Appeal No. 02-0235 **Cir. Ct. No. 00-CV-199**

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

MICHAEL ZIEVE,

PLAINTIFF-APPELLANT,

V.

FILED

Sept. 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

JACK R. HAYES,

DEFENDANT,

STOCKHOLM MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

ERRATA SHEET

Cornelia G. Clark
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Court of Appeals District I
633 W. Wisconsin Ave., Suite 1400
Milwaukee, WI 53203-1918

Court of Appeals District III
2100 Stewart Ave., Suite 310
Wausau, WI 54401

Peg Carlson , Jennifer Krapf
Court of Appeals
Ten East Doty Street, Suite 700
Madison, WI 53703

Court of Appeals District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals District IV
Ten East Doty Street, Suite 700
Madison, WI 53703

Hon. Robert W. Wing
Circuit Court Judge
Pierce County Courthouse
414 W. Main Street
Ellsworth, WI 54011

Beverly Lucente-Berg
Circuit Court Clerk
Pierce County Courthouse
414 W. Main Street
Ellsworth, WI 54011

Arnold P. Anderson
Mohr & Anderson, LLC
P. O. Box 7988
Madison, WI 53707-7988

Joel D. Porter
Mudge, Porter & Lundeen
110 Second St., P.O. Box 469
Hudson, WI 54016-0802

John O. Murrin
Murrin Law Firm
4018 West 65th, Suite 1
Minneapolis, MN 55435

PLEASE TAKE NOTICE that corrections were made to the appeal line and paragraph 10 in the above-captioned opinion which was released on September 24, 2002. A corrected electronic version in its entirety is available on the court's website at www.courts.state.wi.us.

COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0235 **Cir. Ct. No. 00-CV-199**

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

MICHAEL ZIEVE,

PLAINTIFF-APPELLANT,

V.

JACK R. HAYES,

DEFENDANT,

STOCKHOLM MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Zieve appeals a summary judgment granted in favor of Stockholm Mutual Insurance Company.[1] Zieve argues the trial court erred by concluding that Jack Hayes' Stockholm-issued insurance policy did not provide coverage for Zieve's claims. We reject Zieve's arguments and affirm the judgment.

BACKGROUND

¶2 In September 2000, Hayes was convicted of aggravated battery by use of a dangerous weapon with intent to cause substantial bodily harm. The conviction arose from a May 2000 incident in which Hayes shot Zieve. Following Hayes' conviction, Zieve filed a civil suit alleging that Hayes "accidentally, negligently, carelessly and recklessly grabbed a gun from his room and shot [Zieve] causing serious injuries to his body and mind." Alternatively, Zieve alleged that Hayes' conduct constituted an intentional assault and battery.

¶3 In July 2001, Zieve filed a motion for summary judgment arguing that Hayes had failed to respond to Zieve's request for admissions. Stockholm intervened and moved for summary judgment, arguing that there was no coverage for Zieve's claims based on Hayes' criminal conviction and the parties' and witnesses' undisputed testimony. The trial court granted summary judgment in favor of Stockholm and this appeal followed.

[1] By order dated March 7, 2002, this appeal was submitted to the court on the expedited appeals program. Due to court congestion and the complication added by the appellant's motion to strike portions of the respondent's brief, the appeal was removed from the expedited appeals calendar.

ANALYSIS

¶4 This court reviews summary judgment decisions independently, applying the same standards as the trial court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 Zieve argues the trial court erred by concluding that Hayes' Stockholm-issued insurance policy did not provide coverage for Zieve's claims. The insurance policy provided: "We pay, up to our limit, all sums for which an insured is liable by law because of bodily injury or property damage caused by an occurrence to which this coverage applies." In turn, "occurrence" is defined as "an accident." The policy, however, included an intentional-acts exclusion that operated to exclude personal liability coverage for bodily injury or property damage resulting directly or indirectly from "an intentional act of an insured or an act done at the direction of the insured."

¶6 The trial court, concluding that Hayes' intent for purposes of the civil lawsuit was established by his criminal conviction for the same incident, granted summary judgment in Stockholm's favor. Because we conclude that Hayes' intent to injure Zieve may be inferred as a matter of law from the undisputed facts, we need not address Zieve's arguments challenging the trial court's reliance on Hayes' criminal conviction. ***Bence v. Spinato***, 196 Wis. 2d 398, 538 N.W.2d 614 (Ct. App. 1995) (On review of summary judgment, this court may affirm the trial court's holding on a theory or reasoning different from that relied upon by the trial court.).

¶7 In ***Loveridge v. Chartier***, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991), our supreme court addressed the intentional-acts exclusion, stating:

> In Wisconsin, an intentional-acts exclusion precludes insurance coverage where the insured acts intentionally and intends some harm or injury to follow from the act. … [I]ntent may be actual (a subjective standard) or inferred by the nature of the insured's intentional act (an objective standard). Therefore, an intentional-acts exclusion precludes insurance coverage where an intentional act is substantially certain to produce injury even if the insured asserts, honestly or dishonestly, that he did not intend any harm.

¶8 Similarly, in ***Raby v. Moe***, 153 Wis. 2d 101, 450 N.W.2d 452 (1990), our supreme court held that an insured's intentional participation as the driver of the get-away car in an armed robbery was so "substantially certain" to result in some type of bodily injury—there, the death of a store clerk—that the intent to injure necessary to invoke the insurance policy's intentional-acts exclusion was inferred by the facts of the case as a matter of law. ***Id.*** at 105.

¶9 Likewise, in ***Schwersenska v. American Family Mut. Ins. Co.***, 206 Wis. 2d 549, 556, 557 N.W.2d 469 (Ct. App. 1996), an insured was held to know the substantial risk of injury inherent in driving his friend to confront a "seemingly angry mob" with a semi-automatic deer rifle and fifteen to twenty rounds of ammunition. Although the insured argued that he did not expect his friend to shoot the gun, but rather, to use the gun as a scare tactic, this court inferred an intent to injure on the part of the insured as a matter of law. The court held: "What is important … is not whether the original plan was continued, but whether the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent to injure as a matter of law." ***Id.*** at 557.

¶10 Here, the undisputed facts establish Hayes' objective intent to injure Zieve.[2] Hayes testified at his criminal trial that he felt threatened by Zieve. He further testified:

> [Hayes]: I knew where the gun was. I grabbed the gun and I knew where the shells were. I opened … the drawer. I took two shells. Popped them in there and click click, stepped out of the room, and found where he was.
>
> [Defense Counsel]: And I believe you testified the first thing you did, you leveled it at, toward his head, right?
>
> [Hayes]: Yeah.
>
> [Counsel]: And what was your thought?
>
> [Hayes]: I don't know. You know, I don't know, to stop him. I don't know if I would have. I don't know what I would have done. I never had time to finish thinking. … And I had it pointed at his head. And I just, I said no, to, in my mind I went no. I wasn't going to. I wasn't going to blow his head off or anything.
>
> [Counsel]: Do you remember pulling the trigger?
>
> [Hayes]: I remember the gun going off and it surprised me. I was shocked that it went off. I was shaking so bad it went off. … As soon as I seen what it did, you know, when I seen the wound. Anyways as much as a jerk as he is, or he can be at times, I didn't want to hurt him, you know. I

[2] Zieve filed a motion to strike those portions of Stockholm's brief referring to testimony given by Hayes in his criminal trial. Zieve argued that Hayes' trial testimony was inadmissible as "former testimony" pursuant to WIS. STAT. § 908.045(1). By order dated April 26, 2002, we held the motion to strike in abeyance, noting that we would consider the motion when the appeal was taken under submission.

We conclude that Hayes' criminal trial testimony was admissible as admissions by a party opponent. *See* WIS. STAT. § 908.01(4). Admissions are the words of the party opponent offered as evidence against him and "come in as substantive evidence of the facts admitted." ***Kraemer Bros., Inc. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 569, 278 N.W.2d 857 (1979). Moreover, despite Zieve's challenge to Stockholm's reliance on Hayes' criminal trial testimony, Zieve's own brief cites Hayes' testimony in its statement of facts. We therefore deny the motion to strike.

> mean when I shot him, when the gun went off, I, his knee just blew up.

¶11 Hayes loaded the shotgun, pumped a round into its chamber, cocked it and pointed it at Zieve's head with the initial intent to shoot Zieve in the head. Although Hayes claimed that he accidentally shot Zieve in the knee as he was lowering the shotgun, Hayes' conduct was so dangerous that it was "substantially certain" to result in some type of bodily injury. Because Hayes' intent to injure Zieve is inferred as a matter of law, we affirm the judgment.[3]

By the Court.—Judgment affirmed.

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

[3] Zieve additionally argues that Stockholm's summary judgment motion should have been denied because Hayes failed to respond to Zieve's request for admissions. Even were we to conclude that Stockholm was somehow bound by Hayes' failure to respond to the request for admissions, Hayes' intent to injure may nevertheless be inferred from those admissions. Significantly, although the requests for admissions claim that the gun went off accidentally, "Request 11" states: "When you saw [Zieve], you aimed the gun at him." Likewise, "Request 13" provides: "You pointed the gun at his head and in your mind you thought no, you were not going to shoot him and you were shaking badly." Hayes' conduct in aiming a loaded shotgun at Zieve's head was so substantially certain to cause injury that Hayes' intent to injure is inferred as a matter of law.