

follow, we affirm in part, reverse in part, and remand with directions.

¶ 3

FACTS

¶ 4 On June 26, 2008, Farmers filed a complaint for declaratory relief in the circuit court of St. Clair County requesting that the circuit court enter a finding that, pursuant to a homeowners' insurance policy issued by Farmers to Robert Farrow, Farmers had no duty to defend or indemnify the Estate against a complaint filed by Rosalind Wells. According to the complaint for declaratory relief, the facts set forth in Wells's complaint against Farrow did not fit within the definition of an "occurrence" within the policy and were excluded by virtue of the "intentional act" exclusion. The relevant language of the Farmers homeowners' insurance policy is set forth below:

"DEFINITIONS ***

13. **Occurrence** means an accident including exposure to conditions which results during the policy period in **bodily injury** or **property damage**. ***

SECTION II- LIABILITY

Coverages

Coverage E- Personal Liability

We will pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies. ***

At our expense and with attorneys of our choice, we will defend an insured against any covered claim or suit. ***

SECTION II- EXCLUSIONS

Applying to Coverage E and F- Personal Liability and Medical Payments To

Others

We do not cover **bodily injury, property damage** or personal injury which: ***

3. is either:
 - a. caused intentionally by or at the direction of an **insured**; or
 - b. results from any **occurrence** caused by an intentional act of any **insured** where the results are reasonably foreseeable."

¶ 5 The original complaint, filed by Rosalind Wells against the Estate on February 20, 2008, alleged that on or about October 16, 2007, Wells was at Robert Farrow's home in Belleville when he shot her in the eye with a gun. Count I alleged that Farrow was negligent in brandishing a loaded weapon in the vicinity of Wells, shooting said weapon in her vicinity, failing to make sure the gun was not loaded, failing to make sure the gun safety was on, and carelessly causing the firearm to discharge in the vicinity of Wells. Count II alleged a cause of action for intentional battery.

¶ 6 On September 9, 2008, the defendants filed a motion for a summary judgment, requesting the court to find, based on the pleadings, that Farmers had a duty to defend and indemnify the Estate against Wells's complaint. On October 27, 2008, Farmers filed a cross-motion for a summary judgment. On November 19, 2008, the circuit court entered an order granting the defendants' motion for a summary judgment on the issue of the duty to defend, ordering Farmers to defend the Estate, and finding that the issue of the duty to indemnify was premature and would be addressed at a later date.

¶ 7 On March 25, 2009, Farmers filed a renewed motion for a summary judgment, informing the court that Wells had filed an amended complaint against the Estate. In Wells's amended complaint, she added an allegation in the negligence count that, upon belief, Robert Farrow failed to realize that his actions would cause injury to Wells, as Farrow was unaware of Wells's presence in the area. Wells's amended complaint also added a prayer for punitive damages in count II of the amended complaint, which alleged an alternative theory of intentional battery. Based on the allegations of the amended complaint, Farmers requested

that the circuit court grant a summary judgment in its favor with regard to both the duty to defend and the duty to indemnify. On June 1, 2009, Wells filed a renewed cross-motion for a summary judgment. A hearing on the motions was held in abeyance for a discovery deposition of Wells to be conducted by the parties.

¶ 8 On February 26, 2010, Farmers filed a supplemental motion for a summary judgment. Farmers attached the transcripts of two discovery depositions that were taken of Wells, one in the underlying tort action on March 31, 2009, and one in the instant declaratory judgment action on August 19, 2009. On March 31, 2009, Wells testified that she had been in a dating relationship with Farrow for four years at the time of the incident. In the four years they had been dating, and the four years prior to that when she worked for Farrow, she never feared for her safety around him. She did testify that when he drank hard liquor, such as vodka, that he would raise his voice and become "mean," but she never feared for her physical safety on any occasion. She did know that Farrow had a gun in his roll-top desk in the garage, but she had never seen him use it. She was also aware that he had a .22 caliber rifle that he kept in the hallway, but she never saw him use that gun or threaten anyone with any gun.

