

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TITAN INDEMNITY COMPANY : CIVIL ACTION  
v. :  
SCOTT C. CAMERON, :  
and :  
CITY OF EASTON, :  
and :  
ANDREW RAPP, Executor of the :  
Estate of John E. Rapp, Deceased : NO. 01-5435

**MEMORANDUM OF DECISION**

THOMAS J. RUETER  
United States Magistrate Judge

July 30, 2002

Titan Indemnity Company (“Titan”) filed this Complaint for Declaratory Judgment against its insureds, defendants the City of Easton (“Easton”) and former Easton police officer, Scott C. Cameron (“Cameron”). Titan seeks a declaration that it has no duty under a Law Enforcement Officers’ Liability Policy issued to Easton (the “Policy”) to indemnify defendant Cameron with respect to a civil judgment entered against him on August 27, 2001 in favor of Andrew Rapp (“Rapp”), Executor of the Estate of John E. Rapp, deceased (the “Civil Judgment”). (Complaint at 1-2.)

The case before the court brings to mind Chief Justice Rehnquist’s observation “that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a

particular situation.” Graham v. Connor, 490 U.S. 386, 397 (1989). This action arises out of a shooting by defendant Cameron on December 24, 1998 during the course of his employment as a police officer for the City of Easton. Officer Cameron was on duty that Christmas Eve as a uniformed canine patrol officer. He attempted to render assistance to John E. Rapp (the “decedent”), who appeared to be unconscious at the wheel of his parked but running truck situated on the side of a road in a wooded area. The headlights of the truck were on. It was a dark winter night and the area was not well illuminated. When Cameron roused the decedent, the decedent, who was drunk at the time, cursed at Cameron, and struck him with his truck knocking him to the ground. After Cameron partially rose to his feet, decedent struck him a second time with his truck. Cameron drew his service duty weapon, a Smith & Wesson 9mm. semi-automatic pistol, and fired one bullet in the direction of the truck intending to stop the truck before decedent injured others or himself further. The bullet struck and killed the decedent. The time between (1) Cameron first being struck and knocked down by the truck and (2) Cameron firing his weapon, was less than five seconds.

The issue of Cameron’s “intent” is central to the determination of whether Titan must indemnify Cameron under the Policy for the judgment entered against him in the underlying civil action. In its Complaint for Declaratory Judgment (Document No. 1) and its Motion for Summary Judgment (Document No. 22), Titan contends that Cameron expected or intended to cause bodily injury to decedent and, under the terms of the Policy, Titan is not required to indemnify Cameron for the Civil Judgment. Rapp and Cameron argue that Cameron, while intending to fire his weapon, did not expect or intend to injure the decedent and, therefore, Titan is required to indemnify Cameron under the terms of the Policy. (Cameron’s Response at 7-15;

Rapp's Response at 3-13.) With the parties' consent, the issue of Cameron's "intent" was heard at a non-jury trial conducted on June 25, 2002, with the court acting as the finder of fact.<sup>1</sup>

The court must also decide: (1) defendant Cameron's Motion for Summary Judgment ("Cameron's Motion") (Document No. 19)<sup>2</sup>; and (2) defendant Rapp's Motion for Summary Judgment ("Rapp's Motion") (Document No. 20).<sup>3</sup> The issue raised in these motions is whether the Policy is ambiguous and/or illusory as to the coverage provided for civil rights violations. Oral argument on this issue was presented at the June 25, 2002 trial.

For the reasons set forth below, judgment is entered in favor of defendants Rapp, Cameron and the City of Easton to the extent that Titan must indemnify Cameron for the Civil Judgment pursuant to Part I.E.1 of the Policy, since the court finds that Cameron did not intend to cause bodily injury to decedent or to violate decedent's constitutional rights. Rapp and

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<sup>1</sup> The court also considered the following supplemental memoranda addressing the issue of Cameron's "intent:" (1) Titan's Letter Brief dated June 18, 2002 ("Titan's Letter Brief"), and (2) Rapp's Supplemental Memorandum of Law dated June 17, 2002 ("Rapp's Supp. Mem.").

<sup>2</sup> The law firm of Dechert, Price & Rhoads was appointed to represent defendant Cameron in this declaratory judgment action. Our district court has created two panels of volunteer attorneys to provide legal representation to prisoners and others claiming a violation of their civil rights. However, no panel has been established to provide representation to individuals in the position of defendant Cameron, i.e., individuals defending a claim that they violated another's civil rights. This court commends the law firm of Dechert Price & Rhoads for accepting this appointment, and for its participation in the court's pro bono attorney panels. Pro bono appointments provide an invaluable service not only to the individual client, but also to the court system, and to the other attorneys in the case. In this case, Dechert attorneys Stephen D. Brown, Marshall Walthew and Carolyn H. Feeney submitted outstanding briefs and Ms. Feeney presented oral argument all of which greatly assisted the court, and which demonstrate their commitment to providing superb legal services, regardless of the pro bono nature of a particular case.

<sup>3</sup> Counsel for Titan represented to the court that Titan would not file a response to the Cameron Motion or the Rapp Motion, but would stand on the brief submitted in support of Titan's Motion.

Cameron's Motions for Summary Judgment are denied to the extent they seek a finding that the Policy is ambiguous and/or illusory. Titan's Motion for Summary Judgment is denied. Titan's request for declaratory judgment seeking a declaration that it owes no duty to indemnify Cameron under the Policy is denied.

Pursuant to Fed. R. Civ. P. 52, the court makes the following:

**I. FINDINGS OF FACT**

1. This is a declaratory judgment action filed by Titan against its insureds, Easton and Cameron.

2. Titan seeks a declaration that it has no duty under a Law Enforcement Officers' Liability Policy issued to Easton to indemnify defendant Cameron for a judgment entered against him on August 27, 2001 in favor of defendant Andrew Rapp, Executor of the Estate of John E. Rapp, deceased.

**A. The Policy.**

3. At the time of decedent's death on December 24, 1998, Easton maintained a Law Enforcement Officers' Liability Policy with Titan, Policy number 90-HP-01971, which was in effect from January 1, 1997 until January 1, 1998.

4. Pursuant to the terms of the Policy, Titan agreed to:

pay all sums the insured legally must pay as damages because of personal injury or property damage to which this insurance applies, caused by an occurrence resulting from law enforcement activities. This includes governmental action directed toward the prevention and control of crime in the course of public employment.

(Policy, Part III.A.1.)

5. Titan assumed “the right and duty to defend any claim, suit or action asking for these damages even if it is groundless or fraudulent. This includes but is not limited to . . . civil or criminal suits brought under the Civil Rights Act.” (Policy, Part III.A.2.)

6. The term “insured” included “[a]ll law enforcement officers of the law enforcement agency.” (Policy, Part III.D.) The law enforcement agency insured by the Policy was the “City of Easton, Pennsylvania.” (Policy, Declarations.) The parties do not dispute that Cameron was a law enforcement officer for Easton, and hence an “insured” under the Policy.

7. The Policy defined the term “occurrence” to mean an event and includes continuous or repeated exposure to the same condition that results in:
1. Personal injury or property damage the insured did not expect or intend, or
  2. Personal injury or property damage, although expected or intended by the insured, if an objectively good faith reason existed to cause such injury or damage.

(Policy, Part I.E.)

8. The term “personal injury” was defined to mean, inter alia:
1. Bodily Injury. Any physical harm to a person’s health including sickness or disease. . . .
  2. False arrest, wrongful detention or imprisonment.  
. . . .
  7. Assault and battery.  
. . . .
  10. Violation of civil rights.

(Policy, Part I.F.)

**B. The Events Of December 24, 1998.**

9. On December 24, 1998, Cameron was a police officer for the City of Easton, Pennsylvania. Cameron had received many commendations and citations for his work as a police officer. (N.T., 8/23/01, at 5-7.) Cameron's supervisor indicated that Cameron was a good police officer. Id. at 36.

10. At the time of the incident, Cameron was married and his wife was expecting their first child. Id. at 2.

11. Cameron was on duty that Christmas Eve as a uniformed canine patrol officer on the four o'clock to midnight shift. Id. at 11.

12. Several hours into his shift, Cameron drove his patrol car into an area known as Hackett's Park to allow his dog a break. Id. at 15.

13. The parties acknowledge that it was a dark night, and that Hackett's Park was not a well illuminated area. Id. at 14, 16, 18. See also N.T., 8/17/01, at 9, 10, 12, 26.

14. As he entered the park, Cameron noticed a pick-up truck parked along the side of Hackett Avenue. Hackett Avenue goes through the park and is surrounded by a wooded area. The headlights of the truck were on. Cameron did nothing at that time because the truck did not look suspicious. (N.T., 8/23/01, at 16-18.) Cameron had seen vehicles pull over in that area before because the road connected the city with outlying townships. Cameron knew from experience that drivers at times stopped in that area to check maps. Id. at 17.

15. When he left the park ten to fifteen minutes later, the truck had not moved. The headlights of the truck remained on and the engine was running. Id.

16. Cameron became concerned because the running truck had remained parked in the same spot for ten to fifteen minutes. Id. Cameron pulled up next to the truck and shined his right side alley light to illuminate the inside of the vehicle. Id. at 18.

17. Cameron saw a white male, later identified as John E. Rapp, in the driver's seat slumped over toward the steering wheel with his eyes closed. Id. at 18-19. Cameron feared that the man was experiencing a "medical problem," or was in "great distress." Id. at 18.

18. Cameron blew his air horn, but the male did not rouse. Id. at 19.

19. Cameron immediately pulled his patrol car in front of the truck, and went back to the truck to render assistance. Id.

20. Cameron pulled his police car in front of the truck even though it was contrary to police regulations. Cameron explained that it is to a police officer's advantage to park the patrol car behind the vehicle the officer is approaching. Since Cameron did not have any suspicions that he was entering into a dangerous situation, but was simply approaching the vehicle to render assistance, he placed his vehicle in front of the truck. Id.

21. Cameron illuminated the inside of the cab of the truck with his flashlight to check on the driver, as well as for his own safety. Id. at 24.

22. Cameron approached the truck and tapped on the window with his hand. The man in the vehicle roused and looked around, then slumped forward again. Cameron then tapped harder on the window to get the driver's attention. The man roused and looked around again. Id. at 24.

23. The man looked in Cameron's direction, but his eyes did not focus on Cameron. Id. at 24-25.

24. Cameron identified himself as the police and asked if he was “okay.” Id. at 25.

25. At the time, Cameron was wearing his police uniform with a badge and two patches on his jacket, as well as a microphone from his police radio clipped to his jacket coming up from his holster. Cameron’s police car was parked in front of the truck, was illuminated by the truck’s lights, and was marked as a police vehicle with reflective tape identifying it as a police vehicle and overhead lights.<sup>4</sup> Id. at 25-26.

26. The male sternly said, “F- - - you.” Id. at 25.

27. Cameron was startled by the response because he had approached to render assistance. Id.

28. Cameron stepped back from the vehicle because not only had the man used profanity, but also because the male reached down inside the truck towards his right. Id. at 26.

29. At that point, because of the profanity, the actions of the male, and Cameron’s previous experience, Cameron believed the man to be either intoxicated or under the influence of drugs. Id. at 28.

30. It was later determined that decedent was intoxicated at the time with a blood alcohol level of .16, which exceeded the legal limit.<sup>5</sup>

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<sup>4</sup> The overhead lights on the police car were not on at the time. (N.T., 8/23/01, at 25.)

<sup>5</sup> Testimony regarding decedent’s blood alcohol level was presented on August 20, 2001. The transcript does not reflect the content of this testimony because it was presented by way of videotape testimony. However, in the underlying civil action, No. 00-CV-1376, Rapp filed a Motion in Limine to Exclude Decedent Rapp’s Blood Alcohol Content and Evidence of

31. The situation changed from checking on the welfare of an individual, to someone using profanity and reaching down and to his right inside the truck. Id. at 27.

32. Cameron was concerned that the male might have been reaching for a weapon and stepped toward the back of the truck. Id. at 26-27.

33. Cameron heard the driver trying to get the truck into gear; the engine was revving. Id. at 28.

34. Cameron yelled at the male to turn off the engine and to roll down his window. (Mem. of Law Supp. Titan's Mot. Ex. D at 50.)

35. Believing the driver to be either intoxicated or on drugs, Cameron attempted to break the driver's side window with his flashlight and obtain the keys to prevent the driver from leaving the area. (N.T., 8/23/01, at 28.)

36. While Cameron stood next to the driver's side window trying break the window, the driver got the truck into gear, caused the truck to move, and struck Cameron knocking him to the ground. Id. at 30.

37. As Cameron struggled to his feet, the truck struck him a second time. Id. at 30-31.

38. Cameron pulled his service duty weapon and fired a single shot at the truck, striking and killing the driver, John E. Rapp. Id. at 62.

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Intoxication (Document No. 40). The court denied this Motion by Order dated August 14, 2001 (Document No. 48). In Rapp's Motion in Limine, Rapp acknowledges that decedent's blood alcohol level at the time of the incident was .16. (Rapp's Mot. in Limine at 1-2; Mem. of Law Supp. Mot. in Limine at 1-2.)

39. Cameron's service duty weapon was a Smith & Wesson 9 mm. semi-automatic pistol. (Titan's Motion Ex. C. at 5.)<sup>6</sup>

40. At the time Cameron fired his pistol, he did not know in which direction the truck was moving. (N.T., 8/23/01, at 48.)

41. Cameron made the decision to shoot at the truck after the vehicle had struck him. Id. at 62.

42. The time between (1) Cameron first being struck and knocked down by the truck and (2) Cameron firing his weapon, was less than five seconds. (N.T., 8/21/01, at 50.)

43. Cameron shot at the vehicle. Id. at 12.

**C. The Guilty Plea.**

44. Cameron was charged with voluntary manslaughter, a felony, and involuntary manslaughter, a misdemeanor. Id. at 50.

45. On November 4, 1999, Cameron pled guilty to involuntary manslaughter in connection with the death of the decedent.

46. Cameron pled guilty to involuntary manslaughter for the sake of his family and the police department. Id. at 64. Had he been convicted of voluntary manslaughter, Cameron believed he could have been sentenced to up to twenty years imprisonment. Id. at 51, 64.

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<sup>6</sup> The court notes that Cameron only fired a single shot. If Cameron intended to kill decedent, he certainly had the capacity to fire multiple bullets in a very rapid succession with the particular type of weapon assigned to him.

47. At the time Cameron was charged with the crimes, he had been married only a short time and his wife was pregnant with their first child. Cameron pled guilty so that he could see his son grow up. Id. at 51, 64.

48. Cameron pled guilty also because he already had spent \$18,000 to \$20,000 for an attorney, and a trial would cost an additional \$30,000. Id. at 64.

49. Notwithstanding his guilty plea, Cameron believed that the decedent was using his truck as a weapon and that the shooting was justified. Id. at 52; N.T., 8/23/01, at 12.

**D. The Underlying Civil Action.**

50. In his capacity as executor of his brother's estate, Andrew Rapp filed a wrongful death action against Cameron alleging violation of 42 U.S.C. § 1983 and related Pennsylvania statutes.<sup>7</sup> The underlying civil action was captioned as 00-CV-1376.

51. Titan sent Cameron a "reservation of rights letter" dated May 2, 2000 (the "Reservation of Rights Letter"). (Titan's Motion Ex. B.)

52. In the Reservation of Rights Letter, Titan referred to the litigation in the Court of Common Pleas of Northampton County, Pennsylvania captioned Lauralynn Rapp, et al. v. The City of Easton and Scott Cameron, No. 1999-C-08849. (Titan's Motion Ex. B.)

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<sup>7</sup> This action, and a related action brought by decedent's ex-wife and daughter, originated in the state courts, but were removed to the United States District Court for the Eastern District of Pennsylvania and consolidated by the court on July 13, 2000. On July 19, 2000, with approval of counsel, the related action by decedent's ex-wife was dismissed without prejudice. Plaintiff also brought claims against the City of Easton alleging malfeasance in the policies and training practices of the City of Easton prior to the December 24, 1998 shooting of decedent. Plaintiff did not pursue these claims and the City of Easton was released from the case by stipulation of all counsel.

53. Titan indicated as follows in the Reservation of Rights Letter:

Overall, with respect to coverage under the Law Enforcement Officers' Liability Policy, [Titan] hereby reserves any and all rights under the above referenced policy for the reasons found in the following policy parts:

E. "Occurrence" means . . .

F. "Personal injury" means . . .

...

10. Violation of civil rights.

C. WE WILL NOT COVER – EXCLUSIONS.

This insurance does not apply to:

4. Any claim for punitive damages, fines or penalties. However, if a suit is brought against an insured asking for both compensatory and punitive charges, we will defend the suit without liability for the punitive damages.

(Reservation of Rights Letter at 2.)

54. Titan further indicated as follows in the Reservation of Rights Letter:

[Titan] hereby reserves it [sic] rights to provide a defense to you, keeping in mind that should a court or jury determine that your actions were outside the scope of your employment, coverage could be denied to you at that time. Additionally, while punitive damages are not covered under the policy, a defense for same will be provided without indemnification for same. Any action taken by this company shall not be construed as an acceptance of coverage and we further reserve the right to review any additional lawsuits or amendments to this lawsuit to make a separate determination as to whether a defense, or indemnity might be provided by the company. As a qualified insured under the definition of same in the policy, you are obligated to notify us should you be served with any additional lawsuits pertaining to the incident of December 24, 1998.

(Reservation of Rights Letter at 2.)

55. The Reservation of Rights Letter was timely, and fairly informed Cameron of Titan's position as to coverage related to the two actions consolidated in this court. Thus, the letter is effective and Titan is not estopped to deny coverage. See Brugnoli v. United Nat'l Ins. Co., 426 A.2d 164, 167 (Pa. Super. Ct. 1981).

56. Titan retained Daniel J. Dugan, Esquire to defend Cameron in the civil litigation. (Reservation of Rights Letter at 3.)

57. Between August 17, 2001 and August 27, 2001, a jury trial was held before the undersigned upon the consent of the parties (the "Civil Trial"). See 28 U.S.C. § 636(c).

58. The court, after hearing Cameron's testimony and observing his demeanor over several days during the trial, finds that Cameron testified credibly at the trial as to his intent and actions on December 24, 1998.

59. On August 27, 2001, the jury returned a verdict for the plaintiff Rapp and against defendant Cameron in the amount of \$472,955.00, finding that Cameron used excessive force in violation of decedent's constitutional rights on December 24, 1998. The jury did not decide the issue of Cameron's intent.

60. On September 20, 2001, Titan filed a motion to intervene in the Rapp v. Cameron case for the purpose of seeking a declaratory judgment to determine its duty under the Policy to indemnify Cameron for the Civil Judgment. The court granted the motion on October 18, 2001, and Titan's declaratory judgment complaint was docketed under Civil Action No. 01-5435.

61. On February 20, 2002, the court awarded plaintiff \$163,218.35 in attorneys' fees pursuant to 42 U.S.C. § 1988.<sup>8</sup>

**E. Cameron's Intent.**

62. Based on all of the evidence, the court finds that Cameron did not intend to shoot the decedent, John E. Rapp.

63. Based on all of the evidence, the court finds that Cameron did not intend to kill or to injure the decedent.

64. Based on all of the evidence, the court finds that Cameron did not intend to violate decedent's civil rights.

65. Based on all of the evidence, the court finds that the consequences of Cameron's action, i.e. the death of the decedent and the violation of decedent's constitutional rights, were not substantially certain to result from Cameron's actions.

**II. DISCUSSION AND CONCLUSIONS OF LAW**

**A. The Declaratory Judgment Act.**

The Declaratory Judgment Act, 28 U.S.C. §2201, empowers federal courts to grant declaratory relief. State Auto Ins. Cos. v. Summy, 234 F.3d 131, 133 (3d Cir. 2000). The purpose of a declaratory judgment procedure is to furnish an expeditious remedy for the settlement of claims which indicate imminent and inevitable litigation. TIG Ins. Co. v. Nobel Learning Communities, Inc., 2002 WL 1340332, at \* 4 (E.D. Pa. June 18, 2002) (Giles, Ch.J.).

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<sup>8</sup> The attorneys' fee award is currently the subject of an appeal. (Mem. of Law Supp. Cameron's Mot. Ex. 15.)

**B. Interpretation of Insurance Contracts.**

The interpretation of an insurance policy is a question of law properly decided by the court. Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). See also PECO Energy Co. v. Boden, 64 F.3d 852, 855 (3d Cir. 1995) (“In Pennsylvania, interpreting an insurance contract is a question of law to be resolved by a court.”) (citations omitted). The principles guiding the interpretation of insurance contracts are well-settled under Pennsylvania law.<sup>9</sup> The Third Circuit Court of Appeals stated the law regarding interpretation of insurance contracts as follows:

When the language of an insurance contract is clear and unambiguous, a court is required to enforce that language. Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (1983). Furthermore, if possible, “a court should interpret the policy so as to avoid ambiguities and give effect to all of its provisions.” Little v. MGIC Indemn. Corp., 836 F.2d 789, 793 (3d Cir. 1987).

The courts have held, however, that “if the policy provision is reasonably susceptible to more than one interpretation, it is ambiguous.” McMillan [v. State Mut. Life Assur. Co.], 922 F.2d [1073,] 1075 [(3d Cir. 1990)]. “In determining whether a contract is ambiguous, the court must examine the questionable term or language in the context of the entire policy and decide whether the contract is ‘reasonably susceptible of different constructions and capable of being understood in more than one sense.’” Reliance Ins. Co. [v. Moessner], 121 F.3d [895,] 900 [3d Cir. 1990] (citing Gamble Farm Inn, Inc. v. Selective Ins. Co., 440 Pa. Super. 501, 656 A.2d 142, 143-44 (1995) (quoting Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390 (1986))); see also Little, 836 F.2d at 794 (holding that, even if insurer’s interpretation is reasonable, if insured’s interpretation is also reasonable, then provision is ambiguous and should be construed in favor of insured). “Ambiguous provisions in an insurance policy must be construed against the insurer and in favor of the insured; any reasonable interpretation offered by the insured, therefore, must control.” McMillan, 922 F.2d at 1075.

Medical Protective Co., 198 F.3d at 103-04.

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<sup>9</sup> The parties agree that Pennsylvania law governs this case.

**C. The Policy Language.**

As stated above, pursuant to the terms of the Policy, Titan agreed to

pay all sums the insured legally must pay as damages because of personal injury or property damage to which this insurance applies, caused by an occurrence resulting from law enforcement activities. This includes governmental action directed toward the prevention and control of crime in the course of public employment.

(Policy, Part III.A.1.) The Policy defined the term “occurrence” to mean

an event and includes continuous or repeated exposure to the same condition that results in:

1. Personal injury or property damage the insured did not expect or intend, or
2. Personal injury or property damage, although expected or intended by the insured, if an objectively good faith reason existed to cause such injury or damage.

(Policy, Part I.E.)

Titan argues in its Motion for Summary Judgment that (1) there is no coverage under the first prong of the definition of “occurrence” (Policy, Part I.E.1) because Cameron admitted that he intended to injure the decedent, or his intent should be inferred as a matter of law because he fired at close range in decedent’s direction and because he fired at decedent’s vehicle knowing that it was occupied; and (2) there is no coverage under the second prong of the definition of “occurrence” (Policy Part I.E.2) because Cameron’s conduct was not objectively reasonable. Hence, Titan argues that the Policy does not require Titan to indemnify Cameron for the Civil Judgment.

Both Cameron and Rapp contend (1) that Parts I.E. and I.F.10 (providing coverage for civil rights violations) of the Policy are ambiguous and, as such, must be construed against

Titan, the insurer, and (2) that Cameron did not subjectively intend to violate decedent's civil rights or to cause him bodily injury. (Cameron's Mem. of Law Supp. Mot. at 10-17; Cameron's Response at 15 ; Rapp's Mem. of Law Supp. Mot. at 3-9; Rapp's Response at 3-16.)

**1. Policy Part I.E.1 - Expect Or Intend Clause.**

Part I.E.1 of the Policy contains what is generally known as an "expect or intend clause." The court in United Serv. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. Ct. 1986), appeal denied, 528 A.2d 957 (Pa. 1987) (table), explained that courts have been unable to reach a consensus as to the correct interpretation of the word "intend" when it appears in an exclusionary clause.<sup>10</sup> Some courts have interpreted the word "intend" to mean the insured intended the act that resulted in the harm, i.e., general intent, while others have defined "intend" to mean the insured intended the harm that resulted, i.e., specific intent. Id. at 986-87. The court concluded that under Pennsylvania law, expect or intend clauses are ambiguous as a matter of law and must be construed against the insurer. Id. at 987. The court continued that Pennsylvania law is clear on at least one of the issues involved.

In our state, the exclusionary clause applies only when the insured intends to cause a harm. Insurance coverage is not excluded because the insured's actions are intentional unless he also intended the resultant damage. See Mohn v. American Casualty Co. of Reading, 458 Pa. 576, 326 A.2d 346 (1974). The exclusion is inapplicable even if the insured should reasonably have foreseen the injury which his actions caused.

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<sup>10</sup> In Elitzky, the provision at issue in the homeowner's insurance policy stated:

1. Coverage E – Personal Liability and Coverage
- F – Medical Payments to others do not apply to bodily injury or property damage.
- a. Which is expected or intended by the insured.

Elitzky, 517 A.2d at 985.

Elitzky, 517 A.2d at 987. The court, in adopting this subjective intent standard, specifically rejected the view that intent means specific intent to cause the precise injury which did occur.

“Such an approach would reward wrong-doers by affording them . . . coverage just because their plans went slightly awry.” Id. at 988. In summary, the court concluded:

[A]n intended harm exclusionary clause in an insurance contract is ambiguous as a matter of law and must be construed against the insurer. We hold that such a clause excluded only injury and damage of the same general type which the insured intended to cause. An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result.

Id. at 989.<sup>11</sup>

The Third Circuit Court of Appeals in Aetna Life and Cas. Co. v. Barthelemy, 33 F.3d 189 (3d Cir. 1994), considering a homeowner’s policy that excluded bodily injury or property damage “which is expected or intended by any insured,” id. at 191, quoted Elitzky and stated the law in Pennsylvania as follows:

“An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result.” [Elitzky, 358 Pa. Super.] at 375, 517 A.2d 982. For a resulting injury to be excluded from coverage, the test to be applied in Pennsylvania under general liability cases is not whether the insured intended his actions, but whether the insured specifically intended to cause harm. Id. at 372, 517 A.2d 982.

Barthelemy, 33 F.3d at 191.

More recently, in State Farm Fire and Cas. Co. v. In HWA Angela Cooper, 2001 WL 1287574 (E.D. Pa. Oct. 24, 2001) (Reed, Sr. J.), the homeowner’s insurance policy provision

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<sup>11</sup> A federal court applying Pennsylvania law cannot disregard the Superior Court’s opinion in Elitzky, “unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940). No such data exists. Indeed, the Third Circuit and our district court have found Elitzky to be a correct statement of Pennsylvania law.

at issue stated that the insurance company would pay and provide a defense for bodily injury or property damage “caused by an occurrence.” Id. at \*2. The policy defined “occurrence,” and added that coverage under the policy does not apply to bodily injury which “is either expected or intended by an insured,” or “which is the result of willful and malicious acts of the insured.” Id. The court adopted the subjective intent test enunciated by Elitzky stating:

State Farm argues that the factual allegations of the Cooper Action reveal an intentional act because an assault by its nature must be intentional. Inferring intent from an allegation of criminal activity is inappropriate where material issues exist as to the insured’s subjective intent. “An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result.” Elitzky, 517 A.2d at 989.

State Farm Fire and Cas. Co. v. In HWA Angela Cooper, 2001 WL 1287574, at \*3. The court explained that State Farm attempted to distinguish between the subjective intent test adopted by the Elitzky court to analyze an “intended harm” exclusionary clause, and the test to measure intent for purposes of qualifying an event as an intentional “non-occurrence” not covered by the policy. Id. at 3 n.3. The court rejected such a distinction finding that the “few Pennsylvania cases found that specifically disavow a ‘subjective intent’ test for purposes of general insurance coverage are those that hold that a court may infer intent to harm as a matter of law only in extreme cases where there are allegations of child molestation. Outside the context of sexual assault on children, intent cannot be inferred merely from allegations of a criminal act.” Id. (citations omitted). See also State Farm Fire and Cas. Co. v. Dunlavey, 197 F. Supp. 2d 183 (E.D. Pa. 2001) (Tucker, J.) (even though insured was convicted of aggravated assault and disorderly conduct, the court found that the insured had no subjective intent to cause the harm at issue where the insured, who was struck, knocked backwards, feared being struck again, and

swung a helmet without being able to see the victim, testified that he did not intend to strike or injure the victim); Stidham v. Millvale Sportsmen's Club, 618 A.2d 945 (Pa. Super. Ct. 1992) (where insured shot and killed victim and pled guilty to third degree murder, intent to cause type of harm suffered not established as a matter of law, but must look to subjective intent), appeal denied, 637 A.2d 290 (Pa. 1993) (table).

The court in Elitzky also examined the word "expect," and concluded that it was ambiguous and must be construed against the insurer. Elitzky, 517 A.2d at 991. The court stated as follows:

We hold that for purposes of an exclusionary clause in an insurance contract, expected injury means that the insured acted even though he was substantially certain that an injury generally similar to the harm which occurred would result. This interpretation affords insured persons the maximum legal protection they could reasonably expect under a contract excluding expected injuries. . . . [W]e find ourselves in agreement with those jurisdictions which have ruled that intentional or expected are synonomous [sic] for purposes of insurance exclusionary clauses.

Id.

Titan bears the burden of proving that Cameron had the subjective intent to cause the harm suffered by decedent.<sup>12</sup>

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<sup>12</sup> Under Pennsylvania law, an exclusionary provision in an insurance contract is strictly construed, and the insurer bears the burden of proving its applicability. Daburlos v. Commercial Ins. Co. of Newark, New Jersey, 521 F.2d 18, 24-25 (3d Cir. 1985); TIG Ins. Co. v. Nobel Learning Communities, Inc., 2002 WL 1340332, at \*10 (E.D. Pa. June 18, 2002); State Farm Fire and Cas. Co. v. In HWA Angela Cooper, 2001 WL 1287574, at \*3 (E.D. Pa. Oct. 24, 2001). It is irrelevant under what heading in the Policy the insurer chooses to place the exclusion. Daburlos, 521 F.2d at 24-25 (where policy provided coverage "provided that" certain conditions were met, burden of proof was on insurer that sought to deny coverage on the ground that condition was not met). Even if this court were to find that defendants bear the burden of proof on the issue of Cameron's intent, the court would find that defendants fully satisfied this burden.

**A. The Evidence Shows That Cameron Did Not Intend To Injure Decedent Or To Violate Decedent's Civil Rights.**

Cameron consistently expressed, both at the trial and prior to the trial during police interviews, that his intent on December 24, 1998 was to stop decedent's vehicle, not to injure decedent or to violate decedent's civil rights.

**1. Trial Testimony – June 25, 2002.**

The parties presented no testimony at the June 25, 2002 trial. Instead, the parties presented oral argument and moved the following items into evidence: (1) Exhibits attached to Titan's Motion, with a redacted Exhibit K; (2) Exhibits attached to Rapp's Motion; (3) Exhibit's attached to Cameron's Motion; (4) Exhibits from the Civil Trial; and (5) Notes of Testimony from the Civil Trial. The court admitted these items into evidence with no objections from the parties.

**2. Trial Testimony – August 2001.**

Defendant Cameron testified as follows at the Civil Trial:

- Q. [by Mr. Cohen, plaintiff's counsel on direct examination] Now, Mr. Cameron, from the very beginning, you have testified under oath that you did not intend to shoot Mr. Rapp, isn't that so?
- A. That's correct.
- Q. And is that your testimony today?
- A. Yes.
- Q. So even though you did shoot him in the back of the head, you were not aiming at him, were you?
- A. No, sir, I was not.
- Q. And although you intended to shoot your gun, you did not intend to shoot Mr. Rapp, isn't that so?
- A. Correct.
- Q. And your testimony has been that you shot at the vehicle, isn't that correct?
- A. I shot at the threat.

- ...
- Q. Well, did you shoot at the vehicle, sir, or did you shoot at Mr. Rapp, or did you shoot at a tree? What did you shoot at?
- A. The truck.
- Q. The truck. So the vehicle, isn't that so?
- A. Yes.

(N.T., 8/21/01, at 11-12.)

- Q. [by Mr. Cohen, plaintiff's counsel on cross examination] Mr. Cameron, were you thinking when the vehicle passed you and it was going forward toward Hackett's Avenue, and you turned and shot at this vehicle?
- A. It was a reaction.
- ...
- Q. Did you make a decision to shoot at this vehicle after it passed you?
- A. I made a decision to shoot at this vehicle when it struck me.

(N.T., 8/23/01, at 62.)

### **3. Pretrial Statements And Interviews.**

Defendant Cameron's testimony at the Civil Trial was consistent with sworn testimony he gave during various interviews prior to trial.

**i. State Police Interview, December 30, 1998.** Cameron testified as follows during an interview with State Police conducted on December 30, 1998, six days after the shooting ("State Police Interview").<sup>13</sup>

- Q. . . . Could you tell me what it is you're looking at?
- A. Uh, like I said, I didn't have a sight picture. I didn't, I didn't . . .
- Q. Well, what are you firing at? What are you . . .
- A. I, I was firing at the truck as it brushed me and passed me.

(State Police Interview at 66.)

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<sup>13</sup> A transcript of the State Police Interview was attached as Exhibit D to Titan's Memorandum of Law in support of Titan's Motion.

ii. Second State Police Interview. In another interview with

the State Police (“State Police Interview II”)<sup>14</sup>, Cameron testified as follows:

Q. Okay. And at that point you decided to take out your gun and fire a round?

A. I didn’t even remember taking out my gun. But yes, I did turn and fire at the vehicle.

(State Police Interview II at 9.)

Q. And you pointed your weapon where?

A. Ah, at the vehicle.

Q. What part of the vehicle?

...

A. When I turned it was towards the back cab of the truck.

(State Police Interview II at 60-61.)

Q. . . . What were you aiming at?

A. Just the vehicle. I wasn’t, I didn’t aim at anything.

Q. What were you shooting at?

A. At the vehicle.

Q. Why were you shooting at the vehicle?

A. Because I just got knocked to the ground and I’m now getting up off my feet.

Q. Did the vehicle commit a crime?

A. No. The person.

Q. Who committed a crime?

A. The person operating the vehicle committed a crime.

Q. So what were you shooting at?

A. I was shooting at the vehicle. I didn’t have a sight, picture, I didn’t aim, I just pulled out and shot.

(State Police Interview II at 69.)

Q. At the point that he was driving away and you did fire what were you shooting at?

A. I was shooting at the vehicle.

Q. Weren’t you shooting at the driver?

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<sup>14</sup> A transcript of the State Police Interview II is attached as Exhibit E to Titan’s Memorandum of Law in support of Titan’s Motion.

- A. No.  
...  
Q. You don't arrest vehicles do you?  
A. No.  
Q. For aggravated assault. Who do you arrest?  
A. The person.  
Q. Then what were you shooting at?  
A. I was shooting at the vehicle.  
Q. Why were you shooting at the vehicle?  
A. I was in fear of my life.

(State Police Interview II at 74-75.)

- Q. What was your intent for firing that shot?  
A. To stop the vehicle.

(State Police Interview II at 76.)

- Q. Okay, and where are you supposed to fire at a vehicle if you want to stop it?  
A. Towards the driver.  
Q. Is that right? Towards the driver. So when you want to stop a vehicle that is fleeing you fire a shot toward the driver.  
A. Well  
Q. Is that why you fired the shot toward the driver?  
A. I fired a shot towards the, towards the vehicle. I didn't fire, I didn't aim at the driver.  
Q. Did you fire the shot at the vehicle?  
A. Partly because I was scared and because of the person leaving.  
Q. So if the person was leaving why did you shoot, why did you fire the gun? What was the purpose of firing the gun?  
A. To stop that vehicle.  
Q. Okay.  
A. Stop that operator.  
Q. Stop the operator or stop the vehicle?  
A. Stop the vehicle and/or the operator.

(State Police Interview II at 76-77.)

- Q. And what you are telling me now is that you did not identify your target. Is that correct?
- A. No. I just shot towards the vehicle.

(State Police Interview II at 83.)

**iii. Cameron Deposition, January 26, 2001.** In a deposition on January 26, 2001 (“Cameron Deposition”)<sup>15</sup>, defendant Cameron stated as follows:

- Q. When you fired were you aiming at anything in particular?
- A. No.

(Cameron Deposition at 46-47.)

**iv. September 27, 1999 Report.** Titan contends that a report dated September 27, 1999 (“September 1999 Report”) shows that Cameron intended to injure the decedent.<sup>16</sup> The author of the report is unidentified. Unlike the reports of the State Police, the September 1999 Report is not a verbatim recording of Cameron’s words, although Cameron did affix his signature to the report. The report is only a summary of an interview of Cameron by the Easton Police. Titan highlights the following language, inter alia, from the report:

After being impacted/hit the second time, is when he [Cameron] (#1051) fires/shoots at the driver of the truck. . . . Rather, his (#1051) decision to discharge his weapon, to stop the driver of the truck, was made/based on these following reasons(s) or justification(s):

- ...
- 3.) He (#1051) believed he had a duty to protect the rest of the community, and stop the driver of the truck, who had exhibited this extreme indifference and total disregard for human life.
- ...

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<sup>15</sup> A transcript of the Cameron Deposition is attached as Exhibit F to Titan’s Memorandum of Law in support of the Titan Motion.

<sup>16</sup> A copy of the September 27, 1999 report is attached as Exhibit C to Titan’s Memorandum of Law in support of the Titan Motion.

At this point he (#1051) told the S.U.V. driver, that the driver of the pick up truck had just tried to run him over and he (#1051) had just shot at him.

(Titan's Mem. of Law Supp. Titan's Mot. at 10 (citing the September 1999 Report at 6-7 (attached thereto as Ex. C.))).

Read in its entirety, the September 1999 Report is consistent with defendant Cameron's numerous statements that he shot his gun at the vehicle, not the driver. The sentence immediately preceding the above passage quoted by Titan states that Cameron had his "duty weapon in the right hand, pointed at the departing/fleeing vehicle." (September 1999 Report at 6.) This is the only place in the September 1999 Report where it describes at what object Cameron specifically pointed or aimed his gun. Considering the entire record with the September 1999 Report, Cameron's alleged statements that he wanted to "stop the driver" of the vehicle and that he told a passerby that "he had just shot at him," cannot be interpreted to mean that Cameron aimed his gun at the driver intending to inflict bodily harm upon him. Given Cameron's consistent testimony under oath in court and his statements to the State Police that he did not intend to shoot the decedent, the statements in the September 1999 Report can only be interpreted to mean that Cameron shot at the truck with the intention to get the driver to stop his vehicle – not that he intended to kill him or otherwise inflict bodily harm upon him. To the extent Cameron's sworn testimony and his statements to the State Police conflict with statements not recorded verbatim by the Easton Police Department, the court finds the former testimony provides a more accurate account of Cameron's intent.

The evidence in the case clearly shows that Cameron believed he was acting to protect his life and the community. Cameron stated:

Uh, after he lurched forward and I started back peddling, some part of the vehicle struck me, knocking me back to the ground. After I hit the ground, OK, all I kept remembering or thinking was, Get to your feet, get to your feet. When I turned back towards the vehicle, the vehicle still turned to the left, and it was still coming towards me. At that point, uh, I felt my life was in danger, uh, and all I was trying to do was get to my feet because, uh, at that point he was no longer, uh, he wasn't trying to flee. He was coming at me with his vehicle.

(State Police Interview at 59.) See also State Police Interview at 61 (“his intentions were clear to me that he was trying to strike me or run me over”), 81 (Cameron believed his life was in danger because the driver “intentionally came towards me”), 84-86 (same); State Police Interview II at 10 (“[H]e tried to kill me and . . . I knew with his mannerism that he was either intoxicated or on some type of drug and . . . I know that he would be endangering anybody else he came in contact with.”).

At the time Cameron fired his gun, it was dark, in an area that was not well lit and he did not know in which direction the truck was moving. (N.T., 8/23/01, at 48; State Police Interview at 84-85; State Police Interview II at 11.) The time between Cameron first being struck and knocked down by the truck and the firing of the weapon was less than five seconds. (N.T., 8/21/01, at 50.) At the time of the trial, and notwithstanding his guilty plea, Cameron believed that the decedent was using his truck as a weapon to inflict serious bodily injury and that the shooting was justified. (N.T., 8/21/01, at 52.)<sup>17</sup> The evidence presented to the court does not

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<sup>17</sup> See Tennessee v. Garner, 471 U.S. 1, 11 (1985) (“Where the officer has probable cause to believe that the suspect poses a threat of serious bodily harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”); 18 Pa. Cons. Stat. Ann. § 508 (police officer may use “any force which he believes to be necessary to defend himself or another from bodily harm when making the arrest.” Deadly force may be used “only when he believes that such force is necessary to prevent death or serious bodily injury.”).

show that Cameron subjectively intended the harm that occurred, i.e. intended to violate decedent's civil rights or to cause him bodily injury.

Based on all the evidence, the court finds that Cameron did not have the intent to injure decedent or to violate his civil rights.

**B. Civil Judgment In The Civil Trial.** No evidence shows that Cameron intended to violate decedent's civil rights. The Civil Judgment entered against Cameron does not prove otherwise. The jury determined that Cameron's use of force was excessive under the circumstances. The jury did not make a specific determination as to whether Cameron knew his use of force was excessive under the circumstances and thereby intended to violate decedent's civil rights. The court's instructions to the jury made it clear that the jury did not need to find that Cameron intended to violate the decedent's civil right in order to find that Cameron used excessive force. (Cameron's Motion Ex. 4 at Ex. A.) The fact that the jury concluded that Cameron violated decedent's civil rights is not relevant to the determination of Cameron's subjective intent in this declaratory judgment action.

**C. Intent To Injure Cannot Be Inferred As A Matter Of Law In This Case.** Titan argues that Cameron's intent should be inferred as a matter of law because he fired at decedent's vehicle knowing that it was occupied. (Mem. of Law Supp. Titan's Mot. at 14-16.) It is clear under Pennsylvania law that intent can be inferred as a matter of law only in very limited circumstances. As discussed earlier, in State Farm Fire and Cas. Co. v. In HWA Angela Cooper, 2001 WL 1287574 (E.D. Pa. Oct. 24, 2001), the court adopted the subjective intent test enunciated by Elitzky, and stated that the "few Pennsylvania cases found that specifically

disavow a ‘subjective intent’ test for purposes of general insurance coverage are those that hold that a court may infer intent to harm as a matter of law only in extreme cases where there are allegations of child molestation. Outside the context of sexual assault on children, intent cannot be inferred merely from allegations of a criminal act.” Id. at 3 n.3. The Third Circuit Court of Appeals emphasized that “‘in cases that do not involve sexual child abuse, Pennsylvania has adopted a general liability standard for determining the existence of this specific intent that looks to the insured’s actual subjective intent.’” Aetna Life and Cas. Co. v. Barthelemy, 33 F.3d 189, 192 (3d Cir. 1994) (quoting Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 460 (3d Cir. 1993)). In the exceptional case involving sexual child abuse, many jurisdictions have adopted the inferred intent rule which permits a court to infer an actor’s intent from the nature and character of the acts committed, and to “establish conclusively the existence of intent to harm as a matter of law.” Id. at 191 (quoting Wiley, 995 F.2d at 460).

