

**The State of New Hampshire
Superior Court**

Hillsborough - North

STATE FARM FIRE AND CASUALTY COMPANY

V.

COLIN BOUCHARD

No. 216-2020-CV-0425

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, State Farm Fire and Casualty Company, brings this declaratory judgment action against the defendant, Colin Bouchard, claiming it does not have a duty to defend Bouchard in an underlying civil action, Jessica Dannat, Administratrix of the Estate of Jason Barry v. Colin Bouchard, Docket No. 216-2020-CV-132. See Complaint (Doc. 1). The intervenor, Jessica Dannat as Administratrix of the Estate of Jason Barry, filed a motion to Intervene, which the Court granted on July 30, 2020. See Jessica Dannat, Administratrix of the Estate of Jason Barry's Assented to Motion to Intervene (Doc. 7); Order, Delker, J. (July 30, 2020) (Doc. 8).

On October 29, 2021, the plaintiff filed for summary judgment, to which the intervenor and the defendant object. See Pl.'s Mot. Summ. J. (Doc. 13); Pl.'s Mem. Law Support Mot. Summ. J. (Doc. 14); Def.'s Obj. to Pl.'s Mot. Summ. J. (Doc. 18); Intervenor's Incorporated Mem. Law Obj. Pl.'s Mot. Summ. J./Stipulated Fact(s) (Doc. 22). The plaintiff also filed a reply and the intervenor filed a surreply. See Pl.'s Reply to Intervenor's Incorporated Mem. Law Obj. Pl.'s Mot. Summ. J./Stipulated Fact(s) (Doc. 23); Intervenor's Brief Surreply to Pl.'s Reply to Intervenor's Incorporated Mem. Law

Obj. Pl.'s Mot. Summ. J./Stipulated Fact(s) (Doc. 25). The plaintiff also filed an accompanying statement of material facts that were stipulated to by the defendant. See Stipulated Joint Statement Material Facts (Doc. 15).

Also on October 29, 2021, the defendant filed for summary judgment, to which the plaintiff objected, and the defendant filed an identical stipulated statement of material facts. See Def.'s Mot. Summ. J. with Incorporated Mem. Law (Doc. 17); Pl.'s Obj. Def.'s Mot. Summ. J. (Doc. 20); Stipulated Joint Statement Material Facts (Doc. 16). On November 29, 2021, the plaintiff and the defendant supplemented the stipulated joint statement of material facts. See Supp. Stipulated Joint Statement Material Facts (Doc. 21).

After consideration of the pleadings, the arguments, and the applicable law, the plaintiff's motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

Background

The defendant owned a multifamily residence at 874 Union Street in Manchester, New Hampshire. Doc. 15. ¶¶ 1.¹ He resided in one of the apartments and rented the others. Id. ¶¶ 2-3. The property includes a detached garage that was not available for tenants' use. Id. ¶¶ 4-5.

On July 19, 2019, at 11:46 p.m., the defendant received a notification on his cell phone that his video surveillance system detected movement inside of the garage. Id. ¶ 6. He viewed a video of what appeared to be a man inside of the garage going through the defendant's things. Id. ¶ 7. The defendant drove to the property, retrieved

¹ Docs. 15 and 16 are identical. Though the Court cites to Doc. 15 in this order, an identical citation can be made to Doc. 16.

a firearm from his apartment that he knew was loaded, and approached the garage. Id. ¶¶ 8-9. As he approached, he saw a man, later identified as Jason Barry, crawling out from under the open garage door. Id. ¶¶ 9-10, 12. Barry was not a permitted user of the garage. Id. ¶ 16. The defendant yelled for Barry to stop, but Barry continued to climb out. Id. ¶¶ 9-10. The defendant believed he saw something in Barry's hand and, without making any further statement, fired a single shot that hit Barry in the face. Id. ¶¶ 11-12. Barry died en route to the hospital. Id. ¶ 12.

The defendant "believed that he acted in self-defense when he fired the shot that killed Mr. Barry." Id. ¶ 13. Both the plaintiff and the defendant agree that "[t]he intended or expected result of [the defendant]'s act of self-defense was personal injury to Mr. Barry." Id. ¶ 14. The intervenor objects to this fact; she avers that the defendant "panicked and did not mean to shoot Mr. Barry." Doc. 22 at 2. The defendant was not charged for Barry's death. Id. ¶ 15.

