

NO. A08-864

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State of Minnesota  
In Court of Appeals

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RAM Mutual Insurance Company,

*Appellant,*

vs.

Daniel Meyer and Linda Meyer, individually and as parents of  
Shawn Meyer, a minor; Judith Nietfeld and Brian Nietfeld,  
individually and as parents of Curtis Nietfeld, a minor; and  
Paynesville Independent School District No. 741,

*Respondents.*

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**APPELLANT'S BRIEF AND APPENDIX**

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## Statement of Legal Issues

In response to an underlying lawsuit arising from one student's assault of another, is Appellant RAM Mutual Insurance Company entitled to judgment as a matter of law under its policy when: (1) there was no "occurrence" that triggered coverage; and, (2) the policy's unique intentional act exclusion applies to bar coverage under the facts of this case.

The district court denied RAM Mutual's motion for summary judgment and post-trial motion for judgment as a matter of law.

### **Apposite authority:**

*American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001)

*Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. Ct. App. 1994)

*Auto-Owners Ins. Co. v. Smith*, 376 N.W.2d 506 (Minn. Ct. App. 1985)

*Roloff v. Taste of Minn.*, 488 N.W.2d 325, 326 (Minn. Ct. App. 1992)

Whether RAM Mutual is entitled to a new trial because the district court erred in its jury instructions and in framing the special verdict question for the jury, which placed a higher burden of proof on RAM Mutual

The district court denied RAM Mutual's motion for a new trial.

### **Apposite authority:**

*American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001)

*Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885 (Minn. 1978)

*Youngquist v. W. Nat'l Mut. Ins. Co.*, 716 N.W.2d 383 (Minn. Ct. App. 2006)

## **Statement of the Case**

This declaratory judgment action arises out of a high-school student's assault of another student. This appeal addresses whether Appellant RAM Mutual Insurance Company ("RAM Mutual") owes coverage for the serious injury that its insured caused. The district court denied the parties' cross-motions for summary judgment. The Honorable Paul Widick, Stearns County District Court, presided over a two-day jury trial.

Based on the jury's answer to the sole special verdict question, a question that RAM Mutual contends was erroneous, the district court concluded that the one student "did not intend to cause significant harm to" the other student. A.39 (Conclusion of Law No. 9). Accordingly, the district court determined there was coverage under RAM Mutual's policy, finding there was an "occurrence" and rejecting RAM Mutual's argument that its unique intentional act exclusion applied to preclude coverage. The district court denied RAM Mutual's post-trial motions for judgment as a matter of law and for a new trial.

RAM Mutual appeals from the adverse judgment entered upon the jury verdict, and also appeals from the denial of its post-trial motions.

## **Statement of Facts**

RAM Mutual insured Respondents Daniel and Linda Meyer, as well as their son, Shawn Meyer (collectively "Meyers"). Shawn Meyer started and ended a confrontation at a high school that ended in a chase whereby Meyer grabbed or tripped Curtis Nietfeld and knocked Nietfeld onto a concrete floor and caused a serious head injury.

Meyer pulled a stool out from under Nietfeld in shop class, which prompted a confrontation between Nietfeld and Meyer. Nietfeld grabbed the stool and either held it up at or shook it at Meyer. After Nietfeld dropped the stool or had it knocked out of his hands by Meyer, Meyer chased Nietfeld. Meyer caught up with Nietfeld and either grabbed at him or actually grabbed him, and Meyer either knocked or tripped Nietfeld to the floor. Nietfeld struck his head on the concrete floor and a raised lip on the hardened floor. Nietfeld suffered a gash to his head, and claimed serious injuries as a result.

Curtis Nietfeld and his parents sued the Meyers and the school district for the injuries they claim Curtis sustained. Nietfeld allegedly:

suffered great injury to mind and body, including a concussion of the head, a closed injury to his brain, lacerations of the head, loss of memory, loss of sensation, depression, loss of intellectual function and capacity, personality change, and other permanent and disabling injuries.

