STATE OF MICHIGAN

COURT OF APPEALS

HOME-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v

CRAIG JOHN BONNVILLE, DIMITRI JONATHAN BONNVILLE, PAUL MATTHEW LANGE, and RICHARD ALLEN LANGE,

Defendants-Appellees.

UNPUBLISHED
June 8, 2006

No. 266794
Lapeer Circuit Court
LC No. 04-035144-CK

Before: Schuette, P.J. and Bandstra and Cooper, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

Plaintiff brought this declaratory action to determine whether it was obligated under a homeowners policy to defend and indemnify Richard and Paul Lange in connection with an underlying action brought by Dimitri and Craig Bonnville against the Langes. The underlying action arose from an incident in which Paul Lange shot Dimitri with a nail gun while the two were remodeling a room at Richard Lange's home.

Home-Owners Insurance Company argues that the trial court erroneously relied on *Lichon v American Universal Ins Co*, 435 Mich 408; 459 NW2d 288 (1990), to conclude that evidence of Paul Lange's no contest plea to aggravated assault, MCL 750.81a(1), could not be considered against him. The admissibility of the no contest plea is a question of law, which we review de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). We agree with the trial court's determination that the no contest plea was not admissible here, and note for the record that even if it were admissible, evidence of the plea would not entitle plaintiff to summary disposition.

After *Lichon* was decided, MRE 410(2) was amended to provide:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

* * *

> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea[.]

The Comment to MRE 410 specifically notes that the amendment overrules *Lichon* in part: "the exception in subrule (2), which exception has no federal counterpart, altered one of the holdings in *Lichon* by allowing evidence of a nolo contendere plea in certain circumstances."[1] A plea of no contest is not an admission of guilt, but rather is a considered decision against challenging a charge brought by the state, generally for the purpose of "avoid[ing] potential future repercussions which would be caused by the admission of liability, particularly the repercussions in potential future civil litigation." *Lichon, supra* at 417. "Certain circumstances" as stated in the Supreme Court's comments must be read narrowly.

The plain language of MRE 410(2) as amended is dispositive here. To qualify for this exception, the plea must be offered as evidence "to support a defense against a claim asserted by the person who entered the plea." Plaintiff argues that here defendant Paul is making a "claim" under his father's insurance policy, and that plaintiff is attempting to use the no contest plea to defend against that insurance claim. We find that although this is clever linguistically, it is not what the amendment to 410(2) means. Because the rule explicitly addresses evidence admissible in "any civil or criminal proceeding," we must presume that the terms there incorporated carry their common legal meaning. To presume that "claim" might mean any sort of statement or demand made by one private party to another outside of the court system is simply nonsensical, and we will not reach such a result. See *Lichon, supra* at 424. We find that "claim" as used in the rule refers more specifically to a legal action brought by a plaintiff.[2] The rule indicates that where a defendant who entered a no contest plea is later a plaintiff in a related civil action, the defendant may use the plea as evidence in building a defense against that plaintiff's claim. The protection afforded a defendant who chooses not to contest a charge may act as a shield where

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[1] The Comment also notes that the corresponding revision to MRE 803(22) resolves the hearsay issue by specifying that "if not excluded by MRE 410," a nolo contendere plea is admissible.

[2] This reading is supported by MCR 7.202, providing definitions to govern appellate court proceedings. The rule does not explicitly define the term "claim," but it does define "final judgment" or "final order" "[i]n a civil case" as "the first judgment or order that disposes of all the claims." MCR 7.202(6)(a)(i). The court here will not dispose of the insurance claim, but only of the complaint and defenses, or the legal claims.

In addition, MCL 600.605, defining the original jurisdiction of the circuit courts, states that "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies." The insurance claim is not a "claim" within the court's jurisdiction, and the court rules, rules of evidence, and other laws cannot be supposed to extrapolate the meaning of "claim" so far as plaintiff suggests.

that defendant is a defendant again in a civil action, but not as a sword if a defendant in a criminal proceeding later becomes plaintiff in a related civil action.

This reading of MRE 410(2) is consistent with our decisions in *Akyan v Auto Club Ins Ass'n*, 207 Mich App 92; 523 NW2d 838 (1994) and *Akyan v Auto Club Ins Ass'n (On Rehearing)*, 208 Mich App 271; 527 NW2d 63 (1994), both "addressing the effect in this civil action for breach of an insurance contract of *plaintiff's* plea of nolo contendere to a criminal charge." 208 Mich App 271 at 272 (emphasis added).

