

CASE NO. A08-864

STATE OF MINNESOTA
IN COURT OF APPEALS

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.

BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE

Thomas D. Jensen (#50179)
William L. Davidson (#201777)
LIND, JENSEN, SULLIVAN &
PETERSON, P.A.
150 South Fifth Street, Suite 1700
Minneapolis, MN 55402
(612) 333-3637

Attorneys for Appellant

John E. Mack (#65973)
MACK & DABY, P.A.
26 Main Street
P.O. Box 302
New London, MN 56273
(320) 354-2045

*Attorney for Respondents Judith Nietfeld,
Brian Nietfeld and Curtis Nietfeld*

John T. Lund (#129501)
LUND, KAIN & SCOTT, P.A.
13 South Seventh Avenue
St. Cloud, MN 56301
(320) 252-0330

*Attorney for Respondents Daniel Meyer,
Linda Meyer and Shawn Meyer*

Kenneth H. Bayliss (#157569)
Laura A. Moehrle (#0348557)
QUINLIVAN & HUGHES, P.A.
P.O. Box 1008
St. Cloud, MN 56302
(320) 251-1414

*Attorneys for Respondent Paynesville
Independent School District No. 741*

Charles A. Bird (#8345)
BIRD, JACOBSEN & STEVENS, P.C.
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

Attorney for Amicus Curiae
Minnesota Association for Justice

TABLE OF CONTENTS

Table of Authorities	ii
Introduction	1
Argument.....	2
Conclusion.....	6
Certificate of Compliance	7

TABLE OF AUTHORITIES

	Page
<u>Atwater Creamery Co. v. Western National Mutual Insurance Co.</u> , 366 N.W.2d 271 (Minn. 1985)	passim
<u>Bd. of Regents to the Univ. of Minn. v. Royal Insurance Co. of Am.</u> 517 N.W.2d 888 (Minn. 1994)	3
<u>Brager v. Coca-Cola Bottling Co. of Fargo, Inc.</u> , 375 N.W.2d 884 (Minn. Ct. App. 1985)	5
<u>Carlson v. Allstate Ins. Co.</u> , 749 N.W.2d 41 (Minn. 2008)	2, 3
<u>Glarner v. Time Ins.</u> , 465 N.W.2d 591 (Minn. Ct. App. 1991)	5, 6
<u>Jostens, Inc. v. Northfield Ins. Co.</u> , 527 N.W.2d 116 (Minn. Ct. App. 1995)	5
<u>Motor Vehicle Casualty Co. v. Smith</u> , 76 N.W.2d 486 (Minn. 1956)	5
<u>Ronningen v. Sonterre</u> , 274 Minn. 138, 143 N.W.2d 53 (1966).....	5
<u>Sawyer v. Midland Ins. Co.</u> , 383 N.W.2d 691 (Minn. Ct. App. 1986)	6
<u>Secura Supreme Insurance Company v. M.S.M.</u> , 755 N.W.2d 320 (Minn. Ct. App. 2008)	3
<u>Travelers Indemnity Co. v. Bloomington Steel & Supply Co.</u> , 718 N.W.2d 888 (Minn. 2006)	3

INTRODUCTION

Minnesota Association for Justice (MAJ) submits this *amicus curiae* brief on one issue.¹ That issue relates to appellant RAM Mutual's attempt to deny coverage that was reasonably expected from the standpoint of the insured. Specifically, the RAM Mutual policy's definition of "intentional act", if given the literal effect that appellant seeks to enforce, would completely emasculate the insuring agreement and provide virtually no coverage for what a reasonable consumer would expect when purchasing liability insurance. Coverage is illusory and practically non-existent. The exclusion is therefore unenforceable as a matter of law.

MAJ does not address other arguments, such as those parsing the words of the insuring agreement that focus on the definition of "occurrence" being an accident, or that there is an ambiguity in the insuring agreement. These arguments, while meritorious, have ample precedent in the law and do not need the aid of briefing by *amicus curiae*. MAJ instead focuses on the attempt by RAM to sell liability insurance in this state, obtain a premium for such coverage and then deny any obligation to indemnify because of a clause that, if read literally, defeats the very risk such policies were intended to cover and renders such coverage illusory.

¹ Pursuant to Minn. R. Civ. App. Proc. 129.03, neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case. Neither MAJ nor the writer of this brief have any financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

ARGUMENT

The Supreme Court discussed the doctrine of reasonable expectations in Atwater Creamery Co. v. Western National Mutual Insurance Co., 366 N.W.2d 271 (Minn.1985), in which the Court construed a policy insuring against burglary. The policy at issue defined burglary so as to require “evidence of forcible entry.” Id. at 274. While concluding that this definition was not ambiguous, the Court nevertheless did not permit the insurer to enforce a definition that excluded coverage. Id. at 276, 278-79. The court based this decision on its conclusion that “no one purchasing something called burglary insurance would expect coverage to exclude skilled burglaries that leave no visible marks of forcible entry or exit.” Id. at 276. The court wrote:

The doctrine of protecting the reasonable expectations of the insured is closely related to the doctrine of contracts of adhesion. Where there is unequal bargaining power between the parties ... the contract will be strictly construed against the party who drafted it.... The result of the lack of insurance expertise on the part of insureds and the recognized marketing techniques of insurance companies is that “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Id. at 277.

Carlson v. Allstate Ins. Co., 749 N.W.2d 41, 47-48 (Minn. 2008), cited Atwater Creamery with approval, noting that, while ambiguities in the insurance contract were relevant to the inquiry of reasonable expectations, such ambiguities were not necessary to invoke the doctrine. Id. at 48. The court held that Atwater Creamery had since been limited by other decisions, but still had continued viability. Id. at 48. Atwater Creamery had continued use “as a tool for resolving ambiguity and for correcting extreme situations

like that in Atwater, where a party's coverage is significantly different from what the party reasonably believes it has paid for and where the only notice the party has of that difference is in an obscure and unexpected provision.” Id. at 49.

