IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

SC: 122849
COA: 213041
Shiawassee CC: 97-000369-CK

ROBERT DANIEL MCCARN, a Minor; ERNEST WARD MCCARN; PATRICIA ANN MCCARN,

Defendants,

and

NANCY S. LABELLE, Personal Representative of the Estate of KEVIN CHARLES LABELLE, Deceased,

Defendant-Appellant.

BRIEF ON APPEAL - APPELLANT

Oral Argument Requested

Respectfully submitted,

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Dated: December 23, 2003

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TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
STATEMENT OF QUESTION INVOLVED	iii
STATEMENT OF FACTS	2
A. NATURE OF THE ACTION	2
B. CHARACTER OF PROCEEDINGS	3
C. SUBSTANCE OF PROOFS	7
D. INSURANCE POLICY LANGUAGE	10
E. COURT OF APPEALS REVERSAL ON REMAND	12
ARGUMENT	12
A. THE ALLSTATE POLICY EXCLUSION LANGUAGE	13
B. WHETHER THE BODILY INJURY WAS REASONABLY EXPECTED IS AN ISSUE OF FACT	17
RELIEF	21

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DRAMIS,
DUGHTON
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TREE ROAD
MICHIGAN
-4207

517-394-7500
394-7510

INDEX OF AUTHORITIES

CASE LAW **PAGE**

Allstate v Freeman,
432 Mich 656; 443 NW2d 734
Reh Den. with addenda to opinion
433 Mich 1202 (1989) 15,16,17

Allstate v McCarn,
466 Mich 277 (2002) 3,5,13,17

Buczkowski v Allstate Insurance,
447 Mich 669; 526 NW2d 589 (1994) 6,7,17,18

Fire Insurance Exchange v Diehl,
450 Mich 678, 545 NW2d 602 (1996) 17

Frankenmuth Mutual Insurance Company v Masters,
460 Mich 105; 595 NW2d 832 (1999) 5,11

Guerdon Industries, Inc. v Fidelity and Casualty Company of New York,
371 Mich 12; 18-19; 123 NW2d 143 (1963) 11

Nabozny v Burkhardt,
461 Mich 471; 606 NW2d 639 (2000) 5,11

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TREE ROAD
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-394-7510

STATEMENT OF QUESTION INVOLVED

WHETHER POINTING AND DISCHARGING A WEAPON THAT THE SHOOTER BELIEVED TO BE UNLOADED AT THE TIME IS CONDUCT EXCLUDED AS A MATTER OF LAW FROM COVERAGE UNDER AN INSURANCE POLICY EXCLUSION FOR BODILY INJURY WHICH "MAY REASONABLY BE EXPECTED TO RESULT FROM THE INTENTIONAL OR CRIMINAL ACT" OF THE INSURED.

The trial court answered "NO."

Appellant LaBelle contends that the answer should be "NO."

Appellee Allstate contends that the answer should be "YES"

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, MICHIGAN
11-4207

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STATEMENT OF FACTS

A. Nature of the Action

This appeal stems from a declaratory judgment action filed by Appellee, Allstate Insurance Company, seeking a declaration that it had no duty to defend or indemnify its insured, Robert Daniel McCarn, a minor, or his grandparents, Ernest and Patricia McCarn, all named Defendants in the action below. With its Complaint, Allstate Insurance Company filed a demand for jury and paid the jury fee.

On December 15, 1995, two sixteen year old boys, Robert McCarn and his friend decedent Kevin LaBelle, were "horsing around" at McCarn's grandparents' home with a shot gun owned by Robert and usually kept underneath his grandparents' bed. During the course of their horseplay with this weapon, Robert pointed the .410 shot gun at his friend Kevin, motioned as if he was going to pull the trigger, and then ultimately did pull the trigger causing the gun to discharge at close range. Kevin died from his injuries.