¶ 9 Wells testified that she had been at Farrow's house since the day prior to the incident, and they had been doing yard work since that morning. They stopped working around 7:30 p.m. and spent the evening laughing and talking. They both had been drinking beer that day, and she testified that, while Wells had three or four beers, Farrow was intoxicated, as he had also been drinking vodka. Wells started to notice that Farrow was intoxicated around 7:30 p.m., when they stopped working. Around 10 p.m., Wells told Farrow that she was getting ready to go home, but that she would be back. Farrow became angry, telling her that she was not coming back. Wells testified that on prior occasions, she would leave, saying she was coming right back, and would not come back the same night. She never saw Farrow with a gun and did not feel physically threatened by him during this conversation, although Farrow

did seem angry.

¶ 10 Wells testified that she has no memory of ensuing events until she woke up in the living room by the couch. She saw Farrow on the floor with a gun licking the barrel. She made eye contact with him and he said, "Dummy, I shot you." Wells testified she felt no pain, but looked down and saw that her head was lying in a pool of blood. She got on her hands and knees and crawled out of the living room, through the dining room, and out the back door to the neighbor's house, who called authorities.

¶ 11 Wells testified to a prior incident, a few months prior to the shooting incident, where Wells was charged with damaging Farrow's vehicle. Wells testified that on that date, she also told Farrow she was going home and he told her she could not leave. Farrow jumped in Wells's vehicle, which she had started in order to leave. Farrow drove Wells's car down a hill and then jumped out of it. After he jumped out of her car, they got into a physical altercation, both hitting each other, and Wells threw a brick through the window of Farrow's vehicle. Wells was arrested and went to jail for the incident. In her deposition taken in the instant action on August 19, 2009, Wells reiterated that she has no memory of events that occurred between the time she said she was going home and the time she woke up in the pool of blood.

¶ 12 On April 30, 2010, the Estate also filed a cross-motion for a summary judgment. On October 12, 2010, Wells filed an addendum to her cross-motion for a summary judgment, in which she attached correspondence between the attorneys for the Estate and Farmers' attorneys. From said correspondence, it is apparent that after the circuit court partially granted the Estate's motion for a summary judgment as to Farmers's duty to defend, Farmers recognized the Estate's right to choose its own defense counsel due to the conflict of interest between them. At oral argument on appeal, the parties made this court aware that independent counsel for the Estate settled the underlying case on its behalf. The details of

the settlement are not of record, but the issue before this court is whether Farmers is responsible to indemnify the Estate for this settlement.

¶ 13 On November 16, 2010, the circuit court heard argument on the cross-motions for a summary judgment and entered an order granting the motions for a summary judgment filed by Wells and the Estate and denying Farmers's motion for a summary judgment, holding that Farmers has a duty to defend and indemnify the Estate against Wells's complaint. On December 14, 2010, Farmers filed a motion to reconsider, which was denied on January 19, 2011. This appeal followed.

¶ 14

ANALYSIS

¶ 15

1. *Standard of Review*

¶ 16 We begin our analysis with a statement of the applicable standard of review. We apply a *de novo* standard of review to the trial court's decision to grant or deny a motion for a summary judgment. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 519, 893 N.E.2d 934, 941 (2008). " 'Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Id.* (quoting *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305, 837 N.E.2d 99, 106 (2005)). In addition, the construction of an insurance policy is a question of law, so it is also subject to *de novo* review. In this case, the circuit court granted the motion for a summary judgment filed by Wells and the Estate, finding that Farmers had a duty to defend and to indemnify the Estate against Wells's complaint. Because the duty to defend is subject to a different standard than the duty to indemnify, we will address each in turn.

