STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Plaintiff-Appellee,

v

HOWARD WHITEHEAD and NICOLE YOUNG,

Defendants,

and

VENECIA TIPPETT, Personal Representative of the Estate of SEAN REYNOLDS, Deceased,

Defendant-Appellant.

UNPUBLISHED
July 6, 2006

No. 259638
Wayne Circuit Court
LC No. 04-422575-CK

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

In this declaratory judgment action, defendant appeals as of right the trial court's order granting summary disposition in favor of plaintiff under MCR 2.116(C)(10). We affirm.

Defendant first argues that the trial court erred in concluding that Nicole Young's act of shooting and killing Sean Reynolds was not an "occurrence" under a homeowners' insurance policy ("the policy") issued to Howard Whitehead and that plaintiff did not have a duty to defend and indemnify Young and Whitehead in a civil action brought by defendant against Young and Whitehead ("the underlying action"). We disagree.

We review de novo a trial court's decision regarding a motion for summary disposition in a declaratory judgment action. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 416; 668 NW2d 199 (2003). In reviewing a motion under MCR 2.116(C)(10), we consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* "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 might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Additionally, the construction and interpretation of the language of an insurance contract is a question of law that we review de novo. *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140-141; 655 NW2d 260 (2002).

In reviewing an insurance policy, we examine the language of the policy and interpret its terms in accordance with the principles of contract construction. *Allstate Ins Co v McCarn (McCarn I)*, 466 Mich 277, 280; 645 NW2d 20 (2002). If the terms are not defined by the policy, we interpret the terms in accordance with their commonly used meanings. *Id*. A term is not rendered ambiguous by the fact that the policy does not define the term. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). If the terms of the policy are ambiguous, we construe the policy in favor of the insured. *Id*. However, where the terms of the policy are unambiguous, the policy must be enforced as written. *Id*. Determination of the scope of coverage is a separate inquiry from the question whether coverage is negated by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995).

The policy at issue defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: (a) bodily injury; or (b) property damage." However, the term "accident" is not defined in the policy.

In *McCarn I, supra* at 281-282, our Supreme Court interpreted the meaning of a similar definition of "occurrence." There, the term "occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage." *Id*. at 281. The Court noted that the term "accident" has consistently been interpreted to mean "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." *Id*. (citations and quotations omitted). Further, "[a]ccidents are evaluated from the standpoint of the insured, not the injured party." *Id*. at 282. "[I]f 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. Accordingly, the proper analysis to determine if coverage can be avoided is to look to whether "the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured." *Id*. at 283.

In *McCarn I*, the insured removed a shotgun from underneath a bed and, assuming that the weapon was unloaded, aimed it at the decedent's face from one foot away, pulled back the hammer, pulled the trigger and fired the gun, killing the decedent. *Id*. at 279-280. The insured later entered a nolo contendre plea to manslaughter. *Id*. at 288 n 7. Our Supreme Court held that the act was an "'accident,' and thus an 'occurrence,' covered under the policy because [the insured] did not intend or reasonably expect that his actions, pointing and pulling a trigger of an unloaded gun, would cause any bodily injury to [the victim]." *Id*. at 291.

Conversely, in *Nabozny v Burkhardt*, 461 Mich 471, 480-481; 606 NW2d 639 (2000), our Supreme Court held that an "accident," and thus an "occurrence," did not occur when the insured engaged in a fight and intentionally tripped the injured party. The Court reasoned that

the insured "reasonably should have expected the consequences of his acts because of the direct risk of harm created." *Id*. at 481. Similarly, where an insured intentionally set fire to a building, and caused damage to a neighboring building, the act of the insured precluded coverage. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116; 595 NW2d 832 (1999). There, our Supreme Court noted that it was "irrelevant whether the harm that resulted . . . was different from or exceeded the harm intended. . . ." *Id*.

Here, Young was convicted of second-degree murder, MCL 750.317, for the shooting death of Reynolds. The elements of second-degree murder are: (1) a death; (2) caused by an act of the defendant; (3) with malice; and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. at 464. Further, "[a] criminal conviction is admissible in a declaratory action in order to determine whether an insurer has a duty to defend and indemnify its insured." *State Farm Fire & Cas Co v Fisher*, 192 Mich App 371, 376; 481 NW2d 743 (1991).

