

36256-2-II

No. 79168-6

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON  
(Jefferson County Superior Court Cause No. 05-2-00355-2)

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STATE FARM FIRE AND CASUALTY COMPANY, an Illinois  
Corporation,

*Respondent,*

v.

CHANEL CHADWICK, a single woman,

*Defendant,*

and

HAM & RYE, L.L.C., a Washington limited liability company;  
and Retail Services, Inc. d/b/a Aldrich's Market,  
a Washington corporation,

*Appellants,*

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APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT  
Honorable Theodore Spearman, Visiting Judge

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

In *Queen City Farms v. Central Nat'l Ins. Co.*, the Supreme Court rejected the “deliberate act/involuntary means” test in *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.*, ruling instead that “injury or damage resulting from acts of negligence, even though precipitated by an intentional act, would be covered under the occurrence clause.”<sup>1</sup>

The Court of Appeals has noted that product liability insurers may not invoke the *Unigard* rule that “an accident is never present when a deliberate act is performed...” because it results in “meaningless” coverage for product manufacturers.<sup>2</sup>

The Washington Insurance Commissioner has decreed that it is against public policy for disability insurers to sell policies which contain *Unigard's* “accidental means” requirement because it creates illusory coverage for the disabled.<sup>3</sup>

To ensure that victims of underinsured drivers are not left with phantom coverage, the Washington Legislature has declared that

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<sup>1</sup>126 Wn.2d 50, 882 P.2d 703 (1994).

<sup>2</sup>*Safeco Ins. Co. v. Dotts*, 38 Wn. App. 382, 384, n.1, 685 P.2d 632 (1984), citing *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wash.2d 210, 215, 608 P.2d 254 (1980).

<sup>3</sup>WAC 284-50-315(4).

“‘accident’ means an occurrence that is unexpected and unintended from the standpoint of the covered person.”<sup>4</sup>

State Farm’s internal Operation Guide instructs its claims personnel not to issue a reservation of rights in cases like this one “where the investigative facts do not support a conclusion that the insured expected or intended injury or damage.” This instruction is based on “the demands of public policy [that] liability insurance attempts to indemnify the policyholder for bodily injury or property damage for which the insured is only accidentally and unintentionally responsible.”<sup>5</sup>

State Farm initially determined that the Aldrich’s Market fire was an accidental “occurrence” because the “ins[ured’s] daughter was [a] negligent... kid in the area playing with fire.”<sup>6</sup> It admitted the insured’s daughter did not expect or intend to cause any property damage. Its claims supervisor confirmed there were “no coverage issues”.<sup>7</sup>

Then State Farm found out that it would be the “deepest pocket [which] gets the hit” in this “big damages case [with a] fault free plaintiff

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<sup>4</sup>SHB 2415 (2006). *See* Appendix 1.

<sup>5</sup>CP 415-417.

<sup>6</sup>CP 248-249.

<sup>7</sup>CP 245, 248.

and joint and several liability.”<sup>8</sup> So it issued a reservation of rights in violation of its Operations Guide and invoked the *Unigard* rule to disclaim its coverage.<sup>9</sup>

This case demonstrates again that the sale of meaningless coverage is the only “policy” the *Unigard* rule serves.

## II. ARGUMENT

### A. THE “OCCURRENCE”

#### 1. An Insured’s Intentions and Expectations Are Relevant to Determining an “Accident.”

State Farm’s statement of the facts does not dispute, but instead studiously ignores, that the Aldrich’s Market fire flared up after Chanel and her friends had patted the smoldering embers out and left the scene, all believing the fire was completely extinguished. State Farm has not denied that Chanel’s negligent failure to extinguish the fire was an accidental “occurrence”. It concedes the intended or expected acts exclusion does not apply. It does not assert that Chanel’s *relevant act* of failing to extinguish all the embers was “willful and malicious.”

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<sup>8</sup>CP 248-249.

