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Pa. High Court to Consider Duty to Defend in Alleged Accidental Shooting

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On July 10, the Pennsylvania Supreme Court granted a petition of allowance of appeal in *Erie Insurance Exchange v. Moore*, No. 87 WAL 2018, 2018 Pa. LEXIS 3535, a case involving an allegedly accidental shooting. The court's statement of issues to be addressed signals the possibility of a change in Pennsylvania law regarding the duty to defend, where the insured is alleged to have engaged in a violent crime.

The facts of the case are grisly. On Sept. 26, 2013, Harold McCutcheon went to the home of his ex-wife, Terry L. McCutcheon, killed her, and then committed suicide. Before Harold McCutcheon killed himself, Terry McCutcheon's boyfriend, Richard Carly, arrived unexpectedly at the home, struggled with Harold McCutcheon, and was seriously injured by shots fired from Harold McCutcheon's gun, see *Erie Insurance Exchange v. Moore*, 175 A.3d 999, 1001 (Pa. Super. 2017).

Carly brought suit against Harold McCutcheon's estate in February 2014. The complaint alleged that on

Sept. 26, 2013, Harold McCutcheon Jr. left his children a written note stating that he was going to the home of his ex-wife, Terry L. McCutcheon, to kill her and then commit suicide. That night Terry McCutcheon was at the home of her boyfriend, Carly. She left Carly's home shortly before 11 p.m. to go to her home. When Terry McCutcheon arrived home she called Carly on her cellphone to let him know she'd arrived home safely. That conversation was interrupted when Harold McCutcheon, who had broken into the home earlier that night, assaulted Terry McCutcheon and shot her to death. Carly called Terry McCutcheon back but received no answer.

Concerned, Carly drove to Terry McCutcheon's house. He rang the doorbell but received no answer. Carly put his hand on the door-knob to open the door when the door was suddenly pulled inward by Harold McCutcheon, who grabbed Carly by the shirt and pulled him into the house. The complaint alleged that McCutcheon was "screaming, swearing, incoherent, and acting crazy." Once Carly was



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inside the home, a struggle ensued between Carly and McCutcheon, who still had the gun he'd used to kill Terry McCutcheon in his hand. In the course of the struggle Harold McCutcheon "negligently, carelessly and recklessly caused the weapon to be fired which struck [Carly] in the face." The complaint alleged that Carly's injuries were caused by McCutcheon negligent, careless and reckless conduct.

At the time of the incident, McCutcheon was insured under a homeowner's insurance policy and an excess liability insurance policy issued by Erie Insurance. Erie filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify McCutcheon's

estate against Carly's claim. Erie's position was that Carly's injuries were not caused by an "occurrence," defined, in pertinent part, as an accident. Erie also contended that claim was excluded from coverage by the policies' intentional acts exclusions which exclude coverage for injuries "expected or intended" by the insured.

The trial court granted summary judgment to Erie. Relying in part on facts adduced in discovery in the Carly case, the court explained that the evidence demonstrated that McCutcheon expected or intended to cause serious harm to Carly. The trial court also stated that the complaint's allegations made clear that the type of injury Carly suffered was a reasonably foreseeable consequence of McCutcheon's actions, pointing to the complaint's allegation that McCutcheon's conduct created an unreasonable risk of physical harm to Carly.

On appeal, the Superior Court framed the issue as how the policy terms applied to infliction of a gunshot wound during an altercation between two participants.

First, the court noted that the trial court had erred by considering information other than the complaint's allegations. Under Pennsylvania law, the duty to defend is based solely on the basis of the complaint's factual allegations. Other information is not to be considered.

Turning to the substantive issue, the court observed that not all inju-

ries from gun violence are intentional, and that coverage does not turn on the nature of firearms themselves as dangerous instrumentalities. The question of whether an insurance policy covers injury from a gun does not turn merely on whether harm should have been "reasonably anticipated." Citing *United Services Automobile Association v. Elitzky*, 517 A.2d 982 (1986), the court noted that insurance coverage is not excluded because an insured's actions are intentional unless he also intended the resultant damage. Intent means the actor desired to cause the consequences of his act, or that he acted knowing that such consequences were substantially certain to result.

