

STATE OF MINNESOTA
IN COURT OF APPEALS

No.: A07-1736

SECURA Supreme Insurance Company,

Plaintiff-Respondent,

vs.

MSM, Patrick Thomas McArdle,
Suzanne Marie McArdle,

Defendants,

and

Jaclyn Patricia Larson,

Defendant-Appellant.

APPELLANT'S BRIEF & 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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ISSUES

1. Whether the trial court erred as a matter of law in determining that the severability clause did not create coverage for the parents' negligence whether or not their son acted criminally.

The trial court held in the negative

Apposite Authority: See *Travelers Indemn. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888 (Minn. 2006); *Watson v. United Services Automobile Ass'n*, 566 N.W.2d 683, 691-92 (Minn. 1997).

2. Whether the trial court erred as a matter of law in determining that the criminal act exclusion as written was triggered by the son's prior criminal conviction, so as to make irrelevant the litigation of his mental state in the victim's civil case.

The trial court held in the negative.

Apposite Authority: See *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003)(child whose babysitter was convicted of intentionally causing a shaking injury to the child, was not barred from re-litigating the issue of the assailant's intent in the child's civil case that sought homeowner's coverage from the assailant's insurer to compensate for the child's injuries), *citing* RESTATEMENT (SECOND) OF JUDGMENTS, § 85, Comment f (2d ed. 1982)(victim may re-litigate in a civil claim the mental status of a criminal who causes them injury even when the assailant is convicted of a crime of intent in a criminal setting).

STATEMENT OF THE CASE & FACTS

This is a declaratory judgment action over whether a homeowners' insurer must indemnify its insureds for a personal injury claim. The insurer was styled as the plaintiff and the insureds and claimant under the policy were denominated as "defendants" below.

The Plaintiff insurer, Secura, insured the McArdle family - - including a juvenile in their home referred to herein as MSM. The policy covered for acts of negligence by MSM or his parents that resulted in personal injury to others. The McArdles had experienced some behavioral issues with the juvenile MSM, but nonetheless purchased for him a knife collection.

On the morning of August 12, 2004 "MSM, stabbed . . . Jaclyn Larson with a buck knife which [he] . . . obtained from [his parents] . . . as one of numerous knives in a collection that . . . [they had] purchased for him." McArdles' Affidavit, ¶ 2 (A-1). As a result of the stabbing incident, Jaclyn Larson sustained serious injuries, *id* , and sued both MSM and his parents, alleging that the McArdles negligently supervised MSM and negligently entrusted the knife collection to him. *Id.*, ¶ 3 (A-1). In this latter regard, the McArdles admitted that

as a result of our actions and inactions in allowing our minor son to collect knives and allowing him the access to this collection without restriction we believe that there was a strong likelihood of a finding of negligence by a jury in a civil action brought by Jaclyn Larson against us.

Id., ¶ 4 (A-1). When Secura "refused to indemnify us with respect to that civil action brought by . . . Jaclyn Larson," the McArdle family "entered into a Miller Shugart Agreement with her." seeking to limit their personal exposure by assigning Larson any claim they may have

against Secura under the applicable policy. *Id.*, ¶ 5 (A-2).

The parents testified that they “never expected or intended bodily harm to come to . . . Jaclyn Larson.” and that they “did not reasonably expect or intend any bodily injuries to Jaclyn Larson by virtue of our actions or inactions or by virtue of the actions or inactions of MSM.” *Id.*, ¶ 6 (A-2).

Larson maintained that regardless of what MSM had intended, she could access coverage for her injuries under Secura’s policy with MSM’s parents as their conduct was not intentionally wrong, but merely negligent in improvidently furnishing knives to a troubled youth.

Secura defended under a “criminal acts” exclusion in the McArdle’s policy, which barred liability coverage for bodily injuries under the personal injury or medical payments endorsements when a bodily injury “[r]esults from the criminal acts of any [i]nsured.” Secura Contract. Exclusion 1(a)(3), *attached as Exhibit to Affidavit of Robert P. Christensen* (emphasis omitted) (A-112).¹ The parties reserved the issue of MSM’s state of mind and whether or not he was capable of forming the intent to act for a later date,² and instead

¹ The exclusion also exempted coverage for “intentional” acts or those for which the consequences should be foreseen from an intentional act. Secura Contract, Exclusion 1(a), *attached as Exhibit to Affidavit of Robert P. Christensen* (excluding coverage when a bodily injury “(1) Is expected or intended by any Insured; [or] (2) May reasonably be expected to result from the intentional acts of any insured” in addition to when it “(3) Results from the criminal acts of any Insured.”)(emphasis omitted) (A-112).

² In *State Farm v Wicka*, 474 N.W.2d 324, 331 (Minn. 1991), the Minnesota Supreme Court said that,

focused solely on the “criminal act” exclusion.

Larson also noted that the McArdles’ policy with Secura had a “severability” clause that said Secura would treat each insured under the policy separately when assessing coverage:

Severability of Insurance.

This insurance applies separately to each insured. This condition will not increase our [*sic*]

Secura Contract at 60, Severability Clause, *attached as* Exhibit to Affidavit of Robert P. Christensen (emphasis omitted) (A-118). The phrase ends in mid-sentence, but Larson maintains it required a separate analysis as to each insured regarding whether coverage would be extended under the bodily injury provisions of the personal injury or medical payment

for the purposes of applying an intentional act exclusion contained in a homeowner’s insurance policy, an insured’s acts are deemed unintentional where, because of mental illness or defect, the insured does not know the nature or wrongfulness of an act, or where, because of mental illness or defect, the insured is deprived of the ability to control his conduct regardless of any understanding of the nature of the act or its wrongfulness.

Id. at 331. Under *Wicka*, conduct falls outside the scope of an intentional act exclusion if “because of mental illness or defect the insured is deprived of the ability to control his conduct.” because for the intentional act exclusion to apply, the tortfeasor’s conduct must be shown to “be voluntary, originating from [the] insured’s own free will.” *Id.* at 330. For example, in *B.M.B. v State Farm Fire & Cas. Co.*, 664 N.W.2d 817 (Minn. 2003), when a mentally ill man sexually assaulted his victim, the court ruled there was a genuine issue of material fact as to whether the insured’s acts were “unintentional” because he was a “paraphile” which created an irresistible impulse to act with sexual aggression due to a mental illness creating a “lack of control” over his actions. The complex factual issue of MSM’s state of mind was not addressed below. Whether he could form intent or not was thus never resolved.

endorsements or would be withheld under the “criminal acts” exclusion.

Secura brought a declaratory judgment action seeking to exclude coverage under the “criminal acts” exclusion and arguing that the severability clause was irrelevant, because that coverage extending provision had to be read in concert with the exclusion to coverage, and the exclusion provided no coverage when bodily injury “[r]esults from the criminal acts of any [i]nsured.”³ Their preferred reading would exclude coverage to the parents for their negligent conduct so long as MSM acted criminally, even if each insured was entitled to a “separate” analysis of coverage owed to them. Secura argued that since MSM plead guilty to acts of attempted murder as an Extended Jurisdiction Juvenile, his conduct was inherently “criminal” regardless of whether or not he was capable of formulating any “intent,” and thus coverage should be denied to him and to his parents, even though their conduct was only negligent and had not been criminal.

Larson responded in three ways, arguing:

1. Whether or not there was coverage for MSM, his parents were also separate insureds under the policy - - which had a “severability clause” making coverage available to each insured separately, rather than denying it to all for the uncovered actions of one - - and they were accused in her civil claim of negligently facilitating the assault by buying, giving and allowing MSM to have a knife collection despite his mental instability, and that their improvident supervision of him was an act of negligence that would make the parent’s amenable to a negligence claim whether or not coverage for MSM’s criminal act was provided, and she would thus have coverage for the claim against the

³ Secura Contract, Exclusion 1(a)(3), *attached as Exhibit to Affidavit of Robert P. Christensen (emphasis omitted)*(A-112).

parents in any event,⁴

2. She had not yet had the chance to resolve the issue of whether MSM had committed a “criminal act” in her civil case and as she was not in privity with him at the time of his criminal conviction, and his prior conviction for crimes should not estop her pursuit of a civil claim against him as privity between she and MSM is required for *res judicata* from the criminal conviction to apply to her civil claim,⁵ and
3. Under the terms of the subject policy, the “criminal act” exclusion barred coverage only if the injury “resulted from” a criminal act, and since the issue of the assailant’s state of mind was left unresolved factually - - *i.e.*, the injury could have “resulted from” a mental defect as opposed to a criminal act - - the availability of coverage should not be foreclosed simply based on the existence of a criminal act, without complete factual resolution of the “mental defect” issue.

Secura responded that:

⁴ Larson cited the case of *American Nat Fire Ins. Co. v Estate of Fournelle*, 472 N.W.2d 292, 294 (Minn. 1991), under which “each insured must be treated as if each were insured separately, applying exclusions individually as to the insured for whom coverage is sought.” Here the criminal act exclusion purports to cut off coverage for all insureds if any one insured does a bad act. Larson argued that should be read as contradictory to the grant of coverage by the severability clause, and thus create an ambiguity that should be construed against the drafter, or to violate the insured’s reasonable expectations of separate coverage. *See Tower Ins. Co. v Judge*, 840 F. Supp. 679, 692-93 (D. Minn. 1993)(where a bad actor has not intended to commit a criminal act, their “reasonable expectation” of coverage defeats operation of the “criminal act” exclusion in a Secura policy as a matter of law).

⁵ *See Illinois Farmers Ins Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003)(child whose babysitter was convicted of intentionally causing a shaking injury to the child, was not barred from re-litigating the issue of the assailant’s intent in the child’s civil case that sought homeowner’s coverage from the assailant’s insurer to compensate for the child’s injuries). *citing* RESTATEMENT (SECOND) OF JUDGMENTS, § 85, Comment *f* (2d ed. 1982)(victim may re-litigate in a civil claim the mental status of a criminal who causes them injury even when the assailant is convicted of a crime of intent in a criminal setting)

1. While a “severability clause” existed in the policy, it should not be read as creating separate coverages, but rather it should be legally overridden by language in the criminal act exclusion that implies that the criminal act of one insured denies coverage to all of them, thereby depriving the parents of coverage for their negligent supervision,⁶
2. The criminal act exclusion should be enforced to deny coverage by the mere fact that a criminal conviction had been achieved against MSM, and
3. There is no appreciable difference between an exclusion that is triggered when an injury “results from” a criminal act or one that “arises out of” such an act, and the exclusion for injuries “arising out of” criminal acts has been applied in similar settings.

The matter came before Washington County District Court Judge Gregory G. Galler on cross motions for summary judgment seeking his legal resolution of the meaning of the insurance contract. By order dated July 11, 2007, Judge Galler agreed completely with Secura’s position and ordered summary judgment in favor of Secura and against Jaclyn Larson.

This is a timely appeal as of right, pursuant to MINN.R.CIV.APP.P. 103.03(a) from the final judgment entered pursuant to the trial judge’s order. On appeal Larson seeks reversal of the summary judgment determination based on errors of law committed by the trial judge in his construction of the terms of the insurance policy.

⁶ Secura cited to *Travelers Indemn. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888 (Minn. 2006), for the proposition that one insured’s conduct can affect coverage to other insureds as well, despite a severability clause.

STANDARD OF REVIEW

On appeal from summary judgment, the court determines “whether there are any genuine issues of material fact, and whether the lower court erred in its application of the law.” *Olmanson v LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005). It views the evidence in a light most favorable to the party resisting the motion, here Larson. *See Ruud v Great Plains Supply, Inc.*, 526 N.W.2d 369, 371 (Minn. 1995).

Insurance coverage issues are questions of law that appellate courts review *de novo*. *See Thommes v Milwaukee Ins Co.*, 641 N.W.2d 877, 879 (Minn. 2002); *State Farm Ins Cos v Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992).

Insurance contracts are read as a whole, and interpreted to give effect to what the parties reasonably intended when the contract was formed. *Employers Mut Cas. Co v. Kungas*, 245 N.W.2d 873, 875 (Minn. 1976); *Enterprise Tools, Inc. v. Export-Import Bank of the United States*, 799 F.2d 437 (8th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987).

The insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions. *Domtar v. Niagara Fire Insurance Co*, 563 N.W.2d 724, 736 (Minn. 1997). Insurance contract exclusions are construed narrowly and strictly against the insurer, *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609, 613 (Minn. 2001). and, like coverage, in accordance with the expectations of the insured. *Am. Family Mut Ins Co. v Peterson*, 405 N.W.2d 418, 422 (Minn. 1987).

The words in an insurance contract are to be given their plain meaning by a reviewing

court. See *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). The exception is where the insurance contract clearly spells out a different meaning to the words in the definitions section of the agreement. See *Farkas v. Hartford Accid & Indemn Co.*, 173 N.W.2d 21 (Minn. 1969).

