COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 12, 1996

No. 96-1497

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

Plaintiff-Respondent,

v.

SHERRY L. ANDERSON,

Defendant,

JEFFREY M. ANDERSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Jeffrey M. Anderson appeals a summary declaratory judgment determining that General Casualty Company of Wisconsin, his insurer, was not obliged to indemnify or defend his personal injury claim because of the doctrine of fortuity and public policy considerations. The claim

at issue is a personal injury claim alleged by Jeffrey's estranged wife, Sherry, in her amended petition for divorce.[1]

The incident out of which the personal injury claim arose occurred on December 22, 1994. Sherry claims that Jeffrey struck her, threw her to the ground, and dragged her across the floor by the ankles, resulting in injuries to her. Jeffrey argues that because he acted in self-defense, General Casualty's policy provision excluding liability coverage for bodily injury "expected or intended by the insured" does not apply to his conduct.

Jeffrey sought defense and indemnification from General Casualty for the personal injury claim. On June 22, 1995, General Casualty filed a declaratory judgment action against Jeffrey and Sherry, seeking a declaration of the rights and responsibilities of Jeffrey and General Casualty under the terms of its homeowners insurance policy with Jeffrey.

The trial court granted General Casualty's motion for summary judgment, holding that General Casualty had no duty to indemnify or defend Jeffrey based on the doctrine of fortuity and public policy considerations. Jeffrey now appeals the judgment. He argues that General Casualty had the duty to defend, that the question of his intent was inappropriately decided by summary judgment, and that indemnification was not precluded by the principle of fortuity. We agree.

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[1] The "complaint" in this case is Sherry's amended divorce petition, in which she asserted injuries from the following claim of battery:

> [O]n or about December 23, 1994, the respondent intentionally and with malice struck the petitioner, threw petitioner to the ground, dragged her by the ankles for some distance and repeatedly, after that, picked her up and threw her to the ground, all with intent to cause petitioner bodily harm and without petitioner's consent.

In the alternative, Sherry asserted a cause of action in negligence, alleging that Jeffrey "negligently caused petitioner to fall to the floor and negligently dragged her out of the house," resulting in injuries to her. We recognize that it is extremely unusual for a personal injury claim to arise within a divorce petition. However, because neither party raised the issue of whether this is procedurally appropriate, we do not address this potential issue.

We review summary judgments de novo, without deference to the trial court. ***Universal Die & Stampings, Inc. v. Justus***, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS. A complaint should be dismissed as legally insufficient only if it is clear that under no circumstances can the plaintiff recover. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 317, 401 N.W.2d 816, 821 (1987). Because there is a genuine issue of material fact as to whether Jeffrey acted in self-defense, we reverse the judgment.

We first consider whether there is a disputed issue of material fact. It is undisputed that as Sherry was on her way to Jeffrey's residence on December 22, she saw his truck parked in a tavern's parking lot. She went to his residence and waited until he arrived at approximately 1 a.m. with another woman. The record contains two entirely different versions of what transpired next.

Jeffrey asserts that Sherry ran from the house to his truck, verbally confronted the other woman, and ran back into the house in a rage. He followed. She knocked over his Christmas tree and stepped on the ornaments. She then threw herself to the ground, screaming and yelling. He asked her to leave but she refused.

Jeffrey opened his front door and pulled Sherry from the house by her ankles. She tried to kick him as he pulled her a total distance of five feet. After she broke a pole lamp in half over his head and neck, he picked her up from the ground and handed her to Sherry's sister at the front door. Sherry slammed the door and broke its glass.

Jeffrey opened the door and Sherry started to come back into the house, swinging at him. As he put his hands out to stop her, Sherry's sister pulled her away from the house from behind. Suddenly, Sherry and her sister slipped and fell outside the door. Sherry was intoxicated.

Sherry recalls a different sequence of events. According to her, when Jeffrey arrived, she and he spoke briefly outside, and then went inside to talk. Almost immediately, Jeffrey began to throw her around, causing her head to hit a coffee table and knocking over the Christmas tree.

As Jeffrey began to drag her from the house by her ankles, she reached back for the keys she dropped during the commotion. Jeffrey pushed her down. As she reached for the keys, her hand touched the pole lamp. The lamp hit Jeffrey and his coffee table.

Jeffrey threw Sherry out the front door. She somehow got her keys back (she believes her sister retrieved them) and was driven to the hospital. She was treated for bruises on her back and hands, and lacerations to her back. The hospital staff photographed the injuries and contacted the police.

After reviewing the depositions of Jeffrey and Sherry, the trial court rejected Jeffrey's version. On summary judgment we review the same proofs as the trial court. It is evident from the record that the facts of this case are disputed. Jeffrey denies that he threw Sherry on the floor or out the door. In his deposition, he denies striking Sherry, and testified that he did not intend to cause any injury to her, acting only in self-defense. We determine that the facts are disputed and the record supports competing inferences as to whether Jeffrey acted in self-defense.

The issue is whether General Casualty's policy provision excluding liability coverage for bodily injury "expected or intended by the insured" applies to an insured's act of self-defense. He asserts that he acted in defense of his property and in person. Jeffrey held a homeowners insurance policy, in his own name and including liability coverage, with General Casualty at the time of the incident. Coverage E of the policy's Section II Liability Coverages provides in part as follows:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury"[2] or "property

[2] The policy defines "bodily injury" as "bodily harm, sickness or disease, including required

damage" caused by an "occurrence"[3] 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. ...
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent.

Subsection (2)(f) of Section II Exclusions provides that personal liability does not apply to bodily injury to "you" or to an "insured" as defined in the policy. The policy defines "you" or "your" as referring to the "named insured" shown in the Declarations[4] and the spouse "if a resident of the same household." "Insured" means "you" or "residents of your household" who are relatives, or certain other persons under the age of twenty-one.

We review the provisions of an insurance contract independently of the trial court. ***American States Ins. Co. v. Skrobis Painting & Decor., Inc.***, 182 Wis.2d 445, 450, 513 N.W.2d 695, 697 (Ct. App. 1994). Whether the insured has a duty to defend is a question of law, which we review de novo. ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 231, 522 N.W.2d 261, 266 (Ct. App. 1994). The court must construe the words of the policy as would a reasonable person in the position of the insured. ***School District of Shorewood v. Wausau Ins. Cos.***, 170 Wis.2d 347, 367, 488 N.W.2d 82, 88-89 (1992). The court must construe policy exclusions narrowly, and resolve any ambiguities in the policy in favor of coverage. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 811, 456 N.W.2d 597, 598 (1990).

We conclude that the allegations of negligence, if proven, give rise to liability coverage for Jeffrey. General Casualty agreed to defend a claim

(..continued)
care, loss of services and death that results."

[3] The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury;' or b. 'Property damage.'"

[4] Jeffrey Anderson is the only named insured on the Declarations Sheet.

"brought against an insured"[5] for "bodily injury" sustained during an "occurrence" covered by the policy, even if the claim is "groundless, false, or fraudulent." Regardless of the merits of Sherry's allegations, General Casualty has a duty to defend Jeffrey's claim because the requirements of the provision are met.

We recognize that General Casualty's policy contained a provision excluding insurance coverage for bodily injury or property damage which is "expected or intended" by the insured. However, the exclusion is inapplicable to acts of self-defense. *See* ***Berg v. Fall***, 138 Wis.2d 115, 117, 405 N.W.2d 701, 702 (Ct. App. 1987). "[A]n insurance policy excluding liability coverage for intentionally caused bodily injury nonetheless covers privileged acts of self-defense." ***Id.***

We will not interpret an insurance policy to penalize an insured who has not committed any wrongdoing. ***Id.*** at 121, 405 N.W.2d at 704. "Moreover, Wisconsin law has long recognized that reasonable acts of self-defense are legally privileged, not wrongful." ***Id.*** The reasonable insured would not expect to be denied coverage for his or her reasonable acts of self-defense. ***Id.*** However, we recognize that the privilege of self-defense does not permit an actor to use more force than is reasonably necessary to prevent the harm. "An unprivileged infliction of bodily harm constitutes the intentional torts of assault and battery and as such is clearly excluded by the policy language." ***Id.*** at 121-22, 405 N.W.2d at 704.

Because General Casualty's policy does not expressly exclude bodily injury caused by an act of self-defense, we conclude that General Casualty has a duty to defend Jeffrey against Sherry's personal injury claim. A duty to defend arises when a complaint against the insured alleges facts, which if proven, would give rise to liability coverage under the terms of the policy. ***Grieb v. Citizens Cas. Co.***, 33 Wis.2d 552, 557-58, 148 N.W.2d 103, 106 (1967). Although Sherry's amended divorce petition does not allege that Jeffrey acted in

[5] Although Sherry is Jeffrey's spouse, she is not "an insured" because she neither resides in the same household as Jeffrey, nor is she named on the policy. At the time of the incident, Anderson and Sherry had been living apart for approximately two years. He lived at their residence in Brule, and she lived in their residence in Superior.

self-defense, the depositions support such an inference. Therefore, summary judgment is inappropriate and General Casualty has a duty to defend.

Finally, we consider whether the doctrine of fortuity applies and precludes General Casualty's duty to indemnify Jeffrey for the claim. The trial court decided that the fortuity doctrine applied, and stated, "The court agrees that to allow coverage by enforcing the homeowners policy in this case would be contrary to public policy in Wisconsin of deterring and punishing those who engage in domestic disputes or assaults."

The application of fortuity to the facts of this case presents a question of law that we review de novo. *See* ***Prosser v. Leuck***, 196 Wis.2d 780, 784, 539 N.W.2d 466, 468 (Ct. App. 1995).

> [T]he "principle of fortuitousness" ... is, that insurance covers fortuitous losses and that losses are not fortuitous if the damage is intentionally caused by the insured. Even where the insurance policy contains no language expressly stating the principle of fortuitousness, courts read this principle into the insurance policy to further specific public policy objectives including ... (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed.

Id. at 784, 539 N.W.2d at 467-68 (citation omitted).

Jeffrey asserts that fortuity does not apply. First, he states that he has never been found guilty of any charge of domestic abuse or battery. Second, he argues that the application of the doctrine of fortuity requires a factual finding that he acted intentionally, and not in self-defense, and that this is a question of fact for a jury to determine.

Our supreme court applied the principle of fortuity in ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 326 N.W.2d 727 (1982), and decided that the

intentional act of an insured joint owner of property is not, as a matter of law, an absolute bar to recovery under a fire insurance policy by an innocent insured. ***Id.*** at 487-88, 326 N.W.2d at 740. Instead, equity demands that the rights of innocent insureds should be viewed in light of the circumstances of the case and existing public policy concerns. ***Id.***

Subsequent cases have carved out exceptions to the rule established in ***Hedtcke***. In ***K.A.G. v. Stanford***, 148 Wis.2d 158, 434 N.W.2d 790 (Ct. App. 1988), we decided that the intentional act exclusion applied because the intent to harm could be inferred as a matter of law from the insured's intentional act of sexual assault. ***Id.*** at 164, 434 N.W.2d at 793. In ***Hagen v. Gulrud***, 151 Wis.2d 1, 442 N.W.2d 570 (Ct. App. 1989), we decided as a matter of law that coverage for injures sustained by the victim of the insured's act of sexual assault did not exist because such coverage was not within the reasonable expectations of the insured and the insurer. ***Id.*** at 7, 442 N.W.2d at 573.[6] Additionally, we stated, "We deem it good public policy to deter sexual assaults ... [The insurer and the insured] would cringe at the very suggestion that they were buying and selling sexual assault insurance." ***Id.***

The issue in ***Prosser*** was whether fortuity barred insurance coverage for the negligent acts of a juvenile. As Leuck and two other minors played with fire in a warehouse they had broken into, their gasoline can ignited. ***Id.*** at 783, 539 N.W.2d at 467. Leuck kicked it through a hole in the floor to the first floor of the warehouse, resulting in extensive fire damage. ***Id.***

We held that fortuity did not preclude coverage because the damage was within the reasonable expectations of the insurer and the insured, and, based on the jury's findings, the damage was not intentional. ***Id.*** at 786, 539 N.W.2d at 468. We described Leuck's conduct as "far removed from the intentional criminal acts of sexual assault and murder." ***Id.***

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[6] In ***Ramharter v. Secura Ins.***, 159 Wis.2d 352, 463 N.W.2d 877 (Ct. App. 1990), the insured killed his wife and then took his own life. The plaintiff who asserted damages had witnessed the murder-suicide. As in ***K.A.G. v. Stanford,*** 148 Wis.2d 158, 434 N.W.2d 790 (Ct. App. 1988), and ***Hagen v. Gulrud,*** 151 Wis.2d 1, 442 N.W.2d 570 (Ct. App. 1989), the court concluded that coverage for such conduct was not within the reasonable expectations of the contracting parties. ***Ramharter,*** 159 Wis.2d at 356, 463 N.W.2d at 879.

The difference between this case and ***K.A.G*** and ***Hagen*** is that in those cases, the perpetrators had already been convicted of the intentional criminal acts of sexual assault. In ***Prosser***, a jury had already found Leuck's conduct to be negligent, rather than intentional.

Here, there has been an inference by the court, but no factual determination, that Jeffrey acted negligently or intentionally and with the intent to harm Sherry. Summary judgment procedure precludes the resolution of factual issues. ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 515-16, 383 N.W.2d 916, 917-18 (1986). In the instant case, there has been no determination as to whether Jeffrey acted in self-defense. In contrast to intentionally abusive and assaultive conduct, causing damage in a self-defense situation may be within the reasonable expectations of the contracting parties. *See* ***Hagen***, 151 Wis.2d at 7, 442 N.W.2d at 573.

Until a trier of fact hears and resolves the issue of whether Jeffrey acted in self-defense, a determination that the doctrine of fortuity applies is premature. We therefore conclude that the court erred when it applied the doctrine of fortuity to the disputed facts of this case.

By the Court.—Judgment reversed.

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