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Case Number 273,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

USAA CASUALTY INSURANCE COMPANY	)	**No: 273, 2019**
	)	
	)	**Court Below:**
Plaintiff below/Appellant,	)	**Superior Court of the State**
	)	**of Delaware, Kent County**
v.	)	**C.A. No. K18C-05-050 NEP**
	)	
TRINITY CARR,	)	
	)	
Defendant below/Appellee.	)	

APPELLANT'S CORRECTED OPENING BRIEF

YOUNG & MCNELIS

/s/ Jeffrey A. Young

JEFFREY A. YOUNG (#3449)
300 South State Street
Dover, Delaware 19901
(302) 674-8822
Fax (302) 674-8251
jyoung@youngandmcnelis.com
Attorney for Plaintiff Below - Appellant, USAA Casualty Insurance Company

Dated: July 26, 2019

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Superior Court's Opinion of June 12, 2019 by the Honorable Noel E. Primos Denying Plaintiff's Motion for Summary Judgment.

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NATURE OF PROCEEDINGS

This matter involves a declaratory judgment action filed in Delaware Superior Court by USAA Casualty Insurance Company ("USAA"). (A7-8). The insurance coverage issue is whether homeowners insurance coverage must be afforded to the minor daughter, Trinity Carr ("Carr"), of a USAA policyholder when said minor deliberately planned and executed an attack on a fellow high school student, ultimately causing the death of the assailant's victim. That is, in spite of the policy only covering accidents and excluding intentional acts, does homeowner's insurance cover a purposeful assault? Following the criminal prosecution of Carr, civil lawsuits were filed in Superior Court by the administrator of the estate of the decedent as well as the decedent's parents. (A50-85). The tort suits named as Defendants the New Castle County Vocational Technical School District, Trinity Carr, and Zion Snow. Said tort suits remain pending, though removed to United States District Court for the District of Delaware in June 2018.

Carr demanded a defense and indemnification by USAA for her role as a Defendant in the civil lawsuits. Though not a named insured under any USAA policy, Carr resided with her mother at the time of her assault on Amy Joyner Francis ("Francis"), and thus would potentially qualify as a resident relative under her parent's homeowner's policy with USAA. (A87-120).

Given the policy terms and exclusions of the subject USAA homeowner's insurance, the subject declaratory judgment action was filed in Superior Court to determine whether the attacker, Carr, was eligible for coverage in light of the circumstances of her intentional assault on Francis. Upon the completion of discovery for the declaratory judgment matter, USAA filed a Motion for Summary Judgment. Carr opposed summary judgment in her response to USAA's motion. Carr did not file a cross-motion for summary judgment. However, at oral argument, the Superior Court permitted Carr to characterize her response as one for summary judgment as well. Oral argument on the cross motions for summary judgment was heard on April 5, 2019. (A17-49). On June 12, 2019, the Superior Court granted Ms. Carr's Cross Motion for Summary Judgment and denied USAA's Motion for Summary Judgment, thus concluding declaratory judgment. Exhibit A.

On June 27, 2019, USAA timely noticed this appeal to the Supreme Court. USAA requests review of the above-mentioned Superior Court Opinion dated June 12, 2019, which denied USAA's Motion for Summary Judgment and granted Ms. Carr's Cross Motion for Summary Judgment. USAA submits this Opening Brief in support of its appeal seeking the reversal of the Superior Court's denial of USAA's Motion for Summary Judgment.

SUMMARY OF ARGUMENT

1. When a person deliberately plans, predicts and executes an assault on another, causing bodily injury and ultimately death, the assailant has forfeited any claim for homeowner's insurance coverage. For legitimate public policy reasons, an insured can not profit by her own intentional wrongdoing. Further, well-settled law holds a tortfeasor responsible for all natural consequences of her acts, including those which are unexpected or unintended.

Consequently, the Superior Court erred when deeming an undeniably intentional act, the beating of a victim, an accident. Not a single punch or kick by the insured was accidental. That injuries were suffered by the victim was not only not surprising, but was the obvious design of the attacker. Whether or not the victim, who entered a bathroom to face a known adversary, expected to get assaulted, the assaulter had every intention of doing harm. As such, homeowner's insurance offering coverage only when an insured accidentally causes injury or death does not apply or offer protection to an assailant.

2. When an act is committed intending injury or damage of some kind, insurance contract language excluding coverage for all injuries, including death, which result (even those unexpected or greater than intended) is valid. A wrongdoer does not get

to profit or receive greater benefits because she claims not to have anticipated the extensiveness of the damage she deliberately inflicted. Ignorance of the ultimate scope of the outcome is no defense. A tortfeasor takes her victim as she finds her. That the injury delivered triggered a dormant condition and created a tragic result should, under no circumstances, be serendipitous to the insured. Coverage under those facts is excluded.

STATEMENT OF FACTS

On April 21, 2016, Amy Joyner Francis ("Francis") died as a result of the deliberate assault carried out on her by Trinity Carr ("Carr") in a girls' bathroom at Howard High School. (A72-76). The assault and battery by Carr on Francis was captured by cell phone recordings given today's technological advancements and general spectator tendencies, and also given the fact that the attack was premeditated and advertised (A86).[1] Indeed, on the previous day, Carr and others had confronted Francis in a Howard High School bathroom. Upon exiting that bathroom on April 20, Carr and friends of hers announced on cell phone video that they intended to "get" Francis, and noted that Francis was "scared." (A86). As the underlying civil suits set forth, there was also additional evidence of Carr and her allies announcing and preparing to fight Francis. (A74-75).

The following day, April 21, the parties again convened in a girls' bathroom along with a crowd of onlookers. At that point, Carr perpetrated her premeditated attack on Francis. (A86). As the video of the assault depicts, Carr is the initiator and aggressor, taking Francis to the floor, repeatedly punching and kicking the victim

[1] Carr is wearing the purple hoodie in the bathroom assault and the white blouse in the prior day's Snapchat videos.

about her torso and head, and refusing to release her grip on Francis's hair. Only when Carr is pulled off Francis does the attack finally conclude. Tragically, because of the blows sustained in the attack and because of a preexisting heart vulnerability, the result of this assault was the death of Amy Francis.

Following the death of Francis, two separate, but essentially identical, civil lawsuits were filed by the administrator of her estate and her parents on April 6, 2018. (A50-85). Carr then sought a defense and indemnification under her mother's homeowner's insurance coverage provided by USAA Casualty Insurance Company ("USAA"). On May 24, 2018, USAA filed for declaratory relief in the Superior Court of Kent County. (A7-8). Given the death of Francis and the various cell phone recordings, limited discovery was required. Upon the conclusion of all necessary factual background and with the elimination of any material facts in dispute, summary judgment was requested by USAA (A9-16), and oral argument heard (A17-49). Following oral argument, the Superior Court denied the summary judgment motion by USAA and granted Carr's cross motion for summary judgment.[2] Exhibit A. The

[2] Although Carr did not file a motion requesting summary judgment, the Superior Court asked counsel for Carr whether there were any factual issues in dispute, and, hearing none, allowed Carr to designate her objection to summary judgment for USAA as a cross motion for summary judgment. (A17-49).

issue for summary judgment was whether the planned assault and battery perpetrated by Carr against Francis on April 21, 2016 constituted conduct covered under the insurance contract, or alternatively, whether any policy exclusions would apply to such conduct based on its intentional nature. Based on the absence of an "occurrence" or accidental injury and the express terms of the applicable insurance policy, USAA has denied an obligation to defend or indemnify Carr. USAA seeks a reversal of the Superior Court order denying summary judgment to that effect.

ARGUMENT I

I. THE SUPERIOR COURT ERRED IN VIEWING AN ACCIDENT FROM THE PERSPECTIVE OF THE VICTIM WHEN DETERMINING HOMEOWNER'S INSURANCE COVERAGE FOR AN INDIVIDUAL WHO COMMITS AN INJURIOUS, INTENTIONAL ACT.

1. QUESTION PRESENTED

Is a premeditated and violently executed assault by an insured on an individual an accident? (A9-16).

2. SCOPE OF REVIEW

The Superior Court's interpretation of an insurance policy is a determination of law subject to a de novo standard of review. Universal Underwriters Ins. Co. v. Travelers Ins. Co., 669 A.2d 45, 47 (Del. 1995) (citing Hudson v. State Farm Mut. Ins. Co., 569 A.2d 1168, 1170 (Del. 1990). The Supreme Court's standard of review is whether the trial court erred in formulating or applying legal precepts. Hudson, 569 A.2d 1168, 1170 (Del. 1990).

3. MERITS OF ARGUMENT

On April 21, 2016, Amy Francis died as a result of an assault perpetrated against her by Trinity Carr. Said assault was not only executed on that fateful day by Carr, but had been discussed and planned at least 24 hours prior. Snapchat recordings from April 20, 2016 depict Carr and her companions gleefully discussing having threatened Francis that day, anticipating the pending attack on her. (A-86, Carr in white blouse). Then, as calculated, with several others in the girls' bathroom at Howard High School on April 21, some recording the event, Carr does indeed attack Francis over the course of several minutes, including punching and kicking her in the chest and head, grabbing and pulling her hair, and throwing her to the ground in the restroom. (A86, Carr in purple hoodie). The two wrongful death civil Complaints filed in Delaware Superior Court describe in greater detail the history, planning and execution of the beating of Francis (A50-85). Notably, those complaints never characterize Carrs' actions as negligence. From any perspective, this was not a consensual contest, but rather a one-sided beating.

The greatest tragedy of these events is that, because of a preexisting cardiac condition, Francis died following the assault by Carr. As both civil actions assert, but

for Carr's wrongful conduct, Ms. Francis would not have died on April 21, 2016. (A51-58; A72-79). Moreover, what is without dispute in this terrible series of events is the fact that Carr absolutely intended to cause harm to Francis. Carr not only predicted the very attack which she later undertook, but, according to the underlying civil Complaints, came to school that day dressed for a fight. (A54; A74-75). Again, without dispute is the fact that not only did Carr intend to cause bodily injury to Francis, but that was her very expectation and hope. This was no playful roughhousing between friends or involuntary physical reaction. With every punch and every kick, Carr intended harm to Francis. Unsurprisingly, as a result of the harm intended, Francis indeed suffered bodily injury. Not only did she suffer the musculoskeletal wounds of punches and kicks and trauma about her body, but because of her physical vulnerability, Francis's body was unable to recover from the blows inflicted by Carr. Thus, by any interpretation, Carr was the proximate cause of the death of Amy Francis.

To be eligible for homeowner's coverage, Carr bears the burden of proving that her conduct (her assault on Francis) is covered by the policy. State Farm Fire and Cas. Co. v. Hackendorn, 605 A.2d 3, 7 (Del. Super. 1991).

The USAA homeowner's policy under which Carr is potentially an insured by virtue of her status as a resident relative of her mother, who is the named insured under the policy, sets forth the terms of coverage. (A87-120). In Section II, Liability Coverages, the applicable policy language states as follows:

COVERAGE E - Personal Liability.

If a claim is made or a suit is brought against "**insured**" for "**damages**" because of "**bodily injury**" or "**property damage**" caused by an "**occurrence**" to which this coverage applies, we will [defend and indemnify]. (A111).

The Definitions section of the policy defines an "**occurrence**" as "an accident." (A88).

That is, to be eligible for the protections of homeowner's insurance coverage for one's own liability, the injuries caused by the insured and for which the insured is responsible must have been the result of an accident. Merriam-Webster defines an accident as: "1.a. an unforeseen and unplanned event or circumstance; b. lack of intention or necessity; 2.c. law: an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought." (www.merriam-webster.com). On April 21, 2016, Carr did not accidentally attack Francis. This entirely planned act had been discussed and

plotted previously, and was perpetrated in front of a spectating crowd. This was no accident. Yet, defining an "accident" has become more complicated in this case.

To begin, there can be no debate about the soundness or legitimate public policy behind excluding intentional acts from homeowner's insurance coverage. The well-established common law rule is that an insured should not be allowed to profit, by way of indemnity, from the consequences of her own wrongdoing. Hudson v. State Farm Mut. Ins. Co., 569 A.2d 1168, 1171 (Del. 1990). Insuring against liability for intentionally injuring another simply creates a contract tending to encourage illegal conduct, and is thus void as contrary to public policy. Yet, Carr seeks the profit of indemnification by USAA for her intentional assault on Francis.

Courts in this country are divided regarding the appropriate perspective of an accidental occurrence for insurance coverage purposes. Id. at 1170 (citing 72 ALR 3rd 1090). The Superior Court below referenced previous Superior Court decisions in Camac v. Hall[3] and State Farm Fire and Cas. Co. v. Hackendorn[4] for the approach to such questions from the perspective of the victim of the insured's act. However, a closer examination of the precedent in Delaware, particularly in light of the national

[3] 698 A.2d 394 (Del. Super. 1996).

[4] 605 A.2d 3 (Del. Super. 1991).

split of opinion, demonstrates the inapplicability of that reasoning.

In Delaware, the question of insurance coverage for an insured's intentional or reckless act first appeared in Hudson, supra. In Hudson, the Plaintiff was injured while a passenger in a truck driven by her former husband (Hudson), who drove off the road in an attempt to injure her. Hudson sought indemnification through his automobile insurance through State Farm. 569 A.2d at 1169. The applicable State Farm automobile insurance policy offered coverage for "bodily injury to others, caused by accident. . . ." Id. Notably, the policy did not contain an exclusion for intentional or reckless conduct, and thus the only issue in Hudson was the initial coverage decision and definition of an accident. Id.

This Court in Hudson, although noting the national split in authority on the issue of from which perspective an accident must be viewed, did not base its decision on that issue. Id. at 1170. Rather, the Hudson court determined that Delaware's enactment of motor vehicle financial responsibility laws superceded the established common law rule that an insured should not be allowed to profit from the consequences of his own wrongdoing. Id. at 1171. As such, this Court has not settled the issue of perspective when defining an accident.

Given the fact that the insurance is written to cover an insured, based upon the risks and exposure posed by said insured, the question of coverage must perforce be based on the disposition of said insured. In weighing the risks in an actuarial process, while there are few certainties, asking an insurer to predict the vulnerabilities of entirely unknowable victims creates a patent impossibility. Particularly, as in the instant case, where the actions of the insured were inherently injurious, characterizing the consequential injuries as anything but intentionally inflicited would result in the oxymoronic accidental assault. See 71 ALR 3rd 1090, 1103, Section 4[b]. (citing cases determining an accident from the perpetrator's perspective.).

Nevertheless, from the Hudson decision in this Court came the Superior Court decision in Hackendorn. Hackendorn involved a jealous husband enraged by his wife moving out of the family home and becoming involved with another man. 605 A.2d 3, 5 (Del. Super. 1991). On August 17, 1988, Hackendorn arrived at his wife's beauty salon and entered carrying a shotgun. Id. Upon discharging the shotgun while aiming at his wife, the ammunition also struck another patron of the salon. Id. at 6. That patron then sued Hackendorn in a civil claim. The Hackendorn court ultimately determined that the homeowner's policy for Hackendorn, defining an occurrence as an accident, and also excluding coverage for bodily injury which is either expected

or intended, properly excluded coverage for Hackendorn. Judgment for the insurer was entered.

Still, the Hackendorn court also explored the issue of defining an "accident." Id. at 7-8. That court wrote:

> The viewpoint of Hackendorn regarding whether the wounding [of the bystander patron] was an accident presents far more complex problems. The above definitions refer to intention and expectation which are the words of the exclusionary clause in State Farm's policy. The court finds these various definitions of accident in their application to coverage to be ambiguous. Id. at 8.

That is, the Hackendorn court did not seek to establish which side of the nationally split authority on the issue applied in Delaware, but rather deemed the complexity of the facts in that case as creating ambiguity, which was then construed against the insurer. Hence, in light of the ultimate finding in favor of excluded coverage, this "perspective" element of the decision is essentially dicta.

The Superior Court next examined this victim versus victimizer issue in Camac, supra. In Camac, the insured (Hall) went into a bar restroom and punched Camac across the jaw while Camac was just exiting a urinal. 698 A.2d 394, 395 (Del. Super. 1996). The court in Camac, like Hackendorn, concluded that homeowner's coverage was not available to Hall because the act by Camac was intentional and

produced "some injury." Id. at 398. The court further ruled:

> That the injuries might be more extensive than Hall intended is irrelevant. When a person clearly intends the act that causes the other person's injuries, and the resulting injuries are reasonably foreseeable, Delaware law clearly states that a court must give effect to liability coverage exclusion clauses in homeowner's insurance contracts." Id.

The Camac court, nonetheless, also determined that defining "accident" was to be done from the viewpoint of the victim. Id. at 396. That said, Camac essentially looked to the *Black's Law Dictionary* definition of an accident and cited the Hackendorn precedent to come to that conclusion. Id. As noted above, the Hackendorn court did not examine the national split in authority in coming to its conclusion on the accident perspective issue, but instead found the factual setting of that case complex, and determined an ambiguity existed. Similarly, the Camac court focused on the *Black's* definition, which addresses "an event happening without any human agency, or, if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens." Id. The bodily injuries to Amy Francis did indeed happen through human agency, precisely as that human agent intended. Injuring Francis was exactly the intent and the expectation of Carr in that girls' bathroom.

Moreover, though not material if this Court adopts the argument by USAA and the numerous other jurisdictions that the assailant's standpoint determines intent, the fact that Francis entered a high school girls' bathroom to face Carr, given the previous day's confrontation and discussions on social media of what was about to occur, naturally advances the position that Francis had to expect a physical confrontation. Thus, as opposed to the unsuspecting Camac, Francis could not have been surprised by the conduct of Carr or unaware of the environment and the risks. Regardless, in applying insurance contract language to a factual setting, the mindset of the insured, not some non-contracting party, must dictate the coverage.

In sum, the issue of victim versus perpetrator expectation has not been decided by this Court, and has been only touched on in the Superior Court.[5] If this Court follows the rulings of the myriad jurisdictions taking the point of view of the perpetrator in assessing whether an accident occurred, especially where the perpetrator committed an inherently injurious act such as here, then this assault by

[5] Compare TIG Insurance Company v. Premier Parks, Inc., 2004 WL 728858 (Del. Super. March 10, 2004) (confirming that intentional torts are not "accidents" for purposes of a policy definition of "occurrence.").

Carr on Francis meets no definition of an occurrence or an accident, and coverage does not apply.[6]

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[6] For additional case law discussion of an "occurrence" or an "accident," see McAlley v. Selective Ins. Co., 2011 WL 601662 (Del. Super. 2011) at *3. See also, Westfield Ins. Co.v. Miranda & Hardt Contracting and Building Services, LLC, 2015 WL 1477970 (Del. Super. 2015) (page 7) (holding that an action within the control of the insured is not a fortuitous circumstance and thus not an accident).

ARGUMENT II

I. THE SUPERIOR COURT ERRED IN DETERMINING THAT THE EXTENT OF THE BODILY INJURIES SUFFERED BY THE VICTIM WHEN HER ASSAILANT ACTED INTENTIONALLY TO INJURE HER CREATES AN UNEXPECTED LOSS AND THAT THE POLICY LANGUAGE EXCLUDING SUCH CONSEQUENTIAL INJURY IS AMBIGUOUS.

1. QUESTION PRESENTED

When one individual intentionally, repeatedly and forcefully hits, kicks and body slams another individual, are the naturally consequential bodily injuries to the other expected or intended, and thus legitimately excluded. (A9-16).

2. SCOPE OF REVIEW

The Superior Court's interpretation of an insurance policy is a determination of law subject to a de novo standard of review. Universal Underwriters Ins. Co. v. Travelers Ins. Co., 669 A.2d 45, 47 (Del. 1995) (citing Hudson v. State Farm Mut. Ins. Co., 569 A.2d 1168, 1170 (Del. 1990). The Supreme Court's standard of review is whether the trial court erred in formulating or applying legal precepts. Hudson, 569 A.2d 1168, 1170 (Del. 1990).

3. MERITS OF ARGUMENT

A. The foreseeability of an injury makes a tortfeasor responsible for all naturally occurring consequences of her act.

(1) Unforeseen results - Delaware precedent

Upon concluding that the bodily injury sustained by Francis in her fight with Carr was the result of an accident, and thus potentially covered under the USAA homeowner's policy, the Superior Court turned to the express language in that insurance policy excluding coverage for bodily injury:

> a. which is reasonably expected or intended by an "**insured**" even if the resulting "**bodily injury**"
> (1) Is of a different kind, quality or degree than initially expected or intended. (A112).

The Superior Court ruling below examined this exclusionary language in the other Superior Court cases of Camac and Hackendorn, supra, as well as this Court's decision in Farmer in the Dell Enterprises, Inc. v. Farmers Mut. Ins. Co., 514 A.2d 1097 (Del. 1986). Uniformly, those rulings favored the insurers based on the policy language excluding coverage for bodily injury that was "expected or intended" by the

insured.[7] Yet, the Court below deemed the same exclusion inapplicable to the "bodily injuries" suffered by Amy Francis. Although holding the unintended shotgun fragment victim in Hackendorn and the unsuspecting "sucker punch" victim in Camac as receiving their injuries by accident, both the Hackendorn and Camac courts ruled that the injuries sustained, though even if arguably unintended, were the natural, foreseeable and expected results of the insured's intentional act.[8] Additionally, both the Camac and Hackendorn courts relied on this Court's holding in Farmer in the Dell Enterprises.[9]

In Farmer in the Dell, a juvenile male started a fire in a trash pile located a distance from the Farmer in the Dell restaurant. Id. Unexpectedly, and not intended by the juvenile, the fire spread to the restaurant building, causing extensive damage to the structure. Id. The juvenile sought coverage under his parents' homeowner's policy for the ensuing civil claim by the restaurant. Coverage was denied by the insurance carrier based on an exclusion in the policy for "bodily injury or property

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[7] "Bodily injury" in the USAA policy is defined as "physical injury, sickness or disease, including required care, loss of services and death that results." (emphasis added) (A87).

