COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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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. 2017AP1369 **Cir. Ct. No. 2016CV235**

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

KATHRYN BAUMANN-MADER, DAVID MADER, SARA J. HANSON AND COLE S. HANSON,

PLAINTIFFS-APPELLANTS,

BLUE CROSS BLUE SHIELD ASSOCIATION, UNITEDHEALTHCARE INSURANCE COMPANY, WEST BEND MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

INTEGRITY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

SHAWN M. LIEVENSE AND ANNETTE S. SALAZAR,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. The victims of a dog attack by "Tank," as well as Tank's owners, ask that we reform the owner's homeowner's insurance policy so as to provide coverage for damages Tank caused to the victims. We decline to do so and affirm as Integrity's policy unambiguously excludes coverage for injuries caused by a dog that has previously injured a person. The circuit court did not err in granting summary judgment as there are no facts to show that Tank's owners requested coverage for injuries caused by a dog with a prior history of causing injury to a person or that the insurance agent understood that Tank's owner desired such coverage and mistakenly failed to secure the alleged coverage at the time the policy was issued.

Facts

¶2 Tank bit and caused severe injures to Kathryn Baumann-Mader (Kit) and Sara Hanson (Sara) on August 19, 2015.[1] Kit was in her kitchen around 3 p.m. when she heard yelling and shouting coming from outside. Kit ran outside and observed Sara holding her thigh screaming, "He bit me." Kit also saw "Junior," the twelve-year-old son of Tank's owners, holding Tank on the ground crying, "They're going to kill my dog. They're going to euthanize him."

[1] We will refer collectively to the plaintiffs, Kit, Sara, and their respective husbands, as "the victims."

¶3 Kit went to console Junior and help restrain Tank. As Tank was without a leash, Kit ran home, got a leash, and put it on Tank. Tank struggled with Kit while she put a leash on him. Five police cars, a firetruck, and an ambulance responded.

¶4 Tank was turned over to a police officer who took Tank towards a squad car. Kit noticed that Tank was not cooperating and was trying to slip out of his collar. Kit heard a man yell, "Get in the house, get in the house, get in the house," and saw that Tank was loose. Tank "locked eyes" on Kit and in three bounds knocked Kit to the ground and proceeded to repeatedly bite Kit's thighs and crotch area. Within seconds, Kit sensed the presence of a police officer and then felt "this jolting pain" and realized she was being tased. Tank continued to bite Kit.

¶5 Tank then lunged at a police officer and Kit heard what sounded like firecrackers going off and realized the officers were shooting at Tank. While being treated by emergency responders, Kit heard one of the emergency responders whisper to his co-worker, "Is that a dog bite?" The other emergency responder answered, "No, I think it's a bullet hole." Kit required twenty-nine staples in her thighs and crotch, a week in the hospital, and surgically implanted hardware in her left foot as a result of the gunshot.

¶6 The victims filed suit against Tank's owners[2] (Lievense) and Integrity Mutual Insurance Company (Integrity) as Lievense's homeowner insurer. The victims alleged that prior to August 19, 2015, Lievense knew that Tank had

[2] Tank's owners are Shawn M. Lievense and Annette S. Salazar, but we will refer to them in the singular as "Lievense."

vicious propensities, knew that Tank had previously caused injury to another person, and knew he was liable for double damages pursuant to WIS. STAT. § 174.02 (2015-16).[3] According to a Kenosha Police Department report, six months prior, Tank bit another person in an unprovoked attack. Lievense did not report this attack and injury by Tank to Integrity.

¶7 After discovery, Integrity brought a motion for summary judgment on the grounds it had no duty to defend or indemnify Lievense and requested dismissal with prejudice. The victims and Lievense joined together[4] and argued Integrity's policy should be reformed "to provide the coverage intended by Lievense and Integrity's agent, that the exclusion was contrary to public policy, and that the policy covered at least some of the injuries."

