COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2730 **Cir. Ct. No. 2012CV29**

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

ASHLEY E. BIRKHOLZ,

PLAINTIFF-APPELLANT,

V.

FRED A. CRUCKSON, SPECIAL ADMINISTRATOR OF ESTATE OF JAMES M. CRUCKSON AND GERMANTOWN MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

UNITED HEARTLAND, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Ashley Birkholz appeals the grant of summary judgment in favor of the defendant Germantown Mutual Insurance Company, dismissing Birkholz's claims for damages arising out of the shooting death of her husband, Officer Craig Birkholz. Birkholz was shot and killed in the line of duty by Germantown Mutual's insured, James Cruckson. Cruckson shot himself dead rather than surrender to police after firing dozens of shots at police inside and outside of his home in March 2011.

¶2 Because Cruckson's homeowner's insurance policy from Germantown Mutual expressly excluded coverage for injury or damage "which is expected or intended by the insured," the circuit court granted summary judgment, holding that the damages from Cruckson's act of shooting Birkholz were, as a matter of law, "expected or intended" by Cruckson. On appeal, Ashley Birkholz argues that the trial court erred because the facts do not establish conclusively that Cruckson intended the harm he caused to Birkholz and because whether the incident was an "accident" should be determined from the point of view of the victim, Birkholz, not Cruckson.

¶3 We reject these arguments and affirm. We agree with the circuit court that Cruckson's actions were intentional as a matter of law and that the insurance policy unambiguously excludes coverage for damages resulting from Cruckson's intentional shooting of Birkholz. In reaching these conclusions, we note that the Wisconsin Supreme Court's recent decision in ***Schinner v. Gundrum***, 2013 WI 71, ___ Wis. 2d ___, 833 N.W.2d 685, clarified this area of the law and undermined the view of the law that Ashley Birkholz relies upon in this appeal. Under Wisconsin law, Cruckson's actions were intentional, not accidental, as a matter of law, and they trigger the intentional acts exclusion. We affirm.

Facts

¶4 The events that led to this lawsuit happened early in the morning on March 20, 2011, after a woman reported that Cruckson had sexually assaulted her and was holding her young daughter in some unknown location. Shortly before 6:30 a.m., police investigating the woman's accusations entered Cruckson's Fond du Lac home, announcing their presence by shouting "police," and then began searching the home.

¶5 At some point after police entered, as some police were on the stairs to the second floor, shots were fired from above, injuring two officers. At or about the same time, Cruckson also began firing from an upstairs window towards the location of backup officers as they arrived on the scene outside his home.

¶6 One of the backup officers was Birkholz, the second officer to arrive; he exited his car and began running along a wall on the north side of the scene. As Birkholz was running, he was struck by two bullets and fatally wounded. Cruckson continued shooting at officers throughout the morning, firing a total of about forty-eight rounds, until the siege finally ended when Cruckson took his own life.

¶7 After these tragic events, the widow of Birkholz, Ashley Birkholz, filed this wrongful death action against Cruckson's estate. Ashley Birkholz also sued Germantown Mutual, the issuer of the homeowner's insurance policy covering Cruckson's residence. In addition to insurance against property damage to the home, this homeowner's policy also included coverage for losses due to personal liability on the part of the insured, which is defined as liability under "a claim ... made or a suit ... brought against an 'insured' for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this

coverage applies ....” An “occurrence” in turn is defined as “an accident ... which results ... in ... ‘Bodily injury’ ... or ‘Property damage.’” Finally, in addition to limiting covered occurrences to “accidents,” the policy specifically excluded coverage for personal liability arising from “Expected Or Intended Injury,” that is, “‘Bodily injury’ or ‘property damage’ which is expected or intended by an ‘insured’....”

¶8 In the circuit court, Germantown Mutual moved for summary judgment on grounds that no coverage exists under the policy for Ashley Birkholz’s losses, based upon the exclusion of coverage for expected or intended injuries. The circuit court granted summary judgment in favor of Germantown Mutual, for three reasons: as a matter of law Cruckson’s intent to injure must be inferred from Cruckson’s acts in shooting at officers, providing insurance coverage for the losses resulting from Cruckson’s actions would be contrary to public policy principles, and Cruckson’s insurance policy unambiguously excluded coverage. Ashley Birkholz then filed this appeal.