[8] Hackendorn at 9; Camac at 397.

[9] Farmer in the Dell v. Famers Mut. Ins. Co., 514 A.2d 1097 (Del. 1986).

damage: a. which is expected or intended by the insured. . ." Id. at 1099. Although this Court was urged by the appellants to focus on the fact that the actual damage which resulted from the trash fire was neither expected nor intended by the juvenille, thus making inapplicable the express exclusion to coverage, this Court held: "We believe the better rule to be that which permits application of the exclusion upon the showing of an intentional act coupled with an intent to cause some injury or damage so long as it is reasonably foreseeable that the damage which actually followed would in fact occur." Id. at 1099 (underscore added). Only where a tortfeasor "clearly lacks the intent to inflict **any** damage or injury, and it is not foreseeable that damage will occur, the exclusion will not apply." Id. at 1100 (emphasis added). Because the insured minor intended to start a fire, and it was thus entirely foreseeable that additional, if unforeseen, damage would occur, the exclusion applied and coverage was denied.

This Supreme Court decision led the Superior Court in Hackendorn, when dealing with the happenstance victim of a misguided shotgun blast, to deny coverage based on the expected or intended injury exclusion in the subject policy. "Even if the injuries were unintended, they were the natural, foreseeable and expected and anticipatory result of the insured's intentional act. . . ." Hackendorn, 605 A.2d at 9.

Similarly, because assailant Hall intentionally hit Camac and produced "some injury," the Superior Court did not explore the extent of that injury or whether the extent of the injury was foreseeable. Rather, the court held "that the injuries might be more extensive than Hall intended is irrelevant." Id. Therefore, never has the Delaware Superior Court or this Court assessed or weighed the scope or extent of the bodily injury or property damage when applying the expected or intended exclusion. Yet, that is precisely what the Superior Court below did.

(2) The "eggshell" Plaintiff

Carr undeniably intended physical harm to Francis on April 20, 2016. That Francis would indeed suffer bodily injury and harm as a result of being intentionally punched, kicked, grabbed and thrown to the ground is the quintessence of foreseeable under those circumstances. In fact, even the Superior Court below states, "There is no question that Ms. Carr intended to cause some injury to Ms. Francis." Exhibit A, page 13. Where the Superior Court below distinguished the instant case from the entirety of Delaware precedent is based on Carr's death emanating from her preexisting cardiac condition. However, focusing the foreseeability test on that outcome is entirely misplaced.

Basic tort law in Delaware holds a tortfeasor responsible for injuries she causes regardless of the vulnerable or fragile nature of her victim:

> In work-related claims, as in personal injury claims sounding in tort, the employer takes the employee as he finds him. The liability of an employer is not limited to injuries which a physically able and mentally sound employee would sustain in similar accidents. If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established. Reese v. Home Budget Center, 619 A.2d 907, 910 (Del. 1992) (internal citations omitted) (underscore added).

This tort doctrine, sometimes referred to as the "eggshell" plaintiff theory, is applied to any personal injury or wrongful death action. For example, bumping into a plaintiff's car in a parking lot while backing up does not relieve the tortfeasor from liability for injuries sustained by the plaintiff which are caused by that minor impact, even if the injuries lead to spinal surgical procedures which the tortfeasor could not possibly have envisioned as he rolled slowly and briefly backwards from a parking space. Here, Francis was tragically a classic "eggshell." Apparently unknown to Francis, and presumably unknown to Carr, Francis's preexisting cardiac condition made her mortally vulnerable to a physical assault such as that inflicted by Carr. What killed Francis may not have killed almost anyone else at Howard High School. But Carr's assault was the triggering mechanism of Francis's death, so Carr cannot claim ignorance as a defense in a civil action.

The Superior Court's focus on the unknown nature of Francis's preexisting condition not only runs counter to that long-established tort doctrine of this State, but actually defeats a driving concern for the Court below. The Superior Court writes in its conclusion:

> The Court is mindful of the public policy implications of this case, which were also acknowledged by the Court in Hackendorn. On the one hand there is the well-established Delaware rule that an insured 'shall not profit by way of indemnity from his own wrongdoing.' On the other hand, there is an innocent victim, Ms. Francis, whose heirs and family members would be negatively affected by the denial of coverage for Ms. Carr. Exhibit A at page 19.

First, in determining issues of law and insurance coverage, the "negative effects" to one side or the other should never be a consideration. On a legal issue such as this, a holding cannot be outcome oriented or based. Second, if, as the Superior Court suggests, Francis's death was indeed entirely unforeseeable, then as a matter of law, Carr committed no tort and thus Ms. Francis's heirs and family members have no viable claim for wrongful death in the pending civil actions.

The foreseeability focus by the Superior Court is essentially a Palsgraf analysis.[10] In that famous case by Judge Cardozo, and studied by every law student,

[10] Palsgraf v. Long Island Railroad Company, 162 N.E. 99 (N.Y. Ct. of Ap, 1928).

duty is based on whether the consequences of the actor's conduct should have been reasonably foreseen by the actor who engaged in it. The similarly well-studied Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint 145, enters this equation as well, though in a tort rather than contract context. Where there is truly no foreseeability of an event or an injury, then a defendant is not liable for the actual consequences of her breach of duty:

> [I]n this state, the Supreme Court has laid it down that negligence in general is tested by the foreseeability of an event which may result in injury. . . . The same limitation of liability ought to apply whether the form of pleading is on the contract or in tort. A rule of damages of such breadth as to include all the consequences which might be shown to have resulted from the failure or omission to perform a stipulated duty or service would constitute a serious obstruction to an interference with commerce and the common business of life. . . . The great weight of authority is against holding a defendant liable for all the actual consequences flowing from an omission of duty, when they are such as no reasonable person, in the light of the attendant circumstances, would have thought likely to occur. A practical and sound rule, based on wise policy, and consistent with good sense and equity, is found in the formula that in cases of torts not amounting to wilful or wanton wrongs, the wrongdoer is liable only for such injurious consequences as, in the surrounding circumstances of the particular case, might have been foreseen or anticipated by him as likely to follow his negligent act. Clemens v. Western Union Telegraph Company, 28 A.2d 889, 891 (Del. Super. 1942) (internal citations omitted) (underscore added).

By confusing foreseeability in the Palsgraf and Hadley context with foreseeability in the eggshell plaintiff context, the Superior Court has determined

insurance coverage applies but eliminated any action in tort. Undoubtedly, that was not the intention of the Superior Court, nor the desire of the heirs and family members of Amy Francis, yet that is the unavoidable conclusion of the Court's holding.

Likewise, the Superior Court has acknowledged that Carr clearly would have been excluded from insurance coverage based on Delaware law had she "merely" severely injured Francis in that girls' bathroom, even if intending only minor or superficial injuries. Oddly, it was the unforeseen death of Francis that somehow changed the formula and suddenly bars any exclusion of coverage. The Superior Court's rationale for that conclusion is that Francis's injuries and compensation would have been much less under that serious injury scenario. Exhibit A, page 18-19. First, depending upon what physical injuries Francis actually suffered, that may not have been true at all. Second, the extent of potential exposure to the insured should have absolutely no bearing on the ultimate coverage outcome. Under Delaware law, when Carr decided to inflict her punches and kicks on Francis, intending injury and suffering, she became responsible for all bodily injuries, including death, which resulted. As the court in Camac held, "That the injuries might be more extensive than [Carr] intended is irrelevant." 698 A.2d at 398.

