

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 19, 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. 99-0326**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**JEFFREY ERNSTMEYER,**

**PLAINTIFF-APPELLANT,**

**v.**

**RODNEY SUSSEK,**

**DEFENDANT,**

**MILWAUKEE MUTUAL INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT,**

**CAPITOL INDEMNITY CORPORATION, GLORY DAYS  
SPORTS BAR AND WISCONSIN PHYSICIANS SERVICE  
INSURANCE CORPORATION,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Sauk County:  
VIRGINIA WOLFE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Jeffrey Ernstmeyer appeals a summary judgment order dismissing Milwaukee Mutual Insurance Company from his personal injury lawsuit. He claims the trial court erred in determining, as a matter of law, that Milwaukee Mutual's insured had acted intentionally when he injured Ernstmeyer. We disagree and affirm.

### **BACKGROUND**

According to the complaint and other materials submitted by the parties, Ernstmeyer entered the Glory Days Sports Bar with Julie Sussek on the evening of August 24, 1997. Julie's estranged husband, Rodney Sussek, happened to be at the bar and became enraged upon seeing his wife with Ernstmeyer. Sussek grabbed Ernstmeyer from behind, dragged him outside of the bar and threw him into the bumper of a car parked in front of the bar. Sussek continued to punch Ernstmeyer in the face with his fist even after he was unconscious, and left him in a pool of blood on the curb. No one, including a Glory Days employee who witnessed the attack, intervened.

Ernstmeyer filed suit against Sussek and his insurer, Milwaukee Mutual, on theories of assault and battery, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress and negligent failure to render aid. Ernstmeyer also asserted claims against Glory Days and its insurer, Capitol Indemnity Insurance, on theories of negligence, negligent infliction of emotional distress, negligent failure to render aid, and negligent creation of a harmful environment.

Milwaukee Mutual moved for summary judgment on the grounds that Sussek's homeowner's policy did not cover liability for intentional acts, and that no reasonable homeowner would expect coverage for battery.<sup>1</sup> The trial court granted the motion, and Ernstmeyer appeals.

### STANDARD OF REVIEW

We apply 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 an 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 a trial. *Id.* The interpretation of an insurance contract is a question of law which is appropriate for summary judgment. See *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis.2d 808, 813, 456 N.W.2d 597, 600 (1990).

### ANALYSIS

The homeowner's policy at issue here excluded coverage for personal liability and medical payments to others for bodily injury or property damage "which is expected or intended by the insured." Ernstmeyer claims that

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<sup>1</sup> Capitol Indemnity also moved successfully for summary judgment in its favor. However, the appellant informs us that he has settled his claim with Capitol Indemnity and that issue is not before us on appeal.

there is a genuine issue for trial as to whether Sussek “intended” to cause him bodily harm, because the answer depends on Sussek’s state of mind at the time of the incident. However, in *Smith v. Keller*, 151 Wis.2d 264, 270-71, 44 N.W.2d 396, 398-99 (Ct. App. 1989), we held that the court may infer intent to cause bodily harm, as a matter of law, without regard to the insured’s claimed intent, when bodily harm would be substantially certain to occur from the insured’s conduct. “Hitting another person in the face is the type of act which is so certain to cause harm that the person who performed the act can be said to have intended the harm.” *Id.* at 271, 44 N.W.2d at 399. Because Sussek himself admitted that he punched Ernstmeyer at least three times in the face, and that he was not acting in self-defense, the trial court properly determined that, as a matter of law, Sussek’s act was intentional and excluded from coverage under the homeowner’s policy. Milwaukee Mutual was properly dismissed from the suit.

*By the Court.*—Order affirmed.

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

