

EVERETT CASH MUTUAL INSURANCE COMPANY,  
Plaintiff vs. NORMAN C. ROUND AND TERESA L. ROMAN,  
Individually and as Executrix of the Estate of GEORGE P.  
ROMAN, deceased, Defendants, FRANKLIN COUNTY  
BRANCH CIVIL ACTION - LAW A.D. 1997-589

*EVERETT CASH MUTUAL INSURANCE CO. vs. ROUND, ET AL.*

*Summary judgment filed by insurance company - Question regarding duty to defend and obligation to provide liability coverage because insured's acts were "intentional"*

Facts: Insured, Norman Round, killed George Roman. Round felt threatened because Roman pointed gun at him; Round grabbed gun from Roman and beat him with it. Roman died from the injuries. Roman's estate sued Round. The insurance company who issued homeowner's insurance to Round filed motion for summary judgment in its action for declaratory judgment that it need not defend Round nor provide coverage because policy excludes coverage for intentional acts.

1. Homeowner's insurance policy excludes liability coverage for liability "caused intentionally by or at the direction of the insured."
2. Before insurer may validly disclaim liability under exclusionary clause regarding intentional acts, it must be shown that the insured intended by his act to produce the damage which did in fact occur.
3. It is *not* the law in Pennsylvania that if an insured intentionally causes *some* harm, any other harm which results is also considered intentional even if it is of an entirely different character and magnitude.
4. Fact that insured plead guilty to voluntary manslaughter does not establish that insured had the intent to kill the victim where insured indicated at guilty plea colloquy that he acted under influence of passion and anger caused by victim's provocation.
5. Facts, viewed in light most favorable to insured, do not clearly establish that insured had intent to kill victim. While insured was much taller and heavier than victim, it was the victim who had the gun and insured acted under provocation. Determination of insured's intent is material issue of fact for the jury to decide.
6. Where complaint alleges cause of action which may fall within coverage of the insurance policy, the insurer is obligated to defend the insured.

*William A. Adams, Esquire, Attorney for the Plaintiff*  
*Charles E. Schmidt, Jr., Esquire, Attorney for Defendants*

**OPINION AND ORDER**

Walker, P.J., November 2, 1998:

**Factual and Procedural Background**

This case involves an action in declaratory judgment filed by Everett Cash Mutual Insurance Company ("Everett") to determine

the coverage for liability of a homeowner's policy issued to Defendant Norman Round ("Mr. Round"). The parties entered into a stipulation of facts which establishes the following. On November 30, 1995, George Roman went to the residence of Mr. Round and his wife, and told Mr. Round that he had shot a deer which had run onto the Rounds' property and that he wanted to track it. (Stipulation of Facts # 13). Mr. Round went along with Mr. Roman. Mr. Roman had a rifle, Mr. Round was unarmed. Mr. Round has told the police that at some point, he felt threatened because Mr. Roman pointed the gun at him. (Stipulation of Facts # 13). Mr. Round then grabbed the rifle from Mr. Roman and beat Mr. Roman with it. (Stipulation of Facts # 13). After that, Mr. Round contacted his wife via radio and told her to call the state police as well as an ambulance. (Stipulation of Facts # 15; exhibit D attached to stipulation). Mr. Round acted hysterical and was urging emergency personnel to hurry up, telling them that Mr. Roman was "hurt real bad" and that they were just "sitting there picking our noses while he's down there dying." (Stipulation of Facts # 16). Mr. Round cooperated with the emergency personnel and led them to Mr. Roman. (Stipulation of Facts # 16). At the time the emergency personnel reached Mr. Roman, his face was submerged in water and he had no pulse. (Stipulation of Facts # 18). The cause of death was established as "craniocerebral injuries and/or suffocational injuries." (Stipulation of Facts # 21).

On November 14, 1996, Mr. Round entered a plea of guilty to voluntary manslaughter before this court. (Stipulation of Facts # 24). During the plea colloquy, he admitted that he had struck Mr. Roman with the rifle, but stated that he never would have done anything like that without provocation. (Stipulation of Facts # 25-26).

