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NO. A07-1093

State of Minnesota
In Court of Appeals

State Farm Fire and Casualty Company,

Appellant,

vs.

Gary Harold Schwich; Jeanne Carol Stone; and Brandon Mitchell Hackbarth, as Trustee for the next of kin of Alicia Sue Hackbarth,

Respondents.

STATE FARM'S REPLY BRIEF

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INTRODUCTION

Appellant State Farm submits this Reply Brief in further support of its appeal of the trial court's determination that State Farm must defend and indemnify Gary Harold Schwich in the wrongful death action filed by the next of kin of Alicia Sue Hackbarth. (For purposes of this Reply Brief, the next of kin of Hackbarth will be referred to collectively as "Respondent.")

I. RESPONDENT'S ANALOGIES TO *WALSER* ON THE ISSUE OF WHETHER AN "OCCURRENCE" HAS TAKEN PLACE ARE MISPLACED

Rather than attempt to distinguish this matter from the authority cited by State Farm supporting its contention that no "occurrence" under the homeowner's policy at issue has taken place by virtue of Schwich's intentional act of supplying methamphetamine to Hackbarth, Respondent dismisses the cases cited by State Farm without analysis and focuses exclusively on *American Family Insurance Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001). Not only does Respondent ask this Court to ignore cases such as *Johnson v. AID Ins. Co.*, 287 N.W.2d 663 (Minn. 1980), *Rohrer v. Rick*, 529 N.W.2d 406 (Minn. Ct. App. 1995), and *Farmers Union Oil Co. v. Mutual Service Ins. Co.*, 422 N.W.2d 530 (Minn. Ct. App. 1988)—all of which remain good law—but Respondent's many analogies to *Walser* are misplaced.

First, the nature and circumstances of Schwich's acts cannot be legitimately compared to the conduct of Andy Walser in *Walser*. Schwich knowingly and admittedly provided Hackbarth with a dangerous, highly addictive,

and illegal substance which was one of the causes of her death. (AA.9; AA.11; AA.28–29; AA.40.) At the time Schwich provided Hackbarth with methamphetamine, he was an adult who had used and possessed methamphetamine for approximately ten years despite knowing that such use and possession was illegal and dangerous. (AA.9; AA.11; AA.40.) Andy Walser was a tenth–grader engaging in horseplay in a high school gymnasium. *Walser*, 628 N.W.2d at 607. He was literally a choir boy who was helping his choir teacher move chairs prior to playing around with his friends. *Id.* After injuring his friend, Andy Walser apologized. *Id.* After Schwich provided Hackbarth with methamphetamine, he was convicted of third–degree murder. (AA.241.) The factual scenarios of the two cases are distinguishable without question.

Second, the knowledge of the risks involved and the harm that could be done by the acts at issue are dramatically different in the two cases. Schwich knew that methamphetamine was highly addictive. (AA.11.) He tried to stop using methamphetamine three or four years after he began using it because he knew it could—and did—cause harm. (AA.40.) Schwich also knew many people who went through chemical dependency treatment for methamphetamine use. (AA.28–29.) In contrast, Andy Walser had jumped up and hung from basketball rims dozens of times and witnessed others do the same before his friend injured his knuckle after falling down from the rim. *Walser*, 628 N.W.2d at 607–08. Andy Walser had never injured himself while hanging from the rim nor had he ever witnessed anyone get injured from holding onto the rim and then falling

down. *Id.* In this regard, it is significant that courts have previously ruled that an insured is not to be allowed through intentional or reckless acts to consciously control the risks covered by an insurance policy. *AID Ins. Co.*, 287 N.W.2d at 665; *Rohrer*, 529 N.W.2d at 409; *see also Allstate Ins. Co. v. S.F.*, 518 N.W.2d 37, 40 (Minn. 1994); *Farmers Union Oil Co.*, 422 N.W.2d at 534 (holding that an insured's herbicide spraying activities did not constitute an "occurrence" because the insured had knowledge of the substantial risks involved in spraying a specific herbicide but nevertheless proceeded in light of such knowledge). While Andy Walser may not have possessed sufficient information to consciously control the risks covered by his policy, Schwich's knowledge of the risks involved in methamphetamine use and the adverse consequences it caused place Schwich in the category of insureds to whom coverage is not to be available.