If there is an ambiguity in the language of an insurance contract, the ambiguous term is to be resolved against insurance company that drafted the document. See *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 36 (Minn. 1979). For a term to be deemed ambiguous, it must be shown to be susceptible to two or more meanings. See *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985). The determination of whether a contract is ambiguous is a question of law, and therefore whether extrinsic evidence is admissible to determine the parties' intent "is a threshold question of law for the court." *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). Extrinsic evidence is considered to determine the actual mutual intent of the parties and to effectuate that mutual intent. *McCostis v. Home Ins. Co.*, 31 F.3d 110 (2d Cir. 1994). If extrinsic evidence raises credibility issues regarding the parties' intent, a jury must decide the meaning of the ambiguous term as a fact question. *Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble Co.*, 924 F.2d 633, 637 (7th Cir. 1991).

In construing an insurance contract a court is not to read an ambiguity into a contract so as to create insurance coverage that does not legitimately exist. See *Stein v. National Farmers Union Prop & Cas. Co.*, 161 N.W.2d 533, 537 (Minn. 1968). When the terms in

the contract are ambiguous, however, the result of construing the ambiguity against the insurer as the drafter of the agreement, will result in a declaration of coverage. *See Atwater Creamery Co v Western Nat'l Mut Ins Co.*, 366 N.W.2d 271 (Minn. 1985).

One thing that can legitimately create an ambiguity, however, is an internal inconsistency in the insurance agreement, by which one portion of the contract purports to exclude coverage and yet another portion grants an exception in another applicable exclusion, thereby creating a conflict between the exclusions. *See, e.g., Moorhead Mach. & Boiler Co v Employers Commercial Union Ins. Co.*, 285 N.W.2d 465, 467-68 (Minn. 1979). When such an ambiguity exists, coverage may be conferred on an insured by the exception to the exclusion. *Id*

A reviewing court must also consider what the “reasonable expectations” of an insured would have been in reading the contract as a whole, and enforce those objectively reasonable expectations. *See Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn 1985) While an objective standard of reasonableness applies, the experience and sophistication of the insured are relevant factors to weigh in assessing such expectations. *See Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 327 (Minn. 1993); *American Hoist & Derrick Co. v. Employers of Wausau*, 454 N.W.2d 462 (Minn. App. 1990). Although “[t]he reasonable expectation test is not a license . . . to rewrite the exclusion solely to conform to a result that the insured might prefer,” *Board of Regents of the Univ. of Minn. v Royal Ins. Co* 517 N.W.2d 888, 891 (Minn. 1994), *overruling Grinnell Mut Reinsur. Co. v. Wasmuth*,

432 N.W.2d 495, 499 (Minn. App. 1988), *review denied* (Minn., Feb. 10, 1989), it may be inferred that each of the three members of the defendant insured's family could have read the severability clause as granting them individual rights to coverage notwithstanding the acts of other family members.

ARGUMENT

I. Severability Clause should have been enforced to Assess Parents' Coverage Separately from that of MSM, whether or not he acted "Criminally"

Under *American Nat. Fire Ins. Co. v. Estate of Fournelle*, 472 N.W.2d 292, 294 (Minn. 1991), "each insured must be treated as if each were insured separately, applying exclusions individually as to the insured for whom coverage is sought." Here the criminal act exclusion purports to cut off coverage for **all** insureds if **any one** insured does a bad act. That should be read as contradictory to the grant of coverage by the severability clause, and thus create an ambiguity that should be construed against the drafter, or to violate the insured's reasonable expectations of separate coverage.

Since contradictory provisions in a policy are legally viewed as creating ambiguities and ambiguities are construed against the insurer and in favor of the person seeking coverage, and since exclusions are narrowly construed and coverage provisions are broadly construed, Larson maintained that the severability clause should have been enforced to her benefit.

The trial court adopted Secura's argument and disagreed, ruling that *Fournelle* was distinguishable and that the case of *Travelers Indemn. Co. v. Bloomington Steel & Supply Co.* 718 N.W.2d 888 (Minn. 2006), was the better authority. In *Bloomington Steel*, the court dealt with a case in which the owner of a corporation named Cecil Reiners struck a visitor to his business property on the head, causing injury. The victim, Padilla, sued Reiners for assault and battery and sued Reiner's corporation, Bloomington Steel for *respondeat superior*, negligent hiring, negligent retention, and negligent supervision. Bloomington Steel's insurer,

denied any obligation to defend or indemnify Reiners in the claim and brought a declaratory judgment action seeking to establish the lack of coverage under the policy. The court of appeals held that, given Reiners' history of violent behavior, Bloomington Steel must be held to have "expected" the damages resulting from the injury to Padilla, but the supreme court concluded that nothing in the policies issued by Travelers to Bloomington Steel required that Reiners' knowledge of his own history of violence be imputed to Bloomington Steel, and so the supreme court reversed and remanded for further fact findings.

Under the policy at issue in *Bloomington Steel*, Travelers was required to pay for bodily injury caused by any insured, though coverage was excluded when bodily injury would be expected or intended from the standpoint of the insured, but the policy also had a "separation of insureds" clause which said that "this insurance applies: [(1)] As if each Named Insured were the only Named Insured; and [(2)] Separately to each insured against whom claim is made or 'suit' is brought." *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 695 N.W.2d 408, 409, 411 (Minn. App. 2005).

The supreme court said that ,

The language of the Travelers' policies requires that Reiners and Bloomington Steel be considered separately. Under the terms of the policies, each policy applies "as if each Named Insured were the only Named Insured" and "separately to each insured against whom claim is made or 'suit' is brought." As we observed in *Utica Mutual Insurance Co. v. Emmco Insurance Co.*, 309 Minn. 21, 31, 243 N.W.2d 134, 140 (1976), such a severability clause requires that coverage exclusions be construed only with reference to the particular insured seeking coverage. Because it is Bloomington Steel that seeks coverage here, the exclusion for bodily injury expected or intended by "the insured" is limited to bodily injury expected or intended by Bloomington Steel

itself .

The language of the Travelers' policies excludes coverage for bodily injury expected or intended from the standpoint of "the insured." Travelers could have made clear that it was not insuring Bloomington Steel for the risk of an intentional act committed by Reiners in at least two different ways. Instead of excluding coverage for bodily injury expected or intended from the standpoint of "*the*" insured, the Travelers' policies could have excluded coverage for bodily injury expected or intended from the standpoint of "*an*" or "*any*" insured. As we held in *Watson v. United Services Automobile Ass'n*, 566 N.W.2d 683, 691-92 (Minn. 1997), an exclusion in a fire insurance policy for loss caused by the act of "an insured" excludes coverage for co-insured spouses, even when they are not responsible for the property damage at issue, although such clauses conflict with the Minnesota standard fire insurance policy and are therefore unenforceable under Minn. Stat. § 65A.01 (2004).

718 N.W.2d at 890 (emphasis in original) (footnote omitted).

The *Watson* case cited in *Bloomington Steel* is itself quite informative of to these issues and bears some closer scrutiny. *Watson* went on to **grant** coverage to the innocent spouse because denial of coverage to her would have conflicted with the minimal coverage allowed under a fire insurance policy. It thus avoided application of the exclusion. *Watson* is thus **not** a case that rules that use of the "any insured" language in an exclusion will result in denial of coverage even when a "severability" clause is present. Significantly, the *Watson* case did not mention whether there was a "separate insureds" or "severability" clause. We thus know two things from *Watson*:

1. That when a policy has exclusions that contradict the required minimum coverages of a state law, the exclusions will not be enforced, and
2. A policy using the phrase "any insured" is deemed unambiguous in the **absence** of a severability clause.

What we can take away from *Watson* for use in this case is merely that:

1. As - - unlike a fire insurance policy - - state law does not exact minimum insurance coverage for personal injuries under a homeowners' policy, the language of the **policy itself** rather than a state law must be used to resolve whether there is or is not coverage here.
2. As the Secura policy here, - - unlike that in *Watson* - - **did** have a severability or separate insured clause, the exploration of coverage must go beyond the mere fact that a policy has an exclusion using the "any insureds" language. The mere presence of the "unambiguous" phrase "any insureds" in an exclusion does not end the debate. The issue is whether that otherwise "unambiguous" phrase **becomes** ambiguous in the presence of contradictory language in a "severability" or "separate insureds" clause.

The sole focus of the trial court in resolving the coverage issue in **our** case was on the fact that Secura had chosen to employ the "*any insured*" language referenced in the *dicta* of *Bloomington Steel* in its criminal act exclusion. See Order and Memorandum of July 11, 2007, at 6 (A-136) (citing court of appeals version of *Watson* for the proposition that the "intentional act provisions . . . exclude coverage for all insureds when any one insured . . . intentionally causes the loss.").

If we turn to *Bloomington Steel* for more insight on how a court should resolve the question of the interaction of an "any insured" exclusion with a "severability" clause, we are not materially rewarded. The supreme court in *Bloomington Steel* did have *dictum* suggesting that better drafting by Travelers may have avoided coverage by employing a reference to "any insured" instead of "the insured" in its exclusion, but it must be remembered that *Bloomington Steel* involved a policy that did **not** have an "**any insured**" clause, but only a "**the insured**" clause. making the reference to an "any insured" clause in *Bloomington Steel* merely *dicta*.

Moreover, since the phrase “the insured” is not inherently ambiguous, but depends for its understandability on the **context** of the contract as a whole, and since *Bloomington Steel* ruled that it **was** ambiguous to employ a “the insured” clause in a policy that also had a “severability” clause because the two could be read as contradicting one another, we know that a separate inquiry **should** be made in each case as to whether use of an otherwise unambiguous phrase - - like “any insured” or “the insured” - - **becomes** ambiguous when used in a policy that has a severability clause.

The trial court said that “Here, the McArdles are seeking coverage,”⁷ and ruled that even considering the severability clause, it was proper to look at all those seeking coverage under the policy as being equally affected by the “criminal act” exclusion because it refers to a criminal act by “any insured” as withholding coverage. That phrase, however, could just as readily be read as withholding coverage from **the** “any insured” who did the bad act and conferring it to those innocent insureds who did not. In other words, the policy could be read to withhold coverage from “any insured” who commits a criminal act regardless of their status as a named insured or as a mere resident relative of the household. It could be read as excluding coverage for criminal acts of “any insured” regardless of their status as an adult or as a minor. But it could also be read so that the one for whom coverage is withheld is **the** one among “any insured” who actually commits the criminal act, and not a criminally innocent insured who merely commits a negligent act.

⁷ See Order and Memorandum of July 11, 2007, at 7 (A-137).

To deny coverage for **all** insureds based on the criminal act of one, when the policy says that each insured's conduct and coverage will be judged separately, is a contradictory approach that creates an ambiguity and coverage should not be denied in the presence of the ambiguity.⁸ If draftsmanship could have avoided an ambiguity, it would have been for Secura to say simply: *the criminal act of any insured denies coverage to all insureds notwithstanding language in the severability clause to the contrary*. It didn't say that. It is wrong to read the policy that way, when the construction of insurance policies is to favor coverage and read exclusions narrowly and against the drafter.

Insurance contracts are contracts of adhesion. *See Canadian Universal Ins. Co. v. Fire Watch, Inc.* , 258 N.W.2d 570, 574-75 (Minn. 1977). Because policy exclusions are strictly construed against the insurer, and because Secura could have unilaterally included provisions in its policies that would have unambiguously excluded coverage for **all** family members when only one of them acted criminally, the language of the Secura policy should not have

⁸ The case law is not clear as to how a severability clause properly interfaces with an exclusion that purports to deny coverage for the act of "any insured." In *Utica Mutual Insurance Co v Emmco Insurance Co* , 309 Minn. 21, 31, 243 N.W.2d 134, 140 (1976), the court held that a severability clause requires that coverage exclusions be construed only with reference to the **particular** insured seeking coverage. While MSM is seeking coverage for what Secura has characterized as a criminal act, his parents are seeking coverage for negligence, which is specifically covered under the policy. Insurance contracts are contracts of adhesion, requiring their careful construction and enforcement. *See Canadian Universal Ins Co. v. Fire Watch, Inc* , 258 N.W.2d 570, 574-75 (Minn. 1977) Prior to *Bloomington Steel*, the only real case to address this was *Watson v. United Services Automobile Ass'n*, 566 N.W.2d 683, 691-92 (Minn. 1997), which has already been distinguished above. This matter should be treated as a question of first impression.

been read to deny coverage to the parents for the conduct of their son.

II. The Finding of a “Criminal Act” by MSM is not *Res Judicata* to Larson

Regardless of how this court resolves the first question, Larson should still have been able to litigate the issue of whether or not MSM had committed a “criminal act” toward her;⁹ she should not have been bound by MSM’s conviction under EJJ of a crime of attempted murder. She was not in “privity” with MSM in the EJJ proceedings and is not bound by rules of *res judicata* by MSM’s acts in confessing to or being convicted of a wrongful act. He does not get to victimize her twice.

First, case law establishes that a criminal conviction based on a plea of guilty cannot collaterally estop those in a civil action because it is not an adjudication on the merits, like a conviction based on a trial would be. *See, e.g., Glens Falls Group Ins. Corp. v. Hoium*, 294 Minn. 247, 252, 200 N.W.2d 189, 192 (1972) (holding that a judgment of conviction based on a plea of guilty had no collateral-estoppel effect in a civil action); *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 552-57, 163 N.W.2d 289, 293-94 (1968) (collateral estoppel from

⁹ For example in the case of *Tower Ins. Co. v. Judge*, 840 F. Supp. 679, 692 (D. Minn. 1993), an identical Secura “criminal act” exclusion was construed in which the defendant had committed an irresponsible act resulting in the accidental electrocution of his drunken friend and he pled “no contest” to criminal charges. Since a “no contest” plea - - though it resulted in a conviction - - is not evidence of a crime under the rules of evidence. *id*, the court said that it could not **alone** serve as evidence of a “criminal act,” and that “Secura still must establish that [defendant] committed a criminal act” by other means. *Id* Secura put in no other evidence on its insured’s criminality than the pleas, arguing that the plea itself should be deemed as dispositive of the “criminal act” requirement. Secura’s argument was expressly rejected in *Judge*.

a criminal conviction based on a plea will only result in collateral estoppel if the wrongdoer seeks to profit from his crime).

Second, a criminal conviction by a jury or fact-finder does not bind the “crime” victim in civil proceedings she has pursued. In *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003), the Court confronted the civil claim of a child whose babysitter was convicted by a trial court based on factual findings that the babysitter had intentionally shaken the child and caused her injury. The *Reed* court cited with approval *Massachusetts Prop. Ins. Underwriting Ass’n, v. Norrington*, 481 N.E.2d 1364, 1367 (Mass. 1985) (victim is not in “privity” with her victimizer for purposes of “privity” requirement of collateral estoppel), and distinguished portions of the RESTATEMENT (SECOND) OF JUDGMENTS, § 85, Comment *e* (2d ed. 1982), on which the *Reed* court of appeals panel had relied to deny coverage, finding Comment *f* more on point. That Comment provides:

f Judgment for prosecution. preclusion against third party. Under some circumstances the criminal judgment may be preclusive as to issues not only against the defendant in the criminal case but also against those “in privity” with him, as privity is defined in §§ 46, 48, 56(1), and 59-61, or analogous rules. The relationship with the criminal defendant must be sufficiently close that it would be unjust to allow the third party to prevail notwithstanding the judgment for the prosecution.

Illustration 10 to Comment *f* of the RESTATEMENT was found by the supreme court in *Reed* to be particularly relevant to resolving the issue of the victim of a criminal convicted for a crime of intent should be allowed to sue. That illustration says:

D inflicts a blow on *X* as a result of which *X* dies. *D* is convicted of intentional homicide. *P*, administrator of *X*'s estate, brings an action against *D* for

wrongful death, alleging *D*'s act was negligent. *I* had previously issued a policy of liability insurance to *D*, insuring liability for *D*'s negligent acts but excluding intentional acts. In *P*'s action against *D*, *P* is not precluded by the criminal conviction from showing that *D*'s act was negligent rather than intentional.

RESTATEMENT (SECOND) OF JUDGMENTS § 85, Comment *f*, Illus. 10 (2d ed. 1982). Under *Reed*, the victim gets to re-litigate the nature of her assailant's state of mind and the nature of his conduct, notwithstanding even the fact-finder's conviction of an insured for a crime in the criminal case.

This means the trial court erred in our case by suggesting a final disposition against coverage was achieved by the mere fact of the insured's conviction, as the trial court should have allowed the victim of the crime to re-litigate the issue of whether a crime was committed and hence to look into the defendant-insured's capacity to form intent. That issue was reserved by the parties, but the trial court decreed a final disposition notwithstanding the issue of intent.

In *B M B v State Farm Fire & Cas Co.*, 664 N.W.2d 817 (Minn. 2003), a mentally ill man sexually assaulted his victim. The court ruled that where there is a genuine issue of material fact as to whether the insured's acts were "unintentional" by virtue of his being mentally ill, citing *State Farm v. Wicka*, 474 N.W.2d 324, 331 (Minn. 1991), which allows for the possibility that the conduct may fall outside the scope of an intentional act exclusion if "because of mental illness or defect the insured is deprived of the ability to control his conduct." because for the intentional act exclusion to apply, the tortfeasor's conduct must be shown to "be voluntary, originating from [the] insured's own free will." *Id.* at 330. The basis

for the claim of mental illness was a finding that the assailant was a “paraphile” or part of “a small subset of sexual offenders” including pedophiles. Because of this mental illness, it was the contention of plaintiff’s expert that the assault was an irresistible impulse which resulted from the attacker’s “lack of control.” The *B.M.B.* court held that this created a jury issue.

How would the jury resolve the question of whether MSM was capable of forming criminal intent or of wrongful conduct here? We don’t know, because that issue was reserved. The trial court here held mental status to be irrelevant to its disposition of the case because it felt the prior criminal conviction of MSM to be conclusive - - not only as to MSM, but as to his parents and even as to Larson. That is contrary to Minnesota law under *Reed*. The victim in a later civil case gets to re-litigate the factual predicates to coverage. Larson was denied that opportunity by the trial court’s ruling. That ruling was an error of law under *Reed* and must be reversed. When it is reversed, it has the effect of not only requiring remand on the issue of coverage as to MSM, but as to his parents as well, regardless of how the “severability clause” argument is disposed of.

III. If Larson’s Injuries “Resulted from” a Mental Aberration of MSM and not from a “Criminal Act” it was an Error of Law for the Trial Judge to Preemptively Deny Coverage under the Criminal Act Exclusion

By ruling that MSM’s “criminal act” was dispositive of coverage, rather than affording Larson the chance to relitigate that issue and to resolve factually whether his conduct resulted from an aberrant mental state, the trial court unfairly deprived Larson of the chance for her day in court and for compensation.

Moreover, if MSM truly lacked the mental capacity to understand the impropriety and criminality of his actions, then the “reasonable expectations” of MSM and his parents would be for coverage, notwithstanding the criminal act exclusion. In *Tower Ins. Co. v Judge*, 840 F. Supp. 679 (D. Minn. 1993), the court construed the identical “criminal act” exclusion in another Secura policy, where the insured’s son had participated in a foolish prank that accidentally resulted in the electrocution of a friend while asleep in a bed in the subject home. The court noted that “criminal act” exclusion made intent irrelevant “for the criminal act exclusion to apply,” *id.* at 691, but said that the state of the record showed irresponsible and reckless conduct, but not a intentional level of mentality and said that “unless bodily injury was a reasonably expected result of the act” from the actor’s perspective, it would be “objectively unreasonable to expect” operation of the criminal act exclusion. *Id.* at 692. The court thus ruled the Secura “criminal act” exclusion unenforceable as a matter of law under the “reasonable expectations” doctrine. *Id.* at 691-92. While a rational and sane person would readily understand that repeatedly stabbing a sleeping girl with a knife was both morally wrong and would result in injury or death, what about MSM and his mental perceptions, given his state of mind? Again, we don’t know, because that issue was reserved until later, yet the trial court ordered a final disposition of the entire case, deeming MSM’s mental state irrelevant to any issue.

That was a further error, as under *Judge*, a miscreant’s mental status has a direct bearing on the “reasonable expectations” of coverage under the Secura “criminal act”

exclusion. The decision should be reversed and the matter of MSM's intent litigated to a factual finding, after which the court may enter findings on reasonable expectations of an insured with those mental incapacities.

CONCLUSION

The trial court erred by failing to allow Larson to re-litigate the issue of MSM's "criminality" in attacking her. Under *Reed*, she was not legally bound by either his plea of guilt or even his criminal conviction. Since MSM's state of mind could readily account for his incomprehensible assault on Larson with the knives entrusted to him by his parents, as she slept her injuries may not be due to a "criminal act" by anyone, but due to MSM's mental delusions. The case should be reversed and remanded on that ground alone.

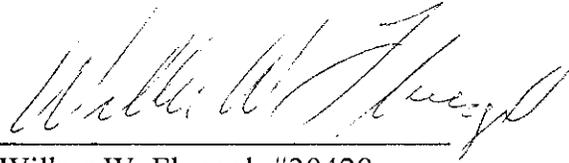
Moreover, no prior case has - - apart from speculative *dicta* - - dispositively addressed the proper interface between exclusionary language in an insurance policy that purports to bar claims by "any insured" to coverage when the same policy contains a "severability" clause purporting to require that each insured's request for coverage be separately addressed. Given that otherwise unambiguous words may have ambiguous meanings when the entire policy is read as a whole, the inherent conflict in those two policy provisions should have been held to require Secura to extend coverage. The reasonable expectations of any individual insured should be to coverage in the absence of their commission of a exclusionary act or omission. Ambiguity requires reading the policy in favor of coverage.

The trial court failed to do that, and thus the presence of a "severability" clause

required extension of coverage and its denial may be reversed on that ground as well.

Respectfully submitted,

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