

THE STATE OF NEW HAMPSHIRE

Hillsborough County, Northern Division

Docket No. 216-2020-CV-00425

State Farm Fire & Casualty Company

v.

Colin Bouchard

CIVIL COMPLAINT FOR DECLARATORY JUDGEMENT

NOW COMES the Plaintiff, State Farm Fire & Casualty Company, by and through counsel, Maggiotto, Friedman, Feeney & Fraas, PLLC, and in support of this Complaint says as follows:

Parties and Jurisdiction

1. State Farm Fire and Casualty Company (“State Farm”), is a corporation organized under the laws of the State of Illinois and is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company, an Illinois mutual insurance company. State Farm’s principal place of business is One State Farm Plaza, Bloomington, Illinois 61710-0001. State Farm is licensed to provide insurance in New Hampshire.
2. Colin Bouchard is an individual who resides at 874 Union Street, Manchester, NH.
3. This is an action seeking a declaratory judgment to determine coverage (or lack thereof) under an insurance policy.
4. This Court has jurisdiction over this matter pursuant to RSA 491:22, II.

Facts

5. State Farm issued a Homeowners Insurance Policy to Mr. Bouchard, having a policy number of 29-BH-V429-3, with effective dates of November 2, 2018 to November 2, 2019 (hereinafter “the policy”).

6. On or about July 18, 2019, Mr. Bouchard encountered Jason Barry upon his (Bouchard’s) property. Bouchard shot and killed Jason Barry during this encounter.

7. On February 5, 2020 Jessica Dannat, Administratrix of the Estate of Jason Barry, filed suit against Bouchard for Jason Barry’s alleged wrongful death. That action was filed in this Court and has a docket number of 216-2020-CV-132 (hereinafter “the underlying action”).

8. The Plaintiff in the underlying action alleges the following facts:

- a. At approximately 11:46 pm on July 19, 2019, Bouchard received a notification on his phone that someone was in or around the garage on his property;
- b. In response, Bouchard drove home, retrieved a hand-gun from inside his home, and went outside to his garage;
- c. Once outside, Bouchard began calling for the alleged intruder to come out of the garage;
- d. Jason Barry was inside Bouchard’s garage at this time, and he began to crawl out of the garage on his belly under the partially-opened door;
- e. As Barry was crawling out of the garage, Bouchard pointed his loaded handgun at Barry, with the “safety” feature of the handgun unlocked;
- f. Bouchard shot Barry in the face as Barry was crawling out of the garage; and
- g. Barry died from the gunshot wound to his face.

9. Plaintiff in the underlying action claims that Bouchard is legally liable for Barry's death. Count I of that action alleges that Bouchard negligently caused Barry's death by a series of actions including having a garage door that did not fully close, failing to call the police rather than take matters into his own hands, and negligently firing his weapon at Barry.

10. Count II of the Complaint in the underlying action states a claim for "Negligent Self Defense." Specifically, Count II alleges that a reasonably prudent person in Bouchard's position would have called the police rather than racing home to get his loaded gun, heading into a dark alley to confront an intruder, and firing his weapon at the face of the intruder.

11. Bouchard has filed a claim with State Farm seeking coverage and a defense under the policy for the claims made against him in the underlying action.

12. State Farm is defending Bouchard in the underlying claim under a "reservation of rights" and files this action seeking a declaration that it does not owe Bouchard coverage or a defense of the claims made in the underlying action.

COUNT I
Declaratory Judgment Under RSA 491:22, II

13. All factual allegations contained in the preceding paragraphs of this Complaint are repeated and incorporated by reference into the following Count where necessary and appropriate to set forth a cause of action.

14. Section II of the policy provides Liability Coverages. The relevant portion reads:

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an **insured**¹ for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the **occurrence**, equals our limit of liability.

15. Occurrence, is defined by the policy as follows:

7. "**occurrence**", when used in Section II of this policy, means an accident, including exposure to conditions, which first results in:

- a. **bodily injury**; or
- b. **property damage**;

during the policy period. All **bodily injury** and **property damage** resulting from one accident, series of related accidents or from continuous and repeated exposure to the same general conditions is considered to be one **occurrence**.

16. Section II of the policy includes the following exclusion:

1. Coverage L and Coverage M do not apply to:
 - a. **bodily injury** or **property damage**:
 - (1) which is either expected or intended by the **insured**; or
 - (2) which is the result of willful and malicious acts of the **insured**;

17. For Bouchard to be covered under the policy for claims arising out of Barry's death, it must have resulted from an accident which was neither expected nor intended by Bouchard.

¹ All "bolded" terms denote those for which the policy provides a definition.

18. Accident means an "undesigned contingency, ... a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Vermont Mut. Ins. Co. v. Malcolm*, 128 N.H. 521, 523 (1986).

19. An insured's act cannot be accidental when it is so inherently injurious that it cannot be performed without a certainty that some injury will result.

20. When Bouchard pointed his loaded gun (safety unlocked) at Barry and fired at him, this was an inherently injurious action that was not accidental.

21. Furthermore, when Bouchard fired his loaded gun at Barry's face, the resulting injury was expected and/or intended by Bouchard.

22. Because Barry's death was not caused by an occurrence but by an act expected or intended by its insured, State Farm owes no liability coverage to Bouchard for the claims made in the underlying action.

23. "In deciding the scope of a liability policy's coverage, a court must compare the policy language with the facts pled in the underlying suit to see if the claim falls within the express terms of the policy; the legal nomenclature the plaintiff uses to frame the suit is relatively unimportant." *State Farm Ins. Co. v. Bruns*, 942 A. 2d 1275, 1280 (NH 2008), *quotations omitted*.

24. Both Counts in the underlying action allege that Barry's death was caused by an inherently injurious act by Bouchard, which was expected and/or intended by him. The policy therefore does not provide any coverage to Bouchard for the claims made in the underlying action.

25. Because the underlying action against Bouchard fails to allege facts in the pleadings to bring it within the express terms of the policy, State Farm is not obligated to defend Bouchard in that action.

Prayer for Relief

WHEREFORE, the State Farm respectfully requests the following relief:

- A. That this Court issue Orders of Notice for service upon the Defendant;
- B. That this Court issue a Declaration that State Farm does not owe coverage to Bouchard for the claims arising in the underlying action;
- C. That this Court issue a Declaration that State Farm does not owe Bouchard a defense in the underlying action; and
- D. For other such relief as the Court deems just and equitable.

Respectfully Submitted,
State Farm Fire and Casualty Company

By: /s/ Christine Friedman
Christine Friedman, Bar No. 8780
Maggiotto, Friedman, Feeney & Fraas, PLLC
58 Pleasant Street
Concord, NH 03301
603-225-5152
chris@mffflaw.com

DATE: May 27, 2020