¶8 The circuit court granted summary judgment, finding the language of Integrity's policy unambiguous in excluding coverage. Appellants renew their arguments. We affirm as reformation is not warranted; Integrity's policy is unambiguous in excluding coverage as Tank's prior bite made the August 19, 2015 attack a noncovered occurrence; Integrity's policy is not contrary to public policy; Kit and Sara's injuries were caused by Tank, and the exclusion extends to injuries also allegedly caused by the police as the officer's actions were not an independent cause; and Integrity is not responsible for $2000 in first aid expenses as they did not arise from a covered occurrence.

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

[4] We will refer to the victims and Lievense jointly as "Appellants."

Integrity's Policy

¶9 Lievense obtained the Integrity policy in November 2013. There is no dispute that Integrity's policy provides an initial grant of coverage for dog injuries. The policy provides that it will provide liability coverage "arising out of any one loss for which an insured person becomes legally obligated to pay as damages because of bodily injury or property damage, caused by an occurrence[5] covered by this policy." There is also no dispute that the policy has an exclusion precluding coverage for subsequent injuries by the same dog. The exclusion provides that "we do not cover" "[b]odily injury or property damage caused by … [a]ny dog with a prior history of causing: (1) Bodily injury to a person," which is "established through insurance claims records, or through the records of local public safety, law enforcement or other similar regulatory agency." The applicable exclusion has been in place in Integrity's policies since at least 2005. There is no factual dispute that Tank's attack in February 2015 brought the exclusion into effect. Pursuant to his policy with Integrity, Lievense had a choice after Tank's attack in February 2015: either remove Tank from his household or self-insure for any damages thereafter caused by Tank.

Reformation

¶10 Appellants argue that we should reform Integrity's policy so as to provide coverage for Tank's August 19, 2015 attack. "A cause of action for reformation of an insurance policy is allowed when the one seeking reformation

[5] An "[o]ccurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage during the policy period."

shows that because of fraud or mutual mistake, the policy does not contain provisions desired and intended to be included." ***Sprangers v. Greatway Ins. Co.***, 175 Wis. 2d 60, 70, 498 N.W.2d 858 (Ct. App. 1993) (citing ***Trible v. Tower Ins. Co.***, 43 Wis. 2d 172, 182, 168 N.W.2d 148 (1969)). Mutual mistake is established when the insured proves that he or she made statements to an agent of the insurer concerning the desired coverage, and that the agent understood the request, but the issued policy did not reflect the coverage desired. ***Sprangers***, 175 Wis. 2d at 71; *see also* ***Trible***, 43 Wis. 2d at 182-83 ("Where the party applying for insurance states the facts to the agent and relies on him to write the policy, which will protect his interests, and the agent so understands, but fails by mistake to so write the contract, the mistake is considered mutual." (citation omitted)). Reformation is not appropriate as there was no request by Lievense for coverage for a dog with a prior history of causing injury to a person. As importantly, there are no facts to show that the agent understood Lievense sought coverage for second dog bites and mistakenly failed to reflect the request in the policy.

¶11 When Lievense obtained his Integrity policy in 2013, Tank was not in his household, although he did have a Chihuahua named "Blue." Integrity's underwriting department was informed by its agent that Blue did not violate Integrity's "no dog list" and that Blue had not bitten before.[6] When Tank was acquired by Lievense, there was no obligation in Integrity's policy to seek approval for coverage nor any obligation to inform or obtain approval from Integrity for Tank as a new pet.

[6] The "ineligible animals" list of Integrity's policy includes a list of excluded dog breeds, including Akita, Chow, Doberman Pincher, German Sheppard, Pit Bull, Rottweiler, and all wolf hybrids.

¶12 Lievense's coverage under the policy changed for Tank only after Tank bit a person in February 2015. It is undisputed that Lievense never informed Integrity's agent that Tank had injured a person. Lievense also never requested coverage from Integrity's agent following February 2015 for damages caused by a dog that had previously injured a person. Lievense did not request that the policy's second dog bite exclusion be removed.