<sup>9</sup>Appellants refer to *Unigard*’s “deliberate act/involuntary means” test as the “*Unigard* rule” because it was the basis of the summary dismissal of their assigned coverage claims.

State Farm never explains why Chanel's unwitting failure to completely extinguish the embers was not an accidental "occurrence". Its claims personnel determined the fire was an accident because it flared up and burned Aldrich's Market after Chanel and her friends thought they put it out and left the scene. An average purchaser of insurance would think the same thing.

Instead of discussing how this accident happened, State Farm maintains that the "relevant facts" are the "malicious mischief" of lighting firecrackers on a high school football field, or a passing bicyclist's admonition to "be careful" about lighting the firecrackers there, or a neighbor's impressions of "voices sounding like teenagers" and unseen footsteps in the night.<sup>10</sup>

But lighting firecrackers on the high school football field didn't cause property damage to Aldrich's Market. Unidentified voices and unseen footsteps do not prove that State Farm's "willful and malicious" exclusion "clearly and unambiguously applies to bar its coverage."<sup>11</sup>

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<sup>10</sup>Respondent's Brief, p. 2.

<sup>11</sup>*Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

According to State Farm, the issue presented in this case is just a tautology which mimics the *Unigard* rule: “Was the deliberately set fire an ‘accident’?”<sup>12</sup> This is merely a restatement of the *Unigard* rationale that if there was a deliberate act, the means were not involuntary, so there was no accident, and there is no coverage.

State Farm argues it is “immaterial... that an insured may not subjectively intend to cause the harm that eventually occurred.”<sup>13</sup> But it surely is material if an insured subjectively expects or intends to cause harm because that state of mind defeats coverage.<sup>14</sup> It also is material if an insured *does not* subjectively expect or intend to cause harm because that state of mind results in an accidental “occurrence”, which is what happened here.<sup>15</sup> Apparently, it doesn’t matter to State Farm if an insured intends and expects harm, or doesn’t intend or expect harm, because State Farm believes it can fall back on the *Unigard* rule to disclaim coverage in either event.

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<sup>12</sup>Respondent’s Brief, p. 1.

<sup>13</sup>Respondent’s Brief p. 9.

<sup>14</sup>*Queen City Farms v. Central Nat’l Ins.*, 126 Wn.2d 50, 71, 882 P.2d 703 (1994).

<sup>15</sup>*Id.* at 65.

**2. The *Unigard* Rule Conflicts with the “Average Purchaser”, “As Written”, and “No Added Language” Rules of Insurance Policy Construction.**

In *McKinnon v. Republic Nat'l Life Ins. Co.*, Chief Justice Reed of Division II noted that the *Unigard* rule is artificial, technical and contrary to law because it undermines the legitimate coverage expectations of the average purchaser of insurance:

... this artificial distinction [between accidental results and accidental means] might easily “swallow up” the average purchaser of accident insurance. Washington courts have long insisted, however, that the language of insurance policies should be interpreted in accordance with the way it would be understood by the average man purchasing insurance, rather than in a technical sense. ... In *Zinn [v. Equitable Life Ins. Co.]*, 6 Wn.2d 379, 107 P.2d 921 (1940)] our Court quoted with approval Chief Judge Cardozo’s support of the average man’s viewpoint in *Lewis v. Ocean Accident & Guar. Corp.*, 224 N.Y. 18, 120 N.E. 56 (1918):

Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an “accident.” [Citations omitted] But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be of the average man...<sup>16</sup>

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<sup>16</sup>25 Wn. App. 854, 863, 610 P.2d 944 (1980) (Reed, C.J. concurring). Justice Cardozo’s famous dissent in *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499, 54 S.Ct. 461, 78 L.Ed. (1934) further explains the conflict between accidental means clauses and the average purchaser rule:

The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog. Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident... On

The *Unigard* rule “swallows up” average purchasers of insurance by preordaining a finding of no “accident” and no coverage, regardless of whether the insured intended and expected, or did not intend or expect, any resulting harm. *Unigard’s* “deliberate act/involuntary means” rule is a literal contradiction in terms: if the insured commits a deliberate act, the “means” can never be “involuntary”, regardless of whether the resulting harm is or is not expected or intended.<sup>17</sup> Under *Unigard’s* twisted logic, the insured’s intentions and expectations are irrelevant to coverage because once a volitional act occurs, the “means” are never “involuntary”, so there never is a covered “accident”.<sup>18</sup>

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the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company....

<sup>17</sup>Contrary to State Farm’s argument, the dictionary definitions of “accident” quoted at p. 12 of its Brief do not focus on or require an unintentional act, but instead describe an accidental “event” or “incident” as being unexpected, unintentional or undesirable.

<sup>18</sup>While it may be possible to interpret *Unigard’s* involuntary means and results requirement to mean that there is an “accident” unless both the insured’s act and the resulting harm are intended or expected, that is not how the courts have applied the *Unigard* rule. With the notable exception of *Detweiler v. J.C. Penny Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 232 (1988), Washington courts, including the trial court in this case, in general

State Farm does not dispute that there isn't a single average purchaser of insurance in Washington who suspects that if she commits a negligent volitional act, she will lose her insurance coverage, "unless some additional unexpected, independent and unforeseen happening occurs...." Even if the average purchaser was told this, she wouldn't have any concept of what these technical, formal, arcane, exclusionary judicial words mean. She would only understand what they meant after her insurer used them to cancel her coverage and leave her personally liable for a loss that she and all her friends and good neighbors, including State Farm, thought was caused by an accident.

Under the *Unigard* rule, coverage does not depend on whether or not there was an "accident". It depends on whether *the court* uses the *Unigard* definition to automatically preclude an "accident" or uses a dictionary definition of "accident" to determine if there actually was a covered "occurrence".

The *Unigard* rule also conflicts with the "as written" and "no added language" rules of insurance policy construction. Washington

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have construed the *Unigard* rule to mean that an "accident is never present" unless *both* "the means as well as the result [are]... involuntary..."

courts follow “the principle of reading the insuring and exclusion clauses, *as written*.”<sup>19</sup> The Supreme Court recently noted that, “We will not add language to the policy that the insurer did not include.”<sup>20</sup>

State Farm’s policy, as written, does not cancel coverage for accidents that result from negligent volitional acts. It does not say that the “means as well as the result” must be “involuntary” or that “an accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs....”

It is the *Unigard* rule, not State Farm’s policy, which says an “occurrence” is not an “accident” unless it results from a nonvolitional act. Only the *Unigard* rule, not State Farm’s policy, contains the exclusionary language that there must be “some additional unexpected, independent and unforeseen happening” for there to be an “accident” whenever a deliberate act occurs. The “as written” and “no added language” rules of policy construction counsel against the judicial insertion of a nonvolitional act requirement and the foregoing

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<sup>19</sup>*Diamaco, Inc. v. Aetna Cas. & Surety Co.*, 97 Wn. App. 335, 340, 983 P.2d 707 (1999).

<sup>20</sup>*Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 430, 951 P.2d 250 (1998). See also *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 874 P.2d 142 (1994).

exclusionary words into State Farm's policy to preclude "accidents" and invalidate the coverage of its insureds.

**3. The *Unigard* Rule Encourages the Sale of Meaningless, Discriminatory Insurance Coverage.**

The *Unigard* rule also is susceptible to manipulation for commercial advantage. It gives an insurer complete discretion to discriminate between claims it wants to adjust and claims it wants to deny. And it permits an insurer to admit or deny coverage based on the size or number of claims, rather than on whether they arose from an accidental "occurrence".

Dream City Catering's and Northwest Natural Resources' \$500 property damage claims and H&R/RSI's \$1,100,000 property damage claims all arose from the same occurrence. Yet State Farm adjusted the DCC and NNR claims but denied the H&R/RSI claims. State Farm doesn't explain why DCC's and NNR's claims resulted from an accidental "occurrence", while H&R/RSI's claims resulted from the "willful and malicious acts" of Chanel Chadwick. State Farm's disparate treatment of these claims shows the *Unigard* rule is a discretionary tool, not to be wasted in adjusting small claims, but to be held in reserve for disclaiming large covered losses.

