

NO. A07-1093

State of Minnesota
In Court of Appeals

State Farm Fire and Casualty Company,

Appellant,

vs.

Gary Harold Schwich; Jeanne Carol Stone; and
 Brandon Mitchell Hackbarth, as Trustee
 for the next of kin of Alicia Sue Hackbarth,

Respondents.

**APPELLANT STATE FARM FIRE AND CASUALTY
 COMPANY'S BRIEF AND APPENDIX**

C. Todd Koebele (#17287X)
 William L. Moran (#177167)
 Scott G. Williams (#0349410)
 MURNANE BRANDT
 30 East Seventh Street, Suite 3200
 Saint Paul, MN 55101-4919
 (651) 227-9411

*Attorneys for Appellant
 State Farm Fire and Casualty Company*

Samuel A. McCloud
 McCLOUD & HEEFNER, P.A.
 P.O. Box 216
 Shakopee, MN 55379
 (952) 445-6595

*Attorney for Respondent
 Gary Harold Schwich*

Jeanne Carol Stone
 Minnesota Correctional Facility
 Attention: Warden Mark Carey
 1010 West Sixth Avenue
 Shakopee, MN 55379

Pro Se Respondent

Sharon L. Van Dyck
 SCHWEBEL, GOETZ & SIEBEN
 5120 IDS Center
 80 South Eighth Street
 Minneapolis, MN 55402
 (612) 377-7777

Michael D. Swor
 SWOR & GATTO, P.A.
 Grand Oak One Office Center
 860 Blue Gentian Road, Suite 150
 St. Paul, MN 55121
 (651) 454-3600

*Attorneys for Respondent Brandon Mitchell
 Hackbarth, as Trustee for the Next of Kin of Alicia
 Sue Hackbarth*

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

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF CASE	2
STATEMENT OF FACTS	5
I. PARTIES	5
A. Gary Harold Schwich	5
B. Alicia Sue Hackbarth	5
C. Jeanne Stone	6
II. EVENTS OF THE EARLY MORNING HOURS OF MARCH 11, 2005	7
III. SCHWICH'S INSURANCE POLICY ISSUED BY STATE FARM	10
IV. SCHWICH'S CRIMINAL TRIAL AND CONVICTION	11
V. WRONGFUL DEATH LAWSUIT AND STATE FARM'S DECLARATORY JUDGMENT ACTION	12
VI. THE WELL-KNOWN DANGERS OF METHAMPHETAMINE USE	14
SUMMARY OF ARGUMENT	16
STANDARD OF REVIEW	18
ARGUMENT	19
I. GENERAL LEGAL PRINCIPLES USED IN INTERPRETING INSURANCE POLICIES	19
II. THE TRIAL COURT ERRED IN CONCLUDING THAT SCHWICH'S INTENTIONAL SUPPLYING OF METHAMPHETAMINE TO HACKBARTH QUALIFIED AS AN "OCCURRENCE"	21

A.	The District Court Ignored Schwich’s Knowledge That Methamphetamine Causes Harm and Instead Erroneously Focused On Whether He Intended to Kill Hackbarth	22
III.	THE TRIAL COURT ERRED IN FINDING THAT COVERAGE FOR SCHWICH’S CONDUCT WAS NOT EXCLUDED AS LEADING TO AN “EXPECTED OR INTENDED” INJURY SUFFERED BY HACKBARTH	25
A.	Schwich’s Homeowner’s Policy Does Not Provide Coverage Because Methamphetamine Use Can Reasonably Be Expected To Result In Adverse Health Effects and Even Death.....	26
B.	Schwich’s Homeowner’s Policy Does Not Provide Coverage Because An Intent To Injure Should Be Inferred From Schwich’s Conduct	27
C.	The Trial Court’s Analysis of the “Intentional Act” Exclusion in this Case is Without Legal Support.....	32
IV.	THE DISTRICT COURT ERRED IN DETERMINING THAT THE “WILLFUL AND MALICIOUS ACTS” EXCLUSION HAS ESSENTIALLY THE SAME MEANING AS THE “EXPECTED OR INTENDED INJURY” EXCLUSION.....	35
V.	THE DISTRICT COURT SHOULD HAVE FOLLOWED RULINGS IN OTHER JURISDICTIONS DENYING INSURANCE COVERAGE FOR CRIMINAL CONDUCT	38
	CONCLUSION	41
	CERTIFICATE OF BRIEF LENGTH.....	43

TABLE OF AUTHORITIES

Cases

<i>Allen v. Osco Drug, Inc.</i> , 265 N.W.2d 639 (Minn. 1978)	35
<i>Allstate Ins. Co. v. S.F.</i> , 518 N.W.2d 37 (Minn. 1994)	22, 27
<i>Am. Family Ins. Co. v. Walser</i> , 628 N.W.2d 605 (Minn. 2001).....	1, 18, 33
<i>B.M.B. v. State Farm Fire & Cas. Co.</i> , 664 N.W.2d 817 (Minn. 2003).....	27
<i>CPT Corp. v. St. Paul Fire & Marine Ins. Co.</i> , 515 N.W.2d 747 (Minn. Ct. App. 1994)	21
<i>D.W.H. v. Steele</i> , 512 N.W.2d 586 (Minn. 1994)	26, 35
<i>Dairyland Ins. Co. v. Implement Dealers Ins. Co.</i> , 199 N.W.2d 806 (Minn. 1972)	19
<i>Estate of Lehmann v. Metzger</i> , 355 N.W.2d 425 (Minn. 1984).....	27
<i>Farmers Ins. Exchange v. Sipple</i> , 255 N.W.2d 373 (Minn. 1977).....	25
<i>Farmers Union Oil Co. v. Mutual Service Ins. Co.</i> , 422 N.W.2d 530 (Minn. Ct. App. 1988)	22
<i>Fillmore v. Iowa Nat'l Mut. Ins. Co.</i> , 344 N.W.2d 875 (Minn. Ct. App. 1984)	19
<i>Fluoroware, Inc. v. Chubb Group of Ins. Cos.</i> , 545 N.W.2d 678 (Minn. Ct. App. 1996)	20
<i>Grinnell Mut. Reinsurance Co. v. Ehmke</i> , 664 N.W.2d 409 (Minn. Ct. App. 2003).....	25
<i>Hauenstein v. St. Paul–Mercury Indem. Co.</i> , 65 N.W.2d 122 (Minn. 1954)	21
<i>Horace Mann Fireman's Fund Ins. Co. v. Hill</i> , 314 N.W.2d 834 (Minn. 1982)	28
<i>Hubred v. Control Data Corp.</i> , 442 N.W.2d 308 (Minn. 1989)	20
<i>Iowa Kemper Ins. Co. v. Stone</i> , 269 N.W.2d 885 (Minn. 1978).....	26, 33, 34
<i>Johnson v. AID Ins. Co.</i> , 287 N.W.2d 663 (Minn. 1980)	21, 23
<i>Merseth v. State Farm Fire & Cas. Co.</i> , 390 N.W.2d 16 (Minn. Ct. App. 1986).....	19
<i>Minnesota Fire & Cas. Co. v. Greenfield</i> , 855 A.2d 854 (Pa. 2004)	1, 28, 29, 31, 39, 40