When Trinity Carr began beating Amy Francis on April 21, 2016, committing any number of crimes and torts, she took Ms. Francis as Ms. Francis was; a young woman whose heart could not take the blows inflicted. Carr's apparent ignorance of that fact is legally meaningless in the realm of tort law. But for that attack by Carr, Amy Francis's heart does not seize and she does not die. As this Court has held, "If the [plaintiff] had a preexisting disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident." Reese, 619 A.2d 907, 910 (Del. 1992). The Superior Court's foreseeability rationale in the case at bar defies the law.

B. Policy language excluding all direct consequences of an intentional act, even those not specifically intended, is neither ambiguous nor contrary to public policy.

Simply expressing in the insurance contract the tort doctrines discussed above, the USAA policy language excludes coverage for bodily injury which is reasonably expected or intended by an insured even if the resulting bodily injury "is of a different kind, quality or degree than initially expected or intended. . . ." (A112). This policy

language merely follows the "eggshell" plaintiff doctrine, and applies it to the intentional conduct of an insured. As was true in Farmer in the Dell, supra, where the minor had no intention of burning down an entire restaurant, and in Hackendorn, supra, where the insured did not intend to shoot or injure the plaintiff, the USAA policy expressly states that an insured does not avoid exclusion from coverage for an intentional act simply because the consequences of that act are greater than initially expected or intended.

While subparagraph (1) is arguably a nuanced clarifier of the preceding language, it does not alter the meaning of the general exclusion. More importantly, it is entirely consistent with tort law in Delaware. At its core, the exclusion applies to an intentional act when that act intends some bodily injury, or where bodily injury can be reasonably expected, regardless of the degree of bodily injury, or, as in this case, death.

The Superior Court speaks in terms of the insured's reasonable expectations based upon Delaware case law. However, one must ask how Carr or any other insured could reasonably expect homeowner's coverage to indemnify her for planning, boasting about and executing her assault on Amy Francis?

The Superior Court criticizes the policy language as confusing and internally contradictory. Yet, that language simply clarifies and expands on the long-accepted "expected or intended" exclusionary language in the policy. If one expects to harm someone or something, the resulting degree of harm, whether more or less than intended, is irrelevant. One may not profit by her intentional act. Ignorance or surprise of consequence is not a valid defense nor a pathway to coverage. Trinity Carr is not, indeed should not be, covered by a homeowner's policy because she caused a death when she "only" meant to cause serious bodily injury.

CONCLUSION

Homeowner's insurance does not cover an insured for the deliberate infliction of injuries to another. The policy language covering only accidents, as opposed to intentionally injurious acts, is long accepted and appropriate. The policy exclusion for expected or intended bodily injuries and property damage, regardless of the extent of said injury or damage, is consistent with Delaware precedent and ingrained tort law. An insured cannot benefit or profit from her premeditated assault on another simply because the extent of the damage done was greater than she may have anticipated. The Superior Court's outcome-based decision must be reversed and summary judgment entered for USAA.

Respectfully submitted,
YOUNG & MCNELIS
/s/ Jeffrey A. Young

JEFFREY A. YOUNG (#3449)
300 South State Street
Dover, Delaware 19901
(302) 674-8822
Fax (302) 674-8251
jyoung@youngandmcnelis.com
Attorney for Plaintiff Below - Appellant

Dated: July 26, 2019

EXHIBIT A to APPELLANT'S CORRECTED OPENING BRIEF

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

USAA CASUALTY INSURANCE COMPANY,	)	
Plaintiff,	)	C.A. No. K18C-05-050 NEP In and For Kent County
v.	)	
TRINITY CARR,	)	
Defendant.	)	

Submitted: April 5, 2019
Decided: June 12, 2019

MEMORANDUM OPINION AND ORDER

Upon Plaintiff's Motion for Summary Judgment
DENIED

Upon Defendant's Cross Motion for Summary Judgment
GRANTED

Jeffrey A. Young, Esquire, Young & McNelis, *Attorney for Plaintiff.*

Benjamin C. Wetzel, III, Esquire (argued) and Natalie M. Ippolito, Esquire, Wetzel & Associates, P.A., *Attorneys for Defendant.*

Primos, J.

On April 21, 2016, Amy Joyner Francis (hereinafter "Ms. Francis"), a student at Howard High School of Technology in Wilmington, Delaware, died tragically following an incident in a restroom at the school. Subsequently, family members of Ms. Francis sued multiple defendants, including Trinity Carr (hereinafter "Ms. Carr"), in two separate lawsuits. Ms. Carr is also the Defendant in the current action, in which Plaintiff USAA Casualty Insurance Company (hereinafter "USAA") seeks a declaratory judgment that it is not required to defend or indemnify Ms. Carr in those lawsuits. The parties have filed cross motions for summary judgment, which have been submitted to the Court for decision. For the reasons stated herein, USAA's motion will be **DENIED**, and Ms. Carr's motion will be **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record before the Court for purposes of summary judgment consists of the allegations of the two complaints filed against Ms. Carr,[1] together with the provisions of the insurance policy at issue, and a copy of certain cell phone video recordings submitted by USAA depicting both an apparent interaction between Ms. Carr and Ms. Francis the day before the alleged attack, and the alleged attack itself. While the parties to this action may disagree about the truth of the facts set forth in the underlying complaints, and while they certainly disagree about the import of the

[1] Under Delaware law, the duty to defend is based upon "whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy." *Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co.*, 137 F. Supp. 2d 517, 525 (D. Del. 2001).

policy's provisions, there is no dispute about what the complaints and the policy say. Therefore, the Court will summarize the relevant portions of those documents.

The two complaints filed against Ms. Carr contain virtually identical language. They allege that Ms. Carr, while a student at Howard High, and another student, Zion Snow (hereinafter "Ms. Snow"), assaulted Ms. Francis in a restroom at the school on April 21, 2016.[2] According to the complaints, Ms. Carr and Ms. Snow "hatched a plot to seek retribution against [Ms. Francis] through the use of verbal and physical threats and intimidation and, ultimately, brutal physical force and violence" and "conspired with each other to intentionally intimidate, threaten and physically attack" Ms. Francis. The complaints allege that, following the attack, Ms. Francis was left gasping for air on the restroom floor and died shortly afterwards of "sudden cardiac arrest caused by the physical and emotional distress of the attack." According to both complaints, "[b]ut for" Ms. Carr's and the other defendants' wrongful conduct, Ms. Francis "would not have died on April 21, 2016."

Following service of process in the two lawsuits, Ms. Carr sought coverage from USAA under her mother's homeowner's insurance policy. By its terms, that policy covers an insured[3] for claims made for "'bodily injury' or 'property damage' caused by an 'occurrence'. . . ." The policy defines "occurrence" as an "accident,

[2] Both Ms. Carr and Ms. Snow are now adults.

[3] USAA concedes that Ms. Carr, as a resident relative of the named insured, is a potential insured under the policy.

including continuous and repeated exposure to. . . harmful conditions" that results in "bodily injury" or "property damage." "Bodily injury" is defined as "physical injury, sickness, or disease, including required care, loss of services and death that results." Finally, the policy contains an exclusion providing that coverage under the policy

> do[es] not apply to **"bodily injury"** or **"property damage"**:
>
> a. Which is reasonably expected or intended by any **"insured"** even if the resulting **"bodily injury"** or **"property damage"**:
>
> (1) Is of a different kind, quality or degree than initially expected or intended . . . .