On April 4, 1997, Teresa Roman, Mr. Roman's wife and executrix of his estate, commenced a suit, docketed at A.D. 1997-143, seeking recovery for her husband's death from Mr. and Mrs. Round. On December 9, 1997, Everett filed a complaint seeking a declaratory judgment, declaring that it has no duty to defend Mr. Round and that the insurance policy does not provide liability coverage to Mr. Round for the claims made by Teresa Roman. Specifically, Everett contends that the insurance policy excludes any coverage for intentional acts, and that for that reason, it has no duty to provide liability coverage to Mr. Round. On July 2, Everett filed a

motion for summary judgment on the basis that there is no genuine issue of material fact because it is clear that Mr. Round intentionally caused Mr. Roman's injuries. Argument was held on September 3, 1998.

### Discussion

Everett argues that it has no duty to defend Mr. Round in the action brought against him by Teresa Roman and that its insurance policy does not cover Mr. Round's liability for the death of Mr. Roman. The homeowner's insurance policy issued by Everett to Mr. Round provides for the following liability coverage:

#### **Coverage L - Personal Liability**

We pay, up to our limit of liability, all sums for which any insured is legally liable because of bodily injury or property damage caused by an occurrence to which this coverage applies.

(Exhibit A, attached to complaint)

An "occurrence" has been defined in the policy as "an accident, including continuous or repeated exposure to substantially similar conditions." (Exhibit A). Furthermore, under the heading "exclusions," the following is provided:

#### **1. Exclusions that Apply to Both Personal Liability and Medical Payments to Others - This policy does not apply to liability:**

....  
h. caused intentionally by or at the direction of any insured;

(Exhibit A).

Everett argues that it is clear that Mr. Round has intentionally caused the injuries which resulted in Mr. Roman's death.

First, Everett contends that Mr. Round has admitted that he intentionally caused those injuries by pleading guilty to voluntary manslaughter. Secondly, even if the guilty plea was not sufficient, the facts set forth in the stipulation show that Mr. Round's acts were intentional. Therefore, Everett seeks the entry of summary judgment in its favor.

Under Pa.R.Civ.P. 1035.2, summary judgment may be granted as a matter of law:

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Summary judgment may only be granted where the right is free and clear from doubt. *Drapeau v. Joy Technologies, Inc.*, 447 Pa. Super. 560, 563, 670 A.2d 165 (1996). The moving party has the burden of proving that there is no genuine issue of material fact. *Drapeau*, at 563. The record and any inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* Any doubt must be resolved against the moving party. *Id.* With this standard in mind, this court will analyze the question of whether summary judgment must be granted.

The leading case on the issue in this case appears to be *Eisenman v. Hornberger*, 438 Pa. 46, 264 A.2d 673 (1970). The Pennsylvania Supreme Court had to interpret an exclusionary clause in an insurance policy which excluded coverage for bodily injury or property damage caused "intentionally by or at the direction of the Insured." *Eisenman*, 438 Pa. at 49. This language is identical to the exclusionary clause in the underlying case. The situation involved two men who burglarized a home, lighting matches in the house to find their way around. One of the matches smoldered and the house caught on fire. The insurance company argued that the men's actions were intentional and therefore excluded from coverage under the policy. *Eisenman*, at 47-49. The Supreme Court noted that this

issue was one of first impression in Pennsylvania. *Id.*, at 47. The Court agreed with the majority of courts in other jurisdictions that "before the insurer may validly disclaim liability, it must be shown that the insured intended by his act to produce the damage which did in fact occur." *Id.*, at 49. The Court furthermore stated that "[t]here is a very real distinction between intending an act and intending a result and the policy exclusion addresses itself quite clearly to the latter." *Id.* Subsequent courts, citing *Eisenman*, have made clear that it is *not* the law in Pennsylvania that if an insured intentionally causes *some* harm, any other harm which results is also considered intentional even if it is of an entirely different character and magnitude. *United Services Auto Association v. Elitzky*, 358 Pa. Super. 362, 372-373 517 A.2d 982 (1986).

Thus, to determine whether Everett has a duty to defend Mr. Round and whether the insurance policy provides coverage, it must be determined whether Mr. Round, by his act of hitting Mr. Roman with his rifle, intended to produce the injuries which did in fact occur. Everett argues that is clear from the plea of guilty to voluntary manslaughter that Mr. Round intentionally caused the injuries which resulted in Mr. Roman's death. The Crimes Code provides as follows with respect to voluntary manslaughter:

(a) **General rule.** - A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed; or

(b) **Unreasonable belief killing justifiable.** - A person who intentionally or knowingly kills and individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to the general principles of justification), but his belief is unreasonable.

