THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

David LaRoche

v.

The Concord General Mutual Insurance Company and
Elizabeth Wolfgram

No. 06-E-0577

ORDER

David LaRoche ("LaRoche"), the petitioner, has brought a declaratory judgment action against The Concord General Mutual Insurance Company ("Concord General"), with Elizabeth Wolfgram ("Wolfgram") as an added party,[1] seeking a determination that Concord General is obligated to defend and provide indemnity in an underlying lawsuit filed by Wolfgram pending in this Court under docket number 06-C-0333. Concord General objects, arguing it has no duty to defend or indemnify LaRoche in the underlying action. Wolfgram supports LaRoche's claim of coverage.

The Court held a hearing on October 11, 2007. All parties appeared and presented their respective positions through evidence and argument. The Court thereafter received supplemental memoranda from LaRoche and Concord General. After a review of the pertinent pleadings, the evidence presented, the parties' arguments and the applicable law, the Court finds and rules as follows.

The underlying case concerns LaRoche's intrusion into Wolfgram's premises in Nottingham, New Hampshire at about 10:00 p.m. on January 24,

[1] LaRoche initially only named Concord General in his action, but Wolfgram came to be added as a party by consent.

2006. Wolfgram alleges in her writ that LaRoche's entry and stay in her secured premises at that time without license or privilege constituted intentional trespass/ invasion of privacy (Count I), intentional and/or reckless infliction of emotional distress (Count II) and negligent infliction of emotional distress (Count III). See Def.'s Ex. B. Wolfgram avers that, as a result of LaRoche's tortious conduct, she sustained, among other things, severe emotional distress with physical manifestations of mental suffering. Id. She also seeks enhanced compensatory damages. Id.

At the October 11th hearing, through offers of proof, the parties submitted evidence going to the pertinent facts of the underlying case. The parties agreed that, in this case, the Court should "inquir[e] into the underlying facts" to decide the coverage issue. See A.B.C. Builders, Inc. v. American Mutual Ins. Co., 139 N.H. 745,749 (1995); see also M. Mooney Corp. V. U.S. Fidelity & Guaranty Co., 136 N.H. 463,469 (1992). The parties also agreed to provide the pertinent evidence through offers of proof.

The evidence discloses that after drinking beer in Laconia during the day (after work), and then drinking considerably more beer at an acquaintance's house later that evening, LaRoche entered Wolfgram's home the night of January 24, 2006, without her permission through an unlocked front door.

Wolfgram then resided in a condominium unit in Nottingham, one of four townhouse style units of a condominium complex. Each of the units contained two floors, and each had its own entrance. LaRoche also then lived in Nottingham but about three miles away from Wolfgram. Neither appears to have known the other.

At the time of LaRoche's entry, Wolfgram was preparing to take a shower on the second story of her two-story townhouse unit. Wolfgram was alone the night in question. She lived with her boyfriend who was not at home that night. She had just taken her dog outside and put the dog in a fenced in area.

Wolfgram heard her front door open and close and became concerned that someone had entered her home. She came to the top of her staircase. She noticed a person standing in the shadows of her entrance way. Wolfgram asked who was there, and LaRoche answered, "Hey."

Wolfgram waited a brief time for LaRoche to realize he had entered the wrong home, but LaRoche remained in her premises, and came to emerge from the shadows and square off at the bottom of the stairs. Wolfgram harshly ordered LaRoche to get out of her house, saying "get the fuck out of my house," but instead of leaving, LaRoche responded, "I want to party," and began to move up the stairs. Wolfgram again harshly ordered LaRoche out of her house (again using an expletive), but this did not stop LaRoche.

Wolfgram, who was an active member of the Air National Guard, then went to her bedroom to retrieve a handgun and ammunition. She had a TV monitoring system operative throughout her unit and could see LaRoche as he continued to move up the stairs. Wolfgram announced that she had a gun, and threatened to shoot LaRoche if he did not leave. LaRoche, who by that time had advanced about half-way to two-thirds up the staircase, began to proceed back down the stairs, but did not exit the premises. Instead, he proceeded to walk down the hallway toward Wolfgram's living room on the first floor. Wolfgram, who had

returned to the top of the stairs, warned LaRoche that she knew he had not left her home, and that she was going to shoot him if he did not do so. Wolfgram then came to notice that LaRoche had exited through the front door.

Wolfgram came downstairs, having by this time put on some additional clothes, and called the police. While on the phone with the police (and after the police inquired if LaRoche was still there which prompted Wolfgram to look), Wolfgram found LaRoche standing just outside her front door. After Wolfgram opened her door, LaRoche placed his foot so that the door would not close. Wolfgram then pointed her gun at LaRoche and threatened to shoot him. LaRoche retreated and walked toward where his vehicle had been parked. Wolfgram did not observe him staggering, but walking slowly.

Shortly after LaRoche's intrusion into Wolfgram's premises, one of Wolfgram's neighbors, Amber Marchio ("Marchio"), a police officer, heard noises that sounded like a door opening and closing. The noises caused her dog, a "coon dog," to bark and get excited. Marchio was then on the second floor of her condominium unit. She first thought the noises may have been caused by her husband but he was asleep. She came to conclude that someone had opened her front door. She sent her dog downstairs, and came to be satisfied that no one was in her house. Investigating the noises, she observed a man whom she did not know walking down the sidewalk servicing the condominiums. She noted the man was wearing a winter jacket, which was the same type of jacket LaRoche was wearing on the evening in question. She did not observe anything unusual about the man.

Marchio proceeded to take her dog outside and there noticed Wolfgram, who had also come outside having heard her neighbor's door being opened and closed. Wolfgram came to tell Marchio about her interaction with LaRoche. Marchio felt that LaRoche had been scared away from her home by her dog.

The police arrived shortly thereafter and found LaRoche's vehicle, with his cell phone left therein, parked near Wolfgram's townhouse. The police remained in the area, and came to observe LaRoche, after a time (about one hour) come out of a nearby wooded area. The police apprehended him. LaRoche identified himself, admitted to being there, and told the police he was in the area to visit friends, whom he did not identify. He told the police he had had a lot to drink. During the pertinent police officer's interactions with LaRoche on the scene, in a cruiser, and at the station, he observed that LaRoche was not fully responsive, smelled of alcohol, appeared to have trouble walking and standing, and claimed he was unable to recollect his intrusive actions that evening.[2]

While Wolfgram did not smell alcohol coming from LaRoche, nor notice him stagger in his walk or slur his speech (though he only uttered a few words to her), she did notice his slow movement and his non-responsiveness to her continued urgings, combined with threats, that he leave her home. Wolfgram identified him as the intruder. LaRoche's wife, Tammy, considered her husband to be extremely intoxicated that night.

[2] LaRoche continues to assert that he has no recollection of his actions concerning this incident, except that he recalls driving his vehicle after leaving his acquaintance's premises, buying cigarettes at a store, and later seeing his wife at the police station when she came to pick him up.

At the time of the LaRoche's intrusion, Concord General insured LaRoche under a homeowner's policy, policy no. H569110-0 ("the policy"). The policy outlines LaRoche's personal liability coverage, and states, in pertinent part:

> **COVERAGE E – Personal Liability**
>
> If a claim is made or a suit is brought against an "insured" for damages because of a "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> > 1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured," and
> >
> > 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . . . Our duty to settle or defend ends when the amount we pay for damages resulting from the "occurrence" equals our limit of liability.

Def.'s Ex. A at 12 of 18 (Homeowners 3 Special Form). The parties do not dispute that LaRoche is an "insured" as defined under the policy. An "occurrence" is defined by the policy as "an accident,[3] including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: 'Bodily Injury[;]' or 'Property Damage.'" Id. at 1 of 18. The policy defines "bodily injury" as "bodily harm, sickness or disease, including required care, loss of services and death that results." Id. The policy also excludes

[3] Under New Hampshire insurance law, accident is given "the meaning that a reasonable person would attach to the term, . . . [which is] an undersigned contingency, . . . a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." Vermont Mut. In. Co. v. Malcolm, 128 N.H. 521, 523 (1986) (quotations and citation omitted).

coverage for bodily injury or property damage "[w]hich is expected or intended by the 'insured[.]'" Id. at 12 of 18.

LaRoche notified Concord General of Wolfgram's pending suit, and sought defense and indemnification under the policy. LaRoche argues, among other things, that he qualifies for coverage as he pertinently acted here in an intoxicated state and not with any requisite intent to call for non-coverage. For its part, Concord General denies it has a duty to defend or indemnify, arguing that LaRoche's actions do not constitute an "occurrence" as defined in the policy because his conduct was not "accidental" as required by the insurance contract. In the alternative, if Concord General is found to have a duty to defend and indemnify, it argues LaRoche could not have formed the requisite intent for the claims brought against him, and, therefore, Wolfgram's writ must be dismissed as a matter of law. For her part, Wolfgram argued at the October 11th hearing that the Court should conclude that coverage is available.

"The interpretation of insurance policy language is ultimately a question of law for. . . [the Court] to decide." Martin v. Maine Mut. Fire Ins. Co., 145 N.H. 498, 500 (2000) (quoting Allen v. Sentry Ins., 137 N.H. 579, 580 (1993)). When considering a declaratory judgment action regarding the coverage of a liability insurance policy, "the burden of proof concerning the coverage shall be upon the insurer whether he institutes the petition or whether the claimant asserting the coverage institutes the petition." RSA 491:22-a (1997). "Insurance companies can limit their liability through clear and unambiguous policy language." Martin, 145 N.H. at 500. In interpreting the policy here in light of the pertinent facts, the

Court must employ "an objective standard, inquiring whether a reasonable person in the insured's position would have expected indemnity for the claims asserted against him." See Mottolo v. Fireman's Fund Ins. Co., 43 F.3d 723,726 (1st Cir. 1995)

Insofar as LaRoche asserts that he was so intoxicated that he was entirely unaware of his location and pertinent actions, and, consequently lacked any intent whatsoever to do what he did, the Court finds otherwise. The evidence shows that LaRoche physically opened the front door and knowingly and intentionally entered Wolfgram's premises without invitation, coherently responded to Wolfgram's inquiry, "Who is there?" by stating, "Hey," indicated to Wolfgram he wanted "to party," did not exhibit to her any slurred speech (though he only uttered a few words) or staggering or stumbling, climbed much of the stairway going to the second floor and then backed down the stairs, took affirmative steps a number of times to persist in staying in the premises, came finally to respond to Wolfgram's entreaties and threats by leaving her home, and did not pursue further entry into Marchio's home after a dog barked. The Court concludes that, though his judgment had certainly been affected by his drinking, and though he was somewhat confused and muddled, LaRoche acted with requisite intent at least in entering the premises and persisting in staying there for a time though urged to leave, indeed threatened by Wolfgram.

This being so, and in deciding whether LaRoche's actions, as here presented, are nonetheless of an "accidental" quality and therefore a covered "occurrence" for insurance purposes under Concord General's policy, the Court

needs to make two inquiries—one subjective, one objective. Marikar v. Peerless Ins. Co., 151 N.H. 395, 398 (2004). The subjective inquiry requires the Court to consider and determine LaRoche's actual intent. Id. If he actually intended to cause the resulting injury, his act or activity may not be deemed accidental. Id. When reviewing LaRoche's actual intent under this inquiry, evidence of intoxication is admissible. Cf. McKinnon v. Hanover Ins. Co., 124 N.H. 456, 462 (1984) (finding evidence of intoxication admissible on the issues of intent and expectation under the insurance policy's exclusion clause there at issue).[4]

Under the objective inquiry, LaRoche's actual intent is irrelevant, and the Court analyzes his act or activity "from the standpoint of a reasonable person in the position of the insured." Marikar, 151 N.H. at 399 (quotation omitted). Here, "an insured's [or LaRoche's] intentional act cannot be accidental . . . [if] it is so inherently injurious that 'it cannot be performed without a certainty that some injury will result.'" EnergyNorth Natural Gas, Inc. v. The Continental Ins. Co., 146 N.H. 156, 162 (2001) (quoting Providence Mut. Fire Ins. Co. v. Scanlon, 138 N.H. 301, 306 (1994)).

An act or activity is "so inherently injurious" when it is certain to cause some injury, but not necessarily the particular alleged injury. Marikar, 151 N.H. at 398; EnergyNorth, 146 N.H. at 164; Scanlon, 138 N.H. at 306. The Court in Scanlon explained that "so inherently injurious" conduct requires more than substantial certainty that an injury will result, but not absolute certainty that the particular injury will result. Scanlon, 138 N.H. at 306; see also EnergyNorth, 146 N.H. at 162.

[4] The Court notes that the "subjective" standard of intent would also govern whether the expected or intended act exclusion in the policy here at issue bars coverage. McKinnon, 124 N.H. at 462.

In Vermont Mutual Ins. Co. v. Malcolm, 128 N.H. 521, 524 (1986), the New Hampshire Supreme Court applied the "so inherently injurious" standard in determining whether coverage existed under a homeowner's policy's "occurrence" grant of coverage requirement with respect to claims of sexual assault upon a minor. In Malcolm, the insured's claimed sexual assaults upon a minor were deemed "so inherently injurious" because "in the most obvious sense . . . they could not be performed upon . . . [a minor victim] without appalling effects on [the minor victim's] mind as well as forbidden contacts with [the minor victim's] body." Id. Since Malcolm, the Supreme Court has also found various forms of assault/battery activity to be "so inherently injurious," notwithstanding that the insured may not have actually intended to cause the particular injury that resulted. See Martin, 145 N.H. at 501; Green Mt. Ins. Co. v. Foreman, 138 N.H. 440, 442 (1994).

Moreover, and also since Malcolm, the Supreme Court has found certain "non-violent"-type actions or activity to be "so inherently injurious" to bar coverage. In EnergyNorth, for example, the insured's act of releasing hazardous waste or substances into a sewer which emptied near the Merrimack River was so found, see 146 N.H. at 160-166, as was the insured's conduct in Fisher v. Fitchburg Mut. Ins. Co., 131 N.H. 769 (1989), of executing two separate purchase and sales agreements for the same residential property, thus conveying the same property to two different parties. Id. at 773.

In Jespersen v. United States Fidelity & Guaranty Company, 131 N.H. 257, 259 (1988), the two individual insureds were accused of intentionally and

wrongfully discharging or terminating a business partner. There was no dispute that the two individual insureds intended to discharge the partner, discontinue his benefits and prevent his further involvement in the management of the business he founded. The Court in Jespersen reasoned that the individual insureds' actions were "so inherently injurious" because "[s]ome degree of the mental and physical distress . . . [the business partner] claims to have suffered . . . [was] certainly the natural consequence of such a discharge, and . . . [the individual named insureds] must be charged with intending those consequences." Id.

On the other hand, the Supreme Court has decided, post-Malcolm, a number of cases where it did not find that the "so inherently injurious" standard had been established. In Marikar, where the insured allegedly engaged in, among other things, negligent acts of physical discipline and verbal abuse in dealing with the children attending the school he owned and operated, the Court ruled that, though verbal abuse is "unpleasant and often demeaning," it is not "so inherently injurious," is unlike "sexual assault, a punch to the face, or a blow to the head combined with a chokehold," and "is not certain to result in injury." Marikar, 151 N.H. at 399. Furthermore, in Scanlon, which involved the named insured's son playing a BB gun "game" with other children and where no injury occurred after several shots, but only with the final one, the Court ruled that the activity was not "so inherently injurious" to bar coverage as it was not certain, in light of the earlier harmless shots, that the final shot would cause injury. See Scanlon, 138 N.H. at 306.

Finally, in the A.B.C. Builders, Inc. case, an insured's intentional construction activity, which resulted in encroachment upon a neighbor's property, was not deemed "so inherently injurious" inasmuch as the Court had "little difficulty" in concluding that it was not certain that the residence would be built encroaching upon the neighbor's land. See A.B.C. Builders, Inc, 139 N.H. at 750.

Applying the above discussed principles of law and precedents to the case at bar, the Court first deals with the previously described subjective inquiry-- that is, whether LaRoche actually intended to harm Wolfgram and cause her injury in acting as he did. The record contains evidence that both supports and goes against a finding of actual intent. While LaRoche did advance on Wolfgram, and persist in staying in her premises, despite her clear directives that he leave her in peace, there is also evidence that LaRoche was quite intoxicated, and acted with impaired judgment and with some confusion. The Court determines that it need not decide this issue. This is so because even if it is assumed that LaRoche has not been shown to have had actual intent to do harm or injury, Concord General has met its burden of showing that LaRoche's conduct, measured from the standpoint of a reasonable person in his position, was "so inherently injurious" as to bar coverage.

A reasonable person in LaRoche's position would have recognized that the activity of entering a stranger's home at night and remaining there after being directed by the homeowner to leave would cause some level of distress to the homeowner. See e.g. Jespersen, 131 N.H. at 261.

This case is not like Scanlon or A.B.C. Builders, Inc. where the activities at issue reasonably could be seen as not necessarily coming to involve injury. Here this may not be said. It should be emphasized that Wolfgram does not, in her underlying suit, merely complain about LaRoche's initial entry into her home. Indeed, she initially thought that perhaps LaRoche had done this by mistake. Rather, her claims of injury pertain particularly to LaRoche's continued persistence in staying in her premise, indeed advancing toward her, despite her efforts to get him to leave. The conduct in question unquestionably would cause Wolfgram, or for that matter, anyone, some level of mental distress.

Nor may LaRoche convincingly assert that he had some good faith basis or reasonable grounds for believing that he had a right or privilege to do what he did. See Lumbar Ins. Companies, Inc. v. Allen, 820 F. Supp. 33, 34-36 (D.N.H. 1993). This is so though LaRoche's actions may have been prompted, to some degree, by some desire to continue socializing with friends.

To be sure, Wolfgram's counts in the underlying suit assert, among other things, reckless and negligent infliction of emotional distress. Nonetheless, and given the Court's findings and conclusions here that LaRoche's pertinent conduct is not of the "accidental" sort to trigger coverage, Concord General does not have an obligation to defend and indemnify with regard to the underlying action.

For the reasons set forth above, the Court enters judgment in favor of Concord General.

The petitioner has submitted requests for findings of fact and rulings of law. The Court's findings and rulings are contained in this Order. Insofar as the

petitioner's requested findings and rulings are consistent with this Order, they are **GRANTED**; otherwise, they are **DENIED**.

So Ordered.

DATE: January 4, 2008

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JOHN M. LEWIS
PRESIDING JUSTICE