STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1208

Jerry L. Brown,
Appellant,

vs.

American National Property and Casualty Company,
Respondent.

Filed April 28, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-07-16288

Charles D. Slane, Terry & Slane, P.L.L.C., 7760 France Avenue South, Suite 610, Bloomington, MN 55435 (for appellant)

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Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant's adult son was in an accident while driving appellant's car. Appellant challenges the district court's grant of summary judgment in favor of respondent-insurer, which denied coverage to appellant based on the policy's intentional-acts exclusion.

Appellant argues that (1) the "initial permission rule" does not apply because his son used the car outside of the scope of permission granted and is therefore not an insured person under the policy; (2) the intentional-acts exclusion does not apply because his son's intent cannot be inferred from his conduct; and (3) the "separation of insureds" clause creates an ambiguity when considered with the intentional-acts exclusion. We affirm.

D E C I S I O N

Appellant Jerry L. Brown argues that the district court erred by granting summary judgment in favor of his insurance company, respondent American National Property and Casualty Company. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A district court properly grants summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. "[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). We view the evidence in the light most favorable to the nonmoving party. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 371 (Minn. 1995).

Insured Person and the Intentional Acts Exclusion

Appellant initiated this insurance-coverage action after respondent denied a claim for property damage, car-rental expenses, and defense and indemnification. Appellant

presented the claim after his adult son, Nathaniel Brown, crashed appellant's vehicle and caused property damage to the vehicle and to property owned by the State of Minnesota. The district court found that Nathaniel was an insured person under the policy.

Appellant first argues that Nathaniel is not an insured person under the policy because he was not acting within the scope of appellant's permission when he fled from a state trooper at high speeds through residential streets. Appellant contends that because the intentional-acts exclusion applies only to "insured persons," it does not bar coverage for the damage to the state's fence and appellant's car, which occurred as a result of Nathaniel's actions.

We must first examine the language of the insurance policy. Interpretation of an insurance policy is a question of law we review de novo. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). An insurance policy is construed according to the plain and ordinary meaning of its text so as to effectuate the parties' intent. *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977). But "[t]he terms of an insurance policy should be construed according to what a reasonable person in the position of the insured would have understood the words to mean," not what the insurance company intended the text to mean. *Id.* Thus, "any reasonable doubt as to the meaning of language in a policy should be resolved in favor of the insured." *Steele v. Great W. Cas. Co.*, 540 N.W.2d 886, 888 (Minn. App. 1995), *review denied* (Minn. Feb. 9, 1996).

Here, the policy provides that:

> We will pay damages *for which an insured person* becomes legally liable because of bodily injury or property damage resulting from the ownership, maintenance, or use of your insured car . . . .
>
> . . . .
>
> There is *no coverage under* [the liability provision]:
>
> . . . .
>
> (11) for bodily injury or property damage *caused intentionally by or at the direction of any insured person*, even if the *actual injury or damage is different than that which was expected or intended*[.]

The policy defines an "insured person" as: "(a) you or a relative; (b) a person other than you or a relative using your insured car if its use is within the scope of your permission[.]" The policy defines a "relative" as "a person living with you and related to you by blood, marriage, or adoption." There is no dispute that Nathaniel is not a relative for the purposes of the policy because he did not live with appellant. Thus, whether Nathaniel is an insured person depends upon whether he was acting within the scope of appellant's permission.

The district court found that Nathaniel was acting within the scope of appellant's permission based on the "initial permission rule." Minnesota adopted the initial permission rule in *Milbank Mut. Ins. Co. v. United States Fid. & Guar. Co.*, 332 N.W.2d 160 (Minn. 1983). In *Milbank*, the Minnesota Supreme Court held that when permission to use a vehicle is initially granted, subsequent use, short of actual conversion or theft,

remains permissive even though the use is not within the contemplation of the parties or is outside the scope of the initial permission granted. 332 N.W.2d at 167.

Appellant first argues that there is a genuine issue of material fact making summary judgment erroneous, citing his own affidavit, filed some two years after the initial incident. There is no dispute that appellant gave Nathaniel permission to use the car. But in his December 14, 2007 affidavit, appellant contends that Nathaniel only had permission to use the car to travel to and from work, and that Nathaniel's use was clearly outside of the scope of appellant's permission. However, appellant's affidavit is contradicted by the complaint and appellant's deposition testimony. "A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact." *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). In *Banbury*, appellant argues that an affidavit he submitted was sufficient to defeat summary judgment. *Id.* The court was not convinced and found that because the affidavit directly contradicted earlier deposition testimony, it was insufficient to defeat summary judgment. *Id.*

Here, according to the complaint, "[s]ometime before October 7, 2005, [appellant] gave his son, Nathaniel Brown, permission to use [appellant's] automobile." Appellant stated at his October 20, 2006 deposition that "[the police] didn't provide much information whatsoever other than to confirm if I was the owner of the car and had I given [Nathaniel] permission to drive it." In addition, Nathaniel Brown testified in his deposition that "I had car troubles and I had asked—[my parents] were out of town, I had asked [them] if I could use their car for a couple days." When asked how his parents

responded, Nathaniel indicated that they agreed to let him use their car. Neither the complaint nor the deposition testimony suggests that appellant limited Nathaniel's use to driving to and from work. We conclude that appellant's affidavit, made nearly two years after the initial incident, is not sufficient to create a genuine issue of material fact. Therefore, based on the initial permission rule, the district court did not err in determining that Nathaniel was acting within the scope of permission and was an insured person under the policy.

Intent as a Matter of Law

Appellant also argues that the district court erred in determining that intent to injure can be inferred from Nathaniel's conduct, and that because there is no intent to injure, the intentional-acts exclusion does not apply. The language in an exclusionary provision is construed in accordance with the expectations of the insured party. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001). Exclusions are construed strictly against the insurer. *Id.*

"[T]he purpose of intentional act exclusions is to exclude insurance coverage for wanton and malicious acts by an insured, and therefore we may, absent a finding of specific intent to injure, infer intent to injure as a matter of law." *Id.; see also Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978) (stating "intent may be established by proof of actual intent to injure, or when the character of act is such that an intention to inflict an injury can be inferred").

"There is no bright line rule as to when a court should infer intent to injure as a matter of law; rather, the determination is made through a case by case factual inquiry."

Walser, 628 N.W.2d at 613 (quotation omitted). In cases when intent to injure has been inferred, "the insureds acted in a manner in which they knew or should have known that some harm was substantially certain to result; that is, they acted with deliberate and calculated indifference to the risk of injury." *Id.* at 614; *see also Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834, 835 (Minn. 1982) (inferred intent to injure when the insured had sexual contact with a minor foster child); *Woida v. N. Star Mut. Ins. Co.*, 306 N.W.2d 570, 573 (Minn. 1981) (intent to injure inferred when the insured drove to a construction site armed with a high-powered rifle loaded with armor-piercing bullets and fired at a guard's truck, which he knew was occupied); *Cont'l W. Ins. Co. v. Toal*, 309 Minn. 169, 177-78, 244 N.W.2d 121, 126 (1976) (intent to injure inferred when the insureds intentionally prepared themselves to inflict serious injury in order to facilitate an armed robbery). But "[t]he mere fact that the harm was a natural and probable consequence of the insured's actions is not enough to infer intent to injure." *Walser*, 628 N.W.2d at 613 (quotation omitted).

Appellant suggests that because Nathaniel's act was a "reflexive action" rather than a "calculated" or planned action, intent cannot be inferred. Appellant is correct that Minnesota courts have determined that intent cannot be inferred from reflexive actions. *See Farmers Ins. Exch. v. Sipple*, 255 N.W.2d 373, 376-77 (Minn. 1977) (no inference of intent to injure when the insured struck a farmer during a heated argument); *Caspersen v. Webber*, 298 Minn. 93, 95, 98, 213 N.W.2d 327, 328, 330 (1973) (no inference of intent to injure when the insured shoved a hat-check clerk while searching for his overcoat). But Nathaniel's actions are distinguishable from these cases. First, Nathaniel did not

strike someone with his hands; he was driving a car, which is an inherently dangerous instrument. *See Mell v. Comm'r of Public Safety*, 757 N.W.2d 702, 708 (Minn. App. 2008) (concluding that there was probable cause for arrest for second-degree assault because a pickup truck is a dangerous weapon under the assault statute). Second, Nathaniel's actions did not result from an argument or confrontation. Nathaniel decided to flee after a state patrol officer activated his emergency lights and attempted to stop him. Finally, Nathaniel's actions did not end instantaneously. It took police several minutes and two pursuit intervention technique maneuvers to stop Nathaniel. Because we conclude that Nathaniel's actions were not reflexive, we will examine whether intent to injure may be inferred from the circumstances.

In determining whether to infer intent to injure, "the facts of particular importance are those tending to show the likelihood of the harm—the greater the likelihood of the harm occurring, the more reasonable it is to infer intent." *R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995). In *R.W.*, the insured had unprotected sex without informing his partner that he had genital herpes. *Id.* at 871. The Minnesota Supreme Court held that "[u]nder these circumstances, [the insured's] decision to engage in unprotected sexual intercourse constituted a serious threat of injury to [the plaintiff] that was substantially likely to occur, and did in fact occur. We conclude that [the insured's] transmission of herpes . . . . was intentional as a matter of law." *Id.* at 873. Similarly, the district court here held that "Nathaniel Brown acted with deliberate and calculated indifference to the risk of injury; his actions were wanton, and intent should be inferred as a matter of law." The record supports the district court's determination and demonstrates that after

drinking several alcoholic drinks Nathaniel got behind the wheel of an automobile and drove at speeds far exceeding the posted speed limit. Moreover, when a state patrol officer attempted to stop him, Nathaniel fled driving at speeds exceeding 70 MPH on residential streets, where he drove through several stop signs and at least one red light. Nathaniel's decision to flee from a state patrol officer at high speeds through residential streets while intoxicated constituted a substantial threat that injury was likely to occur, and that injury did in fact occur in the form of damage to the vehicle and state-owned property. The facts and potential for injury are similar to *R.W.* Injury may not occur every time someone engages in this type of behavior, but the serious threat of injury combined with the wanton disregard for safety require that the intent to injure be inferred as a matter of law. The district court did not err in determining that the intent to injure could be inferred from Nathaniel's conduct. Accordingly, the intentional-acts exclusion applies.

The Separation of Insureds Clause

Appellant conceded at oral argument that our recent holding in *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320 (Minn. App. 2008), *review denied* (Minn. Nov. 18, 2008) is dispositive of this issue. As a result, we need not address this issue further.

Affirmed.