The cases cited by Titan do not require otherwise. In Germantown Ins. Co. v. Martin, 595 A.2d 1172 (Pa. Super. Ct. 1991), appeal denied, 612 A.2d 985 (Pa. 1992) (table), the only case cited by Titan that was decided under Pennsylvania law, the insured, upset over his fiancée returning to her prior boyfriend, took a gun to the ex-boyfriend’s house, where he shot and killed two of the boyfriend’s relatives and injured another person. The insured then killed himself. Id. at 1173. The court concluded that the insured intended to harm the victims based on, inter alia: a statement he made a week before the shootings that he wanted to “just start shooting and kill everybody in the house;” the insured shot each victim multiple times; he was proficient with guns; and the insured chose an automatic handgun from his collection of guns,

brought extra ammunition, drove to the right house, knocked on the door, and began shooting rapidly, but not wildly. Id. at 1175. The court specifically referred to and applied the law in Pennsylvania as stated in Elitzky. The facts in the present case differ greatly from those in Martin, most notably in that the insured in Martin, who had killed himself, was not available to speak to his subjective intent, whereas Cameron spoke credibly regarding his intent.

The other cases cited by Titan in support of its argument that Cameron's intent should be inferred as a matter of law because he fired at Rapp's truck knowing it was occupied and/or because he fired at close range in Rapp's direction, are distinguishable on a number of grounds. See Mem. of Law Supp. Titan's Mot. at 12-16. Some applied standards inconsistent with Pennsylvania law. Compare Auto Club Group Ins. Co. v. Marzonie, 527 N.W. 2d 760, 768 (Mich. 1994) (Coverage is excluded for expected injuries where the insured was aware that harm was likely to follow from his intentional act), abrogated by, Frankenmuth Mut. Ins. Co. v. Masters, 595 N.W. 2d 832 (Mich. 1999), and Harris v. Richards, 867 P.2d 325, 328-29 (Kan. 1994) (under Kansas law, "insured's intent to injure can be inferred when the resulting injury is a natural and probable consequence of the insured's act"), with Elitzky, 517 A.2d at 987, 989 (under Pennsylvania law, "an insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result;" "[t]he exclusion is inapplicable even if the insured should reasonably have foreseen the injury which his actions caused."). The policy provision at issue in North Carolina Farm Bureau Mut. Ins. Co. v. Mizell, 530 S.E. 2d 93, 94 (N.C. Ct. App.), review denied, 544 S.E. 2d 783 (N.C. 2000), unlike the expect or intend clause at issue in the present case, excluded coverage for injury or damage

“[w]hich is intended by or which may reasonably be expected to result from the intentional act.”

Although the court applied a standard similar to the subjective intent test in Elitzky, the policy provision at issue in Barton v. Allstate Ins. Co., 527 So. 2d 524, 524 (La. Ct. App.), writ denied, 532 S. 2d 157 (La. 1988), excluded coverage for injury “which may reasonably be expected to result from an intentional act of the insured.” Moreover, the court in Barton was not addressing a motion for summary judgment, but was considering an appeal from a jury verdict finding that the policy exclusion applied. In almost all of the cases cited by Titan where intent to injure was inferred as a matter of law, the facts evidenced that the insureds’ intentional acts were the result of a personal grudge he or she had against the victim(s), and involved multiple gun shots. See, e.g., State Farm v. Victor, 442 N.W. 2d 880, 882-83 (Neb. 1989) (insured admitted intent to cause bodily harm to one individual, but shot another individual; the court concluded that the injury was “expected or intended” and noted that it was the intent to cause bodily injury to someone that was the key); Commercial Union Ins. Co. v. Ballowe, 671 F. Supp. 421, 421-23 (W.D. Va. 1987) (insured entered house by breaking down door and fired his gun numerous times while shouting “you are both dead”); and Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647, 648-51 (M.D. N.C.) (insured shot victim fifteen times and pled guilty to voluntary manslaughter), aff’d, 307 F.2d 521 (4<sup>th</sup> Cir. 1962). None of the cases cited by Titan involved a police officer’s liability policy and a single shot fired by a police officer during the course of his duties.

The court will not infer as a matter of law that Cameron intended to injure decedent or to violate his civil rights in this case.

**D. The Injury To The Decedent Was Not “Substantially Certain” To**

**Result From Cameron’s Intentional Acts.** Titan argues that “[u]nder the holding in Elitzky, . . . the Court must find that the injury – here death – was substantially certain to result from Cameron’s intentional acts, and is therefore not covered by the Titan policy.” (Titan’s Letter Brief at 2.) In both its Memorandum of Law in Support of the Titan Motion and Titan’s Letter Brief, Titan outlines in detail the intentional acts it claims that Cameron took which were substantially certain to result in the death of decedent. In summary, Titan argues that “Cameron’s actions were, as a trained police officer, taking his gun out of his holster and purposely and intentionally shooting at a truck which was moving away from him while the truck was 12 - 18 inches away, knowing that the truck was occupied. In fact, Cameron has repeatedly admitted that he shot his gun with the intention of ‘stopping’ the driver, who he considered to be a hazard to himself and others.” (Titan’s Letter Brief at 2.)

Cameron repeatedly testified that he fired at the truck in the darkness of the night, and did not have a sight picture at the time he fired. He had just been struck twice by the truck, and the entire sequence of events occurred over a period of time of less than five seconds. The facts do not support a finding that the death of decedent, or that a violation of decedent’s constitutional rights, were substantially certain to result from Cameron’s actions. The law in Pennsylvania is clear that “substantially certain to result” is a higher threshold than “reasonably foreseeable.” See Elitzky, 517 A.2d at 987 (“The exclusion is inapplicable even if the insured should have reasonably foreseen the injury which his actions caused.”).

A case cited by Titan supports this court’s conclusion. In Barton v. Allstate Ins. Co., 527 So. 2d 524 (La. Ct. App.), writ denied, 532 So. 2d 157 (La. 1988), even though the

policy language at issue was dissimilar to that at issue in this case, the court applied a similar test to determine if an injury is intentional. The court summarized the relevant Louisiana law as follows:

Thus when an act is intentional, but the injury is not, the exclusionary clause is not applicable. Sabri [v. State Farm Fire and Cas. Co.], 488 So. 2d 362,] 365 [(La. App.3d Cir.), writ not considered, 493 S.2d 630 (La. 1986)]. ‘An injury is intentional, i.e., the product of an intentional act, only when the person who acts either consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct or knows that the result is substantially certain to follow from his conduct, whatever the desire may be as to the result.’

Barton, 527 So. 2d at 525-26 (quoting Pique v. Saia, 450 So. 2d 654, 655 (La. 1984)). In Barton, the insured’s estranged wife had brought a man home with her from a bar. The insured, the estranged husband, was not living with the estranged wife at the time. Early in the morning, the telephone rang twice at the wife’s trailer, but no one spoke when the wife answered the phone. A short time later, the insured, who had been out drinking, knocked on the trailer door and yelled to be admitted into the trailer. The wife pretended not to be home, and called the police. The insured broke into the trailer, entered the bedroom and asked the location of the other man. The wife denied anyone else was there. The insured slapped and pushed the wife, then noticed that the bathroom door was shut. The insured kicked the door once, then shot into the door. The other man was shot. The insured shot the gun three more times, once into the microwave oven and at least once into the bathroom ceiling. The man opened the bathroom door and the insured held the gun to his head threatening to “blow his brains out.” The insured also held the gun to his wife’s head making the same threat. The insured went outside and hid the gun under his car. The police then arrived. Barton, 527 So. 2d at 525.

On appeal, the court concluded that the jury correctly determined that the insured intended to shoot and injure the other man. The court found that although the other man was in a bathroom behind a closed door, the insured knew that someone was in the bathroom and intentionally fired the gun into the door. The court determined that the insured “should have been well aware that by firing the gun into the door, it was substantially certain that the person behind the door would be injured.” Id. at 526.

While in Barton injury to the victim was substantially certain to occur, the facts in the instant case are distinguishable. Cameron clearly stated his subjective intent, and his testimony is supported by the facts. Cameron did not fire his gun into a small room through a door. He fired a single shot, at a moving truck that had struck him twice, in the darkness of night in a wooded area. Cameron bore no grudge against the decedent, but had stopped to help him in the course of his duties as a police officer. Based on all of the evidence, the court finds that the injury to decedent was not substantially certain to result from Cameron’s actions.

For all the above reasons, under the particular facts and circumstances presented in this case, this court finds that Titan must indemnify Cameron for the Civil Judgment under Part I.E.1 of the Policy.

**2. Policy Part I.E.2 – “Objectively Good Faith” Clause.**

Titan argues that coverage is precluded under Part I.E.2 of the Policy because Cameron had no objectively good faith reason for his intentional injury to decedent. Titan asserts that it is undisputable that the jury’s finding that Cameron used excessive force against the decedent constitutes a finding of unreasonable conduct. While this is true, it is not dispositive in

this case because the court has found that Cameron did not intentionally cause personal injury to the decedent and coverage should be provided under Part I.E.1 of the Policy.<sup>18</sup>

Policy Part I.E.2 provides as follows:

- E. “Occurrence” means an event and includes continuous or repeated exposure to the same condition that results in:
  - 2. Personal injury or property damage, although expected or intended by the insured, if an objectively good faith reason existed to cause such injury or damage.