State Farm rightly points out that “other insurers’ conduct and decisions are irrelevant to what its policy says.”<sup>21</sup> But other insurers’ conduct and decisions are very relevant to whether State Farm’s selective deployment of the *Unigard* rule violates the public policy against selling meaningless coverage.

Most insurers, like Mutual of Enumclaw in this case, only invoke *Unigard*’s automatic coverage invalidation rule when there is evidence that the insured subjectively expected or intended his actions to result in harm, despite his denial.<sup>22</sup> State Farm, however, has never disputed Chanel Chadwick’s denial of any intent or expectation to cause any property damage. Further, State Farm acknowledged by its \$500 payments to Dream City Catering and Northwest Natural Resources that the Aldrich’s Market fire was an accidental “occurrence”. State Farm only invoked the *Unigard* rule to avoid paying H&R/RSI’s \$1,100,000 property damage claim because it involved so much more money.

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<sup>21</sup>Respondent’s Brief, p. 7.

<sup>22</sup>This is true in virtually all of the cases which have applied the *Unigard* rule, except *State Farm v. Parrella*, 134 Wn. App. 536, 539, 141 P.3d 643 (2006), where State Farm invoked the *Unigard* rule to deny coverage for a claim against an underage insured who fired a BB gun as a prank in the general direction of a victim 162 feet away without expecting or intending any that any harm would result.

But the public policy against the sale of meaningless coverage should apply with added force to large losses. It is vastly more damaging to leave an insured personally liable for a large covered loss than a little loss. If State Farm can selectively deploy the *Unigard* rule in this case and *Parrella* to cover small losses and disclaim large ones, other insurers surely will do that too. And the trial courts will continue to uphold such manipulations under the command of the *Unigard* rule.

State Farm contends that intent to harm was not inferred in *Unigard* and other cases which have applied its rule.<sup>23</sup> But this either is wrong or beside the point because in all of the cases it cites but one, the courts inferred the insured's intent *or expectation* that harm would result from the insured's deliberate act.<sup>24</sup> H&R/RSI do not contend that the

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<sup>23</sup>Respondent's Brief, pp. 19-23.

<sup>24</sup>See e.g. *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.*, 20 Wn. App. 261, 265-65, 579 P.2d 1015 (1978) ("the court could have found that the damage to the school building was expected or intended on the part of the boy despite his in-court declarations to the contrary"); *Safeco Ins. v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992) ("no reasonable person could reach the conclusion that Zenker's injury was unforeseeable"); *Grange Ins. Co. v. Brousseau*, 113 Wn.2d 91, 97, 776 P.2d 124 (1989) ("Serious bodily injury, including death... was obviously an expected result of his intentional act of shooting Anderson"); *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990) ("McKay's intentional ramming of Roller was not an accident"); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 16, 977 P.2d 617 (1999) ("the result could be reasonably expected; firing a gun at a person multiple times at

events in these cases were “accidents”, or that these cases should be overruled, because all but one of them had evidence that harm was expected or intended by the insured.

That lone exception is *State Farm v. Parrella*, where Division III applied the *Unigard* rule to preclude coverage despite the trial court’s finding that the insured did not expect or intend any harm to occur from deliberately discharging his BB gun in the general direction of a distant person. *Parrella* should be overruled for applying *Unigard*’s “involuntary means” test to cancel the insured’s coverage for unexpected and unintended harm that resulted from a negligent, volitional act.

But even if *Parrella* was correctly decided, its result would not apply here. In *Parrella*, the “occurrence” was the insured’s deliberate act of shooting a BB gun in the direction of another person, albeit without any intent or expectation that harm would result. As discussed in the next section, however, the relevant “occurrence” in this case is not the insured’s deliberate act of lighting of paper and cardboard, but her

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close range is likely to cause that person’s death.”). In *Safeco Ins. Co. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984), Division III applied *Unigard*’s involuntary means rule to defeat coverage for an insured who assaulted the victim without inferring intent or expectation to harm for purposes of the appeal, but intent to injure could have been inferred from the assault.

accidental failure to completely put out the embers so fire would not spread to Aldrich's Market.

**4. This Case is Not Controlled by the *Unigard* Rule, but by the Rule in *Queen City Farms*.**

State Farm concedes that under *Queen City Farms*, the *Unigard* definition of "accident" is not used when the insured's negligent volitional act was not expected or intended to cause any harm.<sup>25</sup> But it says *Queen City Farms* should not be followed because its policies defined an "occurrence" as "an accident, happening or event... which unexpectedly or unintentionally results in personal injury, property damage....", while State Farm's policy only defines an "occurrence" as an "accident".

But the dictionary definitions of "accident" that State Farm cites do not support its attempt to distinguish between "occurrences" under these different policies. The dictionaries define "accident" as an "unexpected and undesirable *event*" and as an "incident that *happens* unexpectedly and unintentionally."<sup>26</sup> Thus, the dictionaries use the words "event" and "happen[ing]" to define "accident" and treat these terms interchangeably and synonymously. Consequently, an "occurrence" under

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<sup>25</sup>Respondent's Brief, p. 14.

<sup>26</sup>Respondent's Brief, p. 12.

the *Queen City Farms* policies is no different from an “occurrence” under State Farm’s policy.

State Farms’ attempt to distinguish its policy from the *Queen City Farms* policies on grounds that only the latter “expressly required that the injury or damage—as opposed to the act or omission—be unexpected and unintentional” also is mistaken. Neither State Farm’s policy nor the *Queen City Farms* policies say “the act or omission [must] be unexpected and unintentional” to be an accidental “occurrence”.

State Farm’s policy insures against an accidental “occurrence”... “which result[s] in bodily injury or property damage.” The *Queen City Farms* policies insure against accidental “occurrences” “which unexpectedly or unintentionally result in personal injury, property damage.” The insuring provisions are identical, except that the *Queen City Farms* policies incorporate the “unexpected and unintended” damage requirement into the insuring clause, while State Farm’s policy incorporates it into an (admittedly inapplicable) exclusion.<sup>27</sup>

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<sup>27</sup>For these same reasons, State Farm’s attempt to parse and distinguish the policy in *Yakima Cement Prods. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 608 P.2d 254 (1980) also is ineffectual.

The relevant “occurrence” in this case is closely akin and directly analogous to the “occurrence” in *Queen City Farms*. In *Queen City Farms*, the relevant “occurrence” was *not* the insured’s initial discharge of toxic materials into a waste pit, but the insured’s later failure to ensure that the pits contained the wastes and prevented them from leaking into adjacent groundwater:

[T]he initial disposal into the pits is not the relevant event....

We therefore hold that the relevant polluting event is the discharge, dispersal, release or escape of toxic material into the environment....<sup>28</sup>

On this basis, the Supreme Court held as a matter of law that “coverage was provided under the occurrence clause” for the insured’s negligent failure to prevent the toxic wastes from leaking into groundwater and damaging adjacent property.<sup>29</sup>

Where the facts establish that materials were placed into a waste disposal site which was believed would contain or safely filter them, but, in fact, the materials unexpectedly and unintentionally are discharged or released into the environment, there is coverage for the resulting damage.<sup>30</sup>

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<sup>28</sup>126 Wn.2d at 78, 79.

<sup>29</sup>*Id.* at 66.

<sup>30</sup>*Id.* at 92.

