COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 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. 98-0025

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

JESSICA SMITH,

PLAINTIFF,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR-PLAINTIFF-RESPONDENT,

V.

NIKOLAS H. MARKOS,

DEFENDANT-APPELLANT,

STATE FARM FIRE AND CASUALTY COMPANY AND WEST AMERICAN INSURANCE COMPANY,

INTERVENORS-DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Nikolas H. Markos has appealed from a judgment declaring that American Family Mutual Insurance Company, State Farm Fire and Casualty Company, and West American Insurance Company have no duty to defend or indemnify Markos in a lawsuit commenced against him by Jessica Smith. Judgment was granted pursuant to motions for summary judgment filed by the three insurers. We affirm the judgment.

In her complaint and amended complaint, Smith alleged five causes of action against Markos. The first alleged that he committed an assault and battery against her by intentionally subjecting her to unauthorized and offensive bodily contact while she was babysitting his grandchildren at his residence. Her second cause of action alleged that his conduct constituted the intentional or negligent infliction of emotional distress. The third cause of action alleged that while Smith was employed as a waitress at a restaurant owned by Markos, Markos verbally and physically harassed her by making sexually offensive comments and subjecting her to offensive and sexual bodily contact. The fourth cause of action alleged that on numerous occasions at the restaurant Markos committed assault and battery against her, intentionally subjecting her to offensive bodily contact. Her fifth and final cause of action alleged that Markos' actions in the workplace constituted the intentional or negligent infliction of emotional distress.

Markos contended that homeowner's policies issued by State Farm and West American provided coverage for the alleged incident at his residence and the alleged incidents at the restaurant. He also contended that business owners' package policies issued by American Family provided coverage for the incidents at the restaurant. In contending that they had no duty to defend or indemnify

Markos in this action, all three insurers relied upon portions of their policies which excluded coverage for intentional acts. Additionally, American Family relied upon its policies' employer's liability exclusion and an employment practices exclusion. State Farm and West American also relied upon business pursuits exclusions in their policies, and State Farm contended that there was no bodily injury within the meaning of its policy. Because we conclude that the intentional acts exclusions preclude coverage under all of the policies, we affirm the judgment and find it unnecessary to address the remaining arguments of State Farm and West American, or the exclusions in the American Family policies for employer's liability and employment practices.

The standards that this court applies when reviewing a grant of summary judgment are well known and need not be repeated here. *See* ***C.L. v. School Dist. of Menomonee Falls***, 221 Wis.2d 692, 697, 585 N.W.2d 826, 828 (Ct. App. 1998). We review the trial court's decision de novo. *See* ***Millen v. Thomas,*** 201 Wis.2d 675, 682, 550 N.W.2d 134, 137 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.***

Interpretation of an insurance contract also involves this court's independent review. *See* ***C.L.***, 221 Wis.2d at 697, 585 N.W.2d at 828. Insurance policies are to be construed to give their language the common and ordinary meaning as would be understood by a reasonable person in the position of the insured. *See* ***id.***

Section II-Exclusions of the policy issued by State Farm excluded from its coverage "bodily injury or property damage: (1) which is either expected or intended by an insured; or (2) to any person or property which is the result of

willful or malicious acts of an insured." Section II-Exclusions of the policy issued by West American excluded coverage for bodily injury or property damage "which is expected or intended by the 'insured'" or is "arising out of sexual molestation, corporal punishment or physical or mental abuse." American Family's policies contained virtually identical exclusionary language as that contained in the West American policy.

These exclusions are commonly referred to as intentional acts exclusions. An intentional acts exclusion precludes insurance coverage where the insured acts intentionally and intends some injury or harm to follow from his or her acts. *See* ***Ludwig v. Dulian***, 217 Wis.2d 782, 788, 579 N.W.2d 795, 799 (Ct. App.), *review denied*, ___ Wis.2d ___, 584 N.W.2d 124 (1998). An intentional act precludes coverage when it is substantially certain to produce injury even if the insured asserts that he or she did not intend any harm. *See* ***id.*** In addition, coverage is precluded even if the harm that occurs is different in character or magnitude from that intended by the insured. *See* ***id.***

A court may infer that an insured intended harm or injury to result from an intentional act if the degree of certainty that the conduct will cause injury is sufficiently great to justify such an inference. *See* ***id.*** at 789, 579 N.W.2d at 799. Each set of facts must be considered on a case-by-case basis. *See* ***id.*** The more likely it is that harm will result from certain intentional conduct, the more likely it is that intent to harm will be inferred as a matter of law. *See* ***id.*** Furthermore, the mere fact that an insured asserts that he or she did not intend to injure or harm does not prevent a court from inferring intent to injure as a matter of law. *See* ***id.***

Applying these principles here, we conclude that the trial court properly granted summary judgment determining that the insurers had no duty to defend or indemnify Markos. The particular acts allegedly committed by Markos were all intentional, volitional acts. Moreover, intent to harm is not only pled by Smith, it may be inferred as a matter of law from the alleged conduct. Smith's allegations are of assault, battery, nonconsensual sexual contact and verbal sexual harassment. While Smith was not a minor of tender years at the time of the alleged acts as in ***K.A.G. v. Stanford***, 148 Wis.2d 158, 434 N.W.2d 790 (Ct. App. 1988), it can be inferred as a matter of law that psychological and emotional harm will result from being subjected to nonconsensual sexual contact and harassment and otherwise physically accosted. ***Loveridge v. Chartier***, 161 Wis.2d 150, 468 N.W.2d 146 (1991), is clearly distinguishable because the court's refusal to infer an intent to injure in that case was premised upon the consensual nature of the conduct. *See* ***id.*** at 174-75, 468 N.W.2d at 153.

Because intent to injure can be inferred from Markos' alleged conduct as a matter of law, his denial of intent to injure provides no basis for disturbing the trial court's grant of summary judgment. Neither does Markos' failure to plead guilty to criminal charges arising from the conduct preclude inferring intent to injure.[1] Whether intent to injure may be inferred as a matter of law depends upon the underlying alleged conduct and is not dependent upon entry of a guilty plea to criminal charges. *See* ***Schwersenska v. American Family Mut. Ins. Co.***, 206 Wis.2d 549, 559-61, 557 N.W.2d 469, 474-75 (Ct. App. 1996).

[1] Markos entered no contest pleas to charges of fourth-degree sexual assault arising out of his conduct, but did not enter guilty pleas.

The principle of "fortuitousness" is also determinative of the coverage issue. Insurance is designed to cover fortuitous losses, and losses are not fortuitous if the damage is intentionally caused by the insured. *See* ***Haessly v. Germantown Mut. Ins. Co.***, 213 Wis.2d 108, 117, 569 N.W.2d 804, 808 (Ct. App.), *review denied*, 215 Wis.2d 425, 576 N.W.2d 281 (1997). Because a person is presumed to intend the natural and probable consequences of his or her voluntary, intentional acts and because the natural and probable consequence of Markos' alleged intentional acts was injury to Smith, the damage resulting from the acts cannot be deemed fortuitous. *See* ***id.*** at 118, 569 N.W.2d at 808. Because a reasonable person would not expect to be able to purchase insurance coverage that would indemnify him or her for physical assaults or acts of nonconsensual sexual contact and harassment, coverage of Markos' alleged acts is not provided by the policies involved here. *See* ***id.*** at 117-18, 569 N.W.2d at 808; ***Hagen v. Gulrud***, 151 Wis.2d 1, 7, 442 N.W.2d 570, 573 (Ct. App. 1989).

In making this determination, we conclude that Smith's third and fifth causes of action, while including allegations of negligent infliction of emotional distress, also fall outside the scope of coverage of the policies. Any negligence theory is inapplicable in this case because the acts allegedly committed by Markos were intentional, and intent to injure flowed from those acts. *See* ***C.L.***, 221 Wis.2d at 702, 585 N.W.2d at 830. Regardless of whether Smith attempts to label any claim against Markos as negligence, the intentional quality of his conduct remains and precludes coverage for the resulting damages. *See* ***Haessly***, 213 Wis.2d at 118-19, 569 N.W.2d at 808.

Markos also argues that because he denied that the incidents alleged by Smith occurred, and because he testified that any physical contact with her consisted of inadvertently bumping against her while working at the restaurant, a

material issue of fact existed which rendered summary judgment inappropriate and compelled the insurers to provide him with a defense. We disagree. To determine whether an insurer has a duty to defend in a particular case, the allegations of the complaint must be compared to the terms of the insurance policy. *See* ***C.L.***, 221 Wis.2d at 699, 585 N.W.2d at 829. Whether a duty to defend exists depends solely upon the nature of the claim being asserted against the insured and not upon the merits of the claim. *See* ***id.*** The insurer has the duty to defend only if there are allegations in the complaint which, if proven, would be covered by the policy. *See* ***id.*** As already discussed, Smith's claims, if proven, would not be covered by any of the policies insuring Markos.[2] Consequently, the insurers have no duty to defend Markos against those claims.[3]

[2] Markos contends that, at most, he may have inadvertently bumped into Smith while working with her at the restaurant. However, Smith's claims for damages are not based on allegations that Markos accidentally and negligently bumped into her. Her claims are based on allegations that he intentionally groped and fondled her, held her against a wall, and subjected her to unwanted sexual advances. It is these claims which must be considered in determining whether a duty to defend or indemnify exists.

[3] Markos cites ***Berg v. Fall***, 138 Wis.2d 115, 405 N.W.2d 701 (Ct. App. 1987), for the proposition that because he testified that the events alleged by Smith never occurred, he thus presented a material issue of fact as to his liability, giving rise to a duty to defend by the insurers. However, ***Berg*** did not hold that insurers are required to provide a defense whenever an insured denies the allegations made against him or her, even when the allegations involve noncovered conduct. Rather, ***Berg*** held that an insurance policy's intentional acts exclusion does not apply to privileged acts of self-defense. *See* ***id.*** at 117, 405 N.W.2d at 702. Since no claim of self-defense was presented here, ***Berg*** provides no basis to disturb the trial court's grant of summary judgment.

(continued)

By the Court.—Judgment affirmed.

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

Markos also misplaces reliance on ***Elliott v. Donahue***, 169 Wis.2d 310, 485 N.W.2d 403 (1992). He cites it for the proposition that the insurers are required to defend him until such time, if ever, it is determined that he committed the acts alleged by Smith. ***Elliott*** sets forth the well-established principle that the two primary benefits received by an insured from a contract of insurance are indemnification and defense *for claims falling within the parameters of the insurance policy*. *See* ***id.*** at 321, 485 N.W.2d at 407. In fact, ***Elliott*** reiterates that an insurer's duty to defend is predicated on the allegations of the complaint which, if proven, would give rise to a right to recovery under the policy. *See* ***id.*** at 320-21, 485 N.W.2d at 407. Markos' insurers have no duty to either defend or indemnify him precisely because Smith's claims do not fall within the parameters of their policies and, if proven, would not give rise to a right to recovery under the policies.