(Policy Part I.E.2.) Related Policy provision Part I.F.10 provides that “[p]ersonal injury’ means: . . . 10. Violation of civil rights.” (Policy Part I.F.10.) However, Cameron and Rapp both argue that the two provisions in question, Part I.E.2 and Part I.F.10 (coverage for civil rights violations) are inherently contradictory. They contend that Titan cannot provide coverage for civil rights violations, actions defined as objectively unreasonable conduct, under Part I.F.10 of the Policy, then negate such coverage under (1) Part I.E.1 of the Policy to situations which the insured did not intend or expect the consequences of his actions, or (2) Part I.E.2 of the Policy by requiring that the insured act with an “objectively good faith reason” in order for there to be coverage. Cameron and Rapp maintain that if both Part I.E. and Part I.F.10 of the Policy are given effect, the Policy’s express coverage for civil rights violations would be illusory, i.e., no coverage at all.

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<sup>18</sup> Since this court finds that coverage is required under Part I.E.1 of the Policy, *i.e.*, Cameron did not expect or intend to cause injury to decedent, the court need not decide whether Titan must indemnify Cameron under Part I.E.2 of the Policy, which provides that coverage will be provided for expected or intended personal injury “if an objectively good faith reasons existed to cause such injury.” However, this issue is the focus of Rapp’s and Cameron’s Motions for Summary Judgment, and the parties fully briefed this issue and presented oral argument at the trial. The court therefore addresses this issue herein.

(Mem. of Law Supp. Rapp's Mot. at 3-9; Rapp's Response at 13-14; Mem. of Law Supp. Cameron's Mot. at 10-17.)

The concepts of "illusory" and "ambiguity" are separate. While Rapp and Cameron state their claim as one of ambiguity, they interweave the concept of "illusoriness." The court will address both of these concepts below.

**A. The Policy Is Not Illusory.** Insurance coverage is considered "illusory" where the insured purchases no effective protection. See Lee R. Russ, 7 Couch on Insurance 3d, § 101:20 at 101-74 (West 1997). An insurance policy is not illusory if it provides coverage for some acts; "it is not illusory simply because of a potentially wide exclusion." Bagley v. Monticello Ins. Co., 720 N.E. 2d 813, 817 (Mass. 1999). "Coverage under an insurance policy is not illusory unless the policy would not pay benefits under any reasonably expected set of circumstances." Lexington Ins. Co. v. Am. Healthcare Providers, 621 N.E. 2d 332, 339 (Ind. App. Ct. 1993). Contracts are illusory when "one party exploits the other;" where the contracts are "hopelessly or deceptively one-sided." Truck Ins. Exch. v. Ashland Oil, Inc., 951 F.2d 787, 790 (7<sup>th</sup> Cir. 1992) (Posner, J.).

The directors' and officers' liability insurance policy at issue in Lexington Ins. Co., contained an exclusion, "called Exclusion Q," which excluded from coverage claims involving an insolvency or liquidation. Id. at 338. The insureds claimed that Exclusion Q was contrary to public policy because it rendered coverage under the policy illusory. Id. at 339. The court disagreed finding that "[s]ince Exclusion Q does not apply to claims which do not involve insolvency or liquidation, it is easily conceivable that [the insureds] could have benefited from

the directors and operators endorsement. Not all claims asserted against officers and directors of corporations involve an insolvency or liquidation, so the policy was not illusory.” Id.

Similarly, in American Nat’l Gen. Ins. Co. v. L.T. Jackson, 203 F. Supp. 2d 674 (Miss. 2001), the provisions at issue in the rental owners’ and rental dwelling policies provided coverage for invasion of privacy, but excluded coverage for intentional acts by the insured. Id. at 679. The insureds argued that the policies’ coverage for personal injury, defined to include invasion of privacy, which is by definition an intentional tort, was rendered illusory by the policies’ exclusion of intentional acts and definition of “occurrence.” Id. at 685. The District Court for the Southern District of Mississippi rejected that argument relying upon the decision of Fire Ins. Exch. v. Bentley, 953 P.2d 1297, 1302 (Colo. Ct. App. 1998), which rejected an identical argument. In Bentley, as in L.T. Jackson, the policy expressly covered “injuries resulting from invasions of rights of privacy, but not injuries caused by intentional acts.” Bentley, 953 P.2d at 1301. The Bentley court concluded that “a reasonable reading of the policy is that, under certain circumstances, a claim of invasion of privacy could be within policy coverage, but that [an invasion of privacy claim for intrusion upon seclusion] [was] not of the type for which coverage is provided.” Id. The court recognized that although a claim for invasion of privacy based on an unreasonable intrusion upon the seclusion of another requires proof of intentional acts, some courts had held that recovery could be had under at least one type of invasion of privacy – false light invasion of privacy – under a negligence theory. The Bentley court thus concluded that the policy was not illusory because it “[did] provide coverage for some claims of invasion of privacy, but specifically exclude[d] those based on intentional conduct.”

Id. Relying upon Bentley, the court in L.T. Jackson, concluded that the policies at issue in that case were not illusory. L.T. Jackson, 203 F. Supp. 2d at 685-86.

The instant case presents the exact situation which demonstrates that the Policy at issue here is not illusory regarding civil rights violations. A jury determined that Cameron's use of force was excessive under the circumstances and that he violated decedent's civil rights. The jury did not, and was not required to, make a specific determination as to whether Cameron knew his use of force was excessive under the circumstances and thereby intended to violate decedent's civil rights. The court's instructions to the jury made it clear that the jury did not need to find that Cameron intended to violate the decedent's civil rights, or intended to cause him bodily injury, in order to find that Cameron used excessive force. By finding that Cameron used excessive force against the decedent, the jury must have concluded that Cameron's conduct was not objectively reasonable. (Cameron's Motion Ex. 4 at Ex. A.) Thus, while Titan would not be required to indemnify Cameron with respect to the civil rights violation under Part I.E.2 of the Policy, Titan is required to indemnify Cameron under Part I.E.1 of the Policy because Cameron did not intend to injure decedent or to violate his constitutional rights. Giving effect to both Part I.E and Part I.F.10 of the Policy, the Policy does provide for coverage, both for defense and indemnification. The fact that the Policy provides coverage for at least one type of civil rights violation means that the Policy is not illusory. See Lobianco v. Property Protection, Inc., 437 A.2d 417, 421 (Pa. Super. Ct. 1981) (a provision merely limiting one party's liability does not

render the contract illusory because the party would not escape all duties of performance in every case).<sup>19</sup>

**B. The Policy Is Not Ambiguous.** Rapp and Cameron also argue that Part I.E of the Policy and Part I.F.10 of the Policy are ambiguous by simultaneously providing coverage for civil rights violations (Part I.F.10), and then limiting such coverage to situations in which the insured either (1) did not expect or intend to commit the violation (Part I.E.1) or (2) had an “objectively good faith reason” for the conduct (Part I.E.2). Rapp and Cameron contend that these provisions create an inherent ambiguity in the Policy, which, according to Pennsylvania law, must be construed strictly against the insurer and in favor of the insured.

In support of their positions, Rapp and Cameron rely upon two decisions involving the same insurer as this case, Titan: (1) Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336 (N.D. Ala. 1999), considering policy language identical to that at issue in this case, and (2) two related cases: Titan Indem. Co. v. Riley, 641 So. 2d 766 (Ala. 1994) (“Riley I”) and Titan Indem. Co. v. Riley, 679 So. 2d 701 (Ala. 1996) (“Riley II”), considering an earlier version of Titan’s law enforcement officers’ liability policy with language similar to that at issue in this

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<sup>19</sup> No evidence has been produced by the parties as to what the reasonable expectations of the City of Easton or Cameron were regarding the extent of coverage provided by the Titan Policy. The court therefore finds the doctrine of reasonable expectations to be inapplicable. See generally Thomas J. Rueter and Joshua H. Roberts, Pennsylvania’s Reasonable Expectations Doctrine: The Third Circuit’s Perspective, 45 Vill. L. Rev. 581 (2000). Likewise, the policy provision in question is not unconscionable. Under Pennsylvania law, “[a] policy provision is unconscionable if: 1) one of the parties to the contract lacked a meaningful choice as to whether to accept the provision in question; and 2) the challenged provision unreasonably favored the other party to the contract.” Zawierucha v. Philadelphia Contributionship Ins. Co., 740 A.2d 738, 740 (Pa. Super. Ct. 1999), appeal denied, 757 A.2d 934 (Pa. 2000) (table). Here, defendants have failed to offer any evidence that the City of Easton was in any way prohibited from negotiating different contract terms. Hence, the provision in question is not unconscionable.

case. These decisions applied Alabama, not Pennsylvania, law. In Newton, a jury found, inter alia, against Police Officer Newton on malicious prosecution, fabrication of evidence and false imprisonment claims, and entered a substantial verdict in favor of the plaintiffs. Newton, 39 F. Supp. 2d at 1339. Titan brought a declaratory judgment action claiming it was not required to pay the judgment. The plaintiffs argued that the policy language was ambiguous because it excludes coverage for intentional acts on one hand but permits recovery for intentional acts on the other.<sup>20</sup> Id. at 1344. The District Court began its analysis by reviewing Riley I and Riley II in which the Alabama Supreme Court found an earlier version of a Titan law enforcement officer's liability policy ambiguous. The Alabama Supreme Court concluded:

The language of the policy does preclude coverage for intentional acts, but it also specifically provides coverage for acts of malicious prosecution, assault and battery, wrongful entry, piracy and other offenses that require proof of intent. Further, the policy specifically provides for coverage brought under the Federal Civil Rights Act. The conflict between these provisions creates an inherent ambiguity within the policy, and it is well settled in this state that when there is any doubt as to whether insurance coverage exists under a policy, the policy must be construed for the benefit of the insured.