¶ 17

2. *Duty to Defend*

¶ 18 Our supreme court has reiterated, time and time again, the following standards for

determining the duty of an insurance company to defend its insured:

"An insurer's duty to defend its insured is much broader than its duty to indemnify its insured. [Citation.] An insurer may not justifiably refuse to defend an action against its insured unless it is clear from the face of the underlying complaint that the allegations set forth in that complaint fail to state facts that bring the case within or potentially within the insured's policy coverage. [Citation.] A court must compare the allegations in the underlying complaint to the policy language in order to determine whether the insurer's duty to defend has arisen. [Citation.] If the underlying complaint alleges facts within or potentially within policy coverage, an insurer is obligated to defend its insured even if the allegations are groundless, false, or fraudulent. [Citation.] The allegations in the underlying complaint must be liberally construed in favor of the insured. [Citation.] In addition, if several theories of recovery are alleged in the underlying complaint against the insured, the insurer's duty to defend arises even if only one of several theories is within the potential coverage of the policy. [Citation.]" *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154-55, 828 N.E.2d 1092, 1098 (2005).

¶ 19 Applying these principles to the case at bar, it is clear that one of the counts of Wells's complaint alleges that Farrow negligently fired the gun, not intending to harm Wells. Accordingly, applying the four corners of the complaint to the insurance policy, which provided coverage for an accidental occurrence resulting in bodily injury, there was a potential for coverage, and the circuit court was correct in declaring that Farmers had a duty to defend the Estate. Having determined that there was a duty to defend, we will now address the circuit court's determination that there was also a duty on the part of Farmers to indemnify the Estate for the settlement of Wells's claims.

¶ 20

3. *Duty to Indemnify*

¶ 21 Unlike the duty to defend, the duty to indemnify arises only when the insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy. *Johnson v. State Farm Fire & Casualty Co.*, 346 Ill. App. 3d 790, 795, 806 N.E.2d 223, 227 (2004) (citing *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 293, 757 N.E.2d 481, 491 (2001)). "Once an insured has incurred liability as a result of the underlying claim, an insurer's duty to indemnify arises only if 'the insured's activity and the resulting loss or damage *actually* fall within the *** policy's coverage.'" (Emphasis in original.) *Id.* at 795, 806 N.E.2d at 227 (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 128, 607 N.E.2d 1204, 1221 (1992)).

¶ 22 Farrow's estate incurred liability by virtue of a settlement reached in the underlying lawsuit between Wells and the Estate's independent counsel. In a declaratory judgment action brought by an insurance company to determine its duty to indemnify, the burden is on the insured to prove that the claim falls within the coverage of the policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453, 905 N.E.2d 747, 752 (2009) (citing *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 204, 579 N.E.2d 322, 333 (1991)). "Once the insured has demonstrated coverage, the burden then shifts to the insurer to prove that a limitation or exclusion applies." *Id.* at 453-54, 905 N.E.2d at 752.

¶ 23 Keeping in mind these principles, we analyze the coverage issues in the context of the parties' cross-motions for summary judgment—the court having denied Farmers's and allowed Wells's motion.

¶ 24 Summary judgment is warranted if there is no genuine issue as to any material fact. *Country Mutual Insurance Co. v. Hagan*, 298 Ill. App. 3d 495, 499, 698 N.E.2d 271, 274 (1998). "In determining whether a genuine question of material fact exists, a court must construe matters in the record against the party moving for summary judgment and liberally

in favor of the opponent." *Id.* A party seeking summary judgment must demonstrate that it is entitled to a judgment based on a question of law and that the moving party's right to judgment is free and clear from doubt. *Id.* at 499-500, 698 N.E.2d at 274.

¶ 25 As previously set out, Farrow's homeowner's policy allowed for coverage of any "bodily injury" caused by an "occurrence." The policy further defines "occurrence" as an "accident." In a separate section labeled "Exclusions," the policy specifically excluded bodily injury which is either:

- "a. caused intentionally by or at the direction of an **insured**; or
- b. results from any **occurrence** caused by an intentional act of any **insured** where the results are reasonably foreseeable."

