

NO. A04-1713

State of Minnesota
In Supreme Court

Jose Padilla, individually and as assignee of
Bloomington Steel and Supply Co.,

Appellant,

vs.

The Travelers Indemnity Company and
The Charter Oak Fire Insurance Company,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE

1. Whether the intent or knowledge of an agent of a corporation may be imputed to the corporation for purposes of determining whether bodily injury was expected or intended from the standpoint of the corporation.

The trial court held in the affirmative.

The Court of Appeals held in the affirmative.

Authorities: *American Family Mutual Ins. Co. v. M B.*, 563 N.W.2d 326
(Minn.Ct.App. 1997)
Coit Drapery Cleaners, Inc. v. Sequoia, 14 Cal. App. 4th 1595, 18
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Quality Painting, Inc. v. Truck Insurance Exchange, 988 P.2d 749
(Kan. App. 1999)

STATEMENT OF THE CASE

A. Nature of the Case

On October 18, 2000, Mr. Cecil P. Reiners ("Reiners") intentionally struck Mr. Jose Padilla with a two-by-four purportedly because he was angry that Mr. Padilla was speaking Spanish. Mr. Padilla sued both Reiners and Bloomington Steel & Supply Co. ("Bloomington Steel"), Reiners' corporation, in an action in Hennepin County District Court (the "Underlying Action"). Bloomington Steel tendered the claim to The Travelers Indemnify Company and The Charter Oak Fire Insurance Company ("Travelers"). Travelers defended Bloomington Steel under a reservation of the right to deny coverage on the grounds that the "bodily injury" alleged did not result from an occurrence and the injury was expected and intended.

Because the actions, intent and knowledge of Reiners are imputed to Bloomington Steel, any damages awarded to Mr. Padilla are not covered under the insurance policies issued by Travelers (referred to collectively as "Travelers Policy"). As a corporation, Bloomington Steel can only act through its directors, officers, and shareholders. It is undisputed that the injuries Mr. Padilla sustained were the result of an expected, intentional act by Reiners, the corporation's sole director, sole officer and only shareholder. Under these circumstances, the actions, expectation and intent of Reiners are imputed to Bloomington Steel and, from the standpoint of Bloomington Steel, the damages sought by Mr. Padilla were not the result of an "accident" or an unexpected occurrence. Travelers cannot, as a matter of law and public policy, insure individuals or

their solely owned corporations against the consequences of intentional and criminal conduct.

B. Course of Proceedings and the Disposition of the Court Below

Respondents Travelers sought a declaratory judgment in the District Court as to the obligations, if any, to indemnify Bloomington Steel for the injury intentionally inflicted by Reiners, its sole director, officer and shareholder. Travelers sought a declaration that it had no duty to defend or indemnify Reiners, individually or in his capacity as Bloomington Steel's sole director, officer, and shareholder ("the "Coverage Action). Bloomington Steel, Mr. Padilla and Travelers brought cross-motions for summary judgment before the Honorable Robert A. Blaeser in Hennepin County District Court. Judge Blaeser granted Travelers' Motion for Summary Judgment and denied Bloomington Steel's and Mr. Padilla's cross-motions for Summary Judgment, determining that coverage to Bloomington Steel under the Travelers Policy was barred pursuant to the expected injury exclusion.

On appeal, the Minnesota Court of Appeals affirmed Judge Blaeser's order and determined that coverage under the Travelers policy was precluded because the damages sustained by Mr. Padilla were expected from the standpoint of Bloomington Steel.

STATEMENT OF FACTS

A. Bloomington Steel is Owned and Operated Solely by Reiners

Reiners is, and has been, Bloomington Steel's sole director, officer and shareholder since 1991. (RA002) Reiners alone controlled and ran Bloomington Steel.

B. The Underlying Action

Padilla commenced the Underlying Action in Hennepin County District Court seeking damages for injuries sustained from an assault by Reiners, a man with an extensive history of outbursts resulting in violent, aggressive behavior in the workplace. (RA007-RA017)

In the Coverage Action, Mr. Padilla and Bloomington Steel presented extensive evidence that prior to his assault on Mr. Padilla, Reiners engaged in violent and aggressive behavior in the workplace. The violent history of Reiners was set forth in Jose Padilla's Memorandum in Support of Motion for Summary Judgment:

III. Reiners' history of violence

Reiners has an extensive history of violence. Many of the incidents occurred on the job. Reiners assaulted Lonny Menard, a co-employee of Padilla, three separate times.

Albert and Jovita Eggrolla were employees of First Site Staffing and were assigned to Bloomington Steel. On their last day of the job, Reiners became angry with them and threatened them both. Reiners threatened to kill Jovita with a hammer.

Dana Novacek was also an employee of First Site Staffing. She was informed that she could not take a break in the presence of Reiners because he would become irate. When she quit her job, she had the sales rep from First Site collect her personal belongings from the job site, because she feared for her safety if she returned herself.

Bob Teivet was an employee of Bloomington Steel. Reiners became angry with Teivet on the job site and attacked his car by throwing rocks at it. Reiners once became so enraged that a saw malfunctioned, that he destroyed the \$16,000 piece of equipment in a fit of rage.

Mark Rodgers was a sales representative for First Site Staffing. He personally had felt threatened by Reiners during a confrontation with him regarding an employment related dispute.

(A30-A31)

On the day of the assault, Mr. Padilla was eating lunch in a space his employer shared with Bloomington Steel. Reiners evidently became enraged because Mr. Padilla was speaking to other employees in Spanish. (RA028) Reiners hit Mr. Padilla in the head with a "blunt object" and he sustained multiple skull fractures and brain hematomas, requiring surgery. (*Id.*) Reiners told the police officer after he was arrested for his attack on Mr. Padilla that "[a]ll I wanted was for that Mexican to leave my property." (RA039)

Mr. Padilla described the incident in his Complaint in the Underlying Action, in paragraphs 5 – 7, as follows:

...Plaintiff was confronted by Defendant Reiners and informed that Plaintiff would not be allowed to speak Spanish on the job site, but that he could only speak English. A short time later, Plaintiff was again confronted by Defendant Reiners because he was speaking [sic] English.

Defendant Reiners became angry and violent. Defendant Reiners picked up a piece of wood, and raised it above his head and swung it down, striking the head of Plaintiff.

At as direct and proximate result of the assault and battery as alleged above, Plaintiff sustained a significant and permanent injury including a fractured skull and brain injury.

(RA008)

Reiners was prosecuted criminally for the assault and battery of Jose Padilla. (RA038-RA040) Reiners was found guilty by the jury. This conviction was overturned based on a legal error relating to jury selection. Reiners subsequently pled guilty to assault in the first degree on March 1, 2004 in the *State v. Reiners* criminal matter

regarding the Padilla incident, also in Hennepin County District Court. (RA038-RA040)
Reiners was sentenced in May, 2004. (RA045)

In the Underlying Action, Mr. Padilla sought damages from Reiners and Bloomington Steel. (RA007-RA011) Mr. Padilla alleged that Bloomington Steel was liable for the injury he sustained under the doctrine of *respondeat superior* and under the alternative theory of negligent retention and supervision. (*Id.*)

C. The Travelers Policy

For the policy period May 31, 2000 through May 31, 2001 Travelers provided commercial general liability coverage to Bloomington Steel through policy number I-680-29H814-7-COF-00 (“The Primary Policy”) (RA046-RA144) Travelers also provided umbrella liability coverage to Bloomington Steel through Policy No. ISF-CUP-294H901-5-IND-00 (“The Umbrella Policy”). (RA145-RA187)The insuring agreement to the Primary Policy provides, in relevant part:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies...

(RA105)

“Bodily injury” is covered only where it is caused by an “occurrence”, a term defined as follows:

12. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(RA114)

The policy incorporates the following exclusion:

a. Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

(RA105) The Umbrella Policy provides substantially the same provisions and exclusions. (See RA148-149).

