NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 11/15/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

ELIZABETH STOSCUP, a minor, by and through her parents and legal guardians, WILLIAM STOSCUP and HEIDI STOSCUP, Plaintiffs/Appellants/ Cross-Appellees, v. USAA CASUALTY INSURANCE COMPANY aka USAA INSURANCE AGENCY, INC. OF TEXAS (FN), an Arizona company, Defendant/Appellee/ Cross-Appellant.	No. 1 CA-CV 10-0677 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-021644

The Honorable Sam J. Myers, Judge

AFFIRMED

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D O W N I E, Judge

¶1 Elizabeth Stoscup appeals from the entry of summary judgment in favor of USAA Casualty Insurance Company, aka USAA Insurance Agency, Inc. of Texas (FN) ("USAA"). USAA cross-appeals from the entry of summary judgment for Stoscup on the issue of standing. Because the superior court properly granted summary judgment to USAA on Stoscup's substantive claims, we affirm without reaching the cross-appeal.

FACTS AND PROCEDURAL HISORY

¶2 In October 2004, 14-year-old Elizabeth Stoscup was walking on a public sidewalk when she was shot and injured by a BB gun fired by 18-year-old Matthew Morehouse. Stoscup's parents filed a lawsuit on their daughter's behalf against Morehouse and his parents, Julie and James Kautenberger, alleging assault and negligent supervision. They alleged that Morehouse acted maliciously and willfully.

¶3 The Kautenbergers notified their insurer, USAA, of the lawsuit and asked it to defend and indemnify them under their homeowners' insurance policy (the "Policy"). USAA denied coverage, asserting that the incident was not an "occurrence,"

as defined by the Policy, and that it was excluded by the intentional acts exclusion. Stoscup's parents subsequently amended their complaint to dismiss the Kautenbergers as parties and to allege only negligent conduct by Morehouse. USAA's position regarding coverage did not change.

¶4 In September 2007, Stoscup's parents and Morehouse signed an "Agreement to Consent to Judgment and Covenant Not to Execute Judgment." Based on their stipulation, the superior court entered judgment against Morehouse in the sum of $210,000. Stoscup later filed this action against USAA, alleging claims for breach of contract, bad faith, negligent supervision, and professional negligence.

¶5 USAA moved for summary judgment, arguing Stoscup lacked standing because Morehouse had not assigned his rights under the Policy to her. Stoscup opposed the motion and was allowed to submit evidence that the parties intended the September 2007 agreement to be an assignment. The court granted summary judgment to Stoscup on the standing issue.

¶6 In the meantime, USAA moved for summary judgment on each of Stoscup's claims, contending: (i) the shooting was not an occurrence under the Policy, or if it was, it was excluded by the intentional acts exclusion; (ii) it did not act in bad faith because it conducted a reasonable claims investigation; and (iii) the negligent supervision and professional negligence

claims failed as a matter of law. Stoscup opposed USAA's motion and cross-moved for summary judgment on the breach of contract claim. The superior court granted summary judgment to USAA and deemed Stoscup's cross-motion moot.

¶7 Stoscup timely appealed. USAA timely cross-appealed regarding the standing issue. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶8 Stoscup argues the superior court erred in granting summary judgment to USAA on her breach of contract and bad faith claims.[1] A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). "We view the evidence in the light most favorable to the party against whom judgment was entered, and we determine *de novo* whether there are genuine issues of material fact and whether the trial court erred in its application of the law." *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

[1] Stoscup does not challenge the entry of summary judgment on her claims for negligent supervision and professional negligence. We therefore do not address those claims. *See Schabel v. Deer Valley Unified Sch. Dist.*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

I. Breach of Contract

¶9 Interpretation of an insurance contract is a question of law that we review *de novo*. *Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 264, ¶ 9, 183 P.3d 513, 515 (2008). The insured generally bears the burden of establishing coverage under an insuring clause; the insurer has the burden of demonstrating that a policy exclusion applies. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 13, 13 P.3d 785, 788 (App. 2000).

¶10 We assume, without deciding, that Stoscup's shooting was an "occurrence," as defined by the Policy. We confine our analysis to the intentional acts exclusion. That exclusion states that there is no liability coverage for bodily injury

> caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person . . . .

¶11 USAA's intentional act exclusion differs in material respects from policy provisions considered in the cases cited by Stoscup. *See, e.g.*, *Vanguard Ins. Co. v. Cantrell,* 18 Ariz. App. 486, 487, 503 P.2d 962, 963 (1972) (addressing an exclusion for bodily injury "which is either expected or intended *from the standpoint of the Insured,*" as well as an exclusion for injury "caused intentionally by, or at the direction of, the insured") (emphasis added) (disapproved on other grounds by *Ohio Cas. Ins.*

Co. v. Henderson, 189 Ariz. 184, 191, 939 P.2d 1337, 1344 (1997)); *Farmers Ins. Co. of Ariz. v. Vagnozzi*, 138 Ariz. 443, 444, 675 P.2d 703, 704 (1983) (addressing an exclusion for bodily injury "arising as a result of intentional acts of the insured"). The provision at issue here imposes an *objective* standard in excluding coverage for intentional or purposeful acts that "would reasonably be expected to result in bodily injury."