Underlying Amended Complaint, Count I, ¶ VI. Nietfeld was left “lying on the concrete floor unconscious and . . . bleeding from the back of his head.” Underlying Amended Complaint, Count III, ¶ III. The Nietfelds alleged that Meyer’s “assault” was “willful or malicious” and that Meyer intentionally injured Nietfeld. Nietfeld later included claims of negligence against Meyer.

RAM Mutual has defended the Meyers under a reservation of rights. It brought this declaratory judgment action to determine its rights and obligations. RAM Mutual’s liability policy provides, in relevant part:

We pay, up to our limit, all sums for which an insured is liable by law because of bodily injury or property damage caused by an occurrence to which this coverage applies.

A.15 (Policy, FCPL-1A, p. 2). Under the Policy, “Insured” means, in relevant part:

- a. you;
- b. your spouse or relatives, if residents of your household;
- c. person(s) under the age of 21 in your care or in the care of your resident relatives, if residents of your household;

\* \* \*

Each of the above is a separate insured, but this does not increase the limit of liability indicated on the declarations.

A.14 (Policy, FCPL-1A, p. 1).

The following additional terms relevant to this declaratory judgment action are defined under the Policy as follows:

\* \* \*

- 3. Bodily Injury means bodily harm, sickness or disease sustained by any person(s) including death resulting from any of these at any time.

A.14 (Policy, FCPL-1A, p. 1).

\* \* \*

- 19. Occurrence means an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions.

A.15 (Policy, FCPL-1A, p. 2).

RAM Mutual’s intentional act exclusion states:

This policy does not apply to liability which results directly from . . . any act intended by an insured, or done at the direction of an insured, whether or not the bodily injury or property damage was intended.

A.18-19 (Policy, FCPL-1A, pp. 5-6).

Over RAM Mutual’s objection, T.298-99 (lines 5-25; lines 1-13), the jury was asked a single question in the special verdict form:

Did Shawn Meyer know, or have reason to know, that a significant harm was substantially certain to result when he grabbed and/or tripped Curtis Nietfeld?

A.37; T.307 (lines 14-15). RAM Mutual's proposed jury instructions, A.27, and proposed special verdict form, A.35, were rejected.

## **Argument and Authorities**

### **Introduction and Standard of Review**

When interpreting insurance policies, general principles of contract interpretation apply. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998) (citation omitted). Insurance policies are similar to other contracts; they are matters of agreement by the parties and the court's function is to determine what the agreement was and enforce it. *Fillmore v. Iowa Nat'l Mut. Ins. Co.*, 344 N.W.2d 875, 877 (Minn. Ct. App. 1984). Thus, the interpretation of an insurance policy is a question of law subject to *de novo* review on appeal. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006).

When policy language is clear and unambiguous, "the language used must be given its usual and accepted meaning." *Bobich v. Oja*, 258 Minn. 287, 104 N.W.2d 19, 24 (1960) (stating that "[w]here there is no ambiguity there is no room for construction. In such cases, the parties being free to contract, the language used must be given its usual and accepted meaning"). A court may not read an ambiguity into the plain language of an insurance policy in order to construe it against the drafter. *Id.* Exclusions contained in an insurance policy are as much a part of the contract as any other part, and must be

given the same consideration in determining whether coverage exists. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002).

Even viewing the evidence in the light most favorable to the jury's verdict and to respondents, RAM Mutual owes no coverage for Shawn Meyer's conduct. There was no occurrence because Shawn Meyer's conduct was not an accident. Likewise, there is no coverage for Meyer's intentional act, particularly because RAM Mutual's policy excludes coverage for intentional acts regardless of whether injury or harm was intended.

In framing the special verdict question in terms of "significant" harm, the district court erroneously instructed the jury and improperly increased the burden of proof RAM Mutual had to overcome before the jury. At a minimum, RAM Mutual is entitled to a new trial. The judgment should be reversed and remanded for a new trial with specific directions to instruct the jury properly on the applicable law.