18 Pa.C.S.A. § 2503.

This court finds that the mere fact that Mr. Round pleaded guilty to voluntary manslaughter is not conclusive to determine his intent. This court points out that a guilty plea can be a "trial technique" by the defendant to avoid more serious charges or a lengthy trial. Furthermore, the Superior Court has held that a plea to third-degree murder was not conclusive on the issue of intent, but that independent evidence of intent was required. *Stidham v. Millvale Sportsmen's Club*, 421 Pa. Super. 548, 618 A.2d 945 (1993). In *Stidham*, Robert McLaughlin pleaded guilty to third degree murder for having shot to death a patron in a bar while intoxicated. Mr. McLaughlin had previously had alcoholic blackouts on the rare occasions that he drank alcohol, and he did not remember having used a gun that night. The court looked at the definition of homicide, which states that "[a] person is guilty of criminal homicide if that person intentionally, knowingly, recklessly, or negligently causes the death of another human being." 18 Pa.C.S.A. § 2501; *Stidham*, 421 Pa. Super. at 558-559. The court noted that the guilty plea established that Mr. McLaughlin had shot and killed the victim, but that it was not decided at the guilty plea colloquy whether he had been consciously aware of his acts or the consequences. Therefore, the guilty plea did not establish whether he had the intent to shoot and kill the victim. *Stidham*, at 560; 562.

Similarly, in the underlying case, Mr. Round was charged with criminal homicide. Mr. Round was not acting under the influence of alcohol, as in *Stidham*, but rather under passion and anger caused by the victim's provocation. During the guilty plea colloquy, Mr. Round stated that he never would have done something like this without provocation. This court thus finds that the guilty plea, by itself, did not establish that Mr. Round had the intent to injure and kill Mr. Roman.

Aside from the guilty plea, this court looked at whether the facts as stipulated establish that Mr. Round intentionally caused Mr. Roman's injuries. Everett argues that the facts clearly establish this intent, because Mr. Round was much taller and heavier than Mr. Roman, he hit Mr. Roman five or six times while yelling "you son of a bitch," and because Mr. Round continued to hit Mr. Roman after he had fallen down. However, the facts also show that Mr. Roman had

a gun while Mr. Round did not. The facts, as viewed in the light most favorable to Mr. Round, furthermore show that Mr. Round acted under provocation by Mr. Roman. This court finds that in this situation it is not absolutely clear that he had the intent to injure and kill Mr. Roman. Mr. Round's intent remains a material issue of fact to be decided by the fact finder. Only after that determination can this court decide whether the policy excludes coverage. Thus, Everett's motion for summary judgment on the basis that the insurance policy does not provide coverage is denied.

Based on the reasoning set forth above, it appears that the cause of action brought against Mr. Round by Teresa Roman may fall within the coverage of the insurance policy. Where a complaint alleges a cause of action which may fall within the coverage of the policy, the insurer is obligated to defend the insured. *Stidham*, 421 Pa. Super. at 564. Thus, Everett's motion for summary judgment on the basis that it has no duty to defend Mr. Round in the action brought against him by Teresa Roman is also denied.

If the parties intend to bring the civil action against Mr. Round, in which it must be determined what his intent was, before a judge rather than a jury, this court will recuse itself at that time, because it was involved in the acceptance of Mr. Round's guilty plea and had conversations with both District Attorney and defense counsel which were not made part of the record. If, on the other hand, the parties intend to proceed with a jury trial in this matter, this court would request counsel for both parties to submit proposed verdict slips well in advance of trial. This will permit a careful review of the verdict slip to ensure that it is phrased in such a manner that it can be easily determined what the jury's finding is with respect to Mr. Round's intent.

#### ORDER OF COURT

November 2, 1998, after consideration of the motion for summary judgment by Plaintiff Everett Cash Mutual Insurance Co., this court finds that a material issue of fact exists as to Mr. Round's intent, and therefore denies the motion. Because the cause of action brought against Mr. Round by Teresa Roman, docketed at A.D. 1997-143, may fall within the coverage of the insurance policy, Everett is obligated to defend Mr. Round in that action.

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