In Bd. of Regents to the Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 889 (Minn. 1994), the Supreme Court held that Atwater Creamery “presented a unique situation,” and was not a rule of broad applicability. The Court went on to affirm Atwater Creamery’s continued applicability in situations where major exclusions are hidden in the policy. Id. at 891. In such cases, “the insured should be held only to reasonable knowledge of the literal terms and conditions.” Id. These quotes from Bd. of Regents were cited with approval in the more recent Carlson v. Allstate decision. 749 N.W.2d at 49.

This Court most recently considered the reasonable expectations doctrine in Secura Supreme Insurance Company v. M.S.M., 755 N.W.2d 320 (Minn. Ct. App. 2008). At issue was a “criminal acts” exclusion that was invoked by the insurance company because the minor insured had assaulted the victim. The court affirmed the declaration of the trial court that there was no coverage, relying entirely upon Travelers Indemnity Co. v. Bloomington Steel & Supply Co., 718 N.W.2d 888 (Minn. 2006). While there was a discussion of the traditional intentional acts exclusion (bodily injury “expected or intended from the standpoint of the insured”), there was no discussion of the Atwater Creamery case or its continued viability. Secura is therefore not applicable to these facts.

This case is similar to Atwater. There is a promise of coverage in the insuring agreement. The insurer promises to pay, up to the limits, “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. Occurrence is defined as an “accident which is neither expected nor intended.” A-15. These two clauses, taken together, give an insured the reasonable belief that there will be liability coverage for negligent acts. In the intentional acts exclusion, buried deep in the list at item 19, everything is taken away. Appellant excludes “*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-19 (italics added). This provision, read literally, bars virtually any negligence claim.

Some examples of the potential breadth and scope of the exclusionary language is helpful in analyzing the applicability of Atwater Creamery.

1. A defendant driver intends to drive the vehicle into the intersection. At the same time, the insured does not intend to cause injury to the occupants of the other vehicle. Because the act of driving into the intersection was an “act intended by an insured” and the exclusion applies “whether or not the injury or property damage was intended”, there is no coverage.
2. A defendant driver intends to drive his car over the speed limit, or to drive his car while intoxicated. He does not intend to injure his passengers. No coverage.
3. A defendant pheasant hunter intends to discharge his shotgun. He does not intend to injure the person the pellets strike. No coverage.

4. A defendant homeowner intends to throw a beer to his friend in the living room, who is watching the Vikings game. He does not intend to injure his friend who isn't looking when the beer hits him in the face. No coverage.

It is difficult to conceive of a situation where an act of an insured is not intended. Almost everything we do is volitional and thus excluded under the RAM policy.

Situations where there might be coverage are so rare that automatic defenses arise. Say a defendant driver intends to brake the car, but there is ice on the highway and he cannot stop. In this rare case, the injury resulting from such conduct does not arise out of an intentional act (unless the driver were speeding, in which case there would be no coverage), but gives rise to an automatic defense based upon the emergency doctrine, or as an "act of God" for which no liability exists. Brager v. Coca-Cola Bottling Co. of Fargo, Inc., 375 N.W.2d 884 (Minn. Ct. App. 1985) (emergency doctrine); Ronningen v. Sonterre, 274 Minn. 138, 143-44, 143 N.W.2d 53, 57 (1966) (act of God).

The point here is that the possibility of paying out on coverage on the RAM policy, when its exclusion is given literal application, is so remote that such coverage is illusory. Pursuant to the doctrine of illusory coverage, "insurance contracts should, if possible, be construed so as not to be a delusion to' the insured." Jostens, Inc. v. Northfield Ins. Co., 527 N.W.2d 116, 118 (Minn.Ct.App.1995) (quoting Motor Vehicle Casualty Co. v. Smith, 76 N.W.2d 486, 490-91 (Minn.1956)). The doctrine of illusory coverage is to be applied "where part of the [insurance] premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent." Jostens, 527 N.W.2d at 119; *See also* Glerner v. Time Ins., 465 N.W.2d

591, 595 (Minn.Ct.App.1991) (finding coverage illusory where the insurer received a premium for a period without incurring any risk for that period); Sawyer v. Midland Ins. Co., 383 N.W.2d 691, 695-696 (Minn.Ct.App.1986) (refusing to construe an automobile insurance definition of “uninsured motor vehicle” in such a way as to eliminate its usefulness because such an interpretation would render coverage illusory).

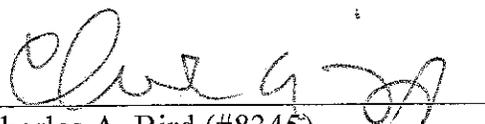
RAM is paid a premium but incurs no risk. RAM agrees to insure, but takes away the insurance with the exclusion. This policy cannot stand. It is, as noted by the Court in Atwater Creamery, this is a policy that must be reformed to provide coverage according to the reasonable expectations of the insured.

CONCLUSION

The Court should affirm the decision of the trial court.

Dated: October 10, 2008

BIRD, JACOBSEN & STEVENS, P.C.



Charles A. Bird (#8345)
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

*Attorney for Amicus Curiae
Minnesota Association for Justice*

CERTIFICATE OF COMPLIANCE

I certify that the above brief complies with the requirements of Minn. R. App. P.

132.01, in that:

The font is 13-point or larger;

The length of the brief is 1581 words and was prepared using Microsoft Word
2007.



Charles A. Bird (#8345)
BIRD, JACOBSEN & STEVENS, P.C.
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503