

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 REPLY BRIEF

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ARGUMENT

I. Summary.

A. Respondent asserts Negligent Supervision claims are always Excluded when the “underlying conduct” is Excluded.

This brief replies to the relevant arguments raised by Respondent SECURA, which asserts that: (1) every insured under a policy is always excluded from coverage, regardless of their criminal innocence, so long as injury “results from” the “criminal act” of any one insured, as claims for “negligent supervision” of a criminal wrongdoer are always excluded anytime the “criminal” is barred from coverage,¹ and -- somewhat repetitiously -- that (2) the “bodily injury” here “resulted from” a “criminal act” -- a deed for which “intent” is irrelevant, given the “inherently criminal” nature of the attack.

Here, the Respondent overlooks the supreme court precedent of *Republic Vanguard Ins. Co. v. Buehl*,² and its application in *Redeemer Covenant Church v. Church Mut. Ins. Co.*,³ which recognize the **viability** of negligent supervision claims even when a co-insured actor is excluded from coverage.

B. Respondent Concedes the Central Point of Appellant’s Claim

Most important is what the Respondent chose not to argue. Respondent essentially

¹ SECURA also argued that the term “any insured” is not ambiguous and that a severability clause does not override an exclusion. These issues were adequately addressed in Appellant’s principal brief and will not be argued further here.

² 295 Minn. 327, 204 N.W.2d 426 (1973).

³ 567 N.W.2d 71 (Minn. App. 1997), *review denied* (Minn., Oct. 1, 1997).

ignored Appellant's argument that the trial court erred as a matter of law by failing to allow Appellant the opportunity to litigate the issue of the assailant's **criminality** in her civil case, given the rules of *res judicata*⁴. Hence, this argument must be taken as **conceded** by Respondent.⁵

The significance of conceding the right of Appellant in her own right to **litigate** the criminality of her attacker's conduct, is that it **eliminates** Respondent's right to defend under the "criminal act exclusion," which was the only exclusion asserted as the basis for summary judgment.⁶ Necessarily, summary judgment must thus be reversed.

II. Respondent's Argument that "All Insureds" are barred by the Misdeeds of One, Relies on the Central False Assumption that "Negligent Supervision" Claims Never have a Life Separate from the Acts of the Supervised Actor.

Key to Respondent's argument against coverage to the parents is the bald assertion that Minnesota law never extends homeowner's liability coverage to defend parents accused of the negligent supervision of a child when the child's conduct bars him from coverage. The argument is premised on an unpublished federal district court case called *Illinois Farmers*

⁴SECURA argued only that the conduct was "inherently criminal," an argument it lost in *Tower Ins. Co. v. Judge*, 840 F.Supp. 679 (D. Minn. 1993).

⁵ Issues not briefed on appeal are waived. See *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

⁶ Respondent also argued that its criminal act exclusion was free to operate based on criminal negligence and did not require "intent" to operate. This is an apparent attempt to avoid reversal because of the unlitigated fact issue of the attacker's capacity to form intent. It fails, however, for two added reasons: (1) the crime the attacker was convicted of, involved a crime of "intent" and (2) Respondent's "inherently criminal" argument essentially asks the appellate court to infer intent as a matter of law.

Ins. Co. v. M.S.,⁷ in which Judge Kyle did his best to survey state and federal law on the issue of negligent supervision and concluded:

The rule that emerges from these cases is that when an insurance policy excludes coverage for an injury “arising out of” or “resulting from” certain specified conduct (i.e., using a car, intentional acts, assault, battery, or bodily injury), and such conduct occurs, coverage is also excluded for the insured’s negligent supervision if the injury would not have occurred *but for* the specified conduct.⁸

First, Judge Kyle cites in support of this proposition only those cases that he believes fit with his pronouncement,⁹ and neither of the homeowner’s coverage cases decided by the Minnesota appellate courts that expressly rule to the contrary: *Republic Vanguard Ins. Co. v. Buehl*,¹⁰ and its application in *Redeemer Covenant Church v. Church Mut. Ins. Co.*¹¹ Second, the “authorities” upon which he relies are cases - - just as his parenthetical notes - - involve the use of a **car**, or **intentional** acts involving assault and battery, or where coverage is excluded for any **bodily injury**. This mix of state and federal cases does not address the issue of negligent supervision by parent homeowners for failing to supervise the acts of an insured

⁷ 2005 WL 741898, unpublished (D. Minn. 2005), *attached at* RA-8.

⁸ *Id.* at * 5, *reprinted at* RA-11 (emphasis by Judge Kyle).

⁹ *Id.*, *citing* *Faber v. Roelofs*, 250 N.W.2d 817, 821-22 (Minn. 1977); *St. Paul Sch. Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41, 46 (Minn. 1982); *Fillmore v. Iowa Nat’l Mut. Ins. Co.*, 344 N.W.2d 875, 880 (Minn. App. 1984); *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881 (8th Cir. 1996); *Amos v. Campbell*, 593 N.W.2d 263, 269 (Minn. App. 1999).

¹⁰ 295 Minn. 327, 204 N.W.2d 426 (1973).

¹¹ 567 N.W.2d 71 (Minn. App. 1997), *review denied* (Minn., Oct. 1, 1997).

child who may - - or may not - - have committed a criminal act in the eyes of a civil court.

In Judge Kyle's defense, his "holding" is obviously focused on the fact pattern of the case before him: an intentional sexual assault case where no mental defect was alleged to be possessed by the assailant. Our case is different. The parties **reserved** the issue of the attacker's state of mind, because of obvious fact issues on his mental state, and Appellant specifically **preserved** below her right to litigate the issue of criminality in her own right and not to have it implied as a matter of *res judicata* from her assailant's conviction. Those are really big differences. They mean that neither intent nor criminality has yet been judicially ascertained and cannot therefore form the basis for a summary judgment.

Also, since our case does not involve a car, or admitted intent or an exclusion barring coverage for any bodily injury, the cases that are far more important to a proper disposition of our case are two that Judge Kyle glossed over in the *M.S.* decision because they were factually less relevant to the case he was adjudicating. They are factually much closer, however, to our case.

First is the supreme court decision of *Republic Vanguard Ins. Co. v. Buehl*,¹² which involved an allegation that parents negligently permitted their son access to the dangerous instrumentality of a motor scooter, despite his "known propensity [of] . . . bad driving habits."¹³ While the underlying act involved driving - - an act excluded from coverage under

¹² 295 Minn. 327, 204 N.W.2d 426 (1973).

¹³ 295 Minn. at 330, 204 N.W.2d at 428.

the homeowner's policy - - the insured parents were sued "for relief predicated on the theory of common-law negligence,"¹⁴ as under RESTATEMENT (SECOND) OF TORTS, § 316, adopted by the *Buehl* court, "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent" causing harm to others or creating "an unreasonable risk of bodily harm to them," if the parent "has the ability to control his child" and is aware of the need and opportunity to do so."¹⁵ The *Buehl* court reversed the trial court's grant of summary judgment to the homeowner's insurer, because "liability of the parent arises from his active parental misconduct in creating an unreasonable risk of harm to others by **placing the instrumentality into the hands of a minor child**, who the parents know, or **ought to know**, is unable to utilize it without endangering innocent third parties."¹⁶

Here, the record shows the admission that the insured parents knew or ought to have known that given his mental aberrations, giving their son a collection of hunting and attack knives created an unreasonable risk of harm to others by placing those instrumentalities into the hands of their minor child.

Coverage was allowed in *Buehl* even though the child's misdeed was the ultimate cause of the claimant's injury because the efficient cause that set the act in motion was negligence by the parents relating to the supervision of their son and of the furnishing of the

¹⁴ *Id.*

¹⁵ *Id.*, n. 3, *quoting* RESTATEMENT (SECOND) OF TORTS, § 316 (2d ed. 1965).

¹⁶ 295 Minn. at 332, 204 N.W.2d at 429 (emphasis added).

instrumentality of injury to him.

Respondent argues essentially: but an assault by the son was the thing causing injury. How does a knife assault occur without knives? In *Buehl* the supreme court reasoned that a scooter injury can't occur without giving the boy the scooter, and allowed coverage against the parents for facilitating that. Such should have been the trial court's ruling here too. This is even clearer given the cases cited by *Buehl*, including another Minnesota Supreme Court decision involving a parental gift of a dangerous instrument to their son: *Clarine v. Addison*.¹⁷ In *Clarine*, the court recognized the availability of such a cause of action when a minor child was given a .22-caliber pistol by his father and the boy shot a neighbor child.¹⁸ *Buehl* also cited with approval the New Jersey case of *McDonald v. Home Ins. Co.*¹⁹ - - an insurance coverage decision in which the court reversed a trial court's grant of summary judgment to the insurer - - saying,

We hold that Home was obliged to defend the McDonalds against the Dorman action. The [a]ction against the McDonalds was not based upon "the ownership, maintenance, operation, use, loading or unloading of . . . automobiles . . ." even though the immediate cause of the [i]njury and death . . . was [their son] Mickey's operation of the automobile. The action was based on their alleged negligence in failing to supervise and control their child, knowing of his violent and dangerous habits."²⁰

¹⁷ 182 Minn. 310, 234 N.W. 295 (1931).

¹⁸ 182 Minn. at 311, 234 N.W. at 296.

¹⁹ 97 N.J. Super. 501, 235 A.2d 480 (1967).

²⁰ 97 N.J. Super. at 503, 235 A.2d at 482, *quoted in Buehl, supra*, 295 Minn. at 332, 204 N.W.2d at 429.

The *Buehl* precedent cannot be ignored on our facts even if it was properly overlooked by Judge Kyle in his formulation of a rule applicable to the federal district court case he was addressing.

The *coup de grace* for the Respondent's position is administered by the language SECURA chose to put into its exclusion. Insurance policy terms are construed against the drafter who chose them.²¹ Here, the exclusion seeks to bar coverage for injuries that “**result from**” a criminal act. The Minnesota case of *Redeemer Covenant Church v. Church Mut. Ins. Co.*,²² makes clear that “**arising out of**” exclusions are broader and that even they may end in coverage to certain insureds and not to others.

First, *Redeemer* explains the reason that coverage may have been barred in some cases and not in *Buehl* or others, noting that “[t]he critical distinction between *Buehl* and *Faber*, it seems lies in the broader sweep of an exclusion containing the words “arising out of.”²³ The court said that “[t]he distinction between exclusions that contain the words ‘arising out of’ and those that do not may be a fine one, but it is appropriate and sound.”²⁴ According to the supreme court, “‘arising out of’ means ‘originating from,’ or ‘having its origins in,’ ‘growing

²¹ 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).

²² 567 N.W.2d 71 (Minn. App. 1997), *review denied* (Minn., Oct. 1, 1997).

²³ 567 N.W.2d at 77.

²⁴ *Id.*

out of,' or 'flowing from.'"²⁵ As was noted in Appellant's principal brief, "results from" implies a direct causal nexus or closer association, so it applies in more narrow circumstances and excludes fewer claims than the broader "arising out of" exclusionary language would.

Here SECURA chose the "results from" language over the "arising out of" language. Absent "arising out of" language, the Court in *Redeemer* ruled that while insurance coverage was properly withheld from a pastor who sexually assaulted 17 women in his congregation, it was **improper** to withhold coverage from the employing church for claims that it **negligently supervised** him. While the pastor's licentious acts deprived him of coverage under the policy's "criminal act" exclusion, the "action against Redeemer was not based on criminal or licentious acts of Redeemer"²⁶ and since they instead alleged negligent hiring, supervision and retention of someone with the pastor's known propensities, coverage was held to be available to the victimized women in those negligence claims against the supervising entity. So too, should the negligent supervision claim have been afforded coverage here.

It was an error of law for the trial court to grant summary judgment in favor of the insurer against coverage for the parent's negligent supervision of M.S.M. That decision must be reversed and the matter remanded for trial.

²⁵ *Associated Indep. Dealers, Inc. v. Mutual Serv. Ins. Co.*, 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975).

²⁶ 567 N.W.2d at 77.

III. However the “Criminal Act” of M.S.M. is Characterized, Appellant never was given the chance to prove whether or not it was “Criminal,” and the Conviction of M.S.M. is not Res Judicata as to her

The key case relied on by Appellant for the proposition that she was entitled to litigate M.S.M.’s criminality in her own right was *Illinois Farmers Ins. Co. v. Reed*.²⁷ Respondent’s only citation to *Reed*, is at page 29 of its brief, where it is cited for the proposition that it merely involved a question over “intent.” While the criminal act in *Reed*, was an intentional one, the court’s holding is that a finding against a victimizer in his criminal case is not res judicata against his victim in her civil case and she gets to re-litigate the coverage-triggering issue in her own name.

Reed involved a child whose babysitter was convicted of intentionally causing a shaking injury to the child. The supreme court reversed a lower court decision and held that the child was not barred from re-litigating the issue of the assailant’s actions in the child’s civil case that sought homeowner’s coverage from the assailant’s insurer. The decision is based not on any fact-specific issue like “intent,” but on the dictates of the RESTATEMENT (SECOND) OF JUDGMENTS, § 85, Comment *f* (2d ed. 1982), which expressly says that a 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.

Here M.S.M. was convicted of attempted first degree murder in violation of MINN. STAT. § 609.185, which requires as an essential element attempting to take the life of a

²⁷ 662 N.W.2d 529 (Minn. 2003).

“human being with premeditation and with intent to effect the death of the person or of another,” MINN. STAT. § 609.185, subd. a(1), which is clearly a crime of intent. Since intent was not litigated in the civil case below the record in the civil case is empty on the question of both intent and criminality, so it was judicially improper for the trial court to impose a “finding” of intent or of criminality. The issue of intent was expressly **reserved** in the civil declaratory judgment action given the complex psychological issues of the disturbed state of M.S.M.’s mind.

Respondent’s only effort to refute this, is to argue that some cases are so extreme that intent is inferred as a matter of law, citing cases involving the intentional firing of weapons from which the intent to injure is inferred as a matter of law, **absent** proof of a limited state of the actor’s mind to appreciate the difference between right and wrong or to understand the nature of his acts.

That latter *caveat* is expressly the reason why the case must be remanded so that the Appellant - - having been once victimized by M.S.M. is not re-victimized by the judicial system’s attempt to deprive her of even one day in court to litigate the extent of M.S.M.’s mental capacity, and of the culpability of his parents for furnishing him with the instruments of her savage injuries.

The trial court’s grant of summary judgment should be reversed.

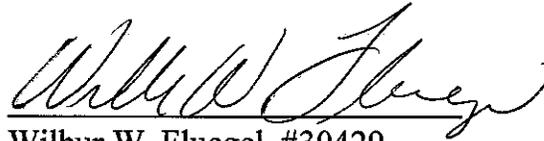
CONCLUSION

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, Minnesota precedents that are considerably more on point than the foreign or unpublished federal district court cases relied on by Respondent, support the conclusion that in a claim against homeowner's coverage, a suit seeking damages for negligent supervision is allowed even when coverage is properly withheld for the conduct of the unsupervised actor.

Respectfully submitted,

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