

NO. A07-1736

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State of Minnesota  
**In Court of Appeals**

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SECURA Supreme Insurance Company,  
*Plaintiff-Respondent,*

vs.

M.S.M., Patrick Thomas McArdle,  
Suzanne Marie McArdle,  
*Defendants,*

and

Jaclyn Patricia Larson,  
*Defendant-Appellant.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

**I. When an Exclusionary Clause in an Insurance Policy Uses the Unambiguous Term “Any Insured” and Further Excludes Coverage for Injury That “Results From” an Excluded Cause, Does That Exclusion Negate Coverage for All Insureds When Any Individual Insured’s Actions Fall Within the Scope of the Exclusion?**

Recognizing that a severability clause cannot override unambiguous policy language, the trial court held: In the affirmative.

*Travelers Indemnity Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888 (Minn. 2006)

*Faber v. Roelofs*, 311 Minn. 428, 250 N.W.2d 817 (1977)

*BP America, Inc. v. State Auto Property & Cas. Ins. Co.*, 148 P.3d 832, 2005 OK 65 (Okla. 2005)

*Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8<sup>th</sup> Cir. 1996)

**II. Is the Criminal Act Exclusion in Secura’s Policy Applicable as a Matter of Law Since the Exclusion Does Not Contain an Intent to Injure Requirement and Appellant’s Injuries Resulted From an Act That Was Inherently Criminal?**

The trial court held: In the affirmative.

*Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. App. 1994)

*Grinnell Mut. Reins. Co. v. Olinger*, No. C3-95-207, 1995 WL 507551 (Minn. App. Aug. 29, 1995)

*Allstate Ins. Co. v. Juniel*, 931 P.2d 511 (Colo. App. 1996) *cert. denied* (Colo. Feb. 18, 1997)

## STATEMENT OF THE CASE

Appellant, Jaclyn Larson, appeals from a judgment of the trial court entered on July 11, 2007 pursuant to an Order granting summary judgment to Respondent, SECURA Supreme Insurance Company ("Secura"). The case is a declaratory judgment action arising out of a brutal assault committed upon Appellant by Secura's insured, Defendant M.S.M.. Secura, which issued a homeowners policy to M.S.M.'s parents, Patrick and Suzanne McArdle, sought a declaration that the intentional and criminal act exclusions in its policy excluded coverage for all insureds regardless of the theory of liability upon which the claims against them were based.

On March 5, 2007, the trial court, the Honorable Gregory G. Galler presiding, directed the parties to submit all legal issues relating to coverage, the resolution of which were not dependent on M.S.M.'s mental state, to the court upon cross-motions for summary judgment. In accordance with that Order, the parties brought cross-motions for summary judgment that were heard by the trial court on April 13, 2007. In its motion, Secura requested summary judgment and a declaration of no coverage upon the following grounds: 1) the language in the exclusions at issue and in particular the exclusions' reference to "any insured," unambiguously excludes coverage for all insureds if any one insured commits an excluded act; and 2) because the criminal act exclusion in its policy contains no intent to injure requirement and Jaclyn Larson's injuries resulted from a criminal act, the exclusion applies as a matter of law. The trial court agreed, and by Order dated July 11, 2007 granted Secura's

motion in its entirety, denied Appellant Larson's cross-motion, and declared that Secura's policy bars coverage for all claims made by Larson against the McArdles. Judgment was entered pursuant to the Order on July 11, 2007. Larson timely appealed.

## STATEMENT OF FACTS

Appellant, Jaclyn Larson, was asleep in her bedroom on August 12, 2004 when Defendant M.S.M. entered the home, went to Larson's bedroom and began to stab her as she slept. Complaint at App. 6.<sup>1</sup> Using a buck knife, M.S.M. repeatedly stabbed Larson – more than twenty times – in the face, legs and abdomen. *See* R.App. 5 (Response to Admission Nos. 2, 3). M.S.M. was arrested shortly after the incident and subsequently charged with Attempted First Degree Murder under Minn. Stat. § 609.185, First Degree Assault under Minn. Stat. § 609.221, subd. 1, and Burglary under Minn. Stat. § 609.582, subd. 1(c). *See* Delinquency Petition attached as Exhibit C to March 16, 2007 Affidavit of Andrea E. Reisbord.<sup>2</sup> On September 23, 2004, he pled guilty and was convicted of Attempted First Degree Murder by the Washington County District Court, Judge Kenneth Maas. *See* Sentencing Order, Exhibit C to March 16, 2007 Affidavit of Andrea E. Reisbord.

At the time of the August 12, 2004 incident, Patrick and Suzanne McArdle were named insureds on a policy of insurance, Policy No. PX 256 43 48, issued by SECURA Supreme Insurance Company (“Secura”) that included homeowners coverage with a personal liability limit of \$300,000 per occurrence. *See* App. 33. Under the “HOMEOWNERS

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<sup>1</sup> All references to “App.” herein are to the Appendix to Appellant’s Brief. References to “R.App.” shall refer to the Appendix to this Respondent’s Brief.

<sup>2</sup> Because M.S.M. was a minor at the time of the assault, records of the criminal proceedings were filed with the trial court under seal. In order to preserve the confidentiality of these records, they are not included in Respondent’s Appendix.

INSURANCE PORTION, SECTION II (Liability)” “Coverage E - Personal Liability,”

provisions in the policy, Secura agrees as follows:

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

1. Pay up to our limit of liability for the damages for which you or a *family member* are legally liable. Damages include prejudgment interest awarded against the insured; and
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . . .

See App. 111. The personal liability coverage afforded by the policy, however, does not apply to bodily injury:

a. Which:

- (1) Is expected or intended by any *Insured*;
- (2) May reasonably be expected to result from the intentional acts of any *insured*; or
- (3) Results from the criminal act of any *insured*.

App. 112. The term “insured” is defined for purposes of the homeowners insurance to mean the named insureds (Patrick and Suzanne McArdle) and any of their “family members,” with “family members” defined to mean a resident of the named insured’s household related to the named insured by blood, marriage or adoption. App. 61, 93. M.S.M., as a member of Patrick and Suzanne McArdles’ family, is an insured under the Secura policy.

In or about December 2005, Jaclyn Larson commenced a lawsuit in Washington County District Court against M.S.M. and his parents, Patrick and Suzanne McArdle. App. 5. Larson alleged in her Complaint that M.S.M.'s conduct proximately caused her injuries and that the McArdles' failure to supervise and exercise adequate control over M.S.M. was also a proximate cause of her injuries. *See* Complaint, *generally* at App. 5-12. The Complaint alleged two causes of action against Patrick and Suzanne McArdle for "negligent exercise of parental responsibility" and "negligent entrustment" of a dangerous weapon to M.S.M. App. 6-9.

The McArdles tendered their defense of the Larson personal injury action to Secura requesting indemnity for the claims asserted therein. Secura accepted the tender of defense by Patrick and Suzanne McArdle, providing them a defense subject to a reservation of rights, and promptly commenced the present declaratory judgment action. R.App. 1. The tender of defense on behalf of Defendant M.S.M. was denied. The parties to the underlying personal injury action ultimately entered into a *Miller-Shugart*<sup>3</sup> settlement pursuant to which Larson released the McArdles from any personal liability, in exchange for which the McArdles agreed to withdraw their Answer and allow the entry of a default judgment against them, provided Larson seek recovery only from available insurance. *See* Agreement at App. 17-19.

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<sup>3</sup> *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

## STANDARD OF REVIEW

On appeal from a grant of summary judgment, the reviewing court must determine whether there are genuine issues of material fact presented by the parties and whether the trial court erred in its application of the law. *Offerdahl v. University of Minnesota Hospital & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). When the material facts of a case are not in dispute, a reviewing court need not defer to the trial court's application of the law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

The interpretation and construction of an insurance policy is a matter of law that a trial court can properly determine on summary judgment and is reviewable *de novo* on appeal. *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 886-87 (Minn. 1978). In Minnesota, the terms of an insurance policy establish the rights and obligations of an insurer and its insureds. *Bobich v. Oja*, 258 Minn. 287, 104 N.W.2d 19, 24 (1960). The rules regarding the construction of an insurance policy are well established. Notably, Minnesota follows the plain meaning rule of insurance contract interpretation under which an insurance policy:

must be construed according to the terms the parties have used, and the language must be given its ordinary and usual meaning so as to give effect to the intention of the parties as it appears from the contract.

*Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 294 Minn. 236, 199 N.W.2d 806, 811 (1972). An insurance policy must be read as a whole, and its individual sections taken in the context of the entire document. *State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). Exclusions in a policy are as much a part of the contract as other parts thereof and

must be given the same consideration in determining the scope of coverage. *Bobich*, 104 N.W.2d at 24-25. Finally, it is not the business of the courts in this state to rewrite insurance contracts. *Lessard v. Milwaukee Ins. Co.*, 496 N.W.2d 852, 857 (Minn. App. 1993), *aff'd* 514 N.W.2d 556 (Minn. 1994). Thus, while reasonable doubts as to the meaning of the language in an insurance policy are to be resolved against the insurer, the courts are not permitted to read an ambiguity into the plain language of an insurance policy in order to construe it against the insurer. *Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 558 (Minn. 1994); *Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986).

## ARGUMENT

### **I. The Trial Court Properly Concluded That Secura's Broadly-Worded Intentional and Criminal Act Exclusions Unambiguously Exclude Coverage for All Insureds If Any One Insured Commits an Excluded Act.**

The trial court's conclusion that the criminal act exclusion in Secura's policy barred coverage for Appellant's negligence claims against Patrick and Suzanne McArdle was made upon two grounds, only one of which is addressed in Appellant's Brief, but either one of which, alone, is sufficient to sustain the judgment. First, accepting an argument that was raised by Appellant herself, the trial court properly concluded Secura's use of the term "results from" in its criminal act exclusion required the court to focus on the direct or immediate cause of the injury for which coverage was sought and substantially broadened the scope of the criminal act exclusion to include claims for negligent supervision. This conclusion is supported by over 30 years of Minnesota case law.

Second, consistent with the overwhelming body of case law nationally, and with recent pronouncements by the Minnesota Supreme Court, the trial court gave effect to Secura's use of the specific term "any insured" in its exclusions, concluding that the term was unambiguous and intended to exclude coverage for all insureds based on acts committed by any one insured. Finally, the trial court rejected Larson's argument that a severability clause in the policy should override the clear and unambiguous language of the exclusions at issue.

Because all of these conclusions by the trial court are amply supported by Minnesota law, its decision that the criminal act exclusion would apply to the negligent supervision and negligent entrustment claims against Patrick and Suzanne McArdle must be affirmed.

**A. When an Insurance Policy Excludes Coverage for Injury That Results From the Criminal Acts of Any Insured, and the Insured's Child Injures Another Through a Criminal Act, No Coverage Exists for the Insured's Negligent Supervision of the Child Because the Injury or Damages Would Not Have Occurred "But For" the Criminal Act.**

Absent from Appellant's Brief is any discussion regarding Secura's use of the term "results from" in its criminal act exclusion, and of the trial court's conclusion that this language required the court to focus on the immediate cause of Appellant's injuries – the stabbing by M.S.M. – as opposed to the negligent supervision by the McArdles. Appellant has made no effort to address this independent basis for the trial court's decision, because it was she who made the argument in the trial court. And as she apparently must realize, there simply is no counter argument.

Minnesota law regarding the application of policy exclusions employing the terms "arising out of" or "resulting from" to claims of negligent supervision is well developed. The issue was first addressed by the Minnesota Supreme Court over thirty years ago in *Faber v. Roelofs*, 311 Minn. 428, 250 N.W.2d 817 (1977). In that case, the Minnesota Supreme Court examined a school district's general liability policy that excluded coverage for bodily injury "arising out of" the use of any automobile. *Id.*, 250 N.W.2d at 819-20. Faber was injured when he slipped and fell under the wheels of a school bus. The Fabers successfully sued the

school district alleging, among other things, negligent failure to supervise the children and students, and negligence in establishing bus routes and bus loading procedures. *Id.*, 250 N.W.2d at 819-20 and 821. Although the primary holding in *Faber* was that the insurer was estopped from denying coverage because it controlled the defense through the appeals process without a reservation of rights, the Minnesota Supreme Court necessarily had to address the issue of coverage in considering whether the school district was prejudiced by the insurer's continuing defense of the case. *Id.*, 250 N.W.2d at 820. The court observed that the policy excluded bodily injury arising out of the use of a bus, and notwithstanding the claim that the school district negligently supervised the children at the school, the plaintiff's injuries arose out of the use of a bus. *Id.* Distinguishing one of its earlier decisions, *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 204 N.W.2d 426 (1973), the Minnesota Supreme Court commented that the exclusion in the policy before it "[did] not apply merely to the use of an automobile, but to bodily injuries arising out of the use of an automobile." *Id.* at 822 (emphasis in the original). The court concluded "it matters not that the [negligent supervision claim] is a claim of general negligence; the injuries arose out of the use of the bus and the exclusion would apply." *Id.* at 821-22.

Five years later, the Minnesota Supreme Court again examined an insurance policy exclusion for bodily injury "arising out of" the use of any automobile. See *St. Paul School Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41, 44 (Minn. 1982). As in *Faber*, the parents of a student injured by a school bus sued the district for negligently establishing

loading procedures and for negligent supervision. *Id.*, 321 N.W.2d at 43. The Minnesota Supreme Court again found the exclusion to be applicable, noting that, for the exclusion to apply, “all that need be established is a ‘but for’ causal relation exists between the use of the vehicle and the injury.” *Id.* at 46 (citing *Faber*, 250 N.W.2d at 822-23).

In *Fillmore v. Iowa National Mutual Ins. Co.*, 344 N.W.2d 875 (Minn. App. 1984), the insured was sued for negligent supervision after his son caused a deadly automobile accident. Relying on an exclusion in its homeowners policy for bodily injury “arising out of” the use of a motor vehicle, the insurer denied any duty to defend or indemnify the insured parents against claims of negligent supervision. *Id.*, 344 N.W.2d at 877. The Minnesota Court of Appeals, citing *Faber* and *Columbia Transit Corp.*, agreed and held that “where the policy provides that it excludes coverage for injuries *arising out of the use* of a motor vehicle, claims for negligent supervision . . . are excluded from coverage thereunder.” *Id.* at 880 (emphasis in the original).

More recently, the United States Court of Appeals for the Eighth Circuit, applying Minnesota law, interpreted a homeowners policy that excluded coverage for injuries or damages “resulting from” acts that are “intended or expected to cause bodily injury.” See *Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8<sup>th</sup> Cir. 1996). The court did so in the context of a claim for damages against a 16-year-old for assault and battery (a rape) and intentional infliction of emotional harm, and against his parents for their separate negligence in failing to prevent the rape through the proper supervision and control of their son. *Id.* at 880.

Affirming the trial court's summary judgment to Allstate, the Eighth Circuit concluded that the homeowners policy did not provide coverage for the negligence claims against the parents. The court first noted that coverage was barred by a joint obligations clause in the policy, but it also specifically held that **even without the joint obligations clause**, the policy's exclusion for damages "resulting from" intentional misconduct precluded recovery for negligent supervision. *Id.* at 881. Relying on the "but for" test articulated in *Faber and Fillmore*, the court concluded that, even assuming the Steeles had failed to adequately supervise their son, the claimants would not have been injured "but for" the son's intentional conduct. *Id.* at 881. "Therefore, the harm 'resulted from' an intentional act, and [the claimant's mother] cannot circumvent the policy's intentional conduct exclusion by suing the Steeles for negligent supervision." *Id.* at 881.

The Minnesota Court of Appeals again focused on whether exclusionary language in a policy excluded coverage for injury "arising out of" a prohibited act, or merely excluded certain acts, to resolve a coverage dispute in *Redeemer Covenant Church of Brooklyn Park v. Church Mutual Ins. Co.*, 567 N.W.2d 71 (Minn. App. 1997), *rev. denied* (Minn. Oct. 2, 1997), **the sole case upon which Appellant relied before the trial court**. At issue in *Redeemer* was whether an insurer, Atlantic Mutual, had an obligation to defend and indemnify the insured church against allegations of negligent retention and supervision of a pastor who sexually abused and molested fifteen parishioners. Atlantic's policy incorporated an exclusion stating that the insurance did not apply to "any dishonest,

fraudulent, criminal or malicious act or omission of any insured.” *Id.*, 567 N.W.2d at 77. The district court held that the exclusion did not apply to Redeemer, because Redeemer was neither accused nor guilty of criminal acts or licentious behavior, but was instead accused of negligence in its supervision of the pastor. *Id.* The court of appeals agreed. In evaluating the scope of the exclusion, the court of appeals focused on the supreme court’s prior decisions in *Buehl* and *Faber*. Siding with the church, the *Redeemer* court noted that the distinction between the two prior cases, and the explanation for their divergent results, lay in the “broader sweep of an exclusion containing the words ‘arising out of’” – words that were present in the policy at issue in *Faber* but not in *Buehl* or in the policy before it. *Id.*, 567 N.W.2d at 77. The court of appeals noted that Atlantic Mutual could have similarly drafted its exclusions to cover injury or liability arising out of criminal acts or licentious behavior, as opposed to merely excluding the acts themselves. *Id.* at 77-78. Appellant Larson echoed this conclusion in her Memorandum to the trial court: “As in *Redeemer*, [Secura] ‘Atlanta] could have drafted its exclusions to cover injury or liability arising out of criminal acts or licentious behalf, but it did not do so.”” *See* Defendant Larson’s Memorandum in Support of Summary Judgment Motion, p. 7. In fact, Secura did.

A case decided a year after *Redeemer* significantly undercut Appellant’s argument. Specifically, in *Mork Clinic v. Fireman’s Fund Ins. Co.*, 575 N.W.2d 598 (Minn. App. 1998), the court of appeals held that the term “resulting from,” used in Secura’s policy, “has the same ordinary and plain meaning as ‘arising out of.’” *Id.*, 575 N.W.2d at 602. As the court

of appeals further observed in *Mork*, courts that have dealt with exclusions for injuries “resulting from” or damage that “results from” an excluded act have treated the provision in the same fashion as courts that have analyzed exclusions for injuries “arising out of” excluded acts. *Id.* In those cases, like the cases interpreting exclusions for injuries “arising out of” excluded conduct, the courts have held that if the immediate cause of injury constitutes the conduct defined in the exclusion, coverage is defeated for all insureds. *Mork*, 575 N.W.2d at 601.

The issue again came before the Minnesota Court of Appeals in *Amos v. Campbell*, 593 N.W.2d 263 (Minn. App. 1999), which examined the applicability of an insurance policy’s exclusion for “any claims arising out of . . . assault or battery” to claims brought against a school district for negligent supervision after a teacher sexually assaulted a student. The Minnesota Court of Appeals held that the exclusion, and a similar exclusion for “claims arising out of bodily injury” barred coverage for the parents’ negligence claims. *Amos*, 593 N.W.2d at 268. It reasoned that, despite the parents’ attempt to focus the case on the school district’s alleged negligence, the policy’s “arising out of” language required the court to instead focus on the direct cause of the original claim – the sexual assault. *Amos*, 593 N.W.2d at 267. Then, focusing on the sexual assault, as opposed to the alleged negligence, the Minnesota Court of Appeals held that the case against the school district would not have existed “but for” the assault of, and bodily injury to, the student. *Id.* at 269. As a result, the

exclusions for claims arising out of assault or battery or bodily injury barred coverage for the alleged negligent supervision. *Id.*

Finally, and most recently, the broad sweep of a policy exclusion for bodily injury “arising out of” or “resulting from” certain enumerated conduct was recently addressed by United States District Court Judge Richard Kyle in *Illinois Farmers Ins. Co. v. M.S.*, 2005 WL 741898 (D. Minn. Mar. 31, 2005). Judge Kyle thoroughly examined the development of the law regarding insurance policy exclusions and negligent supervision claims, addressing all of the cases discussed above. He then distilled this line of cases into a single succinct holding:

The rule that emerges from these cases is that when an insurance policy excludes coverage for 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.

*M.S.*, 2005 WL 741898, \*5 (emphasis in the original). As an example, Judge Kyle noted that when an insurance policy excludes coverage for claims “arising out of” assault, battery, or bodily injury, and an insured’s employee assaults someone, no coverage exists for the insured’s negligent supervision of that employee because the injured party’s claim would not have existed but for the assault. *Id.* (citing *Amos*, 593 N.W.2d at 269). Likewise, when an insurance policy excludes coverage for injuries or damages “resulting from” acts intended to cause bodily injury, and the insured’s child intentionally causes bodily injury to someone, no coverage exists for the insured’s negligent supervision of the child because the injury or

damages would not have occurred but for the child's intentional misconduct. *Id.* (citing *Steele*, 74 F.3d at 881).

In this case, Secura's policy exclusions not only expansively refer to "any insured," but in addition to excluding bodily injury which is expected or intended by any insured, also excludes coverage for bodily injury which "may reasonably be expected to result from the intentional acts of any insured," as well as bodily injury which "results from the criminal acts of any insured." See App. 112. As discussed in Part II of this Brief, Jaelyn Larson's injury "resulted from" M.S.M.'s criminal act, and further, could reasonably be expected to "result from" his intentional conduct. Accordingly, the trial court correctly concluded that, as in *Steele* and *M.S.*, Larson cannot circumvent Secura's expected injury and criminal act exclusions by suing M.S.M.'s parents for negligent supervision. Under Minnesota law, the policy excludes coverage for the McArdles' alleged negligent supervision of M.S.M. because Larson's injuries would not have occurred "but for" M.S.M.'s intentional and criminal conduct.

**B. Secura's Use of the Term "Any Insured" in Its Policy Exclusions Also Clearly and Unambiguously Indicates That When These Exclusions are Applicable, They Will Be Applied, and Coverage Denied, to All Insureds.**

Although the "resulting from" language in Secura's criminal act exclusion, alone, is sufficient to sustain the trial court's decision, there was a second, equally supported basis for the trial court's ruling. Specifically, the trial court also concluded that Secura's use of the term "any insured" throughout its exclusions clearly and unambiguously expressed an intent

to exclude coverage for all insureds when injury results from the wrongful conduct of “any insured.” Its conclusion that the term “any insured” “clearly and unambiguously excludes coverage for M.S.M., Patrick McArdle and Suzanne McArdle” as a result of M.S.M.’s criminal act is supported by the overwhelming weight of authority nationally, and within Minnesota itself.

It is almost universally accepted that use of the term “any insured” in an insurance policy exclusion unambiguously conveys an intent to exclude coverage for all insureds if any one insured commits a prohibited act. *See, e.g., American Family Ins. Co. v. Corrigan*, 697 N.W.2d 108, 116 (Iowa 2005). *See also BP America, Inc. v. State Auto Property & Cas. Ins. Co.*, 148 P.3d 832, 836, 2005 OK 65, ¶ 10 (Okla. 2005) (citing cases from Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuit Courts of Appeal, federal district courts in Maryland, Hawaii, Oregon, Louisiana, Pennsylvania, Nevada, and the state courts of Iowa, Arizona, Virginia, Maine, Wisconsin, Utah, Colorado, New Hampshire, Massachusetts, Ohio, Oregon, Texas, Washington, New Jersey, Missouri, Illinois, New York and Vermont); *N. Sec. Ins. Co. v. Perron*, 777 A.2d 151, 163 (Vt. 2001) (citing cases from Alaska, Louisiana, Maine, Michigan, New Hampshire, Tennessee, Washington and the Ninth Circuit Court of Appeals); *McCauley Enterprises v. New Hampshire Ins. Co.*, 716 F.Supp. 718 (D. Conn 1989). The rationale for applying the exclusion to all insureds is succinctly stated by the Oklahoma Supreme Court in *BP America, supra*:

The overwhelming number of courts, addressing policy language similar to that at issue here, determines, as a matter of law, that the term “any insured”

in an exclusionary clause unambiguously expresses a definite and certain intent to deny coverage to all insureds - even to innocent parties. . . . These jurisdictions recognize that to impose liability on the insurer would raise coverage where none is intended and no premium was collected. Furthermore, the majority acknowledges that only by ignoring the plain language of the contract relating to “any insured” will an ambiguity be created. . . . Insureds have not been allowed to avoid the clear application of exclusions relating to “any insured” by conjuring up ambiguities nor have they convinced courts to apply tortured interpretations to create them. . . .

*Id.*, 148 P.3d at 836-37, 2005 OK 65, ¶ 10 (citations omitted).

Minnesota is in accord with the majority view. Notably, in *Watson v. United Services Automobile Assn.*, 551 N.W.2d 500 (Minn. App. 1996), *aff’d* 566 N.W.2d 683 (Minn. 1997), the Minnesota Court of Appeals considered whether a fire insurance policy exclusion for intentional acts committed by an insured would deny coverage for an innocent co-insured. The court explained the distinction between “an insured” or “any insured” and “the insured” as follows:

We conclude that the instant policy unambiguously denies coverage for an innocent insured. “The” is a definite article; accordingly, the supreme court in *Hogs Unlimited* concluded that “the insured” did not refer to all insureds. “An” is an indefinite article, however, and in its plain sense means *any* insured. The fraud and intentional act provisions in the instant policy, given their plain and ordinary meaning, exclude coverage for all insureds when one insured commits fraud or intentionally causes the loss.

*Watson*, 551 N.W.2d at 502 (emphasis in the original). The Minnesota Supreme Court affirmed that portion of the court of appeals’ decision, concluding that the “an insured”

language of the policy before it unambiguously barred coverage for **all** insureds, including innocent co-insureds. *Watson*, 566 N.W.2d at 689, 691-92.<sup>4</sup>

Subsequently, the Minnesota Court of Appeals, in an unpublished decision, addressed the distinction in the context of a liability policy. *See Slavens v. American Fire & Cas. Co.*, No. C7-00-1070, 2001 WL 69463 (Minn. App. Jan. 30, 2001). American Fire issued a homeowner's policy to the Barnharts that included a home-daycare endorsement. The Barnharts sought coverage under the policy for claims of negligence, negligent misrepresentation and breach of contract after their son sexually abused one of the children in their care. American Fire's policy, however, excluded coverage for bodily injury arising out of sexual molestation by "**an** insured." *Id.* at \*2. Affirming summary judgment in favor of American Fire, the Minnesota Court of Appeals concluded that the son was "an insured" under the homeowner's policy and, as a result, the exclusion applied. *Id.* The court further rejected the insured's argument that a severability clause in the policy limited application of the exclusion to those instances when the insured seeking coverage is the one who committed the excluded act:

An exclusion may apply only to the particular person committing the designated acts if the exclusion itself delineates a particular individual. Here the sexual molestation exclusion is not negated by the severability clause because the exclusion bars coverage if someone who qualifies as "an insured" under the policy committed acts of sexual molestation. Accordingly, the

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<sup>4</sup> Although concluding that the policy language barred coverage for all insureds, the supreme court ultimately refused to enforce the provision because it conflicted with the statutory requirements for standard fire insurance policies in Minnesota. *Id.*

provision, read in conjunction with the severability clause, bars coverage in this case.

*Id.* at \*3.<sup>5</sup>

Most recently, the Minnesota Supreme Court cited the term “any insured” as precisely the type of language that unambiguously excludes coverage, and should be used in an exclusion when the insurer’s intent is exclude coverage for all insureds based on acts committed by one of those insureds:

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 Association*, . . . an exclusion in a fire insurance policy for loss caused by the act of “an insured” excludes coverage for co-insured’s 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). There is no comparable CGL policy language under Minnesota law and therefore such a clause in the policies issued by Travelers to Bloomington Steel would have been

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<sup>5</sup> A similar conclusion was reached by the Michigan Supreme Court in *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989). Analyzing an intentional act exclusion contained in an insurance contract providing third-party liability coverage, the Michigan Supreme Court engaged in a thorough and comprehensive discussion of the distinctions between “a,” “an,” and “the” insured as used in the policy. *Id.*, 443 N.W.2d at 752-755. It concluded that “an insured” unambiguously refers to “all” or “any” insureds under an insurance policy. *Id.* at 755. The Michigan Supreme Court reached this decision notwithstanding its conclusion earlier in the case that the insurer had a separate and distinct duty to cover each of the insureds. *Allstate*, 443 N.W.2d at 750.

enforceable here and would have barred coverage for Bloomington Steel for Reiners' acts to the extent Reiners was also insured under the policies.

*See Travelers Indemnity Co v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895 (Minn. 2006) (emphasis in the original) (footnote omitted). Despite Appellant's characterization of the court's pronouncement as *dicta*, the supreme court could not have stated its opinion any clearer – an insurer that intends to bar coverage to all insureds based on the acts of one insured can do so by referencing “any insured” in its exclusions. Under *Bloomington Steel* and the cases that preceded it, the trial court properly concluded that the exclusions are enforceable and bar coverage for Patrick and Suzanne McArdle in addition to M.S.M.

**C. The Severability Clause in Secura's Policy Does Not Override or Make an Otherwise Clear and Unambiguous Exclusion Ambiguous.**

Appellant's sole argument with respect to the scope of the intentional and criminal acts exclusion is that, notwithstanding their clear and ambiguous language, the policy exclusions are inapplicable to Patrick and Suzanne McArdle in light of the policy's severability clause, which provides “this insurance applies separately to each insured.” *See Policy*, p. 60. She maintains that since the claims against the McArdles are based, in part, on their independent negligence, that fact, combined with the severability clause, makes the exclusions inapplicable to her claims against them. Appellant's argument, however, is not supported by current case law.

A severability of interest clause requires a policy to be read with reference to the particular insured seeking coverage, as Appellant correctly maintains; but the clause

traditionally has been applied to insurance policy occurrence requirements, and to policy exclusions that refer to “the insured.” See, e.g., Risjord and Austin, “*Who is The insured*” *Revisited*, 28 *Ins.Couns.J.* 100, 101 (1961), quoted in *Utica Mut. Ins. Co. v. Emmco Ins. Co.*, 309 *Minn.* 21, 243 *N.W.2d* 134, 140 (1976). See also *Bloomington Steel*, 718 *N.W.2d* at 894. Where, however, an exclusion intends to exclude coverage for injury that “results from” the prohibited acts of “any insured,” the severability clause should not be applied to narrow an exclusion that was intentionally written in broad terms.

As with the scope of Secura’s exclusion generally, Appellant’s severability argument disregards the trial court’s preliminary finding that the “results from” language in Secura’s policy shifts the focus from the actor to the immediate cause of the injury for which damages are sought.<sup>6</sup> Because of this shift in focus, a severability clause has no impact on the scope of the exclusion. Regardless of the insured for whom coverage is sought, the injury still resulted from the criminal act of an insured.

Moreover, with respect to the court’s findings regarding the use of the term “any insured,” as noted above, the Minnesota Court of Appeals, in *Slavens*, rejected the insured’s argument that a severability clause in an insurance policy limits the application of a policy exclusion, regardless of how that exclusion is worded, to those instances in which the insured seeking coverage is the one who committed the excluded act. *Slavens*, 2001 WL 69463, \*3.

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<sup>6</sup> In this regard, it should be noted that the *Faber* line of cases all involved what appear to be typical commercial general liability, homeowners, and professional liability policies in which one would expect to find a severability clause.

Likewise, in *Bloomington Steel*, the Minnesota Supreme Court highlighted the distinction between an exclusion that employs the term “the insured” and one that broadly refers to “any insured” notwithstanding the fact that the policy at issue, a CGL policy, included a severability clause. *See Bloomington Steel*, 718 N.W.2d at 894-95. It noted that had Travelers “unilaterally included provisions in its policies” referring to “any insured,” such provisions “would have unambiguously exceeded coverage for Bloomington Steel for claims against it resulting from Reiner’s actions.” *Id.* at 895.

Again, Appellant attempts to downplay *Bloomington Steel*’s significance, calling it *dicta* and arguing “that a separate inquiry should be made” as to whether a severability clause renders the otherwise unambiguous term “any insured” ambiguous. The Minnesota Supreme Court, however, already made this inquiry. It began its analysis by holding that “a severability clause requires that coverage exclusions be construed only with reference to the particular insured seeking coverage,” but then went on to note~~x~~ that Travelers could have prevailed, regardless of the severability clause, if instead of excluding coverage for bodily injury expected by “the” insured, the policies had excluded coverage for bodily injury expected by “an” or “any” insured. *Bloomington Steel*, 718 N.W.2d at 894-95. Notwithstanding the supreme court’s obvious awareness that the policy before it included a severability clause, the court concluded that had the exclusion used the term “any insured,” it would have been both unambiguous and enforceable against the particular insured seeking coverage. *Id.* at 895.

This approach, and Secura's position, generally, that a severability clause does not create an ambiguity or permit coverage when an exclusion specifically refers to "any insured," is, again, the majority view. *See BP America, Inc.*, 148 P.3d at 32. *See also EMCASCO Ins. Co. v. Diedrich*, 394 F.3d 1091 (8<sup>th</sup> Cir. 2005); *Corrigan, supra*, 697 N.W.2d at 116-17 (although severability clause requires court to apply criminal act exclusion from the viewpoint of the insured, the plain language of the exclusion mandates the court to consider whether the claims against the insured include as an element conduct by any insured that is a violation of criminal law). Consistent with the manner in which the severability clause traditionally has been applied in Minnesota, these courts reason that the clause's only effect is to alter the meaning of the term "the insured," and not to negate a plainly worded exclusion. *See, e.g., BP America*, 148 P.3d at 841, 2005 OK 65, ¶ 23; *Corrigan*, 697 N.W.2d at 116-17. In concluding that the presence of the severability clause does not create an ambiguity giving rise to insurance coverage when an exclusion is clear, the majority offers, among many others, the following rationales:

- To hold otherwise would effectively nullify exclusions from coverage in any case involving co-insureds - despite a clearly drafted exclusionary provision.
- To find an ambiguity would be to allow severability clauses to trump and render superfluous coverage exclusions.
- Imposing coverage requires a tortured reading of the insurance agreement.
- Imposing coverage would invite collusion among insureds whereby any one insured could make a damage claim caused by any other insured.

- To hold otherwise would result in the specific terms of the exclusionary clause being overridden by a more general severability provision and require the court to ignore and treat as superfluous the term “any” in the policy language.

See *BP America*, 148 P.3d at 840-41, 2005 OK 65, ¶ 21 (and cases cited therein). These considerations are no less applicable in Minnesota than elsewhere.

Finally, *American National Fire Ins. Co. v. Estate of Fournelle*, 472 N.W.2d 292 (Minn. 1991), upon which Appellant also relies, is not applicable as the trial court correctly concluded. In *Fournelle*, American National brought a declaratory judgment action to determine whether it was obligated under a homeowner’s policy to provide coverage to the estate of a father who killed his two sons at a time when the father, who was a named insured on the policy, was not living with the children or his wife. The policy contained the following exclusion:

2. Coverage E – Personal Liability, does not apply to:

\* \* \* \*

- f. Bodily injury to you and any insured within the meaning of part a. or b. of Definition 3. “Insured”.

*Fournelle*, 472 N.W.2d at 293. A heavily divided supreme court ultimately concluded that American National could not rely on the exclusion for bodily injury to “any insured,” because the exclusion itself specifically limited its application to insureds within the meaning of the policy definitions. *Id.* at 295. The court then applied the severability clause to the term “you” used in the policy’s definition of an insured and concluded that because the sons were

not residents of the father's household, they were not "insureds" for purposes of the exclusion. *Id.*

While the *Fournelle* court did discuss the policy's severability of interest clause, it was not in the context of the policy exclusion. Rather, the court's focus was on the interplay between the severability of interest provision and a definition of "insured" that included resident relatives of the named insured.<sup>7</sup> Justice Coyne, who was joined by Justices Simonett and Tomljanovich in her dissent, explained why the claimants and the court majority were required to shift their focus away from the exclusion and to place all of their emphasis on the policy definition of an insured; and in so doing, she highlighted why use of the term "an" or "any" in an exclusion makes a difference:

Certainly, the severability clause has long been understood to clarify the meaning of the term "the insured" when that term appears in a policy exclusion, and especially in an employee exclusion. . . . It is, however, one thing to say that when it appears in an exclusion the term "the insured" means only the person claiming coverage. . . . It is quite something else to say that "the person claiming coverage" should be substituted for the term "any insured" in an exclusion for "bodily injury to you and any insured." In an apparent recognition that such an interpolation would render the exclusion meaningless, (the person claiming coverage has no liability for injury to himself or herself) Joanne does not attempt to make the substitution but instead urges that because Robert Fournelle's estate alone seeks the protection of the policy, the exclusion should be "read" as if Robert were the sole named

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<sup>7</sup> In contrast, when the insured status of an injured party is not based on the party's relationship to the insured seeking coverage, but upon some other designation, an exclusion for injuries to "any insured" is enforceable notwithstanding a severability of interest clause in the policy. See *State Farm Fire and Cas. Co. v. McPhee*, 336 N.W.2d 258 (Minn. 1983). See also *Fournelle*, 472 N.W.2d at 298, n.5 (Coyne dissenting) (noting the *McPhee* policy contained severability clause).

insured. Of course, the “reading” required to support Joanne’s proposed conclusion does not go to the exclusion, but rather to the definition of insured, which must then be “read” to *exclude* the Fournelle sons . . . from the status of insured.

*Fournelle*, 472 N.W.2d at 296-297 (Coyne dissenting) (citations omitted).

In summary, the majority of courts that have addressed the issue have concluded that when an exclusion in a policy, including a liability policy, uses the term “any” or “an” insured, its scope is far broader than if the exclusion merely referred to “the insured” – even in the face of a severability clause. Minnesota follows the majority approach as demonstrated expressly by *Bloomington Steel*, *Watson*, *Slavens* and *McPhee*. The terms of Secura’s policy are unambiguous and exclude coverage for all insureds, regardless of the theories of liability claimed, if the conduct of any one of them falls within the scope of the exclusion. Appellant is a highly sympathetic party; but the Court is not permitted to read an ambiguity into a policy where none exists, and her argument is, therefore, simply unavailing in the face of the holdings in *Bloomington Steel*, *Watson*, *Slavens* and the majority of cases that hold a policy exclusion’s use of the terms “results from” and “any insured” unambiguously bars coverage for co-insureds.

**II. The Trial Court Correctly Found, as a Matter of Law, that Appellant’s Bodily Injury Resulted From a Criminal Act by M.S.M. and Is, Therefore, Excluded.**

In addition to the intentional and expected injury exclusions, Secura’s policy separately excludes coverage for injury that results from the criminal acts of any insured. *See* Policy, p. 54. Appellant was injured as a result of being stabbed over twenty times by an

insured, M.S.M, who was subsequently charged with Attempted First Degree Murder, First Degree Assault, and Burglary, all felony level offenses. His acts were criminal, and as a result, the trial court properly concluded that the criminal act exclusion excludes coverage for Appellant's claims.

**A. The Criminal Act Exclusion in Secura's Policy Has No Intent to Injure Requirement.**

Appellant's argument with respect to the application of Secura's criminal act exclusion is two-fold. First, citing *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529 (Minn. 2003) and *B.M.B. v. State Farm*, 664 N.W.2d 817 (Minn. 2003), Appellant argues that the trial court erred in applying the exclusion as a matter of law, because whether M.S.M. intended to cause injury is an issue of fact, and the fact of his conviction does not collaterally estop Appellant from litigating the issue of his criminal intent. At issue in *Reed*, *B.M.B.* and a third case cited by Appellant, *State Farm v. Wicka*, 474 N.W.2d 324 (Minn. 1991), however, was the application of an intentional act exclusion, not a criminal act exclusion. And unlike the intentional act or expected injury exclusion in its policy, the criminal act exclusion, as worded in Secura's policy, requires no element of intent to injure. See *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. App. 1994). See also *Grinnell Mut. Reins. Co. v. Olinger*, No. C3-95-207, 1995 WL 507551 (Minn. App. Aug. 29, 1995) ("a criminal act exclusion applies whether or not an act was intentional."). This is particularly true when a policy, like Secura's, separates the criminal act exclusion from other exclusions for intentional acts. *Liebenstein*, 517 N.W.2d at 75. Cf. *Grinnell Mut. Reins. Co. v. Ehmke*,

664 N.W.2d 409, 413-14 (Minn. App. 2003) (refusing to apply criminal act exclusion where insured was not charged with any crime and exclusions specifically required intent to cause loss), *rev. denied* (Minn. Sept. 24, 2003). *Reed, B.M.B.* and *Wicka* simply do not apply because Secura is not arguing that Appellant's claims fall within the intentional or expected injury exclusions as a matter of law. As Appellant notes, the application of those exclusions was deferred by the trial court in its March 5, 2007 Order. Rather, Secura's position, accepted by the trial court, was that intent to injure was not required for the criminal act exclusion to apply. If the injury-causing conduct is inherently criminal, coverage is excluded.

Courts in other jurisdictions have similarly concluded that intent to injure, while relevant to exclusions for intentional acts, is not required in order for a criminal act exclusion to apply. *See, e.g., 20<sup>th</sup> Century Ins. Co. v. Schurtz*, 92 Cal. App. 4<sup>th</sup> 1188, 1196 (2002) *rev. denied* (Cal. Jan. 23, 2002); *Donegal Mut. Ins. Co. v. Bauhammers*, 893 A.2d 797 (Pa. Super. 2006) (criminal act exclusion barred coverage for claims arising out son's shooting spree notwithstanding allegations in underlying complaints that son suffered from mental illness) *rev. granted*, 908 A.2d 265 (Pa. Aug. 29, 2006); *Hooper v. Allstate Ins. Co.*, 571 So.2d 1001 (Ala. 1990); *Allstate Ins. Co. v. Schmitt*, 570 A.2d 488 (N.J. Super. A.D. 1990). In *Allstate Ins. Co. v. Juniel*, 931 P.2d 511 (Colo. App. 1996) *cert. denied* (Colo. Feb. 18, 1997), for instance, the Colorado Court of Appeals refused to insert the words "either intended or reasonably expected to result from" into an unambiguous exclusion for bodily injury

resulting from a criminal act or omission. The court's reasoning was four-fold. First, the court noted that, in the insurance context, the language "injuries resulting from [an action]" has been interpreted as meaning injuries "caused by or contributed to" by the action, regardless of whether the party causing the injuries intended to cause injury. *Id.*, 931 P.2d at 514-15. Second, the court noted that if the insurer had intended to qualify this general meaning such that only reasonably expected or intentional injuries would be excluded, the exclusion could have explicitly stated as much. *Id.* at 515. Since, however, it did not, the court was not permitted to rewrite the unambiguous insurance contract to create an intent requirement. *Id.* Third, the court noted that the proposal to qualify the exclusion with the term "intentional" would make the exclusion partially redundant of another policy exclusion—the intentional acts exclusion. *Id.* Finally, citing the Minnesota Court of Appeals decision in *Liebenstein, supra*, among others, the court noted that various jurisdictions support the view that a generally worded criminal exclusion eliminates from coverage more than just intentional crimes or injuries intended or reasonably expected. *Id.*

The various considerations cited in *Juniel* apply equally in this case. Secura could have lumped its criminal act exclusion together with the intentional act exclusion, or otherwise qualified the exclusion with the terms "intended" or "expected," as other homeowners policies occasionally do. *See, e.g., Ehmke*, 644 N.W.2d at 412. Secura, however, did not so draft its exclusion, and like the Colorado courts, Minnesota courts are not permitted to rewrite the unambiguous terms of an insurance policy. *Lessard*, 514 N.W.2d

at 558. Moreover, as the court noted in *Juniel*, if the criminal act exclusion is construed to require an element of intent, notwithstanding the absence of any such qualifier, then the exclusion is wholly superfluous because Secura's policy already excludes coverage for bodily injury which is expected or intended by any insured, and for bodily injury that may reasonably be expected to result from the intentional acts of any insured. *See* Policy, p. 54. To construe the exclusion to require intent would violate long-standing rules of insurance contract interpretation, including the rule that a policy and its endorsements should be construed so as to give effect to all provisions, and the well-established rule that the construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible to another construction that gives effect to all of its provisions and is consistent with the general intent. *See Bobich, supra*, 104 N.W.2d at 25; *Wyatt v. Wyatt*, 239 Minn. 434, 58 N.W.2d 873, 875 (1953); *Employers Reinsurance Corp. v. Caswell*, 490 N.W.2d 145, 148 (Minn. App. 1992), *rev. denied* (Minn. Nov. 17, 1992). Because Jaclyn Larson's injuries resulted from a criminal act, the trial court properly determined that the exclusion in Secura's policy is applicable without regard to whether M.S.M. intended to injure her.

**B. The Reasonable Expectations Doctrine is Not Applicable in This Case Because M.S.M.'s Conduct Was Inherently Criminal.**

Appellant's second argument – that the McArdles “reasonably expected” to have coverage and, therefore, the criminal act exclusion should not apply in the absence of evidence that M.S.M. intended to harm her – relies on a case that did address Secura's

criminal act exclusion, but under significantly different factual circumstances. The insured's reasonable expectations may have provided a basis for the court to overlook the plain and unambiguous exclusions in *Tower Ins. Co., Inc. v. Judge*, 840 F.Supp. 679 (D. Minn. 1993), cited by Appellant, but only because of the particular facts presented in that case. The same, however, cannot be said given the facts of this case.

*Tower* was a declaratory judgment action in which various insurers, Secura included, sought a declaration regarding their rights and responsibilities in regard to a wrongful death suit brought by the heirs of Christopher Meyer following the electrocution death of their son. The death in *Tower* occurred after a group of boys had consumed alcohol throughout the day. *Tower*, 840 F.Supp. at 682. After Meyer fell asleep, his drinking companions, including Secura's insured, decided that they would attempt to awaken Meyer by jolting him with electrical currents. *Id.* Believing there to be no danger because the circuit carried only 110 volts and because the shocks would be brief in duration, the boys used wires to hook Meyer up to a light socket and then flipped the switch on and off several times. *Id.* at 682-83. Unbeknownst to the boys, the light switch had been wired in such a way that no electrical current flowed when the switch was in the on position; instead, a current was flowing to the decedent the entire time the light switch was in the off position. *Id.* at 683.

In the subsequent declaratory judgment action, Judge MacLaughlin considered the application of the same criminal act exclusion at issue in this case. Judge MacLaughlin accepted that the insured had committed a criminal act – reckless homicide, endangering

safety and/or battery – that would be excluded through a literal reading of the criminal act exclusion. *Tower*, 840 F.Supp. at 692. The judge, however, applied the “reasonable expectations” doctrine to find potential coverage, concluding that the insured’s conduct, while involving a calculated risk, was not inherently criminal, but rather was criminal only because of the tragic result. *Id.* at 693. Expressing the belief that it would be bad policy to find that the exclusion applied in that case simply because the State of Wisconsin decided to pursue criminal charges, Judge MacLaughlin concluded that the injured parties should not be denied compensation because of a discretionary decision by the State. *Id.*<sup>8</sup>

*Tower* is not applicable. For one thing, it predates *Liebenstein* and Minnesota’s acceptance that the criminal act exclusion requires no element of intent. The case is, in any event, distinguishable based on the conduct at issue. In *Tower* the court focused on the act committed by the insured, and not upon the consequences of the act. The conduct in *Tower*, while incredibly stupid, was not inherently criminal – it was instead a prank that the boys were certain would not harm the victim, but that nevertheless went wrong. *Tower*, 840 F.Supp. at 682. *See also Olinger, supra*, 1995 WL 507551 at \*3 (distinguishing *Tower* on this basis).<sup>9</sup> In contrast, M.S.M.’s acts were clearly criminal in nature. He entered the

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<sup>8</sup> The court also noted, in a footnote, that the criminal act exclusion at issue was added to the Secura policy by way of amendment without any evidence of an effort to explain, much less point out, to the insureds the reduction in their coverage as required by Minnesota law and, for this reason, the insurer should not be able to rely upon the exclusion. *Tower*, 840 F.Supp, at 693 n.7.

<sup>9</sup> Appellant raised a second case, *Illinois Farmers Ins. Co. v. Rodgers*, Nos. C7-02-425  
(continued...)

Larson home without permission, went to Larson's room and stabbed her over twenty times. M.S.M. was immediately placed under arrest and promptly charged with Attempted First Degree Murder, among other charges.

The reasonable expectations doctrine is what it purports to be – a doctrine that is based on the objectively reasonable expectations of the parties: the “expectations of coverage by the insured [must] be reasonable under the circumstances.” *Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985). It is a narrowly recognized doctrine to be applied only in unique circumstances and has generally been limited to cases involving hidden exclusions. *Grinnell Mut. Reassurance Co. v. Wasmuth*, 432 N.W.2d 495, 499 (Minn. App. 1988); *Ross v. City of Minneapolis*, 408 N.W.2d 910, 914 (Minn. App. 1987). In determining the reasonable expectations, the court may consider whether the contract is ambiguous, whether the insurer advised the insured of “important, but obscure, conditions or exclusions,” and whether public generally is aware of the provision at issue. *Atwater Creamery*, 366 N.W.2d at 278. As Secura’s criminal act exclusion is unambiguous under *Bloomington Steel*, is not obscured or in any way hidden, and is certainly typical of a liability policy, none of these considerations are met in this case. Neither

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<sup>9</sup> (...continued)

and C9-02-426, 2002 WL 31554598 (Minn. App. Nov. 19, 2002), before the trial court. Lest she attempt to argue the case in her reply brief, it should be noted that the insured’s conduct in *Rodgers*, while involving some criminal culpability, was not inherently criminal either, but instead purely accidental – the insured and the decedent were engaged in bantering, the insured stood up quickly to avoid being urinated on, dropped his gun, and the gun discharged, hitting the decedent. *Id.* at \*1.

Secura's insureds, nor Appellant, could reasonably expect that the policy of insurance issued by Secura would provide coverage for inherently criminal acts constituting attempted murder. The trial court properly rejected Appellant's argument to the contrary.

## CONCLUSION

The trial court's findings in this case are supported by the overwhelming weight of authority, nationally and within the state of Minnesota. Secura's exclusions are enforceable against all insureds, regardless of the theory of liability, because they contain precisely the type of language that both the Minnesota Supreme Court and Court of Appeals have stated they should contain in order to unambiguously exclude coverage based on the conduct of any one insured. The trial court correctly applied the law and properly refused to rewrite Secura's policy to provide coverage that was never intended. Its decision should be affirmed in all respects.

Respectfully submitted,

**COUSINEAU McGUIRE CHARTERED**

Dated: November 6, 2007

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