The Underlying Action was tendered to Travelers. Travelers denied any obligation to defend or indemnify Reiners in the Underlying Action on the grounds that the Policy did not afford coverage for damages sustained as a result of his assault of Mr. Padilla. (RA193 – RA194)

Travelers provided a defense to Bloomington Steel in the Underlying Action but reserved the right to deny coverage on the grounds that the damages sustained by Mr. Padilla did not result from an occurrence. (RA188-RA192) Travelers also reserved the right to deny coverage on the alternative grounds that the injury sustained by Mr. Padilla was expected or intended by the insured. (*Id.*)

D. Judge Blaeser's Order

In the Coverage Action, Bloomington Steel, Mr. Padilla and Travelers brought cross-motions for summary judgment before the Honorable Robert A. Blaeser. In his Order and Memorandum dated July 20, 2004, Judge Blaeser denied Bloomington Steel's and Mr. Padilla's motions for summary judgment and granted Traveler's Motion for Summary Judgment. (A141-A145) Judge Blaeser determined that "Bloomington Steel,

given Reiners' extensive history of physical violence on the job, knew or should have known that an outburst of violence by Reiners was highly likely to occur" and that "Reiners' knowledge bars coverage to Bloomington Steel for damages stemming from his intentional assault on Padilla." (A145)

E. The Minnesota Court of Appeals Decision

In its opinion dated May 3, 2005, the Minnesota Court of Appeals affirmed Judge Blaeser's order, finding that the district court did not err when it determined there was no coverage under the Travelers policy where Reiners' assault on Padilla was expected from the standpoint of Bloomington Steel. *The Travelers Indem. Co. v Bloomington Steel & Supply Co.*, 695 N.W.2d 408, 410 (Minn.Ct.App. 2005) (attached as COA1-COA3 to Appellant's Appendix)

ARGUMENT AND AUTHORITIES

The intent and knowledge of the sole owner and operator - the agent at issue here - of a corporation may be imputed to the corporation for purposes of determining whether bodily injury arose from an "accident" and was expected or intended from the standpoint of the corporation. A corporation may only act by and through its agents. A corporation can only expect or intend what its agents expect or intend. The actions and knowledge of the individual controlling the corporation can be imputed to the corporation for coverage purposes. To hold otherwise would allow persons to hide behind a corporate shield to avoid the real economic consequences of their criminal conduct. Reiners cannot shield himself behind Bloomington Steel, his alter ego company, to avoid the economic consequences of his intentional actions. Reiners' and Bloomington Steel's conduct was

expected and intentional and the damages Padilla seeks resulting from that conduct are not covered under the Travelers policy.

I. STANDARD OF REVIEW

On an appeal from summary judgment, an appellate court asks two questions: "(1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue of material fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). No party raised a genuine issue of material fact which was in dispute. Summary judgment was appropriate here.

II. THE COURT MUST IMPUTE THE INTENT AND EXPECTATION OF REINERS TO THE CORPORATION HE ALONE OWNS AND CONTROLS TO BAR COVERAGE UNDER THE TRAVELERS POLICY.

The Court directed the parties to address the following issue:

Whether the intent or knowledge of an agent of a corporation may be imputed to the corporation for purposes of determining whether bodily injury was expected or intended from the standpoint of the corporation.

The short answer is this: it depends on what level of control the agent has over the corporation. Imputation should reflect the reality of how a corporation acts and how a corporation gains and maintains knowledge. If an agent is the sole owner and operator of the corporation, imputation is appropriate. Minnesota law would not support a decision that intent or expectation should be imputed for coverage purposes in the case of an

assault being committed by a first-level employee of a large corporation which had a functioning Board of Directors which had no prior knowledge of the violent tendencies of the employee. But that factual scenario is not presented here. Here, the imputation issue is presented with the backdrop of the undisputed facts that Reiners was the sole director, officer and shareholder of Bloomington Steel during the time of the assault and that Reiners exercised complete control over Bloomington Steel. It is also undisputed that prior to his assault on Padilla, Reiners committed violent acts towards others. Accordingly, while the intent or knowledge of any agent of a corporation should not necessarily be imputed in every instance to the corporation for purposes of a coverage analysis, the Court should impute the intent and expectation of Reiners, the sole owner and operator of Bloomington Steel. Imputation in these circumstances does not improperly ignore the corporate form; rather, imputation accurately reflects the reality of the situation. And here, rather than ignoring the corporate form, Travelers, the trial court and the Court of Appeals treated Bloomington Steel and Reiners as separate and distinct legal entities under the law for purposes of the coverage analysis. But in these circumstances, when the control over the corporate entity is so complete by one agent of the entity, the intent and expectation must be imputed to the corporation. To do otherwise would allow an insured, in this case Bloomington Steel, to control its risk of loss and its sole owner and operator to hide behind a corporate form to protect himself from the economic consequences of his violent assault.

In general, a corporation can only act through its agents. A corporation can only possess the knowledge and expectation of its agents. Minnesota and other jurisdictions

impute the knowledge or intent of an agent to his or her corporate entity. Where, as here, an intentional injury was inflicted, the intent of a high ranking officer who inflicted the injury must be imputed to the corporation. *Employers Reinsurance Corp. v. United Fire and Casualty Co.*, 1992 WL 55010 (Minn. App. 1992)(unpub.)(RA197-RA199)(fraudulent acts of the owner and director were the fraudulent acts of the corporation)(citing *Farmers and Merchants State Bank of Pierz v. St. Paul Fire and Marine Ins. Co.*, 309 Minn. 14, 19, 242 N.W.2d 840, 843 (1976)); *see also*, *Langford Electric Co. v. Employer Mutual Indemnity Corp.*, 210 Minn. 289, 297 N.W. 843 (Minn. 1941)(intent of the person in charge of the insured's operations imputed to the corporation); *Heaver v. Lerch Bates and Assoc., Inc.*, 467 N.W.2d 833, 835 (Minn. App. 1991)(manager's knowledge is imputed to the corporation); *see also Brooks Realty, Inc. v. Aetna Ins. Co.*, 276 Minn. 245, 149 N.W.2d 494 (Minn. 1967) (noting knowledge insured's agent would be "imputable").

Minnesota courts and other jurisdictions apply the longstanding principle that a corporation can only act through its agents, and that the intent of an agent can be imputed to a corporation. *See Mercy Medical Center, Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 149 Md.App. 336, 366 (Md.Ct.App. 2003) (Because a corporation can only act through its agents, notice to a an office or agent of a corporation is deemed to be notice to the corporation where the office or agent could reasonably be expected to act upon or communicate the knowledge to the corporation); *Stamm v. Salomon*, 551 S.E.2d 152, 159 (N.C.Ct.App. 2001) (the knowledge of a corporation's president is imputed to the corporation itself); *Bailie Communications, Ltd v. Trend Business Systems*, 765 P.2d

339, 343 (Wash.Ct.App. 1988) (when president and sole shareholder of a corporation committed fraud, the corporation as a separate entity had knowledge of the fraud); *City of Arkansas City v. Anderson*, 762 P.2d 183, 189 (Kan. 1988) (a corporation had “identical knowledge” of its president because a “corporation is an artificial person; it may acquire knowledge only through real people – its officers, agents, or employees.”); *Pubs, Inc. v. Bank of Illinois in Champaign*, 618 F.2d 432, 438 (7th Cir. (Ill.) 1980) (If the president, vice-president or director of a corporation has knowledge of a fact, knowledge or notice of that fact is generally imputed to the corporation); *Grounds v. Triple J Construction Co., Inc.*, 606 P.2d 484, 490-91 (Kan.Ct.App. 1980) (in workers’ compensation case, respondent employer had knowledge of employee’s prior back injury and prior workers’ compensation claim where the employer’s president and the claimant employee had been personal friends since childhood and the president’s knowledge was imputed to the employer); *Department of Transportation Bureau of Traffic Safety v. Michael Moraiti, Upper Darby Auto Center, Inc.*, 34 Pa.Cmwlt. 27, 30 (1978) (“Where an officer of the corporation has performed the illegal act on behalf of and in furtherance of the corporation’s business, knowledge of that act may fairly be imputed to the corporation.”); *Rose v City of Chicago*, 45 N.E.2d 717, 732-33 (Ill.Ct.App. 1943) (the knowledge of president and general manager of a corporation regarding the acts of violence and of employees was the knowledge of the taxicab company in regard to its liability for injuries sustained by a taxicab passenger when a mob attacked a taxicab during a strike).

An intentional tort committed by a corporate officer in the course of his duties as a managing agent constitutes an intentional tort committed by the corporation. *Seminole*

Point Hosp. Corp. v. Aetna Cas. & Sur. Co., 675 F. Supp. 44 (D.N.H. 1987) (citing *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 884 (3d Cir.1975)); see also *Aetna Casualty & Surety Co. v. Shuler*, 72 A.D.2d 591, 421 N.Y.S.2d 87, 88 (1979); S. Speiser, *The American Law of Torts* § 4:51 (1983).

Courts in other jurisdictions have found that the corporation is not entitled to indemnity for claims based on the intentional conduct of a managing agent. See *Coit Drapery Cleaners, Inc. v. Sequoia*, 14 Cal. App. 4th 1595, 18 Cal. Rptr. 2d 692 (1993)(no coverage where perpetrator of assault and harassment was the corporation's founder and President); *Quality Painting, Inc. v. Truck Insurance Exchange*, 988 P.2d 749 (Kan. App. 1999)(where perpetrator was sole owner of the corporation, the corporation could not be regarded as a negligent, non-culpable insured); *Roberts v. R.S. Liquor Stores, Inc.*, 164 So.2d 533 (Fla. App. 1964)(assault found to be by or at the direction of corporate insured where the general manager was involved in and ratified the assault); *Deluca v. Coal Merchants Mutual Ins. Co.*, 203 Misc. 261, 59 N.Y.S.2d 664 (1945) (no coverage for assault committed by the manager and president); *Greater New York Mutual Ins. Co. v. Perry*, 6 A.D.2d 432, 178 N.Y.S.2d 760 (1958)(assault by an officer of the company deemed to be an assault by the insured).

In these decisions, courts recognize that, in the context of insurance obligations, if the insured controls the company, the insured's intentional acts are the acts of the company. In *Coit Drapery Cleaners, Inc.*, 18 Cal.Rptr.2d at 692, the President, Chairman of the Board and major shareholder of Coit Drapery was sued for sexual harassment. The Court held that the company's insurer had no duty to defend or

indemnify Coit Drapery where the underlying complaint alleged that the corporation's owner and sole proprietor sexually harassed an employee. The Court acknowledged that in circumstances where the perpetrator controls the company, the company's failure to prevent the sexual harassment was not an "accident" but was "expected or intended" and therefore excluded from coverage notwithstanding what theory the underlying lawsuit may or may not be premised upon. *Id.*

In *Quality Painting, Inc. v Truck Ins. Ex.*, 988 P.2d 749 (Kan. App. 1999), a case similar to the one presented here, the sole proprietor and owner of the company was sued for sexual harassment by an employee. The employee also brought a negligent supervision claim against the company. The harasser, Holloway, was the owner of Quality Painting, Inc., the insured, and controlled of the company, including the power to hire and fire employees. Just as the Appellant asserts in this case, the insured in *Quality Painting Inc* argued "that notwithstanding the intentional nature of Holloway's alleged acts, the potential for coverage existed for the negligence claim against Quality because Quality could be viewed as a nonculpable insured which is vicariously liable for Holloway's misconduct...and that Quality, as a separate legal entity and the 'insured' under the policy, should be entitled to a defense on the allegation that Quality negligently failed to supervise Holloway." *Id.* Even in the broader duty to defend context, the *Quality Painting* Court held that the perpetrator and the company were "one and the same" for insurance coverage purposes and the former employee's claim against the insured corporation for negligent failure to provide a workplace free of sexual harassment was not covered under the policy. The Court explained that "it would defy logic to say

that [the company] might not have authorized or ratified [the perpetrator's] intentional actions...[and the company] cannot be regarded as a negligent, nonculpable insured." *Id* The Court noted that liability for "mere negligence" could not exist but for the intentional acts of the perpetrator and to shift the economic consequences resulting from what was characterized as an intentional corporate practice to the company's insurer would violate public policy. *Id*.

The Court in *Matter of World Hospitality*, 983 F.2d 650, 652 (5th Cir. 1993) explained this general rule as follows:

"[T]here is a strong policy reason for denying the corporation coverage under the bonds in question. A corporation can only act through its officers and directors. When one person owns a controlling interest in the corporation and dominates the corporation's actions, his acts are the corporation's acts. Allowing the corporation to recover for the owner's fraudulent or dishonest conduct would essentially allow the corporation to recover for its own fraudulent or dishonest acts.

See also Red Lake County State Bank v. Emp Ins of Wausau, 874 F.2d 546 (8th Cir. 1989) (fidelity bond would not provide coverage for losses caused by dishonest corporate employee who was 92 percent shareholder, president, chief operating officer, director, and effective owner of bank).

In reaching their decisions in analogous cases, courts from other jurisdictions have routinely held that an employee's tortious acts can be imputed to his corporation. In *Walthers v. Gossett*, a patient sued her orthodontist and his corporation for sexual abuse. 941 P.2d 575 (Or.Ct.App. 1997). Like the facts in this case, the orthodontist in *Walthers* was the defendant corporation's sole officer and shareholder at the time of the alleged

sexual abuse. *Walthers*, 941 P.2d at 579. The Oregon Court of Appeals held that the orthodontist's tortious acts could be imputed to the corporation, stating:

Because Gossett was defendant's sole officer at the time the corporation scheduled plaintiff's appointments and provided the examination room, he wielded "the whole executive power of the corporation" and "participated in and directed all that was planned and done." Accordingly, his knowledge that he intended to molest plaintiff, or that he was likely to do so, may be imputed to the corporation...

Id. at 579. The court determined that the orthodontist "was the sole corporate officer, and the corporation's knowledge must come from [the orthodontist] himself." *Id.* In this case, as in *Walthers*, any action taken or knowledge Reiners had was clearly imputed to the corporation Bloomington Steel, as Reiners was the sole director, officer and shareholder of Bloomington Steel.

In *Aetna Cas. & Surety Co. v. Shuler*, an officer, director and shareholder of a corporation shot and wounded a woman. 72 A.D.2d 591 (N.Y.S. 1979). The court stated that "[g]enerally, an intentional tort committed by a corporate officer in the course of his duties as managing agent, constitutes an intentional tort by the corporation." *Id.* at 592 (citations omitted). The court further recognized that "a corporation acts through its agents, whose acts are the acts of the corporation." *Id.* Since the plaintiff's complaint in *Shuler* was premised upon Shuler's commission of an intentional tort during the course and scope of his duties as a manager of the corporation, as is the case here, the *Shuler* court concluded that "such acts also constituted an intentional tort to the corporate insured [and] since intentional torts are beyond the scope of coverage, Aetna has no obligation to indemnify [the corporation]." *Id.*

This case is also analogous to the sexual harassment case *Ross v. Twenty-Four Collection, Inc* , 681 F.Supp. 1547, 1552 (S.D.Fla. 1988). In *Ross*, the plaintiff employee sued both Goldstein and her employer for sexual harassment. Goldstein was the president, chief operating officer, director and majority shareholder of the employer. *Ross*, 681 F.Supp. at 1551. The employee alleged that Goldstein made various sexual advances toward her. *Id.* The *Ross* court recognized that an employer is not automatically liable for sexual harassment of its supervisors, and instead the plaintiff must show that the employer knew or should have known of the harassment and failed to take remedial action. *Id.* at 1552. Applying this standard, the *Ross* court stated:

Since Goldstein was both the harassing employer and the president and director and majority shareholder of the corporation, there can be no doubt that his actual knowledge of the conduct can be imputed to the corporate defendant.

Id. Like the knowledge and conduct imputed from Goldstein to the corporate employer in *Ross*, there can be no distinction between the knowledge and action of Reiners from Bloomington Steel. Goldstein was the alleged harasser, and also was the president, director and majority shareholder of the company. Here, Reiners was the assaulter, and also was the sole director, officer and shareholder of Bloomington Steel. Any knowledge Reiners is imputed to Bloomington Steel. The actions of Reiners are imputed to Bloomington Steel.

A. MR. PADILLA'S DAMAGES DID NOT ARISE OUT OF AN "OCCURRENCE".

Because the intent and expectation of Reiners is imputed to Bloomington Steel, the damages sought by Mr. Padilla for the assault did not arise out of an "occurrence", as that term is defined in the Travelers policy.

"In construing an insurance contract, the policy must be considered as a whole." *Carlson v. Mutual Serv. Cas. Ins. Co.*, 527 N.W.2d 580, 583 (Minn. Ct. App. 1995). "[U]nambiguous language must be accorded its plain and ordinary meaning." *SCSC Corp.*, 536 N.W.2d at 311. A court "must not create an ambiguity where none exists in order to afford coverage." *Carlson*, 527 N.W.2d at 583. No party identified any ambiguity in the Travelers policy.

The burden of proving the existence of coverage rests with the insured, or here, Mr. Padilla. *Boedigheimer v. Taylor*, 287 Minn. 323, 329, 178 N.W.2d 610, 614 (1970). Mr. Padilla has no greater rights under the policy than the insured. *See State Farm Mut Auto. Ins. Co v. Worthington*, 405 F.2d 683 (8th Cir. 1968)(claimant has no greater rights than the insured). Mr. Padilla cannot establish that damages awarded in the Underlying Action are covered. Mr. Padilla cannot meet his burden of proof that the bodily injury Padilla sustained was the result of an "occurrence," defined in the Travelers Policy as an "accident."

The terms of the policy are clear and unambiguous. The policy provides coverage for claims of "bodily injury" caused by an occurrence. "Occurrence" is defined in the Travelers policy as follows: **"Occurrence" means an accident, including continuous**

or repeated exposure to substantially the same general harmful conditions.” (RA114)(emphasis added). This Court defined an “accident” as “**an unexpected, unforeseen, or undesigned happening.**” *Hauenstein v. St. Paul Mercury Indemnity Co.*, 65 N.W.2d 122 (Minn. 1954)(emphasis added).

The assault on Mr. Padilla was not an “occurrence” under the Travelers policy. First, the assault on Mr. Padilla was not an “occurrence” because finding so would allow the insured to have improperly controlled the risk of loss under the policy. Second, the assault and resulting damages were expected by Bloomington Steel and was not an “accident” and, therefore, not an “occurrence.”

1. Bloomington Steel Controlled Its Risk of Loss.

To require Travelers to indemnify Bloomington Steel in the Underlying Action would violate a well recognized principle of insurance law that an insured should not be allowed to consciously control the risks that are insured. If an insured controls the risk of loss, the loss did can result from an “accident”. Minnesota courts, and courts from other jurisdictions, have consistently ruled that risk resulting in a loss or damages which is controlled by the insured is not insurable.

In *Bituminous Cas. Corp. v. Bartlett*, 240 N.W.2d 310, 312 (Minn. 1976), overruled on other grounds by 277 N.W.2d 389 (Minn. 1979), the Minnesota Supreme Court stated: “If the single insured is allowed through intentional or reckless acts to consciously control the risks covered by the policy, a central concept of insurance is violated.” *Id.* If the insured consciously controls the risk of loss, the insured does not suffer an “accidental” loss. *Cameron v State Farm Ins. Co* 1989 WL 3543, at *2 (Minn.

Ct. App. 1989)(unpub.)(RA195-RA196); *see also Farmers Union Oil Co. v. Mut. Serv. Ins. Co.*, 422 N.W.2d 530 (Minn. Ct. App. 1988) (even if no damage was intended by the insured, knowledge of the insured which implied a high expectation of damage renders the loss not an “occurrence”); *Heritage Mut. Ins. Co. v. Croix Circuits, Inc.*, 1996 WL 118297 (Minn. Ct. App. 1996)(unpub.)(RA200-RA204)(no “occurrence” under CGL when insured knew its manufacturing practices would produce defective products); *Farmers Union Oil Co. v. Mutual Serv. Ins. Co.*, 422 N.W.2d 530, 533 (Minn. Ct. App. 1988) (damages did not result from occurrence where insured knew of risk of damage, proceeded in light of this knowledge, and disregarded the known hazard).

The Minnesota Supreme Court reaffirmed the principle that an insured should not be allowed to control the risk of loss in *Franklin v. Western National Mut. Ins. Co.*, 574 N.W.2d 405 (Minn. 1998). In *Franklin*, the Court held that the insurer owed no duty to defend a claim of trespass brought against its insured in an action seeking judicial construction of a lease. In the lease dispute, the insured made a conscious decision to ignore a notice that required him to vacate the property. When the lessors brought an action for trespass against him the insured sought a defense from Western Mutual. The Court concluded that there could be no coverage for liability resulting from the insured’s deliberate business decisions because to do so would “impermissibly allow [the insured] to consciously control its risk of loss.” *Id.* at 408; *see also St. Paul Fire & Marine Ins. Co. v. Briggs*, 464 N.W.2d 535, 539 (Minn. Ct. App. 1990) (“it would be contrary to public policy to require insurers to pay for losses occasioned by willful acts”). Simply put, “one cannot insure himself against the consequences of his willful acts, committed

with the intent to inflict injury.” *Klatt v. Continental Ins. Co.*, 409 N.W.2d 366, 372 n.6 (S.D. 1987); *See, e.g., Cunningham & Walsh v. Atlantic Mut. Ins. Co.*, 744 P.2d 1317, 1320 (Or. Ct. App. 1987) (“[w]e may not read into an insurance contract that which we would regard as against public policy if it were expressly included in it. We would not enforce a provision of a policy which requires indemnity for mental distress caused by the policyholder’s fraud and deceit”); *Allstate Ins. Co. v. Belezos*, 744 F. Supp. 992, 997 (D. Or. 1990) *aff’d*, 951 F.2d 358 (9th Cir. 1991) (“[a] clause in a contract of insurance purporting to indemnify the insured for damages recovered against him as a consequence of his intentional conduct in inflicting injury upon another is unenforceable by the insured on the ground that to permit recovery would be against public policy”); *Continental Ins. Co. v. McDaniel*, 772 P.2d 6, 7-8 (Ariz. Ct. App. 1988) (court grants summary judgment for the insurer, holding that public policy precluded it from finding insurance coverage for the physician’s intentional misconduct); *Germantown Ins. Co. v. Martin*, 595 A.2d 1172, 1175 (Pa. Super. Ct. 1991) (“[t]he courts of Pennsylvania have refused to require an insurer to defend an insured for his own intentional torts and/or criminal acts”); *Wedge Products v. Hartford Equity Sales Co.*, 509 N.E.2d 74, 76 (Ohio 1987) (“public policy is contrary to insurance against intentional torts”); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1007 (Fla. 1989) (“it is axiomatic in the insurance industry that one should not be able to insure against one’s own intentional misconduct”).

Reiners had exclusive control over his own company. He knew his violent behavior could result in lawsuits against his company. Reiners and Bloomington Steel

cannot be allowed to control the risk of loss and expect coverage under the Travelers Policy.

2. The Damages Were Not Caused By An "Occurrence" Because Bloomington Steel Expected The Assault.

The bodily injury sustained by Mr. Padilla as a result of being struck over the head with a two-by-four did not occur accidentally from the standpoint of Reiners or Bloomington Steel. An "accident" is an "unexpected, unforeseen or undesigned happening or consequence." *Hauenstein*, 65 N.W.2d 122. The assault on Mr. Padilla did not arise from an "unexpected, unforeseen or undesigned happening."

Mr. Padilla describes the assault as follows: "The argument escalated. Reiners picked up a piece of wood and smashed Padilla's skull." (A33) In submissions to the trial court, Mr. Padilla further stated: "It is undisputed that Reiners' actions in assaulting Padilla were intentional. *** Reiners, as an individual, has no right to coverage under the policies." (A39) It is undisputed that the assault committed by Reiners was not accidental.

Mr. Padilla and Bloomington Steel also contend that the violent acts of Reiners were patently foreseeable to Bloomington Steel prior to the attack. Mr. Padilla stated in submissions to the trial court:

[Bloomington Steel's] liability arises from the foreseeability of the underlying act. Bloomington Steel knew that Reiners had a long history of violence, including many incidents in the workplace. **It was foreseeable that Reiners would again commit a violent offence in the workplace.**

(A41)(emphasis added).

This conclusion is well-supported by the following undisputed facts:

III. Reiners' history of violence

Reiners has an extensive history of violence. Many of the incidents occurred on the job. Reiners assaulted Lonny Menard, a co-employee of Padilla, three separate times.

Albert and Jovita Eggrolla were employees of First Site Staffing and were assigned to Bloomington Steel. On their last day of the job, Reiners became angry with them and threatened them both. Reiners threatened to kill Jovita with a hammer.

Dana Novacek was also an employee of First Site Staffing. She was informed that she could not take a break in the presence of Reiners because he would become irate. When she quit her job, she had the sales rep from First Site collect her personal belongings from the job site, because she feared for her safety if she returned herself.

Bob Teivet was an employee of Bloomington Steel. Reiners became angry with Teivet on the job site and attacked his car by throwing rocks at it. Reiners once became so enraged that a saw malfunctioned, that he destroyed the \$16,000 piece of equipment in a fit of rage.

Mark Rodgers was a sales representative for First Site Staffing. He personally had felt threatened by Reiners during a confrontation with him regarding an employment related dispute.

(A30 - A31) Bloomington Steel knew that Reiners was violent and Bloomington Steel could expect that Reiners would commit violent offenses in the workplace. Mr. Padilla was indeed correct that it was foreseeable: It is undisputed that prior to this attack on Mr. Padilla, Reiners had an extensive history of violence in the workplace. It is undisputed that Reiners threatened employees with death; hit employees with objects; and in a rage destroyed expensive equipment. The assault on Mr. Padilla was not "unexpected, unforeseen or undesigned" by Bloomington Steel and under any theory of liability

pleaded, the bodily injury sustained by Mr. Padilla was not an "occurrence" under the policy.

B. THE DAMAGES SOUGHT BY MR. PADILLA IN THE UNDERLYING ACTION ARE BASED ON REINERS' INTENTIONAL AND EXPECTED CONDUCT AND THERE IS NO COVERAGE FOR THESE EXPECTED OR INTENDED ACTS UNDER THE POLICIES.

The policy provides that "insurance does not apply to... **"Bodily injury"** or **"property damage" expected or intended from the standpoint of the insured.**" (RA105)(emphasis added) Here, the Court is faced with two analyses: whether the intent of Reiners in committing the assault is imputed to Bloomington Steel and whether the knowledge of Reiners of his prior assaults and violent behavior is imputed to Bloomington Steel such that his assault on Padilla was expected. Under either analysis, the exclusion applies.

Under Minnesota law, an intentional injury exclusion does not relieve an insurer from liability unless the insured acted with the intent to cause bodily injury. *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327, 330 (1973). Intent may be established: (1) by proof of an actual intent to injure; or, (2) when the character of an act is such that an intention to inflict injury can be inferred as a matter of law. *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 573 (Minn. 1981).

Mr. Padilla argues that Bloomington Steel, as Reiners' corporation, did not intend or expect the bodily injury because Reiners was the assailant and Bloomington Steel is simply a corporate entity. That argument fails: (1) the undisputed intent of Reiners to assault Mr. Padilla is imputed to Bloomington Steel, (2) intent can be inferred from the

nature of the act, and (3) Bloomington Steel, with Reiners as its sole director, officer and shareholder, expected and intended the bodily injury inflicted on Mr. Padilla. There can be no coverage because the expected or intended injury clause in the policy excludes coverage where Bloomington Steel expected or intended the injury sustained by Mr. Padilla.

Insurers have the burden to prove the applicability of the exclusion as an affirmative defense. *Hubred v Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). Travelers met this burden, and Mr. Padilla and Bloomington Steel, through their admissions, established the applicability of the exclusion. In the trial court, Judge Blaeser found that "Travelers has demonstrated the applicability of its Insurance Policy's intentional act exclusion given the intentional nature of Reiners' assault on Padilla." (A144) It is undisputed that the assault on Mr. Padilla was committed intentionally. It is undisputed that Bloomington Steel expected and intended Reiners to commit workplace violence.

With regard to the expectation of Bloomington Steel, the Minnesota Court of Appeals' case *American Family Mut. Ins. Co v M.B.*, 563 N.W.2d 326 (Minn.Ct.App. 1997) is on point and instructive in determining that Bloomington Steel, as Reiners' corporation, expected or intended Reiners' assault against Padilla. (A145)

In *M.B.*, the insured corporation Le Terra, Inc. was found liable for "negligence" for claims relating to the sexual harassment of models by a photographer used by Le Terra, Inc. The President of Le Terra, Inc., Susan Gurler, was present in the studio when the photographer harassed the models and was aware that the photographer "used

sexually demeaning language" to the models, and took them to secluded areas of the building. Gurler was also aware that after models had been with the photographer, they were uncomfortable and disturbed. The Court of Appeals explained the meaning of "expected" in an exclusionary clause similar to the clause in the policy here:

For the purposes of an exclusionary clause in an insurance policy the word "expected" denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions.

Id. at 328 (citing *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1389, 1391 (8th Cir. 1996) (applying Minnesota law). The Court held that a "reasonably prudent person in Gurler's position would have had sufficient indications to forewarn her that [the photographer's] sexual harassment and assault...were highly likely to occur." The Court found that there was no coverage under the general liability policy issued to the corporation because the injuries were expected or intended by Le Terra, Inc. *Id.*

Here, as in *MB*, any reasonably prudent person (specifically Reiners) had sufficient indication to forewarn himself that an assault by him was likely to occur. It defies logic to conclude that Bloomington Steel – a company solely owned and operated by Reiners – was not aware of Reiners' intentions, actions, or dangerous proclivities. His violent history was not a secret. Reiners assaulted employees before. (Appellant's Brief, at pp. 5-6) He also knew that "unfit" employees could subject his company to lawsuits. (Appellant's Brief, at p. 3) Reiners was clearly aware that his assault on someone could result in a lawsuit against the company. Just as the knowledge of Gurler barred coverage

to Le Terra, Inc. in *MB*, Reiners' knowledge bars coverage to Bloomington Steel for damages for his intentional assault.¹

C. REINERS CANNOT HIDE BEHIND HIS CORPORATE SHIELD.

Minnesota Courts recognize that the legal fiction of a corporation cannot be used to shield persons from the effects of the laws. In *Gunderson v Harrington*, 632 N.W.2d 695 (Minn. 2001), an employee of a closely owned corporation in the business of providing orthodontic services brought an action against the orthodontist who was the corporation's president and sole shareholder, alleging assault, battery and intentional infliction of emotional distress. This Court held that the orthodontist was, for all practical purposes, the corporation. The employee's claim was barred by the Workers Compensation Act. The employee argued that the corporation was a legal entity separate from its shareholders and the orthodontist and his corporation were separate legal entities such that the acts of the orthodontist were not the acts of the company. This Court disagreed, explaining that a corporation can only act through individuals and the

¹ Mr. Padilla argued in the Court of Appeals (for the first time in this litigation) that the *MB* court incorrectly applied a subjective standard test instead of the objective standard test set forth in *Domtar v. Niagra Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997). The *Domtar* court focused on the actual expectation of damage standard when interpreting the "expected or intended" exclusion. *Domtar*, 563 N.W.2d 724. The *Domtar* court required a level of expectation to a "high degree of certainty" and equated "expected" damage with "reckless" conduct. *Id.* The Court of Appeals found Padilla's proffered distinction "unavailing" and declined to reach the issue. (COA3). The Court of Appeals went on to correctly state that even if the proposed *Domtar* standard was applicable to the facts to before it, Bloomington Steel still would have been found to expect the damages resulting from Mr. Padilla's injuries, stating that the "commingled identity of Reiners and Bloomington Steel permits no other rational result." (COA3) In his appeal to this Court, Mr. Padilla does not challenge the standard.

orthodontist, as sole shareholder and president of the company, was virtually indistinguishable. The Court noted that “[t]o rigidly cling to the form of the corporation, ignoring [the individual’s] sole authority to manage and direct [the [employee’s] employment,” would frustrate the purposes of the Workers Compensation Act. *Id.*

Like the conduct, intent and knowledge of officers and directors and managers in the many cases herein, the intent and knowledge of Reiners is the intent and knowledge of Bloomington Steel. It is beyond dispute that Reiners intentionally assaulted Padilla and that Reiners was the sole director, officer and shareholder of the company. There is also no dispute that Reiners, as the sole officer of the company, knew about his prior violent acts. His intent of committing the assault must be imputed to Bloomington Steel as a matter of law and damages sought by Padilla are excluded. Likewise, the knowledge of Reiners that he would commit the assault must be imputed to Bloomington Steel excluding from coverage the damages sought by Padilla.

III. THE “SEPARATION OF INSUREDS” PROVISION IN THE TRAVELER’S POLICY DOES NOT REQUIRE TRAVELERS TO INDEMNIFY BLOOMINGTON STEEL FOR DAMAGES RESULTING FROM ITS INTENTIONAL CONDUCT.

Rather than address the discrete issue presented by the Court, Padilla and the MTLA filed briefs in which both re-argue, and in some instances, raise new arguments as to why the negligent supervision claim is covered and why the Court must apply the Separation of Insureds provision. There should be no question that the trial court and the Court of Appeals agreed with Padilla and undertook the coverage analysis from the perspective of Bloomington Steel as required by the Separation of Insureds provision.

Further, whether a complaint included a claim for negligent supervision may be relevant to determine whether a defense was owed to Bloomington Steel, but not relevant to whether, based on the actual facts presented, Travelers had an indemnity obligation to Bloomington Steel. As such, MTLA's brief is not helpful, goes beyond the scope of the order allowing briefing and should be stricken. (See Section VI, below.) However, Travelers must respond since Appellant and Amicus raised a number of issues which are not relevant to this appeal.

Appellant contends that the separation of insureds provision in the Travelers' Policy precludes the Court from imputing Reiners' intent to Bloomington Steel. Appellant cites no case which directly stands for that proposition which is helpful to this case. Moreover, Travelers, the trial court and the Court of Appeals all honored the "Separation of Insureds" provision by viewing the coverage issues from the perspective of Bloomington Steel, not Reiners. In fact, the Court of Appeals agreed that the Separation of Insureds provision is not relevant to the appeal of the District Court's grant of summary judgment to Travelers. The Court of Appeals reasoned that this provision was irrelevant to the appeal "because the district court clearly agreed with Padilla[.]" (COA3)(underscoring added). The District Court agreed that the Separation of Insureds provision applied and the District Court was required to "consider whether the assault on Padilla was 'expected or intended' from the standpoint of each insured." (COA3)(underscoring added).

To illustrate the absurdity of Padilla's position that the Separation of Insureds dictates a different result here, take the following factual scenario: Reiners engaged in

previous violent assaults before he assaulted Padilla. Bloomington Steel's hypothetical other co-owner was aware of the prior violent conduct and assaults and did nothing to address the problem. In that case, the co-owners' knowledge and expectation could clearly be imputed to Bloomington Steel for coverage purposes. But as Padilla asserts, because here the sole owner of a corporation committed the assault possessing the prior knowledge of his own assaults, the corporate entity must be charged with knowledge about the previous conduct. Decisions about coverage and imputation must reflect reality. Reiners was the controlling agent of Bloomington Steel when he committed the prior assaults; Bloomington Steel knew about those prior assaults because Reiners knew about the assaults. The Separation of Insureds provision requires that the insurer apply the policy separately to each insured. It does not require the insurer or the courts to ignore the plain facts that a corporation had sufficient knowledge of previous conduct such that a subsequent assault was not unexpected.

A. THE CASE LAW RELIED UPON BY APPELLANT IN SUPPORT OF HIS "SEPARATION OF INSUREDS" ARGUMENT IS FACTUALLY DISTINGUISHABLE.

Appellant relies on *Mork Clinic v. Fireman's Fund Ins. Co.*, 575 N.W.2d 598 (Minn.Ct.App. 1998) in support of his argument that the separation of insureds clause allows coverage to Bloomington Steel. *Mork Clinic* held that there was coverage for the negligence claims against the insured which arose out of its employee's intentional acts. 575 N.W.2d 598 (Minn. Ct. App. 1998) In *Mork*, several former patients of an allergist employed by the insured clinic claimed that the allergist sexually abused them during the course of medical examinations. The patients sued the allergist and the clinic, and

brought a claim for negligent hiring and supervision against the clinic. The Court analyzed whether the alleged negligent conduct caused the injury. Importantly, in sharp contrast to the issues the Court is asked to consider here, the *Mork* court did not consider or even address whether imputation of intent applied, or even whether the claim was barred by an intentional acts exclusion. In contrast to this case, the insurer in *Mork* did not claim the applicability or existence of an intentional acts exclusion. *Id.*

Appellant argues that the *Mork* case is persuasive because the court used the existence of a severability clause in the policy to justify their opinions. In contrast, the Eighth Circuit purportedly relied on a "joint obligations" clause in *Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8th Cir. 1996) to bar coverage for a negligence claim arising out of an intentional act. It is true that the Travelers Policy does not contain a "joint obligations" provision. But the presence of the severability provision in the policy does not dictate any particular result in this case. The coverage here is barred due to Bloomington Steel's intentional conduct. Moreover, despite the Eighth Circuit's reliance on this distinction, in *Steele* the Court specifically stated that even if the "joint obligations" provision was not included in the policy, the negligence claims were still barred under the policy. *Steele* also did not address the imputation issue presented in this case. Coverage is barred for damages awarded against Bloomington Steel because it expected or intended the injury and the injury was not an "occurrence" from its own standpoint. The analyses undertaken by the Courts in *Mork* and *Steele* are very different from the analysis presented here and, as such, those opinions are not controlling in this case.

Appellant also relies upon *Utica Mt. Ins. Co. v. Emmco Ins. Co.* and *Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n* in support of his severability argument. However, neither case cited by Appellant addresses the imputation issue and are not controlling on this Court. In *Utica Mt. Ins. Co. v. Emmco Ins. Co.*, the Minnesota Supreme Court solely addressed the severability issue in the context of an employee bodily injury exclusion, and whether the employee was defined as an "insured" under the policy. 243 N.W.2d 134 (Minn. 1976) This is not the case here, where the acts of company's sole director, officer and shareholder are imputed to the company.

Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n is also not applicable to this case. The New York Court of Appeals was faced with the issue of providing coverage to co-partners where the partners had been issued liability policies individually. 305 N.Y. 243 (1953). The Court determined the liability of a partner is barred when the other partner committed an assault, which is a situation wholly different than what this Court faces in this case. *Id.* Interestingly, the *Morgan* court distinguished a case very similar to the facts in this case, where the liability policy excluded coverage for assaults or acts committed at the direction of the corporation insured. *Id.* at 276 (citing *De Luca v. Coal Merchants Mut. Ins. Co.*, 59 N.Y.S.2d 664). The *Morgan* court stated that in *De Luca*, "the assault was committed at the direction of the manager and president through whom, as agent, the corporation acted. Thus his acts were its acts. The situations here and there are not alike." *Id.* at 276.

Appellant also argues that the opinion issued in *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 77 (Minn.Ct.App. 1997) is

helpful to the imputation issues faced by the Court here. This is not true. *Redeemer Covenant* does not address any imputation principles. In *Redeemer Covenant* there was no evidence that the only person controlling the insured was the person who committed the acts.

Appellant relies upon *American Employers Ins. Co. v. Doe*, 165 F.3d 1209 (8th Cir. (Minn.) 1999). *American Employers* is not applicable to this case, where, as with the other cases cited by Appellant, there were no imputation principles addressed. In *American Employers*, the priest who allegedly committed sexual abuse and the Diocese, as the employer of the priest and the insured under the policy, were clearly two separate entities. There were no principles of imputation. In addition, as in *Mork Clinic*, there was no “intentional acts” exclusion addressed in *American Employers*.

B. THE CASE LAW RELIED UPON BY APPELLANT AND AMICUS IS LEGALLY DISTINGUISHABLE IN THAT IT RELATES TO AN INSURER’S DUTY TO DEFEND, NOT DUTY TO INDEMNIFY.

This case addresses whether or not Travelers had a duty to indemnify Bloomington Steel for the intentional assault by its sole director, officer and shareholder. Travelers’ duty to defend Bloomington Steel is not at issue here. Travelers provided Bloomington Steel with a defense in the Underlying Action.

On appeal to this Court, Appellant and Amicus rely upon case law that is not applicable to this action. Many of the cases cited by Mr. Padilla and the MTLA only deal with an insurer’s duty to defend, not the insurer’s duty of indemnification. These are separate inquiries.

Appellant and Amicus MTLA both rely heavily upon the cases of *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002) and *Silverball Amusement, Inc v. Utah Home Fire Ins. Co.*, 842 F.Supp. 1151 (W.D.Ark. 1994) in support of their severability arguments.

In *Silverball*, the insured amusement company employed Emerson. *Silverball*, 842 F.Supp. at 1152. Emerson molested a 9-year-old girl on the insured's business premises and while Emerson was in the scope of his employment with Silverball. *Id.* at 1153. The girl's family brought a negligent hiring, retention and supervision claim against Silverball. *Id.* The insurer denied coverage under the intentional acts exclusion. *Id.* *Silverball* is distinguishable from the present action. *Silverball* mainly addressed the insurer's duty to defend which is premised upon the allegations in the Complaint. *Id.*, at 1155-56. In addition, the principle of imputation was not addressed in *Silverball* because the relationship between Emerson and Silverball Amusement differed greatly from the facts in this case. Emerson was simply one of many employees hired by Silverball Amusement. *Id.* at 1152. The decision does not set forth that Emerson had any managerial capacity in the company. In this case, Reiners was the sole director, officer and shareholder of Bloomington Steel. In essence, Bloomington Steel could not act without Reiners and as such, Reiners' knowledge, intent and actions are imputed to Bloomington Steel.

In *King*, the Texas Supreme Court determined whether an insurer had to duty to defend an insured employer for the assault committed by one of its employees. *King*, 85 S.W.3d at 187. In contrast to this case, the only question before the King court was

whether the insurer had a duty to defend the employer for negligent hiring claims. *Id.* In *King*, King was the sole proprietor of a construction company. Lopez was an employee of King's. Lopez assaulted Jankowiak, an employee of another construction company working on the same worksite. In a civil suit, Lopez alleged that King was liable for negligent hiring. *Id.* King specifically alleged that he did not intend to injure Jankowiak and that he was not physically involved in the assault in any way. *Id.* at 188. The insurer contended it had no duty to defend King because the acts of the employee were intentional and precluded under the intentional acts exclusion. *Id.* at 188. Applying the separation of insureds provision, the *King* court declined to impute Lopez's intent to injure to King, finding that it would treat both King and Lopez as separate insureds. *Id.*

Appellant and Amicus MTLA erroneously cite *King* for the overly broad proposition that when there is a separation of insureds clause, intent can not be imputed to the insured corporation. The *King* court was faced with facts which differ greatly from this case: King, the sole proprietor of the business hired Lopez and Lopez, King's employee, committed the assault. Based on those facts, the holding in *King* makes sense. If King committed the assault, the decision might have been helpful to inform this case.

