

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.

RESPONDENT'S BRIEF AND APPENDIX

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*

(Counsel for Amicus Curiae listed on following page)

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)
QUINLIVAN & HUGHES, P.A.
P.O. Box 1008
St. Cloud, MN 56302
(320) 258-7840

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

Charles A. Bird (#8345)
Bird, Jacobsen & Stevens, P.C.
300 Third Avenue SE, Suite 305
Rochester, MN 55904
(507) 282-1503

*Attorney for Amicus Curiae
Minnesota Association for Justice*

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).

Table of Contents

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii, iii
Statement of Legal Issues	1
Argument and Authorities	2
Introduction and Standard of Review	2
I. RAM Mutual’s policy provides insurance coverage as it defines an “occurrence” as an “accident” which has been held to include unexpected, unforeseen or undesigned consequences	3
II. The intentional act exclusion of RAM Mutual’s policy does not bar coverage for the claims alleged against the Meyers	5
III. The special verdict question inquiring whether Meyer intended to cause a “significant harm” did not constitute an abuse of discretion by the trial court	10
Conclusion	12

Table of Authorities

Cases	<u>Page</u>
<i>Russell v. Johnson</i> , 608 N.W.2d 895, 898 (Minn. App. 2000)	2
<i>Alholm v. Wilt</i> , 394 N.W.2d 488, 490 (Minn. 1986)	2
<i>Morlock v. St. Paul Guardian Insurance Co.</i> , 650 N.W.2d 154, 159 (Minn. 2002)	2
<i>Alevizos v. Metropolitan Airports Comm.</i> , 452 N.W.2d 492, 501 (Minn. App. 1990)	2
<i>Columbia Heights Motors, Inc. v. Allstate Insurance Co.</i> , 275 N.W.2d 32, 34 (Minn. 1979)	2, 6
<i>Rusthoven v. Commercial Standard Insurance Co.</i> , 387 N.W.2d 642, 644 (Minn. 1986)	2, 6
<i>Nordby v. Atlantic Mutual Insurance Co.</i> , 329 N.W.2d 820, 822 (Minn. 1983)	3
<i>Dairyland Insurance Co. v. Implement Dealers Insurance Co.</i> , 199 N.W.2d 806, 811 (Minn. 1972)	3
<i>American Family Insurance Co. v. Walser</i> , 628 N.W.2d 605, 609 (Min. 2001)	4
<i>American Family Insurance Co. v. Walser</i> , 628 N.W.2d 605, 611-612 (Minn. 2001)	4, 7
<i>Brown v. Auto & Casualty Underwriters</i> , 293 N.W.2d 822, 824 (Minn. 1980)	5
<i>Morris v. Weiss</i> , 414 N.W.2d 485, 487-88 (Minn. App. 1987)	6

<i>Atwater Creamery Company v. Western National Mutual Insurance Company</i> , 366 N.W.2d 271 (Minn. 1985)	8
<i>Atwater Creamery Company v. Western National Mutual Insurance Company</i> , 366 N.W.2d 271, 275 (Minn. 1985)	8
<i>Atwater Creamery Company v. Western National Mutual Insurance Company</i> , 366 N.W.2d 271, 277 (Minn. 1985) <u>citing</u> , <i>Keeton Insurance Law Rights at Variance with Policy Provisions</i> , 83 Harv. L. Rev. 961 (1970)	9
<i>Carlson v. Allstate Insurance Co.</i> , 749 N.W.2d 41, 49 (Minn. 2008)	9
<i>R.W. v. T.F.</i> , 528 N.W.2d 869, 872 (Minn. 1995)	10
<i>State Farm Fire and Casualty Co. v. Wicka</i> , 474 N.W.2d 324, 329 (Minn. 1991)	10
<i>Youngquist v. Western National Mutual Insurance Co.</i> , 716 N.W.2d 383, 385 (Minn. App. 2006)	12

STATEMENT OF LEGAL ISSUES

- I. RAM MUTUAL'S POLICY PROVIDES INSURANCE COVERAGE AS IT DEFINES AN "OCCURRENCE" AS AN "ACCIDENT" WHICH HAS BEEN HELD TO INCLUDE UNEXPECTED, UNFORSEEN OR UNDESIGNED CONSEQUENCES.
- II. THE INTENTIONAL ACT EXCLUSION OF RAM MUTUAL'S POLICY DOES NOT BAR COVERAGE FOR THE CLAIMS ALLEGED AGAINST THE MEYERS.
- III. THE SPECIAL VERDICT QUESTION INQUIRING WHETHER MEYER INTENDED TO CAUSE A "SIGNIFICANT HARM" DID NOT CONSTITUTE AN ABUSE OF DISCRETION BY THE TRIAL COURT.