The trial court and all three Court of Appeals judges acknowledged that the evidence was undisputed that Robert was unaware that the weapon was loaded, and that he did not intend to fire a bullet into Kevin. The majority in the Supreme Court likewise agreed that the facts demonstrated that Robert did not believe the gun was loaded and did not expect the gun to discharge:

> "We agree that this case does not present a question of fact. The fact that Robert believed the gun was unloaded is a matter about which there is no genuine issue of material fact. This is because there is nothing in the record to reasonably support a conclusion that, contrary to Robert's testimony that he believe the gun was unloaded, he consciously believed the gun was loaded, or even contemplated that there was any possibility that it was loaded when he pulled the trigger. Even

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, MICHIGAN
1-4207
517-394-7500
-394-7510

> Plaintiff, the insurer, acknowledged that Robert believed the firearm was unloaded when he pulled the trigger . . ."
> McCarn, supra, at 285

B. Character of Proceedings

A wrongful death action was filed by the Estate of Kevin LaBelle against Robert McCarn and his grandparents. Appellee Allstate filed a declaratory judgment action claiming that the homeowners insurance policy purchased by Robert McCarn's grandparents did not provide coverage for the claim because the fatal shooting from which the wrongful death action arose did not constitute an "occurrence" within the meaning of the insurance policy. The policy defines an "occurrence" as an "accident resulting in bodily injury." Allstate also asserted that coverage was precluded under an exclusionary clause which would preclude coverage for the intentional or criminal acts of the insured.

Following briefs and oral argument, the trial court granted Summary Disposition in favor of all Defendants, concluding that there was coverage for the shooting which he determined was an "occurrence" within the meaning of the policy. **The trial court also concluded that such coverage was not precluded by the intentional/criminal acts exclusion of the policy.** It is the language contained in an exclusion in Allstate's policy which the Court of Appeals addressed on remand from the Supreme Court in this action, and which is now the subject of this appeal. That language in pertinent part reads as follows:

> "We do not cover any 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."

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, MICHIGAN
1-4207
517-394-7500
-394-7510

The facts at the trial court level were undisputed that Robert was unaware that the gun that he pointed at his friend, Kevin LaBelle, was loaded at the time that he pointed and pulled the trigger. Further, the facts relied upon by the trial court in granting Summary Disposition in favor of the Defendants included the conclusion that Robert in fact believed that the gun that he was pointing at his friend was "unloaded" at the time.

The trial court, in his Opinion rendered from the bench, determined that the two boys were "horsing around" with the gun, and that Robert McCarn, the insured, did not expect that a gun he believed to be unloaded would in fact fire:

> "In this case, it seems clear to this court that the horsing around, the fooling around with the gun was foolhardy, it was immature, and it was dangerous, but certainly by our standards it was dangerous, but by the standards that seem to be embodied in the testimony of the youth here who pulled the trigger, he never intended the act of shooting the gun. **Again, whether we look at immaturity in the context of his age, in the context of his problems exhibited by testimony of treatment in a psychiatric facility, trouble in school, I can't help but come to any other conclusion but that the shooting death was not the expected result of pulling the trigger of what the shooter thought to be an unloaded gun.**"
> (Transcript of Proceedings, February 6, 1998, p 41; Appellee's Exhibit E, attached to Appellee's Brief on Appeal; Appellant's Appendix, p 135a)

The Court of Appeals, in its first Opinion on appeal herein, likewise acknowledged that Robert did not intend to fire a bullet into Kevin:

> "Although Robert did not intend to fire a bullet into Kevin, he did intend to aim the gun at Kevin's face to pull back the hammer and to pull the trigger. In other words, Robert intended to set in motion a dangerous weapon, but with limited consequences."
> (Slip Opinion, p 3; Appellant's Appendix, p 146a)

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, MICHIGAN
11-4207
517-394-7500
-394-7510

In its Opinion reversing the trial court, the majority in the original Court of Appeals decision herein (McCarn I), relied upon the decisions of the Michigan Supreme Court in Frankenmuth Mutual Insurance Company v Masters, 460 Mich 105; 595 NW2d 832 (1999) and Nabozny v Burkhardt, 461 Mich 471; 606 NW2d 639 (2000).

The majority, in its Opinion reversing the Circuit Court grant of Summary Disposition in favor of all Defendants, concluded that Robert's intentional action in pulling the trigger created a "direct risk of harm that precludes coverage." The Court of Appeals, citing the Supreme Court decisions in Masters, supra and Nabozny, supra held that the circumstances of the shooting as described above did not constitute an "occurrence" resulting from an "accident" within the meaning of the applicable homeowners liability insurance policy.