<i>Minnesota Fire & Casualty Co. v. Greenfield</i> , 805 A.2d 622 (Pa. Super. Ct. 2002)	28, 31
<i>Nat'l Union Fire Ins. Co. v. Gates</i> , 530 N.W.2d 223 (Minn. Ct. App. 1995)	25, 39
<i>R.W. v. T.F.</i> , 528 N.W.2d 869 (Minn. 1995).....	39
<i>Rohrer v. Rick</i> , 529 N.W.2d 406 (Minn. Ct. App. 1995)	1, 21, 23, 24, 33, 34
<i>Ross v. City of Minneapolis</i> , 408 N.W.2d 910 (Minn. Ct. App. 1987).....	19
<i>Boedigheimer v. Taylor</i> , 178 N.W.2d 610 (Minn. 1970).....	19
<i>Smith v. Senst</i> , 313 N.W.2d 202 (Minn. 1981).....	38
<i>St. Paul Fire & Marine Ins. Co. v. Lenzmeier</i> , 243 N.W.2d 153 (Minn. 1976)	20
<i>St. Paul Fire & Marine Ins. Co. v. Nat'l Chiropractic Mut. Ins. Co.</i> , 496 N.W.2d 411 (Minn. Ct. App. 1993)	20
<i>State Farm Fire & Cas. Co. v. Neises</i> , 598 N.W.2d 709 (Minn. Ct. App. 1999).....	1, 26, 35, 38
<i>State Farm Fire & Cas. Co. v. Wicka</i> , 474 N.W.2d 324 (Minn. 1991).....	25
<i>State Farm Fire & Cas. Co. v. Williams</i> , 355 N.W.2d 421 (Minn. 1984)	27, 36, 38, 39
<i>State Farm Fire & Casualty Co. v. Baer</i> , 745 F. Supp. 595 (N.D. Cal. 1990)	28, 30, 31
<i>State Farm Fire & Casualty Co. v. Baer</i> , 956 F.2d 275 (9th Cir. 1992).....	30
<i>State Farm Ins. Cos. v. Seefeld</i> , 481 N.W.2d 62 (Minn. 1992).....	18
<i>Wanzek Constr., Inc. v. Employers Ins. of Wausau</i> , 679 N.W.2d 322 (Minn. 2004)	18
<i>Western World Ins. Co. v. HD Eng'g Design & Erection Co.</i> , 419 N.W.2d 630 (Minn. Ct. App. 1988)	38
<i>Westfield Ins. Co. v. Kroiss</i> , 694 N.W.2d 102 (Minn. Ct. App. 2005).....	20
<i>Woida v. North Star Mut. Ins. Co.</i> , 306 N.W.2d 570 (Minn. 1981)	20, 28
<i>Wojciak v. Northern Package Co.</i> , 310 N.W.2d 675 (Minn. 1981).....	35

STATEMENT OF ISSUES

1. Did the district court err in finding that Gary Harold Schwich's intentional act of supplying methamphetamine to Alicia Sue Hackbarth, which was a cause of her death, qualified as an "occurrence" under the homeowner's insurance policy issued to Schwich by State Farm Fire and Casualty Company ("State Farm")?
2. Did the district court err in ruling that coverage for Schwich's intentional conduct was not excluded under his homeowner's insurance policy exclusion for "expected or intended" injury?
3. Did the district court err by holding that the "willful and malicious acts" exclusion in Schwich's homeowner's policy had essentially the same meaning as the "expected or intended injury" exclusion (thereby rendering one of the exclusions superfluous) when concluding that the "willful and malicious acts" exclusion did not bar coverage?
4. Did the district court err in finding that public policy considerations do not preclude providing insurance coverage for Schwich's criminal conduct, despite rulings in other jurisdictions refusing to allow coverage for the provision and distribution of illegal narcotics on public policy grounds?
 - Trial court held: State Farm must defend and indemnify Schwich in the wrongful death action filed by the next of kin of Hackbarth.
 - Most apposite authority: *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001); *State Farm Fire & Cas. Co. v. Neises*, 598 N.W.2d 709 (Minn. Ct. App. 1999); *Rohrer v. Rick*, 529 N.W.2d 406 (Minn. Ct. App. 1995); *Minnesota Fire & Cas. Co. v. Greenfield*, 855 A.2d 854 (Pa. 2004).

STATEMENT OF CASE

Alicia Sue Hackbarth died on March 11, 2005, after injecting methamphetamine given to her by Gary Harold Schwich. Prior to Hackbarth's death, Schwich used methamphetamine on a routine basis for approximately ten years and kept methamphetamine at his home. Schwich knew that possession and use of methamphetamine was illegal, that methamphetamine was highly addictive, and that methamphetamine was harmful.

As a result of Hackbarth's death, Schwich was tried before a jury and convicted of third-degree murder in violation of Minnesota Statutes section 609.195(b), which states, in part, as follows:

Whoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance classified in schedule I or II, is guilty of murder in the third degree

At the time of Hackbarth's death, Schwich was insured under a homeowner's policy issued by State Farm. The homeowner's policy had common policy language requiring an "occurrence" before coverage could be invoked and excluding coverage for "expected or intended" injuries or injuries which were the result of "willful and malicious acts" of the insured.

Following Hackbarth's death, Hackbarth's next of kin brought a wrongful death lawsuit against Schwich in Scott County District Court. State Farm appointed counsel to defend Schwich in the wrongful death lawsuit under Schwich's homeowner's insurance policy. Thereafter, State Farm filed a

declaratory judgment action to determine whether it had a continuing duty to defend and/or indemnify Schwich in connection with the wrongful death lawsuit. State Farm then moved for summary judgment to obtain a declaration that it had no duty to provide coverage to Schwich under the homeowner's policy at issue.

State Farm argued to the district court that there was no evidence of an "occurrence" under the insurance policy. State Farm also asserted that, in any event, coverage for the claims against Schwich were excluded, as a matter of law, on the grounds that the injuries were "expected or intended" by the insured and/or that the injuries were the result of "willful and malicious acts" of the insured. Finally, State Farm argued that public policy should preclude providing insurance coverage for Schwich's criminal conduct. Hackbarth's next of kin and Schwich both opposed the motion, arguing that State Farm had a duty to provide coverage to Schwich.

In conjunction with the motion for summary judgment, the parties stipulated to the following material facts: (1) that Schwich provided Hackbarth with methamphetamine on the night she died; (2) that the methamphetamine was at least one of the causes of Hackbarth's death; and (3) that although Schwich intentionally provided Hackbarth with methamphetamine, he did not intend to kill her.

The Honorable Carol A Hooten, Judge of Scott County District Court, denied State Farm's motion for summary judgment. Instead, the district court

determined that State Farm must defend and indemnify Schwich in the wrongful death action filed by the next of kin of Hackbarth. This appeal followed.

STATEMENT OF FACTS

I. PARTIES

A. Gary Harold Schwich

Prior to his conviction for third-degree murder, Gary Harold Schwich was a resident of Jordan, Minnesota. (AA.5.) He started using methamphetamine in approximately 1996. (AA.10.) From approximately 1996 onward, Schwich used methamphetamine on a daily basis and kept methamphetamine at his home. (AA.10,12,16.)

Notwithstanding his routine methamphetamine use, Schwich knew that possession and use of methamphetamine was illegal. (AA.9.) He also knew that methamphetamine was highly addictive and that he was addicted to methamphetamine. (AA.11.) Schwich tried to stop using methamphetamine three or four years after he began using it because he knew it could—and did—cause harm. (AA.40.) Schwich also knew many people who went through chemical dependency treatment for methamphetamine use, including a former girlfriend. (AA.28–29.)

B. Alicia Sue Hackbarth

Schwich met Alicia Sue Hackbarth in approximately 1998. (AA.6.) Hackbarth moved into Schwich's house in the summer or fall of 2004. (AA.6.) In approximately January 2005, Hackbarth moved out of Schwich's house and moved in with her boyfriend. (AA.8.) In approximately February 2005, Hackbarth moved back into Schwich's home after he bailed her out of jail, where she was

being held for driving under the influence. (AA.8.) Hackbarth lived at Schwich's house continuously in the weeks preceding her death. (AA.8.)

Hackbarth used methamphetamine during the approximately nine months she lived in Schwich's house, and Schwich admits that he gave her methamphetamine. (AA.6–7,10.) Schwich saw Hackbarth use methamphetamine at his home "every couple of days" in the month preceding her death. (AA.8,10.) Specifically, he saw her snort methamphetamine at the kitchen table in his home. (AA.35.) According to Schwich, using methamphetamine was routine for Hackbarth. (AA.16.) While Hackbarth had snorted and smoked methamphetamine, she had not injected it intravenously prior to March 11, 2005. (AA.21.)

C. Jeanne Stone

Jeanne Stone originally met Schwich in 2004 through a friend who told her that Schwich was looking for someone to help with his house cleaning. (AA.96,99.) Stone developed both an employment relationship and a friendship with Schwich. (AA.100.) In approximately February 2005, Stone began to have problems with her boyfriend, who had become physically abusive. (AA.96,100.) Schwich subsequently offered to let Stone live in his home. (AA.96,100.) Stone moved into Schwich's home on March 10, 2005—one day before Hackbarth died. (AA.9.)

Stone also had a long history of methamphetamine use. She started using methamphetamine in 2001. (AA.96.) Stone began using methamphetamine with

Schwich on the first day they met. (AA.99.) Schwich taught her how to inject herself with methamphetamine. (AA.99.) Before she moved in with Schwich, Stone used methamphetamine at least once a week, sometimes more. (AA.97.) After she moved in with Schwich, her methamphetamine use increased and she began to use the drug three or four times per week, occasionally more than once a day. (AA.97.)

Schwich provided Stone with methamphetamine. (AA.9–11.) Despite her long history of methamphetamine use, Stone knew using methamphetamine could adversely affect one's physical health. (AA.97.)

II. EVENTS OF THE EARLY MORNING HOURS OF MARCH 11, 2005

Schwich began the morning of March 10, 2005, by using methamphetamine. (AA.13.) He then picked up Stone from her trailer, dropped her off at his house because she was moving in, and went to work. (AA.13.) Schwich returned home at 8:30 p.m., took a shower, ate a meal that Hackbarth had cooked for him, and used more methamphetamine with Stone. (AA.13.) Schwich and Stone then left to run errands. (AA.15.) Schwich and Stone visited a few bars after they finished running their errands. (AA.15,17.)

Schwich and Stone returned to Schwich's home at 1:30 a.m. on March 11, 2005. (AA.17.) When they returned home, Hackbarth was sitting at the kitchen table talking on the telephone. (AA.17.) Schwich went upstairs to his bedroom and injected himself with more methamphetamine. (AA.18–19.) Hackbarth and Stone remained downstairs. (AA.18.) Schwich then filled the hot tub in the

bathroom adjacent to his bedroom upstairs and told Hackbarth and Stone he was going to get in the hot tub. (AA.18.) He then went into his bedroom to rest in his bed. (AA.19.)

Hackbarth and Stone came upstairs and into Schwich's bedroom. (AA.19.) They told Schwich they wanted to use methamphetamine. (AA.19.) Hackbarth also told Schwich that she wanted to try injecting methamphetamine, which she had not done before. (AA.22.) Schwich prepared two syringes of methamphetamine—one for Hackbarth and one for Stone—and gave them to Stone. (AA.19–22.) Hackbarth and Stone then entered the adjacent bathroom to inject the methamphetamine. (AA.20.)

Stone returned to the bedroom, disrobed, and then entered the hot tub in the bathroom. (AA.20.) Hackbarth went downstairs. (AA.20.) Schwich went downstairs to talk to Hackbarth, who was upset over issues related to some bad checks she had written. (AA.21–22.) Schwich asked Hackbarth to come upstairs and join him and Stone in the hot tub. (AA.22.) Hackbarth told Schwich she would be right up. (AA.22.) She also told Schwich that she wanted to have sex with Stone. (AA.23.) Schwich told Hackbarth that he would watch the two women having sex. (AA.23.) Schwich then went upstairs. (AA.23.)

When Schwich returned upstairs, Stone had left the hot tub for her bedroom. (AA.23.) Schwich then entered the hot tub. (AA.24.) Approximately fifteen to twenty minutes later, Hackbarth came into the bathroom and had a conversation with Schwich about her legal problems while he was in the hot tub.

(AA.24.) Schwich then left the hot tub and Hackbarth got in. (AA.24–25.) Schwich went to his bedroom and went to sleep. (AA.25.)

Schwich was subsequently awakened by Hackbarth, who yelled to him from the hot tub to inquire how to turn the hot tub jets off. (AA.25–26.) Schwich yelled instructions to her and fell back asleep. (AA.25–26.)

Some unknown period of time later, Schwich woke up and heard the hot tub jets running. (AA.26.) He got up, went into the bathroom, and found Hackbarth floating face down in the hot tub. (AA.26.) Schwich put his arms around Hackbarth and dragged her out of the hot tub and onto the bathroom floor. (AA.26.) Her lips were blue and she appeared bloated. (AA.26.) Schwich left to find Stone, who attempted to perform mouth-to-mouth resuscitation on Hackbarth while Schwich performed chest compressions. (AA.26.) Schwich and Stone then called 911. (AA.26.)

At approximately 5:56 a.m., the Scott County Sheriff's Office, Prior Lake Rescue, and an Allina Ambulance were dispatched to Schwich's home. (AA.172.) The Prior Lake Fire Chief arrived first on the scene at 6:03 a.m. (AA.172.) Members of the Scott County Sheriff's Department and the Allina Ambulance arrived shortly thereafter. (AA.172.) At approximately 6:30 a.m., the Allina paramedics stopped resuscitation efforts on Hackbarth. (AA.173.)

The Minnesota Regional Coroner's Office performed an autopsy on Hackbarth. (AA.179.) As part of the autopsy, the Coroner's Office collected blood and vitreous fluid, as well as Hackbarth's liver, for toxicological analysis.

(AA.236.) The toxicology report showed that Hackbarth had methamphetamine in her system when she died, which measured 1.96 milligrams per liter.

(AA.240.) The Coroner's Office determined that Hackbarth died of cardiac arrhythmia. (AA.180,236–40.) In making this determination, the Coroner's Office noted that the underlying or contributing factors in Hackbarth's death were acute methamphetamine and alcohol intoxication and the presence of an underlying cardiac condition called arrhythmogenic right ventricular cardiomyopathy. (AA.180,236–40.)

III. SCHWICH'S INSURANCE POLICY ISSUED BY STATE FARM

At the time of Hackbarth's death, Schwich was insured under a homeowner's insurance policy issued by State Farm. The policy contains the following relevant language:

DEFINITIONS

* * *

7. "occurrence", when used in Section II of this policy, means an accident, including exposure to conditions, which results in:
 - a. **bodily injury**; or
 - b. **property damage**;

* * *

SECTION II – LIABILITY COVERAGES

COVERAGE L – PERSONAL LIABILITY

If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the **occurrence**, equals our limit of liability.

* * *

SECTION II – EXCLUSIONS

1. Coverage L and Coverage M do not apply to:
 - a. **bodily injury** or **property damage**:
 - (1) which is either expected or intended by the **insured**; or
 - (2) which is the result of willful and malicious acts of the **insured**;

* * *

(AA.210–35.)

IV. SCHWICH'S CRIMINAL TRIAL AND CONVICTION

On March 31, 2005, following a police investigation, Schwich was indicted and charged with, *inter alia*, third-degree murder in violation of Minnesota Statutes section 609.195(b). (AA.180.) In relevant part, section 609.195(b) states as follows:

Whoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling,

giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance classified in schedule I or II, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years or to payment of a fine of not more than \$40,000, or both.

Minn. Stat. § 609.195(b).

On February 7, 2006, after a criminal trial in which he was represented by counsel, Schwich was found guilty of aiding and abetting third-degree murder by a jury of his peers.¹ (AA.241.)

V. WRONGFUL DEATH LAWSUIT AND STATE FARM'S DECLARATORY JUDGMENT ACTION

On October 10, 2005, Hackbarth's next of kin began a wrongful death lawsuit against Schwich and Stone in Scott County District Court. (AA.192-94.)

The Complaint in the wrongful death lawsuit alleged the following:

2. That on March 11, 2005, defendants negligently, carelessly, and unlawfully caused the death of the decedent by directly or indirectly unlawfully selling, giving away, bartering, delivering, exchanging, distributing or administering methamphetamine to the decedent.
3. That as a direct result of the negligence, carelessness and unlawfulness of the defendants, and each of them jointly and severally, decedent passed away due to cardiac arrhythmia as a result of acute methamphetamine and alcohol intoxication.

¹ Stone was also criminally charged as a result of Hackbarth's death. On October 27, 2005, she pled guilty to third-degree unintentional murder in Scott County District Court before the Honorable Michael A. Young. (AA.183-90.) At the plea hearing, Stone testified that Schwich provided the methamphetamine that she injected into Hackbarth, and that Schwich encouraged Hackbarth to inject it. (AA.185,188.) On November 15, 2005, Stone was sentenced to serve sixty-two months in the Women's Correctional Facility in Shakopee, Minnesota. (AA.191.)

(AA.192–93.)

After Schwich was served with the Summons and Complaint in the wrongful death lawsuit, State Farm began defending Schwich under a reservation of rights pursuant to the terms and conditions of the homeowner’s insurance policy referenced above.

On November 23, 2005, State Farm began a declaratory judgment action to determine whether it had a continuing obligation to defend and/or indemnify Schwich in connection with the wrongful death lawsuit commenced by Hackbarth’s next of kin. (AA.195–208.) On July 13, 2006, the Honorable Diane M. Hanson, Judge of Scott County District Court, issued an Order to Stay Proceedings, staying the wrongful death lawsuit until State Farm’s declaratory judgment action was resolved. (AA.209.)

Subsequently, State Farm moved for summary judgment in the declaratory judgment action to obtain a ruling that it had no duty to provide coverage to Schwich under the homeowner’s policy at issue. (AA.159.)

State Farm argued to the district court that there was no evidence of an “occurrence” under the insurance policy. (AA.163.) State Farm also asserted that, in any event, coverage for the claims against Schwich were excluded, as a matter of law, on the grounds that the injuries were “expected or intended” by the insured and/or that the injuries were the result of “willful and malicious acts” of the insured. (AA.163.) Finally, State Farm argued that public policy should preclude providing insurance coverage for Schwich’s criminal conduct. (AA.163.)

Hackbarth's next of kin and Schwich both opposed the motion, arguing that State Farm had a duty to provide coverage to Schwich. (AA.162.)

In conjunction with the motion for summary judgment, the parties stipulated to the following material facts: (1) that Schwich provided Hackbarth with methamphetamine on the night she died; (2) that the methamphetamine was at least one of the causes of Hackbarth's death; and (3) that although Schwich intentionally provided Hackbarth with methamphetamine, he did not intend to kill her. (AA.162.)

On March 29, 2007, the Honorable Carol A. Hooten, Judge of Scott County District Court, denied State Farm's motion for summary judgment. (AA.160.) Instead, the trial court determined that State Farm has a duty to defend and indemnify Schwich in the wrongful death action filed by the next of kin of Hackbarth. (AA.160.)

VI. THE WELL-KNOWN DANGERS OF METHAMPHETAMINE USE

According to the National Institute on Drug Abuse, a subdivision of the National Institute of Health, methamphetamine is an addictive stimulant drug that strongly activates certain systems in the brain. (AA.242.) It is taken orally or intranasally, by intravenous injection, and by smoking. (AA.242.) It is made in illegal laboratories and has a high potential for abuse and addiction. (AA.242.)

Methamphetamine has a neurotoxic effect, damaging brain cells that contain dopamine as well as serotonin, another neurotransmitter. (AA.242.) Animal research extending back more than twenty years shows that

methamphetamine damages neuron cell endings. (AA.242.) Over time, methamphetamine causes reduced levels of dopamine production, which can result in symptoms like those of Parkinson's disease. (AA.242.)

The central nervous system ("CNS") actions that result from taking even small amounts of methamphetamine include increased wakefulness, increased physical activity, decreased appetite, increased respiration, hyperthermia, and euphoria. (AA.242.) Other CNS effects include irritability, insomnia, confusion, tremors, convulsions, anxiety, paranoia, and aggressiveness. (AA.242.) Hyperthermia and convulsions can result in death. (AA.242.)

Methamphetamine causes increased heart rate and blood pressure and can cause irreversible damage to blood vessels in the brain, producing strokes. (AA.242.) Other effects of methamphetamine include respiratory problems, irregular heartbeat, and extreme anorexia. (AA.242.) Its use can result in cardiovascular collapse and death. (AA.242.)

Shannon Mackey-Bojack, a medical doctor affiliated with the Minnesota Regional Coroner's Office, testified during Schwich's criminal trial that methamphetamine can cause death. (AA.238.) More specifically, Dr. Mackey-Bojack testified that methamphetamine can cause various conditions and side effects, including cardiac arrhythmia, rupture of the aorta, and heart attacks, all of which can cause death. (AA.239.) Dr. Mackey-Bojack further testified that there have been reported fatalities attributed to methamphetamine use. (AA.239.) In those cases, the amount of methamphetamine in the victim's bloodstream

ranged from 0.09 milligrams per liter up to forty milligrams per liter. (AA.239–40.)

The level of methamphetamine in Hackbarth's system, 1.96 milligrams per liter, was within the range where fatalities have been reported. (AA.240.)

Dr. Mackay–Bojack also testified that methamphetamine is wildly unpredictable, and a severe adverse reaction to the drug could occur at any time:

Q. And in cases where—that death has been attributed to methamphetamine, have there been situations where the person has used methamphetamine and not had a bad outcome, but later on used and had a bad outcome?

A. Yes. It is a potentially dangerous drug. There is no really good way to predict how someone is going to react to taking the drug. You can have a bad outcome the first time you take it, or you can have a bad outcome or a bad side effect or reaction taking it after having taken it many times before, and there is no real way to predict when or—when you are going to have a bad outcome, if you will, or who will.

(AA.240.)

Methamphetamine use is so pervasive in Scott County that the county has established a Meth Task Force to combat the use of the drug. (AA.245.) The Scott County Meth Task Force has published an informational pamphlet, available at the information desk of the Scott County Courthouse, which documents the adverse effects methamphetamine has on its users. (AA.245–49.)

SUMMARY OF ARGUMENT

The trial court erred in concluding that Schwich's intentional supplying of methamphetamine to Hackbarth, which was one of the causes of her death, qualified as an "occurrence" under the homeowner's insurance policy issued to

Schwich by State Farm. Since it is undisputed that Schwich's criminal act of providing Hackbarth with methamphetamine was not accidental and that Schwich knew that methamphetamine causes harm, the act cannot constitute an "occurrence" under the policy, regardless of whether Schwich intended to kill Hackbarth.

The trial court also erred in finding that that coverage for Schwich's conduct was not excluded as leading to an "expected or intended" injury suffered by Hackbarth. In this regard, the trial court improperly examined whether Schwich was intending to cause Hackbarth's *death* (which all parties agree he was not), instead of whether Schwich's provision of a substance which he knew to be illegal and dangerous should be sufficient to find intent or infer intent on his behalf to cause *some harm* (i.e. not necessarily death) to Hackbarth.

With respect to the "willful and malicious acts" exclusion, the trial court incorrectly ruled that this exclusion has essentially the same meaning as the "expected or intended injury" exclusion and therefore did not exclude coverage for Schwich's conduct. Under the trial court's interpretation, one of the two exclusions relevant to this case is rendered superfluous, even though Minnesota courts have previously examined the exclusions separately and provided them with different meanings. Courts have used the "willful and malicious acts" exclusion to deny coverage in analogous cases.

Finally, the trial court erred in concluding that public policy considerations do not preclude providing coverage for Schwich's criminal conduct under the

circumstances. The district court's refusal to deny coverage on public policy grounds places Minnesota out-of-step with courts in other jurisdictions that have refused to allow insurance coverage for the provision and distribution of illegal narcotics, and instead sets a dangerous policy of insuring drug dealers against the harm they cause to society.

For any or all of the above reasons—because Schwich's conduct does not constitute an "occurrence," because one of two exclusions clearly apply to deny coverage, or because it is in the public interest to refuse to provide insurance coverage to drug dealers who willfully supply others with drugs which are understood to be dangerous and illegal—this Court should reverse the trial court's determination that Schwich is entitled to insurance coverage for his criminal conduct.

STANDARD OF REVIEW

"Insurance coverage issues are questions of law for the court." *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). Since a reviewing court is not bound by a lower court's determination of a purely legal question, a de novo standard of review applies to this case. *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004); *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001).

ARGUMENT

I. GENERAL LEGAL PRINCIPLES USED IN INTERPRETING INSURANCE POLICIES

“Insurance policies are similar to other contracts; they are matters of agreement by the parties and the function of a court is to determine what the agreement was and enforce it.” *Fillmore v. Iowa Nat’l Mut. Ins. Co.*, 344 N.W.2d 875, 877 (Minn. Ct. App. 1984). Where there is no ambiguity in the insurance policy, there is no room for construction. *Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 199 N.W.2d 806, 811 (Minn. 1972). Exclusions in a policy are as much a part of the contract as other parts and must be given the same consideration in determining the coverage afforded. *Ross v. City of Minneapolis*, 408 N.W.2d 910, 914 (Minn. Ct. App. 1987). A court cannot distort the natural meaning of the terms of an insurance policy to read an ambiguity into its plain language in order to provide coverage or enlarge the liability of the insurer. *Id.*; see also *Merseth v. State Farm Fire & Cas. Co.*, 390 N.W.2d 16, 18 (Minn. Ct. App. 1986) (declaring that where the insurance policy clearly and unambiguously sets forth the terms and scope of its coverage, the insurer is entitled to have that coverage enforced according to its terms).

A person claiming coverage under the terms of an insurance policy has the burden to establish that coverage exists. See, e.g., *Boedigheimer v. Taylor*, 178 N.W.2d 610, 614 (Minn. 1970). An insurer has the burden of proving that a

policy exclusion applies. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

A liability insurer assumes two duties to its insured: a duty to defend and a duty to indemnify. *St. Paul Fire & Marine Ins. Co. v. Nat'l Chiropractic Mut. Ins. Co.*, 496 N.W.2d 411, 415 (Minn. Ct. App. 1993). The duty to defend is distinct from and broader than the duty to indemnify. *St. Paul Fire & Marine Ins. Co. v. Lenzmeier*, 243 N.W.2d 153, 156 (Minn. 1976).

The duty to defend arises when a claim is brought against the insured alleging facts which, if established, would support a recovery within the policy's coverage. *Nat'l Chiropractic Mut. Ins. Co.*, 496 N.W.2d at 415. Usually, the duty to defend is determined by comparing the complaint with the policy language; however, if the insurer has knowledge of facts outside the complaint, it may use these to determine coverage. *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102, 106 (Minn. Ct. App. 2005). The insurer has an obligation to defend a claim against its insured when the claim falls arguably within the coverage afforded by the policy, but the complaint does not control when the actual facts clearly establish the existence or nonexistence of a duty to defend. *Fluoroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 681 (Minn. Ct. App. 1996).

When it can be concluded as a matter of law that there is no basis upon which an insurer may be obligated to indemnify the insured, the insurer is relieved of its duty to defend. *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 574 (Minn. 1981). Whether an insurer has duty to defend is an issue of

policy interpretation and therefore a question of law. *CPT Corp. v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 747, 750 (Minn. Ct. App. 1994).

II. THE TRIAL COURT ERRED IN CONCLUDING THAT SCHWICH'S INTENTIONAL SUPPLYING OF METHAMPHETAMINE TO HACKBARTH QUALIFIED AS AN "OCCURRENCE"

State Farm has no duty to defend or indemnify Schwich in the wrongful death lawsuit because Schwich's intentional act of supplying methamphetamine to Hackbarth, which was one of the causes of her death, establishes that no "occurrence" under the policy at issue has taken place. As set forth above, Schwich's homeowner's policy defines "occurrence" as "an accident, including exposure to conditions, which results in 'bodily injury' or 'property damage'" during the policy period. (AA.213) (emphasis omitted).

Minnesota courts have interpreted an "accident" and thus an "occurrence" as an unexpected, unforeseen, or undesigned happening or consequence. See, e.g., *Hauenstein v. St. Paul-Mercury Indem. Co.*, 65 N.W.2d 122, 126 (Minn. 1954). The fact that an intentional act causes unintended damage does not render the act at issue an "accident." *Rohrer v. Rick*, 529 N.W.2d 406 (Minn. Ct. App. 1995) (finding that repeated and harassing telephone calls late at night did not constitute an "accident" and, therefore, did not qualify as an "occurrence," even if the extent of the injuries was unintended).

Further, "an insured will not be allowed through intentional or reckless acts to consciously control the risks covered by the policy." *Johnson v. AID Ins. Co.*, 287 N.W.2d 663, 665 (Minn. 1980); *Rohrer*, 529 N.W.2d at 409; see also *Allstate*

Ins. Co. v. S.F., 518 N.W.2d 37, 40 (Minn. 1994) (finding that intentional sexual assaults cannot not be characterized as “accidents”); *Farmers Union Oil Co. v. Mutual Service Ins. Co.*, 422 N.W.2d 530, 534 (Minn. Ct. App. 1988) (holding that an insured’s herbicide spraying activities did not constitute an “occurrence” because the insured had knowledge of the substantial risks involved in spraying a specific herbicide but nevertheless proceeded in light of such knowledge).

A. The District Court Ignored Schwich’s Knowledge That Methamphetamine Causes Harm and Instead Erroneously Focused On Whether He Intended to Kill Hackbarth

According to the district court, the death of Hackbarth qualified as an “occurrence” under the homeowner’s policy issued to Schwich because “the undisputed material facts establish that while Schwich intended to provide Hackbarth with illegal drugs, he did not intend to cause her physical harm or death.” (AA.164.) As such, the district court reasoned, “the death of Hackbarth, which was neither intended [n]or expected by the insured Schwich, constitutes an ‘occurrence’ within the meaning of the State Farm policy.” (AA.164.)

The district court’s decision thus ignored the following undisputed facts: (1) that Schwich knew that methamphetamine was highly addictive (AA.11); (2) that Schwich knew methamphetamine could—and did—cause harm (AA.40); (3) and that Schwich knew many people who went through chemical dependency treatment for methamphetamine use (AA.28–29). By failing to take into consideration these undisputed facts, the district court erroneously allowed Schwich, through his *intentional* act of supplying Hackbarth with illegal drugs he

knew to be dangerous, to “consciously control the risks covered by the policy.” *Rohrer*, 529 N.W.2d at 409. Under Minnesota law, when an insured consciously controls the risks covered by a policy through intentional conduct, no “occurrence” or “accident” is present. See, e.g., *Johnson v. AID Ins. Co.*, 287 N.W.2d 663, 665 (Minn. 1980).

In addition, the district court’s assertion that “the undisputed material facts establish that while Schwich intended to provide Hackbarth with illegal drugs, he did not intend to cause her **physical harm** or death” is contradicted by Schwich’s knowledge about the harmful effects of methamphetamine use. (AA.164) (emphasis added). Since Schwich knew that methamphetamine is a harmful and dangerous substance, it follows that his intentional act of supplying Hackbarth with methamphetamine, by its very nature, intended to cause her harm. Simply because Schwich may have hoped that Hackbarth would also derive some sort of perverse pleasure from using a dangerous and illegal substance which has well-known negative effects does not change the nature of his act. If insureds in Schwich’s position may provide a knowingly harmful substance to another and not be charged with intending to cause that person harm, they are provided with a license to commit irresponsible and malicious acts.

Finally, in finding that the death of Hackbarth qualified as an “occurrence” under the policy, the district court erred in focusing its analysis on whether Schwich intended to kill Hackbarth, instead of whether Schwich intended to provide her with methamphetamine. Under Minnesota law, the fact that an

intentional act causes unintended damage does not render the act at issue an “accident.” *Rohrer v. Rick*, 529 N.W.2d 406, 409 (Minn. Ct. App. 1995). Accordingly, whether Schwich intended to kill Hackbarth is not really significant for determining whether his conduct qualified as an “occurrence” under the policy. The central question is whether Schwich intended to provide Hackbarth with a substance which he knew to be dangerous—and it is undisputed that Schwich did have this intent.

In sum, it is undisputed that Schwich’s intentional act of supplying methamphetamine to Hackbarth, which was one of the causes of her death, was not an “accident.” Since Schwich is not allowed to consciously control the risks covered by the policy and must be held responsible for his intentional conduct—no matter if he intended the ultimate extent of the harm that was suffered—the district court erred in concluding that Schwich’s intentional supplying of methamphetamine to Hackbarth qualified as an “occurrence.” Based upon the undisputed record and controlling legal principles, Schwich has failed to meet his burden of establishing insurance coverage. Accordingly, State Farm respectfully requests that this Court reverse the district court’s determination and conclude that State Farm has no duty to defend or indemnify Schwich in the wrongful death lawsuit.

III. THE TRIAL COURT ERRED IN FINDING THAT COVERAGE FOR SCHWICH'S CONDUCT WAS NOT EXCLUDED AS LEADING TO AN "EXPECTED OR INTENDED" INJURY SUFFERED BY HACKBARTH

The trial court also erred in finding the "expected or intended" injury exclusion inapplicable. (AA.227.)

In this case, the character of Schwich's act of intentionally providing Hackbarth with methamphetamine, an extremely addictive, highly dangerous drug with well-documented health risks—including the risk of death—is such that he should have reasonably expected some harm to Hackbarth to result from use of the drug. Indeed, the very nature of Schwich's actions are such that an intent to injure Hackbarth may be inferred as a matter of law.

The primary purpose of intentional act exclusions is to discourage irresponsible and intentional conduct. *Farmers Ins. Exchange v. Sipple*, 255 N.W.2d 373, 375 (Minn. 1977). Such exclusions further the policy against indemnifying one for intentional or criminal acts. *National Union Fire Ins. Co. v. Gates*, 530 N.W.2d 223, 228 (Minn. Ct. App. 1995). A court may, absent evidence of specific intent to injure, infer intent to injure as a matter of law, based on the circumstances and the nature of the insured's actions. *Grinnell Mut. Reinsurance Co. v. Ehmke*, 664 N.W.2d 409, 412 (Minn. Ct. App. 2003). In other words, an intent to injure may be established: (1) by proof of an actual intent to injure; or (2) by inferring intent as a matter of law. *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 329 (Minn. 1991). The inference of an intent to injure arises when the nature and circumstances of the insured's act are such that

harm was substantially certain to result. See *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 886–87 (Minn. 1978); *D.W.H. v. Steele*, 494 N.W.2d 513, 516 (Minn. Ct. App. 1993).

A liability policy exclusion for “expected or intended” injuries does not require that the particular injury at issue be intended; rather, the actual injury may be more severe or of a different nature than anticipated. *State Farm Fire & Cas. Co. v. Neises*, 598 N.W.2d 709, 711 (Minn. Ct. App. 1999).

A. Schwich’s Homeowner’s Policy Does Not Provide Coverage Because Methamphetamine Use Can Reasonably Be Expected To Result In Adverse Health Effects and Even Death

While it is undisputed that Schwich did not intend to kill Hackbarth, the severe health risks associated with methamphetamine use are of such a nature and character that bodily harm and death could reasonably be *expected* to result from Schwich’s conduct. As set forth above, methamphetamine is a highly addictive drug that can cause neurological damage, strokes, respiratory problems, irregular heartbeat, cardiovascular collapse, extreme anorexia, and death. (AA.242,245–49.)

Further, Schwich understood that methamphetamine is highly addictive and that he was addicted to methamphetamine. (AA.11.) He tried to stop using the drug on numerous occasions because he knew it could harm him. (AA.40.) He knew many people who went through chemical dependency treatment to kick the drug and the health risks that come with its use. (AA.28–29.)

In light of Schwich's admission that methamphetamine is harmful and the substantial amount of information showing that methamphetamine use poses significant health risks, Schwich indisputably expected that he was exposing Hackbarth to severe adverse health effects, including possible death, by providing her with methamphetamine. Since adverse health effects and death can reasonably be expected to result from methamphetamine use, the exclusion for "expected or intended" injuries in Schwich's homeowner's policy bars coverage in this matter.

B. Schwich's Homeowner's Policy Does Not Provide Coverage Because An Intent To Injure Should Be Inferred From Schwich's Conduct

Minnesota has adopted the doctrine of "inferred intent," whereby an intent to injure may be inferred as a matter of law from the nature and character of an act. See *B.M.B. v. State Farm Fire & Cas. Co.*, 664 N.W.2d 817, 822 (Minn. 2003).

For example, Minnesota courts have found that an intent to injure may be inferred as a matter of law in certain sexual abuse cases. See, e.g., *Allstate Ins. Co. v. S.F.*, 518 N.W.2d 37 (Minn. 1994) (holding that claims of non-consensual sexual assault and battery invoke an intentional act exclusion as a matter of law); *Estate of Lehmann v. Metzger*, 355 N.W.2d 425 (Minn. 1984) (finding that the intentional act exclusion relieved an insurer of a duty to defend with respect to the sexual assault of a minor because intent should be inferred as a matter of law); *State Farm Fire & Cas. Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984)

(finding that an intentional act exclusion applied to a sexual assault because intent should be inferred); *Horace Mann Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834 (Minn. 1982) (finding that intent should be inferred from insured foster parent's sexual abuse of foster child despite claim that no harm was intended).

Minnesota courts have also found that an intent to injure may be inferred as a matter of law in situations involving inherently dangerous conduct. See, e.g., *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 573–74 (Minn. 1981) (holding that an intent to injure should be inferred after participants planned to shoot at occupied truck, armed themselves with high-powered rifles and armor-piercing bullets, realized that the truck was occupied, and yet proceeded to fire).

While no Minnesota court has addressed the issue of whether intent to harm should be inferred as a matter of law when one party supplies another with drugs known to be highly dangerous and illegal, cases from other jurisdictions are squarely on point. In both *Minnesota Fire & Casualty Co. v. Greenfield* and *State Farm Fire & Casualty Co. v. Baer*, the courts held that an intent to injure should be inferred because, as here, an insured provided dangerous and illegal drugs to a third party.

In *Minnesota Fire & Casualty Co. v. Greenfield*, 805 A.2d 622 (Pa. Super. Ct. 2002) and *Minnesota Fire & Casualty Co. v. Greenfield*, 855 A.2d 854 (Pa. 2004), the insured, Michael Greenfield ("Greenfield"), voluntarily and intentionally provided heroin to Angela Smith ("Smith"), who voluntarily and intentionally used

the drug and died as a result. 805 A.2d at 623–24. Smith’s parents filed a wrongful death lawsuit against Greenfield, alleging negligence. *Id.* at 624. Minnesota Fire and Casualty Company (“Minnesota”) had issued a homeowner’s policy covering Greenfield for negligence. *Id.* Minnesota filed a declaratory judgment action, arguing that it had no duty to defend or indemnify Greenfield because Smith’s death was a result of an intentional act, and therefore coverage was excluded under the terms of its policy. *Id.* The trial court denied Minnesota’s summary judgment motion and held that under the provisions of the homeowner’s policy, Minnesota had a duty to defend and potentially indemnify Greenfield. *Id.*

On appeal, the Pennsylvania Superior Court noted that the concept of inferred intent is accepted in Pennsylvania and further stated that the “logic and rationale behind the adoption of the inferred intent rule to child abuse cases seems equally applicable here.” *Id.* at 626. In a well–reasoned opinion, the Superior Court stated that although Greenfield may not have intended for Smith to die, the well–known, inherent dangers associated with heroin use justified the conclusion that an intent to injure should be inferred as a matter of law:

While Greenfield may not have *intended* that Angela Smith die, the risk of adverse effects from taking heroin is not unexpected, be those adverse effects sickness or even death. Under the policy language, we find that Greenfield’s conduct in supplying her with heroin was intentional. Her death may not have been intentional, but, because of the known risks, an adverse reaction is an expected occurrence and the situation should not occur because of the degree of the adverse reaction, even when it results in death.

* * *

Our Court has already recognized that the General Assembly has seen that the illegal drug trade produces “ravages and evils” which “pervades our country.” Our legislature and Secretary of Health have determined that heroin has no accepted medical use and is unsafe for use under even medical supervision. The courts also recognize that illegal drug use has an impact on life expectancy so great that the introduction of evidence of its use outweighs any possible prejudice. While certainly not binding upon our Court, the commentary of other jurisdictions also realistically points out the dangers and harm inherent in the use of heroin and the knowledge of that harm. In light of the foregoing, the sale of heroin more than meets the special criteria for the imposition of inferred intent.

Id. at 626, 628–29.

The United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit reached a similar conclusion in *State Farm Fire & Casualty Co. v. Baer*, 745 F. Supp. 595 (N.D. Cal. 1990) and *State Farm Fire & Casualty Co. v. Baer*, 956 F.2d 275 (9th Cir. 1992). In *Baer*, Robert Baer (“Baer”) provided a friend, Dareen Dahlstrom (“Dahlstrom”) with the illegal drug known as “Ecstasy” while Dahlstrom was a guest in Baer’s home. 745 F. Supp. at 596. Dahlstrom ingested the Ecstasy and died shortly thereafter. *Id.* at 596–97. Dahlstrom’s family filed a wrongful death action against Baer. *Id.* at 597. State Farm, which covered Baer under a policy of homeowner’s insurance, filed a declaratory judgment action in federal court. *Id.* State Farm claimed that Baer’s conduct was not covered by his policy because it was not an “occurrence,” because public policy precluded coverage, and because the intentional act exclusion applied. *Id.*

The United States District Court for the Northern District of California held that neither public policy nor California state law, which prohibits insurance coverage for the willful acts of the insured, would allow insurance coverage for Baer's act of providing Ecstasy to Dahlstrom:

Although there are certain cases in which an insured may be entitled to coverage for an act that proved to be unlawful, these cases generally involve situations in which the violation of law, the injury, and sometimes the act itself, were unintended by the insured. This is not such a case. **Baer knew or should have known that "Ecstasy" was a federally controlled substance and that it was illegal to dispense the drug to others. Nevertheless, he willfully prepared and administered the drug to Dahlstrom.**

Id. at 598–99 (emphasis added).

The United States Court of Appeals for the Ninth Circuit subsequently affirmed the district court's decision. The Ninth Circuit stated that "the primary issue is whether administering the drug ecstasy is inherently harmful," and held that **"the unlawful administration of a controlled substance such as ecstasy is so inherently harmful that the intent to commit the act is equivalent to the intent to harm the person."** 956 F.2d at 282 (emphasis added).

The decisions in *Greenfield* and *Baer* are extremely instructive in this matter. The conduct in this case is nearly identical to that at issue in both *Greenfield* and *Baer*. Similar to the insureds in those cases, Schwich provided a third party, Hackbarth, with an illegal, highly addictive, and dangerous drug. Similar to heroin and ecstasy, methamphetamine is an inherently dangerous and

illegal drug which poses serious well-known risks of physiological and neurological harm.

As noted above, Schwich knew that methamphetamine use was both addictive and harmful. (AA.11,40.) Nevertheless, he disregarded the well-documented and widely known risks associated with methamphetamine and the laws criminalizing its possession, distribution, and use when he provided it to Hackbarth. This Court should infer an intent to injure as a matter of law from Schwich's criminal disregard of the well-known known health risks associated with methamphetamine use and the laws prohibiting it—laws which are designed, in part, to prevent tragedies like the one underlying this case from occurring.

C. The Trial Court's Analysis of the "Intentional Act" Exclusion in this Case is Without Legal Support

With respect to the exclusion pertaining to "expected or intended" injuries, the district court determined that when an act itself is intended but the resulting injury is not, the insurance exclusion has no application. (AA.165.) According to the district court, since the undisputed material facts established that Schwich did not have the intent to kill Hackbarth, the only possible way the intentional act exclusion could operate to preclude coverage would be if intent could be inferred as a matter of law. (AA.167.) After examining various cases addressing inferred intent, the district court stated that State Farm failed to demonstrate that "Schwich's provision of an illegal drug was *substantially certain* to cause the

harm that is the subject of the wrongful death action, i.e., Hackbarth's death."
(AA.167.)

The district court's analysis failed to address the legally controlling question of whether Schwich's criminal conduct—providing an admittedly dangerous and illegal drug—should provide sufficient legal grounds to infer intent to cause **some harm** (i.e. not necessarily death) to Hackbarth.

In *Rohrer v. Rick*, 529 N.W.2d 406 (Minn. Ct. App. 1995), this Court examined a case wherein an insured made several harassing phone calls that allegedly caused injury to the victim. This Court inferred intent on the defendant's behalf to cause injury, and stated that its holding would not be different even if the defendant's acts were considered negligent:

Here, Rick was admittedly angry with Anthony Rohrer for his actions in negotiating a union contract. Rick made dozens of admittedly "harassing" telephone calls to the Rohrer home throughout the night regardless of who answered the telephone. On these facts, we infer intent to harm as a matter of law. *Cf. Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn.1978) (court may infer intent to injure, as a matter of law, if "the character of the act is such that an intention to inflict an injury can be inferred"). The allegedly unexpected extent of injuries suffered by Susan Rohrer does not preclude a determination that Rick intended injury. See *id.* (coverage excluded even though "the severe resulting injury was clearly not anticipated or intended").

529 N.W.2d 406, 409. The Minnesota Supreme Court echoed this Court's sentiments in *American Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001):

We have previously stated that the inference of intent to injure as a matter of law arises when the insured acted in a calculated and remorseless manner or when the insured's actions were such that

the insured knew or should have known that a **harm** was substantially certain to result from the insured's conduct.

* * *

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. *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978).

Id. at 611, 613.

Based on the clear holdings in *Rohrer* and *Walser*, the district court in this case should have been examining whether Schwich intended to cause some harm to Hackbarth (or whether his intent should be inferred) by analyzing one of the following issues: (1) By providing Hackbarth with illegal drugs which he knew to be dangerous, did Schwich know, or should he have known, that **any type of harm** was substantially certain to result from his conduct?; (2) By providing Hackbarth with illegal drugs he knew to be dangerous, did Schwich act with deliberate and calculated indifference to the risk of **some type of injury** to Hackbarth?; or (3) Was Schwich's provision of illegal drugs which he knew to be dangerous substantially certain to cause **some type of harm** to Hackbarth? Analyzing the issue under any of the above questions produces a much different result than analyzing whether "Schwich's provision of an illegal drug was *substantially certain* to cause the harm that is the subject of the wrongful death action, i.e., Hackbarth's death," as the district court did. It is clear that the provision of dangerous illegal drugs is substantially certain to cause *some harm* (maybe not death, but some harm) to the person ingesting them. Otherwise,

there would be no reason to aggressively punish distributors and users of dangerous illegal drugs in Minnesota and throughout the country.

Accordingly, State Farm respectfully asks this Court to reverse the district court's determination and find that State Farm has no duty to defend or indemnify Schwich in the wrongful death lawsuit because coverage for Schwich's conduct is excluded as leading to an "expected or intended" injury suffered by Hackbarth.

IV. THE DISTRICT COURT ERRED IN DETERMINING THAT THE "WILLFUL AND MALICIOUS ACTS" EXCLUSION HAS ESSENTIALLY THE SAME MEANING AS THE "EXPECTED OR INTENDED INJURY" EXCLUSION

In addition to the "expected or intended" injury exclusion, Schwich's policy contains a separate, independent exclusion for "willful and malicious acts" that precludes coverage in this case. (AA.227.) The purpose of such an exclusion is to deny the insured a license to commit wanton and malicious acts. *State Farm Fire & Cas. Co. v. Neises*, 598 N.W.2d 709, 712–13 (Minn. Ct. App. 1999); see also *Wojciak v. Northern Package Co.*, 310 N.W.2d 675, 680 (Minn. 1981). "Whatever is done willfully and purposefully, if it be at the same time wrong and unlawful and that known to the party, is of legal contemplation malicious." *Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 644, n.6 (Minn. 1978).

Policy exclusions willful or malicious acts have been applied regardless of the insured's state of mind. See, e.g., *D.W.H. v. Steele*, 512 N.W.2d 586, 589 (Minn. 1994) (finding coverage excluded despite argument that young insured who committed sexual assaults could not have formed requisite intent to harm);

American Family Mut. Ins. Co. v. Peterson, 405 N.W.2d 418, 421–22 (Minn. 1987) (holding that coverage was excluded despite insured’s intoxication); *State Farm Fire & Cas. Co. v. Williams*, 355 N.W.2d 421, 423 (Minn. 1984) (finding that exclusion applied despite stipulation that insured did not intend to inflict harm).

In *Neises*, the insured (“Corty”) broke into the cemetery crypt of a nine–year–old who had died in a swimming accident, removed and dissected the body, displayed it to friends and later dumped it into a river. 598 N.W.2d at 710. Corty was insured under his parents’ umbrella policy with State Farm that contained intentional act and willful and malicious exclusions. *Id.* at 710–11. At trial, the jury found that Corty did not intend to cause injuries to the family members of the nine–year–old and that his acts were not willful and malicious. The trial court concluded that the policy exclusions did not apply. *Id.* at 710. This Court reversed, finding that the policy excluded coverage. *Id.* at 713. This Court noted that Corty did not commit an impulsive act that resulted in unintentional injury, but instead followed a plan to steal and dismember the child’s corpse to satisfy his morbid curiosity despite the “high probability” that the child had a family. *Id.* at 711–12. This Court inferred from these acts an intent to cause emotional and psychological injury, triggering the intentional act exclusion. *Id.* at 712.

In *Neises*, this Court also applied the policy’s separate exclusion for “willful and malicious acts” to deny coverage. This Court found that Corty acted purposefully and knew that what he did was wrong and unlawful. *Id.* This Court rejected Corty’s arguments that he did not intend to harm the child’s family, or

that he acted out of morbid curiosity rather than malice. *Id.* On this point, it was noted that “policy exclusions for intentional, willful, or malicious acts have been applied regardless of the insured’s state of mind.” *Id.* This Court also stated that “we reject the extension of coverage to such egregious acts as grave robbing and corpse mutilation, given the purpose of the exclusion to ‘deny the insured license to commit wanton and malicious acts.’” *Id.* at 713. This Court observed that it was not likely that coverage for liability resulting from such acts was a reasonable expectation for purchasers of the insurance policy at issue. *Id.*

The exclusions in Schwich’s policy are identical to those in the policy at issue in *Nieses*. In this case, Schwich admitted that he knew the possession and use of methamphetamine was illegal. (AA.9.) Despite such knowledge, he provided Hackbarth with methamphetamine and prepared the syringe she used to inject it. His conduct showed a willful indifference to both the law prohibiting the possession, distribution, and use of methamphetamine, as well as an indifference to the dangers that methamphetamine use posed to Hackbarth.

In this case, the district court determined that since “willful” is synonymous with “intentional” and because “malicious” has been defined to mean “substantially certain” to cause injury, the analysis for whether the “willful and malicious acts” exclusion applies is essentially the same as for the “expected or intended” injuries exclusion. (AA.167–68.) Such a reading makes one of the exclusions superfluous and flies in the face of prior case law. See *Stiglich Construction, Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. Ct. App. 2001) (“The

law requires us to construe a contract as a whole so as to harmonize all provisions, if possible, and to avoid a construction that would render one or more provisions meaningless.”); see also *Neises*, 598 N.W.2d at 712 (applying the insurance policy’s separate exclusion for “willful and malicious acts” to deny coverage).

In short, State Farm has no duty to provide coverage to Schwich’s criminal conduct due to the policy exclusion pertaining to “willful and malicious acts” of the insured. Accordingly, State Farm respectfully asks this Court to reverse the district court’s determination and find that State Farm has no duty to defend or indemnify Schwich in the wrongful death lawsuit.

V. THE DISTRICT COURT SHOULD HAVE FOLLOWED RULINGS IN OTHER JURISDICTIONS DENYING INSURANCE COVERAGE FOR CRIMINAL CONDUCT

The purpose of a liability policy like Schwich’s is to provide protection for damage caused by the insured’s accidental conduct. See, e.g., *Western World Ins. Co. v. HD Eng’g Design & Erection Co.*, 419 N.W.2d 630, 635 (Minn. Ct. App. 1988). Consequently, exclusions relating to intentional conduct or willful and malicious conduct of the insured have been upheld and applied to cases for public policy reasons. See *State Farm Fire & Cas. Co. v. Williams*, 355 N.W.2d 421, 423 (Minn. 1984); *Smith v. Senst*, 313 N.W.2d 202, 203–04 (Minn. 1981).

In Minnesota, courts agree that public policy prohibits the insuring of intentional conduct. See *Neises*, 598 N.W.2d at 712–13 (finding coverage denied for grave robbing and corpse mutilation because such coverage is not

within insured's expectation of coverage); *Williams*, 355 N.W.2d at 423 (holding that no coverage exists for sexual assault on handicapped adult where "neither the insured nor the insurer in entering the contract contemplated coverage against claims arising out of nonconsensual sexual assaults"); *R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995) (ruling that intentional act exclusion and public policy barred coverage for transmission of herpes due to unprotected sex because "[w]e refuse to promote the abdication of personal responsibility by providing insurance coverage . . . "); *Nat'l Union Fire Ins. Co. v. Gates*, 530 N.W.2d 223, 227 (Minn. Ct. App. 1995) (finding that foster parent's physical and sexual abuse not covered as a matter of public policy).

While no Minnesota court has addressed the public policy issue of whether distribution of drugs known to be dangerous and illegal falls within the class of acts for which insurance coverage should be denied as a matter of law, the *Greenfield* and *Baer* courts provide helpful analyses.

In *Greenfield*, the Pennsylvania Superior Court stated that there were "compelling public policy reasons" for denying insurance coverage. 805 A.2d at 630. The court noted that the insured was effectively asking the court to "help provide insurance for heroin dealers." *Id.* It rejected this position, stating that "it should not be the public policy of this Commonwealth to insure the sale of such a notoriously dangerous and illegal narcotic, limited only by an express clause denying such coverage." *Id.* Based on the foregoing, the Superior Court reversed the trial court and held that sound public policy (in addition to the

intentional act exclusion) barred coverage. *Id.* The Pennsylvania Supreme Court subsequently upheld the Superior Court's decision, finding that Greenfield's policy did not provide coverage "as a matter of overriding public policy." 805 A.2d at 866.

In *Baer*, the U.S. District Court explicitly stated that insurance coverage should not be extended to individuals who furnish illegal drugs as a matter of public policy:

As an additional and alternative basis for this holding, the Court finds that the administration or provision of Schedule I controlled substances by an unlicensed individual is in that category of activities that carries with it an inherent danger of injury. Recently, in relation to cases of sexual assault and child molestation, courts have held that there are certain acts from which an intent to harm may be inferred. Because of the significant physiological and neurological effects of controlled substances, and the danger inherent in their unsupervised use, the Court finds that the furnishing of Schedule I drugs is also in this category. Public policy precludes the provision of insurance coverage for those who choose to engage in inherently harmful activities of this nature.

745 F.Supp. at 599.

Schwich's conduct should not give rise to insurance coverage as a matter of public policy. Similar to the insureds in *Greenfield* and *Baer*, Schwich is effectively asking this Court to assist in reducing the risks faced by illegal drug suppliers. State Farm submits that the strong public policy interest in eliminating illegal drug use, particularly methamphetamine use, would greatly undermined if it were required to provide insurance coverage for Schwich's conduct in this case. Clearly, there is no evidence that either State Farm or Schwich

contemplated coverage for such acts at the time of entering into the contract for insurance. The public policy in favor of eliminating the distribution of dangerous and illegal drugs cannot be overstated. A reversal of the trial court's decision would place those who choose to use and distribute methamphetamine on notice that they do so at their own risk and that they do not have the protection of insurance for their criminal conduct.

CONCLUSION

Insurance coverage does not exist so that those who knowingly provide others with dangerous and illegal substances may avoid responsibility for their harmful and illegal conduct. This Court should follow the well-reasoned and thoughtful decisions from other jurisdictions that have refused to allow insurance coverage for the provision and distribution of illegal narcotics. A ruling in favor of insurance coverage sets a dangerous policy of insuring drug dealers against the harm they cause to society.

For any or all of the reasons addressed above—because Schwich's conduct does not constitute an "occurrence," because one of two exclusions clearly apply to deny coverage, or because it is in the public interest to refuse to provide insurance coverage to drug dealers who willfully supply others with drugs which are understood to be dangerous and illegal—this Court should reverse the trial court's determination that Schwich is entitled to insurance coverage for his criminal conduct.

Dated: July 30, 2007

MURNANE BRANDT

A handwritten signature in cursive script, reading "Scott G. Williams". The signature is written in black ink and is positioned above a horizontal line.

C. TODD KOEBELE, #17287X

WILLIAM L. MORAN, #177167

SCOTT G. WILLIAMS, #349410

Attorneys for Appellant State Farm

30 East Seventh Street, Suite 3200

St. Paul, Minnesota 55101

(651) 227-9411

(651) 223-5199 (Facsimile)

CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Appellant certifies that this Brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 9,894 words, excluding the Table of Contents and the Table of Authorities.

MURNANE BRANDT



C. TODD KOEBELE, #17287X
WILLIAM L. MORAN, #177167
SCOTT G. WILLIAMS, #349410
Attorneys for Appellant State Farm
30 East Seventh Street, Suite 3200
St. Paul, Minnesota 55101
(651) 227-9411
(651) 223-5199 (Facsimile)

758710.1