ARGUMENT AND AUTHORITIES

Introduction and Standard of Review

District courts have broad discretion in drafting special verdict questions. *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000).

Appellate courts will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). District courts are allowed a considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction. *Morlock v. St. Paul Guardian Insurance Co.*, 650 N.W.2d 154, 159 (Minn. 2002). "Where jury instructions fairly and correctly state the applicable law, this court will not reverse the denial of a new trial." *Alevizos v. Metropolitan Airports Comm.*, 452 N.W.2d 492, 501 (Minn. App. 1990).

Minnesota cases identify two types of ambiguity in insurance contracts. Ambiguity may result from terms in a policy which are susceptible to more than one meaning. *Columbia Heights Motors, Inc. v. Allstate Insurance Co.*, 275 N.W.2d 32, 34 (Minn. 1979). Ambiguity may also result from an irreconcilable conflict between terms or provisions within the policy. *Rusthoven v. Commercial Standard Insurance Co.*, 387 N.W.2d 642, 644 (Minn. 1986).

The determination of ambiguity will most often decide the issue of coverage under an insurance policy because that determination leads to the application of one of two rules

of construction. When the language of an insurance policy is ambiguous, it must be construed in favor of finding coverage. *Nordby v. Atlantic Mutual Insurance Co.*, 329 N.W.2d 820, 822 (Minn. 1983). Where there is no ambiguity, there is no room for construction. Insurance contracts must be construed according to the terms used by the parties, giving the language its ordinary and usual meaning so as to effectuate the intent of the parties as it appears from the contract. *Dairyland Insurance Co. v. Implement Dealers Insurance Co.*, 199 N.W.2d 806, 811 (Minn. 1972).

I. RAM Mutual’s policy provides insurance coverage as it defines an “occurrence” as an “accident” which has been held to include unexpected, unforeseen or undesigned consequences.

The RAM Mutual policy provides personal liability coverage which is defined as follows:

“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. We will defend a suit seeking damages if the suit resulted from bodily injury or property damage not excluded under this coverage.” A.15 (Policy, FCPL-1A, p.2).

The policy defines an occurrence:

“Occurrence” means an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions. (Emphasis supplied). A.15 (Policy, FCPL-1A, p.2).

The policy does not provide a definition for the term accident.

The term, however, has been given definition by the Minnesota Supreme Court. In *American Family Insurance Co. v. Walser*, 628 N.W.2d 605, 609 (Min. 2001) the court held “In interpreting the word accident, we are guided by the maxim that in insurance contracts, coverage provisions are construed according to the expectations of the insured and exclusions are construed narrowly. When applying this maxim to coverage provisions of an accident policy, we established that the word encompasses both the acts of the insured and the consequences of the insured’s acts.” Specifically, the court defined an accident as “an unexpected, unforeseen, or undesigned happening or consequence.” “(W)here there is no intent to injure, the incident is an accident, even if the conduct itself was intentional.” *American Family Insurance Co. v. Walser*, 628 N.W.2d 605, 611-612 (Minn. 2001).

As the Appellant has stated, “RAM Mutual agreed to provide liability coverage for bodily injury “caused by an occurrence.” (Appellant’s Brief p.7). The policy defines an occurrence as an accident which the supreme court has defined as “an unexpected, unforeseen or undesigned happening or consequence.” *American Family Insurance Co. v. Walser*, 628 N.W.2d 605, 611-612. As the trial court found, since the jury found the insured had no intent to injure, “the incident was an accident.” (A.39, Order for Judgment dated April 14, 2008). As an accident, the Appellant was required to provide coverage, unless otherwise excluded.

II. The intentional act exclusion of RAM Mutual's policy does not bar coverage for the claims alleged against the Meyers.

On December 14, 2006, the trial court heard cross motions regarding the Appellant's duty to defend and/or indemnify the Respondent Meyers. In its Order, dated April 24, 2007 (See Respondent's Appendix 1-13) the trial court entered a number of orders.

After examining the history of intentional act exclusions in Minnesota and finding, "An intentional act exclusion of a homeowner's policy applies only if the insured acts with intent to cause injury, and not where the insured merely intends to act."