In reversing the original Court of Appeals decision herein, the Michigan Supreme Court distinguished this case from Masters and Nabozny as follows:

> "Thus, unlike in Nabozny, 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. Similarly, unlike Masters, where the consequence of the act was intended, here the consequence - shot leaving the gun - was not intended. Furthermore, even if one used some variation on a foreseeability test, no bodily harm could have been foreseen from Robert'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 Robert believed them to be, that shot would be discharged. **Therefore, we cannot say Robert should have expected the unfortunate consequences of his act.** The discharge of the shot was an accident and entitled to coverage unless a policy exclusion applies."
> McCarn, supra at 290 (Emphasis supplied)

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, MICHIGAN
11-4207

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In light of its conclusion that the events resulting in bodily injury to Kevin LaBelle were an "accident" within the meaning of the coverage language of the policy, the Supreme Court remanded this case to the Court of Appeals with instructions that the Court of Appeals on remand consider the applicability of the intentional act/criminal act exclusion that the Court of Appeals had not addressed below.

On remand, the Court of Appeals in an unpublished, non-unanimous opinion released on November 15, 2002, reversed the Order of the Shiawassee County Circuit Court entered on June 23, 1998, in which the Circuit Court had granted Summary Disposition in favor of all Defendants. In so doing, the majority opinion in the Court of Appeals on remand specifically reversed the decision of the trial court in which the trial judge had determined that the language of the subject exclusion for "intentional/criminal acts" contained in the Allstate Insurance Company policy did not preclude coverage under these facts.

In its opinion on remand, the Court of Appeals held that an exclusionary clause which contains the words "may reasonably be expected" is evaluated using an "objective standard," but the word "expected" in an exclusionary clause of an insurance policy means more than "reasonably foreseeable," rather, the indications must be sufficient to forewarn the insured that the "results are highly likely to occur." The majority, therefore, held that Robert McCarn "could reasonably expect that his criminal act would result in LaBelle's death." Judge Helene White, in her dissent, in reliance upon the Supreme Court decision in Buczkowski v Allstate Insurance Company, 447 Mich 669; 526 NW2d 589 (1994), wrote that reasonable minds could differ regarding whether Kevin Labelle's death occurred as the "natural, foreseeable, expected, and anticipated result of Robert's intentional or

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, MICHIGAN
11-4207
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7-394-7510

criminal acts." Judge White would remand to the trial court consistent with Buczkowski which determined that the issue of what was "reasonably expected" in that case was a question of fact. (Court of Appeals Opinion on Remand, Appellant's Appendix 203a).

From the November 15, 2002 non-unanimous, unpublished opinion of the Court of Appeals, Appellant filed a timely Application for Leave to Appeal which was granted by this Court on November 6, 2003.

C. Substance of Proofs

The facts relating to whether or not the shooting of Kevin LaBelle gave rise to a "bodily injury . . . intended by, or which may reasonably be expected to result from the intentional or criminal acts . . . of any insured person" within the meaning of the homeowners insurance policy exclusion from coverage were presented to the trial court by way of deposition testimony, primarily from Robert McCarn and his grandparents. The pertinent facts pertaining to the issue of whether or not the exclusion applies are summarized as follows:

1. Robert considered Kevin LaBelle to be his friend; **(Deposition, Robert McCarn, pp 28-30; Appellant's Appendix, pp 48a-50a)**

2. Robert believed that he was the last person to use the shotgun several weeks prior; **(Deposition, Robert McCarn, p 24; Appellant's Appendix, p 44a)**

3. Robert forgot that he had not unloaded the gun the last time that he had used it; **(Deposition, Robert McCarn, pp 27-28; Appellant's Appendix, pp 47a-48a)**

4. Robert believed that the gun was not loaded at the time that he pointed it at Kevin; **(Deposition, Robert McCarn, pp 41; 44; Appellant's Appendix, p 61a; 64a)**

5. Robert did not intend the gun to fire; **(Deposition Robert McCarn, p 40; Appellant's Appendix, p 60a)**

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11-4207
E 517-394-7500
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6. Robert and his friend Kevin were "horsing around" with the gun as they had done on previous occasions; **(Deposition, Robert McCarn, p 44; Appellant's Appendix, p 64a)**

