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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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ALLSTATE INSURANCE COMPANY,

Respondent/Plaintiff,

v.

NICHOLAS WAYNE THORNTON, an individual; DALE THORNTON
and TAMMY THORNTON, husband and wife; and JOHN PETTY,

Appellants/Defendants.

BRIEF OF RESPONDENT ALLSTATE INSURANCE COMPANY

Submitted by:

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INTRODUCTION

This case arises out of Nicholas Wayne Thornton's criminal act of recklessly burning John Petty's (hereinafter "Petty") barn. On April 7, 2005, Nicholas Wayne Thornton pled guilty to first degree reckless burning and admitted that he "recklessly damaged a barn by knowingly causing a fire in Ridgefield, Washington." Petty filed suit against Nicholas Wayne Thornton and his parents, Dale and Tammy Thornton, arising from the damage caused by the fire. Petty provided a release of all claims against the Thorntons in exchange for an assignment of claims against Allstate. Dale and Tammy Thornton have a Mobile Home Insurance Contract with Allstate Insurance Company (hereinafter "Allstate") and tendered the claims made against them to Allstate. Allstate filed a Declaratory Judgment action seeking a determination from the Court that it had no duty to defend and no duty to indemnify Nicholas Wayne Thornton and Dale and Tammy Thornton for the claims made against them by Petty, based upon the insurance contract's exclusion for "property damage which may reasonably be expected to result from the *** criminal acts of an insured person." Allstate filed a Motion for Summary Judgment and Petty filed a Cross-Motion for Summary Judgment. The Court granted

Allstate's Motion for Summary Judgment, declaring that there is no coverage for, and no duty to defend, the Thorntons for the claims made against them by Petty.

RESPONSE TO ASSIGNMENT OF ERROR

The Court made no error. The Court properly granted Allstate's Motion for Summary Judgment which denied coverage for the claims made by Petty against Nicholas Thornton, Dale Thornton and Tammy Thornton based upon the "criminal acts" exclusion contained in Allstate's insurance contract.

STATEMENT OF THE CASE

Petty's statement of the case is incomplete. On or about November 21, 2006, Petty filed suit against Nicholas Thornton, Dale Thornton and Tammy Thornton in Clark County Superior Court, Case No. 06-2-06153-9. [CP 5-7]. The Complaint filed by Petty alleges that on or about June 6, 2003, Petty's barn "burned to the ground destroying the barn and all hay stored therein causing \$39,837.00 to the barn and contents." [CP 6]. The Complaint also alleges that Petty discovered in or around April, 2005 that "Nicholas Wayne Thornton admitted that on

June 6, 2003 he entered [Petty's] barn without actual or implied permission" and that he "admitted that while on the premises he allowed the ashes from a cigarette to fall into hay stored in the barn and failed to fully extinguish the embers causing the barn to burn down." [CP 6].

The Complaint further alleges that Nicholas Thornton pled guilty to first degree reckless burning and was assessed restitution of \$39,837***." [CP 6]. The Complaint also alleges that pursuant to RCW 4.24.190, "Dale and Tammy Thornton are liable for up to \$5,000 in damages caused by the willful or malicious acts of their minor child." [CP 6].

Nicholas Thornton pled guilty to First Degree Reckless Burning on April 7, 2005. [CP 101-111]. In his "Statement of Defendant on Plea of Guilty to Non-Sex Offense," Nicholas Thornton stated "****between June 1, 2003 and December 31, 2003 I Recklessly damaged a barn by knowingly causing a fire in Ridgefield, Washington." [CP 123].

ARGUMENT

1. **The Allegations Of The Complaint And The Specific Elements Of The Crime He Pled Guilty To Establishes That Thornton Reasonably Expected That Property Damage Would Occur As A Result Of His Criminal Act**

Petty has incorrectly argued that there is no evidence that Nicholas Thornton expected or intended that his actions of allowing ashes from his cigarette to fall onto hay stored in Petty's barn would cause property damage. Petty's argument is without any merit in light of the specific allegations contained in the Complaint filed against the Thorntons and the specific elements of the crime to which Nicholas Thornton pled guilty on April 7, 2005.

First, the relevant exclusion of the Mobile Home insurance contract entered into between Allstate and Dale and Tammy Thornton is, as follows:

“Exclusions-Losses We Do Not Cover:

1. **We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.”**

Therefore, the applicable portion of this exclusion for purposes of this case is that Allstate does not cover “property damage which may

reasonably be expected to result from the *** criminal acts of an insured person.”

It is important to note that Petty incorrectly states in his Brief that the exclusion does not apply because Petty did not intend to cause a fire, did not intend to drop the ash from his cigarette and did not intend for the ashes to kindle a flame. [Petty’s Brief, pg. 3]. However, the policy does not require that Nicholas Thornton *intend* to cause the damage. Instead, the policy only requires that there be a reasonable expectation that property damage would occur from the insured’s criminal act.

Evidence of Nicholas Thornton’s reasonable expectation of property damage is contained in the allegations made by Petty and by the specific elements of the crime he which he pled guilty. The Complaint filed against the Thorntons alleges that on or about June 6, 2003, Petty’s barn “burned to the ground destroying the barn and all hay stored therein causing \$39,837.00 to the barn and contents.” [CP 6]. The Complaint also alleges that in April, 2005, Nicholas Wayne Thornton admitted that on June 6, 2003 he had entered Petty’s barn and allowed ashes from his cigarette to fall into the hay stored in

the barn and failed to extinguish the embers which caused the barn to burn down. [CP 6]. Nicholas Wayne Thornton “plead guilty to first degree reckless burning and was assessed restitution of \$39,837***.” [CP 6].

