

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 6, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 98-2929**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**BLAKE K. SAUNDERS, BY HIS GUARDIAN AD LITEM  
GREGORY R. WRIGHT,**

**PLAINTIFF-APPELLANT,**

**AMERICAN MEDICAL SECURITY INSURANCE, INC.,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**DERYLANNE R. SPERRY,**

**DEFENDANT,**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Marquette County:  
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Blake Saunders appeals an order dismissing the American Family Mutual Insurance Company from his personal injury action against American Family and its insured, Derylanne Sperry. The issue is whether a child who has suffered injuries as a result of a homeowner's recklessly shaking the child may recover under the homeowner's insurance policy when the policy excludes from coverage injuries resulting from the "physical or mental abuse of a person." We agree with the trial court that the policy excludes coverage for liability under these circumstances and affirm.

### **BACKGROUND**

According to the complaint and other materials submitted to the court, when Saunders was six months old, he suffered retinal hemorrhaging of his left eye, subdural hematomas in his brain, and a fractured left leg, as a result of being shaken by Sperry. Sperry was providing in-home day care to Saunders at the time and was convicted of first-degree reckless injury based upon the incident.

Sperry had homeowner's insurance through American Family providing coverage for any compensatory damages for which she would be liable because of bodily injury caused by an occurrence which was not excluded from the policy. The policy exclusions relevant to this appeal are as follows:

1. Abuse. We will not cover bodily injury or property damage arising out of or resulting from any actual or alleged:
  - a. sexual molestation or contact;
  - b. corporal punishment, or
  - c. physical or mental abuse of a person.
- ....
10. 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 trial court granted Saunders partial summary judgment on the issue of Sperry's liability, leaving the issue of damages for trial, but it dismissed American Family from the suit based upon the policy's abuse exclusion clause.

### STANDARD OF REVIEW

The interpretation of an insurance contract presents a question of law which is appropriate for summary judgment.<sup>1</sup> *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 209 Wis.2d 42, 48-49, 561 N.W.2d 787, 790 (Ct. App. 1997). An exclusionary clause should be construed in accordance with "what a reasonable person in the position of the insured would have understood" the clause to mean. *Id.* at 49, 561 N.W.2d 790.

### ANALYSIS

In order to defeat the claim that American Family is obligated to indemnify Sperry for her personal liability to Saunders under the general terms of the insurance policy, the insurance company must establish that Saunders's

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<sup>1</sup> It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. Section 802.08, STATS.; *State v. Dunn*, 213 Wis.2d 363, 368, 570 N.W.2d 614, 616 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *Id.* If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *Id.* at 368, 570 N.W.2d at 617. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require trial. *Id.*

conduct falls within one of the exceptions to coverage. American Family maintains that Saunders's conduct falls within the abuse exception.<sup>2</sup>

Saunders counters that the term "physical or mental abuse of a person" is ambiguous because reasonable persons could understand it to include a wide range of negligent acts or to be limited to intentional acts. Because the term is ambiguous, Saunders's argument continues, it should be construed against the insurance company to allow coverage in this case. However, we agree with the trial court that the term abuse unambiguously excludes Sperry's acts from coverage under the policy.

Webster's dictionary defines abuse as "physically harmful treatment," and lists "maltreatment" as a synonym. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 8 (Philip Babcock Gove, Ph.D., ed. Merriam-Webster Inc. 1993). We believe this to be the common, ordinary meaning of the word. We further conclude that any ordinary, reasonable person would consider shaking an infant hard enough to cause hematomas, hemorrhaging and a broken bone to constitute maltreatment, or abuse. We have found no cases holding similar conduct to be covered under a homeowner's policy in this state. We therefore conclude that a reasonable homeowner in Saunders's position would have no reason to expect coverage for injuring a child by shaking him, and hold that the policy precludes coverage.

It is true, as Saunders asserts, that the parties dispute whether Sperry's actions were intentional, reckless, or negligent. However, this dispute

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<sup>2</sup> American Family also argued below that the intentional acts exclusion precluded coverage, but has not appealed the trial court's determination that resolution of that issue would be for the jury.

would only be material if the policy's abuse exclusion were limited to intentional acts. Since we have concluded it is not so limited, there are no material factual disputes to preclude American Family's dismissal from the case.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