After completion of discovery in this declaratory judgment action, USAA moved for summary judgment. Ms. Carr filed a written response in opposition to the motion but did not file a cross motion for summary judgment. At oral argument, however, counsel for Ms. Carr agreed with counsel for USAA that there is no genuine issue of material fact and that this matter is ripe for decision as a matter of law. At that time, the Court permitted counsel for Ms. Carr to advance an oral cross motion for summary judgment.

II. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] Where, as here, the parties have filed cross motions for summary judgment and have not argued that there is any issue of material fact, the Court "shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[5] In such a procedural setting, the parties are conceding the absence of any material factual issues and, at the same time, are acknowledging that the factual record before the Court is sufficient to support their respective motions.[6]

If the language of an insurance policy is clear and unambiguous, "a Delaware court will not destroy or twist the words under the guise of construing them."[7] However, where there is ambiguity in the policy language, or confusion in the deliberate selection of language, the court must engage in construction of the language, and the policy language is always construed most strongly against the

[4] Del. Super. Ct. Civ. R. 56(c).
[5] Del. Super. Ct. Civ. R. 56(h).
[6] *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, 642 A.2d 820, 823 (Del. Super. 1993).
[7] *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) (citing *Apotas v. Allstate Ins. Co.*, 246 A.2d 923, 925 (Del. 1968), and *Novellino v. Life Ins. Co. of North America*, 216 A.2d 420, 422 (Del. 1966)).

insurer.[8] In addition, an insurance contract should be read in accordance with the "reasonable expectations" of the insured as far as the language permits.[9]

In considering whether an insurer has a duty to defend its insured, the court must consider the following factors:

> (a) where there exists some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
> (b) any ambiguity in the pleadings should be resolved against the carrier;
> (c) if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises.[10]

The insured bears the burden of proving that a claim is covered by the policy.[11] Once the insured does so, the insurer has the burden of proving that an exclusion bars coverage.[12]

III. DISCUSSION

In determining whether USAA is obligated to defend and indemnify Ms. Carr, the Court must answer two questions: (1) whether the underlying incident qualifies as an "occurrence" under the policy, and (2) whether the policy's "intentional tort" exclusion operates to bar coverage in this case.

[8] *Novellino*, 216 A.2d at 422; *Steigler v. Insurance Co. of North America*, 384 A.2d 398, 400 (Del. 1978).
[9] *Steigler*, 384 A.2d at 401.
[10] *Continental Cas. Co. v. Alexis I. duPont School Dist.*, 317 A.2d 101, 105 (Del. 1974).
[11] *State Farm Fire and Cas. Co. v. Hackendorn*, 605 A.2d 3, 7 (Del. Super. 1991) (citing *New Castle County v. Hartford Accident and Indemnity Co.*, 933 F.2d 1162, 1181 (3d Cir. 1991)).
[12] *Id.* (citing *Merced Mut. Ins. Co. v. Mendez*, 213 Cal. App.3d 41, 47 (1989)).

A. Ms. Carr Has Carried Her Burden of Showing That the Underlying Incident is Covered Under the Policy as an "Occurrence."

As previously noted, Ms. Carr, as the insured, bears the burden of proving that the conduct at issue is covered by the policy, while USAA bears the burden of proving that any exclusions apply. In determining whether the alleged assault is covered as an "occurrence," this Court looks to its earlier decision in *Camac v. Hall.*[13] Under the facts of *Camac*, the insured, Hall, had entered a restroom, encountered Camac, and intentionally struck him, causing injury to him. In *Camac*, as here, coverage was provided for bodily injury or property damage caused by an "occurrence," and "occurrence" was defined as bodily injury or property damage resulting either from an "accident" or from continuous and repeated exposure to a condition. Moreover, in *Camac*, as here, the term "accident" was not defined by the policy.

The *Camac* Court noted that the Court's earlier decision in *Hackendorn, supra*, had defined "accident" as "an event not anticipated or foreseen by the victim, or an outcome not intended by the insured."[14] The *Camac* Court concluded that the assault qualified as an "accident" because Hall had struck Camac while Camac was using the restroom, and it was "not usual or expected to be struck at such a time."[15]

[13] 698 A.2d 394 (Del. Super. 1996).
[14] *Camac*, 698 A.2d at 396 (citing *Hackendorn*, 605 A.2d at 7-9).
[15] *Id.*

The *Hackendorn* Court similarly found that the incident at issue in that case qualified as an "accident," and therefore that the insured had met his burden of demonstrating coverage.[16] In reaching this conclusion, the *Hackendorn* Court examined decisions from other jurisdictions regarding the definition of "accident" and summarized those decisions as follows: whether an event is considered an accident is determined by "(1) taking the point of view of the injured person *and/or* (2) looking at the insured's conduct."[17] Applying these principles to the facts before it, the *Hackendorn* Court concluded that as to the victim, Dillman, the shooting was clearly an accident, but as to the insured, Hackendorn, whether the incident was an accident was much more complicated, given the concepts of intention and expectation discussed in the decisional law examined by the court.[18] The *Hackendorn* Court therefore found applications of the various definitions of accident to the questions of coverage in the case before it to be ambiguous, and because ambiguity is to be construed against the insurer, whether the incident was to be considered an accident was to be viewed from the perspective of the victim, Dillman.[19]

There is similar ambiguity in this case with regard to whether the incident in

[16] Under the facts of *Hackendorn*, the insured had fired a shotgun twice in a confined space (a small beauty salon), killing his wife (the intended target) but also injuring the victim, Dillman.
[17] 605 A.2d at 8 (emphasis in original).
[18] *Id.* This was presumably because, although Hackendorn had not *intended* to wound Dillman, he had *intentionally* discharged the shotgun and should have *expected* that she would be injured.
[19] *Id.*

the restroom at Howard High qualifies as an accident. It is clear from the record before this Court that, from the perspective of Ms. Francis, the attack in the restroom at Howard High was an accident—that it was a "happening by chance, unusual, fortuitous and not anticipated."[20] Although the complaints in the underlying lawsuits allege that Ms. Carr and Ms. Snow had "confronted and threatened" Ms. Francis the day before the attack, there is no indication in the complaints that Ms. Francis entered the restroom on April 21 expecting to be physically assaulted.[21] The perspective of Ms. Carr, on the other hand, like that of Mr. Hackendorn, is more complicated. While there can be no dispute that Ms. Carr intended to harm Ms. Francis, there is no indication, as will be more fully discussed later in this opinion, that Ms. Carr either intended to cause Ms. Francis's death or expected that her death would result from her (Ms. Carr's) actions. Therefore, the ambiguity must be construed against USAA, and the incident must be viewed from Ms. Francis's perspective—*i.e.*, as an accident.

Clearly one aspect of the ambiguity present in both *Camac* and *Hackendorn*—and also present here—is that none of the insurance policies involved clarify whether the term "accident" is to be analyzed from the perspective of the victim or that of the insured. In both *Camac* and *Hackendorn*, the Court concluded

[20] *Id.*

[21] The Court notes, as well, the absence of any indication in the cell phone video recordings of the incidents of April 20 and 21 that Ms. Francis anticipated or expected the physical attack.

that the ambiguity present should be resolved against the insurer by viewing the event from the perspective of the victim. The Court must reach a similar conclusion here, and must determine that Ms. Carr has carried her burden of showing that the incident in question constitutes an "occurrence" under the policy.