The intervenor filed the underlying wrongful death action alleging that the defendant negligently caused Barry's death. Id. ¶¶ 17-18. At all times relevant, the defendant held a homeowner's insurance policy with the plaintiff. Id. ¶ 19. Though the plaintiff provided counsel to the defendant in the underlying action, on January 23, 2020, the plaintiff wrote to the defendant citing certain provisions in the insurance policy, detailed at page 5 of this Order, as "possible bases to disclaim coverage." Doc. 15 ¶ 23-24. This action followed.

Analysis

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. “An issue of fact is ‘material’ for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law.” VanDeMark v. McDonald’s Corp., 153 N.H. 753, 756 (2006) (citation omitted). The moving party bears the burden of proving its entitlement to summary judgment. See Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991). In evaluating a motion for summary judgment, the Court considers “the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.” Id.

“In an action for declaratory judgment under RSA 491:22-a (2010), the insurer bears the burden of establishing lack of coverage.” Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co., 164 N.H. 612, 616 (2013). “The interpretation of an insurance policy, like any contract, is an issue of law for the [C]ourt to decide.” Id. at 617. “The fundamental goal of interpreting an insurance policy is to carry out the intent of the contracting parties.” Id. at 616. In interpreting insurance contracts, the Court looks to the “plain and ordinary meaning of the policy’s words in context, and [it] construe[s] the terms of the policy as would a reasonable person in the position of the insured based on a more than a casual reading of the policy as a whole.” Id. (citations omitted). “If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer.” Id.

The defendant's homeowner's policy states that the plaintiff will "provide a defense at [its] expense by counsel of [its] choice" if "a claim is made or a suit is brought against an insured for damages because of bodily injury . . . caused by an occurrence." Doc. 15 ¶ 20; Doc. 21 Ex. A at Homeowners Policy, Section II – Liability Coverages, Coverage L – Personal Liability. "Occurrence" is defined in the policy as "an accident, including exposure to conditions, which first results in: (a) bodily injury; or (b) property damage." Doc. 15 ¶ 21; Doc. 21 Ex. A at FE-3491 Homeowners Policy Endorsement (New Hampshire) p. 1 of 7. Excluded from coverage is bodily injury "expected or intended by the insured." Doc. 15 ¶ 22; Doc. 21 Ex. A at Homeowners Policy, Section II – Exclusions at (1).

The plaintiff argues that because the defendant's act of shooting Barry was not an "occurrence," and because the policy "unambiguously" excludes coverage for injuries that were expected or intended by the insured, it is not obligated to defend the defendant in the underlying action. Doc. 14 at 2. The defendant asserts that self-defense cannot be disclaimed under the policy.

The New Hampshire Supreme Court has further supplemented the definition of "occurrence." Assigning "the meaning that a reasonable person would attach to the term," in Vermont Mutual Insurance Company v. Malcolm, the court defined "accident" as "an undersigned contingency, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." 128 N.H. 521, 523 (1986). Whether an act is accidental is judged in relation to the insured; "[b]ecause an injury is always fortuitous to a non-consenting victim, if its accidental character were to be judged in relation to such a victim, virtually all instances

of compensable injury would also be instances of accident.” Id. “An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen circumstance exists or happening occurs which produces or brings about the result of injury or death.” Id. “Nor can an insured’s intentional act be an accidental cause of injury when it is so inherently injurious that it cannot be performed without causing the resulting injury.” Id. at 524. “If the insured did not intend to inflict the injury on the victim by his intentional act, and the act was not so inherently injurious that the injury was certain to follow from it, the act as a contributing cause of injury would be regarded as accidental and an ‘occurrence.’” Id.

Here, the plaintiff and the defendant agree that the defendant believed he was acting in self-defense at the time that he shot Barry. “The self-defense statute permits a person to use force, sometimes deadly and sometimes non-deadly, in defending himself from various harms.” State v. McDonald, 163 N.H. 115, 127 (2011). Relevant here, the statute provides that:

II. A person is justified in using deadly force upon another person when he reasonably believes that such other person:

...

(b) Is likely to use any unlawful force against a person present while committing or attempting to commit a burglary; [or]

...

(d) Is likely to use any unlawful force in the commission of a felony against the actor within such actor’s dwelling or its curtilage.

RSA 627:4, II(b), (d). Self-defense is “unique among defensive force situations because the actor makes the justification decision at a moment when he is in a difficult position.”

2 Paul H. Robinson, Criminal Law Defenses § 131 (July 2021 Update). It is the defensive, not offensive, nature that justifies the basis of self-defense, as even the appearance of aggression by the person claiming self-defense invalidates the defense.

