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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AMEX ASSURANCE COMPANY,) No. 1 CA-CV 09-0685
)
) DEPARTMENT B
Plaintiff/Counterdefendant/)
Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
ALLEN SISLER,) Civil Appellate Procedure)
)
)
Defendant/Counterclaimant/)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. 2008-003342

The Honorable Kenneth Mangum, Judge

REVERSED AND REMANDED

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J O H N S E N, Judge

¶1 Allen Sisler appeals from judgments entered in favor of Amex Assurance Company on Amex's claim for a declaratory judgment and on Sisler's claims for breach of contract and breach of the duty of good faith and fair dealing. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 David Smokoska hired Sisler and Tom Erhardt to help on a remodeling project in his garage. Sisler and Erhardt were friends of Smokoska. Without any apparent warning or provocation, Smokoska shot each of the men in the head while they were at his house one afternoon. He then drove away and shortly thereafter, took his own life. Sisler and Erhardt, who survived, made a joint demand against Smokoska's widow for the policy limits of her homeowner's insurance policy issued by Amex.¹ Amex agreed to defend the claims under a reservation of rights and filed a declaratory judgment action to determine coverage. Sisler responded to the complaint, asserting the policy covered his claim. Sisler and Smokoska's widow ultimately entered into a *Morris* agreement with a stipulated judgment of \$1,000,000 in exchange for a covenant not to

¹ Any claims Erhardt might have against Amex are not before us on this appeal.

execute.² Sisler then amended his counterclaim and, as assignee of the insured's rights under the policy, alleged breach of contract and breach of the duty of good faith and fair dealing against Amex.

¶13 On cross-motions for summary judgment, the superior court held the policy's intentional-act exclusion barred coverage for the shootings. On September 2, 2009, the court entered a signed judgment in Amex's favor on its claim. Although the judgment lacked finality language pursuant to Arizona Rule of Civil Procedure 54(b), Sisler filed a notice of appeal on September 29, 2009. In an unsigned minute entry order filed October 27, 2009, the court then granted Amex's motion for summary judgment on Sisler's counterclaims. Sisler filed an amended notice of appeal dated October 29, 2009, to "reflect his appeal" from the October 27 order. On February 1, 2010, the court entered a separate signed judgment on the bad faith claim. Sisler appeals from the judgments against him.

DISCUSSION

A. Our Jurisdiction.

¶14 As an initial matter, Amex argues we lack jurisdiction because Sisler did not timely appeal from the February 1, 2010 formal judgment the court entered on his bad faith claim.

² *United Serv. Auto. Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987).

Sisler's amended notice of appeal was premature because it was filed prior to entry of a final judgment that disposed of all claims in the complaint and counterclaim. See *Barassi v. Matison*, 130 Ariz. 418, 420-21, 636 P.2d 1200, 1202-03 (1981). The supreme court's decision in *Barassi*, however, teaches that while premature appeals are not favored, they will not be dismissed in the absence of prejudice to the appellee. *Id.*

¶15 Amex does not argue it was prejudiced by Sisler's premature appeal. Instead, it argues that *Barassi* does not apply because the October 27 minute entry order from which Sisler filed his amended notice of appeal left unresolved the issue of Amex's entitlement to attorney's fees arising from the dismissal of Sisler's counterclaims. Amex argues that had Sisler waited to file his amended notice of appeal until expiration of the 20-day period that Arizona Rule of Civil Procedure 54(g) permits for filing of a fees request, his notice of appeal would have been premature but not fatally so. It contends, however, that because Sisler filed his amended notice of appeal before the time to request attorney's fees had expired, his appeal is invalid.

¶16 Although a request for attorney's fees may constitute a separate claim for relief pursuant to Rule 54(b), Amex did not file a request for attorney's fees on the counterclaim. For this reason, no fees request was pending at the time of Sisler's

October 29 amended notice of appeal or thereafter. Amex cites no authority for the proposition that under these circumstances, a premature notice of appeal is fatal. In the absence of authority supporting Amex's argument, we follow the direction in *Barassi* that "a premature appeal from a minute entry order in which no appellee was prejudiced and in which a subsequent final judgment was entered over which jurisdiction may be exercised need not be dismissed." 130 Ariz. at 422, 636 P.2d at 1204. See also *Hanen v. Willis*, 102 Ariz. 6, 9, 423 P.2d 95, 98 (1967) ("[W]hen adequate notice to appeal has been given to the other party, no mere technical error should prevent the appellate court from reaching the merits of the appeal.").