(Respondent's Appendix 9-10), citing *Brown v. Auto & Casualty Underwriters*, 293

N.W.2d 822, 824 (Minn. 1980). The trial court noted the unique language employed in the exclusion contained in the Appellant's insurance policy:

"RAM argues that its policy language has been drafted around this case law. RAM's policy language excludes coverage for all intentional acts "whether or not the bodily injury was intended." In other words, regardless of the consequences, any injury resulting from any intentional act would not be covered. Under Plaintiff's theory, RAM's insured have purchased a policy under which these would be no coverage for anything if the injury or property damage could be traced back to an act of the insured.³

³Reminiscent of Monty Python's "never pay policy" sketch.

Being injured by a falling tree in one's yard would not be covered because of the insured's act of walking into the yard. Having one's house destroyed by a fire started negligently by a visiting child would not be covered because of the act of inviting

the child into the home or bringing home the matches that started the fire. The injury to a child who wanders into one's yard and is bitten by the dog when the child puts its hand into the kennel would not be covered if the insured put the dog in the kennel or directed someone else to do it. These scenarios illustrate the precise reason that some policies include language relating to what reasonable people can expect from their actions. "Intent" or "intentionally" means either that a person aims to cause the consequences of his or her acts, or, that a person knows that his or her acts are substantially certain to cause those consequences. 4A Minn. Prac. Civ. JIG 60.10. It is illogical to have an intentional act exclusion that is interpreted to mean that no loss will be covered if related either directly or indirectly from any action taken by an insured, without regard to what the actor either intends or should foresee the consequences. The language of the intentional act exclusion in RAM's policy is ambiguous." (Respondent's Appendix p. 10).

"Minnesota cases identify two types of ambiguity insurance contracts.

Ambiguity may result from terms in a policy which are susceptible to more than one meaning. *Columbia Heights Motors, Inc. v. Allstate Insurance Co.*, 275 N.W.2d 32, 34 (Minn. 1979). Ambiguity may also result from an irreconcilable conflict between terms or provisions within the policy.

Rusthoven v. Commercial Standard Insurance Co., 387 N.W.2d 642, 644 (Minn. 1986). *Morris v. Weiss*, 414 N.W.2d 485, 487-88 (Minn. App. 1987).

The conflict in the RAM policy cannot be resolved. The policy promises to provide as a part of its "principle coverages" "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). As

we have shown in section I. of this Brief, the policy defines an occurrence as an accident and Minnesota courts have defined accidents as encompassing both the acts of an insured and the consequences of those acts. “Where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional.” *American Family Insurance Co. v. Walser*, 628 N.W.2d 605, 611-612 (Minn. 2001).

While this might sound like exactly what a person would purchase a personal liability policy for, coverage against accidents which are caused by their actions, an exclusion three pages later, takes all of that away.

The RAM exclusion reads, in its entirety,

“This policy does not apply to liability which results directly or indirectly from... 19. 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 FCPL-1A p. 7-8)

A fair reading of the exclusion must result in the conclusion that the policy which was intended to provide coverage for accidents provides coverage for nothing. While an accident encompasses the “acts of an insured and the consequences of those acts” and would appear to cover, the exclusion eliminates coverage for both the acts of an insured and the consequences of those acts.

In *Atwater Creamery Company v. Western National Mutual Insurance Company*, 366 N.W.2d 271 (Minn. 1985) the supreme court examined a burglary insurance policy that limited coverage to burglaries when there was “evidence of forcible entry,” while including a conformity clause which stated, “Terms of this policy which are in conflict with the statutes of the state wherein this policy are issued are hereby amended to conform to such statutes.” While the court found no conflict between the policies definition of burglary and the Minnesota criminal definition, it did find that, “The difference between the two, however, has a bearing on the insured’s reasonable expectations in purchasing burglary insurance.” *Atwater Creamery Company v. Western National Mutual Insurance Company*, 366 N.W.2d 271, 275 (Minn. 1985). In finding coverage, despite a lack of evidence of forcible entry, the court employed the doctrine of reasonable expectations. In a lengthy opinion 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 so that one party controls [**13] all of the terms and offers the contract on a take-it-or-leave-it basis, the contract will be strictly construed against the party who drafted it. Most courts recognize the great disparity in bargaining power between insurance companies and those who seek insurance. Further, they recognize that, in the majority of cases, a lay person lacks the necessary skills to read and understand insurance policies, which are typically long, set out in very small type and written from a legalistic or insurance expert’s perspective. Finally,

courts recognize that people purchase insurance relying on others, the agent or company, to provide a policy that meets their needs. The result of the lack of insurance expertise on the part of insureds and the recognized marketing techniques of insurance companies is that “the 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.”