However, even if evidence of the plea could be considered, it would not entitle Home-Owners to summary disposition. An assault conviction requires proof of "an intent to injure *or* an intent to put the victim in reasonable fear or apprehension of an immediate battery." *People v Norwood*, 123 Mich App 287, 295; 333 NW2d 255 (1983) (emphasis added). Thus, the fact that Paul was convicted of aggravated assault does not necessarily mean that he acted with intent to injure. Rather, Paul's plea is also consistent with his having intended to only scare Dimitri, as he claims. Further, even where a no contest plea is admissible, it is only additional evidence to be considered; it is not conclusive of the facts essential to sustain the judgment. *Akyan v Auto Club Ins Ass'n (On Rehearing)*, 208 Mich App 271, 274-277; 527 NW2d 63 (1994). As will be discussed, other evidence submitted below shows that there is a genuine issue of material fact concerning whether the injury to Dimitri was an accidental occurrence covered by plaintiff's policy.

Plaintiff argues that the trial court erred in granting summary disposition to defendants because the shooting was not an "occurrence" under the policy.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

"In interpreting a policy of insurance, we are obligated to construe clear and unambiguous provisions according to the plain and ordinary meaning of the terms as used in the provision." *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 11; 512 NW2d 324 (1993). In the present case, the policy provides coverage for an "occurrence," which is defined as "an accident that results in bodily injury or property damage." Plaintiff maintains that Paul's shooting of Dimitri was not an accident and, therefore, was not an occurrence under the policy.

Our Supreme Court has held that, under its common and ordinary meaning, "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." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999). However, an insured need not act *un*intentionally in order for an injury-causing event to be an accident. *Allstate Ins Co v McCarn*, 466 Mich 277, 282; 645 NW2d 20 (2002) (*McCarn I*). Rather, where

an insured acts intentionally, "a determination must be made whether the consequences of the insured's intentional act '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.'" *Frankenmuth Mut Ins Co, supra* at 115, quoting *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 648-649; 527 NW2d 760 (1994). Summarizing this test, our Supreme Court has stated:

> 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. [*McCarn I*, *supra* at 282-283 (emphasis added).]

"[T]he question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences." *Id.* at 283 (emphasis in the original). The test is subjective. *Id.* at 284-285. That the insured acted negligently is not enough to preclude coverage. *Id.* at 284, 287-288.

In *Frankenmuth Mutual Ins Co*, *supra* at 107, for example, the insured intentionally set fire to the inventory in his store, but the fire spread, resulting in damage to other nearby businesses. When neighboring business owners sued, the insured asked the plaintiff to defend him. *Id*. at 107-108. On appeal, the Supreme Court reinstated the trial court's decision granting summary disposition to the plaintiff, finding that the fire was caused by the insured's intentional act, which was intended to do property damage; therefore, there was no accident, and no occurrence within the meaning of the policy. *Id*. at 116-117.

Similarly, in *Nabozny v Burkhardt*, 461 Mich 471, 472-473, 480-481; 606 NW2d 639 (2000), the Supreme Court found that, where the insured purposefully tripped the victim during a fight, breaking his ankle, he created a direct risk of harm from which an injury should reasonably have been expected to result. Therefore, the injury was not an accidental occurrence covered by the policy. *Id*. at 477-478, 480-481. It was irrelevant that the insured did not intend to cause the particular injury that resulted. *Id*. at 481-482.

By contrast, in *McCarn I*, *supra* at 290-291, the Supreme Court held that, where an insured pointed what he thought was an unloaded gun at another and pulled the trigger, there was an accidental occurrence within the scope of the insurance policy. The Court found that "there was no intentional creation of a direct risk of harm because of the undisputed evidence that [the insured] believed he was pulling the trigger of an unloaded gun." *Id.* at 284. The Court concluded that the death was an accident covered by the policy because the insured "had no intention of firing a loaded weapon." *Id*. at 285.

