STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

ARTHUR P. MATA, Personal Representative of the ESTATE OF SYLVIAN SAULTMAN, Deceased, WILLIAM MASON HARDIMON, JR., Personal Representative of the ESTATE OF, WILLIAM MASON HARDIMON, Deceased,

Defendants-Appellees.

UNPUBLISHED
October 15, 1996

No. 170112
LC No. 89-108021-CZ

Before: White, P.J., and Fitzgerald and E.M. Thomas, *JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court's order denying its motion for summary disposition in this declaratory judgment action. Plaintiff had issued a homeowner's insurance policy to the now-deceased William Hardimon. Hardimon shot and killed Sylvia Saultman, then himself. Saultman's estate sued Hardimon's estate, and Hardimon's estate sought coverage from Allstate. Allstate brought this action seeking a declaration that coverage for the shooting is excluded under the policy. Allstate moved for summary disposition pursuant to MCR 2.116(C)(10). Following several hearings, the court issued a written opinion concluding that reasonable minds could differ regarding whether Hardimon intended the results of his acts, and denied Allstate's motion. We reverse.

Saultman was Hardimon's former girlfriend. She had broken her engagement with him a few months before the shooting. Apparently Hardimon then became angry and obsessed and began stalking Saultman. Hardimon started treating with a psychiatrist, but then discontinued treatment, although his obsession with Saultman continued. The shooting took place on the night of December 23, 1988. Hardimon arrived at an employee Christmas party and waited about twenty minutes until Saultman, who

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* Circuit judge, sitting on the Court of Appeals by assignment.

had been there earlier, returned to the party. When Saultman returned, Hardimon walked up to within two feet of her, drew a pistol from the waistband of his pants, and shot her three times. He did not assault or shoot anyone else. Hardimon then fled the building, and shot himself dead in the parking lot.

The Allstate homeowner's insurance policy issued to Hardimon contained the following exclusion:

> Exclusions-Losses We Do Not Cover
>
> **We** do not cover any **bodily injury** or **property damage** which may reasonably be expected to result from the intentional or criminal acts of an **insured person** or which is in fact intended by an **insured person**. (Emphasis original).

Defendants claimed that Hardimon was insane at the time of the shooting, so his actions could not be considered intentional under the policy exclusion. Hardimon had seen a psychiatrist four or five times a few months before the shooting, and was diagnosed as suffering from "adjustment disorder with mixed emotional features." An expert described Hardimon's behavior as "driven, compulsive, obsessive." One expert testified at deposition that it was virtually impossible to give an opinion regarding whether Hardimon was insane at the time of the shooting due to the lack of information. However, he believed that Hardimon likely had the capacity to form the intent to shoot or kill Saultman, since there was no evidence to suggest otherwise.

At the first hearing on Allstate's motion, the court adjourned the matter to allow defense counsel to obtain an opinion from defendants' expert, psychiatrist Emmanuel Tanay. Dr. Tanay's deposition was taken 10½months later. In his deposition, Dr. Tanay testified as follows regarding Hardimon's intent:

> Q. All right. What is your opinion, Doctor?
>
> A. In regard to what?
>
> Q. In regard to the mental status of William Hardimon at the time that he shot Sylvia Saultman on December 23, 1988.
>
> A. My opinion is that he was suffering from mental illness and that he was insane at the time, in my opinion, when he committed this act.
>
> * * *
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> A. Based upon all of the information available, including deposition, I am of the opinion that Mr. Hardimon suffered from severe suicidal depression, which was the cause of his homicidal and suicidal behavior. Had Mr. Hardimon survived killing Sylvia Saultman, and survived his own suicide attempt, I am of the opinion that the

information available would be sufficient to render the opinion that he was not criminally responsible.

It is therefore my opinion that his behavior was the result of the mental illness and that he could not adhere to the requirements of the law nor could he refrain from committing the homicide and suicide in question.

Q. Does that mean insanity, what you have just read?

A. I believe so.

Q. Now, when you talk about insanity, are you talking legally insane?

A. That's the only way one can be insane.

Q. All right.

A. Insanity is a legal term.

* * *

Q. Did he have the capacity to understand that what he was doing was wrong when he pointed a gun and shot somebody?

A. I would say that that can only be tested in some operational way. Had you asked him afterwards whether it was wrong to shoot someone, I presume he probably would have said yes.

Q. He understood you're not supposed to shoot people?

A. I assume he would have said so had he been alive. That would be my assumption.

* * *

Q. If I could maybe try to clarify it for you, assume that not shooting someone is right and assume that shooting somebody is wrong. Did Mr. Hardimon have the capacity to formulate an understanding in that regard?

A. Well, he would have an intellectual understanding, in my opinion, that shooting someone is not right.

Q. Did Mr. Hardimon have the mental capacity to refrain from shooting Sylvia Saultman on the night of the shooting?

A. No.

Q. And what do you base that on?

A. I base it upon that Mr. Hardimon was not a criminal, he was an individual who, to my best knowledge, was a law abiding citizen, that he loved Ms. Sylvia Saultman, that he suffered from mental illness, that he was suicidal, that he struggled with homicidal impulses over some time, and did indicate through his behavior that he was in need of help, that he committed the homicide under bizarre circumstances, and last not least, that he killed himself. I believe that a more clear-cut case of insane conduct cannot be provided.

Q. In you opinion, Doctor, did Mr. Hardimon have the capacity to form intent to commit murder?

A. In my opinion, he did not have the capacity to form intent, and I understand the concept.

Q. And what is your understanding of the concept of intent?

A. That a person has the choice to engage in a given behavior as a result of deliberation and not as a result of a disease of the mind, or mental illness.

* * *

Q. Dr. Tanay, if I understand your testimony correctly, Mr. Hardimon could not form the intent to do an assault and battery on Sylvia Saultman on the night in question?

A. Yes, that's true.

Q. And if I also understand your testimony correctly, he could not form the intent to do a willful, wanton act of assault on the night in question?

A. In my opinion, he could not form the specific intent of committing a crime, that is my opinion.

At the second hearing, held three months after Dr. Tanay's deposition was taken, defense counsel asked to adjourn the matter so that he could obtain Dr. Tanay's opinion regarding Hardimon's intent under the applicable civil standard. The court granted the adjournment.

At the final hearing, defense counsel asserted that Dr. Tanay expressed to him the opinion that Hardimon did not, and could not, intend the consequences of his acts, and could not have expected those consequences because of his mental illness. Allstate argued that Dr. Tanay's new opinion was inconsistent with his prior statements, that he seemed to be changing his testimony to conform to standards set forth in recent caselaw, and that under an objective, reasonable standard, there was no question of fact that Saultman's death was the natural, foreseeable, and expected result of Hardimon's shooting her. Defendants argued that there was a question of fact regarding whether Hardimon intended or expected Saultman's injury within the meaning of the policy language. The court denied the motion concluding that "the facts of this case are not such that reasonable minds could not differ on whether Mr. Hardimon intended the results of his acts."

We conclude that reversal is compelled by our Supreme Court's decisions in *Allstate Ins Co v Freeman*, 432 Mich 656, 688; 433 NW2d 734 (1989), *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 568-569; 489 NW2d 431 (1992), and *Allstate Insurance Co v Miller*, 448 Mich 908; 533 NW2d 581 (1995). The exclusion contained in plaintiff's policy provides: "We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person." The clause's reference to injury which "may reasonably be expected" requires that the insured's acts be evaluated using an objective standard. *Buczkowski v Allstate Ins Co*, 447 Mich 669, 673; 526 NW2d 589 (1994) (Opinion by Brickley, J); *Freeman, supra*, p. 688.

In *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 568-569; 489 NW2d 431 (1992) the Court had before it a policy with a less broad exclusion that excluded injury "expected or intended by an insured." This clause had been held to require a subjective intent on the part of the insured. *Id., 567-568.* The Court was faced with the question whether an insane person is incapable of intending or expected the consequences of his acts:

> We must determine if Mr. Frost knew what he was doing when he shot and killed Gary Churchman. We conclude that he did. While Mr. Frost may not have been criminally liable for his acts, he was capable of foreseeing their consequences and understanding what he was doing, i.e., ending another human being's life. Criminal intent is not required in these circumstances.
>
> The ability of a mentally ill or insane person to distinguish right from wrong is not implicated in this situation. Criminal responsibility for those actions is not part of the necessary analysis in cases like the one before us today. Because we have determined that Henry Gordon Frost intended to take a gun and shoot Gary Churchman, the exclusionary clause of the instant insurance contract applies and there is no coverage.

The Court concluded:

> [W]e hold that it is possible for an insane or mentally ill person to intend or expect the injuries he causes within the meaning of the insurance policy language. This is not to say that the insured is necessarily criminally liable for his acts. We find that an insane or mentally ill individual can still form the requisite intent to injure another and yet may not be considered criminally culpable. We also conclude that under the facts of this case, Henry Gordon Frost intended or expected the results of his acts. He purposely went to Gary Churchman's house and shot him four times at close range. Further, the exclusionary clause in plaintiff's policy is applicable, and plaintiff is relieved of its duty to defend and indemnify under the policy. *Churchman*, 440 Mich 573.

In *Miller*, after several remands,[1] the Supreme Court summarily vacated the Court of Appeal's judgment reversing the circuit court's order granting summary disposition to Allstate. The Court stated that with respect to two of the shooting victims, the actions of the allegedly insane insured were intentional within the policy's exclusion language, and that the circumstances of a third victim's being shot were insufficiently developed, so summary disposition was improper.

We conclude that under *Freeman*, Hardimon's acts must be viewed under an objective standard to determine whether the resulting injuries were the reasonably expected result of Hardimon's intentional acts. Here, Hardimon, who had been stalking Saultman, armed himself, went to the employee party, and waited for Saultman to return. When Saultman returned, Hardimon walked up to her and shot her three times at extremely close range. He did not shoot or threaten anyone else. After shooting Saultman, Hardimon fled the scene and shot himself. Although Hardimon's mental state may have rendered him not criminally culpable, his actions can only be considered intentional under the terms of the policy exclusion, *Churchman, supra; Miller, supra*, and Saultman's death was the reasonable and expected result of his acts.

Reversed and remanded for entry of judgment in favor of plaintiff.

/s/ Helene N. White
/s/ Edward M. Thomas

[1] In *Miller*, the trial court granted Allstate's motion for summary disposition. The Court of Appeals reversed in *Allstate Ins Co v Miller*, 175 Mich App 515; 438 NW2d 638 (1989). The Supreme Court then remanded to the Court of Appeals for reconsideration in light of *Allstate Ins Co v Freeman*, 432 Mich 656; 433 NW2d 734 (1989). *Allstate Ins. Co v Miller*, 434 Mich 882; 452 NW2d 209 (1990). On remand, 185 Mich App 345; 460 NW2d 612 (1990), the Court of Appeals affirmed its original decision reversing the circuit court. The Supreme Court then vacated this Court's decision on remand and remanded to the Court of Appeals for reconsideration in light of three recently decided cases, including *Auto-Owners v Churchman*, 440 Mich 560; 489 NW2d 431 (1992). On remand, the Court of Appeals again affirmed its prior decision reversing the circuit court, concluding that a "genuine issue of material fact concerning the insured's intention to act still exists." Unpublished per

curiam No. 161270, issued October 8, 1993. The Supreme Court then vacted the Court of Appeals opinion in *Allstate Ins Co v Miller*, 448 Mich 908; 533 NW2d 581 (1995).