

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 PAYNESVILLE INDEPENDENT SCHOOL DISTRICT'S
BRIEF AND APPENDIX**

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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).

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LEGAL ISSUES

1. Whether RAM's Policy affords coverage for liability arising from acts that are not intended to cause significant harm to an injured party?

The trial jury determined that Meyer did not intent to injury Nietfeld. The district court applied the jury's verdict to RAM's policy language and determined that the incident between Meyer and Nietfeld was an "accident" and therefore was covered by RAM's policy and not subject to the policy's intentional act exclusion.

Apposite Authority:

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

Hauenstein v. St. Paul-Mercury Indem. Co., 65 N.W.2d 122 (Minn. 1954).

Gilman v. State Farm Fire & Cas. Co., 526 N.W.2d 378 (Minn. Ct. App. 1995).

Minnesota Civil Jury Instruction 60.10.

2. Whether the district court's special verdict form conformed with Minnesota law in asking the jury whether Meyer acted with intent to cause "significant harm" such that RAM's request for a new trial should be denied.

The district court determined that the jury instruction was proper and denied RAM's motion for a new trial.

Lincoln Logan Mut. Ins. Co. v. Fornshell, 722 N.E.2d 239 (Ill. Ct. App. 1999).

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

Gilman v. State Farm Fire & Cas. Co., 526 N.W.2d 378 (Minn. Ct. App. 1995)

Caspersen v. Webber, 213 N.W.2d 327 (Minn. 1973)

STATEMENT OF THE CASE

This is a declaratory judgment action initiated by RAM Mutual Insurance Company. RAM issued a policy of insurance to Dan and Linda Meyer that named their minor son, Shawn Meyer (hereinafter “Meyer”) as an insured. On May 14, 2005, Meyer and his classmate Curtis Nietfeld (hereinafter “Nietfeld”) engaged in horseplay during a class at Paynesville High School resulting in injury to Nietfeld. Nietfeld brought a tort action against Meyer and ISD #741. Meyer sought coverage under its policy with RAM and RAM denied coverage and instituted this declaratory judgment action in Stearns County. This declaratory judgment action was tried to a jury during a two-day trial before the Honorable Paul Widick.

At trial, the jury was asked to determine whether “Meyer knew or had reason to know that a significant harm was substantially certain to result when he grabbed and/or tripped Curtis Nietfeld.” The jury answered in the negative. Applying the jury’s verdict, the district court determined that the incident was not intended, and therefore an “accident” triggering coverage under RAM’s policy. The Court also held RAM’s intentional act exclusion did not apply. RAM brought a post-trial motion seeking an order that its policy did not afford coverage to Meyer. RAM’s motion also objected to the language used in the special verdict form. The district court denied RAM’s motions. RAM now appeals from the district court’s denial of its post-trial motion and request for a new trial.

STATEMENT OF FACTS

At the time of the underlying incident in this matter, Nietfeld and Meyer were ninth-grade classmates at Paynesville High School, a school operated by Independent School District #741. On May 14, 2005, Meyer and Nietfeld engaged in horseplay during class, which culminated in an injury to Nietfeld. This horseplay was the subject of a jury trial. Evidence was presented at trial demonstrating that Meyer pulled a stool out from under Nietfeld, inciting Nietfeld and Meyer to chase one another. At some point, the evidence suggested that Meyer caught up with Nietfeld and either grabbed at, actually grabbed, or possibly tripped Nietfeld. Nietfeld fell and struck his head on the concrete floor and now claims a variety of injuries as a result of this fall.

Appellant has attempted to characterize the incident as a calculated violent act. This characterization is contrary to the evidence. Meyer and Nietfeld had been friends since elementary school. There was no animosity between them. They were not fighting over a girl or a spot on the baseball team. They were simply acting like fifteen-year-old boys.

Several eyewitnesses to the incident offered divergent testimony at trial. Isaac Jones told the jury that Meyer and Nietfeld were engaging in horseplay and Meyer pulled backwards on Nietfeld's shirt and Nietfeld's feet came out from under him. (R. 10-11). Keegan Meagher testified that as Meyer and Nietfeld were chasing one another, Meyer grabbed at Nietfeld's shirt. He testified that Meyer appeared to be trying to stop Nietfeld, but did not pull with enough force to throw

Nietfeld to the ground. (R. 1-2). Jacob Mackedanz testified Meyer grabbed the back of Nietfeld's shirt and jerked him down. (R. 4). He described their behavior prior the incident as "screwing around." Jerman Lieser testified that Meyer either grabbed at Nietfeld's shirt or tripped him. (R. 6-7).

Significantly, Meagher and Mackedanz believed that Meyer did not intend to hurt Nietfeld. (R. 3, R. 5). Lieser and Jones testified that, at best, they did not know Meyer's intentions one way or the other. (R. 9, R. 12). After Nietfeld fell, Meyer did not proceed to punch, kick or act in an otherwise violent manner towards Nietfeld. Instead, Meyer walked away and cried. (R. 8). Indeed, Nietfeld even testified that had he not hit his head, he would have considered their behavior to be "screwing around" just like any other day. (R. 13-14).

After weighing the evidence presented by all parties, a jury found that "Shawn Meyer did not 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)¹. Notwithstanding the jury's verdict, RAM, as Meyer's insurer, brought a post-trial motion seeking a declaratory judgment that RAM's homeowners insurance policy did not afford coverage to Meyer for this incident. RAM also objected to the language of the special verdict form employed by the district court.

¹ All citations identified with an "A" refer to Appellant's appendix. All citations identified with a "R" refer to Respondent's appendix.

The policy language at issue in this case is the policy's coverage provisions, the policy's definition of "occurrence," and the policy's intentional act exclusion. (A. 14-15, 18-19). The district court considered this policy language in connection with the jury's verdict, and ultimately denied RAM's post-trial motions. The court observed that the jury determined that Meyer did not intend to harm Nietfeld, and therefore the incident was an accident, and could not be excluded under RAM's intentional act exclusion. The district court also determined that it had properly instructed the jury and that the language of the special verdict form was consistent with Minnesota law. RAM now brings this appeal from the adverse judgment entered upon the jury verdict and appeals from the denial of its post trial motions. Respondent ISD #741 respectfully requests, for the reasons stated herein, that the holdings of the district court be affirmed.

STANDARD OF REVIEW

This case involves the interpretation of language contained in an insurance contract, and the review of an instruction provided to the trial court jury on a special verdict form.

Review of a district court's interpretation of an insurance contract provision presents a legal issue that the appellate court reviews de novo. Hibbing Educ. Ass'n v. Pub. Employment Relations Bd., 369 N.W.2d 527 (Minn. 1985). Language of an insurance contract should be given its plain and ordinary meaning. Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877 (Minn. 2002). When the language of an insurance contract is ambiguous, any doubts as to its meaning should be resolved in favor of the insured and against the insurer who drafted the policy. Fawcett House Inc. v. Great Central Ins. Co., 159 N.W.2d 268 (Minn. 1968); Cavallero v. Travelers Ins. Co., 267 N.W. 370 (Minn. 1936). Where provisions of a policy are susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. Struble v. Occidental Life Ins. Co. of Cal., 120 N.W.2d 609 (Minn. 1963).

In reviewing the facts in a case where a motion for a new trial has been denied, the court must affirm if there is any competent evidence reasonably tending to sustain the verdict. Rettman v. City of Litchfield, 354 N.W.2d 426, 429 (Minn. 1984). Further, a jury's answers to special verdict questions will not be set aside unless they are perverse and palpably contrary to the evidence or where the evidence is so clear to leave no room for differences among reasonable

people. Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302, 209 (Minn. Ct. App. 1992).

Here, the language of RAM's policy is ambiguous and therefore should be construed in favor of the insured affording coverage. Construing the policy language in the manner suggested by the Appellant is not only contrary to the generally accepted rule that a contract should be construed against the drafting party, but it also leads to absurd and unanticipated results.

Additionally, the trial court's special verdict form requiring a finding that Meyer knew significant harm was substantially certain to result is entirely consistent with Minnesota law and case law nationwide. Appellant's have failed to present any evidence tending to show that the jury's verdict in this case was palpably contrary to the evidence. Indeed, the witnesses overwhelmingly testified that Meyer did not intend to hurt Nietfled. Therefore Appellant is not entitled to a new trial.

ARGUMENT

I. RAM MUST PROVIDE COVERAGE FOR THE UNDERLYING CLAIMS BECAUSE MEYER DID NOT ACT WITH INTENT TO CAUSE INJURY TO NIETFELD.

Appellant RAM argues it should be relieved from affording insurance coverage to its insured, Meyer, because the incident does not meet the definition of an “occurrence” under RAM’s Policy. Specifically, RAM disagrees with the jury’s finding that the incident in question was an “accident” and therefore an “occurrence” under RAM’s Policy.

RAM’s argument must be rejected. An incident is an “occurrence” and therefore triggers coverage as long as the incident is an “accident.” The Minnesota Supreme Court has determined that incidents are “accidents” if the actor, like Meyer, did not intend to cause harm to the injured party, like Nietfeld. Here, the jury determined that Meyer did not intend to harm Nietfeld. Accordingly, the incident between Meyer and Nietfeld was an accident, and therefore a covered occurrence under RAM’s Policy. RAM offers no argument, other than its general disagreement with the jury’s findings, in support of its denial of coverage. Accordingly, for the reasons stated herein, RAM’s denial of coverage should be rejected and the finding of the District Court should be affirmed.

A. RAM’s Policy Provides that All Accidents are Occurrences.

The coverage provision of RAM’s Policy, like many other policies, provides coverage for damages resulting from an “occurrence.” RAM’s Policy, like many

other policies, defines an “occurrence” as “an accident which is neither expected nor intended including continuous or repeated exposure to substantially similar conditions.” (RAM’s Policy, FCPL-1A, p. 2). The application of these terms necessarily requires that if a jury determines that an event was an “accident” RAM’s Policy affords coverage for damages resulting from the event. This premise is undisputed. Because the policy provides no definition of “accident,” coverage depends on the meaning of “accident” as established by Minnesota case law.

B. Accidents Are Defined as Acts Not Intended to Cause Harm.

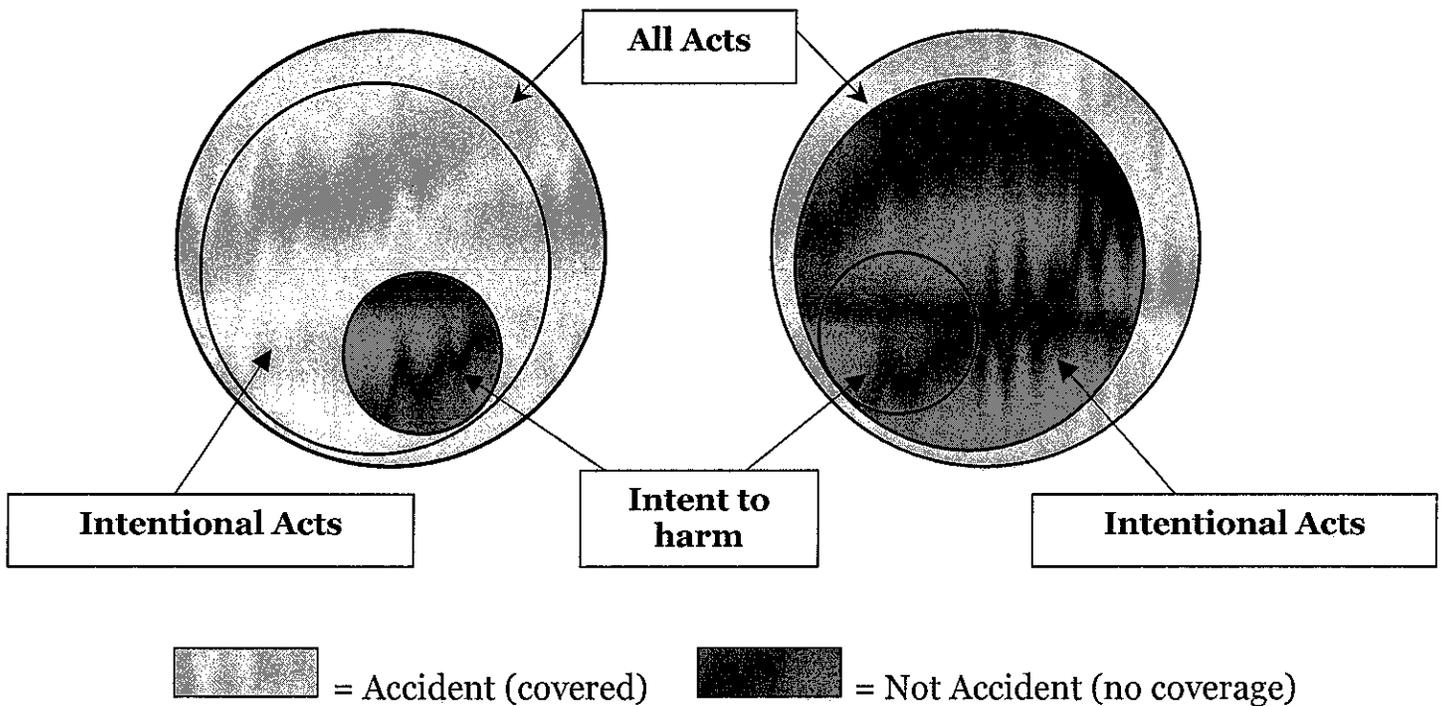
The Minnesota Supreme Court, in American Family Insurance Co. v. Walser, defines the term “accident” as “an unexpected, unforeseen, or undersigned happening or consequence.” 628 N.W.2d 605, 611 (Minn. 2001). RAM does not dispute this definition, and indeed agrees that the Walser definition of “accident” is controlling and applicable to this case. (Appellant’s Br. at 7).