7. Robert was surprised when the gun actually fired; **(Deposition, Robert McCarn, p 46; Appellant's Appendix, p 66a)**

8. Immediately following the discharge of the gun, Robert called 9-1-1. **(Deposition, Robert McCarn, p 46; Appellant's Appendix, 66a)**

(See Appellant's Brief on Appeal, Appellant's Appendix B, Deposition Transcript of Robert D. McCarn)

In addition to those facts summarized above from the deposition of Robert McCarn, additional facts were presented to the trial court based upon information contained in the report of the State Police investigating officer attached to Appellee Allstate's Brief on Appeal, Appendix D; Appellant's Appendix, p 155a. The State Police Report information is summarized as follows:

1. Kevin LaBelle drove Robert home from school on December 15, 1995;

2. Kevin and Robert fixed themselves a sandwich to eat and played with a guinea pig in the home;

3. Robert offered to show Kevin his 410 shotgun and retrieved it from its case in his grandparents' bedroom;

4. Robert reported that he and Kevin had "fooled around" with guns both at Kevin's house and at Robert's house on approximately four prior occasions;

5. Robert reported that they had each pointed a weapon at each other and pulled the trigger in the past, utilizing empty weapons;

6. Robert reported that neither he nor Kevin checked the gun at any time to determine if it was loaded;

7. Robert said that he was thinking that when he pulled the trigger he would hear a "click;"

8. Robert repeatedly stated that he had no intention of hurting Kevin LaBelle and had no knowledge that the weapon was loaded.

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517-394-7500
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At the trial level, additional evidence was presented to the trial court regarding the last time that Robert had used this particular weapon prior to December 15, 1995. This evidence indicated that Robert had last used the gun for rabbit hunting in the fall of 1995, and then later for target practice in the back yard. Robert, in his deposition and statements to the police, could not recall if he had unloaded the weapon the last time he used it. He believed that on that prior occasion he had forgotten to unload the gun in his haste to put it away before his grandparents came home from work:

Q What did your grandfather tell you when he found out that you had been using this gun?

A He asked me if I was using it.

* * *

Q Did he prohibit you from using this gun when he was not home?

A Yes.

* * *

Q Do you recall whether after you used that gun you unloaded it?

A No.

Q You don't recall?

A No.

Q Is it possible that you left it loaded after using it?

A Yes.

Q When you finished using the gun for target shooting that day, were you in a hurry to put it away?

A Yes.

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, MICHIGAN
1-4207

517-394-7500
-394-7510

Q Is that because you were expecting your grandparents to come home?

A Yes.

Q And you knew that you weren't supposed to be using it?

A Yes.

Q So in your haste to put it away, you may have forgotten to unload the gun?

A Yes.

(Robert McCarn Deposition, pp 25-28; See Appellant's Brief on Appeal, Appendix B; Appellant's Appellant's Appendix, p 45a-48a)

D. Insurance Policy Language

Allstate relied upon two separate provisions in its insurance policy to deny coverage.

First, Allstate contended that the loss giving rise to the claim under the policy was not covered because it was not an "occurrence" within the meaning of the policy language." The coverage language in the policy (which has now been determined by this Court not to preclude coverage herein) reads as follows:

> "Coverage X
> Family Liability Protection
>
> Losses We Cover Under Coverage X:
>
> Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy."
> (Insurance Policy p 27; Appendix p 190a)

The trial court determined that the events of December 15, 1995 did constitute an occurrence within the meaning of the policy coverage language. The term "occurrence"

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TREE ROAD
MICHIGAN
1-4207

517-394-7500
-394-7510

was defined in the policy as "an accident." Although the term "accident" remains undefined in the Allstate policy, the term has been commonly defined since at least 1963 as:

> "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." Guerdon Industries, Inc. v Fidelity and Casualty Company of New York, 371 Mich App 12, 18-19; 123 NW2d 143 (1963)

In its first review of this matter on appeal, the Court of Appeals held that the trial court erroneously concluded that the events of December 15, 1995 were an "accident" within the meaning of the coverage language of the policy. The Court of Appeals relied upon the Michigan Supreme Court decisions in Frankenmuth Mutual Insurance Company v Masters, 460 Mich 105; 595 NW2d 832 (1999) and Nabozny v Burkhardt, 461 Mich 471; 606 NW2d 639 (2000) in support of the majority's conclusion:

> "Robert reasonably should have expected the consequences of his actions because of the direct risk of harm created by pointing a gun at another human being and pulling the trigger."

