

STATE OF MICHIGAN
COURT OF APPEALS

WOLVERINE MUTUAL INSURANCE
COMPANY,

UNPUBLISHED
March 14, 1997

Plaintiff- Appellee,

v

No. 190025
Kent Circuit Court
LC No. 94-4875-CK

JUDY MOLLIEN, as Personal Representative of the
Estate of DAVID PAUL SMITH, Deceased, and
DANNY SMITH,

Defendants,

and

CHARLES SIMMONS, as Next Friend of BRYAN
SMITH, TIMOTHY SMITH, KATHY SMITH,
KATY SMITH, ESTATE OF SANDRA K. SMITH,
and MICHAEL SMITH,

Intervening Defendant- Appellant.

Before: Wahls, P.J., and Young and J.H. Fisher, * JJ.

PER CURIAM.

Plaintiff filed this action seeking a declaratory judgment that it does not owe a duty to defend or to indemnify the estate of David Smith, plaintiff's alleged insured, with respect to an underlying claim filed on behalf of Smith's children seeking damages for physical and mental harm allegedly caused by Smith's intentional shotgun killing of his ex-wife, the Smith children's mother, following which Smith killed himself. A next friend (hereinafter "defendant") intervened on behalf of the Smith children.

Plaintiff moved for summary disposition, arguing both that Smith was not its insured because he was not domiciled with his brother, who was plaintiff's insured, and further that, assuming Smith was

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

domiciled with his brother, the insurance policy's intentional acts exclusion excluded coverage arising out of Smith's intentional act of killing his ex-wife.

The trial court granted plaintiff's motion, finding that, while the issue of whether Smith was domiciled with his brother was a jury question, Smith's intentional killing of his ex-wife fell within the policy's intentional acts exclusion and, thus, plaintiff was entitled to summary disposition.

Defendant appeals as of right arguing, first, that the intentional acts exclusion does not apply and, second, the trial court should have granted summary disposition in favor of defendant on a finding that Smith was domiciled with his brother, plaintiff's insured. We affirm.

I

Defendant argues that, although there is no question that Smith intentionally killed his wife, case law is clear that there yet can be coverage as to unintended injuries though they result from intentional acts. Whether an injury is covered by an intentional acts exclusion is to be determined from the viewpoint of the insured, i.e., whether Smith expected or intended the injury to his children. Defendant emphasizes that plaintiff, on its motion for summary disposition, bears the burden of demonstrating that there is no genuine issue of material fact, yet, defendant argues, plaintiff has failed to produce any evidence that Smith intended or expected to injure his children. We disagree.

A trial court's grant of a motion for summary disposition is reviewed de novo. *Pinckney Schs v Continental Cas*, 213 Mich App 521, 525; 540 NW2d 748 (1995). All the evidence and reasonable inferences therefrom must be construed in favor of the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994).

Defendant is correct that there yet can be coverage as to unintended injuries though they result from intentional acts and that whether a particular injury was intended or expected is to be determined from the insured's perspective. *Frankenmuth Ins v Piccard*, 440 Mich 539, 548-549; 489 NW2d 422 (1992). However, certain intentional acts give rise to the conclusion that the insured expected, or should have expected, an injury. *Id.*, 552.

For example, an individual who wishes to destroy a building (which he owns and has insured) by setting a bomb to go off at a time of day when people are in the building may be presumed to have known (expected), at the very least, that somebody might be injured. [*Id.*]

In *Piccard*, *supra*, the Michigan Supreme Court held that, while Piccard intended a building that he owned to burn, he did not intend injury to a fireman who fell through the roof; thus, Piccard's insurer was obligated to defend and indemnify him relative to the fireman's personal injury suit. *Id.* In clarifying its holding, the Court stated that "the unforeseen consequences of an insured's intentional criminal act will preclude coverage where the conduct . . . [itself] constitutes the injury." *Id.*, 553.

Given the foregoing, it is clear that the trial court did not err in granting summary disposition to plaintiff. Smith's act in killing his wife and himself, and certainly in the manner in which he did so, i.e., with the children at home, is one of the type of acts the Michigan Supreme Court identified in *Piccard, supra*, 440 Mich 552, as giving rise to the conclusion that the insured expected, or should have expected, an injury even though he intended only a different injury. Assuming Smith had no intention to harm his children, and there is no evidence on this record to suggest that he did, his "intentional criminal act will preclude coverage ... [because] the conduct ... [itself] constitutes the injury." *Id.*, 553. While one could achieve the destruction of a building by fire without injuring anyone, one could not kill a child's mother without necessarily causing emotional injury to that child. Moreover, because the children were home, they witnessed this gruesome transaction or at least their parents' slain bodies, adding to their injury.

We reject defendant's assertion that Smith's mental condition prevented him from knowing what he was doing. "[A]n insane or mentally ill individual can still form the intent to injure another." *Auto-Owners v Churchman*, 440 Mich 560, 573; 489 NW2d 431 (1992).

In sum, the trial court did not err in granting plaintiff summary disposition under the intentional acts exclusion of the policy, where, even assuming Smith had no intention of harming his children, Smith had to expect or to know that his act of killing their mother would, by necessity, work that result.

II

We do not reach the issue of whether Smith was domiciled with his brother because even assuming Smith was domiciled with his brother, his estate nevertheless is not entitled to coverage by virtue of the policy's intentional acts exclusion.

Affirmed.

/s/ Myron P. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher