COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP997 **Cir. Ct. No. 2010CV60**

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

JANE DOE, BY HER GUARDIAN AD LITEM, SUSAN A. HANSEN, KURT SCHMOLDT AND STACY SCHMOLDT,

PLAINTIFFS-APPELLANTS,

WISCONSIN LABORERS HEALTHFUND,

INVOLUNTARY-PLAINTIFF,

V.

CHRISTA THORIN AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Kurt Schmoldt, Stacy Schmoldt, and Jane Doe, by her guardian ad litem (collectively, the "Schmoldt Plaintiffs"), appeal an order of the circuit court in which the court ruled that American Family Mutual Insurance Company ("American Family") had no duty to defend and no duty to indemnify Christa Thorin with respect to the Schmoldt Plaintiffs' claims against her for injuries sustained by Jane Doe. The order was entered after the circuit court granted American Family's motion for summary judgment. On appeal, the Schmoldt Plaintiffs argue that the circuit court erred when it ruled that the abuse exclusion in the American Family homeowners' insurance policy held by Thorin applied to exclude coverage under the policy.

BACKGROUND

¶2 This case arises from injuries caused to Jane Doe, the infant daughter of Kurt Schmoldt and Stacy Schmoldt, while Christa Thorin was babysitting her. Thorin went outside and left Jane Doe in a crib inside the house. Also inside the house was Thorin's thirteen-year-old son, Preston, who was home sick from school. In an attempt to quiet Jane Doe's crying, Preston pushed Jane Doe's head down in her crib and threw a toy phone onto her face, which resulted in injury to the baby. Preston stated during his deposition that he intended to toss the toy onto her face, and that he figured it would probably hurt her or cause her pain.

¶3 The Schmoldt Plaintiffs filed an action seeking compensation from Thorin and from American Family, the issuer of Thorin's homeowner's insurance policy, for the injury sustained by Jane Doe. American Family moved for summary judgment, arguing that exclusions for abuse, business pursuits, and intentional injury in Thorin's insurance policy barred coverage. The circuit court

granted the motion on the basis that the abuse exclusion barred coverage, and did not address the issue of whether the other two exclusions applied. The circuit court entered an order stating that American Family had no duty to defend or indemnify with respect to the claims in this case. The Schmoldt Plaintiffs now appeal, arguing that this is a negligence case, and that the exclusions in the American Family policy do not apply to bar coverage.

DISCUSSION

¶4 The framework for determining whether coverage is provided under the terms of an insurance policy is well-established. ***Olson v. Farrar***, 2012 WI 3, ¶40, 338 Wis. 2d 215, 809 N.W.2d 1. The interpretation of an insurance policy, including a determination as to whether the policy is ambiguous, presents a question of law that we review de novo. ***Ellifson v. West Bend Mut. Ins. Co.***, 2008 WI App 86, ¶13, 312 Wis. 2d 664, 754 N.W.2d 197. We begin with the language of the policy, and we give the language its common and ordinary meaning, that is, the meaning understood by a reasonable person in the position of the insured. ***Siebert v. Wisconsin Am. Mut. Ins. Co.***, 2011 WI 35, ¶31, 333 Wis. 2d 546, 797 N.W.2d 484. A provision in an insurance policy is ambiguous if, when read in context, it is reasonably susceptible to more than one construction. ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 536-37, 514 N.W.2d 1 (1994).

¶5 The policy provision at issue in this case is found under "Exclusions – Section II" of the American Family policy that was issued to Thorin. The provision states:

> 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.

¶6 The Schmoldt Plaintiffs argue that the exclusion provision does not apply in this case. They argue that the term "abuse," as used in this section, is ambiguous and should be construed against American Family and in favor of coverage. *See* ***Kaun v. Industrial Fire & Cas. Ins. Co.***, 148 Wis. 2d 662, 669, 436 N.W.2d 321 (1989). The Schmoldt Plaintiffs assert that abuse can be interpreted to include a wide range of intentional and unintentional acts and that, because the American Family policy has a separate exclusion for intentional injury, the meaning of the abuse exclusion is uncertain. The Schmoldt Plaintiffs also argue that, in some contexts, abuse can mean overuse of something or a course of conduct, such as "alcohol abuse" or "abuse of authority," and that the meaning of the term in the American Family policy is unclear.