Analysis

¶9 Summary judgment is properly granted on an insurance coverage question if no issue of material fact exists and there is, as a matter of law, no coverage. ***Jones v. Sears Roebuck & Co.***, 80 Wis. 2d 321, 325, 259 N.W.2d 70 (1977). On appeal, the court of appeals reviews de novo whether the circuit court properly interpreted the insurance policy and properly granted summary judgment. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 486, 588 N.W.2d 285 (Ct. App. 1998).

¶10 The Wisconsin Supreme Court recently reviewed the history of standard personal liability insurance coverage and exclusion of coverage for

intentionally caused damages. ***Schinner***, 2013 WI 71, ¶¶41-44. At first, standard policy language was worded to require as an element of proof that the damage claimed resulted from an accident, i.e., "a sudden, identifiable event." ***Id.***, ¶42 (citation omitted). Later, the standard policy defined coverage in terms of damages from an "occurrence," which was defined as "an accident ... which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." ***Id.*** (citation omitted). Finally, like in the policy at issue here, this phrase, "not expected or intended from the standpoint of the insured," was moved to the intentional acts exclusion in the liability policy. ***Id.***, ¶43.

¶11 As ***Schinner*** explains, there has been confusion concerning whether, when an assault causes damages, the question whether the assault was an "accident" should be resolved from the perspective of the insured or the injured party. ***Id.***, ¶44. Before the ***Schinner*** decision, it could be argued that some Wisconsin decisions, a number of which were cited by Ashley Birkholz below and in this appeal, supported the proposition that the question should be resolved from the viewpoint of the injured party, though there were other authorities pointing the other way. ***Id.***, ¶¶45-51 (discussing ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845, ***Tomlin v. State Farm Mut. Auto. Liab. Ins. Co***, 95 Wis. 2d 215, 290 N.W.2d 285 (1980), ***Fox Wis. Corp. v. Century Indem. Co.***, 219 Wis. 549, 263 N.W. 567 (1935), and ***Button v. American Mut. Accident Ass'n***, 92 Wis. 83, 65 N.W. 861 (1896)).

¶12 Any confusion concerning the rule in Wisconsin, however, was resolved when ***Schinner*** reviewed and explained all of the relevant cases and held that "when an insured is seeking coverage, the determination of whether an injury is accidental under a liability insurance policy should be viewed from the

standpoint of the insured." ***Schinner***, 2013 WI 71, ¶52. Under this rule, in ***Schinner***, for instance, the court determined that the personal liability provision of a homeowner's policy provided no coverage because the "means or cause" of the bodily injury in that case consisted of intentional, illegal actions—procuring and serving alcohol to minors, including a minor known to act aggressively when intoxicated. ***Id.***, ¶¶69, 81.

¶13 Since the court in ***Schinner*** was interpreting the same policy language that applies in the case at hand, the same holding applies here: the liability provision's definition of occurrence as an "accident" in Cruckson's policy cannot extend coverage to damages resulting from the insured's intentional actions in violation of the law, such as shooting at police officers during a lawful police investigation. Having determined that ***Schinner*** dictates this interpretation of the contract, we need not reach the issue of whether public policy also bars coverage.

¶14 What is more, as the circuit court correctly determined, this coverage would also be excluded under the intentional acts exclusion. In her briefs, Ashley Birkholz points out that there is no evidence that Cruckson had any particular motive to harm police officers, that it was still dark at the time of the shooting, and that Cruckson was firing multiple shots (possibly at random) at distances of seventy-five or eighty yards. As the circuit court recognized, however, the question is not what Cruckson, subjectively, desired to result from his shooting; the question is what a reasonable person in Cruckson's shoes would be "substantially certain" would result: "where a reasonable [person] in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with ... as though he had intended [the result]." ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 711, 278 N.W.2d 898 (1979) (citations omitted). This treatise section quoted in ***Packucki*** illustrates this rule

with the example of a "man who fires a bullet into a dense crowd," ***id.***, and we agree with the circuit court that, essentially, that is what Cruckson did. Any reasonable person who fires nearly fifty shots from an upstairs window out into the darkness where police cars and officers are assembling is charged with knowing, to a substantial certainty, that serious injury or even death will result.

¶15 Birkholz's death was an expected and intended result of Cruckson's shooting. The insurance policy Germantown Mutual issued to Cruckson did not extend coverage for such damages he caused through such actions.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).