COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1836 **Cir. Ct. No. 2006CV2780**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DANIEL D. BUCKEL AND THERESA M. BRZYKCY,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE INDEMNITY COMPANY, DOUGLAS BARNES, KATHLEEN BARNES, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AARON LENTZ, GREGG LENTZ, JULIE LENTZ, TRENTON TAUKE, STEVEN TAUKE, NANCY TAUKE, ABC INSURANCE COMPANY, JOHN DOE, JIM DOE AND JANE DOE,

DEFENDANTS-RESPONDENTS,

BLUE CROSS BLUE SHIELD OF WISCONSIN,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Curley, JJ.

¶1 SNYDER, J. Daniel D. Buckel and Theresa M. Brzykcy appeal from a summary judgment in favor of the defendants. Buckel and Brzykcy argue that the circuit court erred when it did not allow the questions of intent and parental negligence to proceed to the jury. They further argue that the definitions of "intentional" in the defendants' insurance policies were ambiguous and should have been interpreted in favor of the insureds to provide coverage. We affirm the judgment.

BACKGROUND

¶2 This case arises from a single vehicle motorcycle accident that occurred when Buckel, the motorcycle driver, and Brzykcy, his passenger, struck a "wall" of plastic wrap that had been placed across the road. Both were injured in the accident. The plastic wrap had been placed across the road by defendants Douglas Barnes, Trenton Tauke and Aaron Lentz.[1] At the time, Douglas was sixteen years old, Trenton was sixteen years old, and Aaron was fourteen years old. The events leading up to the accident are as follows.

¶3 On the evening of July 12, 2004, Trenton Tauke was an overnight guest at the home of Douglas Barnes and his parents. That night, they were chatting online with a friend, David Walker. The boys' chat revolved around a plan to place plastic wrap across Guthrie Road in Waukesha county to create an

[1] The record indicates that another boy, identified as David Walker, took part; however, he is not a defendant in this action.

invisible barrier, and to see what would happen. They decided to go forward with their plan in the early hours of July 13.

¶4 Shortly after midnight, Trenton and Douglas slipped out of the Barnes' home and took Trenton's car to pick up David Walker and another friend, Aaron Lentz. When the four arrived at the agreed upon spot on Guthrie Road, they wrapped clear plastic wrap around two sign posts and across the road about "five or six times." They walked a short distance away and stopped and waited. After about twenty minutes, they saw a light coming over the hill toward their barricade and the boys hid behind some bushes. They heard a loud screech and ran back to Trenton's car and left. The light they had seen was Buckel and Brzykcy approaching the plastic wrap barrier on their motorcycle. The riders were both seriously injured in the ensuing collision.[2]

¶5 Buckel and Brzykcy sued, alleging negligence by the boys and negligent failure to supervise by the parents. They filed claims against Douglas and his mother, along with the Barnes' homeowners insurance carrier, Allstate Indemnity Company. They also sued Trenton and Aaron, their parents and their homeowners insurance carrier, American Family Mutual Insurance Company. Allstate moved to bifurcate the issue of insurance coverage and stay all proceedings on liability until coverage was determined. The court granted the motion, and stated "The defendants shall be entitled to file motions for summary judgment regarding whether the claims against them should be dismissed because

[2] Douglas, Trenton and Aaron were referred to juvenile court on delinquency petitions. Each pled guilty to two counts of second-degree reckless endangerment.

the actions of the minor defendants were intentional rather than negligent as alleged in the Complaint."

¶6 Allstate moved for summary judgment on grounds there was no coverage under their policy for Douglas or his mother for Douglas's intentional acts. American Family followed with its own motion for summary judgment, likewise arguing that its policy afforded no coverage for the intentional acts of Trenton or Aaron and therefore there was no coverage for their parents either. The Barnes family, the Tauke family and the Lentz family also moved for summary judgment, arguing that because the lawsuit arises out of intentional acts, the applicable statute of limitations barred Buckel and Brzykcy from bringing suit against the boys and further arguing that there was no genuine issue of material fact as to negligent supervision on the part of the parents.

¶7 The circuit court held a hearing on the motions on June 25, 2007. It summarized the issues before it as follows:

> [I]f the two year statute of limitations applies and the court considers this an intentional act, that this lawsuit then must be dismissed on its very terms because it was not filed in a timely fashion…. [I]f the court determines as a matter of law that this was not an intentional act but rather could be considered a negligent act, then the three year statute of limitations would apply and therefore the lawsuit was in fact timely filed.

The court also noted, "[I]f the court determines that these actions constitute intentional acts as opposed to negligent acts, that there is no coverage under any of these insurance policies …." Applying the WIS JI—CIVIL 2001 definition of intentional conduct, the court specifically analyzed whether the boys' conduct was such that injury was substantially certain to occur. The court decided that the

claims made by Buckel and Brzykcy, although articulated in terms of negligence, were caused by intentional conduct and therefore time barred.

¶8 The court also held that the claims against the parents for negligent supervision could not stand because there was no evidence that the parents knew or should have known that their sons would engage in this sort of conduct. Further, the court determined that the claims against the parents were derivative claims and that the insurance policies' intentional acts exclusions, which excluded coverage for the acts of the wrongdoers, also excluded coverage for the parents' supervision and control of the wrongdoers. Buckel and Brzykcy appeal.

DISCUSSION

¶9 Buckel and Brzykcy raise several issues on appeal. They contend that summary judgment was inappropriate because the question of intent should have gone to the jury, the insurance policy exclusions for intentional acts were ambiguous and should have been construed against the insurers, and the parents should have been held liable for the acts of their children under the theory of negligent supervision.

¶10 We review a summary judgment using the same methodology as the circuit court, which is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Linville v. City of Janesville***, 184 Wis. 2d 705, 714, 516 N.W.2d 427 (1994). Furthermore, the interpretation and application of an insurance policy provision to undisputed facts is a question of law and thus calls for de novo

review. ***Steven G. v. Herget***, 178 Wis. 2d 674, 684, 505 N.W.2d 422 (Ct. App. 1993).

The Intentional Acts Exclusion

¶11 Buckel and Brzykcy contend that the insurance policy intentional acts exclusions are ambiguous and must be construed against the companies in this instance. "In Wisconsin, an intentional-acts exclusion precludes coverage only where the insured acts intentionally and intends some harm or injury to follow from the act." ***Loveridge v. Chartier***, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991) (citing ***Raby v. Moe***, 153 Wis. 2d 101, 110, 450 N.W.2d 452 (1990)). Our supreme court has held that an intentional acts exclusion precludes coverage where an intentional act is substantially certain to produce injury even if the insured person asserts (honestly or dishonestly) that no harm was intended. ***Id.***

¶12 The relevant American Family policy language is as follows: "Intentional injury: We will not cover bodily injury or property damage caused intentionally by or at the direction of any insured even if the actual bodily injury or property damage is different than that which was expected or intended from the standpoint of any insured." The relevant Allstate policy language is as follows:

> We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional … acts or omissions of, any insured person. This exclusion applies even if … such bodily injury or property damage is of a different kind or degree than intended or reasonably expected ….

¶13 Buckel and Brzykcy argue that the intentional acts exclusions are ambiguous because neither policy further defines the word "intentionally" and that the term is susceptible to more than one interpretation. The argument is unpersuasive in the face of a substantial body of case law concerning intentional

acts, the doctrine of fortuitousness, and public policy. *See e.g.*, ***Loveridge v. Chartier***, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991) (intentional acts exclusions preclude coverage where the insured acts intentionally and intends some harm or injury to result); ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 483-84, 326 N.W.2d 727 (1982) ("[I]nsurance covers fortuitous losses and ... losses are not fortuitous if the damage is intentionally caused by the insured."); ***B.N. v. Giese***, 2004 WI App 137, ¶21, 275 Wis. 2d 240, 685 N.W.2d 568 (conduct that is intentional as a matter of law falls under an intentional acts exclusion). Even where an insurance policy does not contain an intentional acts exclusion, courts will read this principle into the policy to further public policy objectives. *See* ***Hedtcke***, 109 Wis. 2d at 484. Buckel and Brzykcy cannot reasonably maintain that the policies' intentional acts exclusions could be misinterpreted. Where an insured person acts intentionally and intends some harm or injury to follow from the act, the intentional acts exclusion applies. *See* ***Loveridge***, 161 Wis. 2d at 168.

The Intent to Harm or Injure

¶14 The parties agree that the conduct of the boys was intentional; in other words, they did not accidentally or unknowingly place a clear plastic wrap barrier across Guthrie Road. The disputed issue here is whether they also intended harm or injury to follow from their intentional act. Buckel and Brzykcy argue that the "mind set of the minors at the time they committed the act is a question of fact for the jury."