¶7 The Schmoldt Plaintiffs correctly point out that the meaning of the word "abuse" may differ slightly in different contexts. However, that does not render the term ambiguous in this particular context. In the American Family policy at issue, we conclude that the term "abuse" is unambiguous. The fact that a separate exclusion within the policy prevents coverage for intentional injury does not render the abuse exclusion ambiguous. The intentional injury exclusion prevents coverage for injury "caused intentionally by or at the direction of any insured," even if the actual injury was "different than that which was expected or intended." While there may be certain injuries caused by acts that would qualify as both abuse and as intentional injury, that fact does not create ambiguity. *See* ***Smith v. State Farm Fire & Casualty Co.***, 192 Wis. 2d 322, 331, 531 N.W.2d 376

(Ct. App. 1995) (holding that no ambiguity arises merely because the existence of two exclusions provides two separate reasons for denying coverage).

¶8 The circuit court found that the injury sustained by Jane Doe was bodily injury arising from physical abuse. This determination involved a mixed question of fact and law. The first question is what, in fact, actually happened to Jane Doe; the second question is whether those facts, as a matter of law, constitute "abuse" as that term is used in the American Family policy. *See* ***DOR v. Exxon Corp.***, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979), *aff'd*, 447 U.S. 207 (1980). As to the court's finding that Jane Doe suffered bodily injury caused by Preston, we will not set aside that finding because an examination of the record shows that the finding is supported by the record and is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (2009-10).[1] Preston stated during his deposition that he pushed Jane Doe's head down and threw a toy phone at her face. He stated that he meant to throw the toy onto her face and that he figured it would probably hurt her or cause her pain. Jane Doe's mother, Stacy Schmoldt, stated in her deposition that her daughter had bruises on her face when she picked her up from Thorin's home on the day of the incident. These record facts support the court's finding that Preston caused bodily injury to Jane Doe.

¶9 We turn, then, to the question of whether the bodily injury suffered by Jane Doe was "abuse," as that term is used within the abuse exception of the American Family policy. We conclude that it was, and that throwing a toy at a baby's face and injuring the baby constitutes abuse, within the common and ordinary meaning of the word. We are not convinced by the Schmoldt Plaintiffs'

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

argument that the word "abuse," in the context of the American Family policy, would be interpreted by a reasonable person in the position of the insured to mean a course of conduct or overuse of something. Even if we were to read "abuse" in that way, the abuse exception would still apply. Throwing a toy to injure a child is a misuse of the toy, and bodily injury to a baby of the type inflicted by Preston would be considered physical abuse whether it was caused by a single act or a course of conduct.

¶10 Having concluded that the physical abuse caused by Preston to Jane Doe fits within the abuse exception, we must also conclude that the abuse exception precludes coverage for Thorin's alleged failure to control or supervise Preston. The Wisconsin Supreme Court has held that negligence of a parent or other entrusted person is not actionable in the absence of a wrongful or negligent act of the child or entrustee. ***Bankert v. Threshermen's Mut. Ins. Co.***, 110 Wis. 2d 469, 478, 329 N.W.2d 150 (1983). The "injury" or "occurrence," for purposes of determining whether there is insurance coverage under a policy, is the act of the child or entrustee. *See* ***id***. at 478-79. In this case, the act of the child, Preston, was throwing a toy at Jane Doe. As we have discussed, that act was a form of physical abuse excluded from coverage under the American Family policy. Applying the analysis used in ***Bankert***, we conclude that, because the Schmoldt Plaintiffs do not have a compensable claim under the American Family policy for the injury caused by Preston's act of abuse, which is excluded by the policy, they also do not have a claim against Thorin under the policy for failure to control or supervise Preston. *See* ***id***.

¶11 We note that, in the argument summary section of their brief, the Schmoldt Plaintiffs assert that this case is a negligence case. However, no arguments are raised or addressed by either party as to the standard for when an

adult may be held liable for physical harm caused to a child by another child for the adult's negligent failure to control the child who caused the harm, as set forth in ***Gritzner v. Michael R.***, 2000 WI 68, ¶67, 235 Wis. 2d 781, 611 N.W.2d 906. As this issue was not argued by the parties, nor was it decided by the circuit court, this court need not decide the issue here. We also need not decide the issue of whether Jane Doe's injury is excluded by the intentional injury exclusion or the business exclusion in the American Family policy, as we affirm the decision of the circuit court on other grounds; specifically, that the abuse exclusion prevents coverage.

By the *Court.*—Order affirmed.

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