Atwater Creamery Company v. Western National Mutual Insurance Company, 366 N.W.2d 271, 277 (Minn. 1985) citing, *Keeton Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970).

The doctrine of reasonable expectations has been criticized and limited. Despite this, the terms of the policy before the court fit the doctrine, even as limited by the court when it wrote, “we are unwilling to expand the doctrine of reasonable expectations beyond its current 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 an obscure and unexpected provision.” *Carlson v. Allstate Insurance Co.*, 749 N.W.2d 41, 49 (Minn. 2008).

The trial court found both an ambiguity and an extreme situation in the Appellant’s policy. It wrote, “It is illogical to have an intentional act exclusion that is interpreted to mean that no loss will be covered if related

directly or indirectly from any action taken by an insured, without regard to what the actor intends or should foresee the consequences.” (Respondent’s Appendix p. 10).

To the contrary, it was reasonable for the Respondents to expect that they purchased a personal liability policy which would cover accidents, rather than a Monty Python “never pay policy.”

III. The special verdict question inquiring whether Meyer intended to cause a “significant harm” did not constitute an abuse of discretion by the trial court.

The jury was asked one single question, “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). Appellant contends the question should have read “some harm” and that it was substantially prejudiced by the instruction.

“The law in Minnesota is well settled that an intentional act exclusion applies only where the insured acts with a specific intent to cause bodily harm. Specifically, the requisite intent demands that the insured intended the harm itself, not merely that the insured generally intended to act.” *R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn. 1995). The language of earlier case law was far more strict. In *State Farm Fire and Casualty Co. v. Wicka*, 474 N.W.2d 324, 329 (Minn. 1991) the court had said, “the law in Minnesota is well settled that

an intentional act exclusion applies only where the insured acts with a specific intent to cause bodily injury. Under this subjective standard, the necessary intent may be established by proof on an insured's actual intent to injure or by inference, when the character of the act is such that an intention to inflict injury can be inferred as a matter of law." (citations omitted).

The inclusion of the word "significant" was a response to the Appellant's request that the court ask the jury whether "Shawn Meyer knew or should have known that a harm was substantially certain to result from his conduct" (A.35) rather than whether an injury was substantially certain to result. It was felt that the term harm could encompass consequences not included by the term injury. As the result, significant was added.

The attorney for the Nietfelds made one of the few trial references to the term in his closing argument. He said, "Now the kind of things in most adolescent playground things, most adolescent scuffles and so forth, involve pain. They don't involve injury. Hurt not harm. This is such a case. It might be reasonably anticipated that someone who gets tackled is gonna get hurt. It is not reasonably anticipated that there's gonna be significant harm and it certainly isn't substantially certain that there's going to be significant harm." (Transcript pp. 340-41).

The trial of this matter focused upon the intent of Shawn Meyer and whether his actions could result in an inference of an intent to injure Curtis Nietfeld. Both the actor and the injured boy testified that they did not believe that Shawn Meyer intended to injure.

To succeed on appeal, the Appellant must show that the special interrogatory was an abuse of discretion and that it was prejudiced by it. *Youngquist v. Western National Mutual Insurance Co.*, 716 N.W.2d 383, 385 (Minn. App. 2006). Here it can show neither.

CONCLUSION

The decision of the trial court should be affirmed.

Dated: September 29, 2008.

LUND KAIN & SCOTT, P.A.



John T. Lund, ID #129501
Attorney for Respondents
Daniel Meyer, Linda Meyer and
Shawn Meyer
13 South Seventh Avenue
St. Cloud, MN 56301
(320) 252-0330

State of Minnesota
Stearns County

APR 26 2007

District Court
Seventh Judicial District

Court File Number: 73-C5-06-002333

Case Type: Civil Other/Misc.

Notice of Filing of Order

JOHN T LUND, T
13 SOUTH 7TH AVENUE
ST CLOUD MN 56301

RAM MUTUAL INSURANCE COMPANY vs. DANIEL MEYER et al.

You are notified that an order was filed on this date.

Dated: April 24, 2007

Jeanne S, Deputy
Court Administrator
Stearns County District Court
725 Courthouse Square Room 134
St. Cloud MN 56303
320-656-3620

cc: THOMAS D JENSEN
JOHN E MACK
KENNETH H BAYLISS, III

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF STEARNS

SEVENTH JUDICIAL DISTRICT

RAM Mutual Insurance Company,
a Minnesota Corporation,

Plaintiff,

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,

Defendants,

COURT FILE NO.

C5-06-2333

AMENDED FINDINGS AND ORDER

The above-entitled matter came on for hearing before the Honorable Vicki E. Landwehr, Judge of District Court, on the 14th day of December, 2006.

Thomas D. Jensen and Susan E. Hettich appeared on behalf of Plaintiff RAM Mutual Insurance Company (hereinafter RAM); John T. Lund appeared on behalf of Defendants Linda and Daniel Meyer, individually and as parents of Shawn Meyer, a minor; John E. Mack appeared on behalf of Defendants Judith and Brian Nietfeld, individually and as parents of Curtis Nietfeld, a minor. There was no appearance by Defendant Paynesville School District.

RAM brought a motion for declaratory judgment arguing that it has no duty to defend the tort action against their insured brought by the Nietfelds or to indemnify the Meyers' claims. The Nietfelds and the Meyers brought a motion for summary judgment

seeking a ruling that RAM must defend and indemnify under the policy issued to the Meyers.

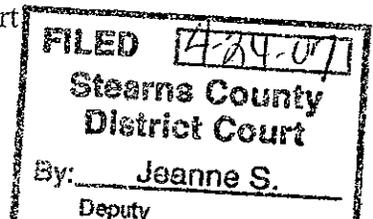
NOW, having duly considered the arguments and memoranda of counsel, the documents and proceedings herein, together with the applicable law, this Court **ORDERS:**

1. **THAT**, Defendants' Motion for Summary Judgment on the issue of RAM's duty to defend is **GRANTED**.
2. **THAT**, Plaintiff must defend the tort action against the Meyers.
3. **THAT**, Defendants' motion for Summary Judgment on the issue of RAM's duty to indemnify the claim against Shawn Meyer for negligence and the claim against Linda and Daniel Meyer for negligent supervision is **DEFERRED**.
4. **THAT**, Plaintiff has no duty to indemnify the assault claim against Shawn Meyer.
5. **THAT**, Plaintiff's motion for Declaratory Judgment is **DENIED**.
6. **THAT**, Defendants Linda and Daniel Meyer and Defendants Judith and Brian Nietfeld are awarded costs and disbursements herein.
7. **THAT**, all other motions not specifically addressed in this motion are summarily **DENIED**.
8. **THAT**, the attached memorandum is a part of this Order.

Dated this 24th day of April, 2007.



Vicki E. Landwehr
Judge of District Court



FINDINGS OF FACT PERTINENT TO SUMMARY JUDGMENT

1. Defendants Judith Nietfeld, Brian Nietfeld and Curtis Nietfeld have brought an action in Stearns County against Defendants Linda Meyer, Daniel Meyer, Shawn Meyer and Paynesville Independent School District No. 741 arising out of an incident on May 14, 2005 when Curtis Nietfeld was injured. (Court File No. C9-06-2464).
2. In that underlying action, the Nietfelds allege that Defendant Shawn Meyer pulled a chair out from under Curtis Nietfeld at Paynesville High School, causing injuries. The causes of action against Shaun Meyer are Assault and Negligence. The cause of action against Daniel and Linda Meyer as the parents of Shawn Meyer is negligent supervision.
3. At the time of the incident, the Meyers were insured by RAM for personal liability.
4. The Meyers made a claim under their policy to have RAM defend and indemnify that tort action.
5. RAM seeks summary judgment and a declaration that the insurance policy issued by RAM does not provide coverage for the May 14, 2005 incident.
6. Defendants Meyers and Nietfelds seek summary judgment and an order that RAM must defend and indemnify the tort action under the Meyers' personal liability policy.

DISCUSSION

The parties have filed cross motions for summary judgment. Plaintiff seeks declaratory judgment from Court finding that as a matter of law the Meyer's insurance policy with RAM does not cover the incident in the underlying action or any allegation arising indirectly from this incident, therefore RAM has no duty to defend against the action by the Nietfelds and no obligation to pay the claim.