Third, whereas the record in *Walser* was clear that Andy Walser did not intend to cause *any type* of injury to his friend, Schwich's knowledge about the harmful effects of methamphetamine use creates a much different factual record in this matter. In an attempt to minimize the significant implications of the different facts of this case, Respondent argues that "[i]t is undisputed that Schwich did not intend to kill Hackbarth." (Respondent's Brief at 12.) Thus, just as the district court did, Respondent focuses the analysis on whether Schwich

intended to *kill* Hackbarth, instead of the legally pertinent question of whether Schwich intended to cause *some type of harm* to Hackbarth.[1]

Under Minnesota law, the fact that an intentional act such as supplying another with methamphetamine causes unintended damage does not render the act at issue an "accident." *Rohrer*, 529 N.W.2d at 409; *see also Walser*, 628 N.W.2d at 613 ("We note, though, that to find that an insured acted intentionally, a court need only find that the insured intended some harm, not that the insured intended the specific harm that resulted.")

Accordingly, whether Schwich intended to kill Hackbarth is not the appropriate inquiry for determining whether Schwich's conduct and the resultant injury give rise to an "occurrence" under the policy. The central question is whether Schwich intended to provide Hackbarth with a substance which he knew caused harm. It is undisputed that Schwich exhibited this intent. Schwich's very act of providing Hackbarth with a substance which he knew caused harm, by definition, establishes that Schwich intended to cause some type of harm to Hackbarth.

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[1] Notably, Respondent asserts that "Schwich's intent was not to injure" without citing to anything in the record supporting this position. (Respondent's Brief at 13.) While the parties did stipulate at the trial court level that Schwich did not intend to *kill* Hackbarth, there was no stipulation as to whether Schwich intended to injure Hackbarth. After this Court examines the factual circumstances of this case, including Schwich's knowledge that methamphetamine causes harm and the stipulated fact that he intentionally provided Hackbarth with methamphetamine, there should be no question that Schwich intended to cause some type of harm to Hackbarth.

Respondent argues that "Hackbarth had used methamphetamine on multiple occasions in the past and Schwich had injected it himself over a ten year period with no known ill effects," so it cannot be claimed that Schwich knew that some type of injury might result from methamphetamine use. (Respondent's Brief at 12.) This assertion misstates the record. Schwich *had* suffered known ill effects—he was addicted to methamphetamine and he had tried to stop using it because he knew it could and did cause harm—and simply because Schwich had beat the odds and not suffered a grave injury as the result of his methamphetamine use does not establish that he was going to continue to beat the odds. If a Russian roulette participant has survived several rounds of play, it should not be resolved that the game must be safe for everyone to keep playing.[2]

Finally, according to Respondent, Schwich's conduct should be insurable as an "occurrence" because Schwich's real intent on March 11, 2005, was to provide Hackbarth "with the means to get a quick high, not to cause her harm." (Respondent's Brief at 12.) This rationale should be rejected by this Court. If Respondent's justification for Schwich's conduct is deemed valid, there is nothing to prevent a child molester, for example, from successfully arguing that insurance coverage should be provided for his or her conduct because the real intent of the

[2] As set forth in State Farm's initial brief, it is undisputed that methamphetamine use causes severe adverse health effects, including death, and that the effects of the drug are wildly unpredictable, meaning a severe adverse reaction to the drug could occur at any time.

molestation was to make the perpetrator (or victim) feel good, not to harm the victim. Such an absurd rationale is unconscionable.

A person claiming coverage under the terms of an insurance policy has the burden to establish that coverage exists. *See, e.g., Boedigheimer v. Taylor*, 178 N.W.2d 610, 614 (Minn. 1970). Respondent has not met the burden of establishing coverage here. Accordingly, State Farm respectfully requests that this Court reverse the district court's determination and conclude that State Farm has no duty to defend or indemnify Schwich in the wrongful death lawsuit because no "occurrence" has taken place under the policy at issue.

