COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2007

David R. Schanker
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. 2005AP1653

Cir. Ct. No. 2004CV780

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

DUSTIN R. ELBING,

PLAINTIFF,

TOUCHPOINT HEALTH PLAN, INC.,

INVOLUNTARY-PLAINTIFF,

V.

MATTHEW J. BLAIR,

DEFENDANT-APPELLANT,

AMERICAN FAMILY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

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

¶1 PER CURIAM. This is a personal injury action arising out of a hockey fight. Matthew Blair appeals a summary judgment concluding American Family Insurance did not provide coverage for injuries sustained by Dustin Elbing, the other fighter. Because two separate exclusions from coverage in the American Family policy apply here, we affirm the judgment.

BACKGROUND

¶2 Elbing and Blair were players for opposite teams in a hockey game played June 30, 2002. According to Elbing, he pushed Blair into the boards while both players were going for the puck. Blair then got up off the ice, threw his stick down, dropped his gloves, and punched Elbing at least six times, including once in the face. Elbing stated he turned away to protect himself when he saw Blair drop his gloves and did not attempt to punch back.

¶3 Blair's story was slightly different. According to Blair, Elbing had been engaging in dirty, cheap plays throughout the game. Toward the end of the game, Elbing cross-checked Blair into the boards from behind.[1] Blair pushed Elbing then, in Blair's words, "I kind of looked at [Elbing] and said you know drop your gloves, let's go and then I punched him in the face and that was it." Blair characterized his actions as "the natural reaction coming from playing hockey. More of a defense mechanism, you know, it wasn't my intention to hit him and break his nose or anything like that. It was more of a defense, head thing, you send a message." Blair pled no contest to disorderly conduct, a class B misdemeanor, in connection with the incident and was found guilty.

[1] Blair explained that a "cross-check" is a penalty in hockey and involves hitting the opposing player into the boards using the stick and body simultaneously.

¶4 On June 28, 2004, Elbing filed suit against Blair and American Family, Blair's insurer. Elbing alleged claims for negligence and battery, and demanded compensatory and punitive damages. American Family moved for summary judgment, arguing coverage was barred under two exclusions in its policy: one for intentional acts and one for conduct that results in a criminal conviction. The circuit court rejected American Family's argument based on its criminal conviction exclusion, but agreed with American Family that Blair's actions were intentional acts as defined in the policy. The court therefore granted American Family summary judgment.

DISCUSSION

¶5 We review summary judgments without deference, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** "If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance," summary judgment is not appropriate. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶6 American Family's intentional acts exclusion provides:

> **Intentional injury.** [American Family] 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**. (Emphasis in original.)

American Family argues the undisputed facts show Blair's conduct fits within this exclusion. We agree.

¶7 As we stated in a similar case, “hitting another person in the face is the type of act which is so certain to cause harm that the person who performed the act can be said to have intended the harm.” ***Smith v. Keller***, 151 Wis. 2d 264, 271, 444 N.W.2d 396 (Ct. App. 1989). Blair does not argue he did not intend to hit Elbing, or that he did not intend to cause any injury to Elbing. Blair does not—nor could he—argue the exclusion does not apply because he did not intend the precise harm that actually resulted. *See* ***id.***

¶8 Instead, Blair argues there is a disputed material fact as to whether he was acting in self-defense. He relies on his statement that his actions were “more of a defense mechanism” and “the natural reaction coming from playing hockey.” American Family apparently concedes its policy provides coverage for privileged self-defense. *See* ***Berg v. Fall***, 138 Wis. 2d 115, 121, 405 N.W.2d 701 (Ct. App. 1987) (construing a similar exclusion as providing coverage for privileged self-defense).

¶9 However, an intentional acts exclusion allows coverage only where an insured acts in privileged self-defense. ***Id.*** at 121. Privileged self-defense exists only when an individual reasonably believes he or she is in danger of bodily harm. ***Crotteau v. Karlgaard***, 48 Wis. 2d 245, 250, 179 N.W.2d 797 (1970). Here, neither Elbing nor Blair testified Blair was reacting to any threat of bodily harm when he punched Elbing. To the contrary, when Blair dropped his gloves, Elbing turned away to protect himself and did not attempt to punch back. Under these circumstances, a trier of fact could not conclude Blair was acting in privileged self-defense.

¶10 Next, Blair argues his conduct should be judged by a negligence standard, not as an intentional tort, because it was part of an organized team

activity. He relies on ***Lestina v. West Bend Mut. Ins. Co.***, 176 Wis. 2d 901, 904, 501 N.W.2d 28 (1993). However, ***Lestina*** did not involve any intentional torts. ***Id.*** The only question in that case was whether the proper legal standard for non-intentional injuries caused as part of an organized sporting activity was recklessness or negligence. ***Id.*** at 906-07. ***Lestina*** does not stand for the proposition that injuries caused during an organized sporting activity can never be intentional; in fact, the court specifically acknowledged that "a player in a recreational team contact sport should be liable" when he or she commits an intentional tort. ***Id.*** at 906.

¶11 Finally, Blair argues the differences in the parties' accounts of the altercation create a material factual dispute. He points out that the parties' accounts are not entirely consistent on "the viciousness or illegality" of Elbing's initial check, how many times Blair struck Elbing, or the time period that elapsed between the initial check and Blair's punch.

¶12 None of these facts are material. The key under the American Family policy is whether Elbing's injuries were "caused intentionally" by Blair. For purposes of intentional torts, conduct is intentional where the actor "actually meant some harm to follow from a particular act or where some harm is substantially certain to follow from an act according to common experience." WIS JI—CIVIL 2001 (1995). The only reasonable inference here is that when Blair punched Elbing in the face, he meant to cause harm to Elbing. This is true regardless of what Elbing did to provoke Blair, how long Blair waited before throwing the punch, or how many punches Blair threw.

¶13 Even if American Family's intentional acts exclusion did not apply, American Family still would not provide coverage here. American Family's

policy also excludes coverage for injuries "arising out of … violation of any criminal law for which any insured is convicted." The parties agree Blair pled no contest to disorderly conduct, a violation of criminal law, as a result of the hockey fight.

¶14 Blair argues a no contest plea is not an admission under Wisconsin law, and therefore cannot be grounds for excluding coverage. WISCONSIN STAT. § 904.10[2] provides that "evidence of" a plea of no contest is not admissible in a subsequent proceeding against the defendant. Courts have consistently interpreted that statement to mean that a criminal judgment of conviction can be used only to prove "the fact of conviction and the legal consequences flowing therefrom" but not the truth of the allegations underlying the criminal proceeding. ***Gedlen v. Safran***, 102 Wis. 2d 79, 96, 306 N.W.2d 27 (1981). For example, a plaintiff's prior conviction, on a no contest plea, for battery to an officer was not admissible to defend against his later civil action for excessive use of force. ***Robinson v. City of West Allis***, 2000 WI 126, ¶¶38, 44, 239 Wis. 2d 595, 619 N.W.2d 692. However, a dentist's judgment of conviction was admissible in a proceeding to revoke his dental license where revocation was available for conviction of a crime involving moral turpitude. ***Lee v. Wisconsin State Bd. of Dental Exam'rs***, 29 Wis. 2d 330, 333-34, 139 N.W.2d 61 (1966).

¶15 Here, the American Family policy excludes coverage because of the fact that Blair was convicted, not based on any admission by Blair derived from his no contest plea. *See* ***Gedlen***, 102 Wis. 2d at 96.

---

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

By the Court.—Judgment affirmed.

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