COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP611 **Cir. Ct. No. 2003CV2275**

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

ROGER W. SMITH AND ANTOINETTE M. SMITH,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Reversed and cause remanded for further proceedings.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 HIGGINBOTHAM, P.J. Antoinette M. and Roger W. Smith appeal an order granting American Family Mutual Insurance Company's motion for summary judgment. The Smiths challenge American Family's refusal to

indemnify them under their home insurance policy for damages resulting from a fire started by Antoinette. The circuit court concluded that American Family properly denied the Smiths' claim because the policy's initial grant of coverage indemnified only "accidental" losses, and that the only reasonable inference arising from the undisputed facts is that the fire was not started by accident. The circuit court further concluded the policy's intentional acts exclusion also barred recovery. Because we conclude that an issue of material fact exists as to whether Antoinette possessed the state of mind to intend to start the fire, we reverse the circuit court's order of summary judgment and remand for further proceedings.

Background

¶2 The following is taken from the summary judgment materials and pleadings. Roger and Antoinette Smith, husband and wife of over forty years, own a home in Madison. In the mid-1990's, Antoinette became addicted to alcohol. Antoinette's drinking magnified existing problems with depression and anxiety, for which she was prescribed medication. Prior to the August 8, 2002 fire that damaged the Smiths' home, Antoinette attempted suicide on two occasions.

¶3 Antoinette's behavior became increasingly erratic in the years and months preceding the fire. Roger and Antoinette experienced marital difficulties. Roger stated in deposition testimony that while Antoinette was intoxicated, she threatened on several occasions to kill herself and to set fire to their home. At her deposition, Antoinette stated that she could not recall making such threats:

> Q: … Prior to the night of the fire, it was your husband's testimony that you told him several times before that that you wanted to kill yourself. Do you not recall that, or do you disagree?
>
> A: I do not recall it.

> Q: Okay. It was his testimony that you had threatened to burn the house down on other occasions before August 8 of 2002. Is that something you do not recall?
>
> A: I do not recall that.
>
> Q: Now, when you were taking the drugs and then when you had alcohol, would there be things that you'd just simply black out on, you just don't remember?
>
> A: Correct.
>
> Q: Okay. So what you're telling me is that you don't remember making threats against your life or threats to burn the house down prior to the evening of the fire, but it could be that you were in sort of an alcoholic blackout?
>
> A: Correct.

Roger described Antoinette as being "[o]ut of her mind," as not "know[ing] what she was doing when she drank." One night, an intoxicated Antoinette went after Roger with a knife, then threatened to cut her wrists. As a result of this incident, Antoinette entered a plea of no contest to a charge of misdemeanor battery and was sentenced to 18 months' probation.

¶4 Roger attempted to make the home safe by dumping Antoinette's liquor bottles when he found them, and later by removing his collection of firearms from the house. Roger tried on three occasions to have Antoinette admitted for inpatient alcohol and mental health treatment.

¶5 Around July 31, 2002, Roger decided he could no longer tolerate Antoinette's behavior and moved out of the house. In the days thereafter, Roger stayed with Antoinette at the house during the day, and left after supper to stay at a relative's house in Madison. Antoinette would typically start drinking at night and call Roger to beg him to come home. Roger testified that "a couple of times" Antoinette threatened to kill herself when he refused to come home.

¶6 On the evening of August 8, 2002, Antoinette went to a meeting at the Italian Workman's Club, where she had one glass of wine. She left around 8 p.m., stopping at a liquor store on the way home to purchase a quart bottle of brandy. She apparently finished about half of the bottle that night at home, although she has no independent recollection of how much she drank.

¶7 Roger was playing cards with friends in Verona, Wisconsin, that night. Roger testified that sometime between 11:15 and 11:30 p.m., Antoinette called his cell phone. He said that he could tell that Antoinette had been drinking. Roger stated that she begged him to come home and threatened to kill herself and burn the house down if he did not. Roger told her to "knock it off," "[j]ust go lay down, go to sleep," and continued playing cards. On his way home later that night, Roger received a call from a neighbor who told him that his house was burning down, but that Antoinette was safe.

¶8 Antoinette testified she does not recall phoning Roger that night and threatening to kill herself and burn the house down. She stated she recalled standing in the master bedroom on the side of the bed next to the dog beds, and later:

> [T]here was like a 3-D movie going on, and I see this arm and it's got a hand and—an arm and a hand and the hand has a lighter, and I see this arm reaching out, and I'm watching this like it's—like I'm in the audience, and it reaches out and it puts the lighter to the curtain. And I couldn't—I mean there was no way I could stop. It was like sitting in an audience and watching this. It's so weird to try and explain that. And all of a sudden there was this wall of flames. It just—it was all around me.

Antoinette immediately ran to the porch to save her dogs and led them outside to safety. She then "turned around and … walked back in" to the burning house "to die."

¶9 As a result of the fire, Antoinette was charged with arson, contrary to WIS. STAT. § 943.02(1)(a) (2005-06),[1] and was ultimately convicted of the charge after entering a plea of no contest. The criminal complaint filed against Antoinette states that, as she walked back toward the burning building, she was stopped by Officer Terry McHugh of the City of Madison Police Department, who had been dispatched to the fire. When asked by McHugh why she had attempted to enter the burning building, Antoinette said she believed that one of her dogs was still in the house. She denied drinking any alcohol that night. When asked if she knew how the fire had started, Antoinette initially responded that it might have been started by a coffee pot that had been left on. She later said that she had seen flames coming from an electric power strip in the computer room of the home.

¶10 Three days later, Antoinette told Lieutenant James Roberts of the Madison Fire Department that an unattended cigarette must have started the bedroom curtains on fire. When Lt. Roberts said he did not believe that she was being truthful, she admitted that she set the bedroom curtains on fire with a lighter, but claimed she "did not intend for the fire to get out of hand and she only meant for the fire to burn the curtain area and not go anywhere else." Lt. Roberts' report states that Antoinette "said she lit the fire to get the attention of her husband and to show that she meant business."

¶11 The Smiths' home was insured on a policy issued by American Family Mutual Insurance Company. The Smiths sought to recover on their policy for the fire damage to the home. Antoinette was interviewed by an investigator

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

with American Family, Michael Leslie. Antoinette admitted to Leslie that she had started the fire, but said that she did not understand what she was doing and did not intend to burn down the house. When Leslie was asked in deposition whether he had reason to believe that Antoinette was lying when she told him that she did not start the fire intentionally, he said he did not.

¶12 American Family refused payment on the Smiths' claim, asserting primarily that the loss fell under the policy's exclusion for intentional acts.[2] In July 2003, Roger brought this action against American Family, alleging breach of contract for denial of the Smiths' claim.[3] In connection with the lawsuit, Antoinette was examined by Dr. Michael Spierer, a licensed psychologist. Dr. Spierer averred that his professional opinion was that on the night of the fire, Antoinette's judgment was "severely impaired, she had a confused mental state, and her ability to reason was grossly distorted as a result of the combination of alcohol, prescription medications, and severe depression." Dr. Spierer further averred that he believed that Antoinette "did not intend to cause a loss and did not intentionally and deliberately burn down the house."

¶13 American Family moved for summary judgment. In July 2004, the circuit court denied the motion, rejecting American Family's argument that it properly denied coverage under the policy's exclusion for losses caused by the

[2] The policy's intentional acts exclusion states in pertinent part: "We do not insure for loss caused directly or indirectly by any of the following.... 2. Intentional loss, meaning any loss or damage arising out of any act committed: a. by or at the direction of any insured; and b. with the intent to cause a loss."

[3] An amended complaint was filed in April 2004 which added Antoinette as a co-plaintiff, and added a claim for insurance bad faith.

insured's intentional acts.[4] The circuit court concluded that an issue of material fact existed concerning whether Antoinette intended to cause harm by her actions, or even whether she had the mental capacity to intend anything at the time of the fire. The circuit court explained: "While there is no suggestion that the damage was caused accidentally, the terms of the policy call for exclusion only when an act is committed 'a. by or at the direction of any insured; *and* b. with the intent to cause a loss.'"

¶14 Addressing the question of whether Roger, as the innocent insured, would be barred from recovery if a jury were to determine that the intentional loss exclusion precluded coverage for Antoinette, the court concluded that the policy, which prohibits recovery for intentional losses by "any insured," unambiguously denies recovery by an innocent insured for intentional losses caused by others covered under the policy.

¶15 Following the circuit court's denial of summary judgment, American Family deposed Dr. Spierer, who testified as follows about Antoinette's state of mind at the time of the fire:

> Q: Do you have an opinion to a reasonable degree of professional certainty as to whether Mrs. Smith intended to light fire to the curtain?
>
> A: It's my opinion that because of the combination of her depression and intoxication, that she probably lacked

[4] The circuit court also rejected American Family's arguments that coverage was properly denied under policy language excluding coverage for losses caused by: (1) failure to disclose known threats to the property (here, Roger's failure to disclose Antoinette's threats to burn down the house); and (2) failure to exercise all reasonable means to prevent the loss (Roger's alleged failure to stop Antoinette from starting the fire). American Family has not challenged the circuit court's order and decision rejecting these grounds for summary judgment, and we do not address them further.

> the ability to form intent in the way I usually think about that.
>
> Q: And what is your definition of intent?
>
> A: In this instance, I'm talking about a desire to set the house on fire. I think her goal was to die, and I think the fire was the vehicle for that.
>
> Q: Do you have an opinion to a reasonable degree of professional certainty as to whether Mrs. Smith intended on that evening to attempt to die?
>
> A: Yes.
>
> Q: What's your opinion?
>
> A: I believe that she did.
>
> Q: And what was her mechanism of causing her death?
>
> A: Well, I think that the mechanism she intended was that she would either be asphyxiated or burn up in the fire.
>
> ….
>
> A: The fire was the mechanism for killing herself. I think killing herself was to solve those problems.

When asked to define alcoholic blackout, Dr. Spierer stated that it "refers to a period of time for which an individual has no memory as the result of alcohol intoxication."

¶16 American Family subsequently filed a renewed motion for summary judgment, based on Dr. Spierer's testimony and the circuit court's statement in its initial summary judgment decision that "there is no suggestion that the damage was caused accidentally." The Smiths filed a cross-motion for partial summary judgment on grounds that no evidence existed in the record to support a conclusion that Antoinette intended to cause the loss. The circuit court granted American Family's renewed motion and denied the Smiths' motion. The circuit

court noted it had stated in its first decision that there was "no suggestion that the damage was caused accidentally," and concluded that language in the policy's grant of coverage section providing indemnity for "risks of *accidental* direct physical loss" (emphasis added) barred recovery on Antoinette's claim, regardless of what her intent may have been that night.

¶17 Although the circuit court concluded that its interpretation and application of "accidental" was dispositive, it nonetheless reexamined the exclusionary clause precluding recovery for intentional losses. This time, the circuit court focused on the meaning of "loss," a term not defined in the policy, concluding that "loss" was commonly understood to mean "something that is lost." In so doing, the circuit court rejected the Smiths' view that "loss" could also be reasonably read in this context to mean the total damages of an insurance claim.

¶18 Finally, the circuit court concluded that the basis for its first decision was erroneous: "[C]ontrary to [this court's] earlier summary judgment ruling, Antoinette's intent to burn, and thereby damage, at least the curtains in her bedroom can be inferred from the fact that she deliberately set them on fire with a lighter. There is no other way to interpret such behavior." The Smiths now appeal the circuit court's order granting American Family's renewed motion for summary judgment.

Standard of Review and Principles of Contract Interpretation

¶19 We apply de novo review to a circuit court's order granting a motion for summary judgment. *See* ***Linden v. Cascade Stone Co., Inc.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189. We employ the same summary judgment methodology as the circuit court in determining whether the order was properly granted. *See* ***id.*** Summary judgment is appropriate when "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). We view the facts, and the reasonable inferences drawn from those facts, contained in the movant's supporting papers in the light most favorable to the party opposing the motion. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶20 To determine whether summary judgment was properly granted in this case, we are required to interpret the language of American Family's insurance contract with the Smiths. The question of whether an insurance contract provides coverage is a question of law that we review independent of the circuit court's analysis. *See* ***1325 North Van Buren, LLC v. T-3 Group, Ltd.***, 2006 WI 94, ¶23, 293 Wis. 2d 410, 716 N.W.2d 822. We apply general principles of contract interpretation when interpreting an insurance contract. ***State Farm Mut. Auto. Ins. Co. v. Bailey***, 2007 WI 90, ¶22, __ Wis. 2d __, 734 N.W.2d 386. "Any ambiguity that may exist is construed in favor of the insured, while exclusions in coverage are narrowly construed against the insurer." ***Id.*** Contractual language is ambiguous if it is susceptible to two or more reasonable interpretations. ***Id.***

Analysis

¶21 The first issue we address is whether, for purposes of determining insurance coverage, Antoinette intended to start the fire, or whether the fire was an accident. When considering insurance coverage disputes, we typically start by determining whether the policy's initial grant of coverage extends to the insured's claim. *See* ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2,

¶24, 268 Wis. 2d 16, 673 N.W.2d 65. We then examine the exclusionary clauses to see whether any of them bar coverage on the claim. ***Id.*** However, in this case, the question of whether the fire was "accidental" in the language of the initial grant of coverage raises the same issue regarding Antoinette's intent as does the policy's exclusion for "intentional losses." We therefore address the issue of intent both for coverage and the exclusion together.

Grant of Coverage for Accidental Loss and Exclusion for Intentional Loss

¶22 In the initial grant of coverage section of the Smiths' home insurance policy, the "**PERILS INSURED AGAINST**" part provides, under the heading "**COVERAGE A – DWELLING AND DWELLING EXTENSION**," as follows: "**We** cover risks of accidental direct physical loss to property described in Coverage A …, unless the loss is excluded in this policy." Under "**LOSSES NOT COVERED**," the policy states that "**We** do not cover loss to the property described in Coverage A … resulting directly or indirectly from or caused by one or more of the following," which includes "1. Losses excluded under **EXCLUSIONS – SECTION I**."

¶23 American Family contends that, regardless of whether Antoinette intended to start the fire, the fire was not an "accidental … loss" covered under the policy's initial grant of coverage.[5] We disagree. We conclude that whether the

[5] The distinction between "accidental … loss" and "intentional loss" that American Family seeks to make here appears to be the result of the circuit court's statement in its first decision that there was "no suggestion that the damage was caused accidentally." In its renewed motion for summary judgment, American Family focused on this statement, persuading the circuit court that if there truly was "no suggestion" that the loss was accidental, coverage would not exist under the policy's initial grant of coverage for "risks of accidental … loss." We note that the circuit court's statement regarding whether the loss was accidental was made in passing and not offered for the purpose of deciding the question of whether coverage existed under the initial grant of coverage.

fire was "accidental" raises the issue of whether Antoinette intended to start the fire. The term "accidental" is not defined by the Smiths' policy. We therefore consult a dictionary to ascertain the ordinary and common meaning of the word. *See* ***American Girl***, 268 Wis. 2d 16, ¶37. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1993) defines "accidental" as "happening or ensuing without design, intent, or obvious motivation or through inattention or carelessness." Under this definition, "accidental" describes an event that is characterized by a lack of intent. We therefore turn to the policy's exclusion for intentional losses to guide our discussion on whether American Family is entitled to summary judgment on the issue of coverage.

¶24 The "**EXCLUSIONS**" section of the policy, "**PART A**," provides that "[t]he following exclusions apply to Coverage A …. **We** do not insure for loss caused directly or indirectly by any of the following," which includes "2. **Intentional Loss**, meaning any loss or damage arising out of any act committed: a. by or at the direction of any **insured**; and b. with the intent to cause a loss."

¶25 The exclusion for intentional losses defines "intentional loss" as "any loss or damage arising out of any act committed: a. by or at the direction of any **insured**; and b. with the intent to cause a loss." The Smiths do not dispute that the fire was started by Antoinette. The disputed issue is whether Antoinette did so "with the intent to cause a loss." The Smiths contend that the circuit court erred in granting American Family's motion for summary judgment because an issue of material fact exists as to whether Antoinette possessed the state of mind necessary to intend to cause the loss.

¶26 The parties' focus on the term "loss" in the phrase "with intent to cause a loss." American Family contends that the circuit court correctly

interpreted "loss" to unambiguously mean "something that is lost." The Smiths contend that the meaning of "loss" is not unambiguous here, arguing that loss may also be reasonably interpreted to mean "the amount of a claim of an insurer by an insured," AMERICAN HERITAGE COLLEGE DICTIONARY 1063 (3d ed. 1993). The Smiths suggest that, for the exclusion to apply, American Family would have to show that Antoinette intended to cause the total loss of the home in the fire, not merely to start the fire or, perhaps, to cause her own death. American Family responds that the Smiths' interpretation is absurd because it would require proof that the insured intended to cause the total "amount of [the] claim." American Family, citing ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 710-12, 278 N.W.2d 898 (1979), argues that the insurer need only prove that the insured intended to commit the act that caused the loss (here, light the curtains) for an intentional acts exclusion to apply.

¶27 In ***Pachucki***, the supreme court reviewed a jury verdict denying insurance coverage by application of an exclusion for "bodily injury or property damage which is either expected or intended." ***Id.*** at 705. The insured in ***Pachucki*** sought coverage for an eye injury suffered while playing a game with co-workers in which they shot "greening pins" at each other. ***Id.*** at 706. Pachucki contended on appeal that the intentional acts exclusion applied only if his co-workers intended to cause the specific loss he sustained, the eye injury. Because no evidence was presented at trial that his co-workers intended to cause the eye injury, Pachucki argued that the jury verdict was invalid. The legal issue presented in ***Pachucki*** was thus whether the intentional act exclusion applied when the insured did not intend to cause the specific injury suffered, but may have intended to cause some less serious injury. *See* ***id.*** at 707.

¶28 Following a majority of jurisdictions that had considered this question, the ***Pachucki*** court concluded that, for coverage to be precluded by an intentional acts exclusion, the actor must intend to cause some harm, but not necessarily the harm actually sustained by the insured. ***Id.*** at 709. ***Pachucki*** restated the majority rule as follows: "[O]nce it is found that harm was intended, it is immaterial that the actual harm caused is of a different character or magnitude than that intended." ***Id.*** The ***Pachucki*** court thus affirmed the jury's verdict even though no evidence existed that the co-workers intended to seriously injury Pachucki's eye because intent to cause some injury could be inferred by the co-workers' actions. *See* ***id.*** at 713-14.

¶29 Applying ***Pachucki***, we conclude the intentional loss exclusion applies if Antoinette intended the act that caused the loss, i.e., setting fire to the curtains, regardless of whether Antoinette intended to cause the total loss of the home. The analysis is the same under the grant of coverage for accidental loss. When determining whether the loss in this case was accidental, the focus of the inquiry is on whether Antoinette intended to set the curtains on fire. Therefore, American Family is entitled to summary judgment on the issue of coverage as to Antoinette if no material issue of fact exists concerning whether Antoinette intended to set fire to the curtains.

¶30 American Family suggests that ***Pachucki***'s conclusion that intent to cause injury may be inferred from the circumstances of a case mandates judgment in favor of American Family here. American Family is mistaken. ***Pachucki*** arose on a challenge of a jury verdict against the insurer. The court's task in ***Pachucki*** was to determine whether a jury *could have* reached the conclusion it did. The ***Pachucki*** court concluded that a jury could have inferred intent to cause injury based on the circumstances presented in that case. Unlike ***Pachucki***, the present

case arises on summary judgment, and our task today is to determine whether a jury could reach a judgment in favor of the Smiths on the affidavits and other evidentiary submissions. Here, while intent to set fire to the curtains may be inferred from the circumstances, we must determine whether, based on the record, this inference is the only reasonable one available. We now turn to the summary judgment materials to address this question.

¶31 American Family suggests that Antoinette's intent to start the fire is demonstrated by the multiple threats she made to burn the house down. American Family points to Roger's testimony that Antoinette threatened to burn the house down on multiple occasions, the last being in her call to him the night of the fire. American Family also suggests that Antoinette demonstrated intent by changing her story to investigators multiple times on the night of the fire and in the days thereafter. American Family also points to deposition testimony of the Smiths' expert, Dr. Spierer, who asserted his belief that Antoinette intended to kill herself on the night of the fire, and that the fire was the mechanism for doing so.

¶32 Antoinette asserts that she did not intend to set the curtains on fire. She points to her testimony that she did not recall making threats to burn down the house in the weeks when she was drinking heavily leading up to the fire. She notes testimony that she had been drinking heavily on the night of the fire, and that she recalled little about what happened before the fire started. She contends that her recollection of starting the fire is not consistent with a volitional act. She notes that she testified that she saw a hand put the lighter to the curtain, and that she was "watching this like it's—like I'm in the audience, and it reaches out and it puts the lighter to the curtain." Antoinette further notes that Dr. Spierer testified that he believed that "because of the combination of her depression and intoxication …

[Antoinette] probably lacked the ability to form intent in the way I usually think about that."

¶33 Viewing the evidence in the light most favorable to the Smiths, we conclude that a disputed issue of material fact exists as to whether Antoinette intended to set fire to the curtains. The question of intent is generally an issue of fact to be determined by a fact finder. *See, e.g.*, ***Pachucki***, 89 Wis. 2d at 711; ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 739, 593 N.W.2d 814 (Ct. App. 1999). Here, the summary judgment materials show a triable issue exists concerning whether Antoinette formed the intent to start the fire. As Antoinette testified:

> [T]here was like a 3-D movie going on, and I see this arm and it's got a hand and—an arm and a hand and the hand has a lighter, and I see this arm reaching out, and I'm watching this like it's—like I'm in the audience, and it reaches out and it puts the lighter to the curtain. And I couldn't—I mean there was no way I could stop. It was like sitting in an audience and watching this. It's so weird to try and explain that. And all of a sudden there was this wall of flames. It just—it was all around me.

¶34 Moreover, Antoinette's severely intoxicated state supports an inference that she lacked the capacity to form an intent to set the curtains on fire. We note that in the criminal law context, a defendant may offer a defense of intoxication (whether voluntary or involuntary) to negate the existence of the state of mind essential to the crime charged. *See* WIS. STAT. § 939.42 ("An intoxicated or a drugged condition of the actor is a defense … if such condition … [n]egatives the existence of a state of mind essential to the crime …."). A defendant is entitled to a jury instruction regarding the defense of intoxication when evidence exists that the defendant was intoxicated at the time of the offense. *See* CHRISTINE M. WISEMAN, ET AL., WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 17.26 (1996). Of course, as one treatise notes, "juries greet the

intoxication defense with great skepticism and reluctance." ***Id.*** Nonetheless, the question of whether intoxication negated the defendant's capacity to intend to commit an intentional act is a jury question in a criminal matter. We consider the criminal code's treatment of the potential effect of intoxication on the capacity to form intent to be instructive here.

¶35 It may very well be that a jury will reach the conclusion that Antoinette intended to start the fire. However, the procedure of summary judgment is not a trial on the affidavits. *See*, *e.g.*, ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶31 n.12, 297 Wis. 2d 458, 725 N.W.2d 944. We conclude that Antoinette has met her burden of raising an issue of material fact to preclude summary judgment.

¶36 American Family protests that Antoinette's capacity to form intent is not at issue here because the Smiths' own expert, Dr. Spierer, testified that Antoinette "intended" to kill herself that night. It notes that Dr. Spierer stated that the fire was "the mechanism she intended" for causing her death. It further notes that Roger testified that he told a psychiatrist he had sought out for Antoinette shortly after the fire that she had "tried killing herself by burning the house down."

¶37 We agree that the above cited testimony of Roger and Dr. Spierer support *a* reasonable inference that Antoinette intended to start the fire. However, Antoinette's testimony and other testimony of Dr. Spierer support a competing conclusion that Antoinette lacked the capacity to intend to start the fire. Dr. Spierer's complete deposition testimony includes his opinion that Antoinette lacked the ability to form intent:

> Q: Do you have an opinion to a reasonable degree of professional certainty as to whether Mrs. Smith intended to light fire to the curtain?

> A: It's my opinion that because of the combination of her depression and intoxication, that she probably lacked the ability to form intent in the way I usually think about that.

Thus, it is apparent that there is a factual dispute concerning whether Antoinette intended to start the fire. We therefore conclude that the issue of Antoinette's intent must be tried.

Existence of Coverage for Innocent Insured

¶38 We next address whether Roger is entitled to coverage as the innocent insured even if a jury were to find that Antoinette intended to start the fire and the intentional loss exclusion therefore applied. The Smiths contend that denial of coverage to Roger as the innocent insured violates public policy as enunciated by the supreme court in ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 326 N.W.2d 727 (1982). Applying ***State Farm Fire & Cas. Ins. Co. v. Walker***, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990), we conclude that the circuit court correctly determined that Roger is not entitled to coverage as the innocent insured under the unambiguous terms of the policy.

¶39 In ***Walker***, we addressed whether an insurance policy could by its terms preclude recovery by all insureds for the wrongful actions of one insured. ***Walker*** examined ***Hedtcke***, in which the supreme court determined that an insurance company's denial of recovery to an innocent insured for the actions of another insured violated public policy where the insurance policy did not unambiguously bar recovery for the innocent insured. ***Walker*** noted that the ***Hedtcke*** court based its decision on narrow grounds, declining to address whether it would violate public policy for an insurance company to deny recovery to an

innocent insured when the terms of the policy unambiguously supported the denial. ***Walker***, 157 Wis. 2d at 471 (discussing ***Hedtcke***, 109 Wis. 2d at 487-89).

¶40 ***Walker*** declined to hold that an insurance policy that unambiguously denied recovery to innocent insureds was contrary to public policy. We explained:

> For a court to declare as a matter of public policy that an insurer may not make the obligations of the insureds joint would be to upset long-established rules of insurance contract interpretation....
>
> No matter what this court's opinion is on the public policy issue of this case, it is not within the province of the appeals court to announce a public policy that has the effect of overturning long-established rules of insurance contract jurisprudence. Such a step can be taken only by the state supreme court….

Walker, 157 Wis. 2d at 471-72.

¶41 Turning to the language of the American Family policy, we note that the intentional loss exclusion precludes recovery for intentional acts committed "by or at the direction of any **insured**." We conclude that this language—precluding coverage for the intentional acts of "any" insured, not "an" insured—unambiguously creates a joint obligation of the insureds for the intentional acts of one insured, barring recovery for innocent insureds such as Roger.

Conclusion

¶42 In sum, we conclude that the circuit court erred in granting American Family's motion for summary judgment because an issue of material fact exists concerning whether Antoinette possessed the state of mind necessary to intend to start the fire. We further conclude that the Smiths' policy unambiguously bars recovery to Roger as an innocent insured in the event that a jury finds that Antoinette intended to start the fire, precluding her recovery under

the intentional loss exclusion. Accordingly, we reverse the order of the circuit court and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.