**I. RAM Mutual's policy does not cover the underlying claims because the incident did not involve an "occurrence."**

It is fundamental that the alleged incident be accidental before there can be an "occurrence" under the plain language of RAM Mutual's policy. Simply put, the alleged incident was no accident. Because there was no "occurrence," there is no coverage for the Meyers for the claims asserted in the underlying action.

An "occurrence" means "an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions." A.15. RAM Mutual asserts that the assault on the shop floor was not an "accident" that triggers

coverage. Because the incident was not an “occurrence,” there is no coverage for any of the claims alleged against the Meyers resulting from this incident.

The word “accident” in an insurance policy is given its common, ordinary meaning – that is, “an unexpected happening without intention or design.” *Weis v. State Farm Mut. Auto Ins. Co.*, 242 Minn. 141, 64 N.W.2d 366, 368 (1954); *see also American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 611 (2001) (reaffirming definition of accident as “an unexpected, unforeseen, or undesigned happening or consequence”).

The undisputed facts are that Shawn Meyer pulled a stool out from under Curtis Nietfeld. After Nietfeld challenged him, Meyer later chased after Nietfeld and either grabbed him or tripped him, knocking him to the ground and cracking his head on the concrete floor. Shawn Meyer’s actions in chasing after and grabbing or tripping Nietfeld were not an accident. As the Nietfelds originally alleged in their underlying lawsuit, Meyer’s actions were “willful” and “malicious.”

RAM Mutual agreed to provide liability coverage for bodily injury “caused by an occurrence.” A.15. Because the incident at school was no accident, there is no “occurrence” and thus is no liability coverage for the Meyers. To find otherwise, would require the Court to torture the specific policy language. Other courts have rejected such an approach. *See Allstate v. Steele*, 74 F.3d 878 (8th Cir. 1996) (refusing, as did the district court, to torture the policy language to find intentional sexual contact was an “accident” under the terms of the homeowner’s policy); *Haarstad v. Graff*, 517 N.W.2d 582, 585 (Minn. 1994) (finding the assault claim fell clearly outside the coverage provided by the policy); *Bituminous Cas. Corp. v. Bartlett*, 302 Minn. 72, 240 N.W.2d

310, 311-13 (1976), *overruled on other grounds, Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 391 (Minn. 1979) (if there is no accident, there is clearly no occurrence; thus, no coverage for the claim).

**II. The intentional act exclusion in RAM Mutual’s policy bars coverage for the underlying claims alleged against the Meyers.**

The district court and Respondents all relied upon *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001). But *Walser* did not contain the same intentional act exclusion that is at issue here. The intentional act exclusion in *Walser* stated:

We will not pay for damages due to bodily injury or property damage **expected or intended from the standpoint of the insured.**

*Id.* at 609 (emphasis added). Notably, the decision in *Walser* was specifically based on “the language of the policy, our definition of accident, and the finding of the district court.” *Id.* at 613. Thus, the specific policy language remains important, even after *Walser*.

Here, RAM Mutual’s intentional act exclusion excludes from coverage liability “that results directly or indirectly from” intentional acts of an insured “whether or not the bodily injury or property damage was intended.” A.19 (Policy, p. 6). Because Meyer acted intentionally in chasing Nietfeld and grabbed and/or tripped him, coverage is excluded.

Respondents below did not cite a single case in which an intentional act exclusion with the language in RAM Mutual’s policy was found to give rise to a duty to defend or to indemnify an insured for an intentional act even when the insured was found not to

have an intent to injure. Such a finding would be clearly contrary to the unambiguous terms of the policy.

