COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2017

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. 2016AP444 **Cir. Ct. No. 2014CV387**

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

GRAYSON ROSENTHAL, A MINOR AND RENATA BRANDENBURG,

PLAINTIFFS-APPELLANTS,

FORWARD HEALTH C/O UNITED HEALTHCARE SERVICES, INC. AND UNITED HEALTHCARE SERVICES, INC. A/K/A UNITEDHEALTHCARE OF WISCONSIN, INC.,

INVOLUNTARY-PLAINTIFFS,

V.

JORDAN H. CHRISTIAN, A MINOR, JAYNE M. CHRISTIAN AND THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION P/K/A ABC INSURANCE COMPANY,

DEFENDANTS,

STRATTEC SECURITY CORPORATION,

INTERVENOR,

THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Renata Brandenburg and her minor son Grayson Rosenthal appeal a summary judgment order that dismissed The Farmers Automobile Insurance Association (Farmers) from a personal injury lawsuit that Brandenburg and Grayson filed against Farmers and its insureds, Jayne Christian and her minor son Jordan Christian.[1] The lawsuit was based upon allegations that Jordan injured Grayson by choking him with a wrestling move while the children were playing and that Christian provided negligent supervision over her son. We conclude that case law interpreting policy language substantially similar to that at issue here compels the determination that the Farmers policy did not provide coverage for Jordan's conduct, because the chokehold constituted an intentional act. We further conclude that the policy at issue did not provide coverage for Christian's conduct because her conduct was not an independent concurrent cause of Grayson's injuries.

[1] For ease of discussion, we will refer to the adults by their last names and the children by the first names.

STANDARD OF REVIEW

¶2 We apply the general summary judgment method of examining the parties' opposing affidavits, depositions, and other materials in the light most favorable to the party opposing summary judgment to determine whether there are any material facts in dispute that would require trial. *See* WIS. STAT. § 802.08(3) (2015-16)[2] (setting forth the standard for summary judgment) and ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997) (discussing summary judgment methodology).

BACKGROUND

¶3 We accept as true the facts and inferences most favorable to Brandenburg and Grayson. Brandenburg dropped her son off at Christian's house on a day when school had been canceled due to inclement weather so that Grayson could play with Christian's son Noah Christian, a school friend of Grayson's, under Christian's supervision. While Christian was lying on the living room couch watching television and playing games on her phone, Grayson went into Noah's bedroom, where Noah was playing video games with his older brother, Jordan. Grayson left the bedroom door open and Christian could see into the bedroom from the couch.

¶4 While Grayson was in the bedroom, Noah and Jordan stopped playing video games and engaged in "a playful wrestling match" with one another, with both boys putting each other in headlocks and trying to pin one another until

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the other "tap[ped] out." As the brothers continued wrestling for five to ten minutes, Grayson picked up their cell phones from the floor and took them into the living room, pretending to steal them as a joke.

¶5 Jordan ran out of the bedroom after Grayson, with Noah following, and the brothers caught up with Grayson in the living room, about two feet away from Christian, who was still on the couch. According to Grayson, Jordan wrapped his right forearm around Grayson's neck from behind, dug his elbow into Grayson's sternum, and lifted Grayson off the ground in a "chokehold" for two to three seconds until Grayson lost consciousness. According to Jordan, Jordan got Grayson "in a sleeper hold with his chin" for a few seconds so that Noah could get the phones back. Jordan said that he released Grayson as soon as Noah got the phones, and that Grayson then fell down. Grayson said that Christian was looking at Jordan and Grayson while Jordan was choking Grayson, but did nothing to stop it.

¶6 When Grayson regained consciousness, he was lying on the floor with extreme pain in his head, his lip and tongue were bleeding profusely, and his ears were ringing to the point that he could not hear anything. Although Grayson was bleeding, crying, and dry-heaving from nausea, Christian did not ask if Grayson needed help or provide any assistance to him. Grayson was left to tend his own injuries and to call his mother to pick him up. Brandenburg took Grayson to the emergency room that same day, and the doctor who saw them suggested that they call the police because Grayson's injuries indicated that he had been strangled.

¶7 Following the incident, Grayson alleged that he experienced a number of significant medical problems, including short term memory deficits,

migraine headaches, fatigue and stress reactions leading to periodic seizures, difficulty focusing, sleep deprivation, impaired motor skills, and ongoing tinnitus. Medical personnel noted a bump on Grayson's head, as well as bruising to his neck, and opined that Grayson may have suffered a seizure-triggering concussion from hitting his head when he fell, in addition to an anoxic brain injury from lack of oxygen. Grayson's mother and stepfather incurred over $45,000 in medical bills and related expenses, and anticipated additional expenses for ongoing treatment.

