STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

AUTO CLUB GROUP INSURANCE COMPANY,

Plaintiff,

v

Case No. 05-24456-NZ
HON. PHILIP E. RODGERS, JR.

GARY LEIRSTEIN and CHESTER WILSON,

Defendants.

Joseph K. Bachrach (P25498)
Attorney for Plaintiff

Angelo A. Plakas (P18934)
Attorney for Defendant Gary Leirstein

John R. VanderVeen (P40467)
Attorney for Defendant Chester Wilson

DECISION AND ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY DISPOSITION AND
GRANTING SUMMARY DISPOSITION FOR THE DEFENDANTS

While deer hunting together on November 15, 2003, Defendant Gary Leirstein accidentally shot Defendant Chester Wilson resulting in a serious injury to Defendant Wilson's right leg. Defendant Wilson made a claim against Defendant Leirstein's homeowner's insurance carrier, Plaintiff Auto Club Insurance Company ("Auto Club"). Auto Club ultimately denied the claim under the "Intentional Act" and "Criminal Act" exclusions of the policy.

Defendant Wilson filed a negligence action against Defendant Leirstein which is currently pending in the Mecosta County Circuit Court, Case No. 04-16527-NI. In that action he alleges that Defendant Leirstein owed a duty to refrain from actions which bore "an unreasonable risk of causing [Wilson's] injury and Leirstein was "negligent" in "failing to use good judgment" and "in careless discharge of his weapon where [Wilson] might suffer injury."

Auto Club filed this declaratory judgment action seeking an order holding that it need not provide Defendant Leirstein with a defense and need not provide coverage. Auto Club filed a

Motion for Summary Disposition pursuant to MCR 2.116(C)(10) arguing that it is entitled to judgment as a matter of law because there is no genuine issue of material fact and that the shooting does not constitute an insured "occurrence" and is expressly excluded from coverage because negligently or carelessly discharging a firearm causing injury is a criminal act, pursuant to MCLA 752.861. The motion was scheduled for hearing on Monday, October 3, 2005, but due to counsel's scheduling conflict, the Court waived oral argument and has decided the motion on the written submissions. MCR 2.119(E)(3).

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a

> nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

UNDISPUTED FACTS

It is undisputed that Leirstein and Wilson are both experienced hunters and have been friends and hunting companions for a number of years. On the occasion in question, they were legally hunting on land that they own together. They were each familiar with the land and with the hunting blind occupied by Wilson and the 8' tripod stand occupied by Leirstein. They were using appropriate safety precautions – wearing hunter's orange and communicating by two-way radios. Neither had consumed alcohol.

Leirstein originally maintained that he was aware of the location of the blind where Wilson was and he shot from the tripod stand at a deer that was to the south of the blind. He knew he had to shoot before the deer entered the open field because of the location of the blind. He thought he hit the deer because it initially went down, but then jumped back up. Leirstein later admitted that he thought the blind was further to the north than it actually was. After Leirstein heard Wilson on the radio indicating that he had been shot and needed help, he went to the blind and Wilson was transported to the hospital in Mount Pleasant.

Detective Borkovich of the Michigan Department of Natural Resources investigated the incident. He did not seek any criminal charges against Leirstein.

THE RELEVANT POLICY PROVISIONS

Auto Club first argues that it is not obligated to defend or provide coverage because the shooting was not a covered "occurrence."

The homeowner's policy in question provides liability coverage in the event of an event defined as an "occurrence" meaning "an accident" including "injurious exposure to conditions which result, during the policy term, in bodily injury or property damage." The policy defines an "accident" as "a fortuitous event or chance happening that is neither reasonably anticipated nor

reasonably foreseen from the standpoint of both any insured person and any person suffering injury or damages as a result."

Under Part II, the policy excludes from coverage "bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage." Under Part II, the policy excludes from coverage "bodily injury or property damage resulting from a criminal act or omission committed by anyone or an act or omission, criminal in nature, committed by an insured person . . . This exclusion applies whether or not anyone is charged with or convicted of a crime."

APPLICABLE LAW

The construction and interpretation of insurance contracts is a question of law. *Henderson v State Farm Fire Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). An insurer is not required to defend its insured against claims specifically excluded from policy coverage. *Protective Nat'l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). Where policy language is clear, this Court is bound by the specific language set forth in the policy. *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 657; 572 NW2d 686 (1997).

