COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 00-0737

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

WELLS ANDREW MCGIFFERT,

PLAINTIFF,

V.

FRANK CARL ROZOWSKI, JR. AND FRANKIE'S TAVERN, INC., A WISCONSIN CORPORATION,

DEFENDANTS,

GRE INSURANCE GROUP,

PLAINTIFF-RESPONDENT,

V.

FRANKIE'S TAVERN, INC., A WISCONSIN CORPORATION AND FRANK CARL ROZOWSKI JR., INDIVIDUALLY

DEFENDANTS-APPELLANTS,

WELLS A. MCGIFFERT,

DEFENDANT.

APPEAL from a judgment of the circuit court for Douglas County: JOSEPH MCDONALD, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Frank Rozowski, Jr., and Frankie's Tavern, Inc., appeal a summary judgment holding that GRE Insurance Group has no duty to defend or indemnify against Wells McGiffert's claims following a tavern altercation. The circuit court dismissed the action against GRE on the ground that the policy's intentional act exclusion applied. Rozowski and the tavern argue that disputes of material fact regarding intent preclude summary judgment. They also argue that the trial court erroneously relieved GRE of its duty to defend against McGiffert's negligence claim.

¶2 Our analysis differs from that advanced by Rozowski and the tavern. Because of the parties' narrow approach,[1] the only question is whether the complaint alleges conduct which, if proven, would be excluded from coverage by the intentional acts exclusion. Due to the policy language in question, we conclude that McGiffert's negligence claims are not excluded by the intentional acts exclusion, under our supreme court's analysis in ***Doyle v. Engelke***, 219

[1] Because the parties' briefs focus solely on the exclusion, and not coverage, our discussion is limited to the applicability of the exclusion.

Wis. 2d 277, 580 N.W.2d 245 (1998). Therefore, we reverse the summary judgment and remand for further proceedings.[2]

¶3 Rozowski is the owner and an employee of Frankie's Tavern, Inc. McGiffert brought this action for personal injuries following an altercation at Frankie's Tavern. McGiffert's second amended complaint alleges that while a patron at Frankie's, he accidentally broke a Pabst mirror hanging on the wall. He offered to pay for replacing the mirror and, when he reached into his wallet for his credit card, an employee grabbed his wallet and telephoned Rozowski. McGiffert claimed he was prevented from leaving until Rozowski arrived. When Rozowski entered the tavern, he allegedly slapped McGiffert on the back of his head, grabbed him by the shirt and threw him around the tavern. Rozowski demanded McGiffert's watch in payment, and McGiffert declined, offering his credit card.

¶4 McGiffert's second amended complaint further alleges that "Rozowski then threw [McGiffert] to the floor, struck him in the face with his hand and demanded the watch or [Rozowski] would 'ram a barstool down his throat' and 'cut off his hand.'" McGiffert "feared for his life and handed over the watch hoping that the outrageous and assaultive behavior of [Rozowski] would stop." Rozowski then demanded McGiffert's silver ring. McGiffert handed over the ring and was escorted from the tavern. McGiffert claimed that as a result of

[2] The tavern also suggests that a corporate entity cannot have intent within the meaning of the exclusion. It cites no authority for this proposition. Also, there is no indication that this issue was raised and determined at the trial court level. Therefore, we do not address it for the first time on appeal. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

Rozowski's assault, he suffered a deviated septum, numerous bruises and abrasions.

¶5 McGiffert's second amended complaint alleged assault and battery, false imprisonment, conversion, and negligence. The complaint stated further:

> 35. That Defendants' conduct and actions were willful, wanton, and made with a total and intentional disregard for the Plaintiff's rights.
>
> 36. That Defendants knew or should have known that the Plaintiff would be injured from the conduct of the Defendants.
>
> 37. That Defendants either had the purpose to injure Plaintiff Wells McGiffert, or Defendants were aware their conduct was practically certain to cause that result.
>
> 38. Likewise, that Defendant acted vindictively and maliciously towards the Plaintiff; that Defendants' actions were the result of hatred, ill will, and desire for revenge, or inflicted under circumstances where insult or injury is intended.

