COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2669

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

DAVID FRIEDMAN,

PLAINTIFF-APPELLANT,

MEDICA HEALTH PLANS/ALLINA HEALTH SYSTEMS,

INVOLUNTARY-PLAINTIFF,

V.

ARNOLD J. STUEBER AND GLOBE AMERICAN CASUALTY, CO.,

DEFENDANTS,

USAA CASUALTY INSURANCE CO.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. David Friedman appeals a summary judgment dismissing his insurer, USAA Casualty Insurance Co. He contends that his USAA uninsured and underinsured motorist policy covers his injuries because they were caused by an accident. Alternatively, Friedman argues that summary judgment should not have been granted because the facts raise conflicting inferences. He submits that a jury must resolve the conflicting inferences. We agree that the facts raise conflicting inferences and therefore reverse the judgment and remand for further proceedings.

BACKGROUND

¶2 The following facts are derived from depositions and affidavits submitted to the court. On the night Friedman was injured, he stated that he went with two friends, Shawn McCarten and Melissa Burt, to the Diamond Lounge. While Friedman and his friends were sitting at the bar, Arnold Stueber, who they did not know, came up to Friedman and asked him if he wanted to buy some "whites." Friedman testified that he interpreted this as a proposition to sell him illegal drugs. He stated that he told Stueber to leave him alone, that he had no interest, and to go away.

¶3 Stueber then approached McCarten and put his arm around McCarten's shoulders. McCarten, who also had never met Stueber, stated that he was not accustomed to having a stranger walk up to him and put his arm around him. He testified that he pushed Stueber away and told him to back off. Stueber told them that if they knew who he was, they would not push him away and that he could have their families killed within a week if he wanted to. McCarten stated that he tried to ignore Stueber and asked him to leave, but Stueber continued with

the threats. He testified that he got tired of Stueber's behavior and escorted Stueber out of the bar.

¶4 Friedman stated at deposition that he heard that Stueber and McCarten had left the bar. He followed them out of the bar to see if McCarten was all right. Once outside the bar, Friedman witnessed a verbal exchange between McCarten and Stueber. Stueber, who appeared very intoxicated, agitated and tense, began taunting Friedman. He started coming toward Friedman with his fists clenched. Friedman stated that he believed Stueber was going to attack him, so he kicked Stueber between the legs. He testified that the kick did not appear to have any effect on Stueber, who then turned and went to his car, still taunting Friedman. Friedman kicked the door of Stueber's car, told Stueber to be on his way, and walked back to the bar.

¶5 Friedman heard car tires squeal. While he was still on the sidewalk in front of the bar, he stated that he turned around and saw Stueber driving his car at him. Stueber hit Friedman with his car, knocking him to the ground. Friedman was struggling to stand up when Stueber backed his car up and drove at Friedman again. Friedman jumped to get out of the way. When the car stopped, his body was on Stueber's car hood, but his ankle was pinned against the outside wall of the Diamond Lounge. Friedman lost consciousness and, when he awoke, he was shaking and his ankle was turned ninety degrees.

¶6 Friedman suffered multiple fractures to the bones around his ankle. Doctors operated to straighten out his foot, and he remained in the hospital for a week. He continues to feel pain and stiffness in his ankle and wears a brace occasionally.

¶7 Stueber had an automobile insurance policy in effect at the time of the incident with a $25,000 liability limit. However, the policy excluded coverage for damages caused by the insured's intentional acts. The trial court dismissed Stueber's insurance company from the proceedings and the dismissal was not appealed.

¶8 Friedman had a USAA policy that provided uninsured and underinsured coverage under which he sought to recover damages.[1] USAA moved for summary judgment, arguing that its policy only provides coverage for bodily injury caused by an accident. It contended that the incident between Stueber and Friedman was not an accident because Stueber intended to injure Friedman. Friedman opposed the motion arguing that, from Friedman's perspective, the incident that caused his injuries was an accident. The trial court granted summary judgment and dismissed USAA from the action. Friedman now appeals.