RAM Mutual's policy excludes coverage for injuries "directly or indirectly" resulting from "any act intended by an insured, or done at the direction of an insured, whether or not the bodily injury or property damage was intended." The Minnesota Supreme Court has explained: "the purpose of intentional act exclusions is to exclude insurance coverage for wanton and malicious acts by an insured." *Walser*, 628 N.W.2d at 613. Many insurance policies, including the one in *Walser*, contain intentional act exclusions that bar coverage for "bodily injury or property damage expected or intended from the standpoint of the insured." In these cases, courts have determined that for coverage to be excluded as intentional, it must find the insured acted with specific intent to cause harm and the insured intended the harm itself, not that the insured merely intended to act. *Id.*

These intentional act exclusions are sufficiently different than the exclusion at issue here. Here the intentional act exclusion precludes coverage "for any act intended by an insured . . . whether or not bodily injury or property damage was intended." A.19 (Policy, p. 6) (emphasis added). Thus, under RAM Mutual's policy any intentional act by an insured is excluded regardless of whether or not any harm was intended. Thus, this Court need not engage in a discussion or speculate whether Meyer intended the harm or merely intended to act because any liability resulting directly or indirectly from the intentional act – whether or not bodily injury was intended – is excluded from coverage

under the specific terms contained in RAM Mutual's policy. *See Bobich*, 104 N.W.2d at 24 (where there is no ambiguity there is no room for construction).

Under the plain meaning of RAM Mutual's intentional act exclusion, there is no coverage for Shawn Meyer's assault, which involved him chasing after Curtis Nietfeld and grabbing at him and pulling him back onto the concrete floor. *See Haarstad*, 517 N.W.2d at 585 (homeowner insurer owed no duty to defend for an insured's intentional assault). Accordingly, the claims alleged against the Meyers in the underlying action are excluded from coverage under the plain language of RAM Mutual's policy.

In a case asserting a negligent supervision claim, this Court reviewed an exclusion precluding liability that results "indirectly or directly" from the use of a motor vehicle. *Austin Mut. Ins. Co. v. Klande*, 563 N.W.2d 282, 283 (Minn. Ct. App. 1997). RAM Mutual's policy contains similar language, excluding coverage for liability that results "directly or indirectly" from certain conduct. In *Klande*, the homeowner insurer sought a declaration that its policy did not cover a negligent supervision claim where a motorcycle's hot muffler burned a child. The insurer argued that the claim was excluded because the injury resulted either directly or indirectly from the use of a motorized vehicle. This Court agreed, concluding:

the negligent supervision claim is so intertwined with and intimately connected to the insureds' ownership and use of the motorcycle it cannot be said that the claim arose independently of the motorized vehicle related cause.

*Id.* at 284. Here the claim of negligent supervision is not divisible from the alleged assault. Like in *Klande*, the negligent supervision claim is intertwined with and

intimately connected with the alleged assault. There would be no negligent supervision claim if there had been no assault. Consequently, RAM Mutual is not obligated to defend or indemnify the Meyers for the alleged negligent supervision claim. *Id.*; *see also Fillmore*, 344 N.W.2d at 881 (insurer had no duty to defend or indemnify insured under homeowner's policy, which excluded from coverage bodily injury or property damage arising out of the use of a motor vehicle, because negligent supervision claim was not an independent non vehicle-related claim).

Just as a criminal-act exclusion that contains no language requiring intent will be enforced, coverage may be excluded for injuries resulting from a criminal act, regardless of intent, *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73, 75 (Minn. Ct. App. 1994), so too an intentional act exclusion should be enforced if it does not require intent to cause a specific harm.

Notably, RAM Mutual's policy excludes liability resulting directly or indirectly from any act intended by *an* insured. A.18-19 (Policy, pp. 5-6) (emphasis added). The Supreme Court has noted that the term "an" in front of insured can have a significant impact in evaluating intentional act exclusions. *Travelers Indemnity Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895 (Minn. 2006). In *Bloomington Steel*, the sole shareholder and director of a company allegedly hit one of its employees with a piece of wood and fractured the employee's skull. *Id.* The insurance policy issued to the company excluded coverage for bodily injury expected or intended from the standpoint of "the insured." *Id.* The company's insurer moved for summary judgment on all claims, including the claims against the company for respondeat superior and negligent retention

and supervision. In rejecting the insurer's coverage arguments, the court recognized that one of the ways the insurer could have made clear that it was not insuring the company for all risks arising from the intentional act the shareholder committed was to exclude coverage from the standpoint of "an" insured. *Id.*