II. RESPONDENT FAILS TO ADDRESS THE MANY REASONS WHY THE "INTENTIONAL ACT" EXCLUSION SHOULD PRECLUDE COVERAGE SET FORTH IN STATE FARM'S INITIAL BRIEF

Respondent's briefing with respect to the "intentional act" exclusion leaves unchallenged the many reasons set forth in State Farm's initial memorandum, supported by case law, explaining why the "intentional act" exclusion should preclude coverage. Instead, Respondent asserts many of the same positions with respect whether the exclusion should apply as Respondent does on the issue of whether an "occurrence" has taken place. Notably, Respondent once again makes the unsupported statement that Schwich had a "lack of specific intent to injure Hackbarth," even though this was not a stipulated fact at the trial court level. (Respondent's Brief at 14.)

Respondent contends that the "language of the exclusion itself upholds the trial court's treatment of it" because Schwich did not know that Hackbarth had a

pre–existing heart condition and therefore could not have intended her death. (*Id.* at 15.) But a liability policy exclusion for "expected or intended" injuries does not require that the particular injury at issue be intended; rather, the actual injury may be more severe or of a different nature than anticipated. *State Farm Fire & Cas.* Co. *v. Neises*, 598 N.W.2d 709, 711 (Minn. Ct. App. 1999).

Respondent also argues that Schwich did not intend to cause Hackbarth harm because she had used methamphetamine in the past with no obvious physical harm and because Schwich himself had used it for approximately ten years without suffering physical harm. (Respondent's Brief at 15.) Again, Schwich *had* suffered known adverse physical effects, as he was addicted to methamphetamine and he had tried to stop using it because he knew it could and did cause harm. Further, to return to the Russian roulette analogy, it is clear that if one plays the game long enough, one should "expect or intend" to suffer some type of harm, no matter how many times the game has been played without incident.

Interestingly, Respondent admits that it is "foreseeable that the use of methamphetamine in combination with alcohol carries with it the very real risk of overdose and death," but argues that such a fact only points toward a "negligence standard, not a specific intent to injure." (*Id.*) However, the inference of an intent to injure specifically arises when the nature and circumstances of the insured's act are such that harm was substantially certain to result, i.e., when the nature and circumstances of the act leave it foreseeable that

some type of harm was substantially certain to result. *See Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 886–87 (Minn. 1978); *D.W.H. v. Steele*, 494 N.W.2d 513, 516 (Minn. Ct. App. 1993). Thus, under Respondent's own analysis, it is necessary to infer intent as a matter of law in this matter.

While Respondent suggests that this case is not "extreme" enough to infer intent and that it falls closer in line to a case involving the pushing of a hat–check girl where no intent to injure was inferred, State Farm respectfully disagrees. Methamphetamine use is inherently harmful. The risks associated with methamphetamine use include physical addiction, neurological damage, strokes, respiratory problems, irregular heartbeat, cardiovascular collapse, extreme anorexia, and death. (AA.238–42.) Methamphetamine use has become an epidemic in several areas throughout Minnesota. This is not a case where a person pushed a hat–check girl. Instead, this is a case involving the distribution of a dangerous and illegally narcotic. *Accord Minnesota Fire & Casualty Co. v. Greenfield*, 805 A.2d 622 (Pa. Super. Ct. 2002) & 855 A.2d 854 (Pa. 2004), and *State Farm Fire & Casualty Co. v. Baer*, 745 F. Supp. 595 (N.D. Cal. 1990) & 956 F.2d 275 (9th Cir. 1992) (all holding that insurance coverage should not be provided because, as here, an insured provided dangerous and illegal drugs to a third party).

Accordingly, State Farm respectfully asks this Court to reverse the district court's determination and find that State Farm has no duty to defend or indemnify

Schwich in the wrongful death lawsuit because coverage for Schwich's conduct is excluded as leading to an "expected or intended" injury suffered by Hackbarth.

III. RESPONDENT DOES NOT CHALLENGE THE CASE LAW CITED BY STATE FARM RECOGNIZING THAT THE "WILLFUL AND MALICIOUS ACTS" EXCLUSION IS SEPARATE FROM THE "EXPECTED OR INTENDED INJURY" EXCLUSION

Respondent does not challenge the case law cited by State Farm establishing that, in addition to the "expected or intended" injury exclusion, the policy at issue contains a separate, independent exclusion for "willful and malicious acts" that precludes coverage in this case. Instead, Respondent simply asserts that the trial court was correct in interpreting the exclusion as having essentially the same meaning as the "expected or intended" injury exclusion. (Respondent's Brief at 16.)

Contrary to State Farm's arguments, State Farm has no duty to provide coverage for Schwich's criminal conduct due to the policy exclusion pertaining to "willful and malicious acts" of the insured in this matter. Accordingly, State Farm respectfully asks this Court to reverse the district court's determination and find that State Farm has no duty to defend or indemnify Schwich in the wrongful death lawsuit.

IV. RESPONDENT'S ATTEMPT TO REVERSE THE PUBLIC POLICY ARGUMENT IN RESPONDENT'S FAVOR IS WITHOUT MERIT

Perhaps recognizing that a determination that Schwich should be provided with insurance coverage for providing Hackbarth with a knowingly dangerous and illegal drug would greatly undermine the public policy in favor of eliminating the

distribution of dangerous and illegal drugs, Respondent attempts to create a competing public policy argument. In this regard, Respondent argues that State Farm could have drafted an insurance contract including a specific exclusion to eliminate criminal acts from coverage, but that because it did not do so, this Court should enforce the contract as written to insure that all policyholders are given the coverage for which they bargained. (Respondent's Brief at 19–21.)

There are two significant flaws in Respondent's position. First, it rests upon the premise that State Farm is obligated to specifically identify each wrongful or tortious act that is not covered by it policies. If Respondent's position were correct, every insurance policy would need to be as thick as a telephone book to identify all wrongful and/or tortious activities that are not covered. On this point, the Court need look no further than the many cases cited in State Farm's briefing denying coverage to understand that insurance policies do not have to specifically identify each and every wrongful and/or tortious activity to have such activity fall outside the scope of coverage afforded by a policy. In many of the cases cited by State Farm, the courts held that there was no coverage under the insureds' insurance policies, *even though the insurance policies did not specifically identify the wrongful and/or tortious activity at issue.*

Second, Respondent's position with respect to the supposed contractual responsibilities of State Farm ignores the purposes of insurance and the reasons why public policy prohibits the insuring of intentional conduct. Requiring State Farm to defend and/or indemnify Schwich for his distribution of

methamphetamine to Hackbarth only encourages irresponsible conduct and encourages others to distribute methamphetamine, with the assurance that insurance coverage is available should something unfortunate occur. It should not be the public policy of Minnesota to insure the sale of notoriously dangerous and illegal narcotics such as methamphetamine. It cannot be legitimately argued that Schwich or State Farm contemplated at the time of entering into the contract of insurance that Schwich's illegal conduct relating to the provision of drugs would ever conceivably give rise to a covered claim under the homeowner's insurance policy.

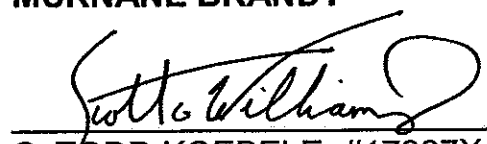
A reversal of the trial court's decision is necessary in order to place those who choose to use and distribute methamphetamine on notice that they do so at their own risk and that they do not have the protection of insurance for their criminal conduct.

CONCLUSION

For the foregoing reasons, as well as those set forth in State Farm's initial memorandum, it is State Farm's position that this Court should follow the well–reasoned and thoughtful decisions from other jurisdictions that have refused to allow insurance coverage for the provision and distribution of illegal narcotics. Accordingly, State Farm respectfully asks this Court to reverse the trial court's determination that Schwich is entitled to insurance coverage for his criminal conduct.

Dated: September 11, 2007

MURNANE BRANDT



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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Appellant certifies that this Brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 2,778 words, excluding the Table of Contents and the Table of Authorities.

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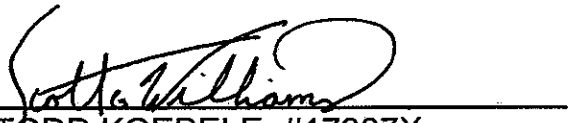

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