¶8 Grayson and his mother brought four claims against Christian, Jordan, and Farmers: (1) common law negligence by Jordan Christian; (2) statutory parental liability of Jayne Christian for her son's alleged negligence;[3] (3) common law negligence for violation of an assumed duty by Jayne Christian; and (4) loss of society and companionship.

¶9 At the time of the incident, Christian had a homeowner's policy with Farmers that provided personal liability coverage for herself and related household members qualifying as "insured" persons for an "occurrence," defined in relevant part as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in … 'Bodily injury.'" A separate provision in the insurance policy excluded personal liability coverage for bodily injury that is "expected or intended by an 'insured,'" even if the resulting injury "[i]s of a different kind, quality or degree than initially expected or intended."

[3] WIS. STAT. § 895.035.

¶10 The circuit court determined that Grayson's injuries were not the result of a covered occurrence because Jordan's use of a chokehold on Grayson was an intentional act, and therefore not an accident, as a matter of law. The court further held that any failure of Christian to stop the intentional act of her son was not an "independent concurrent cause" of Grayson's injuries. The circuit court dismissed Farmers from the lawsuit, and Brandenburg and Grayson appeal.

DISCUSSION

¶11 We first decide whether any material factual dispute requiring trial exists as to whether Grayson's injuries were caused by an "accident" within the meaning of the insurance policy. Although the policy does not define what constitutes an accident, the parties agree that several Wisconsin cases have interpreted policy language nearly identical to that at issue here and these cases should guide our analysis.

¶12 In ***Doyle***, the Wisconsin Supreme Court noted that common definitions of the term "accident" "center on an unintentional occurrence leading to undesirable results." ***Doyle v. Engelke***, 219 Wis. 2d 277, 290, 580 N.W.2d 245 (1998). The court further observed that, since "comprehensive general liability policies are 'designed to protect an insured against liability for negligent acts resulting in damage to third parties,'" a reasonable insured would expect the "accident" provision defining a covered event to include negligent acts. ***Id.*** (quoted source omitted). The court then held that a claim against an employer for negligent supervision of an employee fell within the definition of an accident, and was not excluded under an intentional acts clause, whether or not the employee committed the underlying wrong intentionally. ***Id.*** at 290-92.

¶13 In ***American Girl***, the Wisconsin Supreme Court expanded on the proper interpretation of the term "accident" relating to a covered "occurrence" in an insurance policy, emphasizing that is not enough for a result to be unexpected; rather, "the means or cause must be accidental." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶37, 268 Wis. 2d 16, 673 N.W.2d 65 (quoted source omitted). The court then held that property damage resulting from the settlement or erosion of soil under a warehouse had been accidentally caused by faulty site-preparation advice given by a subcontractor. ***Id.***, ¶38. Although not explicitly stated, the opinion implies that the cause was deemed accidental at least in part because the subcontractor was unaware that the advice it gave was faulty and in part because the soil erosion happened over a period of time.

¶14 In ***Estate of Sustache***, the Wisconsin Supreme Court held that an insurer had no duty to defend against an intentional tort claim of battery. ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶¶50-51, 56, 311 Wis. 2d 548, 751 N.W.2d 845. Applying the interpretations of the term "accident" discussed in ***Doyle*** and ***American Girl***, the court reasoned that the allegation that the insured had intentionally punched someone was inconsistent with an accident, even though there was no dispute that the insured had not intended the victim to fall and strike his head as a result of the punch, unexpectedly causing the victim's death. ***Estate of Sustache***, 311 Wis. 2d 548, ¶¶5, 48, 52-53.

¶15 Finally, in ***Schinner***, the Wisconsin Supreme Court held that a homeowner's policy did not cover personal injury claims arising from an alleged statutory violation of serving alcohol to a minor and negligent breach of duty by a party host, when the plaintiff had been assaulted by a guest at an underage drinking party hosted by the insured son of the policyholder. ***Schinner v. Gundrum***, 2013 WI 71, ¶¶2, 27-28, 92, 349 Wis. 2d 529, 833 N.W.2d 685. The

court reasoned that the host had "not host[ed] the underage drinking party by mistake, against his will, or by chance." ***Id.***, ¶68. Rather, the host had undertaken a series of intentional acts that had created a "volatile situation" and thus substantially contributed to the assault—in particular, by inviting minors to his party, illegally procuring alcohol for them, and promoting excessive drinking by making arrangements for beer pong to be played, knowing that at least one of the guests had a tendency to become belligerent when intoxicated. ***Id.***, ¶¶68-71. The court again emphasized that "[a] result, though unexpected, is not an accident; the means or cause must be accidental." ***Id.***, ¶69 (quoted source omitted).