Here RAM Mutual's policy contains the very language that the Supreme Court suggested would aid in clarifying an insurer's obligations. RAM Mutual excluded from coverage "any act intended by *an* insured . . ." RAM Mutual did not insure the Meyers for liability arising either *directly* or *indirectly* from any intentional act an insured committed. While respondents might try to circumvent this policy language, such arguments cannot carry the day because the policy unambiguously excludes liability resulting "directly or indirectly" from any intentional act.

In *Roloff v. Taste of Minnesota*, 488 N.W.2d 325, 326 (Minn. Ct. App. 1992), a patron was injured in a fight and brought an action against the festival for negligent security. The festival's insurer refused to defend the suit because its policy excluded coverage for claims based on assault and battery. *Id.* The exclusion provided:

It is hereby understood and agreed that no coverage shall apply under this policy for any claim, demand or suit based on assault and battery, and assault shall not be deemed an accident, whether or not committed by or at the direction of the Insured.

*Id.* The patron argued that because his claim was based on negligence, the exclusion did not shield the insurer from liability. *Id.* This Court concluded that the exclusion unambiguously excluded coverage when a claim is "causally related" to an assault and battery, regardless of the legal theory asserted. *Id.*

In another case, the Supreme Court analyzed whether the insurer issuing a homeowner's policy covered an insured for allegedly failing to warn or prevent the sexual abuse the insured's husband committed against a young girl. *Metropolitan Prop. & Cas. Ins. Co. v. Miller*, 589 N.W.2d 297 (Minn. 1999). The exclusion stated that: "Bodily injury does not include . . . the actual, alleged or threatened sexual molestation of a person." *Id.* at 299. The *Miller* Court concluded that the plain language of the policy provided no coverage for injury from sexual molestation regardless of whether the insured caused the injury or could have prevented it. *Id.* at 300; *see also Allstate Ins. Co.*, 74 F.3d at 881 (concluding homeowner's policy excluded damages resulting from intentional misconduct, including negligent supervision claim based on insured teenager's sexual contact with his stepsister). RAM Mutual's unambiguous intentional act exclusion should be enforced. This Court should declare that no coverage exists.

**III. The district court erred in asking a special verdict question that inquired whether Meyer intended to cause "significant harm" to Nietfeld and in instructing the jury that "significant harm" was required.**

The district court erred when it crafted a special verdict question addressing whether "significant harm" was substantially certain to occur as a result of Meyer's conduct. Similarly, the court erred in instructing the jury that "significant harm" was the relevant standard. The instruction given and the question asked should have been whether "some harm" was substantially certain to occur. The modifier "significant" is contrary to Minnesota law. By framing the issue this way, the district court prejudiced RAM Mutual and improperly raised the bar as to what RAM Mutual had to establish.

Because of this error, RAM Mutual is entitled to a new trial so that it can receive a fair opportunity to have a jury assess the evidence with the proper standard in mind.

An appellate court will not reverse a district court's denial of a motion for a new trial on the ground of an erroneous jury instruction absent a clear abuse of discretion.

*Youngquist v. W. Nat'l Mut. Ins. Co.*, 716 N.W.2d 383, 385 (Minn. Ct. App. 2006).<sup>1</sup>

While district courts typically have considerable latitude in choosing jury instructions, a court errs if it gives a jury instruction that materially misstates the law. *Id.* A new trial is warranted if an erroneous jury instruction destroys the substantial correctness of the charge, causes a miscarriage of justice, or results in substantial prejudice. *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

An error is prejudicial if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Youngquist*, 716 N.W.2d at 386 (citing *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990)). If an appellate court is unable to determine whether an erroneous jury instruction affected the jury, a new trial should be granted. *Rowe v. Munye*, 674 N.W.2d 761, 769 (Minn. Ct. App. 2004), *aff'd*, 702 N.W.2d 729 (Minn. 2005). In cases where a party has been prejudiced as a result of erroneous jury instructions, courts typically grant a new