[1] The USAA policy provides in part:

> A. **UNINSURED MOTORISTS COVERAGE**
>
> We will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **[Bodily Injury]** sustained by a **covered person**; and caused by an accident.
>
> ….
>
> B. **UNDERINSURED MOTORISTS COVERAGE**
>
> We will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **[Bodily Injury]** sustained by a **covered person**; and caused by an accident.

ANALYSIS

¶9 Friedman argues that his injuries were caused by an accident because, from his perspective, his injuries were not intended or expected. He contends that he did not start the chain of events that led to his injury. Friedman complains that the trial court should not have granted summary judgment because the facts could lead a reasonable jury to conclude that Stueber was the aggressor. He submits that a jury should determine who provoked the events that led to his injury. We agree.

¶10 We review a grant of summary judgment de novo. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651, 476 N.W.2d 593 (Ct. App. 1991). Summary judgment is appropriate only when there are no material facts in dispute and a party is entitled to summary judgment as a matter of law. WIS. STAT. § 802.08 (1999-2000); ***Tomlin v. State Farm Mut. Auto. Ins. Co.***, 95 Wis. 2d 215, 218, 290 N.W.2d 285 (1980). If different inferences may be drawn from the facts, summary judgment should not be granted. ***Tomlin***, 95 Wis. 2d at 218. "[I]t is for the trier of the fact to draw the proper inference and not for the court to determine on summary judgment which of the two or more permissible inferences should prevail." ***Fischer v. Mahlke***, 18 Wis. 2d 429, 435, 118 N.W.2d 935 (1963).

¶11 In this case, "accident" is not defined in the policy. Whether an injury is accidental under the terms of an insurance policy is to be determined from the standpoint of the injured person. ***Tomlin***, 95 Wis. 2d at 221-22. If the events giving rise to the injuries were neither expected nor anticipated by the injured party, they are considered to be caused by an accident within the meaning of the insurance policy. ***Id.*** at 222. This general rule, however, does not apply where the injured party was the aggressor or in some way provoked the attacker

into inflicting the injuries. ***Id.*** The aggressor is the person who started the chain of events that resulted in the injury. ***Id.***

¶12 The trial court noted, "Normally, whether an accident is an accident … is one that is a question of fact for the jury." However, it determined that this case could be decided as a matter of law. The trial court concluded that Friedman's injuries were due to "provocation," without determining who the aggressor was. We thus conclude that the trial court applied the wrong test.

¶13 In ***Tomlin***, a trooper was stabbed while recovering beer from a car he stopped. ***Id.*** at 217. The court determined that the trooper's injuries were caused by an accident, although it also concluded that coverage was excluded for other reasons. ***Id.*** at 221-22, 225. USAA argues that ***Tomlin*** may be distinguished from the current case because the trooper did not act tortiously to provoke his attacker. Nevertheless, it argues that the ***Tomlin*** test, as stated above, applies to this case and that the only issue is whether these facts lead, inescapably, to the inference that Friedman was the aggressor. USAA concedes that who the aggressor was is normally a jury question, but contends that this case has undisputed facts that lead to only one reasonable inference.

¶14 The key question then, is who was the aggressor; that is, who started the chain of events that led to Friedman's injuries. ***Id.*** at 222. If Stueber was the aggressor, then Friedman has coverage, unless some other policy provision excludes coverage. If Friedman was the aggressor, he has none.

¶15 We cannot say on the record before us that, as a matter of law, Friedman started the chain of events that led to his injury. A reasonable jury could find that Stueber started the chain of events when he asked Friedman to buy drugs and then continued harassing him and his friend. A reasonable jury could also

find that Friedman started the chain of events when he followed Stueber out of the bar, engaged in conversation with him, and kicked him. Then again, a jury could find that the exchange was over when Friedman walked back to the bar[2] and that Stueber became the aggressor when he turned his car around and drove into Friedman, eventually pinning him against the wall.[3] Summary judgment was thus inappropriate, and we reverse and remand for a trial.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[2] The record does not reflect the time delays between events.

[3] It is interesting to note that the parties debate whether they were provoked to respond or acted in self-defense. Although not necessary to set them forth here, suffice it to say that their various arguments, relying on contested inferences, demonstrate that the circumstances present fact questions to be resolved by a jury.