¶ 26 The general coverage provision determines whether the claim is within the scope of coverage. To fall within Farmers's policy coverage, the injury must have resulted from an "occurrence," defined by the policy as an "accident." The policy, however, does not define "accident." "The word 'accident' has no settled legal meaning." *Cobbins v. General Accident Fire & Life Assurance Corp.*, 3 Ill. App. 3d 379, 385, 279 N.E.2d 443, 447 (1972), *rev'd on other grounds*, 53 Ill. 2d 285, 290 N.E.2d 873 (1972). "Thus, 'accident' may mean anything that happens, or that is a result not anticipated, is unforeseen and unexpected by the person injured or affected thereby; that is, something that takes place without the insured's foresight or expectation, without his design or without its being caused by him. *Id.*; see also COUCH ON INSURANCE 2d § 41.6 (1962). If the language of a policy is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer, who drafted the policy, and in favor of the insured. *Travelers Insurance Co.*, 197 Ill. 2d at 293, 757 N.E.2d at 491; see also *Country Mutual Insurance Co. v. Carr*, 372 Ill. App. 3d 335, 867 N.E.2d 1157 (2007). We believe the meaning of the term "accident" is ambiguous, and consequently, we must give the term a liberal construction in favor of coverage. *Country*

Mutual Insurance Co., 372 Ill. App. 3d at 340, 867 N.E.2d at 1161. Additionally, our Supreme Court of Illinois directs that the real question of inquiry as to whether something is an accident, is whether the result was intended or expected, not whether the act causing the injury was intentional. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 78, 578 N.E.2d 926, 932 (1991); see also *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 811 N.E.2d 718 (2004).

¶ 27 The "exclusion" section of a policy limits and excludes injuries and liabilities that would otherwise fall within the broad category of events covered under the policy. *Country Mutual Insurance Co.*, 372 Ill. App. 3d at 342, 867 N.E.2d at 1163. Farmers's policy placed the provision negating coverage for "intended acts" or "reasonably foreseeable results" in a separate section entitled "Exclusions." Under general principles allocating burden of proof in Illinois, the insurer bears the burden to prove that a limitation or exclusion applies. COUCH ON INSURANCE 3d § 254:12 (2011); *Addison Insurance Co.*, 232 Ill. 2d at 453, 905 N.E.2d at 752. For an exclusion to make sense, it must eliminate coverage that would have existed without the exclusion. COUCH ON INSURANCE 3d § 139:32 (2011). Otherwise, allowing the general coverage to be subsumed by the exclusion would render the coverage illusory.

¶ 28 Since the entry of summary judgment is a drastic measure to dispose of litigation, the right of the moving party to invoke the remedy must be free of any doubt. *Federal Savings & Loan Insurance Corp. v. Pacific Employers Insurance Co.*, 63 Ill. App. 3d 157, 160, 379 N.E.2d 682, 685 (1978); see also *Walker v. Valor Insurance Co.*, 314 Ill. App. 3d 55, 60, 731 N.E.2d 363, 368 (2000). While there is support for the proposition that construction of an insurance policy is a matter of law and properly decided in summary judgment, it should not be used to preempt the right to a jury trial or the right to fully present the factual basis for a case where a material dispute may exist. *Federal Savings & Loan Insurance Corp.*, 63 Ill.

App. 3d at 161, 379 N.E.2d at 685. "Indeed, 'summary judgment is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.' " *Farmers Automobile Insurance Ass'n v. Williams*, 321 Ill. App. 3d 310, 314, 746 N.E.2d 1279, 1282 (2001) (quoting *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 859, 539 N.E.2d 787, 794 (1989)). Although summary judgment may still be granted if the record is sufficiently clear, it must be denied if the facts are susceptible to different inferences by fair-minded persons. *Id.* at 314, 746 N.E.2d at 1282 (quoting *Giannetti v. Angiuli*, 263 Ill. App. 3d 305, 314, 635 N.E.2d 1083, 1090 (1994)).

¶ 29 We believe that it was error for the judge to decide as a matter of law that Farmers owed a duty to indemnify Farrow. We are not prepared to hold summarily that the injury resulting from the discharge of a firearm by Farrow was an accident which was neither intended nor reasonably foreseeable. Viewing the facts in the light most favorable to the nonmovant, Farmers Insurance Company, the shooting injury could well have been a deliberate act or a reasonably foreseeable result of Farrow brandishing a firearm.

