COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 1998

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. 97-3300

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

BETHANY P.A.C.,[1] BY HER GUARDIAN AD LITEM GREGORY R. WRIGHT,

PLAINTIFF-APPELLANT,

DEPARTMENT OF HEALTH & SOCIAL SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

CHARLES ERMERS,

DEFENDANT,

MT. MORRIS MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

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[1] This court has modified the caption of the case in order to protect the confidentiality of the minor victim.

APPEAL from an order of the circuit court for Adams County: DUANE A. POLIVKA, Judge. *Affirmed.*

Before Dykman, P.J., Deininger and Bartell,[2] JJ.

PER CURIAM. Bethany C. appeals a summary judgment order dismissing her negligence claim against the Mt. Morris Mutual Insurance Company. The issue is whether a child, who is sexually abused by the live-in boyfriend of a baby sitter who should have known of the danger of abuse, can recover under the sitter's homeowner's insurance policy notwithstanding an intentional acts exclusion clause. We conclude that recovery is barred by such an exclusion clause under ***Jessica M.F. v. Liberty Mut. Fire Ins. Co.***, 209 Wis.2d 42, 561 N.W.2d 787 (Ct. App. 1997), and therefore affirm the decision of the circuit court.

According to the amended complaint, Harriet Thurber was providing child care services for Bethany in Thurber's home on or about July 15, 1993, when Thurber's live-in boyfriend, Charles Ermers, intentionally sexually assaulted two-year-old Bethany, causing serious injury. Bethany maintains that Thurber, who she alleges was aware of Ermers' pedophilic tendencies and past history of child molestation,[3] violated a duty of ordinary care to Bethany by failing to protect her from the assault. At the time, Thurber was covered by a Mt. Morris homeowner's policy which insured her for liability for damages sustained due to her individual negligence. Mt. Morris responds that the homeowner's policy in question also

[2] Circuit Judge Angela B. Bartell is sitting by special assignment pursuant to the Judicial Exchange Program.

[3] Ermers himself testified in his deposition that he had discussed his problem concerning little girls with Thurber and that Thurber had been present while he molested Bethany.

contained an exclusion clause which stated that the insurance company would "not cover bodily injury ... resulting from the act of any insured person if a reasonable person would expect or intend bodily injury ... to result from the act."

The interpretation of an insurance contract presents a question of law which is appropriate for summary judgment.[4] ***Jessica M.F.***, 209 Wis.2d at 48-49, 561 N.W.2d at 790. An exclusionary clause should be construed in accordance with "'what a reasonable person in the position of the insured would have understood'" the clause to mean. ***Id***. at 49, 561 N.W.2d at 790 (quoted source omitted). In ***Jessica M.F.***, we held that "a reasonable person would understand that if he or she 'knew or, in the exercise of reasonable care should have known' of a spouse's sexual abuse of children, a homeowner insurance policy's intentional-acts exclusion will preclude coverage" for harm resulting from that person's negligent failure to prevent further sexual abuse. ***Id***. at 49, 561 N.W.2d at 790-91. Thus, under ***Jessica M.F.***, an intent to injure may be inferred for the purpose of an intentional act exclusion where someone has negligently failed to prevent the sexual molestation of a child, because injury is substantially certain to result. ***Id***. at 54, 561 N.W.2d at 792.

Bethany attempts to distinguish ***Jessica M.F.*** from the present case on two grounds: first, that the grandmother who failed to protect her grandchildren from sexual molestation by her spouse in that case lacked the same

[4] It is well established that this court applies 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 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***.

special relationship and duty of care which Thurber owed Bethany by virtue of her role as a baby sitter; and second, that the intentional actor/molester in that case was an insured and related to the caretaker. We are not persuaded by either argument. The decision in ***Jessica M.F.*** did not rest upon the insured grandmother's relationship to either her molested grandchildren or her coinsured, molesting spouse. Rather, the insured grandmother became an intentional actor herself for purposes of the exclusion clause by reason of inferred intent. This inferred intent arose from the substantial certainty that her failure to act to prevent sexual molestation would result in harm. In other words, where there are factual allegations sufficient to show that an insured homeowner should have known about sexual abuse occurring in his or her home—a necessary element to a negligence claim—those same alleged facts are sufficient to establish a defense under a homeowner's policy which excludes from coverage harm resulting from intentional acts. The omission or failure to act is treated in the same manner as an act in each instance. *See also* § 948.03(4), STATS., (assigning criminal responsibility to those who fail to act to prevent sexual abuse of a minor).

Like the homeowner's policy in ***Jessica M.F.***, the Mt. Morris policy at issue here excluded coverage for bodily injuries which a reasonable person would expect or intend to result from an act of the insured. Like the insured in that case, Thurber could reasonably expect her failure to act to result in bodily injury to Bethany. Therefore, ***Jessica M.F.*** controls. Because the Mt. Morris policy at issue did not provide coverage for the allegations in the amended complaint, summary judgment was properly granted to Mt. Morris.

By the Court.—Order affirmed.

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