The Minnesota Supreme Court’s definition of “accident” in Walser is deliberate in its rationale and consequently effortless in its application. Prior to Walser, two definitions for the term accident had emerged: one through the Hauenstein and Bartlett line of cases, and the other through cases including Sage, Milbank and Gilman. See id. at 610 – 11; citing Hauenstein v. St. Paul-Mercury Indem. Co., 65 N.W.2d 122 (Minn. 1954); Bituminous Cas. Corp. v. Bartlett, 240

N.W.2d 310 (Minn. 1976); Sage Co. v. INA, 480 N.W.2d 695 (Minn. Ct. App. 1992); Milbank Ins. Co. v. B.L.G., 484 N.W.2d 52 (Minn. Ct. App. 1992); Gilman v. State Farm Fire & Cas. Co., 526 N.W.2d 378 (Minn. Ct. App. 1995). The difference between the two definitions relates to the type of intent that is required to fall within (or outside) the realm of “accident”. At base, there are three subsets of “acts” for purposes of coverage: (1) all acts, which include all intentional acts and all unintentional acts, such as involuntary movements; (2) all intentional acts; and (3) acts undertaken with the intent to cause harm. The Hauenstein definition of “accident” pertains to circumstances where an injury is unintended or unexpected, and does not focus on whether the conduct that caused the injury was intentional. Walser, 628 N.W.2d at 610. The Gilman definition of “accident,” on the other hand, requires inquiry into whether the insured’s conduct was intentional and therefore wrongful, and does not focus on whether injury was intended. Id. For illustrative purposes, we will assume that the largest circle represents all acts, the mid-sized circle represents a subset of “all acts” which includes only voluntary or intentional acts; and the smallest subset are those acts that are undertaken with the intent of causing harm. As the diagram illustrates, the Hauenstein definition of “accident” would provide broader coverage than the Gilman definition.

Fig. 1: Hauenstein “Accident”

Fig. 2: Gilman “Accident”



In considering both the Hauenstein and the Gilman definitions of “accident,” the Minnesota Supreme Court was mindful that the definition it chose must harmonize with the intent required to trigger the application of an intentional act exclusion in an insurance policy. Id. at 611. The Court was aware that the intent required in determining whether coverage existed must be the same or broader than the intent required to trigger and exclusion from that policy. Id.

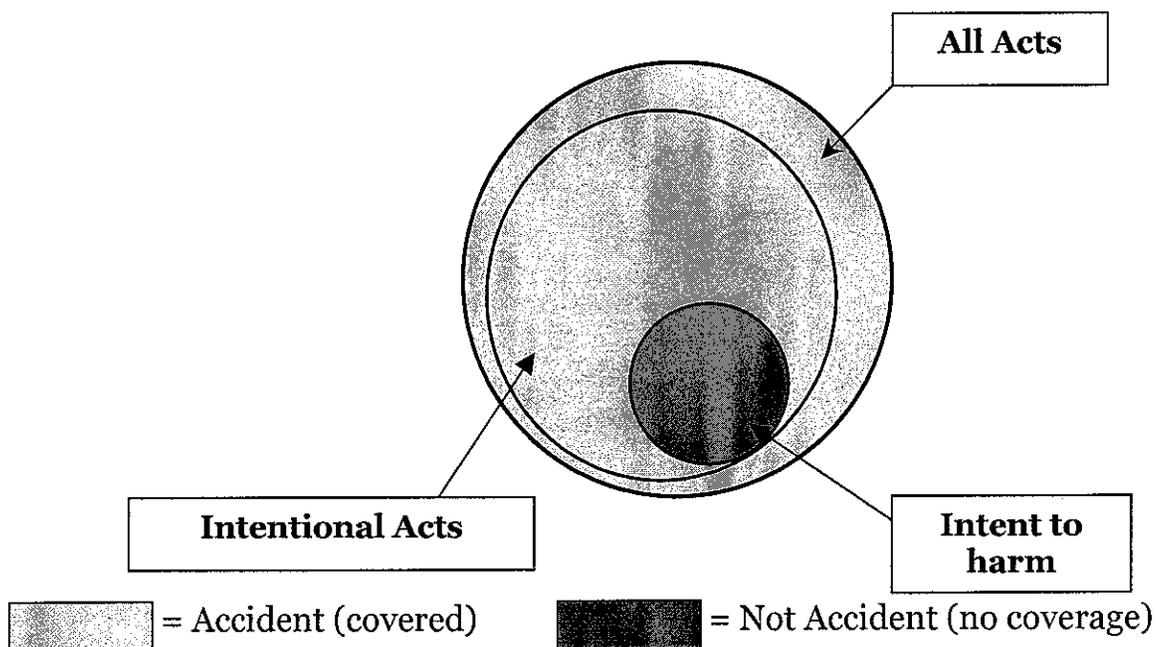
In the realm of intentional act exclusions, as discussed more thoroughly below at pages 15-25, an event may be excluded from coverage as “intentional” only when an “insured acted with specific intent to cause harm, and that the

insured intended the harm itself, not merely that the insured intended to act.” Id. citing R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995). The Court stated:

When applying this principle, we inquire into the intentions of the insured, but we do not inquire whether the insured’s conduct was wrongful. Thus, there is coverage for an incident “when the act inflicting the assault and battery is intended, but the resulting injury is not intended.” 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.

Id. [citations omitted]. Stated otherwise, a typical intentional act exclusion excludes those acts that are undertaken with the intent to cause at least some harm, even if it is not the specific harm that actually resulted.

Fig. 3: Intentional Act Exclusion



The Court then juxtaposed the intent required under both the Hauenstein and Gilman definitions of “accident” that trigger coverage [Fig. 1 and 2] with the intent required to exclude an event from coverage pursuant to an intentional act

exclusion [Fig.3]. Id. The Court concluded that the Gilman definition of accident, which only provided coverage for conduct that was unintentional, was more restrictive and resulted in narrower coverage than the intentional act exclusion analysis. (Compare Fig. 2 and Fig. 3). The Court found this to be problematic, stating “it makes little sense to give a narrower reading to ‘occurrence’ than we do to an exclusion from coverage for the ‘occurrence.’” Id. citing Milbank, 484 N.W.2d at 58.

Instead, the Court concluded that the Hauenstein definition of “accident” was the applicable standard. Therefore, in deciding whether an incident is an “accident,” the finder of fact must simply consider whether the insured acted with specific intent to injure. Id. at 612. If an insured does not act with specific intent to injure, then the incident is an accident under Walser. (See also, Fig. 1).

C. An Insured Acts Intentionally When He Wants to Cause the Consequences of His Acts or Knows that His Acts are Substantially Certain to Cause Those Consequences.

Applying the Court’s analysis in Walser, the determination of whether an event is an accident requires the finder of fact to determine whether the insured, Meyer, intended to injure Nietfeld.

Intent is defined by Minnesota Civil Jury Instruction 60.10, which provides:

“Intent” or “intentionally” means that a person:

1. Wants to cause the consequences of his or her acts, or

2. Knows that his or her acts are substantially certain to cause those consequences.

CIVJIG 60.10. This definition is undisputed, and in fact was employed by RAM in RAM's proposed jury instructions to the District Court. (A.32). If Meyer intended to cause injury to Nietfeld, the incident is not an accident, and therefore not an occurrence covered by the policy. If Meyer did not intend to cause injury to Nietfeld, the incident is an accident, and therefore an occurrence that is covered by the policy.

D. The Jury Determined Meyer Did Not Know, or Have Reason to Know That a Significant Harm was Substantially Certain to Result When He Grabbed and/or Tripped Nietfeld.

In accordance with Minnesota Civil Jury Instruction 60.10, the special verdict form asked but one question of the jury, namely "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). The jury, weighing all of the evidence, concluded that Meyer did not know or have reason to know that a significant harm was substantially certain to result from his actions. Stated otherwise, the jury concluded that Meyer did not intend to injure Nietfeld. CIVJIG 60.10. This conclusion is consistent with the testimony of several of the eyewitnesses and Nietfeld himself. Because Meyer did not intend to injure Nietfeld, the incident may be properly considered an "accident" under the definition adopted by the Minnesota Supreme Court in Walser. RAM's Policy provides that accidents qualify as "occurrences" under the policy, and all

“occurrences” are covered acts. Accordingly, Meyer’s conduct is clearly covered as a named insured under RAM’s policy.

RAM argues that it should be relieved of providing coverage to its insured in this case because RAM believes that the incident between Shawn Meyer and Curtis Nietfeld was not an “accident.” RAM colorfully contends that this incident was instead an “assault on the shop floor” that was “started and ended by Meyer” when Nietfeld “cracked his head on the concrete floor.” (Appellant’s Br., p. 4-7). Unfortunately, RAM’s characterization of the events between Meyer and Nietfeld is irrelevant. This is the same language that RAM used during trial in its effort to persuade the jury that this incident was not an “accident.” The jury heard these arguments and considered them along with the testimony of all of the witnesses, many of whom expressly stated that they did not believe Meyer intended to injure Nietfeld. The jury ultimately disagreed with Appellant’s version of the facts. The jury instead weighed all of the evidence presented by all of the witnesses and determined that the incident was indeed an “accident.” Accordingly, the jury’s determination, and the court’s application of the jury’s determination finding coverage must be affirmed.

II. RAM'S INTERPRETATION OF ITS INTENTIONAL ACT EXCLUSION CONFLICTS WITH THE PLAIN LANGUAGE OF THE EXCLUSION, THE POLICY AND THE COMMON LAW.

RAM argues that even if Meyer's conduct is found to be accidental, its "intentional act exclusion" language bars coverage. The Court must look no further than the jury verdict in this case to determine whether Meyer should be denied coverage based on intentional acts.

As noted above, the Minnesota Supreme Court in Walser adopted the Hauenstein definition of "accident." In doing so, the Court emphasized that "accidental conduct and intentional conduct are the opposite sides of the same coin." Walser 628 N.W.2d 611. (See, Fig. 1 and Fig. 3). Stated otherwise, "where there is specific intent to cause injury, conduct is intentional for purposes of an intentional act exclusion, and not accidental for purposes of a coverage provision." Id. at 612. Generally, intentional injury exclusions do not relieve an insurer of liability unless the insured has acted with the intent to cause bodily injury. Woida v. North Star Mut. Ins. Co., 306 N.W.2d 570, 573 (Minn. 1981), citing Caspersen v. Webber, 213 N.W.2d 327, 330 (Minn. 1973). The intentional act exclusion has no application when the act inflicting the [harm] is intended but the resulting injury is not intended. Brown v. State Automobile & Casualty Underwriters, 293 N.W.2d 822, 824 (Minn. 1980). The jury determined that Meyer did not intend to cause significant injury to Nietfeld. The inquiry may end there.

Here, RAM is alleging that its exclusionary clause is “unique” and materially different from the exclusionary clauses considered by Minnesota Courts. RAM asks this Court to set aside the jury’s verdict and argues that its exclusionary clause accomplishes what no other exclusionary clause has managed to accomplish: to deny coverage based solely on the nature of the acts of their insureds regardless of the insured’s intent. RAM argues that its position is supported by language of its exclusion. However, careful review of RAM’s policy language reveals that RAM’s arguments are in fact wholly contrary to the plain meaning of its exclusion. RAM’s proposed interpretation of its exclusion also creates conflicts with other provisions within the policy, and is contrary to Minnesota law.

A. RAM’s Application of the Intentional Act Exclusion Conflicts with the Plain Meaning of the Language of the Intentional Act Exclusion.

RAM’s intentional act exclusion reads:

This policy does not apply to liability which results directly 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). RAM would have the Court apply this provision broadly to exclude coverage for liability caused by an act as long as the insured intended to act. RAM argues “because Meyer acted intentionally in chasing Nietfeld and grabbed and/or tripped him, coverage is excluded.” (Appellant’s Br., p. 8). RAM’s application of this policy language wholly ignores the legal definition of the term

“intent” and is in essence is suggesting that the Court replace the phrase “the bodily injury” with the phrase “any bodily injury” so that the policy language reads:

- (19) any act **intended** by an insured, or done at the direction of an insured, whether or not **the any** bodily injury or property damage was intended.

This interpretation is contrary to the plain language of the provision.

The first clause of the exclusionary provision provides that the exclusion applies to “any act intended by an insured.” RAM’s Policy does not define the term “intended.” Although RAM argues (without authority) that “intent” simply means “intent to act,” we must look to the plain meaning of the term for guidance. Minnesota law provides that a person acts with “intent” when a person wants to cause the consequences of his or her acts, or knows that his or her acts are substantially certain to cause those consequences. CIVJIG 60.10, Walser, 628 N.W.2d at 611-12; State Farm Fire and Cas. Co. v. Schwich, 749 N.W.2d 108, 111 (Minn. Ct. App. 2008). Accordingly, to give effect to all of the words employed by RAM’s exclusionary provision, the Court must give the term “intent” its plain meaning, namely that there must be an intent to cause harm. The provision ought to be interpreted as excluding from coverage:

- (19) any act intended [**to cause harm**]² by an insured, or done at the direction of an insured, whether or not the bodily injury or property damage was intended.

² Respondent is not suggesting that the words “to cause harm” need to be added to the policy language. Indeed, doing so would be redundant because the term “intent” has been defined as intent to cause harm. Instead, Respondent includes

The second clause of the exclusionary provision qualifies the first clause, stating that the first clause should operate to exclude coverage “whether or not the bodily injury. . .was intended.” RAM interprets this language to mean that coverage may be excluded whether or not any bodily injury was intended. Indeed, RAM misquotes its own policy language by removing the word “the” and inserting the word “any” in its argument, stating:

Here the intentional act exclusion precludes coverage “for any act intended by an insured...whether or not **[sic]** bodily injury or property damage was intended.” Thus, under RAM Mutual’s policy, any intentional act by an insured is excluded regardless of whether or not **any** harm was intended.

(Appellant’s Br., p. 9)[emphasis added].

Simply stated, the word “the” does not mean “any.” The term “the” refers to something specific, such as the precise bodily injury that resulted from an act. The term “any” refers to a much more broad spectrum of outcomes. In interpreting exclusionary provisions, the Minnesota Supreme Court has held “in order to find that an insured has acted intentionally, a court need only find that the insured intended some harm, not that the insured intended the specific harm that resulted” but must find that the insured “acted with specific intent to cause harm.” Walser 628 N.W.2d at 611.

The exclusionary language “whether or not the bodily injury. . .was intended” is wholly consistent with the notion that an insured does not have to

this language merely for illustrative purposes to aid in the proper application of the existing contractual language.

intend the precise result of his actions to trigger the policy exclusion.

Furthermore, adopting RAM's application of the policy language would cause absurd results. The use of the phrase "the bodily injury" as written in the second clause is wholly consistent with the use of the word "intent" in the first clause, whereas the use of RAM's phrase "any bodily injury" is wholly inconsistent with the first clause. Under RAM's argument, the policy would exclude from coverage:

- (19) any act intended [**to cause harm**] by an insured, or done at the direction of an insured, whether or not [**any**] bodily injury or property damage was intended.

This interpretation forces a contradiction in terms. This policy language would exclude coverage for acts intended to cause harm, but would do so whether or not any harm was intended. Stated otherwise, under Appellant's proposed application of its coverage and exclusion language, an insured who intentionally acts, but does not intend to cause any harm would be both covered and excluded from coverage under the policy. In interpreting contractual language, the court should construe the contract as a whole and try to harmonize all of its provisions. Chergosky v. Crosstown Bell, Inc., 463 N.W.2d 522, 525 (Minn. 1990). Because it is presumed that the parties intended the language used in the contract to have effect, the court should avoid any interpretation that would render a contract provision meaningless. Id. at 526. Here, RAM's proposed interpretation of the second clause effectively renders the first clause meaningless. This is an impermissible result.

To avoid this consequence, we must simply give the existing terms of the exclusionary provision their intended meanings, without tweaks or torture.

Applying the plain meaning of each of the terms, here provided in brackets, the policy excludes from coverage:

- (19) any act intended [**to cause harm**] by an insured, or done at the direction of an insured, whether or not the [**resulting**]³ bodily injury or property damage was intended.

When read according to its plain meaning, RAM's exclusionary provision excludes from coverage any acts intended to cause harm, regardless of whether the actual harm that resulted was different than the harm that was intended.

Applying the plain meaning of these terms also harmonizes with the undisputed definition of "accident" which excludes acts that are intended to cause harm. The plain meaning of the policy language is unambiguous, and unlike RAM's interpretation, does not create conflict with other terms within the exclusionary provision or other provisions within the policy.

Here, the jury determined that Meyer did not intend to injure Nietfeld. Because Meyer did not intend to injure Nietfeld, the exclusionary provision does not apply. The District Court properly interpreted the exclusionary provision in

³ Again, Respondent is not suggesting that the words "to cause harm" and "resulting" need to be added to the policy language. Indeed, doing so would be redundant because the term "intent" has been defined as intent to cause harm and the phrase "the bodily injury" by its terms refers to a specific result. Instead, Respondent includes this language merely for illustrative purposes to aid in the proper application of the existing contractual language

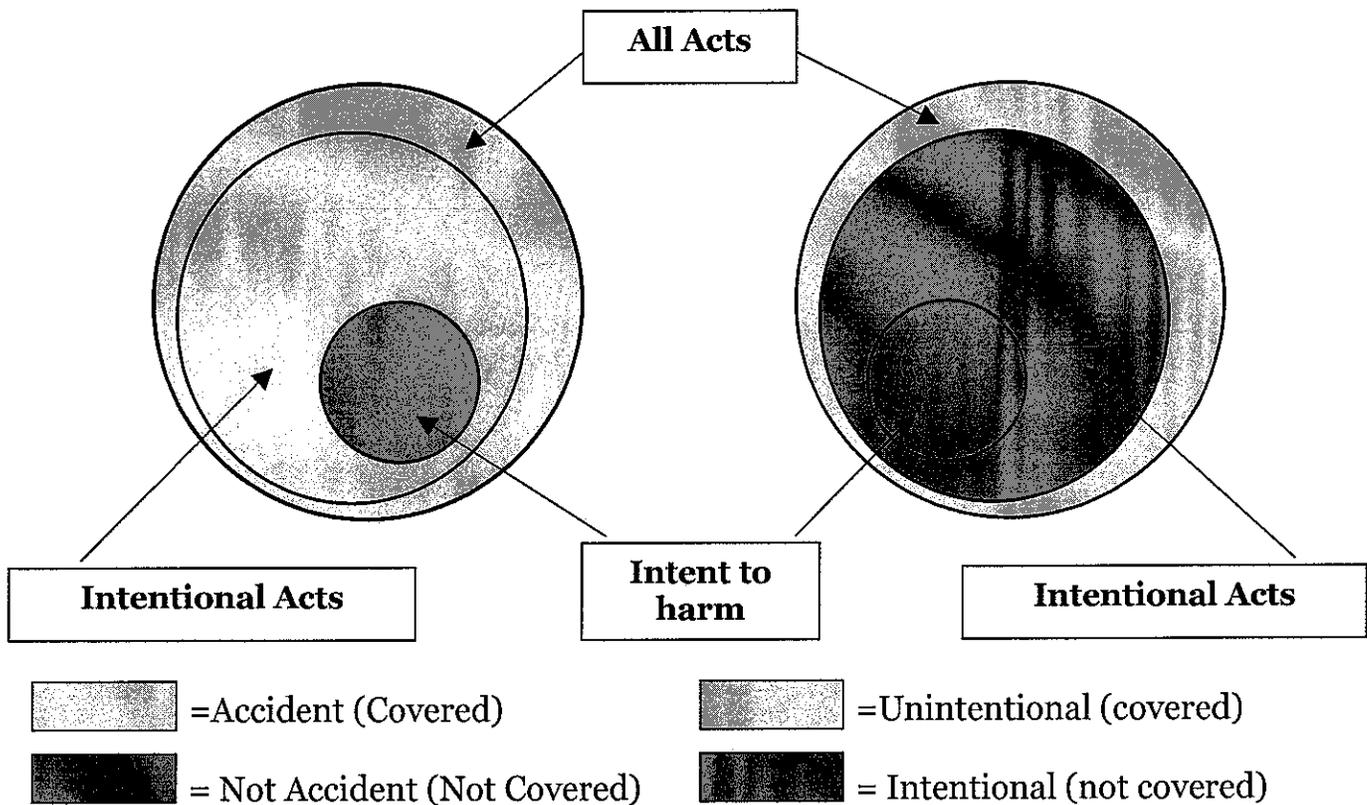
accordance with its plain meaning, and therefore its decision affording coverage should be affirmed.

B. RAM's Application of the Intentional Act Exclusion Conflicts with the Policy's Coverage Provisions.

In addition to violating the plain meaning of the language of the intentional act exclusion, RAM's proposed application of its policy language is wholly inconsistent with the type and scope of coverage afforded by the policy. RAM asks the Court to accept its interpretation of its policy language that, before an insured can enjoy the benefits of a policy for which he has paid, the Court must be convinced that the insured did not intend to engage in the conduct that gave rise to the injury. The outer-limits of this exclusion are incapable of definition because, as many courts have acknowledged, there are very few acts that are purely unintended.

As previously discussed above at pages 7-14, the RAM policy provides coverage for "accidents," which include all acts that are not undertaken with the intent to cause harm. RAM submits that its intentional act exclusion should operate to exclude from coverage all intentional acts, regardless of whether the actor intended to cause harm to another individual. Juxtaposing the coverage afforded by the policy with RAM's proposed exclusionary provision immediately reveals an irreconcilable conflict, namely that the policy would cover fewer acts than it would exclude:

Fig. 5: Definition of Accident **Fig. 4: RAM's Intentional Act Exclusion**



RAM's application of its intentional act exclusion should be rejected for almost precisely the same reason that the Minnesota Supreme Court in Walser rejected the Gilman definition of "accident." The Supreme Court in Walser rejected the Gilman definition of "accident" because the coverage that the definition provided was disproportionate to the exclusionary language. Instead, the Walser court acknowledged "that accidental conduct and intentional conduct are the opposite sides of the same coin." Walser, 628 N.W.2d at 611.

Here, RAM's interpretation of its exclusionary rule creates a problem similar to that posed by the Gilman definition of accident: the exclusionary

language is broader and therefore materially inconsistent with the scope of coverage afforded by the policy. By RAM's definition, the very same acts are both expressly included and expressly excluded from coverage. RAM's proposed interpretation of its exclusionary language would render its coverage language meaningless. Accordingly, RAM's interpretation of its exclusionary language is incorrect.

By contrast, interpreting the plain language of the exclusionary provision such that it only excludes those acts that are intended to cause harm harmonizes with the policy's coverage provision. This interpretation conforms with the general principle that coverage provisions should be read broadly and exclusionary clauses should be read narrowly. Id. It also conforms with the traditional interpretation of the intent required to trigger the intentional act exclusion. According to the Minnesota Supreme Court:

The intent required to exclude coverage is neither the intent to act nor the intent to cause the specific injury complained of. Rather it is the 'intent to cause bodily injury' even if the actual harm is more severe or of a different nature than the injury intended.

Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978). If the Court were to adopt the interpretation proposed by RAM, any act of any insured would be excluded from coverage as long as the insured simply intended to act, even if the insured acted with innocent motives. This is an absurd result, and a result that is certainly not expected by RAM's premium-paying policyholders. For instance, a driver who speeds is in some way engaging in an intentional act –

both driving and speeding – but it is unimaginable that coverage could be denied if a similar exclusion was placed on an auto policy.

The jury in this case decided that Meyer did not intend harm when he was horse-playing with Nietfeld. Accordingly, the intentional act exclusion does not apply and RAM must afford coverage.

C. RAM’s Interpretation of the Intentional Act Exclusion Conflicts with the Courts’ Interpretations of the Same Policy Language.

As detailed above, the language of the intentional act exclusion should be interpreted to exclude acts undertaken with the intent to cause harm, whether or not the resulting harm is different than the harm that was intended. Courts in other jurisdictions have found this interpretation of this precise exclusionary language to be the most logical, and to best represent the parties’ intentions. Lincoln Logan Mut. Ins. Co. v. Fornshell, 722 N.E.2d 239, 242 (Ill. Ct. App. 1999). The court in Lincoln commented that if the exclusionary clause denied coverage for negligent or innocent acts as well, the clause would “contradict and swallow the entire personal liability policy.” Id. This construction would create a circumstance in which different provisions of the contract would be in conflict with one another, which is contrary to the general rules of construction. Id.

RAM claims its policy is different because it employs sweeping language that excludes coverage regardless of whether the insured intended to cause harm or property damage. However, in analyzing this very language, the Illinois Court of Appeals in Lincoln commented that the exclusionary language is ambiguous

and purports to exclude intentional acts “whether or not the bodily injury or property damage was intended.” 722 N.E.2d 239, 242 (Ill. Ct. App. 1999.) The court noted that the exclusion seems to apply in two situations, one where injury or damage is intended and another where injury or damage is not intended. *Id.* at 243. The court held that, despite its drafting, the clause should be read in the way that the traditional exclusionary language is read, that is, both the act and the harm have to be intended to qualify for exclusion from coverage. *Id.* This interpretation is practical, considering the reality that there are very few acts that are purely unintended. The District Court’s reading of this policy language was appropriately narrow, limiting the exclusions to all acts that intend some significant harm, regardless of whether the actual harm was intended.

RAM’s interpretation of its exclusionary language is at odds with other language within the same policy and has been rejected by the courts in favor of the traditional intentional acts analysis which requires that both the act and the harm to be intentional. The jury in this case has determined that Meyer did not intend to harm Nietfeld, and accordingly, the act was not intentional and therefore coverage cannot be excluded under the “intentional acts” exclusion of RAM’s policy.

III. THE JURY WAS PROPERLY INSTRUCTED TO DETERMINE WHETHER MEYER KNEW, OR HAD REASON TO KNOW, THAT A “SIGNIFICANT HARM” WAS SUBSTANTIALLY CERTAIN TO RESULT FROM HIS ACTIONS.

RAM takes issue with the Court’s use of the term “significant harm” in the special verdict form submitted to the jury. RAM’s objection is based solely on its reading of the phrase “significant harm” as synonymous with “substantial” or “serious” harm. This is incorrect. Instead, the term “significant” simply requires a finding of an intent to cause a “harm” that is more than an “insignificant harm” or a “dignitary harm” such as a tap on the shoulder, a pat on the back, or playfully grabbing another’s ankles.

The trial court’s special verdict form requiring a finding that Meyer knew significant harm was substantially certain to result is entirely consistent with Minnesota law and case law nationwide. For example, Minnesota law has repeatedly found that intentional act exclusion language cannot be triggered by simple acts alone. Instead, insureds must undertake an act with the intent of causing some harm before the policy may be triggered. See Stone, 269 N.W.2d at 887. Indeed, as explained above, the policy in question in this case is one such policy.

In review of Minnesota case law, it is clear that exclusionary language has never been applied when the insured engaged in conduct that resulted in mere casual physical contact with a third person. See e.g. Caspersen v. Webber, 213 N.W.2d 330 (Minn. 1973). In Caspersen, the insured intentionally pushed a

hatcheck girl against a wall when she refused to allow the insured to enter the coat room without a claimcheck card. Id. The court determined that the intentional act exclusion did not apply because the insured did not intend to injure the hatcheck girl, despite the fact that he intentionally pushed her. Id. Likewise, in Gilman a jury determined that the insured did not intend to injure his friend, even though he tackled him to the ground to prevent him from leaving a party. See 526 N.W.2d 378, 381. Also, while the young men in Walser certainly intended to grab a hold of their friend's ankles and forcefully pulled on them to get him down as he was hanging from a basketball hoop, the Court found that the boys did not have the specific intent to harm him and therefore the intentional act exclusion did not apply. See 628 N.W.2d at 613.

Significantly, in all of these cases the insureds intentionally pushed, pulled or tackled another party. These actions require some level of physical contact with another person, and this type of physical contact, such as the touching of an hand to a shoulder, or the grabbing of an ankle, or a tackle to the ground may cause some mild pain, discomfort, embarrassment or other dignitary harm to the receiving party. Admittedly, this mild pain, discomfort or embarrassment can appropriately be considered unwanted touching or "harm." However, as the decisions of Caspersen, Gilman and Walser demonstrate, these types of insignificant harms are not the types of harm that must be intended to fall within an intentional act exclusion. Based on these decisions, a person can clearly engage in this type of conduct, conduct that arguably intends to effect

some type of unwanted touching, and still not intend to “harm” another person in a way that is considered “significant” by the Court to trigger the application of an intentional act exclusion.

Instead, the intentional act exclusion has historically applied where the intentional acts intended something more than an insignificant harm. See Continental Western v. Toal, 244 N.W.2d 121 (Minn.1976) (armed robbery); Auto-Owners Ins. Co. v. Smith, 376 N.W.2d 506 (Minn. Ct. App. 1985) (firing a gun into a dark home), Nabozny v. Burkhardt, 606 N.W.2d 639 (Mich. 2000) (bar fight).

Indeed, courts in other jurisdictions have expressly stated that “significant harm” is required for an intentional act exclusion to apply. See Western Agricultural Ins. Co. v. Brown, 985 P.2d 530 (Ariz. App. Div. 1, 1998) (intent to harm may be presumed for purposes of intentional acts exclusion when act was intentional and there was either subjective desire to cause some specific harm or substantial certainty some significant harm would occur, even if injury was more severe or different than intended); Ohio Cas. Ins. Co. v. Henderson, 939 P.2d 1337 (Ariz., 1997) (intent required for “expected or intended” injury exclusion in liability insurance policy to apply may be actual, or it may be inferred by nature of act and accompanying substantial certainty that some significant harm will occur.)

Applying RAM’s policy language to exclude claims for injuries that result from actions that intend nothing more than insignificant harm would be contrary

to the plain language of the policy, and also to reason and public policy. The holding in Walser demonstrates that the Minnesota Supreme Court will not apply an intentional act exclusion where the insured's acts intend only insignificant harms, such as playfully grabbing a friend's ankles. Indeed, the decisions in Gilman and Caspersen demonstrate that the courts will not apply an intentional act exclusion where a jury finds that an insured did not intend to harm the injured party, even where the insured fully intended to make bodily contact by pushing or tackling the injured party. These acts are nearly identical to or more severe than the acts undertaken by Meyer in this case.

The trial court's use of the term "significant" is consistent with Minnesota law, and accurately describes the type of harm required to trigger application of the policy's exclusionary language. RAM's objection to the use of the word "significant" in the special verdict form is based entirely on their misinterpretation of the word "significant" to mean a "serious" or "grave" harm. Indeed, RAM argues that in employing the term "significant" the district court "required RAM to establish that Meyer intended to cause the specific injury complained of, Curtis Niedfeld's severe head injury." (Appellant's Br., p. 15). This is incorrect. The jury in this case was asked to decide whether Meyer intended a significant harm, as distinguished from an insignificant harm. RAM argues that this case involved more than a "mere touching." (Appellant's Br., p. 16). This argument is unavailing as Caspersen, Gilman and Walser involved more than a

“mere touching” and the court nevertheless determined that this touching was not sufficient to establish intent to cause “some harm.”

RAM also argues that counsel for Respondents improperly put emphasis on an “incorrect” legal standard during closing arguments. First, arguments of counsel are not considered evidence. Second, the arguments of counsel properly described the meaning of the term “significant” indicating that actions like a “headlock,” while perhaps a dignitary harm, is not a harm that is considered “significant” to trigger the application of the intentional act exclusion. Finally, counsel for RAM had an opportunity to explain to the jury that they only need to find that Meyer intended to cause more than a merely insignificant harm to Nietfield to find that Meyer intended to harm him, but chose not to make this argument to the jury.

The appellate court may 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) (emphasis added). 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. Border State Bank of Greenbush v. Bagley Livestock Exch., 690 N.W.2d 326, 336 (Minn. Ct. App. 2004). A new trial is warranted only 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., 214 N.W.2d 672, 676 (Minn. 1974).

The district court's use of the phrase "significant harm" in the special verdict form accurately reflects Minnesota law. The instruction was not erroneous in any regard. The district court acted within its discretion in choosing the language of the special verdict form and reflects a clear and correct understanding of the law. RAM has presented no evidence that the inclusion of this language caused the jury to decide the case differently than they would have had the term been excluded, and cannot demonstrate that the inclusion of the phrase "significant harm" resulted in substantial prejudice. For this reason, the decision of the district court should be affirmed and RAM's request for a new trial should be denied.

CONCLUSION

RAM's policy affords coverage for occurrences, which are defined as "accidents." The Minnesota Supreme Court has expressly held that an "accident" includes all intentional acts as long as the actor did not intend to cause injury. Walser 628 N.W.2d 611. The jury determined that Meyer did not intend to cause injury to Nietfeld, and therefore the trial court properly held that RAM's policy afforded coverage to Meyer.

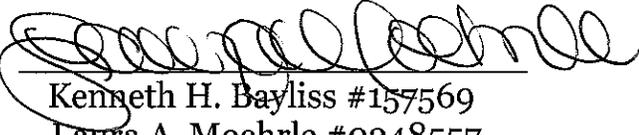
RAM's interpretation of its intentional act exclusion is contrary to the plain language of its policy, conflicts with other provisions within the policy and is contrary to Minnesota law. The plain language of RAM's policy provides that an act may be excluded from coverage if the insured acts with the intent to cause harm, whether or not the harm that results is the harm that was intended. Any

other interpretation of this language tortures the language itself, and causes absurd results in light of the remaining policy language. Accordingly, the District Court's ruling affording coverage should be affirmed.

The district court also instructed the jury in accordance with Minnesota law. The phrase "significant harm" simply means that a person must act with the intent to cause more than an insignificant harm before coverage can be denied. The Minnesota Court of Appeals and the Minnesota Supreme Court have recognized this principle. Accordingly, RAM's request for a new trial was properly denied and the District Court should be affirmed.

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