STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1630

Western National Mutual Insurance Company,
Respondent,

vs.

Alyssa Marie Donahue,
Defendant,

Scott Williams,
Appellant.

Filed April 24, 2023
Reversed and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CV-21-2120

John M. Bjorkman, Patrick H. O'Neill III, Larson King, LLP, St. Paul, Minnesota (for respondent)

James W. Balmer, Falsani Balmer Peterson & Balmer, Duluth, Minnesota; and

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and Cleary, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Respondent Western National Mutual Insurance Company brought a declaratory-judgment action to determine whether its insured, defendant Alyssa Marie Donahue, was entitled to defense and indemnification in a negligence action brought by appellant Scott Williams. Williams is a police officer who suffered injuries when he was dragged by Donahue's vehicle. The district court granted summary judgment in favor of Western National because it determined that the there was no genuine dispute that Donahue acted intentionally and the insurance policy therefore did not provide coverage. Williams appeals, arguing that there is a genuine dispute of material fact as to whether Donahue acted with the requisite intent. Because we conclude that the record presents a genuine dispute of material of fact on that issue, we reverse and remand for trial.

FACTS

In July 2019, Williams and other law enforcement officials went to the apartment shared by Donahue and her boyfriend, M.H., planning to execute a search warrant. While on the street outside the apartment, the officers spotted M.H. in his car, surrounded him at a stoplight, and took him into custody. Meanwhile, Donahue approached the scene in a different vehicle and yelled to M.H. from her car. One officer yelled at Donahue to leave. Williams, though, realized that Donahue should also be detained, so he approached Donahue's vehicle. Williams, who was working in plain clothes at the time, engaged with Donahue, and Donahue ended up reversing her vehicle with Williams attached to the

doorframe, dragging him about 50 or 60 feet. Williams sustained injuries to his left shoulder and lower body.

Donahue was criminally charged in connection with the incident. She pleaded guilty to and was convicted of fleeing a peace officer in a motor vehicle resulting in bodily harm, in violation of Minnesota Statutes section 609.487, subdivision 4(c) (2018). At her plea hearing, Donahue testified about the incident.

Williams brought a negligence action against Donahue. In a deposition taken in connection with that action, Donahue also testified about the incident.

Donahue's vehicle was insured under an automobile liability policy from Western National. Western National defended Donahue under a reservation of rights.

Donahue's policy with Western National provided coverage as follows:

> Part A – Liability Coverage
>
> INSURING AGREEMENT
>
> A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for damages which are payable under the terms of the Policy. In addition to our limit of liability, we will pay all defense costs we incur.

The policy included an intentional-act exclusion, stating as follows:

> EXCLUSIONS
>
> A. We do not provide Liability Coverage for any "insured":
> 1. Who intentionally causes "bodily injury" or "property damage."

Western National brought this declaratory-judgment action, seeking a declaration that it did not owe a duty to defend or indemnify Donahue. Western National moved for summary judgment, arguing that undisputed facts demonstrated that Donahue acted intentionally and thus the policy did not provide coverage. Williams opposed the motion, arguing that genuine disputes of fact existed.

The district court granted Western National's motion for summary judgment. In determining whether there existed a genuine dispute of fact, the district court first decided that Donahue's deposition testimony about the incident contradicted her earlier plea-hearing testimony and therefore would "not be given any weight." Then, evaluating the arguments "based on [Donahue's] testimony at the plea hearing," the district court determined that "Donahue's intent to injure [was] inferred by her commission of the fleeing offense" and that the policy therefore did not provide coverage.

Williams appeals.

DECISION

On review of summary judgment, appellate courts analyze whether there are genuine disputes of material fact and whether the district court erred in its application of law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). When considering the record on summary judgment, appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Summary judgment is proper if the moving party shows that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law" based on the record,

which may include depositions, documents, affidavits, admissions, and interrogatory answers. Minn. R. Civ. P. 56.01, 56.03(a). A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

The interpretation of an insurance policy is a question of law that we review de novo. *See Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018). Appellate courts interpret an insurance policy "to ascertain and give effect to the intentions of the parties as reflected in the terms of the policy" and "give unambiguous policy language its plain and ordinary meaning." *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310, 316 (Minn. 2021) (quotation omitted). Neither party contends the intentional-act exclusion in this policy is ambiguous.