Id.; see also State v. Etienne, 163 N.H. 57, 75 (2011) (“When force, purely defensive at first, increases and becomes more than is reasonable necessary for defense, the excess is aggressive and not defensive.”).

The New Hampshire Supreme Court has not had an opportunity to consider whether self-defense is an “occurrence.” Some courts have found acts of self-defense are not an “occurrence” entitling the insured to a defense or indemnification by the insurance company, while others have come to the opposite conclusion. Compare, e.g., Auto-Owners Ins. Co. v. Harrington, 565 N.W.2d 839, 843 (Mich. 1997) (“To except injurious action taken in self-defense from the intentional-acts exclusion would impermissibly disregard the clear language of the exclusion in the contract between insurer and insured.”) with, e.g., Allstate Ins. Co. v. Novak, 313 N.W.2d 636, 641 (Neb. 1981) (“An injury resulting from an act committed by an insured in self-defense is not, as a matter of law, an expected or intended act within the meaning of a policy of insurance exempting bodily injuries or property damages which are either expected or intended from the standpoint of the insured.”). See also Vermont Mut. Ins. Co. v. Walukiewicz, 966 A.2d 672, 678-79 (Conn. 2009) (collecting cases on both sides).

In cases that come to the first conclusion, courts have focused on self-defense as being an intentional act or one that has an expected result. See, e.g., State Farm Fire and Cas. Co. v. Marshall, 554 So.2d 504, 505 (Fla. 1989) (“The intent underlying an act of self-defense where the defender intends to harm the attacker is identical to that underlying an assault. In either, the actor intends to inflict harm on the other. Just as assault is often impulsive or reactive, so too is self-defense. The difference between the two lies in the motive or purpose governing the act; the motive for one is worthy, that

for the other is not.”); Erie Ins. Grp. v. Baker, 489 S.E.2d 901, 904 (N.C. Ct. App. 1997) (“[W]e conclude that an allegation of self-defense does not negate the element of intent for a particular act; rather, it justifies or excuses the act.”).

Courts that come to the second conclusion focus on either the reactionary or the justifiable nature of self-defense. See, e.g., Novak, 313 N.W.2d at 640-41 (“[W]hen one acts in self-defense the actor is not generally acting for the purpose of intending any injury to another but, rather, is acting for the purpose of attempting to prevent injury to himself.”); Transamerica Ins. Grp. v. Meere, 694 P.2d 181, 188 (Ariz. 1984) (en banc) (“We believe the blow struck in self-defense is analogous to [injuring someone] in an attempt to get to [a] basketball. In both cases the insured must be aware that his act possibly or even probably may cause injury. In neither case does the insured necessarily have a primary desire to injure the victim.”); State Farm Fire and Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 708 (D. Haw. 1987) (“When faced with a harm-threatening situation, the decision to defend one’s self is not a choice. It is an instinctive necessity.”).

After reviewing the case law, the Court is persuaded by the latter cases that conclude “liability insurance coverage is not precluded for injuries caused by privileged acts taken in self-defense.” Walukiewicz, 966 A.2d at 679. Acts of self-defense are “by their very nature, . . . spontaneous and unplanned” and “are prompted by unforeseen, dangerous circumstances warranting an immediate response.” Id. at 680. The individual acts in self-defense not to injure a third party, but to protect himself from some unanticipated danger or use of force. An act of self-defense is not squarely inconsistent with the New Hampshire Supreme Court’s definition of “accident” articulated in Malcolm.

“[A]cts in self-defense can be an ‘accident’ where the third party’s actions provoking the self-defense response were the unforeseen and unexpected element in the causal chain of events making the insured’s acts in self-defense unplanned and involuntary.” Id. “[I]t is the unexpectedness of the third party’s actions which creates the ‘accident’ within the meaning of the coverage clause.” Id.

In New Hampshire, “[a] defendant asserting the defense of self-defense to a homicide charge tacitly admits the killing was intentional but claims it was justified or excused for some reason” articulated in the statute. State v. Pugliese, 122 N.H. 1141, 1021 (1982). These situations are narrow, generally limited to when an individual cannot resort to other means to protect himself, such as retreating, surrendering, or complying with an aggressor’s demand. See RSA 627:4, III. The individual cannot be the instigator, nor can he act disproportionately to the threat posed to him. See Etienne, 163 N.H. at 75 (“When resistance starts beyond the reasonable necessity of the case, it may be divisible into two parts; so far as reasonably necessary, it is resistance; so far as it is not reasonably necessary, it is aggression.”). As long as the individual can show that his deadly force was used only to the extent “necessary to protect himself . . . from the use of unlawful deadly force or an imminent threat to life or basic bodily integrity,” his use of that force is justified. State v. Warren, 147 N.H. 567, 569 (2002).