¶13 Lievense, acknowledging that he and the agent "did not specifically discuss coverage for second bites," argues that such specificity is not required. Lievense's reliance on ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 148 N.W.2d 641 (1967), and ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, 244 Wis. 2d 802, 628 N.W.2d 876, is unavailing. In ***Artmar***, the agent had previously provided a policy that covered outbuildings and failed to do so when securing a policy for the same property with a new insurer. The prior dealings were sufficient to show that the agent knew that the insured desired to insure the outbuildings. ***Artmar***, 34 Wis. 2d at 189-90. Similarly, in ***Vandenberg***, the supreme court held that reformation may be available when the insured can demonstrate that there was an understanding regarding the desired coverage based on prior dealings, i.e., when there are facts to show that the agent is aware of the insured's insurance requirements, even absent a specific request. ***Vandenberg***, 244 Wis. 2d 802, ¶¶53-57. In that case, there were facts to show that the insured previously had a policy through the same agency that provided coverage for the insured's day care business, and the agent was aware that the insured had a day care business in her home at the time of renewal. ***Id.***, ¶48. Here, there are no facts to show that the agent was aware of, or understood, that Lievense desired or needed second dog bite coverage.

¶14 ***Poluk v. J.N. Manson Agency, Inc.***, 2002 WI App 286, 258 Wis. 2d 725, 653 N.W.2d 905, is also inapplicable. There, the insured advised the agent that a tenant was leaving the building, which raised red flags that a vacancy clause may exempt the building from coverage. ***Id.***, ¶23. Here, Lievense never told the agent that Tank had a prior bite. There was no red flag. In the absence of a request or information suggesting an exclusion might be triggered, there is no obligation by an insurer to explain each and every exclusion to each insured. ***Id.***; ***Sprangers***, 175 Wis. 2d at 73.

¶15 Lievense also contends that there are genuine issues of material fact centered on the agent's misunderstandings. He points to alleged misunderstandings by the agent as to whether the dogs should have been identified on the application, or upon renewal. Although the argument is unclear, Lievense posits that the identification of the dogs may have led to questions about the dogs, such that he lost the opportunity to inform Integrity about Tank.[7] He also points to the agent's mistaken understanding *after* the claim was submitted, believing that there would be coverage because there was no "bite history" reported to the insurer. While these may arguably be mistakes on the part of the agent, none of these facts show a request by Lievense for second dog bite coverage, or an understanding by the agent that Lievense sought such coverage and a mistake by

[7] We fail to see how Lievense's argument that the agent misunderstood the "scope of coverage" of Integrity's policy as it related to underwriting certain breeds has anything to do with the second dog bite coverage. Moreover, while an agent's misunderstanding regarding the scope of coverage may be relevant to the "mistake" aspect of reformation, the insured still needs to show that the coverage was requested or that the agent understood that it was desired and mistakenly failed to implement the insured's desire. *See* ***Trible v. Tower Ins. Co.***, 43 Wis. 2d 172, 182-83, 168 N.W.2d 148 (1969); *see also* ***General Cas. Co. v. Choles***, No. 2009AP832, unpublished slip op. (WI App Mar. 18, 2010) (insured requested coverage, both the insured and the agent believed that specific coverage was included, and both the insured and the agent mistakenly believed the accident was insured).

the agent to secure Lievense's purportedly desired coverage at the time the policy was issued.

¶16 Lievense also notes that the agent asked him when applying whether Blue had prior bites. Again, this does not show that Lievense asked for second bite coverage or that the agent understood he desired it.

¶17 In sum, there are no facts to show a statement to an agent of the insurer concerning the desired coverage that was not reflected in the policy, or an understanding by the agent that Lievense desired coverage for second dog bites, and a mistake by the agent to secure the allegedly desired coverage at the time the policy was issued. The circuit court did not err in granting summary judgment as there were no facts to support a reformation claim.

Public Policy

¶18 Appellants next argue that WIS. STAT. § 174.02 is evidence of a public policy in Wisconsin to protect persons against dog bites and to compensate those who are injured by dogs. Appellants infer from § 174.02 that insurers of dog owners must cover all injuries caused by dogs regardless of the number of times a dog has injured persons, domestic animals, or property.