¶12 The superior court ruled that "no reasonable finder of fact could make the finding that [Morehouse's act of shooting at Stoscup] would not be reasonably expected to result in bodily injury." We agree.

¶13 Morehouse admitted the shooting "was not an accident" and that he "intended to shoot at" Stoscup. Indeed, Morehouse pumped, aimed, and fired a loaded BB gun at Stoscup from a distance of roughly 20 feet. Although Morehouse claimed he shot at Stoscup to "scare," not injure her, inherent in the nature of his intentional act is a reasonable likelihood of bodily injury. *See, e.g.*, *Am. Family Mut. Ins. Co. v. Wubbena*, 496 N.W.2d 783, 785 (Iowa Ct. App. 1992) ("The character of the act of pointing a bb gun at another is such that physical harm can be foreseen as accompanying it."); *Lopez v. Am. Family Mut. Ins. Co.*, 148 P.3d 438, 439 (Colo. App. 2006) ("[I]t may be inferred that when an individual deliberately aims a loaded BB gun at someone and

pulls the trigger, the shooter intends or expects to cause harm."); *Bell v. Tilton*, 674 P.2d 468, 477 (Kan. 1983) ("[T]he act of shooting another in the face with a BB pellet is one which is recognized as an act so certain to cause a particular kind of harm it can be said an actor who performed the act intended the resulting harm, and his statement to the contrary does nothing to refute that rule of law."); *Misle v. State Farm Mut. Auto. Ins. Co.*, 908 S.W.2d 289, 291 (Tex. Ct. App. 1995) (as a matter of law, insured intended to cause offensive bodily contact or apprehension of such contact by firing BB gun into a crowd).

¶14 The police report describes Stoscup's injury as "1 [inch] deep BB entrance hole in left lower tricep with BB lodged 1 [inch] deep into tricep." The fact that Morehouse neither intended nor anticipated the exact harm that Stoscup suffered is immaterial. *Cf. Ohio Cas.*, 189 Ariz. at 190, 939 P.2d at 1343 ("Once it is found that harm was . . . substantially certain to occur, it is immaterial that the actual harm caused is of a different character or magnitude than that intended or expected."); *Chapman by Ricciardi v. Wis. Physicians Serv. Ins. Corp.*, 523 N.W.2d 152, 154 (Wis. Ct. App. 1994) (injury was expected or intended within meaning of policy exclusion where teenager intended to sting friend with BB pellet, but not to cause serious injury). The superior court

properly granted summary judgment to USAA based on the intentional acts exclusion.

II. Bad Faith

¶15 Stoscup also challenges the entry of summary judgment for USAA on her bad faith claim. She argues USAA ignored controlling Arizona law and failed to conduct a proper claims investigation.

¶16 An insurer breaches its duty of good faith and fair dealing when it "intentionally denies, fails to process or pay a claim without a reasonable basis." *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237, ¶ 20, 995 P.2d 276, 279 (2000) (citation omitted). An insurer may, however, challenge claims that are fairly debatable. *Id*.

¶17 As discussed *supra*, the Policy in fact excluded coverage for the shooting. USAA therefore had a reasonable basis for denying the claim. USAA could nonetheless be liable for bad faith if it knowingly acted unreasonably in investigating, evaluating, and processing the claim. *See id*. at 238, ¶ 22, 995 P.2d at 280 ("[W]hile fair debatability is a necessary condition to avoid a claim of bad faith, it is not always a sufficient condition."). However, nothing in this record supports Stoscup's contention that USAA conducted a "sham" investigation.

¶18 USAA retained independent coverage counsel, who advised that the insurer had no duty to defend or indemnify because there was no covered "occurrence" and because the intentional acts exclusion applied. USAA also obtained and reviewed documents filed in the original civil lawsuit, as well as copies of police reports and minute entries from Morehouse's criminal case.[2] USAA attached copies of its claims file to its motion for summary judgment, detailing the investigative process and the actions taken by the insurer.

¶19 Contrary to Stoscup's contention, and as previously noted, USAA did not misinterpret Arizona law regarding intentional act exclusions. Nor did USAA fail to consider Morehouse's statements, though it determined his subjective intent was not dispositive of the coverage decision. Finally, Stoscup cites no legal authority that required USAA to issue a new coverage opinion after the complaint was amended, especially where the coverage decision was not based on Morehouse's subjective intent. Under these circumstances, the superior court properly granted summary judgment to USAA on Stoscup's bad faith claim.

[2] Morehouse pled guilty to aggravated assault based on his shooting of Stoscup.

CONCLUSION

¶20 We affirm entry of summary judgment in favor of USAA. In the exercise of our discretion, we deny USAA's request for an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01. However, USAA is entitled to recover its appellate costs upon compliance with ARCAP 21(c). We deny Stoscup's request for fees because she is not the successful party.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PETER B. SWANN, Judge

/s/
DONN KESSLER, Judge