Following reversal of the Court of Appeals decision with regard to whether or not there was coverage under the policy, this matter was remanded to the Court of Appeals for determination as to whether or not coverage was excluded under the intentional/criminal act exclusionary language. That language in the Allstate Insurance policy provides that even if the events constitute an "occurrence" coverage can nevertheless be excluded under a separate provision of the policy which reads as follows:

> "Losses We Do Not Cover Under Coverage X:
>
> 1. We do not cover any 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. This exclusion applies even if:

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-394-7510

a) such insured person lacks the mental capacity to govern his or her conduct;

b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or

c) Such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime."
(Insurance policy, p 27; Appendix p 190a)

It is the language of the policy exclusion in the Allstate Homeowners Insurance policy which is now the subject of this second appeal to this Court.

E. Court of Appeals Reversal on Remand

As is indicated, the Court of Appeals on remand reversed the trial court's ruling on Motion for Summary Disposition on February 6, 1998 in which the trial court had determined that the exclusion did not bar coverage in this case.

In an unpublished non-unanimous opinion, the Court of Appeals held **as a matter of law** that Robert should reasonably have expected that injury would result from his conduct. Court of Appeals Opinion on Remand, Appellent's Appendix, p 203a.

In her dissent, Judge White would remand to the trial court for further proceedings on the basis that "reasonable minds could differ regarding whether Kevin's death occurred as the natural, foreseeable, expected, and anticipated result of Robert's intentional or criminal acts."

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-394-7510

ARGUMENT

POINTING AND DISCHARGING A WEAPON THAT THE SHOOTER BELIEVED TO BE UNLOADED AT THE TIME IS NOT CONDUCT EXCLUDED AS A MATTER OF LAW UNDER AN EXCLUSION FOR BODILY INJURY, REASONABLY EXPECTED TO RESULT FROM" THE CRIMINAL ACT CRIMINAL OR INTENTIONAL ACTS OF AN INSURED.

A. The Allstate Policy Exclusion Language

In its earlier decision in this case, this Court has held that the shooting death of Kevin LaBelle was an accident:

> "We hold today that Kevin LaBelle's death was an 'accident,' and thus an 'occurrence,' covered under the policy because Robert did not intend or reasonably expect that his actions, pointing and pulling a trigger of an unloaded gun, would cause any bodily injury to Kevin Labelle. We reverse the Judgment of the Court of Appeals and remand to the Court of Appeals to decide whether the criminal-acts exception in this policy excludes coverage."
> (Allstate v McCarn, et. al, 466 Mich 277 (2002) at p 291

In addressing the issue of coverage under the "occurrence" language of the policy, the Michigan Supreme Court held that whether the injury producing circumstances constituted an "accident" within the meaning of the occurrence language of the policy was to be determined from the standpoint of the insured, and that a "subjective standard" should be applied to the analysis.

On remand, the Michigan Court of Appeals in an unpublished non-unanimous opinion, held that the intentional-criminal acts exclusion applied to the facts of the present case, and that Allstate was relieved of its obligation to indemnify the insureds.

The language of the subject exclusion contained in Allstate's homeowners policy provides in pertinent part as follows:

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11-4207
E 517-394-7500
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> "We do not cover any bodily injury . . . intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. . .

It is first important to note that the language of the exclusion in the subject policy is different from language in other policies which give rise to an exclusion for "bodily injury resulting from a criminal act." It is insufficient for Allstate to contend in this case that the conduct of Robert which gave rise to the death of Kevin LaBelle was criminal and therefore no coverage exists. Rather it is Allstate's burden to show that the bodily injury to Kevin LaBelle was:

1. Intended by Robert McCarn; or
2. Reasonably expected to result from the intentional acts of Robert McCarn, or,
3. Reasonably expected to result from the criminal acts of Robert McCarn.

Analysis of the first prong of the exclusion is relatively uncomplicated. There is simply no evidence upon which any person may reasonably suggest that Robert subjectively intended to injure his friend Kevin LaBelle. It is precisely the absence of any such evidence that the majority in this Court pointed to in its earlier decision finding that the claims against Robert LaBelle were covered under the subject insurance policy as an occurrence.

With respect to the other two prongs of the exclusion in Allstate's policy, determination of the issue of applicability of the exclusion turns upon the language of the exclusion requiring that the bodily injury to Kevin LaBelle be determined to be such that "may reasonably be expected to result from" either the intentional or criminal acts or omissions of Robert McCarn.

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In 1989, the Michigan Supreme Court addressed a similar policy exclusion in Allstate Insurance Company v Freeman 432 Mich 656; 443 NW2d 734, Reh Denied with addenda to opinion, 433 Mich 1202 (1989). The exclusion in Freeman, supra at 685, provided:

> "We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person."

The majority of the court in Freeman, supra concluded that the exclusion language described above required application of a two-part objective test:

> "An insurer may relieve itself of its duty to defend and indemnify if (1) the insured acted either intentionally or criminally, and (2) the resulting injuries occurred as the natural, foreseeable, expected, and anticipated result of an insured's intentional acts."

Although the facts in Freeman involved a firearm's injury the circumstances were somewhat different than the instant case. In Freeman, supra, the injury resulted from a fight between neighbors in which Alonda Freeman left the scene of the fight, reentered her home, then, rather than remaining safely inside, reappeared with a loaded gun and fired towards her neighbor approximately 3 to 6 feet away. Based upon these facts and its interpretation of the exclusion language, the Court held that the exclusion applied to these facts. In so ruling, the Court stated some acts are "so nearly certain to produce injury that intent or expectation to injure should be inferred as a matter of law." The Court felt that it would be "patently disingenuous to say that injury would not be reasonably expected from the shooting incident" as described.

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In addressing the issue of interpretation of the subject exclusionary language, the Freeman Court focused on the word "expected" and engaged in the following analysis:

> "We agree with those courts which have held that 'for purposes of an exclusionary clause in an insurance policy the word 'expected' denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions." City of Carter Lake v Aetna Casualty and Surety Company, 604 F2d 1052, 1058-1059 (CA 8, 1979) We also reject defendant's contention that the standard we adopt today will preclude coverage for negligent acts by the insured. As the City of Carter Lake Court stated, supra at 1059, n 4:
>
> "The difference between "reasonably foreseeable" and "substantial probability" is the degree of expectability. A result is reasonably foreseeable if there are indications which would lead a reasonably prudent man to know that the particular results could follow from his acts. **Substantial probability is more than this. The indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications must also be sufficient to forewarn him that the results are highly likely to occur.**"
> (432 Mich at 675) (Emphasis added)

In addressing the question whether or not the "indications" were sufficient to forewarn a reasonably prudent person (i.e., Robert McCarn held to an objective standard), that the bodily injury to Kevin was "highly likely to occur" it is nevertheless important to take into consideration what "indications" the reasonably prudent person is looking to. In this case, those "indications" are well summarized by the majority of the Supreme Court who decided that this case satisfied the coverage language of the policy:

> "We agree that this case does not present a question of fact. The fact that Robert believed the gun was unloaded is a matter about which there is no genuine issue of material fact. This is because there is nothing in the record to reasonably support a conclusion that, contrary to Robert's testimony that he believed the gun was unloaded, he consciously believed the

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TREE ROAD
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11-4207
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7-394-7510

> gun was loaded, or even contemplated that there was any possibility that it was loaded when he pulled the trigger. Even plaintiff, the insurer, acknowledged that Robert believed the firearm was unloaded when he pulled the trigger . . ."
> (Allstate v McCarn, supra at 285-286)

In short, in assessing whether the bodily injury to Kevin LaBelle was a result "highly likely to occur" from the circumstances at hand, even viewed from the standpoint of a reasonably prudent person, consideration must still be given to the circumstances surrounding the event. Where the facts are undisputed that the person pulling the trigger subjectively believes that the gun is unloaded, it cannot be said that this case meets the same standard as was found in Freeman, supra, and which has been found in other cases where intent can be inferred as a matter of law.[1] Nowhere in Freeman, supra, or other cases addressing similar exclusionary language have our courts held that the determination of whether or not a reasonably prudent person would expect the result must be decided in a complete vacuum without any of the "indications" which might explain why the trigger was pulled.