¶19 The Wisconsin Legislature enacted WIS. STAT. § 174.02, a strict liability statute, based on a "legislative judgment that those who own, harbor, or keep a dog are in the best position to reduce the risk of injury and should bear liability for any damages, rather than making those who are injured by no fault of their own suffer without compensation." ***Pawlowski v. American Family Mut. Ins. Co.***, 2009 WI 105, ¶¶17, 72, 322 Wis. 2d 21, 777 N.W.2d 67. Section 174.02 provides that if a dog owner has no notice of their dog previously injuring a

person, domestic animal, or property, then a dog owner is strictly liable "for the full amount of damages caused by the dog." Sec. 174.02(1)(a). If, however, a dog owner has notice that their dog had "previously, without provocation, bitten a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement," then the public policy of Wisconsin is that "the owner of [the] dog is liable for 2 times the full amount of damages caused by the dog biting a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement." Sec. 174.02(1)(b).

¶20 We agree that the legislature made recovery for dog bite victims easier by enacting a strict liability statute. We disagree with Appellants' premise that Wisconsin's public policy is that insurers must pay the damages for a known vicious dog. Integrity provided initial coverage for liability resulting from Lievense's dogs—with the caveat that while a first injury is covered, damages for subsequent injuries are excluded where a dog has a "prior history of causing … [b]odily injury to a person." We see no public policy rationale for forcing insurers to pay damages for a dog which has already shown a history of causing injury. The public policy of WIS. STAT. § 174.02 is that the owners of dogs that have bitten once are on notice that they will be financially disadvantaged to the tune of two times the full amount of damages if they allow their dog to bite again. Section 174.02 does not prevent an insurer from contractually excluding coverage for dogs that repeatedly injure.

Damages "caused by" Police

¶21 Appellants next argue that the circuit court erred in construing the terms of Integrity's policy. According to Appellants, the policy exclusion only applies to injuries "caused by" the dog, not those injuries inflicted by the police.

Appellants argue that since the police tased and shot Kit, which resulted in some of her injuries, summary judgment was erroneously granted as it was not Tank who "caused" Kit's taser and gunshot wounds. Integrity's policy exclusion is unambiguous: "We do not cover: … Bodily Injury or property damage *caused by* … any dog with a prior history of causing: (1) bodily injury to a person." (Emphasis added).

¶22 Appellants rely solely on the policy language and do not contend that there are any disputed issues of fact at this summary judgment stage. They argue that the second dog bite exclusion contains "caused by" rather than the broadly construed "arising out of" language commonly seen in exclusions. Without pointing to any authority relating to causation under insurance policies, they declare that only damages with a "direct casual connection" should be excluded, and contend that the injuries caused by the police were not caused by Tank. Likewise, Integrity fails to provide any applicable authority relating to causation under the policies—relying largely on their contention that the presence of the police was necessitated because of Tank's attack, but alternatively, that if the injuries were not caused by the dog, the plaintiffs would not have a negligence claim.

¶23 Neither party adequately addresses the legal issues concerning "cause" as it relates to the question of coverage under an insurance contract.[8] It is

[8] The court in ***Smith v. State Farm Fire & Cas. Co.***, 192 Wis. 2d 322, 333, 531 N.W.2d 376 (Ct. App. 1995), discussed "cause" as it relates to the coverage question, explaining,

(continued)

not our role to develop arguments for the parties. ***Clear Channel Outdoor, Inc. v. City of Milwaukee***, 2017 WI App 15, ¶28, 374 Wis. 2d 348, 893 N.W.2d 24 (courts should not abandon their neutrality to develop arguments for the parties). That said, we address this issue briefly as we are faced with a summary judgment decision that has not been shown to be incorrect.