In this case, Paul and Dimitri both testified that they knew that the nail gun would not fire merely by depressing the trigger. Rather, either the nose must make contact with an object, or it must be pulled back manually. Thus, by merely pointing the nail gun at Dimitri and depressing the trigger, Paul did not create a direct risk of harm from which an injury should reasonably have been expected to follow. Dimitri testified in his deposition that Paul pushed the nail gun against his chest and shot him. Although Paul admitted that he purposefully picked up the nail gun and pulled the trigger, he claimed that the contact between the nose of the nail gun and Dimitri's

chest happened accidentally when Dimitri turned suddenly. From the evidence presented, we conclude that reasonable minds could disagree whether Paul purposefully made contact with Dimitri's chest, thereby causing the gun to fire, or whether the contact was unintended and occurred accidentally.

Because there is a genuine issue of material fact with regard to whether the shooting was accidental, the trial court properly denied plaintiff's motion for summary disposition but erred in granting summary disposition to defendants with respect to this issue.

For the same reasons, we also conclude that there is a genuine issue of material fact with regard to whether coverage is precluded by the policy exclusion that excludes coverage for

> bodily injury or property damage reasonably expected or intended by the insured. This exclusion applies even if the bodily injury or property damage is of a different kind or degree, or is sustained by a different person or property, than that reasonably expected or intended.

"'[E]xpected' injuries are the 'natural, foreseeable, expected, and anticipated result of an intentional act.'" *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 383; 565 NW2d 839 (1997), quoting *Metro Prop & Liability Ins Co v DiCicco*, 432 Mich 656, 674; 443 NW2d 734 (1989). Therefore, this exclusion "bars coverage for injuries caused by an insured who acted intentionally despite his awareness that harm was likely to follow from his conduct." *Auto-Owners Ins Co*, *supra* at 383-384. "In other words, coverage is precluded if the insured's claim that he did not intend or expect the injury 'flies in the face of all reason, common sense and experience.'" *Id.* at 384, quoting *Auto Club Ins Group*, *supra* at 642.

Because this exclusion depends on whether an injury was reasonably expected by the insured, it "requires a subjective inquiry into the intent or expectation of the insured." *Auto-Owners Ins Co*, *supra* at 383. Accordingly, the trial court must "first determine what [the insured] actually believed . . . , not what a reasonable third party would have believed." *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 291; 683 NW2d 656 (2004) (*McCarn II*). Then, the court must "determine whether a reasonable person, possessed of the totality of the facts possessed by [the insured], would have expected the resulting injury." *Id.*

In *McCarn II*, *supra* at 288-291, for example, the Supreme Court found that coverage was not precluded by an exclusion barring coverage for injuries reasonably expected to result from the intentional or criminal acts of the insured. The Court stated:

> [W]e are called to determine if a reasonable person would have expected bodily harm to result when the gun, in the unloaded state [the insured] believed it to be, was "fired." The answer is no because, obviously, an unloaded gun will not fire a shot. [*Id.* at 290-291.]

"No bodily harm could have been foreseen from [the insured's] intended act, because he intended to pull the trigger of an unloaded gun, and, thus, it was not foreseeable, indeed it was impossible, under the facts as [the insured] believed them to be, that shot would be discharged." *Id.* at 291, quoting *McCarn I*, *supra* at 290-291.

In this case, Paul's version of events does not fly in the face of reason, common sense, or experience. Rather, it shows that Paul was knowledgeable about the nail gun, and knew that it would not fire unless the nose was pulled back or pressed against an object. Paul has consistently maintained that he did not intend the contact between the nose of the nail gun and Dimitri's chest. Without initiating contact with Dimitri, he could not have reasonably expected the injury to happen. According to Dimitri, however, Paul intentionally "stuck the gun to [his] chest" and shot him. The evidence establishes a genuine issue of fact whether Paul intended the injury or reasonably should have expected it. Thus, the trial court properly denied plaintiff's motion for summary disposition, but erred in granting summary disposition to defendants on the basis of this exclusion.

Lastly, we find no merit to plaintiff's claim that coverage is precluded by the fellow-employee exclusion. While there is evidence that Dimitri may have been Richard Lange's employee on the day of the incident, we agree there is no record support for plaintiff's claim that Paul was also Richard Lange's employee. See *Ashker v Ford Motor Co*, 245 Mich App 9, 14-16; 627 NW2d 1 (2001). Thus, the trial court correctly concluded that coverage was not precluded by the fellow-employee exclusion.

We affirm as to the exclusion of the evidence of Paul Lange's nolo contendere plea, but reverse as to the grant of summary disposition to defendants, finding there are genuine issue s of material fact to be decided by a trier of fact. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Jessica R. Cooper