

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2013AP580

Cir. Ct. No. 2012CV165

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ESTATE OF SHAWN E. DOBRY, BY ITS SPECIAL ADMINISTRATOR
CHRISTOPHER J. DOBRY, CHRISTOPHER J. DOBRY AND CYNTHIA M.
STODGHILL,**

PLAINTIFFS-APPELLANTS,

v.

WILSON MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

**ROBERT G. WALKER, SANDE J. WALKER, LUCAS R. WALKER,
JORDAN J. WALKER, TRILOGY HEALTH INSURANCE, INC., ABC INSURANCE
COMPANY, HENRIETTA A. WALKER, DEF INSURANCE COMPANY AND
JOHN DOE,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Oconto County:
JAMES A. MORRISON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. The Estate of Shawn Dobry, by its Special Administrator Christopher Dobry; Christopher Dobry; and Cynthia Stodghill (collectively, the Dobrys) appeal a grant of summary judgment in favor of Wilson Mutual Insurance Company. The circuit court determined a homeowner's policy Wilson Mutual issued to Robert and Sande Walker did not provide coverage for the Dobrys' claims against Robert and Sande; their sons, Jordan and Lucas Walker; and Robert's mother, Henrietta Walker.¹ We conclude the policy's criminal acts exclusion bars coverage for the Dobrys' claims. We therefore affirm.

BACKGROUND

¶2 The following material facts are undisputed. On June 18, 2010, Jordan hosted an underage drinking party at his parents' home in Oconto County. Jordan was nineteen years old. Party attendees included Jordan's sixteen-year-old brother, Lucas, and Jordan's friend Shawn Dobry (Dobry). Jordan's parents were out of town, and his paternal grandmother, Henrietta, was staying at the house to house sit, take care of the dogs, prepare meals, do laundry, and care for Jordan and Lucas.

¶3 After dark, the party attendees went outside to build a bonfire, and Henrietta went to bed. During the course of the night, Jordan became intoxicated. At some point, Jordan asked Lucas's girlfriend to go inside and retrieve a

¹ Because the Walkers share the same last name, we refer to them individually by their first names throughout the remainder of this opinion.

Glock 21 .45 caliber handgun from Jordan's bedroom, which she did. Jordan removed the ammunition from the gun and began "dry firing" at people. In other words, he would point the gun at someone, cock the hammer back, and pull the trigger without a round chambered, causing the gun to make a clicking sound. Jordan loaded and unloaded the gun multiple times throughout the night.

¶4 In the early morning hours of June 19, Dobry came up behind Jordan. Jordan raised the gun over his shoulder, it discharged, and the bullet hit Dobry.² Dobry died as a result of the gunshot wound.

¶5 Jordan was charged with second-degree reckless homicide, contrary to WIS. STAT. § 940.06(1), and two counts of resisting or obstructing an officer, contrary to WIS. STAT. § 946.41(1). At Jordan's trial, Lucas testified he saw Dobry lying on his back on the ground after the shooting.³ There was blood in Dobry's mouth, but it sounded as though he was still breathing. Lucas testified Dobry's ear was injured, so he and Jordan initially believed the bullet had simply grazed Dobry's ear. According to Lucas, they did not know the bullet was actually lodged inside Dobry's body.

² The parties dispute the exact manner in which the shooting occurred. The Dobrys assert that the weapon discharged while Jordan was attempting to hand it to Dobry. Wilson Mutual contends Dobry "ran up behind Jordan, and Jordan fired the gun over his shoulder." These factual disputes are not material to our conclusion that the criminal acts exclusion in Wilson Mutual's policy bars coverage for the Dobrys' claims. Only genuine issues of *material* fact preclude a grant of summary judgment. *See* WIS. STAT. § 802.08(2).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ Lucas testified pursuant to a grant of use immunity. *See* WIS. STAT. § 972.08(1).

¶6 At Jordan’s request, Lucas took the gun inside the house. When Lucas came back outside, he and Jordan discussed what they would tell police about Dobry’s injuries. They decided to say that Dobry had cut his ear while running in the woods. Jordan asked Lucas to look for the spent shell casing, and Jordan then stepped away to call 911.⁴

¶7 Following the shooting, Jordan told police that: (1) Dobry went into the woods and came out with a cut on his ear; (2) Jordan did not immediately call 911 because Dobry “seemed alright[;]” (3) Jordan called 911 after Dobry stopped breathing; (4) Jordan “really [didn’t] know what happened in the woods[;]” and (5) Jordan “tried [his] hardest” to save Dobry.