Riley I, 641 So. 2d at 768 (citations omitted).

In Newton, Titan responded to Riley I and the defendants' contention in Newton that the policy was ambiguous, by arguing that the definition of "occurrence" in the Newton policy was different from the definition in the Riley I policy. Newton, 39 F. Supp. 2d at 1345.<sup>21</sup>

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<sup>20</sup> The policy at issue in Newton defined "personal injury" to mean, inter alia: false arrest, wrongful detention or imprisonment, unlawful prosecution, and violation of civil rights. Newton, 39 F. Supp. 2d at 1340.

<sup>21</sup> The policy at issue in Riley I defined "occurrence" as an event that results in

1. Personal injury the insured did not expect or intend unless the personal injury resulted from the use of reasonable force to protect persons or property.

The court concluded that the difference did not change the outcome; the policy remained ambiguous. The court concluded that the term “objectively good faith reason,” a term not defined in the policy, is an “inherently ambiguous term in the law enforcement liability context for coverage.” Id.

The court stated as follows:

A corollary to the ambiguity doctrine is the illusory coverage doctrine. Alabama recognizes this general law that the language or interpretation of an ambiguous provision by an insurance company may be so tortured as to result in “illusory” coverage.

...

It is clear to the court . . . that the change in the policy to add coverage for intentional acts done with “an objective good faith reason” does not cure the ambiguity identified in Riley I. The policy at issue in Riley I sought to limit Titan’s exposure by excluding intentional acts from the definition of occurrence. The Alabama Supreme Court concluded that the policy was ambiguous because the policy specifically provided for coverage of intentional acts. The policy at issue in this case provides for coverage for injury which is the result of a violation of the Civil Rights Act that is intentional if an objectively good faith reason existed to cause such injury. The coverage is illusory and is, in reality, no coverage at all because of the availability of the qualified immunity defense. Although the precise focus of the qualified immunity defense is the objective reasonableness of a law enforcement officer’s conduct in light of clearly established law, the court cannot conjure up a situation where a law enforcement officer would have an objectively good faith reason for causing an injury but not be qualifiedly immune. Consequently, there is no instance where a jury could

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2. Property damage the insured did not expect or intend.

Newton, 39 F. Supp. 2d at 1345. The policy at issue in Newton, identical to the Policy at issue in the instant case, defines “occurrence” as an event that results in

1. Personal injury or property damage the insured did not expect or intend, or
2. Personal injury or property damage, although expected or intended by the insured, if an objectively good faith reason existed to cause such injury or damage.

Id.

return a verdict for which Titan would be required to provide indemnification if there was an objective good faith reason for the injury caused. . . . Under the terms of the policy, Titan is required to provide coverage for injury under the Civil Rights Act caused by an officer who had an objectively good faith reason to cause the injury. There is no such case which would result in a damage award. Thus, there is no civil rights case in which Titan would be required to pay. The coverage is classically illusory.

Id. at 1344-47 (citations omitted). Rapp and Cameron argue that Newton should lead this court to find that under Titan's interpretation of the Policy, coverage is illusory and, therefore ambiguous, because there is no situation in which the jury could find a civil rights violation that would be covered by the Policy. (Mem. of Law Supp. Cameron's Motion at 15.) If the Policy is ambiguous, Rapp and Cameron assert that it must be strictly construed against Titan, the insurer, and should be construed in favor of affording coverage to Cameron, the insured. (Mem. of Law Supp. Rapp's Motion at 9.)

As addressed above, the Policy is not illusory. Cameron has been found to have violated the decedent's civil rights, yet Titan is required to indemnify Cameron for the Civil Judgment under Part I.E.1 of the Policy. Moreover, the language of Part I.E.2 is not ambiguous under Pennsylvania law. The language is not "reasonably susceptible to different constructions and capable of being understood in more than one sense." Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997) (quoting Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142, 143-44 (Pa. Super. Ct. 1995)). Indeed, Cameron and Rapp have not offered a different interpretation of Part I.E.2 other than that suggested by Titan, but only have argued that the provision conflicts with the language in Part I.F.10 which states that the Policy provides coverage for civil rights violations. The court finds that the Policy, as a whole, does provide for coverage of civil rights violations subject to the limitations and exclusions contained in the Policy,

including the limitations set forth in Part I.E of the Policy.<sup>22</sup> The limitations and exclusions may make the coverage meager, but they do not make the Policy ambiguous.

### III. CONCLUSION

For all the above reasons, the court rejects defendants' argument that there is coverage pursuant to Part I.E.2 of the Policy because the provision is ambiguous or illusory. However, the court finds that Titan must indemnify Cameron for the Civil Judgment pursuant to Part I.E.1 of the Policy and, accordingly, judgment will be entered against Titan. An appropriate order follows.

BY THE COURT:

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THOMAS J. RUETER  
United States Magistrate Judge

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<sup>22</sup> In the event that the arguments of the defendants could be construed, in the alternative, to be that the Policy violates public policy because it is illusory, such a claim is rejected. First, this court finds that the Policy is not illusory. Second, “[c]ontracts are against public policy when they create incentives to commit acts that society has made illegal or, at least, disapproves of.” Truck Ins. Exch. v. Ashland Oil, Inc., 951 F.2d 787, 790 (7<sup>th</sup> Cir. 1992). Under Pennsylvania law, an unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy. Insurance Co. of Evanston v. Bowers, 758 A.2d 213, 220 (Pa. Super. Ct. 2000) (quoting Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998) (citations omitted)). Only “dominant public policy would justify [invalidating a contract as contrary to public policy]. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy.” Id. (quoting Eichelman, 711 A.2d at 1008 (citations omitted)). The instant matter does not rise to this very high standard. The insured and the insurer are not colluding to cause harm to others. See Truck Ins. Exch., 951 F.2d at 790. The Policy does not create incentives to commit acts that society has made illegal. Id. The terms at issue are not contrary to any dominant public policy. Consequently, the Policy does not violate public policy.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TITAN INDEMNITY COMPANY : CIVIL ACTION  
v. :  
SCOTT C. CAMERON, :  
and :  
CITY OF EASTON, :  
and :  
ANDREW RAPP, Executor of the :  
Estate of John E. Rapp, Deceased : NO. 01-5435

**ORDER**

AND NOW, this 30<sup>th</sup> day of July, 2002, upon consideration of Titan Indemnity Company's ("Titan") Complaint for Declaratory Judgment (Document No. 1), Scott C. Cameron's ("Cameron") Motion for Summary Judgment (Document No. 19), Andrew Rapp, Executor of the Estate of John E. Rapp, deceased ("Rapp") Motion for Summary Judgment (Document No. 20), Titan's Motion for Summary Judgment (Document No. 22), evidence and oral argument presented at the trial on June 25, 2002, and for the reasons stated in the accompanying Memorandum of Decision, it is hereby

**ORDERED**

1. Titan's Complaint for Declaratory Judgment seeking a declaration that Titan owes no duty to indemnify defendant Scott C. Cameron for the civil judgment entered against him on August 27, 2001 in favor of defendant Rapp (the "Civil Judgment") is **DENIED**.
2. Titan's Motion for Summary Judgment is **DENIED**.

3. Rapp's Motion for Summary Judgment is **DENIED**.

4. Cameron's Motion for Summary Judgment is **DENIED**.

5. Titan shall indemnify defendant Cameron for the Civil Judgment pursuant to Part I.E.1 of the Law Enforcement Officer's Liability Policy issued by Titan to the City of Easton, Policy number 90-HP-01971, which Policy was in effect at the times relevant hereto.

6. Judgment is hereby entered in favor of defendants Scott C. Cameron, City of Easton and Andrew Rapp and against plaintiff Titan Indemnity Company.

BY THE COURT:

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THOMAS J. RUETER  
United States Magistrate Judge