COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP2637 **Cir. Ct. No. 2004CV10711**

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

BRAD PATRENETS,

PLAINTIFF-APPELLANT,

DAWN STRIEPLING AND GABE PENCE,

PLAINTIFFS,

V.

MARK S. BECK AND THE HANOVER INSURANCE COMPANY,

DEFENDANTS,

ERIK JAMES PAULSON AND STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS,

HUMANA WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Brad Patrenets appeals the trial court's grant of summary judgment declaring that State Farm Fire and Casualty Company's policy did not cover Patrenets's claims against Erik James Paulson. Patrenets contends that the trial court erred when it determined, as a matter of law, that Paulson intended to injure him. We affirm.

I.

¶2 Patrenets was injured when Paulson sprayed bullets at a group of persons and one of the bullets ricocheted off the ground and hit Patrenets in the head. Another person in the group was also struck. Paulson was insured under a homeowner's policy issued by State Farm to Paulson's parents.

¶3 Paulson was charged with and pled guilty to first-degree reckless injury and first-degree recklessly endangering safety. *See* WIS. STAT. §§ 940.23(1)(a), 941.30(1). Patrenets and his parents then sued Paulson and State Farm, alleging, as material, that Paulson "negligently discharged a firearm near a group of individuals, and was otherwise negligent, resulting in injuries to … Patrenets."

¶4 Paulson was deposed by State Farm. He testified that on the night of the shooting, he got into a fight at a house party and left to "[b]low some steam off." Paulson claimed that a few minutes later, while he was walking back to the

house to get his truck, a group of people in the parking lot next to the house began to yell profanities and chase him. Paulson testified that he ran to his truck, pulled out a gun, and ran across the street so that he "wouldn't hit nothing [*sic*] if [he] shot." Paulson said that he fired one shot "into the air in the direction of the group." Paulson also testified that when the crowd kept coming toward him, he fired six shots "at the ground in front of" the group. He said that he then got into his truck and drove away.

¶5 Paulson testified at his deposition that he did not realize he had hit someone until he was arrested by the police. Paulson claimed that he did not intend to hit anyone and that, because of his claimed inexperience with guns, he did not believe that any of the bullets would ricochet off the ground. He agreed at his deposition, however, that "guns are dangerous weapons" that "have the capabilities of seriously injuring someone if you shoot at them."

¶6 State Farm sought a summary-judgment declaration that it had no duty to defend or indemnify Paulson under the intentional-acts exclusion in its homeowner's policy, which provided:

> 1. Coverage L [Personal Liability] and Coverage M [Medical Payments to Others] do not apply to:
>
> a. **bodily injury** or **property damage**:
>
> (1) which is either expected or intended by the **insured**; or
>
> (2) which is the result of willful and malicious acts of the **insured**.

(Bolding in original.) As we have seen, the trial court granted State Farm's summary judgment motion, concluding that Paulson's intent to injure was established by his criminal convictions. *See* ***Raby v. Moe***, 153 Wis. 2d 101, 110,

450 N.W.2d 452, 455 (1990) ("a plea of guilty constitutes an unqualified, express admission by the defendant which may be used against him in a subsequent civil action").

II.

¶7 We review *de novo* a trial court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2).

¶8 While the question of whether someone had the "intent to inflict injury" is generally a question of fact, ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 711, 278 N.W.2d 898, 902 (1979), there is intent to injure as a matter of law "where injury is substantially certain to result" from volitional conduct, ***K.A.G. v. Stanford***, 148 Wis. 2d 158, 163, 434 N.W.2d 790, 792 (Ct. App. 1988). This is a narrow rule, however. ***Ibid.*** There are two requirements to its application: (1) the conduct must be intentional, and (2) the conduct must be substantially certain to cause injury. ***Ibid.***

¶9 Patrenets claims that the trial court erred when it concluded that coverage was precluded under the policy's intentional-acts exclusion because "the facts surrounding Paulson's discharge of a handgun" do not support an inference of intent to injure. Patrenets points to Paulson's deposition testimony and argues that Paulson's intent cannot be inferred as a matter of law because Paulson "took steps to *avoid* injury," such as shooting into the air and at the ground. (Emphasis in Patrenets's main brief on appeal.) We disagree.

¶10 "[A]n insured cannot prevent a court from inferring his intent to injure as a matter of law by merely asserting he did not intend to injure or harm." ***Ludwig v. Dulian***, 217 Wis. 2d 782, 789, 579 N.W.2d 795, 799 (Ct. App. 1998). As Professor William Lloyd Prosser commented:

> "Intent … is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does…. The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it."

Pachucki, 89 Wis. 2d at 711, 278 N.W.2d at 902 (second set of ellipses in ***Pachucki***; quoted-source citation omitted).

¶11 The undisputed facts establish Paulson's intent to injure as a matter of law. Paulson testified at his deposition that he intentionally shot a gun toward a group of approaching people:

> Q Okay. And then after you got to that open area did you turn towards the group that was chasing you?
>
> A Yes.
>
> Q How far away were they?
>
> A About 50 feet.
>
> Q And it was at that point that you shot in the direction of that group that was approaching you?
>
> A Up in the air. I fired one shot and they kept coming.
>
> Q Okay. When you said you fired one shot did you fire one shot straight up in the air?
>
> A No, towards -- towards --

> Q Towards the group?
>
> A Yes.
>
> Q Okay. So you fire one shot into the air in the direction of that group; is that correct?
>
> A Way above their heads.
>
> Q Okay. But it was in the direction of that group, correct?
>
> A Yes.
>
> Q And after that one shot they kept running at you?
>
> A Yes.
>
> Q Then did you fire again?
>
> A At the ground in front of them.
>
> Q So after they kept running at you[,] you then fired at the ground in front of them, correct?
>
> A Yes.
>
> Q How far away from you were they when you fired at the ground in front of them?
>
> A About 40 feet.
>
> Q How many times did you fire at the ground in front of them?
>
> A Six.
>
> Q And again, when I say that you fired at the ground in front of them, you'd agree that you were firing in their direction, correct?
>
> A Yes.

Although Paulson also claimed that he did not intend to hit anyone, shooting at a group, "at the ground in front of them," as Paulson admitted he did, was so dangerous that it was "substantially certain" to result in some type of bodily injury. *See* ***Schwersenska v. American Family Mut. Ins. Co.***, 206 Wis. 2d 549, 556, 557 N.W.2d 469, 473 (Ct. App. 1996) (insured "must be held to know the

substantial risk of injury inherent in taking [another person] to confront a seemingly angry mob with a semi-automatic deer rifle and fifteen to twenty rounds of ammunition").[1]

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[1] We do not address Patrenets's claim that the trial court erred when it relied on Paulson's criminal convictions to establish intent, because Paulson's intent to injure is inferred as a matter of law from the undisputed facts. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614, 620 (Ct. App. 1995) (appellate court may affirm trial court's holding on a theory or reasoning different from that relied on by the trial court).