# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

November 20, 1996

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.

## NOTICE

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**No. 95-3337**

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

**KY T. RASMUSSEN,**

**Plaintiff-Appellant,**

**CHERRIE A. RASMUSSEN,**

**Plaintiff,**

**WINNEBAGO COUNTY,**

**Involuntary-Plaintiff,**

**v.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**Defendant-Respondent,**

**GERALD C. OELERICH,**

**Defendant.**

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed*.

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

PER CURIAM. Ky T. Rasmussen has appealed from a judgment dismissing his complaint against American Family Mutual Insurance Company. The trial court granted summary judgment after determining that the homeowner's and boat owner's insurance policies issued by American Family to its insured, Gerald C. Oelerich, provided no coverage for injuries caused to Rasmussen, a Winnebago County sheriff's officer, when he was shot by Oelerich while attempting to effect an arrest of Oelerich. We affirm the trial court's judgment.

The homeowner's policy issued by American Family to Oelerich defined an "occurrence" for purposes of coverage as an "accident." It specifically excluded from coverage bodily injury "which is expected or intended by any insured." The boat owner's policy issued to Oelerich similarly excluded bodily injury "which is expected, or intended or caused by an intentional act of ... an insured."

American Family argued that the intent to injure which invokes the policy exclusion for injury "expected or intended" by an insured could be inferred on the facts of this case as a matter of law. The trial court agreed and granted summary judgment.

Summary judgment may be used to address issues regarding insurance policy coverage. ***Raby v. Moe***, 153 Wis.2d 101, 109, 450 N.W.2d 452, 454 (1990). On appeal, we apply the same methodology as the trial court and decide *de novo* whether summary judgment was appropriate. ***Coopman v. State Farm Fire & Casualty Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). A motion for summary judgment should be granted when the pleadings, depositions, affidavits and other papers on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***Raby***, 153 Wis.2d at 109, 450 N.W.2d at 455.

Based on ***Raby*** and the record in this case, we agree with the trial court that there is no dispute as to any material fact and that American Family was entitled to judgment dismissing it from the case. In order for an exclusion

for bodily injury "expected or intended" by an insured to preclude insurance coverage in a given case, two requirements must be met. ***Id.*** at 110, 450 N.W.2d at 455. First, the insured must intentionally act. ***Id.*** Second, the insured must intend some injury or harm to follow from that act. ***Id.***

Rasmussen contends that intent to act cannot be found as a matter of law in this case because, in an affidavit from Oelerich submitted in opposition to summary judgment, Oelerich denied intending to shoot or injure Rasmussen. He contends that the only relevant inquiry concerns Oelerich's intent at the specific moment of the shooting, and that the events surrounding the shooting and Oelerich's course of conduct on the night of the shooting cannot be relied upon to determine his intent as a matter of law.

Based upon ***Raby***, we disagree. In ***Raby***, the Wisconsin Supreme Court concluded that an exclusion for injury "expected or intended" by an insured barred coverage in an action for damages arising from the shooting of a clerk during an armed robbery. ***Id.*** at 104-05, 450 N.W.2d at 453. The parents of the deceased clerk brought an action against the driver of the getaway car, who waited outside during the robbery, and his insurer. The Supreme Court concluded that summary judgment should have been granted dismissing the insurer, even though the matter had gone to trial and the jury found that the driver neither expected nor intended that the clerk would be injured during the robbery. ***Id.***

In reaching this conclusion, the court determined that the driver's intent to act was established as a matter of law because it was undisputed that he had willingly and actively assisted in the commission of the armed robbery by driving the getaway car. ***Id.*** at 110-11, 450 N.W.2d at 455. It further noted that the driver knew that one of his co-conspirators entered the store with a loaded shotgun intending to point it at the clerk to successfully carry out the robbery. ***Id.*** at 114, 450 N.W.2d at 457. It concluded that some type of bodily injury was so substantially certain to occur during the commission of an armed robbery that the law would infer an intent to injure on the part of the insured, without regard to his claimed intent. ***Id.*** at 114-15, 450 N.W.2d at 457.

The undisputed facts in the summary judgment record in this case indicate that Rasmussen was shot by Oelerich during the course of a standoff

with police, who had cordoned off Oelerich's residence and were attempting to arrest him for the murder of his wife. The record indicated that police believed Oelerich was in his boat on Lake Winnebago, and that at one point prior to the shooting of Rasmussen shots were fired from the lake in the direction of the Oelerich residence. It was also undisputed that, at approximately 4:00 a.m., Rasmussen observed Oelerich's boat entering a channel adjacent to his property, told him twice to raise his hands, heard him say "okay, okay," and then was shot in the head with shotgun pellets from a gun fired by Oelerich. After shooting Rasmussen, Oelerich engaged in an hours long standoff with police, during which he shot at a squad car.

Based on these undisputed facts, we conclude that both intent to act and intent to injure must be inferred as a matter of law.[1] Like the driver's willing and active participation in an armed robbery, Oelerich's actions in evading and then resisting arrest, and picking up or brandishing a loaded shotgun rather than acquiescing in Rasmussen's order to put up his hands, mandate a conclusion that he was acting intentionally. *Cf.* ***id.*** at 110-11, 450 N.W.2d at 455. Because the risk of injury or death inherent in his conduct was so substantial, intent to injure on his part must also be inferred as a matter of law, without regard to his actual claimed intent. *See id.* at 114-15, 450 N.W.2d at 457.

The trial court therefore properly concluded that the exclusions under the American Family policies prohibited coverage. Based on this disposition, we need not address the remaining arguments raised by Rasmussen.

*By the Court.*—Judgment affirmed.

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

[1] In making this determination, we have not relied upon Oelerich's criminal conviction following a jury trial of the attempted first degree intentional homicide of Rasmussen. We therefore need not address Rasmussen's argument that principles of issue preclusion (formerly called collateral estoppel) do not bar him from litigating issues decided in the criminal trial.