Furthermore, “[f]rom the standpoint of an insurance company, an ‘expected or intended injury’ exclusion prevents individuals from purchasing insurance as a shield for their anticipated intentional misconduct.” Preferred Mut. Ins. Co. v. Thompson, 491 N.E.2d 688, 691 (Ohio 1986) (emphasis in original); see also Meere, 694 P.2d at 189 (“[T]he proper interpretation of the clause in question is that it excludes indemnification

or coverage when the insured acts wrongfully with a purpose to injure.” (emphasis in original)). “Allowing the purchase of such coverage would remove an important disincentive to the commission of intentional torts—the resultant threat, through civil damage claims, to the tortfeasor’s personal assets.” Thompson, 491 N.E.2d at 691. “No purpose is served, however, by denying coverage to an insured who, while acting in self-defense, intentionally injures another.” Id. “[W]hen the insured acts in self-defense, the insured is not in control of the risk of loss (injury).” Walukiewicz, 966 A.2d at 682. “Instead, the insured is attempting to avoid a mishap that has been forced upon the insured.” Id. “Because acts of self-defense are not wrongful, it does not offend public policy to afford insurance coverage to the actor.” Id.

The mere raising of self-defense is not enough to require the plaintiff to provide a defense to the defendant. It is easy to conceive of a case—albeit not the situation in the case at bar—in which the shooter raises self-defense, but the facts establish that that the killer was the initial aggressor or the danger had passed and the shooting occurred in retribution. See Meere, 694 P.2d at 190 (noting that “further discovery may reveal uncontested facts which obviate the self-defense theory If these facts plainly take the case outside policy coverage, there is no duty to defend.”); Poomaihealani, 667 F. Supp. At 709 (“Therefore, if it appears Poomaihealani’s actions were in self-defense, State Farm is required under the insurance policy to defend him in state court.”). Here, however, the plaintiff and the defendant both agree (though the intervenor does not) that the defendant “believed he acted in self-defense when he fired the shot that killed Mr. Barry” and that “[t]he intended or expected result of [the defendant]’s act of self-defense was personal injury to Mr. Barry.” Doc. 15 ¶¶ 13-14. However, even if the

defendant believed that he acted in self-defense and his intended or expected result of his actions was to injure Barry, such facts alone are insufficient to render a finding that the defendant acted in self-defense. See Warren, 147 N.H. at 569 (identifying when an individual is justified in using deadly force upon another). As the intervenor alleges, a trial may establish that the shooting was a pure accident, and not a volitional act of self-defense. This question of fact is appropriately resolved during the course of the underlying case. See Safeco Ins. Co. of Am. v. Tunkle, 997 F. Supp. 1356, 1360 (D. Mont. 1998).

In sum, the Court finds that the plaintiff is required to provide the defendant with a defense and indemnification in the underlying case for two reasons. First, the plaintiff and the defendant agree that the defendant acted in self-defense. For the reasons explained above, acts of self-defense are covered by the defendant's insurance policy. Second, as noted, the intervenor alleges that the defendant's actions were not intentional—or even self-defense at all—but that the shooting was a pure accident. Doc. 18 at 2. This is not surprising because if the intervenor conceded that the defendant was acting in self-defense, the lawsuit would be barred. RSA 627:1 and RSA 627:1-a provide complete immunity from civil liability for any person acting in self-defense. If trial in the underlying lawsuit establishes that the defendant was acting in self-defense, then the intervenor would be responsible for the defendant's costs and attorney's fees as well. See RSA 627:1-a (“In a civil action initiated by or on behalf of a perpetrator against the person [acting in self-defense], the court shall award the person reasonable attorney's fees, and costs . . .”). If, on the other hand, the intervenor

prevails at trial, then the defendant's conduct would be an "occurrence" even under the plaintiff's reading of the insurance policy.

The Court, however, need not decide whether the defendant was, in fact, acting in self-defense for purposes of this declaratory judgment action. The plaintiff and the defendant disagree only on the issue of whether the plaintiff is obligated to provide insurance coverage if the defendant was acting in self-defense when he shot Barry. No one contends that the defendant committed an intentional tort against Barry. Either the defendant's actions were justifiable self-defense or Barry's death was a true accident. In either scenario, the plaintiff is obligated to provide coverage. Accordingly, the plaintiff's motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

SO ORDERED.

January 25, 2022

Date



N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/26/2022