An insurer bears the burden of proving that policy exclusions apply to bar coverage. *Id.* "But the insured carries the burden of establishing that an exception to an exclusion applies." *Id.* The policy here excluded coverage for insureds who intentionally cause bodily injury.[1] "As it applies to sane individuals, . . . an intentional act exclusion applies only where the insured acts with the specific intent to cause bodily injury." *State Farm v. Wicka*, 474 N.W.2d 324, 329 (Minn. 1991). This requires that "the insured intended the harm itself, not that the insured intended to act." *Id.* "Under this subjective standard, the intent to injure

[1] The policy's coverage provision also required that the injury be the result of an "accident," but, as Western National recognizes, intentional acts and accidents are "opposite sides of the same coin." *Am. Fam. Ins. Co. v. Walser*, 628 N.W.2d 605, 611 (Minn. 2001). "[I]n analyzing whether there was an accident for purposes of coverage, lack of specific intent to injure will be determinative, just as it is in an intentional act exclusion analysis." *Id.* at 612.

may be established: (1) by proof of an actual intent to injure, or (2) by inferring intent as a matter of law." *B.M.B. v. State Farm Fire & Cas. Co*., 664 N.W.2d 817, 821 (Minn. 2003). "The general rule is that intent is inferred as a matter of law when the nature and circumstances of the insured's act are such that harm is substantially certain to result." *Id.* at 822 (quotation omitted). "[W]hen the injury involves a criminal act of a serious nature," intent to injure generally can be inferred as a matter of law. *State Farm Fire & Cas. Co. v. Schwich*, 749 N.W.2d 108, 112 (Minn. App. 2008).

But the Minnesota Supreme Court has recognized that intent has both "cognitive and volitional elements . . . , either of which can be affected by a mental illness." *B.M.B.*, 664 N.W.2d at 824. Accordingly, "for purposes of applying an intentional act exclusion in an insurance policy, an insured's acts are unintentional regardless of any cognitive understanding of the nature of the act or its wrongfulness 'where, because of mental illness or defect, the insured is deprived of the ability to control [their] conduct.'" *Id.* (quoting *Wicka*, 474 N.W.2d at 331).

With that background, we turn to Williams's arguments on appeal. Williams asserts that, in granting summary judgment, the district court erred by (1) making a credibility determination between Donahue's plea-hearing testimony and subsequent deposition testimony and, as a result, disregarding the deposition testimony, and (2) failing to recognize the genuine dispute of material fact regarding Donahue's intent.

1. The district court erred by disregarding Donahue's deposition testimony.

Williams argues that the district court erred by weighing and balancing conflicting testimony to reach summary judgment in favor of Western National. The district court found that Donahue's deposition testimony was "contradictory to her testimony at the plea hearing" and, because of this, decided not to give her deposition testimony any weight, leaving only her plea-hearing testimony for consideration.

In the context of civil summary-judgment cases, "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), *rev. denied* (Minn. Sept. 24, 2003). Persons who have provided testimony may provide later affidavits to "explain and clarify the prior statements, rather than simply contradicting them." *Id.* 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, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983*)*; *see also Hoover v. Norwest Priv. Mortg. Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001) (citing *Camfield*, 719 F.2d at 1365, for the rule that "although affidavits that contradict earlier deposition testimony generally may not be used to create a genuine issue of fact, there are exceptions to this rule").

But "[w]eighing the evidence and assessing credibility on summary judgment is error." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 234 (Minn. 2020) (quoting *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007)). This is because, when there is a conflict or a need to weigh conflicting testimony to determine

credibility, the question of credibility should be submitted to a jury. *See Hoyt Props., Inc.*, 736 N.W.2d at 320; *Tsudek v. Target Stores, Inc.*, 414 N.W.2d 466, 469 (Minn. App. 1987), *rev. denied* (Minn. Dec. 18, 1987).

The parties dispute whether the district court's decision to ignore Donahue's deposition was in an improper credibility determination or simply precluded a "sham" factual issue.

At the plea hearing, Donahue said:

> Q: What did you do when the officer asked you to put the car in park?
> A: Panicked and drove away a little bit.
> Q: Where was the officer when you drove away?
> A: In my window.
> Q: Was he still attached to the vehicle?
> A: Yes.
> Q: As you were driving away?
> A: Yes.
> Q: And why did you drive away?
> A: Because I panicked and my PTSD, I just was scared. I've never been in trouble like this before.
> Q: Were you trying to get away from the police?
> A: Yeah.
> Q: You understand that as a result of you driving away with the officer still attached to the vehicle that he suffered significant injuries?
> A: Yes, ma'am.
> . . . .
> Q: I wasn't really clear what you meant when you said you didn't remember him identifying himself as a police officer. Is it possible he did and you just don't remember it?
> A: Yeah. No I think he did. I just, I don't remember it, and I don't want to be, you know, I just don't remember.
> Q: You don't remember one way or another?
> A: I'm pretty sure he did, Ma'am.
> Q: Okay. And it was clear to you that police wanted you to stop and you took off, am I interpreting that correctly?
> A: Yes, ma'am.

At her subsequent deposition, Donahue explained that on the day of the incident, she was following M.H. back to their shared apartment. Then, she saw a person in a car "pull up in front of [M.H.] in regular clothes" and that the person "had a gun pointed at [M.H.]" She explained that she went around the block and then stayed at the stoplight when an officer told her to leave the scene. She said that Williams recognized her "as [she] was backing up" and that he "jumped in [her] car window with [her] not realizing as [she] was backing up that [Williams] was calling [her] name and stuff." Donahue also testified that she thought she "kind of black[ed] out" during the incident. She explained that, in 2016, as a pedestrian, she was struck by a car. Donahue testified that she broke several bones, including her left and right femur and her pelvis, and suffered a traumatic brain injury (TBI). When asked about symptoms from her TBI, Donahue described "blacking out." She testified that she had posttraumatic stress disorder (PTSD) related to cars due to the 2016 incident.

It is true that self-serving testimony that contradicts earlier damaging deposition testimony is insufficient to create a genuine issue of material fact. *See Banbury v. Omnitrition Int'l Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). But Donahue's deposition testimony does not contradict her plea-hearing testimony. Donahue's plea-hearing testimony about the incident is cursory. The only "intent" established at that hearing was that Donahue intended to drive away; she agreed that her actions resulted in bodily harm to Williams, but she did not testify at any point that she intended to injure Williams. Donahue's deposition testimony, on the other hand, provides detail about what she was

experiencing during the incident and what she was intending to do. A fact finder might not find credible the account that Donahue gave in her deposition testimony, but it was error to disregard the testimony under the theory it created a sham factual dispute.

We are not persuaded otherwise by Western National's comparison to *State Farm Fire & Cas. Co. v. Kistner*, A08-2096, 2009 WL 2852618, at *3 (Minn. App. Sept. 8, 2009), *rev. denied* (Minn. Nov. 17, 2009).[2] *Kistner* involved a homeowners' insurance coverage dispute regarding injuries inflicted on a person when the insured, Kistner, threw a glass beer bottle that struck her in the face. *Id.* at *1. On summary judgment, the district court concluded that the intentional-act exclusion applied, and the injured person appealed. *Id.*

Kistner had pleaded guilty to assault. At his plea hearing, Kistner testified that he "intended to assault" another friend who was nearby and that he was "trying to hurt [that friend] with that bottle," which he threw from "just a short distance away." *Id.* During subsequent depositions, though, Kistner asserted that he "slipped and hit [the injured person] in the head," and that he threw the glass bottle with the intent to smash it against the wall. *Id.* We agreed with the district court that Kistner's deposition testimony could not create a genuine dispute of fact about his intent because it contradicted his earlier plea testimony that he threw the beer bottle with the intent of injuring someone. *Id.* at *3.

This case is unlike *Kistner*. Again, at the plea hearing, Donahue testified only to her intent to drive away and did not testify that she intended to injure Williams. As a result,

[2] While *Kistner* is a nonprecedential case and thus nonbinding, we may consider it for its persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

Donahue's subsequent deposition does not "alter" her plea-hearing testimony like as Kistner's subsequent testimony did. *See id*. Thus, Donahue's deposition testimony must be considered in determining whether there exists a genuine dispute of material fact regarding her intent.

2. A genuine dispute of material fact precludes summary judgment.

Taking into account all of Donahue's testimony, we evaluate whether there is a genuine dispute of material fact about Donahue's intent to cause injury.

The district court determined that Donahue's intent to injure is inferred from her commission of the offense of fleeing the police. "Generally, courts infer intent to injure as a matter of law when the injury involves a criminal act of a serious nature." *Schwich*, 749 N.W.2d at 112. But courts will not infer intent based on an actor's commission of a serious criminal act if the act occurs "when the actor is deemed to be unable to form the requisite intent because of serious mental illness." *Id.* at 112 n.1. "[A]n insured's cognitive capacity is presumed," but the presumption can be rebutted. *Wicka*, 474 N.W.2d at 330. "[I]ntent becomes a question for the trier of fact when the evidence suggests that the insured was not the master of [their] own will." *Id.*; *see also B.M.B.*, 664 N.W.2d at 823 (holding that, "where there is a genuine issue of material fact as to whether the insured's acts were 'unintentional' because of mental illness, . . . the [district] court shall submit the issue to the jury and is not, as a matter of law, to infer the insured's intent to cause injury").[3]

[3] Williams argues that the crime of fleeing a police officer is not the type of criminal act from which an intent to injury may be inferred. Western National acknowledges that intent must be inferred from the nature of the act, rather than the mere violation of a criminal statute, but argues that the nature of Donahue's criminal act here supplies the basis for

Williams argues that, because Donahue "suffers from a mental problem," an intent to injure cannot be inferred from her criminal act as a matter of law. Williams asserts that Donahue may have "blacked out" due to her PTSD at the time she dragged Williams about 50 feet with her vehicle, preventing her from forming the requisite intent and precluding a conclusion of inferred intent to cause bodily harm.[4]

Because "the law presumes sanity," *Wicka*, 474 N.W.2d at 330, our analysis begins with the presumption that Donahue was sane when she reversed her car with Williams attached to the doorframe. The question is whether Williams presented evidence to rebut the presumption of sanity. *See Wicka*, 474 N.W.2d at 330.

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inferred intent. We assume, for purposes of argument, that Donahue's act of fleeing a police officer was a criminal act from which intent to injure generally could be inferred and evaluate whether the evidence reflects a fact question as to whether Donahue had the capacity to form the requisite intent at the time of the incident.

[4] Western National asserts that Williams's mental-capacity argument has been waived by Donahue's failure to respond to the complaint or Williams's failure to plead a "mental-illness exception" in his responsive pleadings. But the only case that Western National cites in support of its waiver argument is a federal district court case applying collateral estoppel to a second coverage dispute when the insured did not plead that a mental-illness exception applied despite long having had access to the information needed to assert such an exception. *See Ord. of St. Benedict v. St. Paul Mercury Ins. Co.*, No. 17CV781, 2017 WL 1476121, at *3 (D. Minn. Apr. 25, 2017). We are not persuaded that case has application here. From our review of the record, it appears that Donahue answered Western National's complaint for declaratory relief, with references to her mental health. Furthermore, Western National was aware that Donahue's mental capacity was at issue because Western National's counsel was present during Donahue's deposition at which she testified regarding her mental capacity and Western National addressed the mental-capacity issue in its reply brief in connection with its summary-judgment motion, without asserting that the issue had been waived by Williams. In these circumstances, Western National's waiver argument fails.

Donahue's deposition testimony describes cognitive issues, PTSD, and blackouts that Donahue suffers due to being struck by a car and injured in 2016. Her plea testimony includes evidence that Donahue takes medicine prescribed by a doctor, that she has been hospitalized in a mental-health facility, and that she suffers from PTSD, which caused her to panic during the incident.

Western National argues that Donahue's own statements are not enough to rebut the presumption of Donahue's sanity. It is true that Williams did not present expert testimony regarding Donahue's mental state at the time of the incident. But though the evidence of Donahue's mental capacity is limited to her own testimony, Western National provides no binding authority for the assertion that such evidence cannot create a question for the trier of fact as to whether the presumption of sanity is rebutted.

Western National also argues that issues regarding Donahue's intent do not need to go to the trier of fact because Donahue "made no diminished capacity claims in connection with her criminal convictions." Western National does not cite any caselaw in support of the assertion that the absence of such a defense by Donahue in the criminal case precludes Williams's argument regarding mental capacity in the coverage dispute. And caselaw would suggest otherwise. *See Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 534 (Minn. 2003) ("[A]n insurer may not use an insured's criminal conviction to collaterally estop a subsequent civil suit brought by a third-party crime victim based on the intentional act exclusion within the policy.").

In sum, considering the record as a whole and viewing the evidence in the light most favorable to Williams, we conclude that a genuine issue of fact exists with respect to

Donahue's intent to cause bodily injury. The district court therefore erred by granting summary judgment to Western National on the question of its obligation to defend and indemnify Donahue under its policy.[5]

Reversed and remanded.

[5] Because we conclude that the district court erred by granting summary judgment in favor of Western National due to the dispute of material fact related to Donahue's mental capacity, we do not reach Williams's alternative argument that the evidence raises a fact question as to whether Donahue's actions were "impulsive or reflexive," a separate exception to an inferred-intent conclusion. *See Schwich*, 749 N.W.2d at 112 n.1.