STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB GROUP INSURANCE COMPANY, Plaintiff-Appellant, v MATTHEW KONDZIOLKA and JOHN PATRICK SHWARY, Defendants-Appellees.	UNPUBLISHED March 5, 2013 No. 308255 St. Clair Circuit Court LC No. 10-001159-NO

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over insurance coverage, plaintiff Auto Club Group Insurance Company appeals by right the trial court's order denying its motion for summary disposition and granting summary disposition in favor of defendants Matthew Kondziolka and John Patrick Shwary. On appeal, we must determine whether the trial court erred when it concluded that the undisputed evidence established that the criminal acts exclusion in the insurance policy issued by Auto Club did not apply to bar coverage for a hunting incident. Because we conclude that the trial court did not err when it granted summary disposition in Kondziolka and Shwary's favor, we affirm.

I. BASIC FACTS

Kondziolka went hunting for deer in December 2006. Kondziolka testified at his deposition that he was hunting on property owned by a friend of the family with the owner's permission. He said it was "about dusk."

According to a report written by the officer who responded to the incident, Kondziolka said he was walking out through a bean field to the property line to check for deer. He walked south along the line to a deer stand that his dad had set up. He sat in the stand for a time and saw two other hunters at a distance and saw that one sat down, but did not see where the other went. He then walked east to check on a deer blind. After he started back toward the bean field, he heard footsteps and thought he might have kicked out a deer from the blind that he had just checked. He looked and saw a flash of white, so he pulled up and shot. At that point Kondziolka heard someone yell, "you shot me!" Kondziolka immediately used his cell phone to call 911 to get help.

In his report, the officer stated that Kondziolka shot Shwary (who had been placing sugar beets on his property) and that Shwary was taken to the hospital with what appeared to be a "grazing type wound" to the neck. The officer indicated that he checked with the hospital and found that Shwary was scheduled for surgery to repair the injury.

Shwary sued Kondziolka for the injuries he suffered when Kondziolka negligently fired his rifle in December 2008.

In May 2011, Auto Club sued both Kondziolka and Shwary for declaratory relief. Auto Club alleged that it had issued a homeowner's policy that covered Kondziolka on the day he shot Shwary. It also alleged that Kondziolka violated MCL 750.235(1) when he aimed his rifle at Shwary and discharged it causing injury. Because the insurance policy excludes coverage for "a criminal act or omission" or for "an act or omission, criminal in nature", Auto Club further alleged that it had no obligation to defend Kondziolka or pay any judgment or settlement that may arise from Shwary's lawsuit.

Auto Club moved for summary disposition under MCR 2.116(C)(10) in November 2011. In its motion, Auto Club argued that the undisputed evidence showed that Kondziolka violated MCL 750.235(1), which triggered the criminal exclusion from the policy.

Auto Club submitted a police report in support of its motion. The police officer who took the report wrote that Kondziolka admitted to shooting Shwary:

> He stated that he then turned around and walked back out to the edge of the beans, continued walking. And that as he was walking he began hearing footsteps, thinking that it was a deer that he had possibly just kicked out from the area of that blind. [He] Stated he began looking, he did see a flash of white and that he did pull up and fire a shot from his muzzle loader. He states that he immediately heard somebody yelling that you shot me, you shot me . . . .

Auto Club further argued that it did not matter if the shooting was accidental; rather, because Kondziolka's act violated MCL 750.235(1), the criminal act exclusion applied, and the trial court must declare that there is no coverage under the policy.

Shwary submitted a brief in opposition to Auto Club's motion. Shwary argued that there was undisputed evidence that the shooting constituted an occurrence under the policy and that the criminal exclusion did not otherwise apply. He maintained that the police report was inadmissible and, in any event, that it was not evidence that Kondziolka violated MCL 750.235(1), which was the sole criminal statute cited by Auto Club as the basis for concluding that the criminal act exclusion applied. In order to establish that Kondziolka violated that statute, Shwary explained, Auto Club would have to prove that Kondziolka intentionally pointed or aimed his rifle at Shwary. But all the evidence showed that Kondziolka did not intentionally point or aim at Shwary: all the evidence shows "that Matthew Kondziolka was attempting to hunt for deer and pointed his gun at what he thought was a deer." Shwary cited several pages of Kondziolka's deposition testimony to establish that Kondziolka never intentionally aimed his weapon at a person and indeed had no reason to believe that there was a person in the direction that he aimed. Because there was no evidence that he aimed or pointed his rifle at Shwary

intentionally, Kondziolka "could not be guilty" of violating MCL 750.235. Accordingly, given the undisputed evidence, Shwary asked the trial court to grant summary disposition in his favor under MCR 2.116(C)(10) and declare that Auto Club's policy covered the accidental shooting.