¶16 Here, the complaint did not allege any intentional torts. Rather, it alleged that Jordan had negligently injured Grayson by "accidentally choking" him while engaged in "playful wrestling," and that Christian had negligently injured Grayson by failing to adequately supervise her son.

¶17 Notwithstanding the framing of the claims in the complaint, and Grayson and Brandenburg's assertion that, in their view,[4] the injury Grayson suffered was "accidental," Farmers points out that Grayson asserted during his deposition that the chokehold was the cause of his injuries. Farmers argues that the chokehold must be viewed as an intentional act even if, as in ***Estate of Sustache***, the extent of the resulting injuries to the victim was neither intended nor anticipated.

[4] Brandenburg and Grayson argue that the construction of the insurance policy should take into account their view of whether the act causing injury was accidental. As far as we can determine, that idea comes from older cases interpreting insurance polices that defined an occurrence as "[A]n accident … which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *See, e.g.* ***Bankert v. Threshermen's Mut. Ins. Co.***, 110 Wis. 2d 469, 479, 329 N.W.2d 150 (1983). As set forth in the background section of this opinion, that is not the definition of an occurrence in the policy at issue here.

¶18 We agree with Farmers that it is not necessary that Jordan intended for Grayson to lose consciousness, fall, and hit his head in order for Jordan to be found to have acted intentionally by placing Grayson in a chokehold—which we understand to mean deliberately squeezing Grayson's neck. We also see no material factual dispute between Jordan's and Grayson's accounts of what happened. The different terms used by the boys, a "chokehold" versus a "sleeper hold," both plainly refer to the same conduct of squeezing the neck. Moreover, both boys agree that Jordan put Grayson into the chokehold for the purpose of getting the phones back. Because the parties agree that the chokehold was employed for a specific purpose, the only reasonable inference is that it was a deliberate and volitional act, and that Jordan did not somehow squeeze Grayson's neck accidently for three to five seconds while attempting to do something else. We therefore conclude that ***Estate of Sustache*** controls as to the direct claim against Jordan and the statutory parental liability claim against Christian.

¶19 At one point in their brief, Grayson and his mother appear to acknowledge that applying the definitions used in ***Estate of Sustache*** and other cases would result in the dismissal of their direct liability claim against Jordan and parental liability claim against Christian, asserting those definitions "result in an unjust outcome" under the facts of this case. We acknowledge that applying the definition of the term "accident" established by case law may be harsh in this case, and that most homeowners would expect a personal liability policy to cover damages caused by the negligent torts of children, even when the negligence is premised upon nonaccidental, volitional acts. However, this court is bound by decisions of the Wisconsin Supreme Court, and any argument that the definition of an "accident" should be modified when dealing with the intentional acts of children or others engaged in play should be directed to that court.

¶20 We turn next to the claim against Christian for negligent supervision of her son. Grayson and his mother contend that coverage for this claim exists separately from coverage for the direct negligence claim against Jordan and the statutory parental liability claim against Christian, under the "independent concurrent cause" rule.

> The independent concurrent cause rule provides that where a policy expressly insures against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause. However, in order to trigger coverage, the independent concurrent cause must provide the basis for a cause of action in and of itself and must not require the occurrence of the excluded risk to make it actionable. Stated conversely, if the covered risk is not actionable without the occurrence of an excluded risk, then the covered risk is not sufficiently independent to trigger coverage under the policy.

Siebert v. Wisconsin American Mut. Ins. Co., 2011 WI 35, ¶40, 333 Wis. 2d 546, 797 N.W.2d 484 (quoted sources omitted and punctuation and capitalizations slightly modified).

¶21 In ***Bankert v. Threshermen's Mut. Ins. Co.***, 110 Wis. 2d 469, 329 N.W.2d 150 (1983), the Wisconsin Supreme Court determined that a claim of negligent parental supervision or failure to exercise parental control was not separately covered under an insurance policy when the underlying act that the parents failed to prevent their child from committing did not constitute an "occurrence" under the applicable insurance policy. The same reasoning applies here.

¶22 Christian's alleged actions of sitting on the couch and failing to intervene while the children wrestled did not constitute an independent occurrence or insured risk. Christian's conduct, in and of itself, cannot form the basis for a

cause of action because it requires the occurrence of Jordan's excluded conduct, the chokehold. Therefore, the independent concurrent cause rule is inapplicable.

By the Court.—Order affirmed.

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