¶24 Insurance law addresses claims involving multiple alleged causes for injuries. Although the Appellants contend that the police-related injuries are not caused by Tank, neither party discusses case law addressing the "independent concurrent cause rule." In Wisconsin, we have adopted the independent concurrent cause rule, which states that "[w]hen an insurance 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." ***Varda v. Acuity***, 2005 WI App 167, ¶24, 284 Wis. 2d 552, 702 N.W.2d 65 (citing ***Lawver v. Boling***, 71 Wis. 2d 408, 422, 238 N.W.2d 514 (1976)). However, "[a]n independent concurrent cause must provide

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> In Wisconsin, the substantial factor test is applied to determine whether a particular act is a cause of an accident…. [T]he substantial factor test does not define the risks for which coverage is afforded and does not determine whether a covered risk is independent from an excluded risk. *Cf.* [***Lawver v. Boling***, 71 Wis. 2d 408, 415-16, 238 N.W.2d 514 (1976)] (The causal connection between the included risk and the activities which gave rise to the injuries, for the purpose of invoking coverage, "is not of the type which would ordinarily be necessary to warrant a finding of 'proximate cause' or 'substantial factor' as those terms are used in imposing liability for negligent conduct."). Whether coverage exists is a matter of contract and public policy, *see, e.g.*, ***Hagen v. Gulrud***, 151 Wis. 2d 1, 5-7, 442 N.W.2d 570, 572-73 (Ct. App. 1989), not encompassed by the substantial factor test. Thus, the substantial factor test applies only to liability determinations after a conclusion that there is coverage for the risk of a particular cause.

the basis for a claim in and of itself, and must not require the occurrence of the excluded risk to make it actionable." ***Varda***, 284 Wis. 2d 552, ¶24 (citing ***Smith v. State Farm Fire & Cas. Co.***, 192 Wis. 2d 322, 531 N.W.2d 376 (Ct. App. 1995)).

¶25 For example, in ***State Farm***, a child died in a snowmobile accident involving alcohol and the lack of a helmet. ***State Farm***, 192 Wis. 2d at 333. State Farm's homeowner's insurance policy contained an automobile exclusion that also excluded snowmobiles. The circuit court denied summary judgment to State Farm, arguing that the intoxication and failure to put a helmet on the child were independent concurrent causes of the death. We disagreed, explaining that without the operation of the snowmobile, the injury would not have occurred. ***Id.*** at 332. The court held that 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. ***Id.*** When the policy excludes the instrumentality that caused the injury, there was no insurance coverage. ***Id.*** at 334; *see also* SHEILA M. SULLIVAN ET AL., ANDERSON ON WISCONSIN INSURANCE LAW § 5.180 (7th ed. 2015).

¶26 Similarly, in ***Siebert v. Wisconsin Am. Mut. Ins. Co.***, 2011 WI 35, 333 Wis. 2d 546, 797 N.W.2d 484, a car accident killed one passenger and left one injured. A jury found that the driver had exceeded the scope of his permission in using the vehicle, so there was no insurance coverage. The passenger amended the complaint to allege negligent entrustment. The question on appeal was whether the covered risk—the alleged negligent entrustment of a vehicle to the driver—is actionable without the occurrence of the excluded risk—the driver's alleged negligent operation of the vehicle without permission. Our supreme court answered no, explaining that the case law teaches us that there is no coverage for

alleged negligent entrustment of a vehicle without the excluded risk of negligent operation of the vehicle. ***Id.***, ¶55. The negligent operation without permission is what makes the negligent entrustment claim relevant at all. ***Id.***

¶27 In this case, the injury to Kit allegedly caused by the police is not an independent concurrent cause. The police-related injuries would not be actionable against Lievense without the occurrence of Tank's attack—the excluded risk. The victims could not subject Lievense to liability for the police-related injuries independently of the excluded occurrence of Tank's attack. ***Id.*** The exclusion thus applies. The circuit court did not err in granting summary judgment to Integrity. Kit retains any direct claim she may have or wish to pursue against the police—but Integrity is not the insurer of the police and is not the insurer for Tank's August 19, 2015 attack.

First Aid Expenses

¶28 Appellants' final argument is that Integrity's "First Aid Expenses" policy provision is a covered expense, and the circuit court erred in its grant of summary judgment. We dispense with this argument summarily; the provision provides that Integrity "will pay up to $2,000 per occurrence for reasonable and necessary expenses for immediate medical and surgical treatment provided to persons … at the time of the accident *covered by this policy*." (Emphasis added.)

¶29 For the reasons set forth above, Tank's attack of August 19, 2015, was not covered under Integrity's policy.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.