¶6 The second amended complaint also alleges a negligence claim based upon the tavern's "duty to reasonably act to ensure the safety of Plaintiff while Plaintiff was present on Defendants' premises." In addition, the complaint pled a negligence claim based upon negligent hiring, training and supervision of several employees, including the "bouncers," the manager, and Rozowski himself.

¶7 GRE, who insured Frankie's Tavern under a commercial general liability policy, sought a declaration that it had no duty to defend or indemnify Frankie's Tavern. GRE claimed that various exclusions applied, including the following:

> **Exclusions.** This insurance does not apply to:
>
> **(a) Expected or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

¶8 GRE moved for summary judgement on the basis of its "expected or intended injury" exclusion. The trial court granted GRE's summary judgment motion. This appeal follows.

I. ASSAULT AND BATTERY

¶9 The parties devote the majority of their arguments to the intentional versus nonintentional nature of the assault and battery allegations. We therefore first address that issue.[3] Rozowski argues that the trial court erroneously substituted its judgment for that of a jury when it determined that McGiffert's claims arose out of intentional acts. Without citation to the record, Rozowski states that he filed an affidavit in support of a motion for a protective order that states: "[I]t is my belief that I did not intentionally harm this plaintiff."[4] Also,

[3] The parties do not address the false imprisonment or conversion claims, and therefore we do not address those issues. ***Reiman Assocs., Inc. v. R/A Adver., Inc***., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

[4] Rozowski's citations to the record are inadequate.

> [W]e decline to embark on our own search of the record, unguided by references and citations to specific testimony, to look for … evidence to support [the argument]. Section (Rule) 809.19(1)(e), Stats., requires parties' briefs to contain "citations to the … parts of the record relied on" and we have held that where a party fails to comply with the rule, "this court will refuse to consider such an argument …." "[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]."

Tam v. Luk, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (citations omitted).

without identifying the specific factual dispute, Rozowski contends that "The Second Supplemental Memorandum of Law in Opposition to Motions for Summary Judgment which was filed by the Plaintiff on January 11, 2000, also extensively discusses the conflict in the testimony that is likely to be adduced at the trial of this matter."

¶10 We review a grant of summary judgment independently, applying the same methodology as the circuit court. ***Doyle***, 219 Wis. 2d at 283. Where no material facts remain in dispute, we must determine whether the moving party is entitled to judgment as a matter of law. ***Id.*** This case requires us to interpret an insurance policy to determine if coverage exists and whether the insurer is subject to a duty to defend. The interpretation of words or phrases in an insurance policy and the existence of coverage under that policy are questions of law that we review de novo. ***Id.*** at 283-84.

¶11 In determining an insurer's duty to defend, we apply the factual allegations presented in the complaint to the terms of the policy, "confin[ing] our analysis to the four corners of the complaint." ***Id.*** at 284 n.3. We liberally construe those allegations and assume all reasonable inferences. ***Id.*** at 283. "An insurer has a duty to defend a suit where the complaint alleges facts which, if proven at trial, would give rise to the insurer's liability under the terms of the policy." ***Id.*** at 284-85. "[T]he duty to defend hinges on the nature, not the merits, of the claim." ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 266, 593 N.W.2d 445 (1999).[5] We resolve any doubt as to the existence of the duty to defend in favor of the insured. ***Id.***

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[5] We therefore express no opinion about the sufficiency of the pleadings or the merits of the claims.

¶12 GRE relies upon what is commonly referred to as an intentional acts exclusion. "An intentional-acts exclusion precludes insurance coverage only where the insured acts intentionally and intends some harm or injury to follow from the act." ***Loveridge v. Chartier***, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991). An intentional acts exclusion precludes insurance coverage when it is substantially certain to produce injury even if the insured asserts that he or she did not intend any harm. ***Id.*** Also, coverage is precluded even if the harm that results differs in character or magnitude from what the insured intended. ***Id.*** at 169.

