 670. This Court held:

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(...continued)

other persons or property damage, to which this insurance applies, caused by an occurrence." Likewise, the definitional section defined an "occurrence" as an "accident . . . which results . . . in bodily injury." *Freeman*, *supra* at 666 n 4.

[F]inding [the defendant's] actions to have been intentional, the trial court . . . should have found coverage precluded under the basic "occurrence" requirement of the policy. Regardless of the label affixed to each claim raised by the individual patients, it is clear that the acts performed by [the defendant] upon which those claims were based were intentional and the injuries at least foreseeable. The acts and injuries alleged by the complaining patients did not occur "without the insured's foresight or expectation and without design or intentional causation on his part." [*Id.* at 679 (citations omitted).]

Much like *Kompus, supra* at 679, Bass' injuries did not occur without Price's "foresight or expectation and without design or intentional causation on his part." Also, in *Cannon, supra* at 33, the trial court concluded that "it is sophistry to argue that [the insured] neither intended nor expected there would be bodily injury" after giving a rifle to an individual who just emerged from and planned to return to a barroom brawl.

The record supports a finding that Price could have reasonably anticipated that firing his AK-47 at the ground towards a vehicle with five occupants would result in harm to the occupants. The record demonstrated that Price was an experienced marksman, that Price admitted to firing the AK-47 towards the ground in the direction of the vehicle, that Price understood the concept of ricochet, that Price testified that the AK-47 was similar to other rifles that he used; that Price understood that a bullet fired from an AK-47 could penetrate just about anything; and that Price's father indicated that Price received training on weapons. Further, the trial court could consider evidence of Price's nolo contendere plea in conjunction with all other evidence presented. *Akyan v Auto Club Ins Ass'n*, 207 Mich App 92, 98; 523 NW2d 838 (1994). Price reasonably should have expected that an occupant of the vehicle could get injured when he fired an AK-47 in the direction of the occupied vehicle. *McCarn I, supra* at 282-283. We therefore conclude that there was no "occurrence" under the policy and that coverage is precluded. *Id.* In light of this determination, we need not address whether coverage would also be excluded by operation of the intentional/criminal acts exclusion.

Affirmed.

/s/ Peter D. O'Connell  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald