

NO. A08-864

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State of Minnesota  
**In Court of Appeals**

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RAM Mutual Insurance Company,

*Appellant,*

vs.

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

*Respondents.*

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**APPELLANT'S REPLY BRIEF**

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## Table of Contents

	<u>Page</u>
Table of Contents .....	i
Table of Authorities .....	ii
Argument and Authorities .....	2
I.    RAM Mutual properly moved for a new trial and preserved all issues on appeal.....	2
II.   There is no coverage under RAM Mutual’s policy for the intentional conduct of Shawn Meyer .....	3
III.  The special verdict question asked of the jury erroneously inquired whether <i>significant</i> harm was intended .....	6
IV.  Amicus curiae MAJ’s reasonable expectation and illusory coverage arguments fail .....	8
Conclusion.....	10

## Table of Authorities

<b>Cases</b>	<b><u>Page</u></b>
<i>American Family Ins. Co. v. Walser</i> , 628 N.W.2d 605 (Minn. 2001).....	1, 4-8
<i>Amos ex rel. Amos v. Campbell</i> , 593 N.W.2d 263 (Minn. Ct. App. 1999).....	9
<i>Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.</i> , 366 N.W.2d 271 (Minn. 1985).....	9
<i>Braunwarth v. Control Data Corp.</i> , 483 N.W.2d 476 (Minn. 1992).....	3
<i>Carlson v. Allstate Ins. Co.</i> , 749 N.W.2d 41 (Minn. 2008) .....	9
<i>Caspersen v. Webber</i> , 298 Minn. 93, 213 N.W.2d 327 (1973) .....	3
<i>Farmers Ins. Exchange v. Sipple</i> , 255 N.W.2d 373 (Minn. 1977) .....	7
<i>Iowa Kemper Ins. Co. v. Stone</i> , 269 N.W.2d 885 (Minn. 1978).....	6-7
<i>Jostens, Inc. v. Northfield Ins. Co.</i> , 527 N.W.2d 116 (Minn. Ct. App. 1995) ....	9-10
<i>Kronzer v. First Nat'l Bank of Minneapolis</i> , 305 Minn. 415, 235 N.W.2d 187 (1975).....	2
<i>L.K. v. Gregg</i> , 425 N.W.2d 813 (Minn. 1988).....	3
<i>Peterson v. BASF Corp.</i> , 675 N.W.2d 57 (Minn. 2004) .....	3

<i>Rowe v. Munye</i> , 674 N.W.2d 761 (Minn. Ct. App. 2004), aff'd, 702 N.W.2d 729 (Minn. 2005) .....	8
<i>SCSC v. Allied Mut. Ins. Co.</i> , 536 N.W.2d 305 (Minn. 1995) .....	3
<i>Sigurdson v. Isanti County</i> , 448 N.W.2d 62 (Minn. 1989) .....	3
<i>State Farm Fire &amp; Cas. Co. v. Neises</i> , 598 N.W.2d 709 (Minn. Ct. App. 1999) .....	3
<i>Thuma v. Kroschel</i> , 506 N.W.2d 14 (Minn. Ct. App. 1993).....	2
<i>Univ. of Minn. v. Royal Ins. Co. of Am.</i> , 517 N.W.2d 888 (Minn. 1994) .....	9
<i>Youngquist v. W. Nat'l Mut. Ins. Co.</i> , 716 N.W.2d 383 (Minn. Ct. App. 2006) .....	7

Appellant RAM Mutual Insurance Company (“RAM Mutual”) submits this reply brief to respond to some of the arguments in the three respondents’ briefs and in the *amicus curiae* brief of Minnesota Association for Justice (“MAJ”). This Court should reverse the district court and conclude that there is no coverage under RAM Mutual’s policy for Respondent Shawn Meyer’s conduct.

At a minimum, however, this Court should order a new trial so that RAM Mutual can obtain a fair determination as to whether coverage exists, *i.e.* whether Meyer intended to harm Respondent Curtis Nietfeld. The jury in this declaratory judgment action did not determine that Meyer intended not to harm Nietfeld. Instead, the question asked of the jury, over RAM Mutual’s objection, was whether Meyer knew or should have known that *significant* harm to Nietfeld was substantially certain to result from Meyer’s acts in chasing after and grabbing or tripping Nietfeld. A.37. The district court erred when it included the modifier “significant” in the sole special verdict question asked of the jury. Including it misstated Minnesota law and improperly increased the burden that RAM Mutual had to meet. Minnesota law examines whether “the insured’s actions were such that the insured knew or should have known that *a* harm was substantially certain to result from the insured’s conduct.” *See American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001) (emphasis added).

## Argument and Authorities

### **I. RAM Mutual properly moved for a new trial and preserved all issues on appeal.**

The Nietfelds contend there is a question whether RAM Mutual brought a proper motion for a new trial, contending in effect that the motion was somehow premature. The other respondents make no such argument. Neither the Nietfelds nor the other respondents raised this objection below in response to RAM Mutual's motion for a new trial. Instead, the district court considered RAM Mutual's motion on the merits and denied the motion. Nietfeld did not file a notice of review challenging any ruling rejecting the notion that RAM Mutual's new trial motion was somehow procedurally improper.

The Nietfelds, but not the other respondents, also contend that RAM Mutual did not appeal from an earlier summary judgment ruling in the case. RAM Mutual appealed both from the final judgment entered in this matter and from the order denying its motion for a new trial. In doing so, RAM Mutual preserved all issues for appellate review. Any issues decided in the earlier motion for summary judgment merged into the final judgment, from which RAM Mutual appealed. Thus, the issues decided in the summary judgment motion can be and should be reviewed in this appeal. *See Kronzer v. First Nat'l Bank of Minneapolis*, 305 Minn. 415, 235 N.W.2d 187, 189 n.1 (1975); *Thuma v. Kroschel*, 506 N.W.2d 14, 19 (Minn. Ct. App. 1993). The Nietfelds are incorrect that the earlier summary judgment ruling cannot be reviewed. That ruling was not appealable when issued,

but is subject to review on appeal from a final judgment. *SCSC v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 310-11 (Minn. 1995) (reviewing denial of summary judgment after trial on the merits). Thus, all the issues RAM Mutual has raised on appeal should be considered on the merits.<sup>1</sup>

**II. There is no coverage under RAM Mutual's policy for the intentional conduct of Shawn Meyer.**

The extent of coverage under RAM Mutual's policy raises a question of law that is reviewed *de novo* on appeal. *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327, 330 (1973) ("the extent of coverage under the terms of the policy was a question of law"); *State Farm Fire & Cas. Co. v. Neises*, 598 N.W.2d 709, 711 & n.1 (Minn. Ct. App. 1999). This Court should conclude that there is no coverage for Shawn Meyer's conduct.

Meyer, "who was a lot bigger than Curt was . . . at least 50 pounds bigger," T.126-27, started things when he pulled out Curt Nietfeld's stool. When Nietfeld protested, Meyer testified that he "confronted [Nietfeld]" and Meyer stood his ground. T.227-28. Nietfeld thought Meyer was angry, T.204-05, and Nietfeld

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<sup>1</sup> Similarly, the Nietfelds also incorrectly contend that the earlier summary judgment ruling from Judge Landwehr is "law of the case" and that this Court should not address the issues RAM Mutual raises. "Law of the case" is a rule of practice and not a substantive law. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 65-66 (Minn. 2004). The doctrine does not prevent an appellate court from reviewing a decision of a lower court. *Id.* The doctrine simply means that once an issue is considered and adjudicated, that issue should not be reexamined in *that* court throughout the case. See *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988). Even then, however, the rule does not limit the power of a court to reexamine an issue. *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n.1 (Minn. 1992).

dropped the stool and started running away from Meyer. T.229. Meyer, who admitted he was “somewhat” angry, T.230, started chasing after Nietfeld, T.204-05, 230. Meyer caught up to Nietfeld, grabbed him by the back of his shoulder, and pulled him back towards Meyer and onto the cement floor. T.230-33, 246. Although Meyer denies that he tried to hurt Nietfeld, T.247, Meyer admits he intended to “scuffle with” Nietfeld once he caught him. T.236.

Under the unambiguous terms of the intentional act exclusion in RAM Mutual’s policy, there is no coverage for Meyer’s conduct. Alternatively, Meyer’s conduct is such that an intent to inflict an injury on Nietfeld should be inferred as a matter of law, thereby defeating coverage.

RAM Mutual simply requests that the plain language of its intentional act exclusion be applied. The policy does not cover liability resulting directly from an act an insured intended, whether or not the insured intended the resulting bodily injury that occurred. There is no dispute that the liability claimed arose directly from Meyer’s intentional act in chasing after and grabbing at Nietfeld, which resulted in Nietfeld’s injuries.

Respondents argue that Meyer did not intend to harm Nietfeld. But the unambiguous language of RAM Mutual’s policy does not require an intent to harm. Respondents’ reliance on various cases discussing language in other intentional act exclusions ignores that it is the language of the policy that matters. *See Walser*, 628 N.W.2d at 613; *see also id.* at 611 n. 1 (comparing the language of an intentional act exclusion in another policy).

Similarly, although Respondents contend that the scope of coverage and of an intentional act exclusion are two sides of the same coin, *Walser* specifically cautioned that it did “not conclude or suggest that the scope of coverage for accidents will always coincide with the scope of an exclusion for intentional acts.” *Id.* at 612.

Respondents essentially argue that the exclusion in RAM Mutual’s policy cannot be broader than other exclusions the courts have interpreted. But Respondents offer no support that RAM Mutual’s exclusion is improper or unenforceable on the facts of this case. The various hypothetical situations mentioned do not undercut the simple application of the plain language in the policy to Meyer’s conduct here. As well, the Nietfelds even go so far as to speculate that the Commissioner of Insurance might not have approved RAM Mutual’s policy. The Nietfelds have no evidence or support that the Commissioner has not approved RAM Mutual’s policy. Similarly, the Nietfelds offered no evidence or support as to what the Commissioner might do.

Alternatively, even under Respondents’ view that intent to cause harm is required – something the language of the policy does not require – there is no coverage because intent to harm can be inferred. Unlike the “goofing around” situation in *Walser* where “everything was done in a friendly manner,” 628 N.W.2d at 607, this case involved a much physically larger Meyer, who was admittedly “somewhat” angry, chasing after Nietfeld on a concrete floor with the intent of “scuffling” with Nietfeld once Meyer caught him. Meyer’s actions were

such that he “knew or should have known that a harm was substantially certain to result from” his conduct. *Id.* at 613. While Meyer claims he did not intend to hurt Nietfeld, and he certainly did not intend to cause the actual serious injuries that resulted, an intent to injure should be inferred in this case. *See Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978) (intent inferred when insured wrapped a belt around his hand and struck someone on the head, knocking him to the ground and severely injuring him).

**III. The special verdict question asked of the jury erroneously inquired whether *significant* harm was intended.**

Even assuming the language in RAM Mutual’s policy is ignored, and that an intent to cause harm is read into the exclusion, the district court erred because the question it asked the jury was not the proper standard under Minnesota law. The question the district court asked was whether Meyer knew or had reason to know that a *significant* harm was substantially certain to result when Meyer grabbed or tripped Nietfeld. A.37. This is the wrong standard, although the jury instructions themselves were correct.<sup>2</sup> A new trial is especially needed because only one question was asked of the jury, and that question was wrong.

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<sup>2</sup> RAM Mutual erroneously stated in its initial brief that the jury was improperly instructed. The undersigned apologizes for his misreading of the actual relevant instruction, T.308 (lines 6-10), which accurately instructed as to the appropriate issue – did an insured intend to cause some harm. RAM Mutual’s confusion arose from the similar law and standard when reviewing errors in jury instructions and in verdict forms. Even though the jury was properly instructed, it was asked and it answered an erroneous question, a question that was both irrelevant and confusing.

Respondents incorrectly assert that a “finding that Meyer knew significant harm was substantially certain to result is entirely consistent with Minnesota law.” *E.g.*, District’s Brief at 26. Whether an insured intended “significant” harm is not the relevant standard.

Importantly, Respondents do not dispute any of the authority RAM Mutual cited, which makes clear that if an intent to cause bodily injury or harm exists, then coverage is excluded even if the injury or harm that results is more severe or of a different nature than the injury or harm intended. *E.g.*, *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978). Nonetheless, Respondents baldly contend that including the modifier “significant” was an accurate reflection of Minnesota law. Respondents, however, have not cited a single case that states that “significant harm” is the standard. Some harm or “a” harm is all that is required. *See Walser*, 628 N.W.2d at 613; *compare Farmers Ins. Exchange v. Sipple*, 255 N.W.2d 373, 374 (Minn. 1977) (verdict question asked whether insured expected or intended “bodily injury to occur when he struck” someone; jury not questioned whether “significant” bodily injury was expected or intended).

Respondents also ignore that a district court’s choice of language in a verdict form requires a clear and correct statement of the law. If there is a reasonable likelihood that the erroneous question would have “a significant effect on the verdict of the jury,” prejudicial error exists. *See Youngquist v. W. Nat’l Mut. Ins. Co.*, 716 N.W.2d 383, 386 (Minn. Ct. App. 2006). Moreover, if this Court cannot determine if the jury’s verdict was affected by the error, a new trial

should be granted. *See Rowe v. Munye*, 674 N.W.2d 761, 769 (Minn. Ct. App. 2004), *aff'd*, 702 N.W.2d 729 (Minn. 2005).

The verdict question was not a clear and correct understanding of the law. RAM Mutual is entitled to a new trial so that a jury can evaluate whether Meyer intended to harm Nietfeld. Because there is “no bright line rule” in determining whether to infer intent to injure or in assessing whether coverage exists for alleged intentional acts, *Walser*, 628 N.W.2d at 613, it is particularly important to ask the correct question of the jury so that it can determine if intent to cause harm exists. To require RAM Mutual to meet a higher burden, *i.e.* to show either that Meyer intended to cause significant harm to Nietfeld or that Meyer should have known that a significant harm would result, was not appropriate. At a minimum, this Court should order a new trial so that RAM Mutual might have a fair opportunity to establish and meet the proper standard.

**IV. Amicus curiae MAJ’s reasonable expectation and illusory coverage arguments fail.**

The MAJ weighs in broadly either that the Meyers had a reasonable expectation of coverage or that RAM Mutual’s policy provides illusory coverage. Neither argument is correct.

This is not a case where the reasonable expectations doctrine should apply. Importantly, none of the respondents raised this argument below or on appeal. Moreover, there was no evidence presented that the Meyers had a reasonable

expectation that coverage would exist for Shawn Meyer's conduct in chasing after and grabbing Nietfeld and injuring him.

The Supreme Court in *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41 (Minn. 2008) recently discussed the reasonable expectations doctrine in detail. *Carlson* refused to expand the doctrine, noting instead that the doctrine has been used sparingly in Minnesota only as a tool to resolve ambiguities or to correct extreme situations. *Id.* at 49. Neither situation exists here.

This is not a case, like *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985), with a hidden exclusion. RAM Mutual's intentional act exclusion is included squarely in the policy as an exclusion. *Amos ex rel. Amos v. Campbell*, 593 N.W.2d 263, 269-70 (Minn. Ct. App. 1999) (declining to apply the doctrine of reasonable expectations where the policy exclusions were clearly marked under the heading "EXCLUSIONS"). Moreover, the policy itself is written in plain and clear language.

MAJ's arguments fail because the "reasonable expectation test is not a license to ignore [an] exclusion in this case nor to rewrite the exclusion solely to conform to a result that the insured might prefer." *Carlson*, 749 N.W.2d at 48-49 (quoting *Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 889 (Minn. 1994)).

There is also no illusory coverage, a question involving a doctrine that only rarely might apply to qualify the general rule that courts should enforce insurance contracts as written. *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118

(Minn. Ct. App. 1995). Moreover, the doctrine applies best when part of the premium is specifically allocated to a type or period of coverage that turns out to be functionally nonexistent. *Id.* at 119. There is no such argument or evidence of that here.

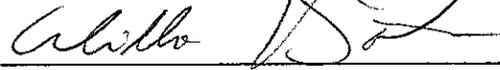
Faithfully applying the language in a policy so that an insurer's obligations are determined and governed by the terms of the parties' contract is not an unreasonable result. While MAJ and others argue that the result here is absurd or unfair, that is not the case. As noted, the policy is written in plain and clear language. The exclusion is not hidden. The policy provides coverage to the Meyers for a variety of acts. Indeed, even the Respondent District, through its argument and diagrams, agrees that the policy provides coverage for negligent, unintentional acts. There is no basis to claim coverage is illusory just because the policy may not provide as much coverage as might be provided under a policy with a different and narrower intentional act exclusion.

### **Conclusion**

For all the foregoing reasons, and those set forth in RAM Mutual's initial brief, this Court should reverse and conclude that RAM Mutual's policy does not provide coverage for Shawn Meyer's assault of Curtis Nietfeld. In the alternative, this Court should order a new trial so that a jury is asked a proper special verdict question that addresses whether Meyer intended to harm Nietfeld, instead of asking whether Meyer intended to cause significant harm.

Dated: October 24, 2008

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