American Educational Institute

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS' COMPENSATION, FRAUD INVESTIGATION, AND AUTOMOBILE

Winter, 2024

AEI CLAIMS LAW QUIZ

CAN CRIMINALLY RECKLESS CONDUCT BE ACCIDENTAL FOR INSURANCE COVERAGE PURPOSES?

[*Ref. Homeowners: Liability Coverages, Paras 1.01 and 2.04, and Liability Insurance Principles, Para. 4.02*]

FACTS: On April 3, 2017, Lindsey Dostal gave birth to her daughter, Haeven. Curtis Strand was in an on-and-off relationship with Dostal and was adjudicated Haeven's father. On July 17, 2017, the three-month-old died as a result of head trauma suffered while in Strand's care.

Law enforcement spoke with Strand several times and he gave two different accounts of the incident that led to the child's death. In a statement given on July 10, 2017, he claimed that he was attempting to burp her when she fell from his knee to the floor. On November 17, 2017, however, Strand changed his story and said that he accidentally dropped her when he collided with a kitchen island. In both versions, Strand admitted that he put Haeven to bed without seeking medical treatment for her.

Criminal charges were filed and Strand was ultimately convicted of second-degree reckless homicide. Dostal subsequently brought a negligence and wrongful death suit against Strand, who sought coverage from his homeowners insurer, State Farm. The insurer intervened in the lawsuit between Dostal and Strand and filed for summary judgment seeking a ruling that there was no coverage. State Farm argued that the elements of reckless homicide precluded the child's death from being an occurrence under the policy. The policy defined occurrence as "an accident" and State Farm asserted that a "reckless homicide" could not also be accidental.

State Farm prevailed on its motion and the court of appeals affirmed, ruling that there was no occurrence and no coverage. Dostal appealed to the state supreme court.

QUESTION: Can a liability insurer deny a claim and argue no coverage based solely on an insured's reckless homicide conviction?

ANSWER: No, according to the Supreme Court of Wisconsin in *Dostal v. Strand*, 984 NW2d 382 (Wis. 2023). The court held that under Wisconsin law, a determination that someone was criminally reckless does not automatically preclude a finding that his conduct was also an accident for purposes of insurance coverage.

At the outset, the Wisconsin Supreme Court recognized that the key issue was understanding and applying the term "occurrence" as defined by both State Farm's policy and Wisconsin case law, and "reckless conduct" as set forth by Wisconsin statutory law. The court began its analysis by discussing the policy's definition of "occurrence" and Wisconsin precedent, saying:

> The insurance policy in this case sets forth that coverage is provided for an "occurrence." An "occurrence," in turn, is defined under the policy as an "accident," which results in, as relevant here, "bodily injury." The policy does not...include a definition for "accident." In interpreting this term, we keep in mind that we read insurance policies from the perspective of a reasonable person in the position of the insured. We have previously described an "accident" as an event "occurring by chance or arising from unknown or remote causes" and "an event which takes place without one's foresight or expectation."

Next, the court sought to determine the meaning of "criminally reckless conduct." Relying on Wis. Stat. § 940.06(1), case law, and citing Wisconsin jury instructions, the court stated:

> Criminally reckless conduct means:
>
> - the conduct created a risk of death or great bodily harm to another person; and
> - the risk of death or great bodily harm was unreasonable and substantial; and
> - the defendant was aware that the conduct created the unreasonable and substantial risk of death or great bodily harm.

Both parties focused on the third element of criminally reckless conduct and the significance of a party being aware that his conduct created an unreasonable risk. Dostal argued that being aware of a risk doesn't necessarily mean that when that risk comes to fruition it isn't an accident. A person could be aware of a risk of death or bodily harm but not intend or expect for it to occur. State Farm, on the other hand, asserted that the focus should be on the conduct itself and not the result of the conduct. It took the position that even if the child's death was unintentional, Strand's conduct was still not accidental because he was aware of the risk of death.

The court ultimately rejected State Farm's argument and sided with Dostal. The court was persuaded by a decision of the New York Court of Appeals in *Allstate Insurance Co. v. Zuk*, 574 NE2d 1035 (N.Y. App. 1991). In that case, Zuk was cleaning and loading a shotgun in a hunting lodge when the gun discharged and killed his friend, Smith. Zuk was convicted of second degree manslaughter based on his reckless conduct, but the court held that the conviction didn't necessarily bar coverage in the civil litigation. The court said that although the jury determined that Zuk was reckless, it didn't lead to the conclusion that his conduct was reasonably expected to result in his friend's death. A person can engage in behavior that involves a calculated risk without expecting that an accident will occur. And that's true even if the conduct leads to criminal responsibility.

The Wisconsin Supreme Court adopted the reasoning in *Zuk* that "a person may engage in behavior that involves a calculated risk without expecting – no less reasonably – that an accident will occur." Using *Zuk* as the lynchpin for ruling that "criminally reckless conduct" and an "occurrence" for purposes of insurance coverage are not mutually exclusive, the court highlighted a very important missing piece of evidence: it was unclear precisely how the child died. In other words, the criminal record did not reveal what aspect of Strand's conduct the jury believed was reckless. The court observed:

> Further, we do not know what act committed by Strand (if it accepted either of his explanations) was determined by the jury to be reckless. The jury heard testimony both that Strand dropped Haeven (whether it was from his knee while trying to burp her or when he turned and hit the kitchen island) and that he put her to bed without seeking medical attention. It could have concluded that the first act (dropping Haeven, however it happened) was an accident, but that it was reckless for Strand to put her directly to bed without first seeking medical care. In such a scenario, there would be an "accident" covered by the State Farm policy.

The court continued that it's ruling was consistent with the meaning of the word "accident" as interpreted by a reasonable insured. The court said:

> Additionally, we recognize that our conclusion is consistent with the reading of the word "accident" by a reasonable insured. The term is not defined in the policy, but under a common understanding of "accident," it would seem that even if one engages in reckless conduct, a resulting injury can still be, in the common parlance of the word, "accidental."... For example, if a person is driving 90 miles per hour on a city street, such conduct would no doubt be reckless, but that doesn't mean it isn't an "accident" if the driver unintentionally hits a pedestrian. Such an event may still occur "by chance" or "without one's foresight or expectation."

The court also found that the intentional acts exclusion didn't bar coverage. With respect to the issue of intent, the Wisconsin Supreme Court held that an intent to injure could be inferred when conduct was substantially certain to cause injury. An intent to injure could not be inferred, however, based solely on a violation of criminal law. Since intent is not an element of a reckless crime, a conviction based on reckless conduct does not equate to an intent to injure. Therefore, a guilty verdict in a second degree reckless homicide trial, without more specific evidence on how the homicide occurred, would not trigger the exclusion.

CONCLUSION: It's important to emphasize that the decision of the Wisconsin Supreme Court in *Dostal* was at the summary judgment stage and it wasn't clear what aspect of Strand's conduct the jury in the criminal case deemed reckless. It's still significant that the court refused to automatically bar coverage based on the insured's reckless homicide conviction. Using the hypothetical of someone driving 90 miles per hour down a city street, the Wisconsin Supreme Court made clear that in some cases an insured's conduct can be both criminally reckless and an accident for purposes of liability coverage.

The court did point out that if the policy had included a criminal acts exclusion, the result might have been different. The insured had been convicted of a criminal act, and that alone would have barred coverage under such an exclusion.