COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2049 **Cir. Ct. No. 97-CV-357**

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

THOMAS G. AND SANDRA G., PARENTS AND GUARDIANS OF TARA G., A MINOR,

PLAINTIFFS-APPELLANTS,

V.

MICHAEL R., A MINOR, KAREN R., AS PARENT OF MICHAEL R., AND ROGER B., AS CUSTODIAN OF MICHAEL R.,

DEFENDANTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Thomas and Sandra G., parents and guardians of Tara G., a minor, appeal a judgment dismissing American Family Mutual Insurance Company from this action. The issue is whether an American Family homeowner's insurance policy issued to Roger B. provides coverage to Roger B. and Michael R. for the injuries allegedly sustained by Tara. We conclude that the policy excludes coverage for intentional acts such as those alleged here. Therefore, we affirm.

¶2 Tara G.'s parents filed this action against Michael R., his mother, his mother's boyfriend, Roger B. (Roger B. had assumed a parental relationship with Michael), and their insurers.[1] They alleged that Michael, who was ten years old at the time, sexually assaulted Tara, who was then four years old. They contended that Michael's mother and Roger B. negligently failed to warn them of Michael's propensity to engage in inappropriate sexual acts with young girls, negligently failed to supervise and control Michael, and negligently inflicted emotional distress upon them.[2] They also contended that Michael acted negligently when he assaulted Tara. This case was previously on appeal to this court and the supreme court on issues unrelated to the current appeal. ***Gritzner v. Michael R.***, 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906. After deciding the legal issues presented, which need not be recounted here, the supreme court remanded for further proceedings. ***Id.***, ¶74.

[1] Tara's parents also brought a claim against Georgia B., Roger B.'s mother, which was later dismissed.

[2] The circuit court dismissed the claim for negligent infliction of emotional distress against Roger B. The amended complaint later filed by Tara's parents alleges causes of action based on physical and mental distress.

¶3 On remand, Roger B.'s homeowner's insurance provider, American Family, moved for summary judgment dismissing it from the case, arguing that its policy did not provide coverage for the conduct alleged in the complaint under its policy exclusions for abuse and intentional conduct. The circuit court initially denied the motion. After the case was reassigned to a different judge, however, American Family again moved for summary judgment. The circuit court then concluded that summary judgment was appropriate and dismissed the case.[3]

¶4 We review the grant of a summary judgment motion *de novo*, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We first examine "the moving papers and documents to determine whether the moving party has made a *prima facie* case for summary judgment …." ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979). "To make a *prima facie* case for summary judgment, a moving defendant must show a defense which would defeat the plaintiff." ***Id.*** (footnote omitted). "If the affidavit in support of the motion makes out a *prima facie* case for summary judgment we must then examine the affidavits in opposition to the motion." ***Id.*** at 567. "To defeat the motion … the opposing party [must] set forth facts showing that there is a genuine issue for trial." ***Id.***

¶5 "The interpretation of an insurance contract and the conclusion as to whether coverage exists under a given contract are questions of law which we review independently." ***Ledman v. State Farm Mut. Auto. Ins. Co.***, 230 Wis. 2d

[3] The circuit court concluded that there was no coverage under the abuse exclusion.

56, 61, 601 N.W.2d 312 (Ct. App. 1999). The exclusions at issue in this appeal provide:

> **Coverage D - Personal Liability and Coverage E - Medical Expense** do not apply to:
>
> 1. **Abuse. We** will not cover **bodily injury** or **property damage** arising out of or resulting from any actual or alleged:
>
>   a. sexual molestation or contact;
>
>   b. corporal punishment; or
>
>   c. physical or mental abuse of a person.
>
> ….
>
> 10. **Intentional Injury. We** will not cover **bodily injury** or **property damage** caused intentionally by or at the direction of any **insured** even if the actual **bodily injury** or **property damage** is different than that which was expected or intended from the standpoint of any **insured**.

¶6 Tara G.'s parents contend that their claims sound in negligence and, as such, coverage for those claims should not be precluded by the intentional acts or abuse exclusions. American Family relies on ***Tara N. v. Economy Fire & Casualty Insurance Co.***, 197 Wis. 2d 77, 89, 540 N.W.2d 26 (Ct. App. 1995), for the proposition that "[a]n exclusion provision which excludes the act of the wrongdoer also operates to exclude coverage for the parents' alleged negligent supervision or control of the wrongdoer." We agree with American Family that ***Tara N.*** is dispositive. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (we are bound by previously published decisions of the court of appeals). Coverage for the negligence claims is precluded if there is no coverage for the acts upon which the negligence claims are grounded.

¶7 Turning to whether Michael's acts are covered under the policy, we conclude that there is no coverage under the intentional acts exclusion.[4] The central allegation underlying all of the claims is that Michael sexually abused Tara, conduct that if proved true cannot be anything other than intentional and, therefore, excluded from coverage by the policy, which explicitly states that there is no coverage for "bodily injury … caused intentionally by … any insured." Tara's parents argue that summary judgment is not appropriate based on this exclusion because "there is a genuine dispute of material fact about what Michael did to Tara and where it occurred." *See* ***Kraemer Bros.***, 89 Wis. 2d at 567 (to defeat a motion for summary judgment, the opposing party must "set forth facts showing that there is a genuine issue for trial"). We reject this argument. There are no *material* facts in dispute. To the contrary, Michael admitted to his mom, Roger B., Tara's parents, and the social worker that he had inappropriate sexual contact with four-year-old Tara. And, Michael has pointed to nothing that suggests that he did not act intentionally,[5] while the affidavits in support of the motion for summary judgment show the opposite. According to the affidavit of Tara's mother, Tara told her mother that Michael said he hated Tara and would kill her and her parents if Tara told them what had happened. In sum, Michael has

[4] Because we conclude that there is no coverage under the intentional acts exclusion, we need not address whether the abuse exclusion also precludes recovery. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

[5] In his response to the motion for summary judgment, Michael asserts that there is an issue of fact as to his intent because he is so young. However, he never alleges that he did not in fact intend to harm Tara. Circumstances that mitigate Michael's behavior, such as his young age, might do just that—mitigate his behavior—but nothing in this record suggests a factual dispute as to whether Michael intentionally assaulted Tara G.

not "set forth facts showing that there [are] genuine issue[s] for trial." ***Id.*** Therefore, American Family was entitled to summary judgment as a matter of law.

¶8 Tara's parents also argue that we should not use the rule of inferred intent to conclude that Michael's conduct was intentional as a matter of law. The rule of inferred intent allows intent to injure to be inferred as a matter of law when an adult sexually assaults a young child because, regardless of the perpetrator's claim that he meant no harm, injury is substantially certain to result. *See* ***K.A.G. v. Stanford***, 148 Wis. 2d 158, 162-64, 434 N.W.2d 790 (Ct. App. 1988). Tara's parents contend that we should not apply this rule because it has not yet been applied to cases in which a minor child has sexually assaulted another minor child. However, we need not reach this issue because Michael has not set forth facts showing that there is a material factual dispute regarding his intent.

¶9 Tara's parents have raised other arguments that they have developed to varying degrees. We have carefully considered them, but have concluded that they are unpersuasive. We need not address them in this opinion. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (we are not required to address each and every issue raised on appeal), *superceded by statute on an unrelated issue as stated in* ***State v. Curtis***, 218 Wis. 2d 550, 556, 582 N.W.2d 409 (Ct. App. 1998).

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).