In arguing that the alleged attack does not qualify as an "occurrence," USAA points to the decision in *TIG Insurance Company v. Premier Parks, Inc.*,[22] where this Court stated that "[b]y their very nature, intentional torts are not 'accidents'" for purposes of a policy definition of "occurrence."[23] The *TIG* Court, however, was applying Oklahoma law, not Delaware law.[24] Therefore, its pronouncements do not apply in this case.[25]

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[22] 2004 WL 728858 (Del. Super. Mar. 10, 2004).

[23] *Id.* at *11.

[24] *Id.* at *4.

[25] *But cf. McAlley v. Selective Ins. Co. of America*, 2011 WL 601662, at *3 (Del. Super. Feb. 16, 2011) (Court found that alleged sexual abuse of minor by insured did not constitute an "accident," and therefore did not qualify as an "occurrence" under the policy). *McAlley* is distinguishable, both because it involved sexual abuse of the alleged victim, and because the insured had conceded that the counts of the complaint alleging intentional or reckless conduct did not invoke coverage, but claimed that the single count of the complaint alleging negligent conduct triggered a duty to defend. *Id.* The Court ultimately determined that the complaint's characterization of intentional sexual abuse as negligent conduct did not operate to trigger coverage, where there were no facts to support such a characterization. *Id.* To the extent, however, that *McAlley* stands for the proposition that **any** incident involving intentional conduct on the part of the insured cannot qualify as an "accident," and therefore as an "occurrence," under similar policy language, this Court declines to follow it, given that there is no acknowledgement or analysis in *McAlley* of the ambiguities inherent in the undefined term "accident," as there was in *Hackendorn* and *Camac*.

B. USAA Has Failed to Carry Its Burden of Showing That the "Intentional Tort" Exclusion Applies.

Because the underlying incident qualifies as an "occurrence," it potentially triggers coverage under the policy. Still at issue, however, is the applicability of the "intentional tort" exclusion.

1. The Injuries That Occurred in This Case Were Not Reasonably Foreseeable.

This Court in *Camac* and *Hackendorn*, as well as the Delaware Supreme Court in *Farmer in the Dell Enterprises, Inc. v. Farmers Mutual Insurance Co.*,[26] considered the applicability of exclusionary language that was similar—but not identical—to the language at issue in this case. All three decisions addressed policy language, like that of the policy in this case, excluding coverage for bodily injury or property damage that was "expected or intended" by the insured.

In *Farmer in the Dell*, *Camac*, and *Hackendorn*, the Courts addressed the importance of the issue of foreseeability in evaluating exclusionary language. In *Farmer in the Dell* and *Hackendorn*, those advocating for coverage argued that the respective tortfeasors had not intended the injury or damage that actually occurred (in *Farmer in the Dell*, the destruction of a building, and in *Hackendorn*, injury to a bystander). In both cases, the Courts found the intentional tort exclusion applicable because the injury/damage was "expected," *i.e.*, reasonably foreseeable, even if not

[26] 514 A.2d 1097 (Del. 1986).

"intended."[27] Similarly, the Court in *Camac* found that "the physical injuries which in fact occurred were reasonably foreseeable"—*i.e.*, "expected"—even if they were more extensive than the tortfeasor intended.[28]

As the Supreme Court explained in *Farmer in the Dell*, an exclusion for injury or damage that is "expected or intended" applies where there has been an intentional act along with an intent to cause some injury or damage "so long as it is reasonably foreseeable that the damage **which actually followed** would in fact occur."[29] The *Hackendorn* and *Camac* Courts similarly recognized that in order for the exclusion to apply, the insured/tortfeasor's conduct must have been intentional and, even if the resulting injuries were not intended, they must have been reasonably foreseeable.[30]

In its Reply Brief, USAA cites *Farmer in the Dell* for the proposition that Delaware courts have denied applicability of the intentional act exclusion only "[w]here the tortfeasor clearly lacks the intent to inflict any damage or injury. . . ."[31] That, however, is not a fair reading. Rather, in the cited passage, the *Farmer in the*

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[27] *Farmer in the Dell*, 514 A.2d at 1099; *Hackendorn*, 605 A.2d at 9.
[28] *Camac*, 698 A.2d at 398.
[29] 514 A.2d at 1099 (emphasis supplied).
[30] *See Hackendorn*, 605 A.2d at 9 ("Even if the injuries were unintended, where they were the natural, foreseeable and expected and anticipatory result of the insured's intentional act, they would fall under the 'expected' exclusionary language."); *Camac*, 698 A.2d at 398 ("When a person clearly intends the act that causes the other person's injuries, and the resulting injuries are reasonably foreseeable, Delaware law clearly states that a court must give effect to liability coverage exclusion clauses in homeowner insurance contracts.")
[31] *Farmer in the Dell*, 514 A.2d at 1100.

Dell Court was merely responding to the citation of inapposite authorities involving an actor who had intended to scare or frighten the victim but had intended no damage or injury to the victim. The quoted passage must be read in the context of the entire decision, including the Supreme Court's holding, noted previously, that application of the exclusion is allowed "upon the showing of an intentional act coupled with an intent to cause some injury or damage so long as it is reasonably foreseeable that the damage which actually followed would in fact occur."[32]

Turning to the facts of this case, there is no question that Ms. Carr intended to cause some injury to Ms. Francis: the factual allegations of the underlying complaints are unequivocal about such an intent. However, there is no indication in the record that the injury that actually resulted from Ms. Carr's conduct—Ms. Francis's death—was either intended by Ms. Carr or reasonably foreseeable to her. Although the underlying complaints are silent about whether Ms. Francis suffered from a latent medical condition,[33] there is no dispute that Ms. Francis suffered from a preexisting cardiac condition that was unknown to all involved, including Ms. Carr and Ms. Francis, prior to the attack, and that this condition led to her death.[34]

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[32] *Id.* at 1099.

[33] The complaints state merely that Ms. Francis "died of sudden cardiac arrest caused by the physical and emotional distress of the attack."

[34] USAA acknowledges in its Opening Brief that Ms. Francis died as a result of the attack "because of an unknown preexisting heart condition. . . ." Similarly, in her Response Brief, Ms. Carr states that Ms. Francis "died from cardiac arrest caused by an undiagnosed, extremely rare medical condition."

Indeed, it was the issue of foreseeability upon which Ms. Carr's appeal of her related delinquency adjudication turned. The Delaware Supreme Court reversed Ms. Carr's criminally negligent homicide adjudication because her conduct had failed to reach the standard for criminal negligence: the "actual result" of her conduct—Ms. Francis's death—was "outside the risk" of which Ms. Carr should have been aware.[35]

A review of the video recording of the attack submitted by USAA confirms that the harm that resulted from Ms. Carr's intentional conduct was not reasonably foreseeable. While the video recording is certainly disturbing, and demonstrates that Ms. Carr intended to cause harm to Ms. Francis, no review of the video recording could lead to a credible contention that Ms. Carr intended to cause Ms. Francis's death, or that she could reasonably have foreseen that her actions would result in Ms. Francis's death. Indeed, this Court concurs with the Supreme Court's assessment that the video does not show a "severely violent" attack, but rather a physical altercation during which Ms. Carr rather ineffectually struck at Ms. Francis and pulled her hair, and the two ended up on the floor pushing against each other

