

NO. A08-864

STATE OF MINNESOTA  
IN COURT OF APPEAL

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RAM Mutual Insurance Company,  
Appellant,

vs.

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

Respondents.

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RESPONDENT NEITFELDS' 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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STATEMENT OF THE LEGAL ISSUE INVOLVED

- I. MUST THE LANGUAGE OF RAM'S POLICY BE INTERPRETED TO PROVIDE COVERAGE FOR AN ACT WHICH WAS TECHNICALLY AN ASSAULT, BUT ONE IN WHICH THE ASSAILANT DID NOT INTEND TO INJURE THE VICTIM?

The District Court Held: In the AFFIRMATIVE.

MOST APPOSITE STATUTE:

Minn. Stat. § 609.02 subd. 7

MOST APPOSITE CASES:

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

*Brown v. Auto & Casualty Underwriters*,  
293 N.W.2d 822 (Minn. 1980)

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

- II. WAS THE DISTRICT COURT'S USE OF THE PHRASE "SIGNIFICANT INJURY" AS THE BENCHMARK FOR DETERMINING WHETHER MR. MEYER'S INJURY OF MR. NIETFELD WAS INTENTIONALLY INFLICTED ERRONEOUS?

The District Court Held: In the NEGATIVE.

MOST APPOSITE STATUTES:

Minn. Stat. § 609.02 subd. 7

MOST APPOSITE CASE:

*Brett v. Watts*, 601 N.W.2d 199 (Minn. App. 1999)

## STATEMENT OF THE CASE AND FACTS

This case arises from an incident in which two high school students engaged in what might fairly be called "roughhousing" at the end of a shop class in Paynesville High School. Curtis Nietfeld, then age 16, was severely injured when he fell and hit his head on the concrete. He brought suit against the Meyers - against Shawn Meyer for assault, and against his parents for negligent supervision (NA-1). He also brought suit against Paynesville Independent School District No. 341 for negligent supervision of the students. The Nietfelds had a policy of homeowners' insurance with RAM Mutual Insurance Co. RAM agreed to defend under a reservation of rights, but brought an action to declare that it had neither a duty to defend the Meyers nor to indemnify them in the event that a judgment was rendered against them.

RAM and the Respondents brought cross-motions for summary judgment with respect to RAM's duty to defend and its duty to indemnify, and Judge Vicki Landwehr granted summary judgment on the duty to indemnify, but held that there were genuine issues of material fact which respect to the duty to indemnify (A-39). The case was assigned to Judge Paul Widick, who heard the case before a jury on January 8<sup>th</sup> & 9<sup>th</sup>, 2008. (<sup>1</sup>A-38). The jury found that

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<sup>1</sup>References are to Appellant's Appendix unless otherwise indicated such as "NA" for "Nietfeld Appendix"

Mr. Meyer had not intended that his acts cause Curtis Nietfeld significant injury, and the Court entered judgment for respondents on April 14<sup>th</sup>, 2008 (A-40). It does not appear that RAM ever made an effective motion for new trial with respect to the jury trial, though it rather curiously did so with respect to Judge Landwehr's summary judgment ruling.<sup>2</sup>

This appeal followed on May 20<sup>th</sup>, 2008 (NA-3).

#### ARGUMENT

##### I.

THE LANGUAGE OF RAM'S POLICY MUST BE INTERPRETED TO PROVIDE COVERAGE FOR AN ACT WHICH WAS TECHNICALLY AN ASSAULT, BUT ONE IN WHICH THE ASSAILANT DID NOT INTEND TO INJURE THE VICTIM.

The only real question in this case is whether RAM can repeal the *Casperson* rule by stealth. In *Casperson v. Webber* 213 N.W.2d 327 (Minn. 1973) and again in *Brown v. Auto & Casualty Underwriters*, 293 N.W.2d 822 (Minn. 1980) and *American Family*

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<sup>2</sup>This is a rather curious issue. The jury issued its special verdict on January 9, 2008. RAM did submit a motion for a determination in its favor or in the alternative for a new trial before the District Court issued its order on the jury verdict (NA-10). There is some doubt under Rule 59.03 whether a motion for new trial can be had from a special verdict before the order of the court. As the comment to Rule 59 states, "Special verdicts under Rule 49.01 and general verdict with interrogatories under Rule 49.02 are not 'verdicts' within Rule 59.03, but are verdict forms looking toward a decision or order by the trial judge prior to the time that it is an effective conclusion to the litigation." Hence it would appear that a motion for new trial does not lie from a special verdict, and hence RAM did not make an effective motion for new trial, even though it called its motion a "motion for new trial." Something similar can be said of its motion with regard to Judge Landwehr's decision: if there is no "old trial," there cannot be a new trial, or a meaningful motion for one.

*Insurance Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), our Supreme Court made it clear that there is a duty to cover and indemnify an insured if that insured assaults another party but does not intend to injure him. As Judge Landwehr put it in granting summary judgment to plaintiff with respect to the insurer's duty to provide a defense:

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.

(A-9)

It is worth noting that RAM did not appeal from Judge Landwehr's April 24<sup>th</sup>, 2007 order and does not appear to be appealing from it in its May 20<sup>th</sup>, 2008 notice of appeal. By the time trial was held on January 8<sup>th</sup>, 2008, Judge Landwehr's ruling

had become the law of the case.<sup>3</sup>

The crucial language in RAM's policy is this:  
This policy does not apply to liability which results directly from ... any act intended by an insured, or done at the direction of an insured, whether or not the bodily injury or property damage was intended.

(A-18, 19)

Clearly, if RAM was attempting to exclude coverage for intentional assaults, the above-quoted language was "overkill." Read literally, this language would appear to exclude coverage for a physical assault. But read literally, it would also appear to exclude coverage for any act whatever. As Judge Landwehr put it:

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. 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 the matches that started the fire. The injury to a child who wanders

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<sup>3</sup>RAM also argues that the events leading to Mr. Nietfeld's injury did not constitute an "occurrence" within the meaning of its policy, but the reference in the policy definition of "occurrence" to an accident, and the definition of "accident" adopted by the Minnesota Supreme Court in *Casperson* and its progeny effectively disposes of this argument. Respondent Nietfeld will have little to say about this argument, because RAM so clearly loses on it and because it has been addressed very well in Respondent Meyers' brief.

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. .... 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.

(A-10)

The courts will not construe contracts in a manner which leads to an absurd result. See *Mead v. Seaboard Surety Co.*, 270 N.W. 563 (Minn. 1936). A result which excluded coverage for every result which eventuated from an intentional act would be absurd.

RAM acknowledges as much, and attempts to give its "intentional acts" exclusion a narrower meaning:

Under the plain meaning of RAM Mutual's intention act exclusion, there is no coverage for Shawn Meyer's assault, which involved him chasing after Curtis Nietfeld and grabbing at him and pulling him back onto the concrete floor.<sup>4</sup>

(Appellant's Brief, p. 10)

RAM is apparently claiming that its language excludes assaults of any kind, but does not exclude negligent acts. There are several problems with this analysis. First, RAM's policy

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<sup>4</sup>Incidentally, it is not altogether clear that this is what happened. Shawn Meyer himself testified that he did not even attempt to pull Mr. Nietfeld to the ground, and the jury was entitled to believe him.

does not make this distinction, referring as it does to "any act intended by an insured." Secondly, suppose RAM's policy had attempted to make the distinction. How would it have done so? Probably by making the distinction that tort law does between intentional torts and negligent torts. The former category includes assaults, and as *Economy Fire & Casualty Co. v. Iverson*, 445 N.W.2d 824 (Minn. 1989) usually an assault is defined, for tort purposes, as a touching in anger. See *Clemens v. Wilcox*, 392 N.W.2d 863 (Minn. 1986); *Economy Fire & Casualty Co. v. Iverson*, 445 N.W.2d 824 (Minn. 1989). Alternatively, RAM's policy could explicitly have excluded injuries resulting from any act which would be considered an assault under the law of the State of Minnesota.

But suppose RAM's policy had done that. Suppose, that is, that RAM had intended to exclude any act which could be construed as an assault. Then the Commissioner of Insurance, who must approve all homeowners' policies sold in the State of Minnesota, would have known that RAM was attempting to overrule the *Casperson* principle in its policy. And if it had attempted to do so, the Commissioner might not have approved the policy for sale. To argue that an ambiguous clause should be interpreted to favor the insurer where the insurer avoided writing an unambiguous clause working the result it argues for is to permit an insurer to "sneak in" a result it probably could not have obtained

directly.

## II.

THE DISTRICT COURT'S USE OF THE PHRASE "SIGNIFICANT INJURY" AS THE BENCHMARK FOR DETERMINING WHETHER MR. MEYER'S INJURY OF MR. NIETFELD WAS INTENTIONALLY INFLICTED WAS NOT ERRONEOUS.

Virtually every battery is likely to result in some harm to the victim, if only minor pain or irritation. Hence, if the test of whether an assailant intended to injure the victim, and the test of coverage were whether the assailant intended "some harm," the mere fact of the assault or battery would serve to negate coverage. Thus, the *Casperson/Brown* rule would be effectively eviscerated. Leaving the jury with an undefined, unqualified version of "bodily harm" would make it possible for a jury to find no coverage, no matter how minor - or nonexistent - the injury would be to read criminal law into civil law. Minn. Stat. § 609.02 subd. 7, defines "bodily harm" as:

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

But Minnesota Courts have consistently refused to assimilate criminal assault with civil assault. See, e.g., *Brett v. Watts*, 601 N.W.2d 199 (Minn. App. 1999). Specifically, Minnesota Courts have been reluctant to apply the criminal principle that the existence and degree of an assault is to be viewed from the point of view of the victim rather than the point of view of the assailant.

With these principles in mind, it is clear that the Court's use of the phrase "significant bodily harm" was not erroneous. First, it sums up rather well the principle enunciated in cases such as *Walser*, *Casperson* and *Brown* that it is the intent of the assailant with respect to injury which governs the existence of coverage and indemnification. Those cases not only involved serious injuries - they involved acts on the part of the assailant which might reasonably be expected to produce serious injury. Yet the jury or trier of fact was permitted to find, on the basis of such facts, that there was no intent to injure. So the injury contemplated by the civil law must be more than mere transitory pain. This is precisely what the words "significant injury" convey.

Moreover, it is hard to see how RAM was prejudiced by such a phrase unless it also was requesting the criminal definition of "bodily harm." Such a definition might have served to permit a finding for RAM if Mr. Meyer could reasonably have expected his acts to cause any pain at all. But (a) such a definition was never requested; and (b) it would probably have been erroneous to give such a definition if it had been requested. Absent such a request, the jury was free to give its own definition to the term "injury," and this definition might not have included mere pain. As football coaches regularly tell their teams, "You play with pain; you don't play with injury." Indeed, many perfectly legal

physical activities - football, wrestling, etc. - assume that bodily contacts will be painful. They do not assume, and attempt to avoid, bodily contacts causing injury. So unless a jury is specifically instructed that pain = injury, as it would be instructed in a criminal case, it is hard to see how the distinction between "some injury" and "significant injury" makes much difference.

Moreover, in many minor assaults (in both senses of the word "minor"), the assailant does not have any real intent with regard to injury at all. He wants to tackle another, or show his manliness, or simply duke it out with another, regardless of consequence. Indeed, in this case, Mr. Meyer appears to have acted more or less reflectively, just as Mr. Nietfeld did when Mr. Meyer pulled the chair out from under him. In short, the assailant often has no intent regarding the result of his assault at all; and unless the assault involves an act which inherently is likely to seriously injure the victim, a jury is entitled to conclude that there was no intent with regard to injury at all.

All of this is to say that a "significant injury" test was (a) not error at all; and (b) harmless error if error it was. The real questions were (a) did Mr. Meyer intend the sort of injuries to Mr. Nietfeld that the latter actually received; and (b) if he did not, were such injuries reasonably likely to flow from his assault, whether those injuries were intended or not?

In both cases, a reasonable jury could answer "No," and in fact this is what the jury did. The verdict and the order based upon that verdict should be upheld.

CONCLUSION

For these reasons, the judgment for Respondents should be sustained, and the appeal dismissed, with costs.

Dated: October 5<sup>th</sup>, 2008

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