¶13 Applying these principles here, we conclude the insurer had no duty to indemnify or defend the insured for an assault and battery claim. The policy unambiguously excludes coverage for injuries "expected or intended from the standpoint of the insured." *See* ***Hagen v. Gulrud***, 151 Wis. 2d 1, 6 n.3, 442 N.W.2d 570 (Ct. App. 1989); *see also* ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 708, 278 N.W.2d 898 (1979). Intent to harm is not only pled by McGiffert, it may be inferred as a matter of law from the alleged conduct. ***Pachucki***, 89 Wis. 2d at 708. Also, "[i]n Wisconsin, the duty of an insurer to provide a defense to its insured is determined by the complaint and not by extrinsic evidence." ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992). Therefore, Rozowski's affidavit, falling outside the four corners of the complaint, provides no basis for not applying the exclusion to coverage for the alleged assault and battery claim.[6]

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[6] Neither does Rozowski's motion to withdraw his pleas to criminal charges arising from the conduct preclude inferring intent to injure. Whether intent to injure may be inferred as a matter of law depends upon the underlying conduct alleged in the complaint and is not dependent upon entry of a guilty plea to criminal charges. *See* ***Schwersenska v. American Fam. Mut. Ins. Co.***, 206 Wis. 2d 549, 559-61, 557 N.W.2d 469 (Ct. App. 1996).

II. NEGLIGENCE CLAIMS

¶14 Our analysis is not, however, complete without separately reviewing McGiffert's negligence claims. The complaint alleges that Rozowski and the tavern "had a duty to reasonably act to ensure the safety of Plaintiff while Plaintiff was present on Defendant's premises." It also alleges a claim based upon hiring, training and supervision of several tavern employees.[7] Rozowski contends that the complaint bases its negligence claim not on his intentional acts, but rather on the tavern's negligence as a business and tavern. *See* ***Miller v. Wal-Mart Stores***, 219 Wis. 2d 250, 263-64, 580 N.W.2d 233 (1998). He contends that the trial court erroneously relieved GRE of its duty to defend against McGiffert's negligence claim.

¶15 Here, the policy in question contains language that is similar to that reviewed in ***Doyle***. In that case, the policy stated that it "won't cover bodily injury … that's … intended by the protected person." ***Id.*** at 290. As in ***Doyle***, the negligence claim here does not focus on acts of bodily injury intended by the insured. Instead, like the negligence claim in ***Doyle***, it focuses on the employer's "negligence in supervising its employees—whether or not the employees committed the underlying wrong intentionally." ***Id.*** at 291. Our supreme court concluded that "the intentional act exclusion cannot apply to [the employer's] negligent conduct." ***Id.*** We discern no reason this holding should not apply to both McGiffert's negligence claims asserted here.

¶16 GRE, relying on ***Berg v. Schultz***, 190 Wis. 2d 170, 526 N.W.2d 781 (Ct. App. 1994), contends that the trial court correctly focused on the nature of the

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[7] *See* ***Miller v. Wal-Mart Stores***, 219 Wis. 2d 250, 263, 580 N.W.2d 233 (1998).

underlying tort rather than the insured's alleged negligence. In ***Doyle***, however, our supreme court drew a distinction with ***Berg*** based on policy language.[8] It stated the insurer's reliance on ***Berg***

> for the proposition that an employer cannot be held liable for the intentional acts of its employees is unworkable. In ***Berg***, the court was confronted with an insurance exclusion which, unlike the clause here, specifically excluded coverage for claims "arising out of" an employee's commission of an assault and battery.

Doyle, 219 Wis. 2d at 291 n.6 (citing ***Berg***, 190 Wis. 2d at 174). Here, the policy does not exclude claims "arising out of" an assault and battery. We conclude, therefore, that GRE's intentional acts exclusion does not apply to McGiffert's negligence claims.[9]

[8] To the extent that the ***Berg v. Schultz***, 190 Wis. 2d 170, 526 N.W.2d 781 (Ct. App. 1994), may be perceived to conflict with ***Doyle v. Engelke***, 219 Wis. 2d 277, 580 N.W.2d 245 (1998), ***Doyle*** governs. *See* ***Purtell v. Tehan***, 29 Wis. 2d 631, 636, 139 N.W.2d 655 (1966) (Ordinarily, where there is a conflict in past decisions, the appellate court adheres to the more recent cases.).

[9] We do not address the scope of GRE's duty to defend, *see* ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992), because neither party addresses the issue. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 480, 480 N.W.2d 16 (1992).

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.