[35] 11 *Del. C.* § 263; *Cannon v. State*, 181 A.3d 615 (Del. 2018). Pursuant to Supreme Court Rule 7(d), Ms. Carr was assigned the pseudonym "Tracy Cannon" for purposes of that appeal. As USAA has not clearly stated an intent to relitigate the Supreme Court's determination that Ms. Francis's death was beyond the risk of which Ms. Carr should have been aware, this Court need not decide whether that determination would have collateral estoppel effect with regard to the issue of foreseeability. *Cf. Nationwide Mut. Ins. Co. v. Flagg*, 789 A.2d 586 (Del. Super. 2001) (defendants collaterally estopped from relitigating with homeowner's insurer the question, previously determined in criminal proceeding, of whether insured had committed intentional acts).

with their feet.[36]

To be sure, while the underlying legal principles are the same, the unusual facts of this case distinguish it from cases like *Farmer in the Dell* and *Hackendorn*—and point to a different result. In *Farmer in the Dell*, it was reasonably foreseeable that starting a fire in a trash pile and then setting the burning trash next to a restaurant building would result in destruction of the building. In *Hackendorn*, it was reasonably foreseeable that discharging a shotgun twice in a small beauty salon would result in injury to persons other than the intended target of the shooting. In this case, by contrast, neither the tortfeasor nor her victim could have reasonably foreseen that the pulling and pushing recorded on the video would result in Ms. Francis's death. Accordingly, this Court must conclude, based upon the record before it, that while Ms. Carr's physical attack upon Ms. Francis was intentional, the result that "actually followed"—Ms. Francis's death—was neither intended nor reasonably foreseeable by Ms. Carr.

2. The Language of the Exclusion Is Confusing and Contradictory and Therefore Fails to Exclude Coverage Where the Injury Was Not Reasonably Foreseeable.

The holdings in *Farmer in the Dell*, *Hackendorn*, and *Camac*, together with the facts of this case, would seem to settle the issue of the exclusion's applicability—*i.e.*, that the exclusion does not apply because the bodily injury in this

[36] *Cannon*, 181 A.3d at 618-19, 625.

case, Ms. Francis's death, was neither "expected" nor "intended." The question of the exclusion's applicability, however, is complicated by the fact that, as noted previously, the exclusionary language before the Court differs from that in *Farmer in the Dell*, *Hackendorn*, and *Camac*. The policy in this case does not simply purport to exclude bodily injury or property damage that is "expected or intended" by the insured, but instead states that coverage

> do[es] not apply to **"bodily injury"** or **"property damage"**:
>
> a. Which is reasonably expected or intended by any **"insured"** even if the resulting **"bodily injury"** or **"property damage"**:
>
> (1) Is of a different kind, quality or degree than initially expected or intended . . . .

The problem here is that the language chosen by the insurer is both confusing and internally contradictory. Specifically, the policy language provides no explanation of how the bodily injury or property damage for which the exclusion purports to exclude coverage differs from the "resulting 'bodily injury' or 'property damage.'" In other words, the bodily injury or property damage for which the exclusion purports to exclude coverage appears to be one and the same with the "resulting" bodily injury or property damage, but the exclusionary language attempts to draw a distinction between the two—a logical impossibility.

As the Delaware Supreme Court explained in *Novellino*, *supra*, an insurance

contract is construed against the insurer when there is "ambiguity in the language employed or confusion in the deliberate selection of language. . . ."[37] The language of this exclusion is ambiguous at best, and utterly confusing at worst. Is "'bodily injury' or 'property damage'. . . [w]hich is reasonably expected or intended by any 'insured'" the injury or damage that actually results from the insured's intentional conduct, or is it some injury or damage in the mind's eye of the insured? If the former, how can it be "different" from the "resulting" injury or damage? If the latter, how can it be injury or damage for which coverage is in fact excluded?

The insurer may have intended to state that coverage is excluded where the insured reasonably expects or intends **some** injury or damage, even if the injury or damage that actually results is neither expected nor intended. The problem here, however, is that the language of the policy does not so state. The Court is left with contradictory, not clear and unequivocal, language, and therefore USAA cannot carry its burden to prove that the exclusion applies.

In *State Farm Mutual Automobile Insurance Co. v. Johnson*, the Delaware Supreme Court first adopted the doctrine of reasonable expectations—that, because insurance policies "'are not talked out or bargained for as in the case of contracts generally . . . [and] the insured is chargeable with its terms because of a business

[37] *Novellino*, 216 A.2d at 422.

utility rather than because he read or understood them . . . hence an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as its language will permit.'"[38] In *Hallowell*, *supra*, the Supreme Court clarified the meaning of the phrase "so far as its language will permit," *i.e.*, that the reasonable expectations doctrine applies only "if the terms [of the policy] are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print."[39] Here, the terms of the "intentional tort" exclusion are ambiguous and conflicting, and the insured is therefore entitled to her reasonable expectations based upon the holdings of *Farmer in the Dell*, *Hackendorn*, and *Camac*—specifically, that coverage is available because the bodily injury that occurred, Ms. Francis's death, was neither intended by Ms. Carr nor reasonably foreseeable by her.

USAA argues that affording coverage to Ms. Carr in this case would yield a perverse outcome, because if Ms. Francis had **not** died from Ms. Carr's intentional assault, coverage would have been denied (presumably because the bodily injury in that case would have been either expected or intended, or both). Certainly, one rejoinder to that argument is that, in such a case, both Ms. Carr's exposure to liability and Ms. Francis's injuries (for which compensation is ultimately being

[38] 320 A.2d 345, 347 (Del. 1974) (quoting *Cooper v. Government Employees Ins. Co.*, 237 A.2d 870, 873 (N.J. 1968)).
[39] 443 A.2d at 927.

sought) would have been much less significant. Beyond that, denying coverage because of the perceived unfairness of the result would involve ignoring both the language of the policy itself and well-established Delaware law regarding interpretation of insurance contracts.

Because the Court has concluded that the exclusionary language is not effective to bar coverage, it need not reach the parties' other arguments, including Ms. Carr's arguments that some of the claims against Ms. Carr are for negligent rather than intentional conduct.

IV. CONCLUSION

The Court is mindful of the public policy implications of this case, which were also acknowledged by the Court in *Hackendorn*. On the one hand, there is the well-established Delaware rule that an insured "shall not profit by way of indemnity from his own wrongdoing."[40] On the other hand, there is an innocent victim, Ms. Francis, whose heirs and family members would be negatively affected by the denial of coverage for Ms. Carr.[41]

Ultimately, however, the Court must base its decision not upon an analysis of competing public policy considerations but upon the language of the policy before it and upon well-settled authority regarding the proper interpretation of insurance

[40] *Hackendorn*, 605 A.2d at 12 (citing *Hudson v. State Farm Mut. Auto. Ins. Co.*, 569 A.2d 1168, 1171 (Del. 1990)).
[41] *See id.* (considering impact of decision upon innocent victim of tortfeasor's conduct).

policies. Because the meaning of "accident" in the definition of "occurrence" is ambiguous, and because the language of the intentional tort exclusion is confusing and contradictory, the policy language must be construed against USAA and in favor of Ms. Carr, and USAA will be required to defend and indemnify Ms. Carr in the underlying lawsuits.

WHEREFORE, for these reasons, USAA's motion for summary judgment will be **DENIED**, and Ms. Carr's cross motion for summary judgment will be **GRANTED.**

IT IS SO ORDERED.

/s/ Noel Eason Primos
Judge

NEP/wjs
Via File & ServeXpress and U.S. Mail
oc: Prothonotary