¶15 We understand that the issue of intent is generally a question of fact and, where intent is disputed and material to the outcome of the case, the issue should prevent summary judgment; however, in some circumstances the state of mind of a person must be inferred from the acts of that person in view of the

surrounding circumstances. *See* ***Pfeifer v. World Serv. Life Ins. Co.***, 121 Wis. 2d 567, 569, 360 N.W.2d 65 (Ct. App. 1984). A person intends to injure another if he or she "intend[s] the consequences of" his or her act or "believe[s] that they are substantially certain to follow." ***Loveridge***, 161 Wis. 2d at 168. We may infer that an insured intended to injure or harm using an objective standard where "the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent to injure as a matter of law." ***Id.*** at 169; *see also* ***B.N.***, 275 Wis. 2d 240, ¶14 (where the facts, viewed objectively, demonstrate a sufficient degree of certainty, the court may infer intent).

¶16 The question of intent must be addressed on a case-by-case basis and the "more likely harm is to result from certain intentional conduct, the more likely intent to harm may be inferred as a matter of law." ***Loveridge***, 161 Wis. 2d at 169-70. Therefore, we must determine whether the boys' conduct supports an objective inference of the intent to injure.

¶17 Douglas, Trenton, and Aaron admitted that they intentionally created a barrier across Guthrie Road using clear plastic wrap and that they intended for a motor vehicle to strike the barrier. Aaron's affidavit states, "The plastic wrap that was placed across Guthrie Road … blocked the road completely. After the plastic wrap had been placed across the road, it was impossible for a vehicle to travel down Guthrie Road without striking the plastic wrap." The boys did not put one single sheet of plastic wrap across the road, but rather wrapped the plastic around the poles at the side of the road a "substantial" number of times and crossed the wrap back and forth over the road to form a barrier from the ground to approximately six feet high. They did this at night, when visibility would be low. The intentional creation of a transparent six-foot-high barrier across the road, located such that avoidance was impossible, and put in place at night, produced

such a high likelihood of injury that intent to injure may indeed be inferred as a matter of law.

¶18 Buckel and Brzykcy respond that the boys affirmatively averred that they had no intent to injure and that such subjective evidence should overcome the objective inference. We disagree. "[A]n insured cannot prevent a court from inferring his [or her] intent to injure as a matter of law by merely asserting he [or she] did not intend to injure or harm." ***Ludwig v. Dulian***, 217 Wis. 2d 782, 789, 579 N.W.2d 795 (Ct. App. 1998). Our supreme court quoted with approval, William Prosser, *Law of Torts*, §§ 31-32 (4th ed. 1971) as follows:

> Intent ... is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does.... The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.

See ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 711, 278 N.W.2d 898 (1979).

¶19 Buckel and Brzykcy also argue that the degree of harm the boys may have expected is substantially different from the degree of harm that actually occurred. They assert that, because their injuries were well beyond any harm the boys reasonably expected to cause, the intent to injure *to this degree* is absent. However, the objective standard for inferring intent also applies to preclude coverage where the harm that occurs is different in character or magnitude from that intended by the insured. ***Loveridge***, 161 Wis. 2d at 169. The court in ***Pachucki*** recognized that two requirements must be met for an intentional loss

exclusion to apply: (1) the insured must intentionally act, and (2) the insured must intend some injury or harm from that act. ***Pachucki***, 89 Wis. 2d at 710. ***Pachucki*** stands for the proposition that when some harm is intended and a greater harm was substantially certain to follow, the intent to cause the greater harm will be inferred. ***Id.*** at 712-13. Here, the conduct of the boys and the likelihood of the harm combine to support the reasonable inference that there was intent to injure as a matter of law. Consequently, the claims brought by Buckel and Brzykcy are for intentional conduct rather than negligence and the two-year statute of limitations under WIS. STAT. § 893.57 precludes these claims.

Parental Liability for Negligent Supervision and Control

¶20 Finally, Buckel and Brzykcy argue that even if the boys' acts were intentional, the claim for negligent supervision by their parents is not subject to the two-year statute of limitations.[3] The duty of a parent to control a child was explained in ***Seibert v. Morris***, 252 Wis. 460, 463, 32 N.W.2d 239 (1948):

> A parent is under a duty to exercise reasonable care so as to control his [or her] minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he [or she] has the ability to control his [or her] child, and (b) knows or should know of the necessity and opportunity for exercising such control.

Wisconsin's civil jury instructions restate this standard of conduct as follows:

[3] The circuit court held that because there was no insurance coverage for the intentional acts of Douglas, Trenton and Aaron, there was no coverage for the derivative claims against the parents for negligent supervision. *See* ***Utecht v. Steinagel***, 54 Wis. 2d 507, 515, 196 N.W.2d 674 (1972); ***Bankert v. Threshermen's Mut. Ins. Co.***, 110 Wis. 2d 469, 477-84, 329 N.W.2d 150 (1983). Buckel and Brzykcy do not challenge this holding on appeal.

> A parent must use ordinary care to control (his) (her) minor child so as to prevent the child from intentionally harming others or from conducting (himself) (herself) so as to create an unreasonable risk or bodily harm to others, if the parent knows or should know:
>
> (1) that (he)(she) has the ability to control the child;
>
> (2) that there is a necessity for exercising such control; and
>
> (3) that there is an opportunity to do it.

WIS JI—CIVIL 1013. Therefore, to present a claim for negligent supervision, Buckel and Brzykcy must have alleged facts to show that the parents here knew or should have known of the need to control their boys and that they had the opportunity to do so. As the Lentz's point out, "[A] general assertion that kids will be kids and a parent must always be on guard will not suffice to place liability."

¶21 To support their claim, Buckel and Brzykcy allege that the three boys "had previously engaged in a prank of [S]aran [W]rapping several cars."[4] They direct us to ***Nieuwendorp v. American Family Insurance Co.***, 191 Wis. 2d 462, 473, 529 N.W.2d 594 (1995), for the proposition that a parent on notice that a child requires supervision to prevent harm to others will be held liable for negligently supervising that child in the event the child causes harm. In ***Nieuwendorp***, the child suffered from attention deficit hyperactivity disorder which required medication. ***Id.*** at 467-68. The parents stopped administering the

[4] At his deposition, Douglas stated that he and Trenton had used Saran Wrap to wrap around "a few cars or a car" about one week prior to the Guthrie Road incident. There is nothing in the record to indicate that Aaron joined Douglas and Trenton in this prank or that he was aware of the plan to place plastic wrap across Guthrie Road until he joined the others in Trenton's vehicle that night.

child's medication but failed to inform the child's school. ***Id.*** at 468-69. The child injured a teacher in an episode stemming from the disorder and the court held the parents liable for negligently failing to control the child's behavior because they knew their child required medication based on past behavior. ***Id.*** at 474-75.

¶22 The analogy fails, however, because ***Nieuwendorp*** turned on the fact that the parents *knew* of their child's tendency for disruptive and potentially harmful behavior when he was not taking his medication. *See* ***id.*** Here Buckel and Brzykcy suggest that because Douglas and Trenton used plastic wrap to wrap a car a week prior to this event, the parents should have known they would use plastic wrap in a future, more harmful prank. They argue that, because Trenton took the plastic wrap from his own home, his parents should have discovered it was missing and therefore should have known their son required supervision and control. They further emphasize that Douglas and Aaron both admitted they had snuck out of their homes "a couple of times" in the past but "had not been caught." This, Buckel and Brzykcy argue, demonstrates that the boys needed supervision and control. However, to be held liable for negligent supervision, a parent must have notice that supervision is needed.

¶23 We are not persuaded that a few missing rolls of plastic wrap and "a couple" of undiscovered escapades would alert parents that their child was going to harm others. *See* ***Bruttig v. Olsen***, 154 Wis. 2d 270, 277, 453 N.W.2d 153 (Ct. App. 1989) (parents need not anticipate disobedience unless given a reason to do so). Even if the parents had known that the boys previously wrapped a car or cars in plastic, or that they had snuck out of the house a couple of times in the past, the "[m]ere knowledge by the parent of a child's mischievous and reckless, heedless or vicious disposition is not of itself sufficient to impose liability with respect to

torts of a child." ***Nielsen v. Spencer***, 2005 WI App 207, ¶14, 287 Wis. 2d 273, 704 N.W.2d 390.

¶24 The circuit court aptly observed that there was

> no evidence … to indicate that any of the juvenile[s'] parents involved in this particular case had any sort of knowledge such that they knew or should have known that their respective sons had a habit of engaging in this particular act or course of conduct …. Rather, the evidence unequivocally indicates that the actions of the actual juveniles themselves, leaving in the middle of the night, leaving their parents' households … and doing these acts was only brought to the attention of the parents after these acts had occurred and … there is absolutely no basis in this record to indicate that any of these parents had any sort of knowledge or should have known that their children were acting in this fashion.

We agree with the circuit court's assessment. No claims against the parents for negligent supervision survive summary judgment review.

CONCLUSION

¶25 We conclude that the conduct of Douglas, Trenton and Aaron was intentional as a matter of law and therefore falls under the intentional acts exclusion and the statute of limitations in WIS. STAT. § 893.57. We further conclude that the facts alleged do not support a claim against the parents for negligent supervision or control of their sons. The summary judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.