State Farm admits Chanel did not expect or intend to cause property damage to Aldrich’s Market when she lit the cardboard and paper. Under the negligent failure to contain rule in *Queen City Farms*, her initial act of lighting these materials was not even a relevant “occurrence” for coverage purposes. Instead, the relevant “occurrence” was Chanel’s subsequent mistaken assumption that she had contained the potential hazard when actually she had not patted out all the embers completely. Therefore, in this case as in *Queen City Farms*, “coverage was provided under the occurrence clause” as a matter of law.<sup>31</sup>

State Farm also argues that Chanel “objectively expected or intended to cause at least some injury or harm when the intentional act [of lighting the discarded paper or cardboard] was performed.”<sup>32</sup> But neither of these propositions is true. First, under *Queen City Farms*, Chanel’s intentions and expectations are determined subjectively, not objectively.<sup>33</sup> And State Farm has admitted that Chanel did not intend or expect to cause

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<sup>31</sup>*Id.* at 66.

<sup>32</sup>Respondent’s Brief, p. 18.

<sup>33</sup>126 Wn.2d at 67.

any property damage to Aldrich's Market. Second, as a matter of law, lighting valueless, discarded paper and cardboard does not constitute "injury" or "property damage".<sup>34</sup>

**B. THE "WILLFUL AND MALICIOUS" EXCLUSION**

**1. The "Willful and Malicious" Exclusion Does Not Apply to the Relevant Coverage Event.**

In *Queen City Farms*, the Supreme Court also held that the relevant event concerning the policy *exclusions* was the unexpected and unintended leakage and spread of the toxic wastes from the pits, not their original deposit into the pits:

[T]he average purchaser of insurance would have understood that mere placement of wastes into a place which was thought would contain or filter the wastes would not have been an event which would fall within the [expected and intended] exclusion. ...

Therefore, if the damage results from the dispersal of materials into the groundwater from a place of containment where the insured believed they would remain or from which they would be safely filtered, and that dispersal was unexpected and unintended, then coverage is provided under the policies.<sup>35</sup>

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<sup>34</sup>See *Prosser v. Leuck*, 539 N.W.2d 466, 469 (Wis. App.), *review denied*, 542 N.W.2d 156 (Wis. 1995) ("expecting harm in the form of a small stain on the window sill is insufficient to satisfy the intent to harm requirement.")

<sup>35</sup>126 Wn.2d at 79, 91.

By the same token, it was Chanel's negligent failure to make sure that all of the embers were patted out, not her initial lighting of the paper and cardboard, which was the relevant event under State Farm's "willful and malicious" exclusion. Since the "dispersal" of the fire from the unextinguished embers to the Aldrich's Market building occurred after Chanel had departed and "was unexpected and unintended, then coverage is provided under [State Farm's] policies."<sup>36</sup>

State Farm has not alleged or proven that Chanel's negligent failure to extinguish all the embers was a "willful and malicious act." Thus, the exclusion does not even apply to the relevant coverage event.

## **2. There Was No Malicious Act.**

But even if the initial lighting of the cardboard and paper was the relevant coverage event, which it is not, State Farm still could not prove its exclusion because it has not shown that Chanel committed any "malicious act." Under State Farm's chosen definition, a "malicious act" is "[a]n intentional, wrongful act *performed against another* without legal justification or excuse."<sup>37</sup> But Chanel's act of lighting valueless cardboard

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<sup>36</sup>*Id.*

<sup>37</sup>Respondent's Brief, p. 27, *quoting from* BLACK'S LAW DICTIONARY 863 (5<sup>th</sup> ed. 2004) (emphasis supplied).

and paper, which RSI had already discarded into a dumpster, cannot plausibly be deemed a “wrongful act performed against [H&R/RSI] without legal justification or excuse.” State Farm concedes Chanel did not expect or intend to commit any wrongful act against H&R or RSI because it admits she did not expect or intend to damage their property. That also was the reason why Chanel was not prosecuted for any crime.

State Farm cites several cases where its “willful and malicious” exclusion barred coverage for its insureds, but all are strikingly inapposite. In *Keathley v. State Farm*, the insured “approached the plaintiff from behind and struck him in the face without warning”, knocking out several of his teeth and damaging his gums.<sup>38</sup> In *Martin v. State Farm*, the insured hired another person to set fire to his building, causing the deaths of two firefighters.<sup>39</sup> In *State Farm v. Baker*, the insured, intending only to damage a car, threw a rock through its window and hit the victim in the head.<sup>40</sup> In these cases, the courts ruled that the acts were malicious, regardless of whether or not the insureds intended or expected to cause the

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<sup>38</sup>594 So. 2d 963 (La. App. 1992).

<sup>39</sup>186 Ill.2d 367, 710 N.E.2d 1228 (1999).

<sup>40</sup>134 Ohio App.3d 407, 758 N.E.2d 228 (2001).

particular harm that resulted from them. But these cases are not apposite because Chanel did not commit a malicious act.

**3. There Must Be Malice and a Relevant Act Before the “Willful and Malicious” Exclusion Applies.**

State Farm cites *Hall v. State Farm* for its position that the “willful and malicious” exclusion does not require intent to injure and the insured’s “acts leading up to” the injury are relevant to this exclusion.<sup>41</sup> In *Hall*, the jury concluded that

willful and malicious acts provoked the struggle during which the gun discharged [and that] Truong’s injuries resulted from Hall’s malicious acts of getting out of the car, yelling racial and gang-related epithets, engaging in a verbal confrontation with Truong, and then pulling a loaded gun during the confrontation.<sup>42</sup>

But *Hall* does not help State Farm because there must be both malice and a relevant act to trigger the exclusion, and neither is present here. The willful and malicious acts of brandishing a loaded weapon and inciting a confrontation were the only relevant events in *Hall*. These acts led directly to the injury because the insured made no effort to withdraw from the confrontation or prevent the resulting harm.

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<sup>41</sup>109 Wn. App. 614, 621, 36 P.3d 582 (2001).

<sup>42</sup>*Id.* at 621-22.

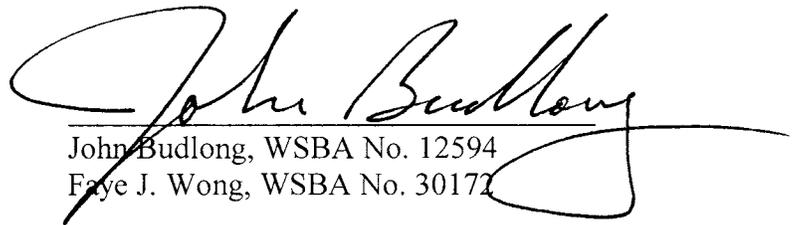
But the relevant act in this case was Chanel's negligent failure to completely extinguish embers. Since State Farm does not contend that this relevant act was "willful and malicious", it cannot prove that its exclusion applies.

### III. CONCLUSION

For these additional reasons, appellants H&R/RSI respectfully request this Court to rule that the property damage to Aldrich's Market is a covered "occurrence" and "loss" under State Farm's policies, and that the "willful and malicious" exclusion does not apply.

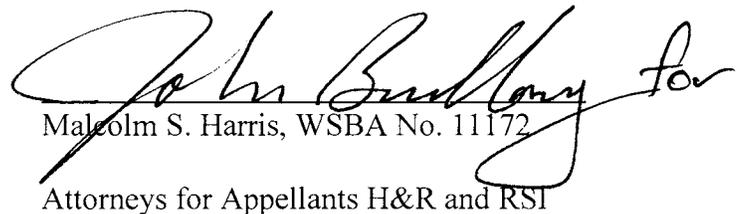
RESPECTFULLY OFFERED this 2<sup>nd</sup> day of March, 2007.

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# APPENDIX

Substitute H.B. 2415, 59<sup>th</sup> Leg. Reg. Sess. (Wash. 2006) provides the following definition of “accident” for underinsured motorist coverage:

As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, “accident” means an occurrence that is unexpected and unintended from the standpoint of the covered person.