A motion for Summary Judgment shall be granted when the pleadings and discovery show that there is no genuine issue of fact and that a party is entitled to judgment as a matter of law. The non-moving party must show that there is a question of fact on which a jury must decide. *Celotex Corp. v. Catrett*, 467 U.S. 242, 247-50 (1986); Minn. R. Civ. P. 56.05. Summary judgment is mandatory against parties who have failed to establish all of the elements of their causes of action. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001). The Court's function is to determine whether there are fact issues to be tried. *Murphy v. Country House, Inc.* 240 N.W.2d 507, 512 (Minn. 1976). The interpretation of an insurance policy and application of the policy to the facts in a case are questions of law. *Am Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001).

The duty of an insurer to defend is separate from its duty to indemnify. *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998). When any part of an insured's claim is arguably within the policy's scope, the insurer has a duty to defend. *Metro. Prop & Cas Ins. Co. v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999). If a complaint alleges several claims, and *any one* of them would require the insurer to indemnify, the insurer must provide a defense against all claims. *Franklin* at 406-07. On

the other hand, to obtain summary judgment on the duty to indemnify, the insured must prove that all claims alleged in the complaint fall within the liability policy coverage; otherwise, the possibility that the insured's liability might ultimately be based solely on a non-covered claim presents genuine issues of material fact. *Reinsurance Ass'n of Minnesota v. Timmer*, 641 N.W.2d 302 (Minn. App. 2002).

Act vs. Occurrence

RAM argues that the incident in the suit by the Nietfelds against the Meyers is not "an occurrence" under the policy, and, therefore, RAM has no duty to defend or indemnify. The RAM policy purchased by the Meyers states:

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. We will defend a suit seeking damages if the suit resulted from bodily injury or property damage not excluded under this coverage.

Under the policy, the definition of "occurrence" is "an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions." Plaintiff argues that because the injuries arose from an act, it is not "an occurrence" under the policy; and therefore even if the incident was horseplay and not an intentional assault, it involved an act, not an occurrence.¹ Reading the policy in that manner would exclude losses the policy clearly does cover. For example if the Meyers were victims of vandalism or theft by an unknown perpetrator, there would be no coverage since the loss was a result of an act.² For purposes of RAM's argument, if an

¹ For purposes of meeting the definition of an accident, it is irrelevant whether what RAM characterizes as an "act" is by the insured or someone else. RAM's argument is that any injury or damage that is a result of any act is not an occurrence

² The policy excludes thefts and vandalism claims when committed by an insured, but they are excluded because the insured has the intent to cause the injury or property damage. They are not excluded because they do not meet the definition of occurrences

injury or property damage occurred on the insured's property as a result of an act, but not as a result of an act by an insured, RAM would not indemnify under its definition of an occurrence.

Defendant RAM made a similar argument in *Reinsurance Ass'n of Minnesota v. Timmer* 641 N.W.2d 302 (Minn. App. 2002). In that case, RAM brought an action seeking declaratory relief when its insured sought defense and indemnification under their personal liability policy for a suit against them. In the underlying action, the Johnstones alleged that the Timmers sold them 100 dairy cows, some of which were infected with a bovine viral diarrhea virus. The causes of action included: (1) breach of express and implied warranties; (2) fraud and misrepresentation; and (3) consumer fraud in violation of the Minnesota Prevention of Consumer Fraud Act. The district court found in favor of the insured ordering RAM to defend and indemnify the claim. The Court of Appeals summarized RAM's argument as follows:

RAM argues that the district court erred when it found that the Johnstones' negligent misrepresentation claim arose from an "occurrence." RAM asserts that since the Timmers necessarily intended to make any representation that they did make, any claim arising from a representation would not qualify as an "occurrence" and, for the same reasons, would fall under the policy exclusion for intentional acts.

Id. at 313. The Court affirmed the district court's order insofar as it held that RAM had a duty to defend the Timmers.

"[I]t must be assumed that the Timmers intended to make the alleged representations, but a claim of negligent misrepresentation presupposes that they did not intend their representations to be false. Such a negligent misrepresentation may cause an "accident" where, as here, the allegedly false representation causes a buyer to accept delivery of diseased cattle that infect a formerly-healthy herd. That accident was neither expected nor intended and is an "occurrence." Moreover, since liability for a negligent misrepresentation does not require proof that it was intentionally false, the claim does not fall under the intentional-acts exclusion. That is, the

relevant “act” for that exclusion is not the act of making a representation, but the act of making a false representation.

Id at 313. In this case, the assault allegation requires proof of a physical act with an intent to injure. The relevant “act” in this alleged assault is not just Shawn Meyer’s physical act of pulling a chair out from under Curtis Nietfeld, but that act combined with an intent to injure, thereby constituting an act of assault. Negligence is not an act even though generally someone must act in some way to breach the duty and cause the injury. To use a classic example, if Shawn had dropped a banana peel at his home and Curtis was injured when he slipped on it and fell, the fact the Shawn “acted” when dropping the banana peel does not change the slip and fall accident into an “act” that is not covered under the policy. Shawn could be negligent for dropping the banana peel and RAM as the insurer would defend and indemnify a claim for injury. However, if Shawn had dropped that banana peel with the intention that Curtis fall and become injured, Shawn’s intention combined with the act of dropping the banana peel would be an intentional act under the policy. Because the Court cannot determine as a matter of law whether Shawn intended to injure Curtis during this incident, The Court cannot find as a matter of law that the incident is an act, not an occurrence.

The RAM policy provides coverage for bodily injury caused by an occurrence. An occurrence is defined as an accident which is neither expected or intended. An accident is defined in Minnesota case law as “an unexpected, unforeseen, or undesigned happening or consequence”. *Am. Family Ins Co. v. Walser*, 628 N.W 2d 605, 612 (Minn 2001)(upholding the definition in *Hauenstein v. Saint Paul-Mercury Indem Co.*, 242 Minn. 354, 65 N.W.2d 122 (Minn. 1954)). This definition focuses on intent as to the result. The *Walser* court concluded specifically “in analyzing whether there was an

accident for purposes of coverage, lack of specific intent to injure will be determinative, just as it is in an intentional act exclusion analysis. *Id.* at 612. The court further stated that “where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional.” *Id.* Therefore, unless it can be determined as a matter of law that Shawn acted with specific intent to injure Curtis, the incident is an accident and RAM has a duty to defend the Meyers.

The Intentional Act Exclusion applied to Plaintiff’s duty to defend Shaun Meyer.

Plaintiff argues that under its policy language the incident between Shaun Meyer and Curtis Nietfeld meets the definition of an excluded intentional act as a matter of law.

Defendants argue that whether Shawn Meyer intended to injure Curtis Nietfeld cannot be determined as a matter of law, and that because there are facts to support the underlying allegation of negligence, RAM must defend Shaun Meyer in the suit against him.

Defendants cite *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605 for this argument which held that if the injury could be perceived as teenagers fooling around then intent to injure cannot be inferred.

Insurance policy exclusions are construed strictly against the insurer. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d at 613. Minnesota case law regarding intentional act exclusions has repeatedly held that insurers must defend and indemnify against an assault claim if the resulting injury was not intended. See *Brown v. Auto & Casualty Underwriters*, 293 N.W.2d 822 (Minn. 1980); *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324 (Minn. 1991); *American Family Insurance Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001); *Grinnell Mutual Reinsurance Co. v. Ehmke*, 664 N.W.2d 409 (Minn. App. 2003). An intentional act exclusion of a homeowner’s policy applies only if the

insured acts with intent to cause injury, and not where the insured merely intends to act. *Brown v. Auto & Casualty Underwriters*, 293 N.W.2d 822, 824 (Minn. 1980). RAM argues that its policy language has been drafted around this case law. RAM's policy language excludes coverage for all intentional acts "whether or not the bodily injury was intended". In other words, regardless of the consequence, any injury resulting from any intentional act would not be covered. Under Plaintiff's theory, RAM's insured have purchased a policy under which there could be no coverage for anything if the injury or property damage could be traced back to an act by an insured.³ Being injured by a falling tree in one's yard would not be covered because of the insured's act of walking into the yard. Having one's house destroyed by a fire started negligently by a visiting child would not be covered because of the insured's act of inviting the child into the home or bringing home the matches that started the fire. The injury to a child who wanders into one's yard and is bitten by the dog when the child puts its hand into the kennel would not be covered if the insured put the dog in the kennel or directed someone else to do it. These scenarios illustrate the precise reason that some policies include language relating to what reasonable people can expect from their actions. "Intent" or "intentionally" means either that a person aims to cause the consequences of his or her acts, or, that a person knows that his or her acts are substantially certain to cause those consequences. 4A Minn. Prac. Civ. JIG 60.10. It is illogical to have an intentional act exclusion that is interpreted to mean that no loss will be covered if related directly or indirectly from any action taken by an insured, without regard to what the actor either intends or should foresee the consequences. The language of the intentional act exclusion in RAM's policy is ambiguous.

³ Reminiscent of Monty Python's "never pay policy" sketch.

Negligence action against Shawn Meyer and RAM's duty to indemnify

The Court cannot find that as a matter of law, Shawn Meyer intended to harm Curtis Nietfeld. That issue must be determined by a jury. "Negligence" and "intent" or, in this case, "intent to injure" are mutually exclusive concepts for determining coverage. The negligence is determined under a different standard and its elements do not include a finding of intent. If a jury determines that Shawn acted negligently, it would be incompatible with a finding that Shawn intended to injure Curtis. As such, the jury will necessarily determine whether Shawn's actions were within the scope of coverage or not. If the jury finds that Shawn was negligent in the incident with Curtis, RAM must indemnify the claim. If the jury finds that Shawn assaulted Curtis, RAM will not have a duty to indemnify. The jury instructions will delineate separate findings and awards for each claim.

The Parental Liability Claim

Under Minn. Stat. § 540.18, the Meyers are financially liable up to \$1,000 if a jury finds that Shawn's willful and malicious behavior caused damage to Curtis Nietfeld. RAM's obligation on this claim is identical to its obligation as to the allegation of assault against Shawn Meyer. RAM has no duty to indemnify; however, since RAM must defend against the other claims against the Meyers, RAM must defend against this claim as well.

Negligent Supervision Claim against Linda and Daniel Meyer

Defendants Meyers and Nietfelds argue that as to the negligent supervision allegation, according to Minnesota case law, a personal liability policy always covers negligence and therefore the intentional act exclusion does not apply to the negligence claim. The claim

against the Meyers alleges that they negligently failed to take proper action to curb their son's "violent propensities" and adequately supervise him. This claim makes alleges negligence. For the claim to be proven, it must be shown that the Meyers reasonably should have known that Shawn would cause an injury and should have taken action to prevent this danger. It must be shown that the Meyers knew or should have known that some harm was substantially certain to result.

Minnesota case law on whether an insurance company is required to defend and indemnify under these circumstances varies. An insurer did not have a duty to defend foster parents who were found to have negligently supervised a resident who sexually assaulted another resident in *National Union Fire Ins. Co. v. Gates*, 530 N.W.2d 223 (Minn. App. 1995). But, in a case where the insurance policy language severed an employee and the company as separate insureds under the same policy, intent could not be imputed to the employer for its employee's intentional act of assault. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888 (Minn. 2006). An insurance company was required to provide coverage for a church's negligent supervision of a pastor under its professional liability policy because the policy did not contain a clause excluding coverage for actions "arising out of" criminal acts or licentious, immoral or sexual behavior. *Redeemer Covenant Church v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 76-78 (Minn. App. 1997), *rev. denied* (Minn., Oct. 2, 1997)) In *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881 (8th Cir.1996) a homeowner's policy precluded coverage for injuries "resulting from" intentional acts).

Here, the Court finds that RAM has a duty to the Meyers against the suit pursuant to *Metro. Prop. & Cas. Ins. Co. v. Miller*, 589 N.W.2d 297, 299, because the Meyers'

claim is arguably within the policy's scope. If a jury determines that Shawn acted negligently, that determination would be incompatible with a finding that Curtis was injured because of Shawn's propensity for violence; therefore, RAM must indemnify this claim. If the jury finds that Shawn assaulted Curtis, but that Linda and Daniel did not negligently fail to take proper action to curb their son's "violent propensities" and adequately supervise him, RAM must indemnify this claim. If a jury finds that Shawn assaulted Curtis and that the Meyers did not take proper action knowing that as a result, some harm was substantially certain to result, RAM will not have a duty to indemnify. The jury instructions on the elements of each claim will be drafted to delineate these determinations.

Conclusion

The incident alleged in this case could be determined to be an occurrence, covered under the Meyers policy, or an intentional act, excluded under the Meyer policy. The Court cannot make the necessary findings to resolve this issue as a matter of law. Because the complaint in the underlying action alleges claims that would obligate the insurer to indemnify if liability is assessed, the insurer must provide a defense against all claims in the complaint. *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302, 307. Therefore, RAM has a duty to defend the action because all of the claims other than the intentional assault may obligate indemnification. However, RAM's duty to indemnify would not extend to liability for intentional assault.



V.E.L.