The holding in *King* can not be analogized to the facts in this case, where the employer and the employee are one in the same. Applying the same logic from *King*, the following nonsensical scenario ensues: Reiners, the sole proprietor of Bloomington Steel who intended to assault Padilla, is somehow separate from Reiners, the individual who physically picked up a two-by-four while "on the job" and assaulted Padilla. The Court

of Appeals correctly noted that Reiners and Bloomington Steel are “commingled.” (COA3) There is simply no one else besides Reiners to bind and act for Bloomington Steel. It is undisputed that, for all practical purposes, Reiners was Bloomington Steel. The two cannot be separated for the purposes of the issues before the Court.

Instead, this case is more akin to the facts set forth in *Loney v. Illinois Farmers Ins Co.*, 2001 WL 267458 (Minn.Ct.App. Mar. 20, 2001) (unpublished) (RA205 - RA206). In *Loney*, appellant-insured’s son damaged a co-worker’s motorcycle and the co-worker brought an action for damages. *Loney*, 2001 WL 267458 at *1. The insurer refused to defend because of the exclusion in the policy for damages arising out of the use of a motor vehicle. *Id.* The insured argued that the exclusion did not apply to her because, in part: (1) the claim was based on parental liability, and (2) the exclusion did not apply to her because of the severability clause in the policy. *Id.* In regard to the insured’s first argument, the Court of Appeals held that regardless of the legal theory alleged in the complaint, the action against the insured sought recovery for damages that arose out of the use of the motorcycle and that “this connection ... is clearly excluded by appellant’s policy.” *Id.* at *2 (citing *Fillmore v. Iowa Nat’l Mut. Ins. Co.*, 344 N.W.2d 875, 877 (Minn.Ct.App. 1984)). In regard to the severability argument, the insured argued that the actions of her son could not be attributed to her. *Id.* at *2. The Court of Appeals reasoned that the insured’s parental liability could not be separated from the wrongful actions of her child, and that the cause of action against the parent was generated by the child’s actions. *Id.*

As in *Loney*, despite the severability provision, the intended or expected acts exclusion precludes coverage because the cause of action against Bloomington Steel is based on the intended and expected injury to Mr. Padilla. The fact that Mr. Padilla sued Bloomington Steel for negligence has no bearing on the coverage determination in this case. It is the actual facts which support the liability of Bloomington Steel which will determine whether Travelers has a duty to indemnify, not the allegations included in the Complaint. See *Reinsurance Ass'n of Minnesota v Timmer*, 641 N.W.2d 302, 308 (Minn. Ct. App. 2002) (the duty to indemnify is only triggered by actual damages that fall within the policy's coverage).

Here, the damages sought resulted from the intentional and expected, not negligent, conduct by the only individual who could act for the corporation. Appellant's and Amicus' defy logic and longstanding corporate law, where the conduct and knowledge of Bloomington Steel can not be separate and distinct from the knowledge and conduct of Bloomington Steel's sole director, officer and shareholder.

C. A RESPONDEAT SUPERIOR CLAIM IS NEVER COVERED UNDER A COMMERCIAL GENERAL LIABILITY POLICY.

Even if the terminology of the pleading had a bearing on whether Travelers must indemnify Bloomington Steel, there would still be no coverage for a claim of respondeat superior.² Mr. Padilla recognized that Bloomington Steel was responsible for Reiners' conduct as if the corporation had committed the assault itself by bringing a claim for

² As set forth in Section VI, below, the Amicus' discussion of respondeat superior is not part of the issue framed by this Court for appeal. However, since both Amicus and Appellant raised the issue, Travelers is forced to respond to this off-topic and irrelevant argument.

respondeat superior in the Underlying Action. In relation to the imputation claim, damages recovered for intentional conduct under a respondeat superior claim are not covered. Amicus MTLA recognizes there is no coverage for a respondeat superior claim under the Travelers, where it stated in its Brief:

As to the claim of *respondeat superior* made by Padilla against Bloomington Steel (*id.* at 149), Bloomington Steel has liability but Travelers is not compelled to either defend or indemnify under the policy of insurance. This is true because the liability alleged is based upon agency principles (vicarious liability for the assault) and is not an accident and thus there is no occurrence to trigger coverage.

(Amicus Brief, at p. 4). There is no dispute that there is no coverage under the Travelers policy for Padilla's claim of respondeat superior against Bloomington Steel.³

Two requirements must be met for the doctrine of respondeat superior to apply: 1) there must be an individual personally liable for the tort; and 2) the actor must be acting within the scope of his or her employment. *Leaon v. Washington County*, 397 N.W.2d 867, 874 (Minn. 1986). Courts recognized that the wrongful intent of the perpetrator will be imputed to the employer where liability is imposed under a respondeat superior theory. *U.S.F. & G. v. Open Sesame Child Care Center*, 819 F. Supp. 756 (N.D. Ill. 1993).

In *Britamco Underwriters, Inc. v. Stokes*, 881 F. Supp. 196 (E.D. Pa. 1995) the court held that because an intentional tort by a bouncer at a restaurant was not accidental, it did not constitute an occurrence within the restaurant's liability and, accordingly, there

³ The merit of Mr. Padilla's negligent supervision and respondeat superior claim against Bloomington Steel is not at issue in this appeal. This Court is not called upon to determine whether Mr. Padilla asserted a viable negligence claim against Bloomington Steel; rather, the only the issue before the Court is whether Travelers has coverage obligations for the damages sought by Mr. Padilla arising from the assault by Reiners.

was no coverage for the claim of respondeat superior on the part of the insured. Similarly, in *New York Life Ins., Co. v. Travelers Ins. Co.*, 92 F.3d 336 (5th Cir. 1996), the court held that a life insurance agent's alleged intent to injure a customer in connection with a fraud scheme was imputed to the insured principal (life insurer). Therefore, the agent's alleged actions did not involve an "accident" and did not produce an "occurrence" within the meaning of the CGL insurance policy. *Id* Likewise, damages awarded for Reiners' intentional conduct under a theory of respondeat superior against Bloomington Steel are not covered.

Courts recognize that the wrongful intent of the perpetrator is imputed to the employer where liability is imposed under a respondeat superior theory. *U.S.F. & G. v. Open Sesame Child Care Center*, 819 F. Supp. 756 (N.D. Ill. 1993). The federal courts have generally ruled that the issuer of insurance policies which insure only against accidental "occurrences" have no duty to defend an employer when the employee committed an intentional assault and battery and the employer is liable only because of respondeat superior. See e.g., *Britamco Underwriters Inc. v. Stokes*, 881 F.Supp. 196 (E.D.Pa.1995); *West American Ins. Co. v. Bank of Isle of Wight*, 673 F.Supp. 760 (E.D.Va.1987); *American and Foreign Insurance Co. v. Church Schools*, 645 F.Supp. 628 (E.D.Va.1986).

Mr. Padilla confusingly argues that Bloomington Steel did nothing intentional that led to their liability but at the same time claims, under the theory of *respondeat superior*, that Bloomington Steel is liable for intentional conduct as if it engaged in the conduct itself. Mr. Padilla argues that public policy mandates recovery for Bloomington Steel

under a theory of “derivative liability” running directly from the employer to the general public.⁴ (Appellant’s Brief, at p. 23) Mr. Padilla argues that this “derivative liability” is “premised upon the conduct of the employer not the behavior of the employee.” (Id.) Travelers’ coverage position is based on the conduct of the employer.

IV. PROVIDING COVERAGE FOR THESE TYPES OF ACTS GIVES THE INSURED A LICENSE TO COMMIT HARMFUL ACTS.

Public policy considerations strongly counsel against an insurer providing coverage for acts such as those committed by Reiners and imputed to Bloomington Steel in this case. The primary purpose of intentional and criminal act exclusions is to discourage irresponsible conduct by avoiding an extension "to the insured a license to commit wanton and malicious acts." *Farmers Ins. Exchange v. Sipple*, 255 N.W.2d 373, 375 (Minn. 1977)(reversed on other grounds). Such exclusions further the policy against indemnifying an individual for intentional or criminal acts. *Nat'l Union Fire Ins. Co. v. Gates*, 530 N.W.2d 223, 228 (Minn.Ct.App. 1995).

Minnesota courts have consistently applied public policy in determining the application of an intentional act exclusion. *See State Farm Fire and Cas. Co.v. Neises*, 598 N.W.2d 709, 712-13 (Minn.Ct.App. 1999)(coverage denied for grave robbing and corpse mutilation; not within insured's expectation of coverage); *State Farm Fire and Cas. Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984)(no coverage for sexual assault on handicapped adult where "neither the insured nor the insurer in entering the contract

⁴ Appellant’s theory of “derivative liability” is a new issue raised for the first time before this Court. This issue is outside of the scope of the issue framed by this Court in its July 19, 2005 Order and should not be considered by this Court.

contemplated coverage against such claims[.]); *R.W. v T.F.*, 528 N.W.2d 869, 873 (Minn. 1995)(intentional act exclusion and public policy barred coverage for transmission of herpes; court stated that "[w]e refuse to promote the abdication of personal responsibility by providing insurance coverage...").

Both Appellant and Amicus argue that since that claims against Bloomington Steel are framed in terms of negligence, then coverage is afforded. However, Bloomington Steel acts through its sole agent and employee – Reiners. Allowing Bloomington Steel to gain coverage for the egregious, violent acts of its sole director, officer and shareholder is in violation to strong Minnesota public policy against insuring these types of acts.

V. COVERAGE CANNOT BE AWARDED BY DISGUIISING AN INTENTIONAL ASSAULT UNDER THE THEORY OF NEGLIGENCE.

Despite Amicus' contentions about coverage for negligent supervision claims which raise new and irrelevant issues, negligence claims based on intentional actions are barred from coverage despite what theory of relief is included in the complaint. *Allstate Ins. Co. v. S.F.*, 518 N.W.2d 37 (Minn. 1994); *see also Rulli v. State Farm Fire & Casualty Co.*, 479 N.W.2d 87 (Minn.Ct.App. 1992) (allegations of "wrongful" or "unlawful" sexual assault and battery do not convert intentional tort claims into negligence claims), *pet for rev. denied* (Minn. Feb. 19, 1992).

In *American National Fire Ins. Co. v. Schuss*, 221 Conn. 768, 776-777, 607 A.2d 418 (1992) the court explained:

It is axiomatic, in the tort lexicon, that intentional conduct and negligent conduct, although differing only by a matter of degree; *Mingachos v CBS, Inc.*, 196 Conn. 91, 103, 491 A.2d 368 (1985); are separate and mutually exclusive. "The distinction between intentional and unintentional invasions

draws a bright line of separation among shadings of almost infinitely varied human experiences.” W. Prosser & W. Keeton, *Torts* (5th Ed.1984) p. 33. Although in a given case there may be doubt about whether one acted intentionally or negligently, the difference in meaning is clear. “As Holmes observed, even a dog knows the difference between being tripped over and being kicked.”

Id. In *Aetna Casualty & Surety Co. v. Sprague*, 163 Mich. App. 650, 415 N.W.2d 230 (1987) the Court of Appeals of Michigan upheld summary judgment in a declaratory judgment action in favor of an insurer on an intentional acts exclusion, notwithstanding the plaintiff’s attempt to couch the complaint against the insured in terms of negligent, rather than intentional conduct. In *Sprague*, the insured, Sprague, beat Marlene Wayne to death and was found guilty of murder. The estate of Wayne sued Sprague and his father for wrongful death and negligence. Aetna issued a homeowner’s policy to the father. Aetna filed a summary judgment motion on the grounds that the policy provided for an exclusion of coverage for bodily injuries “expected or intended” by the insured. In support of its summary judgment Aetna offered evidence of Sprague’s conviction. The estate of Wayne contended that its claim was based on Sprague’s negligence in not taking his medicine and that it was the negligence that was the proximate cause of the death. The Court disagreed, explaining:

First, it is true that the estate’s complaint against Sprague alleged negligence in Sprague’s failure to take his medication or pursue treatment. On the other hand, it is clear that the true basis for the complaint is the fact that Sprague killed Wayne. If Sprague expected or intended that Wayne would die, then the complaint is a transparent attempt to trigger insurance coverage by characterizing allegations of tortious conduct under the guise of “negligent” activity. In such circumstances there would be no duty to defend or provide coverage.

415 N.W.2d at 231.

In addition, courts recognize that, in the context of insurance obligations, if the insured controls the company, the insured's intentional acts are the acts of the company and the company cannot be characterized as a "negligent" insured. *See Coit Drapery Cleaners, Inc., supra*, at 692 (company's failure to prevent sexual harassment was not an "accident" but was "expected or intended" and therefore excluded from coverage notwithstanding what theory the underlying lawsuit may or may not be premised upon); *see also Quality Painting, Inc. v. Truck Ins. Ex.*, *supra*, at 749 (the perpetrator and the company were "one and the same" for insurance coverage purposes and the former employee's claim of negligent failure to provide a workplace free of sexual harassment brought against the insured corporation was not covered under the policy).

Mr. Padilla's attempt to trigger coverage under Bloomington Steel's policy by suing for negligent supervision should be denied. Here, the true nature of the conduct for which Mr. Padilla seeks damages is an intentional act. It would defy logic to say that Bloomington Steel did not authorize or ratify the intentional conduct of its sole director, officer and shareholder who alone controlled the Company. That Padilla attempted to trigger insurance coverage by pursuing a claim for negligent supervision and retention does not turn the patently intentional conduct alleged into negligent behavior.

VI. THE BRIEF OF AMICUS CURIAE MINNESOTA TRIAL LAWYERS ASSOCIATION SHOULD BE STRICKEN.

Travelers moves to strike the portions of MTLA's amicus brief extending beyond the order granting the petition for review of the decision of the Court of Appeals. According to this Court's Order filed July 19, 2005, appeal Briefs were to address

“whether the intent or knowledge of an agent of a corporation may be imputed to the corporation for purposes of determining whether bodily injury was expected or intended from the standpoint of the corporation.” (Order, dated July 19, 2005, on file with the Court.)

The issues raised by Amicus MTLA go beyond the issue of imputation raised by this Court. Amicus not only addresses the imputation issue, but goes outside of the Court’s July 19, 2005 Order and addresses issues such as the alleged improper framing of the issue by the Minnesota Court of Appeal. On appeal to the Supreme Court, the Amicus attempts to raise new issues that go outside of the scope of this Court’s Order. Most notably, the Statement of the Issue, set forth on page 1 of the Amicus MTLA’s Brief, sets forth a completely different two-prong issue than is set forth in this Court’s July 19, 2005 Order.

Specifically, Travelers requests the Court strike the portions of Amicus MTLA’s Brief as outlined below:

- The discussion of “occurrence” and whether the assault can be classified as an “occurrence.” (Amicus Brief, pp. 3-5)
- The alleged erroneous framing of the issue on appeal by the Minnesota Court of Appeals (Amicus Brief, at pp. 3-4, 9)
- The issue of the applicability of the “separation of insureds” provision in the Travelers policy. (Amicus Brief, at pp. 5-11)
- Defining the insured’s “act” as negligent supervision, retention and hiring. (Amicus Brief, at pp. 9-10)

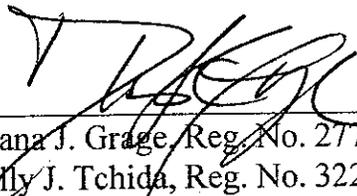
While Travelers addressed some of these issues in its Brief, it was required to do so because the improper issues were originally raised by Amicus MTLA and Appellant. These issues are clearly outside of the scope of the issue on appeal as framed by this Court. The issues of negligent supervision, retention and hiring, whether the “act” was an “occurrence,” and the applicability of the separation of insureds clause to the imputation principle has no bearing on the imputation issue before this Court. These issues should not be considered by the Court. *See e.g. State v. Saunders*, 542 N.W.2d 67, 70 (Minn. 1996) (where brief raised three issues not certified by the Court, the Court may not address those questions on appeal).

CONCLUSION

The Trial Court's grant of Travelers' Motion for Summary Judgment, and the Court of Appeals affirmation of the Trial Court's order, should be affirmed. Travelers has no duty to defend or indemnify Reiners and no duty to indemnify Bloomington Steel with regard to the lawsuit filed by Jose Padilla. The Court must impute Reiners' intent and expectations to the corporation he alone owns and controls.

Dated: September 16, 2005

HINSHAW & CULBERTSON LLP

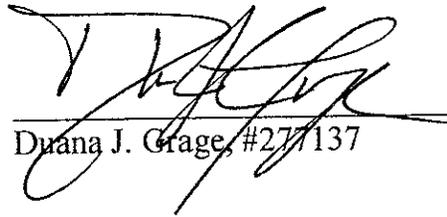
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CERTIFICATION OF BRIEF LENGTH

The undersigned hereby certifies that this Brief complies with the requirements set forth in Minnesota Rule of Civil Appellate Procedure 132.01, where the Brief was produced using proportional typewritten font using Microsoft Word 2002 and contains 11,926 words.

Dated: September 16, 2005



Duana J. Grage, #277137

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).