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<sup>1</sup> The same standard applies to evaluating the language on a special-verdict-form. *See, e.g., Border State Bank of Greenbush v. Bagley Livestock Exch.*, 690 N.W.2d 326, 336 (Minn. App. 2004) (stating that the specific wording of a special verdict form is left to the discretion of the district court and only requires a clear and correct understanding of the law). Because the same standard applies and the erroneous language here was used in both the jury instructions and the special-verdict-form, RAM Mutual addresses them together.

trial. *See Kirsebom v. Connelly*, 486 N.W.2d 172 (Minn. Ct. App. 1992) (granting new trial where court declined to give jury instruction on negligence per se).

Where the district court gives an erroneous instruction and the error causes prejudice, “a new trial is required.” *Bolander v. Bolander*, 703 N.W.2d 529, 539 (Minn. Ct. App. 2005) (new trial required if effect of error cannot be determined). Even where the prejudice is unclear, if an appellate court is unable to determine if the erroneous instruction affected the verdict of the jury, the verdict should be reversed and a new trial should be granted. *Youngquist*, 716 N.W.2d at 386.

In closing argument, respondents’ counsel all emphasized the erroneous standard that the district court gave – did Meyer know that a “significant harm” was substantially certain to result when he grabbed or tripped Nietfeld. *See* T.312 (lines 10-13); T.318-319 (lines 21-25; lines 1-6); T.331 (lines 4-7); T.339-40 (lines 6-25; lines 1-18); T.343 (lines 2-10); T.346-47 (lines 22-25; lines 1-21).

In requiring RAM Mutual to prove that Meyer intended a “significant harm,” the district court erred. In effect, the district court required RAM Mutual to establish that Meyer intended to cause the specific injury complained of, Curtis Nietfeld’s severe head injury. But that is not the law in Minnesota. The law is that if someone intends to cause bodily injury, even if the actual harm is more severe or of a different nature than the injury intended, coverage is excluded. *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978) (“The intent required to exclude coverage is neither the ‘intent to act’ nor the intent to cause the [s]pecific injury complained of. Rather it is the intent to [c]ause bodily injury even if the actual injury is more severe or of a different nature than

the injury intended.”) (quotations omitted). The correct rule of law requires a focus on the intent to injure and not on the specific injury that results. *See Walser*, 628 N.W.2d at 612 (“[W]here there is specific intent to cause injury, conduct is intentional for purposes of an intentional act exclusion”).

In denying RAM Mutual’s motion for a new trial, the district court stated that “the jury found that Shawn Meyer did not intend to harm Curtis Neitfeld [sic].” A.38 (Order, ¶ 1). This is incorrect because the jury was not asked whether Meyer intended to harm Nietfeld. Instead, the jury was presented a special verdict question that addressed not just harm, but “significant harm.”

Similarly, the district court concluded that “[a]cts intended to cause insignificant harms, such as mere touching, are not sufficient to trigger application of an intentional-act exclusion.” A.39 (Conclusion of Law, ¶ 7). This is wrong for at least two reasons. One, it misstates Minnesota law. If an act is intended to cause harm, it falls within an intentional act exclusion even if the harm that results is more severe than what was intended. *Iowa Kemper*, 269 N.W.2d at 887. Two, this case did not involve a “mere touching.” After earlier pulling a stool out from under Nietfeld, Meyer chased after Nietfeld and either grabbed him or grabbed for him, either tripping him or otherwise knocking him onto a hard concrete floor. As well the district court erred in Conclusion of Law, ¶ 8 when it asserted that RAM Mutual’s intentional act exclusion “only excludes acts that intend to cause significant harm.” A.39. RAM Mutual’s policy does not state this, nor do the cases support this heightened requirement of “significant” harm.

In denying RAM Mutual's post-trial motion, the district court asserted that the "significant harm" question was appropriate:

As was explained to the jury, however, the term "significant" simply required an intent to cause harm that is more than an "insignificant" harm such as a tap on the shoulder, a pat on the back, or playfully grabbing another's ankles. It did not require RAM to prove a "substantial" harm or a "serious" harm, as it suggests.

A.45-46 (Memorandum at 8-9). This assertion is wrong; the district court gave no explanation or instruction to the jury explaining the phrase "significant harm," either in terms of the referenced examples or otherwise. See T.302-310 (jury instructions).

Instead, the jury was left uninformed as to what "significant harm" meant.

A jury instruction must not materially misstate the relevant law that is applicable to the verdict. *Id.* at 556; *Youngquist*, 716 N.W.2d at 385-86. If there is a reasonable likelihood that the erroneous jury instruction in question had a significant effect on the verdict of the jury then the instruction is prejudicial and a new trial should be granted. *Id.* at 386. A jury instruction is prejudicial if a more accurate instruction would have changed the outcome in the case. *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006) (reversing and remanding for a new trial where it is "analytically and practically possible that the erroneous . . . instruction affected the jury's analysis").

Throughout the trial and in closing arguments, Respondents' counsel repeatedly illustrated the difference between the correct standard and the erroneous one given to the jury. By illustrating the higher threshold required in the jury's special verdict form, respondents created prejudice. See *Youngquist*, 716 N.W.2d at 386. In explaining the

only question before the jury, counsel for the respondent school district stated that the question was not “do we approve of Shawn Meyer’s actions[.]” but instead:

[i]t’s a much narrower question. Did Shawn intend to cause significant harm? And that’s another thing that’s in that sentence on the special verdict form. Significant harm, not some harm. So if he was gonna go down and put him in a headlock, for instance, you could say, well, that’s harm, but it was not significant harm. You’d have to find it was significant or significant harm and that he was in a position to be substantially certain that that was gonna come about.

T. 318-19.

This statement makes clear that the jury was asked to decide whether Shawn Meyer intended the specific level of harm caused and not merely injury or harm itself. By putting such an emphasis on the incorrect legal standard, the erroneous instruction had a significant impact on the jury’s verdict and the district court erred in denying RAM Mutual’s new trial motion.

The district court’s error prejudiced RAM Mutual because including the term “significant” changed the outcome in the case. *See George*, 724 N.W.2d at 10. By including the term ‘significant’ the jury was asked whether respondent intended the specific level of harm that was actually caused; removal of the term ‘significant’ asks only if respondent intended any harm at all – the legally correct question. Application of the term ‘significant’ to other cases involving intent to harm demonstrates that by including the term ‘significant’ the district court changed the outcome of the case. *See e.g., Iowa Kemper*, 269 N.W.2d at 887 (inferring intent where insured and another boy agreed to fight to “settle” a dispute and the harm that resulted was more severe than the injury intended).

Because the outcome of the case was changed by the district court's error, a new trial is required. A new trial is required even where prejudice cannot be determined when it is unclear whether the erroneous instruction determined the verdict. *Youngquist*, 716 N.W.2d at 386; *Bolander*, 703 N.W.2d 539. Because it cannot be reasonably determined here whether the erroneous instruction provided by the district court influenced the jury. While the jury's verdict may have been based on a conclusion that Shawn Meyer had no intent to harm, it may have also been based on a conclusion that he did not intend to cause significant harm to Nietfeld.

### Conclusion

This Court should reverse and conclude that RAM Mutual does not owe coverage for Shawn Meyers' assault of Curtis Nietfeld. As a matter of law, there was either no "occurrence" or the intentional act exclusion of RAM Mutual's policy applies to bar coverage for the underlying claims. Alternatively, because the district court erroneously instructed the jury and framed the one special verdict question, RAM Mutual is entitled at a minimum to a new trial so that it might have a fair opportunity to establish that no coverage exists. This Court should reverse the judgment for a new trial before a jury that is both properly instructed and asked the right question.

Dated: September 8, 2008

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