The trial court held a hearing on the motion in December 2011. At the hearing, the trial court recognized that the parties did not dispute that the shooting constituted an occurrence under the policy; rather, the question was whether the criminal acts exclusion applied. The trial court also noted that Auto Club had relied on Kondziolka's alleged violation of MCL 750.235(1) as the only ground for concluding that the criminal acts exclusion applied. However, it determined that Auto Club did not present any evidence to establish that the shooting was anything other than a "hunting accident." For that reason, it denied Auto Club's motion and granted summary disposition in Kondziolka's favor under MCR 2.116(I)(2).

The trial court entered an order denying Auto Club's motion for summary disposition and granting Shwary's motion in January 2012. In its order, the trial court also declared that Auto Club has a duty to defend and indemnify Kondziolka in the underlying tort action.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo whether a trial court properly granted summary disposition under MCR 2.116(C)(10). *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation and application of statutes. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

B. THE SCOPE OF OUR REVIEW

In its brief on appeal to this Court, Auto Club has conceded that the shooting was an occurrence for purposes of determining coverage and that the sole question is whether the trial court erred when it determined that Auto Club's criminal act exclusion did not apply to the facts of this case. Nevertheless, it also argues that the relevant question is whether, by firing his rifle on the day at issue, Kondziolka "violated *any* criminal statute." (emphasis added). Auto Club then goes on to analyze whether Kondziolka violated either MCL 750.235(1) or MCL 752.863a—despite the fact that it did not argue before the trial court that Kondziolka violated MCL 752.863a. In addition, in its recitation of the facts and its analysis of the statutes, Auto Club cites evidence that was not raised by any party before the trial court. This includes Shwary's complaint in the original suit, sections of Kondziolka's deposition testimony, the criminal complaint against Kondziolka, and parts of the original police report.

As this Court has explained, when reviewing a trial court's decision on a motion for summary disposition, our "review is limited to review of the evidence properly presented to the trial court." *Barnard Mfg*, 285 Mich App at 380. We are not at liberty to expand the record to include evidence that the trial court did not consider when it decided the original motion. *Id.* at 380-381. Similarly, except in rare cases, this Court will not consider arguments that were not

raised and argued before the trial court. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("Michigan generally follows the 'raise or waive' rule of appellate review.").

Here, Auto Club pleaded that it had no obligation to cover the occurrence at issue in this case because the undisputed facts demonstrated that Kondziolka violated MCL 750.235(1). It further moved for summary disposition on that same basis and relied on the police report alone to establish Kondziolka's acts on the day at issue. In response, Shwary cited MCR 2.116(C)(10) and argued that there was no question of fact that Kondziolka *did not* violate MCL 750.235(1).[1] Thus, our review is limited to whether the trial court erred when it determined that there was no material factual dispute as to whether Kondziolka violated MCL 750.235(1).[2] By failing to raise other bases for invoking the criminal act exclusion, Auto Club waived any claim that the trial court erred to the extent that it did not consider those alternate bases for granting relief.[3] *Walters*, 481 Mich at 388 ("By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually."). Similarly, in reviewing this claim of error, we shall limit our discussion to the evidence actually presented by the parties to the trial court in support of their respective positions. *Barnard Mfg*, 285 Mich App at 380.

C. THE ELEMENTS OF MCL 750.235(1)

The only question actually raised by the parties before the trial court was whether the criminal act exclusion in Auto Club's policy applied because Kondziolka's conduct violated MCL 750.235(1). Accordingly, in order to establish its right to relief, Auto Club had to present evidence that, if left unrebutted, demonstrated that Kondziolka violated that statute.

In its motion for summary disposition, Auto Club argued that the undisputed evidence showed that Kondziolka shot and injured Shwary and that that was sufficient to establish a violation of MCL 750.235(1), even though it may have been an accident. Shwary disagreed; in his brief he argued that Kondziolka could not be guilty under MCL 750.235(1) in the absence of

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[1] Shwary cited MCR 2.116(C)(10) in its response brief, but the trial court treated it as a motion under MCR 2.116(I).

[2] Accordingly, we need not interpret the criminal exclusion clause itself, determine its validity, or determine whether the shooting constituted an occurrence under the policy. We shall assume that the exclusion is valid, enforceable, and would apply to bar coverage if the evidence showed that Kondziolka violated MCL 750.235(1).

[3] It would be incongruous for this Court to declare that a trial court erred by failing to consider arguments that the parties did not raise or erred by failing to consider evidence about which it had no knowledge. It is not the court's duty to make arguments for the parties, to search for evidence to sustain their positions, or to otherwise make up for shortcomings in their submissions. *Barnard Mfg*, 285 Mich App at 382-383 ("Under our adversarial system, each party bears the responsibility for ensuring that its positions are vigorously and properly advocated.").

evidence that he knew that he was pointing or aiming his rifle *at a person*. As such, we must first determine the elements that must be proved in order to establish a violation of MCL 750.235(1).

Under MCL 750.235(1) it is a misdemeanor to maim or injure "another person by discharging a firearm pointed or aimed intentionally but without malice at another person . . . ." The adverb "intentionally" clearly modifies the participles "pointed" and "aimed", which the Legislature further modified by the prepositional phrase "at another person." Because both the adverb "intentionally" and the prepositional phrase "at another person" modify the participles "pointed" and "aimed", the most natural reading is to construe the adverb "intentionally" as applying to the whole phrase. Reading it in that way, we conclude that, to violate the statute, a person must intentionally (i.e., with knowledge that he or she is doing so) point or aim the firearm at a *person*. It necessarily follows that, a person does not violate the statute if he or she did not know that he or she was pointing or aiming the weapon at a person.

On appeal, Auto Club argues that we should construe the adverb "intentionally" as applying only to the participles "pointed" and "aimed" and not to the prepositional phrase "at another person." Under Auto Club's preferred interpretation, a person violates MCL 750.235(1) if he intentionally aims or points a firearm at *anything* and another person happens to be somewhere along that trajectory, even if the person pointing or aiming the firearm has no knowledge of that person's presence and no reason to believe that his or her actions are placing anyone at risk. Auto Club's preferred interpretation would effectively transform MCL 750.235(1) into a strict liability offense; indeed, it would be a violation of MCL 750.235(1) to *intentionally* point or aim a firearm *accidentally* at another person. That is, the person pointing or aiming the firearm would be criminally liable for harms arising from his or her use of a firearm without the prosecutor having to prove *either* negligence (the prosecutor need only prove that the defendant intentionally aimed or pointed the weapon) *or* criminal intent (that the defendant knew that he or she was pointing the firearm at a person). Courts will not lightly presume that the Legislature intended to do away with the common law's *mens rea* requirement—the requirement that the defendant know the facts that makes his or her conduct illegal. See *People v Tombs*, 472 Mich 446, 452-459 (opinion by KELLY, J.), 465-466 (opinion by TAYLOR, C.J., concurring in relevant part); 697 NW2d 494 (2005). In any event, we do not need to read a criminal intent into this statute because we do not agree that Auto Club's preferred interpretation is the most natural reading. Rather, it is plain to us that the Legislature wanted to dissuade persons from pointing or aiming firearms at *persons*—without regard to whether the person doing so intended to discharge the firearm. And it is this intent that constitutes the *mens rea* of the offense: the intent to point or aim a firearm *at another person*.

We further disagree with Auto Club's contention that the phrase "without malice" demonstrates that the Legislature imposed a "limited" intent because discharging the firearm at a person would always be with malice. The phrase "without malice" applies to the pointing or aiming—that is, a person is guilty of violating MCL 750.235(1) if the person intends to point or aim the firearm at another person, even when done without malice—e.g., in jest or under the mistaken belief that the firearm is unloaded—and even when the person pointing or aiming did not intend to discharge the firearm. And it is quite possible for the person pointing or aiming the firearm to then discharge the firearm without any malice, such as is the case when the actor believes the firearm is not loaded or operational. In such a case, the discharge would be

unintended—i.e., without malice—and yet still a violation of MCL 750.235(1). Consequently, our interpretation is not only more natural, but still gives effect to the phrase "without malice."

We further note that our interpretation is consistent with the published authorities discussing this statute and related statutes over the past 150 years.[4] In every opinion that we surveyed, there was clear evidence from which a jury could find that the person pointing or aiming the firearm knew that he or she was pointing or aiming the firearm at another person. *People v Kreidler*, 180 Mich 654, 657; 147 NW 559 (1914) (stating that it was a question of fact for the jury whether the defendant pointed his rifle towards a person given the evidence tending to show that he pointed the rifle at a moving car loaded with passengers); *People v Dudley*, 131 Mich 261, 262; 90 NW 1058 (1902) (stating that there was evidence that the shooting was without malice—and therefore within the statute—even though the defendant aimed the weapon at the boy and said "look out, or I will shoot you."); *People v Chappell*, 27 Mich 486, 487 (1873) (stating that the statute did not apply because the only evidence showed that the defendant either acted in self-defense or with malice). Moreover, our Supreme Court and this Court have explained that related versions of this statute, with substantially similar language, required proof that the person pointing or aiming the firearm knew that he or she was pointing or aiming at a person. See *People v Heikkala*, 226 Mich 332, 337; 197 NW 366 (1924) (stating that the elements included proof that the defendant pointed or aimed the firearm at the person intentionally); *People v Sauer*, 143 Mich 308, 310; 106 NW 866 (1906) (approving the trial court's instruction that the statute precluded the defendant from *knowingly* pointing his rifle in the direction of any person); *People v Maghzal*, 170 Mich App 340, 345; 427 NW2d 552 (1988) (stating that the statute punishes the intentional pointing of a firearm that results in death without the need to prove gross negligence: "The general rule appears to be that, when a person points a gun at someone as a joke, reasonably believing the gun not to be loaded, and pulls the trigger and the gun discharges and kills the victim, he is guilty of manslaughter."); *People v Turner*, 125 Mich App 8, 10-13; 336 NW2d 217 (1983) (holding that the defendant could be guilty of aiding and abetting under the statute because there was evidence that he directed the holder of the firearm to point the firearm at the victim, even though he did not intend for her to fire); *People v Duggan*, 115 Mich App 269, 271; 320 NW2d 241 (1982) (stating that, for the version applicable to cases involving death, the prosecution must prove that the defendant intended to point or aim the firearm at the decedent); *People v Doss*, 78 Mich App 541, 553; 260 NW2d 880 (1977) ("The common sense of all this is that [the statute] was designed to apply in cases of the careless use of firearms, where the accused intended to aim at the victim, but accidentally fired."), rev'd not in relevant part 406 Mich 90 (1979). Therefore, in order to establish that Kondziolka violated this statute, Auto Club had to present evidence that established that Kondziolka pointed or aimed his rifle at a person—that is, at Shwary—with knowledge that he was pointing at that person.

[4] The Legislature first enacted a version of this statute in 1869. See 1869 PA 68. 1869 PA 68 originally had four sections, but those sections were reorganized under different sections of the penal code in 1931; some sections appeared under the section dealing with the unlawful use of firearms and others under the section addressing homicide. See *People v Doss*, 406 Mich 90, 97 n 2; 276 NW2d 9 (1979).

D. THE EVIDENCE IN SUPPORT OF SUMMARY DISPOSITION

In its motion, Auto Club argued that the undisputed evidence showed that Kondziolka violated MCL 750.235. In support of that motion, Auto Club excerpted a part of the police report prepared by the officer who responded to the shooting. However, even assuming that the police report was plausibly admissible, see *Barnard Mfg*, 285 Mich App at 373, the report did not contain any statement by Kondziolka from which a reasonable jury could find that he knew that he pointed or aimed his rifle at a person.[5] Instead, the officer reported that Kondziolka stated that he thought he was aiming at a deer and did not realize that he had raised his rifle at a person until Shwary yelled out that he had been shot. Because Auto Club failed to identify evidence to support its motion, the trial court properly denied it. See *id.* at 370 (stating that, if the moving party fails to properly support its motion, the opposing party has not duty to respond and the trial court should deny the motion). Although the failure to properly support a motion for summary disposition would not normally warrant the grant of summary disposition in the opposing party's favor, in this case Shwary responded to Auto Club's motion by arguing and presenting evidence that the undisputed evidence showed that he was entitled to summary disposition.

Shwary cited Kondziolka's deposition testimony where he explained that he did not realize that another hunter had moved into the area and that he thought he had flushed out a deer. The evidence further showed that Kondziolka turned to look for the deer and then aimed and fired after he saw a flash of white that he thought was the deer. This evidence established that Kondziolka did not knowingly point or aim his rifle at a person, which element must be proved in order to establish a violation of MCL 750.235(1). Because the undisputed evidence presented on the motion for summary disposition showed that Kondziolka did not violate MCL 750.235(1), and because that was the sole basis for Auto Club's reliance on the criminal acts exclusion, the trial court did not err when it determined that that exclusion did not apply.

III. CONCLUSION

We must emphasize the unique procedural posture of this case: Auto Club pleaded and moved for summary disposition on the sole basis that the criminal acts exclusion applied because Kondziolka allegedly violated MCL 750.235(1); it did not plead or attempt to prove that the criminal acts exclusion applied on any other bases. After Shwary argued and demonstrated that there was no evidence to support a finding that Kondziolka violated MCL 750.235(1), Auto Club needed to come forward with evidence to establish a question of fact as to whether Kondziolka violated that statute or, in the alternative, had to request permission to amend its complaint to include alternate bases for establishing the application of the criminal acts exclusion. See MCR 2.118(A)(2). But it did neither. For these reasons, we must conclude that the trial court did not

[5] We note that Kondziolka eventually pleaded nolo contendere to the charge that he violated MCL 750.235(1). However, such a plea is not admissible in a civil case to prove that the defendant actually committed the offense. See *Lichon v American Ins Co*, 435 Mich 408, 418; 459 NW2d 288 (1990). This is because there are a variety of reasons for such a plea, which may not include actual guilt. *Id.* at 420.

err when it denied Auto Club's motion and granted summary disposition in Shwary's favor under MCR 2.116(I)(2).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Michael J. Kelly