STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2096

State Farm Fire and Casualty Company,
Respondent,

vs.

Peter Andrew Kistner,
Respondent,

Joanne Yourchuck, as parent and natural guardian
of Chantel Marie Yourchuck, et al.,
Appellants

Filed September 8, 2009
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-08-6343

Michael J. Tomsche, Matthew R. Smith, Tomsche, Sonnesyn & Tomsche, P.A., 610 Ottawa Avenue North, Minneapolis, MN 55422 (for respondent State Farm Fire and Casualty Company)

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Tristam O. Hage, 919 Old Highway 8 Northwest, Suite 100, New Brighton, MN 55112 (for appellants)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

HALBROOKS, Judge

On appeal from the district court's grant of summary judgment to respondent State Farm Fire and Casualty Company in a declaratory-judgment action, appellants Chantel and Joanne Yourchuck contend that the district court erred by concluding that respondent Peter Kistner, an insured under a homeowners' policy issued by State Farm, acted with actual intent to injure, thereby triggering the policy's coverage exclusion for "expected or intended" acts (intentional-act exclusion). Although the district court did not reach the issues of whether Kistner's intent to injure could be inferred or whether the policy's exclusion for "willful and malicious" acts (malicious-act exclusion) applied, the parties have asked this court to address those issues. Because we conclude that summary judgment is appropriate on the basis of inferred intent, we affirm.[1]

FACTS

In the early morning hours of July 7, 2007, Kistner was concluding a night of drinking with a group of friends that included N.M. and Chantel Yourchuck. Kistner opened a case of beer, grabbed one of the glass bottles, and threw it. The bottle hit Chantel Yourchuck in the face, seriously injuring her. Kistner was charged with and pleaded guilty to third-degree assault. He testified at his plea hearing that he "intended to assault somebody," namely N.M., and that he was "trying to hurt [N.M.] with that bottle" from "just a short distance away."

[1] Because we conclude that the intentional-act exclusion bars coverage as a matter of law, we do not reach the applicability, if any, of the malicious-act exclusion.

Chantel Yourchuck and her mother, Joanne Yourchuck, commenced a negligence action against Kistner in January 2008. The following month, State Farm brought a declaratory-judgment action, arguing that the intentional-act or malicious-act exclusion bars coverage for the negligence claims brought against Kistner.

Kistner was deposed as part of discovery in both actions. At his deposition in the negligence action, Kistner testified that he threw the beer bottle at the back corner of the wall of the minivan opposite the back corner where Chantel Yourchuck and N.M. were sitting. But Kistner said that he "slipped and hit Chantel in the head." At his deposition in the declaratory-judgment action, Kistner testified that he threw the bottle with the intent to smash it against the opposite rear corner and see it explode onto N.M. Kistner said that Chantel Yourchuck was sitting on N.M.'s lap when he threw the bottle.

At the time of the incident, Kistner was covered by his parents' homeowners' insurance policy. The policy excluded from personal-liability and third-party medical-payment coverage "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." State Farm contended in the declaratory-judgment action that either or both exclusions bar coverage for appellants' claims against Kistner. State Farm moved for summary judgment, arguing that (1) Kistner's plea testimony established that he acted with actual intent to injure and that he cannot create a fact issue by directly contradicting his plea testimony; (2) Kistner's actions permit the inference of his intent to injure; and (3) Kistner's actions were willful and malicious. The district court concluded that Kistner had actual intent to injure and that Kistner could not create a factual dispute on

this issue by offering deposition testimony that contradicted his earlier plea testimony. The district court granted summary judgment on that basis and expressly stated that it was not reaching State Farm's other arguments. This appeal follows.

D E C I S I O N

On appeal from summary judgment, we view the evidence in the light most favorable to the party against whom summary judgment was granted and review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002).

I.

Appellants argue that there is a genuine issue of material fact concerning whether Kistner had sufficient intent to injure and that the district court improperly concluded that Kistner was seeking to create a factual dispute by contradicting his earlier sworn testimony. We disagree.

"In the context of summary judgment in . . . civil cases, Minnesota courts have held that a party cannot eliminate the damage done in prior evidence by providing later, contradictory evidence." *Griese v. Kamp*, 666 N.W.2d 404, 408 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). A party cannot create a factual dispute to resist summary judgment by offering a "self-serving affidavit that contradicts other testimony." *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009); *see also Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001); *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876,

881 (Minn. App. 1995). Both *Hoover* and *Banbury* cite *Camfield Tires, Inc., v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983), for this proposition.

The purpose of the rule against permitting a later contradictory affidavit to create a factual dispute is to prevent the assertion of sham defenses. *Camfield Tires*, 719 F.2d at 1365. In *Camfield Tires*, the Eighth Circuit permitted the district court to resolve the factual issue against the party opposing summary judgment "as a recognition of a sham issue" rather than as a credibility determination, which would be improper to resolve on summary judgment. *Id.* The appellate court justified the rule as protecting summary judgment, "a procedure that is of great value in eliminating the sham and frivolous case. . . . A party should not be allowed to create issues of credibility by contradicting his own earlier testimony." *Id.* at 1365–66.

Appellants argue that this rule should not be extended to encompass guilty-plea testimony that is later contradicted by deposition testimony, particularly because Minnesota law provides that an insured's guilty plea may be received in evidence as an admission to be weighed by the fact-finder as opposed to conclusive evidence of an intentional tort. *See Glens Falls Group Ins. Corp. v. Hoium*, 294 Minn. 247, 252, 200 N.W.2d 189, 192 (1972); *see also Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 530, 534 (Minn. 2003) (concluding that an insurer may not use an insured's criminal conviction that resulted from a bench trial to collaterally estop the crime victim from litigating the issue of the insured's intent).

But State Farm is not arguing that a crime victim can never litigate, in the context of a civil action, whether the tortfeasor-criminal's acts were intentional for purposes of a

policy's exclusions. State Farm simply argues that there is no genuine issue of material fact when the insured testifies in court that he intended to injure someone and subsequently provides contradictory testimony. We agree. Allowing Kistner to alter his testimony to suit different purposes would undermine core principles of both civil and criminal justice, most notably the valuable procedures of summary judgment and guilty pleas.

II.

Appellants argue that, even if Kistner's deposition testimony is excluded, the district court erroneously concluded that Kistner had actual intent to injure that is sufficient to trigger the policy's intentional-act exclusion. Interpretation of an insurance policy and its application to the facts in a case are questions of law, which we review de novo. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). When interpreting an insurance contract, words are given their natural and ordinary meaning, and ambiguities are resolved in favor of the insured. *Id.* Language in exclusionary provisions is construed strictly against the insurer. *Id.* at 613.

The intent required to exclude coverage under an intentional-act exclusion is neither the intent to act nor the intent to cause the specific injury complained of; it is the intent to cause bodily injury, "even if the actual injury is more severe or of a different nature than the injury intended." *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978). Intent to cause bodily injury may be established in two ways: by proof of actual intent to injure or by inference based on the nature of the insured's act. *Id.* Here, the district court relied on the first basis and, having found actual intent, expressly

declined to analyze the second basis. Although we generally do not consider matters not argued to and decided by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), we will affirm a district court's grant of summary judgment if it can be sustained on any ground, even one the district court did not address, *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

A. Actual intent to injure

The district court concluded that actual intent to cause bodily injury "does not need to be directed at a specific person," citing *Cont'l W. Ins. Co. v. Toal*, 309 Minn. 169, 244 N.W.2d 121 (1976), for this proposition. *Toal* involved insureds who committed armed robbery and, in the process, killed an employee of the targeted establishment. 309 Minn. at 171–72, 244 N.W.2d at 122–23. In determining that Kistner acted with actual intent to cause bodily injury, the district court appears to have relied on the supreme court's statement in *Toal* that "the facts in the instant case compel the conclusion that the insureds followed through with the armed robbery with knowledge that someone might well be injured or killed in the process." *Id.* at 177, 244 N.W.2d at 126. But in *Toal*, the supreme court did not hold that the insureds had actual intent to injure. Rather, the supreme court concluded that the insureds' acts were such that intent could be inferred. *Id.* at 177-78, 244 N.W.2d at 125-26.

The statement apparently relied upon by the district court is about inferred intent, not the transfer of actual intent from one potential victim to another. And there is considerable doubt whether the doctrine of transferred intent applies in actual-intent insurance-coverage scenarios. We note that in *Toal*, the supreme court cited with

approval an Illinois case holding that an intentional-act exclusion did not apply when "the insured intentionally fire[d] at one individual but unintentionally wound[ed] the plaintiff." *Id.* at 175 n.2, 244 N.W.2d at 125 n.2 (citing *Smith v. Moran*, 209 N.E.2d 18, 21 (Ill. App. Ct. 1965)). We also note that the supreme court has rejected the extension of another classic tort doctrine—the presumption that "a person intends the natural and probable consequences" of his acts—to actual-intent insurance-coverage scenarios. *Id.* at 175, 244 N.W.2d at 125.

We do not decide today whether the doctrine of transferred intent applies to actual-intent scenarios in the law of insurance coverage. We instead conclude that we are able to affirm the district court's grant of summary judgment to State Farm on the alternative ground of inferred intent, where the doctrine of transferred intent does apply.

B. Inferred intent to injure

Intent to cause bodily injury may be established by inference based on the nature of the insured's act. *Kemper*, 269 N.W.2d at 887; *see also B.M.B. v. State Farm Fire & Cas. Co.*, 664 N.W.2d 817, 821–22 (Minn. 2003) ("Whether proven directly or inferred, intent to cause injury reflects the insured's state of mind about the desired harmful consequences of an action by the insured." (quotation omitted)). Inferred intent arises "when the insured's actions were such that the insured knew or should have known that a harm was substantially certain to result from the insured's conduct." *Walser*, 628 N.W.2d at 613.

Here, Kistner admitted to throwing a beer bottle at N.M., with intent to hit and injure him, while Chantel Yourchuck was sitting on N.M.'s lap. In so doing, Kistner

knew or should have known that Chantel Yourchuck could be injured as a result of the bottle being thrown at N.M. Even if Kistner did not and could not have known the risk to her, it is enough that Kistner knew that someone would be injured; in the inferred-intent context, the victim need not be known or intended. *Toal*, 309 Minn. at 177, 244 N.W.2d at 126. We therefore conclude that summary judgment for State Farm is appropriate on the basis of inferred intent under the intentional-act exclusion.

Affirmed.