¶8 The jury acquitted Jordan of second-degree reckless homicide, but it found him guilty of homicide by negligent handling of a dangerous weapon, a lesser included offense. *See* WIS. STAT. § 940.08(1). Jordan was also convicted of the two resisting or obstructing an officer charges. The Dobrys subsequently sued Jordan, Lucas, Robert, and Sande, alleging their negligence caused Dobry’s death. The complaint also named Wilson Mutual, Robert and Sande’s homeowner’s insurer, as a defendant. The Dobrys later amended the complaint to assert claims against Henrietta.

¶9 Wilson Mutual moved for summary judgment, arguing its policy did not cover the Dobrys’ claims. Wilson Mutual contended the policy’s insuring agreement did not make an initial grant of coverage for the Dobrys’ claims

⁴ There are some minor factual disputes regarding Jordan’s and Lucas’s actions after Dobry was shot. Again, these factual disputes are not material to our analysis of the criminal acts exclusion, and, as a result, they do not prevent us from affirming the circuit court’s grant of summary judgment.

because Dobry's death was not caused by an occurrence. In the alternative, Wilson Mutual argued coverage was barred by the policy's criminal acts and intentional acts exclusions.

¶10 The circuit court concluded both the criminal acts and intentional acts exclusions applied. The court therefore granted Wilson Mutual summary judgment on the coverage issue and dismissed it from the case. The Dobrys now appeal.

DISCUSSION

¶11 We review a grant of summary judgment independently, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. 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. WIS. STAT. § 802.08(2).

¶12 Interpretation of an insurance policy presents a question of law that we review independently. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. Our goal in interpreting an insurance policy is to give effect to the parties' intent. *Id.* We construe a policy as it would be understood by a reasonable person in the position of the insured. *Id.* "However, we do not interpret insurance policies to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium." *Id.*

¶13 If policy language is unambiguous, we simply enforce it as written. *Marnholtz v. Church Mut. Ins. Co.*, 2012 WI App 53, ¶10, 341 Wis. 2d 478, 815 N.W.2d 708. However, we construe ambiguous policy language against the

insurer and in favor of coverage. *Id.* Policy language is ambiguous if it is susceptible to more than one reasonable interpretation. *Folkman v. Quamme*, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857.

¶14 We employ a three-step process to determine whether an insurance policy provides coverage for a claim. First, we examine the facts of the claim to determine whether the policy’s insuring agreement makes an initial grant of coverage. *American Girl*, 268 Wis. 2d 16, ¶24. If so, we next consider whether any of the policy’s exclusions preclude coverage. *Id.* If a particular exclusion applies, we then determine whether any exception to that exclusion reinstates coverage. *Id.*

¶15 The insuring agreement in Wilson Mutual’s policy states:

We pay up to our limit, all sums for which an **insured** is liable by law because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies.

The policy defines an “occurrence” as “an accident, including repeated exposures to similar conditions, that results in ‘bodily injury’ or ‘property damage’ during the policy period.”

¶16 Wilson Mutual argues the Dobrys’ claims do not fall within the policy’s initial grant of coverage because Dobry’s shooting was not an accident under Wisconsin law, and therefore was not an occurrence. We need not address this argument because, even if the policy makes an initial grant of coverage, the criminal acts exclusion unambiguously bars coverage for the Dobrys’ claims. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one issue is dispositive). We therefore assume, without deciding, that the policy makes an

initial grant of coverage, and we proceed to an analysis of the criminal acts exclusion.

¶17 Wilson Mutual’s policy excludes coverage for bodily injury “that is the result of a criminal act of an ‘insured’[.]” It is undisputed that Jordan qualifies as an insured under the policy. The policy does not define the term “criminal act,” but we agree with Wilson Mutual that the only reasonable interpretation of that term is an act that violates the criminal code. *See, e.g., Allstate Ins. Co. v. Brown*, 16 F.3d 222, 225 (7th Cir. 1994). In connection with Dobry’s death, Jordan was convicted of homicide by negligent handling of a dangerous weapon, contrary to WIS. STAT. § 940.08(1). The bodily injury Dobry sustained was therefore “the result of a criminal act” of an insured. Consequently, the criminal acts exclusion precludes coverage for the Dobrys’ claims.⁵

¶18 The Dobrys argue the criminal acts exclusion is ambiguous. They contend it would be equally reasonable to interpret the exclusion as applying only to *intentional* criminal acts. Because Jordan was convicted of negligent homicide, which does not require the State to prove intent, the Dobrys argue a reasonable insured could conclude Jordan’s conduct was not a criminal act under the policy.

¶19 The policy language does not support the Dobrys’ interpretation. The criminal acts exclusion clearly states there is no coverage for bodily injury

⁵ The criminal acts exclusion bars coverage for bodily injury resulting from a criminal act of “any” insured. On appeal, it is undisputed that, if one insured committed a criminal act, coverage for bodily injury caused by that act is barred with respect to all insureds. Thus, Jordan’s criminal act bars coverage for the Dobrys’ claims against all of the Walker defendants, not just Jordan himself. *Cf. Wright v. Allstate Cas. Co.*, 2011 WI App 37, ¶27, 331 Wis. 2d 754, 797 N.W.2d 531 (exclusion that barred coverage for bodily injury intended by “any insured” “excluded coverage for all insureds if an intentional act by any insured caused damage”).

resulting from a “criminal act[.]” Nothing in the exclusion requires that the criminal act be intentional. If we adopted the Dobrys’ interpretation, we would be rewriting an unambiguous exclusion to bind Wilson Mutual to a risk it did not contemplate and for which it did not receive a premium. That is something we may not do. See *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶24, 338 Wis. 2d 761, 809 N.W.2d 529.

¶20 The Dobrys nevertheless contend the exclusion is ambiguous when read in context with other policy provisions. Contextual ambiguity arises when a policy provision that at first seems unambiguous becomes susceptible to more than one reasonable meaning when read in the context of other policy language. *Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶18, 342 Wis. 2d 311, 818 N.W.2d 819. The Dobrys argue the criminal acts exclusion is contextually ambiguous because it is located between two exclusions that preclude coverage for intentional harm and intentional and malicious acts. Specifically, the policy states that Wilson Mutual will not cover bodily injury

- 1) which is expected by, directed by, or intended by any **insured**;
- 2) that is the result of a criminal act of any **insured**; or
- 3) that is the result of an intentional and malicious act by or at the direction of any **insured**.

Because the criminal acts exclusion is located between exclusions that refer to intent, the Dobrys argue a reasonable insured “would read and understand [that] the criminal act exclusion encompasses actions for which some level of criminal *intent* is required.”

¶21 We disagree. The three exclusions the Dobrys cite are not grouped under a single heading stating, “Intentional Acts Exclusions.” There is no reason

for an insured to conclude the criminal acts exclusion requires intentional conduct simply because the exclusions before and after it refer, respectively, to intentional harm and intentional and malicious acts. The Dobrys' interpretation of these exclusions is unreasonable.

¶22 The Dobrys further argue the criminal acts exclusion is contextually ambiguous because the policy makes an initial grant of coverage for bodily injury caused by an "occurrence," and it defines an "occurrence" as an "accident." Because case law defines the term "accident" as "[a]n unexpected, undesirable event' or 'an unforeseen incident' which is characterized by a 'lack of intention[,]'" *Doyle v. Engelke*, 219 Wis. 2d 277, 289, 580 N.W.2d 245 (1998), the Dobrys argue the policy "clearly contemplates coverage for the negligent acts of its insured." They therefore argue an insured could reasonably conclude the criminal acts exclusion does not apply to criminal acts that are merely negligent.

¶23 That an insurance policy makes an initial grant of coverage for harm caused by negligent conduct does not mean it cannot exclude coverage for harm caused by certain types of negligent conduct. For instance, a claim for bodily harm caused by an insured's negligent use of a motor vehicle would presumably fall within the Wilson Mutual policy's initial grant of coverage. However, an exclusion in the policy specifically bars coverage for bodily injury resulting from the use of "any motorized vehicles." Thus, the claim would not be covered, even though it alleged negligent conduct on the part of an insured. The same is true here.

¶24 The Dobrys next contend it is against public policy to apply the criminal acts exclusion to acts that are merely negligent. They argue it is a "foundational principle of insurance law" that liability policies are "designed to

protect an insured against liability for negligent acts resulting in damage to third-parties.” *See id.* at 290. They therefore assert, “[I]t follows that an exclusion that bars coverage for *negligent* acts that an insured would reasonably believe to be covered is contrary to public policy.” The problem with this argument is that we have already determined the criminal acts exclusion unambiguously excludes coverage for bodily injury resulting from *all* criminal acts, including those that are merely negligent. Thus, an insured would not have a reasonable expectation of coverage for bodily injury caused by negligent criminal acts.

¶25 Finally, the Dobrys contend our interpretation of the criminal acts exclusion renders the policy’s coverage illusory. This argument is meritless. “Coverage is illusory only when we cannot foresee liability in any imaginable set of circumstances.” *Baumann v. Elliott*, 2005 WI App 186, ¶20, 286 Wis. 2d 667, 704 N.W.2d 361. Here, we can foresee liability in myriad circumstances—specifically, any circumstance involving bodily injury that was not caused by a criminal act.

¶26 We therefore conclude the criminal acts exclusion in Wilson Mutual’s policy unambiguously bars coverage for the Dobrys’ claims. The Dobrys do not argue that any exception to the criminal acts exclusion reinstates coverage. Accordingly, the circuit court properly granted Wilson Mutual’s motion for summary judgment.⁶

⁶ Because we conclude the criminal acts exclusion bars coverage for the Dobrys’ claims, we need not consider whether the intentional acts exclusion also applies. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