In *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137-139; 610 NW2d 272 (2000), the Court stated:

> It is well settled that if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured. *Royce v Citizens Ins Co*, 219 Mich App 537, 543; 557 NW2d 144 (1996), citing with approval *American Bumper Mfg Co v Hartford Fire Ins Co*, 207 Mich App 60, 67; 523 NW2d 841 (1994), aff'd 452 Mich 440; 550 NW2d 475 (1996). Further,[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Dochod v Central Mutual Ins Co*, 81 Mich App 63; 264 NW2d 122 (1978). The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third-party's allegations to analyze whether coverage is possible. *Shepard Marine Construction Co v Maryland Casualty Co*, 73 Mich App 62; 250 NW2d 541 (1976). In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. 14 Couch on Insurance 2d, 51:45, p 538. *Western Casualty Surety Group v Coloma Twp*, 140 Mich App 516, 520-521; 364 NW2d 367

(1985), quoting with approval *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980).

It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). In order to determine whether an insurer has a duty to defend its insured, the courts must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 402; 531 NW2d 168 (1995). Generally, an insurance policy is a contract between the insurer and the insured. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

If a trial court is presented with a dispute between these parties over the meaning of the policy, the trial court must determine what the agreement is and enforce it. *Kass v Wolf*, 212 Mich App 600, 604; 538 NW2d 77 (1995). When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy. *Churchman, supra* at 566. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. *Hosking v State Farm Mutual Automobile Ins Co*, 198 Mich App 632, 633-634; 499 NW2d 436 (1993). A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. *Trierweiler v Frankenmuth Mutual Ins Co*, 216 Mich App 653, 656-657; 550 NW2d 577 (1996). If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. *Heniser v Frankenmuth Mutual Ins Co*, 449 Mich 155, 160; 534 NW2d 502 (1995). However, if the contract is unambiguous, the trial court must enforce it as written. *Arco, supra* at 403; *Royce, supra* at 542-543.

OCCURRENCE

The Auto Club policy provides coverage for injury caused by an "occurrence" to which the policy applies, and also provides that the defense provision of the policy applies solely to occurrences covered under the policy. An "occurrence" is defined as "an accident" - "a fortuitous event or chance happening that is neither reasonably anticipated nor reasonably foreseen from the standpoint of both any insured person and any person suffering injury or damages as a result."

The plain language of the policy demonstrates that the policy excludes both coverage and a defense for occurrences resulting in injury that was subjectively expected by the insured or the injured person. This language differs from the language of an insurance policy excluding coverage for events "caused intentionally" in that it excludes coverage for occurrences of injury that were subjectively expected by the insured or the injured. *Metropolitan Property & Liability Ins Co v DiCicco*, 432 Mich 656, 673, 443 NW2d 734 (1989). Thus, this policy exclusion will preclude coverage in this case if the court can find as a matter of law that, either Leirstein intended to shoot Wilson and cause him injury or, from the standpoint of either Leirstein or Wilson, the bodily injury to Wilson was expected.

Wilson does not allege in the underlying personal injury suit that Leirstein specifically intended to injure him. He also does not allege that he or Leirstein expected it. Nothing in the submissions in support of the motion would allow a rationale trier of fact to conclude that Leirstein intended the injury or that he or Wilson reasonably anticipated it would occur.

Therefore, the Court finds as a matter of law that Leirstein did not intend to injure Wilson. The Court further finds as a matter of law that neither Leirstein nor Wilson, from their subjective standpoints, reasonably anticipated Wilson would be shot.

INTENTIONAL OR CRIMINAL CONDUCT

Auto Club next argues that it is not obligated to provide coverage because the incident falls within the policy's express exclusion for intentional or criminal conduct. Auto Club relies upon MCLA § 752.861 which makes it a misdemeanor criminal offense for any person to carelessly, recklessly or negligently discharge a firearm causing death or injury and Leirstein's admission that he intentionally shot the rifle thinking that the blind occupied by Wilson was further to the north than it actually was. Auto Club states in its brief, however, that "Mr. Leirstein did not testify that the gun went off accidentally, such as, for example, by dropping it or by absent-mindedly pulling the trigger. He was, in fact, aiming at something, missed it, and *did not realize* that directly in line with what he was aiming at was the blind containing Mr. Wilson." [Emphasis added].