B. Whether the Bodily Injury was Reasonably Expected is an Issue of Fact

Not every interpretation of every insurance policy exclusion is a question of law for the Court. In Buczkowski v Allstate Insurance, 447 Mich 669; 526 NW2d 589 (1994) the Supreme Court addressed a policy exclusion nearly identical to the instant case and found that under the circumstances of that case "reasonable minds might differ" concerning

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[1]See for example Fire Insurance Exchange v Diehl, 450 Mich 678, 545 NW2d 602 (1996) in which the Supreme Court discussed cases in which courts should infer the intent to injure where an adult sexually assaults a child, but adopted a "mixed objective - subjective" standard where similar exclusionary language was being applied to the conduct of a child who sexually molested another child.

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whether injury reasonably might have been expected to result from the insured's criminal or intentional act.

In Buczkowski, the insured, while intoxicated, fired a shotgun at plaintiff's car which was parked at his house after dark. Unknown to the insured, the plaintiff was sitting outside on a picnic table. The bullet ricocheted through the car tire and struck plaintiff in the arm and hand. The insured was convicted of reckless use of a firearm and carrying a concealed weapon.

The Court of Appeals in Buczkowski, 198 Mich App 276 (On Rehearing), held that reasonable minds might differ concerning whether injury reasonably might have been expected to result from the insured's criminal or intentional act, and therefore, summary disposition for Allstate was improper. In upholding that ruling, the majority of the Supreme Court in Buczkowski concluded that:

> "Shooting a gun 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. What is to be reasonably expected is a question of fact, and, as a disputed question of fact, it was improper for the trial court to grant the defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(10)."
> (id at 671-672 (Cavanaugh C.J. with whom Levin and Mallett, J.J., concurred) 676 (Brickley, J., concurring in result of C.J. Cavanaugh's opinion).

As in Buczkowski, where the Supreme Court declined to find that shooting a gun in a residential neighborhood at an unoccupied car was "as a matter of law" conduct which would necessarily lead to a reasonable expectation of bodily injury, this Court should likewise conclude that what is "reasonably expected" must be determined in the context of the facts and circumstances which include the following:

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1. The absence of any witnesses or other evidence that would in any way tend to show that Robert subjectively intended to cause any physical injury to his friend.

2. The absence of evidence of any angry motive, argument or fight that preceded the shooting.

3. The absence of any evidence that Robert had loaded the gun during or immediately preceding the incident.

4. The absence of any evidence that Robert subjectively knew that the gun was loaded.

5. The fact that Robert and Kevin LaBelle knew each other and considered themselves to be friends.

6. Evidence that the gun was normally kept in an unloaded state, stored under Robert's grandfather's bed.

7. Robert's statements that he subjectively believed that the gun was in fact not loaded when he pointed it and pulled the trigger.

8. Evidence that Robert and Kevin had "played" with the gun on previous occasions without injury or incident.

9. Evidence that Robert was surprised when the gun actually fired.

10. Evidence that Robert immediately called 9-1-1 and cooperated with efforts to assist his friend.

11. The fact that Robert at the time of the incident was a minor, 16 years of age.

As is discussed above, nearly every Judge who has reviewed this case has acknowledged that the facts are undisputed concerning Robert McCarn's belief that the gun was unloaded at the time that he pulled the trigger. Pulling the trigger of an unloaded gun is not an act which would alert a reasonably prudent person to the fact that the discharge of an unloaded weapon is highly likely to result in bodily injury. The fact that Robert was in error concerning his belief as to the unloaded status of the weapon should

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not change the outcome, as his erroneous belief on this subject only becomes evident after he has acted. At the time that the allegedly intentional/criminal act was performed by Robert, there were no "indications" which would lead him or any reasonably prudent person to know that the injury to Kevin LaBelle was "highly likely to occur." The indications existent at the time were that the weapon was unloaded and therefore nothing more than a clicking sound would result from his pulling the trigger. It is only when the weapon is loaded that it becomes an object that can give rise to a high likelihood of injury.

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RELIEF

For the reasons discussed above, Appellant LaBelle requests that this Court reverse the decision of the Court of Appeals on remand and that this matter be remanded to the trial court for further proceedings consistent with its decision.

Respectfully submitted:

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