Djokovic's defaulted "accident"

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The most talked about event at this year's U.S. Open had nothing to do with tennis. Instead, an incident involving Novak Djokovic caught everyone's attention. After having his serve broken deep in the first set, Djokovic "pulled a ball from his pocket and smacked it with his racket toward the back of the court. It hit a line judge, standing about 40 feet away, in her throat."[1] This resulted in Djokovic being disqualified from the tournament.[2]

This incident has served as fodder for sports and legal commentators alike. For example, a recent article examined Djokovic's "accident" through the lens of insurance law.[3] As a Wisconsin-based law firm, we found ourselves asking: "Would the Wisconsin Supreme Court consider Djokovic's actions to be an 'accident'"?[4]

A typical CGL insurance policy provides coverage for injury "caused by an 'occurrence,'" and defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[5] These policies do not define "accident,"[6] so in Wisconsin, like elsewhere, courts typically look to dictionary definitions for "the common and ordinary meaning of the word as understood by a lay person" and, naturally, to prior decisions.[7] Judicial reliance on dictionaries is unsurprising given that insurance policies "should be interpreted as they would be understood by a reasonable person in the position of the insured."[8]

The Wisconsin Supreme Court has explored the meaning of "accident" in four decisions over the last 15 years. Two cases, *Everson* and *Stuart*, raised the issue in the context of misrepresentation claims. In both, the Wisconsin Supreme Court concluded that "where there is a volitional act involved in . . . a misrepresentation, that act removes it from coverage as an 'occurrence' under the liability insurance policy."[9]

[1] Christopher Clarey, *Novak Djokovic Out of U.S. Open After Accidental Hit of Line Judge*, N.Y. Times (Sept. 6, 2020), https://www.nytimes.com/2020/09/06/sports/tennis/us-open-novak-djokovic.html.

[2] *Id.*

[3] *See* Randy Maniloff, *Djokovic's 'Accident' Through the Insurance Case Law Lens*, Law360 (Sept. 17, 2020 5:42 P.M. E.D.T.), https://www.law360.com/insurance/articles/1311101/djokovic-s-accident-through-the-insurance-case-law-lens.

[4] While Maniloff discusses *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28 (1869), this alert considers much more recent authority from the Wisconsin Supreme Court.

[5] *See e.g.*, *Everson v. Lorenz*, 2005 WI 51, ¶ 12, 280 Wis. 2d 1, 695 N.W.2d 298; *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶ 22, 311 Wis. 2d 492, 753 N.W.2d 448; *Schinner v. Gundrum*, 2013 WI 71, ¶¶ 12–13, 349 Wis. 2d 529, 833 N.W.2d 685

[6] *See Everson*, 280 Wis. 2d 1, ¶ 15; *Stuart*, 311 Wis. 2d 492, ¶ 24; *Schinner*, 349 Wis. 2d 529, ¶ 39.

[7] *See e.g.*, *Schinner*, 349 Wis. 2d 529, ¶¶54–64.

[8] *Stuart*, 311 Wis. 2d 492, ¶ 18.

[9] *Everson*, 2005 WI 51, ¶ 20; *Stuart*, 311 Wis. 2d 492, ¶ 32.

Stated another way, if a person intentionally makes a *representation*, even if they did not intend it to be a *misrepresentation*, it is not an accident. For example, in *Everson*, Lorenz, a real estate developer, filled out a Real Estate Condition Report, misidentifying a parcel sold for the purpose of building a single-family home. Everson, the buyer, ultimately could not build a home in the desired location because it was within a 100-year flood plain. Accordingly, Everson sued. As the Court explained:

> Lorenz may have made a mistake of fact and/or error in judgment, but it later acted with volition. It is clear that Lorenz intended to give Everson information as to whether the property was within the 100-year flood plain. What happened here, stripped to its essentials, is that an "action," not an "accident," of Lorenz gave Everson the misleading information. Even if there was a mistake made in filling out the Real Estate Condition Report, and that mistake induced reliance, the decision to give Everson the report is not an "accident" within the meaning of the policy.[10]

Put simply, "'accident,' as used in accident insurance policies, is 'an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident'; rather, it is the causal event that must be accidental for the event to be an accidental occurrence."[11] This analysis is conducted from the perspective of the insured.[12]

How does this relate to Djokovic's incident at the U.S. Open? Bear with us.

While the *Everson* analytical framework was articulated and reaffirmed in the context of misrepresentation claims, it applies more broadly. In the two other relevant Wisconsin Supreme Court cases, *Schinner* and *Estate of Sustache*, the Court applied this analysis to claims arising out of physical altercations at underage drinking parties.[13] In *Estate of Sustache*, the defendant-insured punched decedent's face, "causing him to fall to the curb and sustain severe injuries that ultimately led to his death."[14] There was no dispute that the defendant-insured "intended to strike" the decedent, nor was there a dispute that defendant "did not intend his blow to be fatal"; yet, because the allegation that defendant "intentionally caus[ed] bodily harm to [Sustache]" could not "reasonably be 'characterized by a lack of intention,'" the incident "did not constitute an 'accident.'"[15] As the Court succinctly noted, "[o]ne cannot 'accidentally' intentionally cause bodily harm."[16]

A similar analysis applied in *Schinner*, where the insured had not assaulted the plaintiff, but rather had taken "a number of intentional actions that ultimately caused Schinner's bodily injury," namely: (1) intentionally hosting the party; (2) intending his invitees would invite others; (3) knowing and expecting "a substantial number" of partygoers would be underage and drinking; (4) arranging beer pong and procuring alcohol; and (5) "encourag[ing], advis[ing], and assist[ing]" the assailant in his alcohol consumption, despite knowing that the assailant "became belligerent when intoxicated."[17] These actions, the Court noted, "were entirely volitional" since the insured "did not host the underage drinking party by mistake, against his will, or by chance."[18] Accordingly, since the insured's "many intentional acts were a substantial factor in causing Schinner's bodily injury," they were neither remote nor accidental, such that insurance coverage was unavailable.[19]

[10] *Everson*, 2005 WI 51, ¶ 22 (internal citations omitted).

[11] *Stuart*, 311 Wis. 2d 492, ¶ 40.

[12] *Schinner*, 349 Wis. 2d 529, ¶ 52 ("[W]hen an insured is seeking coverage, the determination of whether an injury is accidental under a liability insurance policy should be viewed from the standpoint of the insured.").

[13] *See Schinner*, 349 Wis. 2d 529, ¶ 2; *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶ 5, 311 Wis. 2d 548, 751 N.W.2d 845.

[14] *Estate of Sustache*, 311 Wis. 2d 548, ¶ 5.

[15] *Id.* ¶¶ 5, 50, 52 (internal citation omitted).

[16] *Id.* ¶ 52.

[17] *Schinner*, 349 Wis. 2d 529, ¶ 68.

[18] *Id.*

[19] *Id.* ¶¶ 69, 71, 81.

The Wisconsin Supreme Court explained that:

> [O]ur insurance case law does not require that an insured intend to harm, or know with substantial certainty that harm will occur, in order to determine that the harm was not an accident. An accident is "an unintentional occurrence leading to undesirable results." To assess the existence of an accident, a court will focus on the "means or cause" of harm to determine whether it was truly accidental, even if the result was unexpected. . . . Intent, volition, knowledge, and foreseeability are all present, consistent with our case law.[20]

On that note, returning to the 2020 U.S. Open, Djokovic "smacked [a ball] with his racket toward the back of the court," which struck a line judge in the throat forty feet away.[21] The *New York Times* called the incident an "accidental hit" and Djokovic, himself, described it as "[s]o unintended."[22] However, given the volitional act, which was a substantial factor in the line judge's injury—Djokovic hitting the ball—and the foreseeable risk of at least some injury (even if the precise injury was not foreseen), this incident would likely not qualify as an "accident" under Wisconsin insurance law. As in *Schinner*, "bodily injury was not intended and there was no certainty that it would occur," but "bodily injury was hardly unforeseeable."[23] Djokovic has been on much better behavior at this year's rescheduled French Open . . . that's no accident.

[20] *Id.* ¶ 74.

[21] *See* Clarey, *supra* n.1.

[22] *Id.*

[23] *Schinner*, 349 Wis. 2d 529, ¶ 70.