Auto Club refers the Court to two recent cases which it contends have addressed this exact issue. In *ACGIC v Daniel*, 254 Mich App 1; 658 NW2d 193 (2002), the insured unintentionally shot the plaintiff while they were deer hunting in the same deer blind. Both of

them were drinking beer before the shooting incident. When police officers arrived, the insured's blood alcohol content measured 0.103. She later pleaded guilty to a charge of careless discharge of a firearm resulting in injury, MCL § 752.861. Thus, there was no dispute in that case that the incident met the definition of "criminal act or omission" because the intoxicated insured pleaded guilty to the criminal charge of careless discharge of a firearm. The issue actually addressed by the Court was whether the policy's criminal act exclusion, which denies coverage for "bodily injury or property damage resulting from a criminal act or omission," merely excluded reimbursement for actual bodily injury, but not for other damages such as medical bills, wage loss, mental anguish, fright and shock, denial of social pleasure and enjoyment, and so forth. *Id* at 4. Thus, the *Daniel's* case is not on point and not controlling.

In *ACGIC v Weitzel & Edmiston*, an unpublished 2005 case, the insured fatally shot his hunting companion and stated that he thought he was shooting a deer that he had just observed. He pleaded *nolo contendre* to hunting while intoxicated, in exchange for dismissal of the charges brought against him for careless or negligent discharge of a firearm under MCL § 752.681. The Court noted that the policy excluded coverage for bodily injury resulting from a criminal act committed by the insured, regardless of whether the person intended to commit a criminal act, or was charged with or convicted of a crime. The Court further noted that: "In considering whether a policy exclusion for criminal conduct bars coverage, the relevant inquiry is whether criminal conduct occurred, not whether it was charged."

While this unpublished case is not binding precedent and this Court is not constrained to follow it, it is interesting to again note the distinction between it and the instant case. In *Weitzel & Edmiston,* the insured was intoxicated and he pleaded guilty to a charge of hunting while intoxicated in exchange for dismissal of a charge of careless or negligent discharge of a firearm. Once again, there was no dispute that the insured committed a criminal act.

Even though this Court is not required to follow *Weitzel & Edmiston,* this Court agrees that the relevant inquiry is whether criminal conduct occurred. In the instant case, nothing has been presented to the Court that would support a finding that Leirstein committed a criminal act. Leirstein was lawfully hunting. He was not intoxicated or otherwise impaired. There is no dispute that he spotted a deer and intentionally shot his rifle at the deer, as opposed to shooting a hunter that he thought was a deer. The bullet either missed the deer entirely or ricocheted off of some object and struck Wilson in the leg. At the time, Leirstein was exercising proper hunting

safety, he was aware that Wilson was occupying the blind, both men were wearing hunter's orange, they were in contact by radio and aware of the location of all of the other hunters, and Leirstein took what he believed to be the location of the blind into account before he shot. Whether he was mistaken about the exact location of the blind or whether the bullet ricocheted, we will probably never know, but based on these undisputed facts, no rationale juror could possibly find that Leirstein committed a criminal act. All that the evidence shows is that Leirstein's shooting of Wilson was an unfortunate and unintended accident.

CONCLUSION

Hunting accidents usually result in tragic consequences. The Legislature has wisely seen fit to punish hunters who engage in careless, reckless or negligent conduct and injure or kill someone. Yet, the Legislature also recognizes that some shootings are accidental and not criminal.[1] There is no evidence before this Court that would support a finding that Leirstein acted with criminal carelessness, recklessness or negligence when he discharged his rifle. For the reasons stated herein, the Plaintiff Auto Club's Motion for Summary Disposition is denied and summary disposition is granted in favor of the Defendants Leirstein and Wilson pursuant to MCR 2.116(I)(2). The Plaintiff has an obligation to defend and indemnify its insured.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/21/05

[1] CJI2d 16.17(6) The fact that an accident occurred or that someone was killed does not, by itself, mean that the defendant was negligent.