¶ 30 Likewise, we believe that it would have been error for the court to find as a matter of law that Farmers did not owe a duty to indemnify Farrow. We disagree with Farmers's argument that the court erred in not entering summary judgment in its favor. This argument primarily has its basis in an assumption that Farrow's conduct was at least expected-if not intended-and consequently could not be an accident within the policy coverage. "Harm resulting from firing a gun may well be 'foreseeable' in the abstract. Whether it is truly expected under a given set of circumstances, however, is a different issue." *State Farm Fire & Casualty Co. v. Shelton*, 176 Ill. App. 3d 858, 865 n.1, 531 N.E.2d 913, 918 n.1 (1988). In viewing the facts in the light most favorable to Farrow, the shooting could have been a result of his intoxication, a mechanical misfire, reckless behavior, or other conduct where the

resultant injury was neither intended nor reasonably foreseeable.

¶ 31 Neither party has demonstrated that they are entitled to summary judgment. There remain genuine issues of material fact as to whether the event caused by Farrow's conduct was an "occurrence" within the meaning of the policy and, if so, whether it was excluded under the "intended" or "reasonably foreseeable" provision of the policy. Because the inferences both parties seek to draw deal with questions of motive and intent, the parties should have the opportunity to fully develop the factual basis for their respective positions and not be foreclosed by summary judgment.

¶ 32 **CONCLUSION**

¶ 33 For the foregoing reasons, we affirm that portion of the circuit court's order of November 16, 2010, which declared that Farmers had a duty to defend the Estate against the claims of Rosalind Wells, but reverse that portion of the order which declared that Farmers had a duty to indemnify the Estate against those claims. We remand this case for further proceedings not inconsistent with this order.

¶ 34 Affirmed in part and reversed in part; cause remanded with directions.

¶ 35 JUSTICE SPOMER, concurring in part and dissenting in part:

¶ 36 I concur with the majority's analysis and conclude, as did the majority, that the circuit court correctly found that Farmers had a duty to defend the Estate but erred in finding a duty to indemnify. Accordingly, I concur with the majority in affirming the circuit court's summary judgment in favor of the Estate on the defense issue and reversing the circuit's summary judgment in favor of the Estate on the indemnification issue. However, I respectfully dissent from that portion of the majority's order that remands for further proceedings based on a finding that there is a genuine issue of material fact on the indemnification issue. Instead, for the following reasons, I would remand with directions

that the circuit court enter a summary judgment in favor of Farmers as to Farmers's duty to indemnify.

¶ 37 The Illinois Supreme Court has long held that, in a declaratory judgment action brought by an insurance company to determine whether there is a duty to indemnify, the burden is on the insured to prove that its claim falls within the coverage of an insurance policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009) (citing *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 204 (1991)). Under Farrow's homeowner's policy, an insured would have coverage for any "bodily injury" that was caused by an "occurrence." Accordingly, the Estate had the burden to prove that Wells's injury falls under the definition of "occurrence" within the policy. The term "occurrence" is defined as "an accident including exposure to conditions." The policy does not define "accident," but this court has determined, in a case in which "occurrence" was defined exactly as it is defined by the policy in this case, that the focus of the inquiry in determining whether an occurrence is an accident is whether the injury is expected or intended by the insured. *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 409 (2004).

¶ 38 The parties filed cross-motions for a summary judgment. Based on the record, there are simply not enough facts regarding what happened between the time that Farrow appeared angry and the time that Wells woke up in a pool of blood. Not only is the record insufficient, but there is no way to further develop the record with facts regarding how the dispute between them escalated, who introduced the gun into the situation, and how it was fired, because Farrow is deceased, Wells has no memory, and there were no witnesses. Because of the posture of this case and the lack of facts surrounding the incident, the outcome of the indemnification issue turns solely on which party had the initial burden of proof. Accordingly, I would find that Farmers is entitled to a summary judgment on the

indemnification issue and, rather than remanding for further proceedings, would instruct the circuit court to enter judgment in favor of Farmers as to its duty to indemnify.