Reviewing the allegations of the complaint, the Superior Court observed that the facts alleged fairly portrayed a situation in which injury may have been inflicted unintentionally. While the allegations made clear that McCutcheon intended to kill his ex-wife and himself, there was no expressed allegation that McCutcheon intended to harm Carly. Carly's arrival at the home was unplanned and unexpected. There was also nothing in the complaint indicating that McCutcheon knew that Carly was his ex-wife's boyfriend and thus no reason to infer that McCutcheon had any animus toward Carly, and therefore had a motivation to deliberately shoot him. The court also observed that viewing the operative events from McCutcheon's perspective it

is possible that McCutcheon may have fired the shots defensively to ward off Carly.

In sum, the Superior Court concluded that because the complaint alleged that the shooting was accidental, the shooting must be considered an "event occurring unintentionally" and thus within the coverage of the policies. And because the complaint did not allege that McCutcheon intended the resultant damage, the intentional act exclusions did not apply. The court therefore held that Erie had a duty to defend Carly's tort action.

Erie filed a petition for allowance of appeal to the Supreme Court and this petition was granted on July 10. The Supreme Court granted the petition to consider the following issues: did the Superior Court's conclusion that the facts alleged an "occurrence" conflict with Supreme Court precedent? Did the Superior Court's ruling conflict with its decision in *American National Property & Casualty v. Hearn*, 93 A.3d 880 (Pa. Super. 2014), and misconstrue the intentional acts exclusion? And did the Superior Court's ruling conflict with Pennsylvania public policy which, as stated in *Mutual Benefit Insurance v. Haver*, 725 A.2d 743, 747 (Pa. 1999), holds that liability insurance does not cover damages caused as a result of evil or illegal conduct?

In *Hearn* the insured, Brandon Hearn, was at a friend's house, Clayton Russell, watching Russell play a video game in his parents'

basement. While Russell was concentrating on the game, Hearn came from behind and struck him in the groin. Russell felt immediate pain in the groin area and eventually required surgery for torsion of the testicle. Russell sued Hearn for negligence, battery, assault, negligent infliction of emotional distress, and intentional infliction of emotional distress. The complaint alleged that Hearn came from under Russell, hitting him in the groin with his forearm while Russell's back was turned and while he was distracted by the video game. Hearn sought coverage under his parents' homeowners' insurance policy and the insurer filed a declaratory judgment action.

The Superior Court held that the claim was not covered. Although Russell's complaint included allegations of negligence, the Superior Court held that the complaint alleged that Hearn's act of hitting Russell in the groin was intentional. It also noted that Hearn had testified in a deposition taken in Russell's suit that he had intended to strike Russell in the groin, but that he'd only intended to cause him momentary pain. The Superior Court distinguished *Elitzky* in which it had held that the intentional acts exclusion applies only where the insured intends to cause the same general type of harm that occurred. The intentional act exclusion in *Hearn* was broader than that in *Elitzky*. In *Hearn*, the exclusion stated that it applied even if the actual injury or damage was

different than expected or intended.

Mutual Benefit Insurance v. Haver, 725 A.2d 743 (Pa. 1999), involved a suit against a pharmacist, Joseph Haver, for selling prescription pain killers and sleeping pills to a customer, Candice Macko, without a prescription. Macko sued Haver alleging, inter alia, negligence. They also alleged that Haver continued selling the drugs to Macko even though her family members, personal physician, and psychologist contacted Haver and told him not to do so. Although not alleged in the complaint, prior to the filing of the action Haver had plead guilty to federal criminal charges of knowingly, intentionally, and unlawfully distributing controlled substances to Macko.

The insurer denied coverage based on an exclusion in the policy for bodily injury, which was a consequence of "an insured's willful harm or knowing endangerment." Haver argued that the complaint's negligence allegations triggered a defense, but the Supreme Court found that the factual allegations of the complaint were subject to the exclusion, and held that the insurer had no duty to defend.

Justice Sandra Newman authored a concurring opinion in which three other justices joined. In that opinion the justice wrote that the court should not concentrate only on Haver's criminal actions and whether his conduct fit within a policy exclusion. Instead, the justice

argued that regardless of the averments in the complaint or the language of the policy, it was against public policy to permit insurance coverage for an illegal drug transaction.

The common thread that runs through *Mutual Benefit Insurance v. Haver*, 725 A.2d 743, 747 (Pa. 1999), *American National Property & Casualty v. Hearn*, 93 A.3d 880 (Pa. Super. 2014), and most recently *Erie Insurance Exchange v. Moore*, 175 A.3d 999, 1001 (Pa. Super. 2017), is that in each of those cases the courts considered, to one degree or another, information outside of the complaint in determining the duty to defend. It appears that the Supreme Court may be poised to announce a new rule applicable where the claim involves criminal activity.

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