In order to convict Young of second-murder in her criminal trial, the jury was required to find that either (1) Young had the intent to kill Reynolds, (2) Young had the intent to cause Reynolds great bodily harm, or (3) Young had the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior was to cause Reynolds's death or cause Reynolds great bodily harm. *Goecke*, *supra* at 464. Thus, in light of Young's conviction for the murder of Reynolds, Young's intent "is a settled question." See *Masters*, *supra* at 107 n 1. Moreover, Young's trial testimony indicates that she intended both the act and the consequences of her act. *McCarn I*, *supra* at 282. Young testified at trial that she pointed the gun at Reynolds, pulled the trigger and shot Reynolds in the back. Young's subsequent claims that she did not "recall shooting" Reynolds and did not "intend" to pull the trigger are insufficient to overcome the facts leading to her conviction. *Fisher*, *supra* at 376. In light of Young's conviction for second-degree murder, there is no question of fact regarding whether Young had the intent to commit the act that caused Reynolds' death. Further, based on Young's criminal actions, there is no dispute that Young reasonably intended the consequences of her actions because the act of shooting Reynolds created a direct risk of harm to Reynolds. *McCarn I*, *supra* at 282-283; *Nabozny*, *supra* at 481-482. The trial court did not err in its determination that there was no "occurrence" under the policy and that plaintiff did not have a duty to indemnify or defend Young or Whitehead in the underlying action.

Defendant next argues that the trial court erred in concluding that Young's act of shooting and killing Reynolds fell within the intentional acts exclusion of the policy. Again, we disagree. Although exclusionary clauses in insurance policies are strictly construed in favor of the insured, clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). Here, the intentional acts exclusionary clause of the policy provides: "payments to others do not apply to 'bodily injury' or 'property damage'. . . which is expected or intended by one or more of the 'insureds' even if the resulting 'bodily injury' or 'property damage' . . . is of a different kind, quality or degree than initially expected or intended."

In *Allstate Ins Co v McCarn (After Remand) (McCarn II)*, 471 Mich 283, 289-290; 683 NW2d 656 (2004), our Supreme Court interpreted an intentional/criminal acts exclusion that is similar to the provision at issue here. In *McCarn II*, the clause excluded "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 . . . even if . . . such bodily injury or property damage is of a different kind or degree than reasonably expected." *Id*. at 289. The Court set out a two-pronged test to determine whether intentional/criminal acts exclusionary clauses bar coverage. *Id*. Coverage is barred if: 1) the insured acted either intentionally or criminally, and 2) the resulting injuries were the reasonably expected result of the insured's intentional or criminal act. *Id*. at 289-290. The second prong of the test is an objective inquiry, i.e., whether a reasonable person, possessed of the totality of the facts possessed by the insured, would have expected the resulting injury. *Id*. at 290.

Here, Young was convicted of second-degree murder for Reynolds' death. An "essential element" of second-degree murder is a finding by the jury that either (1) Young had the intent to kill Reynolds, (2) Young had the intent to cause Reynolds great bodily harm, or (3) Young had the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior was to cause Reynolds's death or cause Reynolds great bodily harm. *Goecke*, *supra* at 464. Further, "[a]n insured's conviction of a specific intent crime may conclusively establish the requisite intent for the application of the insurer's exclusionary intentional acts clause." *Auto-Owners Ins Co v Harrington*, 212 Mich App 682, 687; 538 NW2d 106 (1995). Therefore, the first prong of the *McCarn II* test is satisfied because there is no question of fact regarding whether Young committed an intentional and criminal act.

Further, the second prong of the *McCarn II* test is satisfied because the resulting injuries to Reynolds were the reasonably expected result of Young's intentional and criminal act of firing the gun at Reynolds. A reasonable person, possessed of the totality of the facts possessed by Young, who fires a gun from close range toward the back of a person may reasonably expect that it is highly likely that injury or death will result from such action. *Id*. at 290. Accordingly, the intentional acts exclusion of the policy applies to preclude coverage. See also *Fisher*, *supra* at 373-378. The trial court did not err in determining that the intentional acts exclusion of the policy applies and that plaintiff is relieved of its obligation to indemnify or defend Whitehead and Young. Accordingly, the trial court properly granted summary disposition in favor of plaintiff.

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens