COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2280 **Cir. Ct. No. 2014CV89**

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

CARMEN SMITH,

PLAINTIFF-RESPONDENT,

UNITED HEALTHCARE INSURANCE COMPANY AND STANDARD INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS-RESPONDENTS,

V.

DEANDRE T. PATTON,

DEFENDANT-RESPONDENT,

BADGER MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a nonfinal order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed*.

Before Reilly, Gundrum and Stark, JJ.

¶1 PER CURIAM. Badger Mutual Insurance Company appeals from a nonfinal order denying its motion for summary judgment.[1] The dispositive issue is whether its automobile liability policy provides coverage for an individual who injured someone with a car during a premeditated robbery. Because we conclude that it does not, we reverse.

¶2 In February 2011, Deandre T. Patton, then age sixteen, arranged via Craigslist to purchase a Samsung tablet from Carmen Smith. In fact, however, Patton intended to—and did—steal the tablet by having Smith meet him and an accomplice at Patton's car in a store parking lot and then driving away without paying for the item.

¶3 Unfortunately for all involved, Smith leaned into the car while Patton's accomplice examined the tablet and lunged further into it as Patton began to accelerate away. Patton's accomplice pushed or punched Smith to force him out of the car. The car then "fishtailed" on the icy surface of the parking lot, running over and seriously injuring Smith.

¶4 Patton and his accomplice were convicted on criminal charges related to the incident. Smith subsequently sued Patton and his automobile insurer, Badger Mutual, for his injuries.[2] Badger Mutual disputed coverage and moved for summary judgment on the issue. The circuit court denied the motion. Badger Mutual then filed a petition for leave to appeal, which this court granted.

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[1] This court granted leave to appeal the order. *See* WIS. STAT. RULE 809.50(3) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] At the time of the incident, Patton was a resident family member on the policy of automobile insurance issued to his parents.

¶5 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Cole v. Hubanks***, 2004 WI 74, ¶5, 272 Wis. 2d 539, 681 N.W.2d 147. Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Additionally, the interpretation of an insurance policy is a question of law that we review de novo. ***Everson v. Lorenz***, 2005 WI 51, ¶10, 280 Wis. 2d 1, 695 N.W.2d 298.

¶6 On appeal, Badger Mutual contends that the circuit court erred in denying its motion for summary judgment. Specifically, it argues that its policy provides no coverage because the injury causing event was not an "auto accident."[3]

¶7 Badger Mutual's policy provides that it "will pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." As "auto accident" is not defined in the policy, Badger Mutual urges us to look to case law for guidance.

¶8 One case Badger Mutual cites in support of its argument is ***Schinner v. Gundrum***, 2013 WI 71, 349 Wis. 2d 529, 833 N.W.2d 685. In ***Schinner***, West Bend Mutual Insurance Company's insured, Michael Gundrum, hosted an underage drinking party. ***Id.***, ¶2. One of Gundrum's guests, Matthew Cecil, assaulted and seriously injured another guest. ***Id.*** Gundrum knew that Cecil had a tendency to become belligerent when he was intoxicated, but he permitted Cecil to

[3] Alternatively, Badger Mutual argues that Patton's actions are excluded from coverage by either the policy's intentional injury exclusion or the principal of fortuitousness. Because we agree with Badger Mutual's first argument, we do not address its alternative arguments.

drink anyway. ***Id.*** The injured guest sued Gundrum and West Bend to recover damages for his injuries. West Bend disputed coverage on the ground that Gundrum's actions as a party host were intentional, and thus, there was no "occurrence" or "accident" under its homeowner's policy. ***Id.***, ¶3.[4]

¶9 The Wisconsin Supreme Court accepted review of the case and agreed with West Bend. The court determined that there was no "occurrence" or "accident" under the homeowner's policy because Gundrum intended to host an illegal underage drinking party and intended to provide alcohol to a guest known to become belligerent when intoxicated, creating a direct risk of harm resulting in bodily injury even though injury was not intended. *See* ***id.***, ¶¶8, 69, 81. In reaching this conclusion, the court emphasized the important public policy supporting its decision:

> Finding an occurrence and coverage under these circumstances would allow the host to escape responsibility for his intentional and illegal actions. We would be sending the wrong message about underage drinking parties, implying that whatever tragic consequences might occur, insurance companies will be there to foot the bill. Moreover, insurance contracts are construed from the standpoint of what a reasonable person in the position of the insured would believe the contract to mean. ***Acuity v. Bagadia***, 2008 WI 62, ¶13, 310 Wis. 2d 197, 750 N.W.2d 817; ***Liebovich v. Minn. Ins. Co.***, 2008 WI 75, ¶17, 310 Wis. 2d 751, 751 N.W.2d 764. We do not believe that a reasonable insured would expect coverage for bodily injury resulting from the hosting of a large, illegal underage drinking party.

Schinner, 349 Wis. 2d 529, ¶80.

[4] The homeowner's policy at issue in ***Schinner v. Gundrum***, 2013 WI 71, ¶¶11-12, 349 Wis. 2d 529, 833 N.W.2d 685, contained personal liability coverage for an "occurrence." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." ***Id.***, ¶13.

¶10 Although ***Schinner*** involved a homeowner's policy, we find its reasoning applicable here. By planning and carrying out a robbery facilitated by the use of a car on icy pavement, Patton created a direct risk of harm even though injury was not intended. Indeed, Patton admitted as much during a deposition through the following questions and answers:

> Q: So when you decided to quickly accelerate to get away from Carmen, you were of the understanding that the ice on the roads could play a factor in terms of your ability to get away?
>
> A: Yes.
>
> Q: And you understood that the car could fishtail or weave when you quickly accelerated, right?
>
> A: Yes.
>
> …
>
> Q: You acknowledge that prior to—Or you acknowledge prior to robbing Carmen that it was possible that he could get injured, fair?
>
> A: Yes.
>
> Q: After all, you were using a vehicle to facilitate a robbery, right?
>
> A: Yes.
>
> Q: And the fact that you were using a vehicle to facilitate a robbery, in your mind, you knew that it was an added risk for Carmen to get injured, fair?
>
> A: Yes.

Consequently, we are not persuaded that an "auto accident" occurred within the meaning of Badger Mutual's policy.

¶11 The public policy considerations in ***Schinner*** are also applicable to this case. Finding insurance coverage for Patton's actions would relieve him of

the financial consequences of purposefully using his car to facilitate a robbery. No reasonable insured would expect automobile liability coverage for bodily injury resulting from the purposeful use of a car to rob someone.

¶12 For these reasons, we conclude that Badger Mutual's policy provides no coverage for Patton's actions. Accordingly, we reverse the order of the circuit court.

By the Court.—Order reversed.

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