¶7 Accordingly, we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

B. Standard of Review.

¶8 Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review the superior court's grant of summary judgment *de novo*, viewing the facts and inferences drawn from those facts in the light most favorable to the party against whom the court entered judgment. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

Our review is limited to the record before the superior court when it considered the motion for summary judgment. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990).

C. Legal Principles Pertaining to the Intentional-Act Exclusion.

¶9 The policy at issue contained a standard exclusion of coverage for intentional acts:

Under Personal Liability Coverage and Medical Payments to Others Coverage, we do not cover . . . bodily injury or property damage expected or intended by one or more insured persons.

¶10 As a matter of public policy, intentional acts are uninsurable. *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 165 Ariz. 31, 35, 796 P.2d 463, 467 (1990) (“[A]n insured may not be encouraged to shoot someone because he is ‘covered.’”); *Wilshire Ins. Co. v. S.A.*, 224 Ariz. 97, 99-100, 227 P.3d 504, 506-07 (App. 2010).

¶11 The Arizona Supreme Court has held that if a party acts with a “subjective desire to cause harm” or “if the nature and circumstances of the [party’s actions are] . . . substantially certain to result [in harm],” we presume the party acted intentionally. *Phoenix Control Sys.*, 165 Ariz. at 35-36, 796 P.2d at 467-68 (adopting the so-called *Steinmetz-Clark* presumption, in which intent can be inferred as a matter of law

based on a party's conduct and the likelihood of the resulting consequences); see also *Ohio Cas. Ins. Co. v. Henderson*, 189 Ariz. 184, 191, 939 P.2d 1337, 1344 (1997) (insured's intent inferred from substantial certainty that bodily harm would occur when "three armed men entered a presumably crowded theater during business hours" to rob the business).³

¶12 The intentional-act presumption does not apply, however, if the insured "was suffering from a derangement of his intellect which deprived him of the capacity to govern his conduct in accordance with reason," and "while in that condition [the insured acted] on an irrational impulse." *Globe Am. Cas. Co. v. Lyons*, 131 Ariz. 337, 340, 641 P.2d 251, 254 (App. 1981) (quoting *Ruvolo v. Am. Cas. Co.*, 39 N.J. 490, 498, 189 A.2d 204, 209 (1963)). The insured in *Lyons*, who drove her car directly into a truck in an attempt to commit suicide, was diagnosed with paranoid schizophrenia and also suffered from "acute brain syndrome and hallucinosis as a result of alcohol abuse." 131 Ariz. at 338, 342, 641 P.2d at 252, 256. This court reversed a judgment in favor of the insurer and held that the extreme

³ The presumption that a party intends the natural consequences of his actions for these purposes was developed in *Steinmetz v. Nat'l Am. Ins. Co.*, 121 Ariz. 268, 589 P.2d 911 (App. 1978), and *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 529 P.2d 1195 (1975).

nature of the insured's mental illness precluded applicability of the intentional-acts exclusion. *Id.* at 343, 641 P.2d at 257.

¶13 In another case, this court held an insured's depression caused by estrangement from his spouse was insufficient to prove the insured's incapacity to form intent. *St. Paul Prop. & Liab. Ins. Co. v. Eymann*, 166 Ariz. 344, 352, 802 P.2d 1043, 1051 (App. 1990). The insured in *Eymann* assaulted a man who was romantically involved with the insured's estranged wife. *Id.* At trial, a psychologist testified the insured suffered acute major depression that "significantly impaired his ability to control his actions." *Id.* at 347, 802 P.2d at 1046. The court held the evidence was insufficient to establish that the insured's mental state "'deprived' him of the mental capacity to act rationally." *Id.* at 352, 802 P.2d at 1051. See also *State Farm Fire & Cas. Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995) (reversing judgment entered after bench trial; evidence showed that at most, mental state of insured who molested a child several times was impaired but that he was not deprived of capacity to act intentionally).

D. A Genuine Issue of Material Fact Precludes Summary Judgment.

¶14 Sisler has no memory of the shootings, and Erhardt's medical condition precludes him from giving an account. On appeal, both sides rely on unsworn statements contained in

police reports submitted on summary judgment to support their contentions with respect to Smokoska's intent and mental state. According to those reports, so far as is known, the shootings were entirely unprovoked and without warning. Smokoska, Sisler and Erhardt were longtime friends. According to other witnesses, sometime after 3 p.m., while Sisler and Erhardt were working in the garage, Smokoska retrieved an automatic handgun and a revolver from two separate locations in the home. After pacing about the house for 10-15 minutes, he instructed the children to go into the backyard and locked the sliding glass door behind them. As he directed the children outside, he told them to stay there until someone came for them. When one of the children asked why, Smokoska responded, "Don't worry about it."

¶15 Smokoska's widow told police she had spoken to her husband two or three times on the day of the shooting and that he "seemed fine, not mad at all." Another man who was helping with the work in the garage, but who left before the shootings, said that Smokoska was in a "great mood" that day.

¶16 On the other hand, Erhardt's wife told police that Smokoska did not seem as friendly as usual when she dropped her husband off at Smokoska's home that morning. Smokoska was acting "weird," she said. She said she spoke with her husband several times during the day, and that he told her Smokoska was "in one of those 'weird moods.'" Smokoska's widow said her

husband had had a nervous breakdown about 10 years before and that he was treated in a "mental hospital" at that time. She said he was on medication for two or three months on that occasion. She said that during the month prior to the shootings, she had noticed "the same signs that he had last time he had a nervous breakdown," and that she had made an appointment for him to see a psychologist.

¶17 In support of his response and cross-motion for summary judgment, Sisler offered a declaration of Richard Rosengard, D.O., a board-certified psychiatrist. Rosengard stated that he had reviewed the police report, the deposition of Smokoska's widow and the statements of five other persons. Rosengard stated that it was his opinion, "to a reasonable degree of probability," that Smokoska "would likely be characterized as friends with the two victims," that "there is evidence" that Smokoska "had a past history of treatment with psychiatric medication and a short psychiatric hospitalization approximately 10 years before the incident," that "there is evidence" that he "was acting in a manner similar to that which occurred prior to" the prior hospitalization, that Smokoska "did not appear to have any specific reason to shoot the victims," and that "[a]fter an exhausted [sic] investigation into the matter, it does not appear that the police could discern any specific motive for shooting the victims." Based on that

"factual background," Rosengard declared that it was his opinion, "to a reasonable degree of probability, that David Smokoska suffered from some form of mental illness or disease which caused him to act upon an irrational impulse and shoot the victims in this case before taking his own life."

¶18 With its response to Sisler's motion for summary judgment and its reply in support of its own motion for summary judgment, Amex provided a copy of an unverified disclosure statement containing a summary of the opinion of Steve E. Pitt, D.O., a board-certified psychiatrist. According to the disclosure statement, it was "Pitt's opinion, to a reasonable degree of medical probability," that Smokoska suffered from "an ill-defined emotional problem" but that "there is ample evidence to indicate that Mr. Smokoska's behavior at the time of the offense was intentional."

¶19 We conclude the evidence in the record creates a genuine issue of material fact as to whether the intentional-act exclusion in the policy bars coverage of the shootings.⁴

⁴ In general, the insurer bears the burden of establishing a coverage exclusion. See *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46, 13 P.3d 785, 788 (App. 2000). Amex argues that once it established facts to support a presumption that Smokoska acted intentionally, the burden shifted to Sisler to prove that Smokoska was incapable of forming the requisite intent. Given the evidence in the record, we need not decide whether Amex's assertion that Sisler had the burden of proving an exception to the exclusion is correct. Cf. *W. Am. Ins. Co. v. McGhee*, 530 N.E.2d 110, 112 (Ind. App. 1988) (insured bears

¶120 At the outset, given that the two victims were injured by separate shots and the deliberate steps Smokoska took beforehand to shield the children from the violence, we reject Sisler's speculation that the shootings may have been accidental. To the contrary, the undisputed facts compel the conclusion that Smokoska's subjective intent was to harm Erhardt and Sisler. See *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 529 P.2d 1195 (1975); *Steinmetz v. Nat'l Am. Ins. Co.*, 121 Ariz. 268, 589 P.2d 911 (App. 1978).

¶121 As Sisler points out, however, there is no evidence in the record of what might have motivated Smokoska to deliberately shoot his two friends. Under the circumstances, the issue is whether Smokoska suffered from a "derangement of his intellect which deprived him of the capacity to govern his conduct in accordance with reason and while in that condition [he acted] on an irrational impulse." *Lyons*, 131 Ariz. at 340, 641 P.2d at 254.

¶122 As noted, Sisler offered a declaration by Rosengard, a psychiatrist who opined that Smokoska "suffered from some form of mental illness or disease which caused him to act upon an irrational impulse" in shooting the victims. This opinion is supported by the apparent lack of motive for the shootings,

burden of proving exception to intentional-act exclusion); *Allied Mut. Ins. Co. v. Costello*, 557 N.W.2d 284, 288 (Iowa 1996) (same).

Smokoska's history of mental illness, the comments of witnesses who reported that he was "weird" that day, and his widow's reported comments that she had noticed "signs" just prior to the shootings that reminded her of Smokoska's behavior before his mental breakdown 10 years before (indeed, those observations had caused her to make appointment for him with a psychologist).

¶123 Amex argues vigorously that Smokoska's actions just prior to the shootings (pacing around in his home for 10-15 minutes with the two firearms; ordering the children outside, locking the door behind them) demonstrate he acted intentionally. Amex cites *Eymann* to support the proposition that the evidence in the record is insufficient to show Smokoska was deprived of his ability to govern his conduct in accordance with reason. In *Eymann*, however, the insured's expert witness testified at trial that "[the insured] had the mental capacity to distinguish between whether his actions would be right or wrong. [The insured] could have made an intent . . . because he had sufficient control over his intellect." 166 Ariz. at 347, 802 P.2d at 1046. Likewise, *Brown* does not control the outcome of this appeal. The claimant's own expert in that case noted that the insured's "generalized anxiety disorder. . . . was a *contributing factor* in the deprivation of [the insured's] capacity to govern his conduct with reason and led him to act on an irrational impulse." 183 Ariz. at 520, 905 P.2d at 529

(emphasis added). On that evidence, the court concluded the insured's capacity was impaired but not deprived. *Id.* at 524, 905 P.2d at 533. Thus, the *Lyons* test was not satisfied.

¶24 By contrast, Rosengard opined in this case that "Smokoska suffered from some form of mental illness or disease which caused him to act upon an irrational impulse and shoot the victims in this case before taking his own life." Amex argues the Rosengard declaration is insufficient to create a material issue of fact because it does not state that Smokoska was incapable of forming an intent to harm the victims, or put differently, that Smokoska's mental condition deprived him of the capacity to act rationally.

¶25 Although the Rosengard declaration does not precisely recite the *Lyons* standard, we hold that, along with the other evidence in the record, it is sufficient to create a genuine issue of material fact with respect to whether Smokoska was deprived of the capacity to act in accordance with reason at the time of the shootings. Unlike the experts in *Brown* and *Eymann*, Rosengard did not opine Smokoska had a mental illness that merely contributed to the shootings; nor did he declare that Smokoska had the ability to form intent. Instead, Rosengard maintained that Smokoska's mental condition "caused him to act upon an irrational impulse" and thereby shoot his two friends (and take his own life immediately thereafter). This evidence

is sufficient to raise a question of fact with respect to whether Smokoska's mental condition rendered him incapable of acting rationally at the moment of the shootings.

¶26 Amex further argues that Rosengard was incompetent to render his opinion. It notes that Rosengard's declaration makes no mention of any examination of medical records or any personal examination of Smokoska himself. It also argues that there is scant evidence of the circumstances of Smokoska's prior hospitalization following what his widow characterized as a "mental breakdown." It points out that the record nowhere contains a precise diagnosis of any mental condition that might have afflicted Smokoska. But these are matters for the trier of fact to weigh. The question before us is whether the evidence Sisler offered was sufficient to defeat Amex's motion for summary judgment, and we hold that it was.

CONCLUSION

¶27 Viewing the evidence in the light most favorable to the party against whom judgment was entered, we hold the evidence was sufficient to create a genuine issue of material fact as to whether at the time of the shootings, Smokoska was suffering from a mental condition that deprived him of the capacity to act rationally and while in that condition, he acted on an irrational impulse. Accordingly, we reverse the judgments

and remand for further proceedings consistent with this decision.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge