COURT OF APPEALS DECISION DATED AND FILED

November 7, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1247-FT

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

PIERRE A. LAFORTE,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY W. BANDOLI, D/B/A TIM'S WAYSIDE TAVERN,

DEFENDANT-APPELLANT,

SOCIETY INSURANCE,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Timothy W. Bandoli, d/b/a Tim's Wayside Tavern, appeals a summary judgment declaring that Society Insurance Company is under no duty to defend or indemnify Bandoli, its insured, for claims arising from an incident at Bandoli's bar during which Bandoli allegedly caused bodily injury to patron Pierre A. LaForte by throwing a bar glass.[1] Bandoli also appeals a second judgment[2] that held as a matter of law that Bandoli's actions were intentional, that he committed a battery on LaForte, that the negligence claim should be dismissed and that the only remaining issues would be causation and damages. Because there are disputed issues of material fact and because even the undisputed facts do not fall within the exceptional situations where intent can be inferred as a matter of law, we reverse the judgments and remand for further proceedings.

¶2 LaForte was injured at Bandoli's bar, Tim's Wayside Tavern, when Bandoli threw a bar glass at least seven feet and it struck LaForte in the head. LaForte filed this suit, alleging two alternative causes of action: intentional battery and negligence. Under the intentional battery theory, LaForte alleged that Bandoli threw the bar glass intending to strike and injure LaForte. Under the negligence theory, LaForte alleged that Bandoli negligently threw the bar glass in the vicinity of LaForte intending not to strike LaForte, but to startle him, and accidentally struck LaForte.

¶3 Society Insurance, the commercial general liability insurance carrier for Tim's Wayside Tavern, provided Bandoli coverage for his negligent acts that

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98).

[2] After summary judgment was granted, Bandoli moved for reconsideration. Following a hearing on Bandoli's motion for reconsideration, a second judgment was entered that contained language identical to the first judgment and one additional paragraph. Bandoli appeals both judgments.

cause bodily injury to others. However, the insurance policy excluded coverage for bodily injuries that are expected or intended from the standpoint of the insured.[3] Based on this exclusion, Society moved for summary judgment seeking to be dismissed from the case, arguing that the material facts were undisputed and seeking a determination that Bandoli's actions were intentional and therefore excluded under Society's insurance policy. Bandoli opposed the motion, arguing that the "expected or intended" exclusion in Society's policy does not apply because he did not intend to cause injury when he threw a bar glass but, instead, intended to startle LaForte and encourage him to leave the bar.

¶4 The trial court granted Society's summary judgment motion, holding that Bandoli's actions were intentional and that the exclusion in Society's policy therefore applied. The trial court also dismissed the negligence claim on the theory that the intentional battery and negligence allegations were mutually exclusive. Bandoli now appeals, arguing that summary judgment is inappropriate because there is an issue of fact, whether Bandoli intended to injure LaForte, that must be resolved by a jury. We agree.

¶5 The standards this court applies when reviewing a grant of summary judgment are well known and need not be repeated here. *See* ***C.L. v. School Dist. of Menomonee Falls***, 221 Wis. 2d 692, 697, 585 N.W.2d 826 (Ct. App. 1998).

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[3] The liability policy issued by Society Insurance contained the following exclusion:

> This insurance does not apply to:
>
> **a. Expected or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

We review the trial court's decision de novo. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.***

¶6 Both parties acknowledge that Bandoli and LaForte offer conflicting versions of the incident. In his affidavit and deposition, Bandoli stated that LaForte was being rude and that he asked LaForte to leave the bar. Bandoli testified that he threw four items to get LaForte's attention and let him know that Bandoli wanted him to leave: a bar glass, an ashtray, pizza and a television remote control. Bandoli admits that the bar glass hit LaForte. In contrast, LaForte in his deposition claimed that Bandoli threw two bar glasses and an ashtray and that LaForte was struck all three times. Bandoli and LaForte also disagree about what may have been said between the two men in the hours before the incident, how much each man had to drink and how far apart they were at the time the objects where thrown.

¶7 Based on our review of the briefs and the record, we are convinced that these disputed facts are material because they may affect the determination of Bandoli's intent. Even Society appears to implicitly acknowledge that the disputed facts may be relevant to a determination of intent. In its brief, Society states:

> It is incredulous for Mr. Bandoli to argue that he only intended to "scare" Mr. LaForte and not injure him. If he had only hit him once, he might have a better argument. However, by hitting Mr. LaForte three times at close range, it is obvious he intended to injure Mr. LaForte.

By basing its argument on a disputed fact, *i.e.*, whether LaForte was hit once or three times, Society undermines its contention that summary judgment is appropriate in this case.

¶8 Assuming *arguendo* that we were to determine that only the undisputed facts (*i.e.*, that Bandoli threw a glass at least seven feet and that it hit LaForte in the head) were material, summary judgment is still inappropriate because the undisputed facts do not fall within the exceptional situations where intent can be inferred as a matter of law. An intentional-acts exclusion like the one in Society's policy precludes insurance coverage where the insured acts intentionally and intends some injury or harm to follow from his or her acts. *See* ***Ludwig v. Dulian***, 217 Wis. 2d 782, 788, 579 N.W.2d 795 (Ct. App. 1998). Intentional acts preclude coverage when they are substantially certain to produce injury even if the insured asserts that he or she did not intend any harm. *See* ***id.*** Intent may be actual (a subjective standard) or inferred by the nature of the insured's intentional act (an objective standard). *See* ***Loveridge v. Chartier***, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991). Therefore, an intentional-acts exclusion precludes insurance coverage where an intentional act is substantial enough to produce injury even if the insured asserts, honestly or dishonestly, that he or she did not intend any harm. *See* ***id.***

¶9 Ordinarily, the question whether an insured intended harm or injury to result from an intentional act is a question of fact. *See* ***Schwersenska v. American Family Mut. Ins. Co.***, 206 Wis. 2d 549, 554, 557 N.W.2d 469 (Ct. App. 1996). However, a court may infer that an insured intended to injure or harm as a matter of law if the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent as a matter of law. *See* ***id.*** There is no bright-line rule to determine when intent to injure should be inferred as a matter of

law. *See* ***Ludwig***, 217 Wis. 2d at 789. Rather, each set of facts must be considered on a case-by-case basis. *See* ***id.*** The more likely it is that harm will result from certain intentional conduct, the more likely it is that intent to harm will be inferred as a matter of law. *See* ***id.***

¶10 Wisconsin courts have approved of inferring an insured's intent to injure as a matter of law under limited circumstances. In ***N.N. v. Moraine Mut. Ins. Co.***, 153 Wis. 2d 84, 450 N.W.2d 445 (1990), and ***K.A.G. v. Stanford***, 148 Wis. 2d 158, 434 N.W.2d 790 (Ct. App. 1988), the courts held that an insured's intent to injure may be inferred as a matter of law, regardless of the insured's claimed intent, when the insured's intentional act is the sexual assault or molestation of a minor of very tender years. *See* ***Loveridge***, 161 Wis. 2d at 170. In ***Raby v. Moe***, 153 Wis. 2d 101, 114-15, 450 N.W.2d 452 (1990), the court held that some type of bodily injury is so substantially likely to occur during the commission of an armed robbery that the law will infer an intent to injure on behalf of the insured actor without regard to his claimed intent. In ***Loveridge***, however, our supreme court clarified ***Raby***, holding that a court cannot infer intent to injure as a matter of law merely because the insured's intentional act violated the criminal law. *See* ***Loveridge***, 161 Wis. 2d at 171.

¶11 Unlike the facts in ***N.N.***, ***K.A.G.***, and ***Raby***, where it was substantially likely that harm would result from certain intentional conduct, it was not sufficiently likely that Bandoli would harm LaForte when he threw the glass at least seven feet across the bar such that we could infer intent as a matter of law. Our conclusion is consistent with ***Gouger v. Hardtke***, 167 Wis. 2d 504, 514-15, 482 N.W.2d 84 (1992), where our supreme court examined similar facts and concluded that intent could not be inferred as a matter of law.

¶12 In ***Gouger***, two high school students where hassling and teasing one another in a welding shop class. *See* ***id.*** at 508. At one point, Gouger threw a piece of soapstone at Hardtke and struck him in the head. Hardtke threw it back, striking Gouger in the eye and damaging his cornea. More than two years later, Gouger filed a personal injury action against Hardtke, alleging Hardtke had negligently injured Gouger. Hardtke answered the complaint with an assertion that the tort was actually an intentional one. *See* ***id.*** Hardtke then moved for summary judgment on grounds that the action was barred by the shorter statute of limitations that governs intentional torts. *See* ***id.*** at 509. The trial court granted summary judgment, concluding that as a matter of law, Hardtke's conduct in throwing the soapstone was "substantially certain" to result in some injury, and that the court could infer Hardtke's intent to injure as a matter of law. *See* ***id.*** at 509-10.

¶13 On appeal, our supreme court examined ***Loveridge***, ***Raby***, ***N.N.*** and ***K.A.G.*** and concluded that the facts in Gouger's case did not warrant inferring as a matter of law that Hardtke intended to injure Gouger. ***Gouger***, 167 Wis. 2d at 512-15. The "throwing of a piece of soapstone at another person, even with the intent of hitting that person, is not so substantially certain to cause injury that a court may infer an intent to injure." ***Id.*** at 514. The court observed:

> [T]he court must consider whether the contact or result itself was substantially certain to occur. It cannot be said that there was a substantial certainty that Hardtke would hit Gouger with the soapstone at all. While Hardtke swears he intended to hit Gouger, the record indicates that he was throwing a rather small object ... at a target approximately twenty feet away. …
>
> It must be noted that the magnitude of potential injury is not dispositive. A substantial certainty of any injury, great or small, may warrant inferring intent to injure as a matter of law. We do not hold that striking another with a thrown piece of soapstone is not harmful. However, neither can it

> be said that striking another with such an object is per se harmful. The certainty of injury from such conduct is a question of fact.

Id. at 515 (citation omitted). Just as the court in ***Gouger*** could not infer intent as a matter of law, we do not believe that even the facts that are undisputed in this case would allow such an inference. Whether Bandoli intended to injure LaForte is a question of fact that must be resolved by a trial. Accordingly, we reverse the trial court's summary judgments and remand the case for further proceedings consistent with this opinion.

By the Court.—Judgments reversed and cause remanded.

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