Nicholas Thornton pled guilty to First Degree Reckless Burning on April 7, 2005. [CP 101-111]. According to RCW 9A.48.040, the elements of First Degree Reckless burning are, as follows:

“Reckless burning in the first degree

(1) A person is guilty of reckless burning in the first degree if he ***recklessly damages*** a building or structure or any vehicle, railway car, aircraft or watercraft or any hay, grain, crop, or timber whether cut or standing, by ***knowingly causing a fire or explosion***.

(2) Reckless burning in the first degree is a Class C felony.” (emphasis supplied)

There can be no dispute that Nicholas Thornton pled guilty to “knowingly causing a fire or explosion.” In fact, in his “Statement of Defendant on Plea of Guilty to Non-Sex Offense,” Nicholas Thornton stated that “***between June 1, 2003 and December 31, 2003 I Recklessly damaged a barn by knowingly causing a fire in Ridgefield, Washington.” [CP 123]. Additionally, the Complaint alleges that he

allowed ashes from his cigarette to fall onto hay stored in Petty's barn and that he failed to fully extinguish a fire.

As set forth in RCW 9A.08.010(1)(b), the penal code expressly provides:

“§ 9A.08.010. General requirements of culpability

(1) Kinds of Culpability Defined.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

Petty's argument that there was no reasonable expectation of property damage completely contradicts the established facts of this case. Nicholas Thornton pled guilty to “*knowingly* causing a fire or explosion.” Furthermore, the Complaint alleges that he *allowed* ashes from his cigarette to fall onto hay stored in the barn and that he failed to fully extinguish a fire. A person who “knowingly” causes a fire by

“allowing” a cigarette ashes to fall onto hay reasonably expects that property damage will result.

Washington cases have addressed the issue of the foreseeability of causing damage even though an insured may not have “intended” to cause damage.

In *Safeco v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), the insured attempted to find the perpetrators who were destroying mailboxes in his neighborhood. *Id.* at 386. After his mailbox was destroyed, the insured took two loaded handguns to his car and began looking for the perpetrators. After locating them in their vehicle, he claims to have seen a “flash” and then fired six shots at the perpetrators’ truck in an attempt to stop the confrontation. *Id.* at 386. One of the perpetrators was struck in the head and seriously injured. The Insured did not *intend* to shoot Mr. Butler.

Safeco filed a declaratory action seeking to have the court declare that the injuries sustained were not the result of an “accident” within the meaning of Mr. Butler’s insurance policy. *Id.* at 387. Mr. Butler, the insured, argued that the injuries were a result of an “accident” because he “did not foresee that his shots would cause

injury” and that it was an “unintentional ricochet” of the bullet that caused the injuries. *Id.* at 509. The Court rejected Mr. Butler’s arguments and found that the ricochet of the bullets was foreseeable and not caused by an accident. *Id.* The Court stated, in relevant part:

“The Butlers argue that the ricochet was an additional, unexpected, independent and unforeseen happening. Safeco responds that the ricochet was foreseeable. We agree with Safeco. Under the facts of this case no reasonable person could reach the conclusion that Zenker’s injury was unforeseeable.***” *Id.* at 509.

As in Butler, even if Nicholas Thornton did not have a *specific intent* to cause damage, it was entirely foreseeable and reasonable that property damage would result from his admitted act of knowingly causing a fire.

In *Safeco v. Dotts*, 38 Wn.App. 382, 685 P.2d 632 (1984), the Washington Court of Appeals found that a mere slap to the head was enough to establish that death was a reasonably foreseeable consequence of that act *as a matter of law* even though the insured did not intend subjectively to hurt the decedent:

*** the contact between Mr. Dotts’ hand and Mr. McKee’s face was an open-handed, backhanded slap. The contact did

not mark the insured's hand or the victim's face. No other physical contact occurred. Soon, Mr. McKee left the premises seemingly unaffected by Mr. Dotts' slap.

Later that morning, Mr. McKee was taken by a friend to a Spokane hospital, where he lapsed into a coma. He died 5 days later without regaining consciousness.

A Stevens County jury convicted Mr. Dotts of second degree manslaughter and second degree assault. At that trial, Mr. Dotts testified he did not intend to hurt the deceased and he was not angry with him; Mr. Dotts just wanted to get Mr. McKee's attention.

The parties agree the backhanded slap was a "deliberate act". Similarly, for purposes of this appeal, it is undisputed Mr. Dotts subjectively did not intend or expect the "result" of death. At oral argument, appellants maintained the record does not reveal the actual cause of death. We disagree. While the record does not reflect a medical diagnosis, it nonetheless sets forth an uninterrupted chain of events put into motion by Mr. Dotts' deliberate slap. The decedent was taken to the hospital within hours of the assault. Appellants have not presented facts in opposition to Safeco's motion for summary judgment to raise an inference that the actual cause was "independent" of the hand slap within the meaning of *Johnson*. Rather, the only facts offered by appellants to suggest a material issue of fact exists is the decedent's flinching, or leaning-back action, at the prospect of being slapped. Appellants contend this was an independent and unexpected action so as to keep the incident within the policy definition of "occurrence". This argument

is unpersuasive. The victim's leaning back may have been subjectively unexpected and even unforeseeable, but it was not "independent" since it was instantly and directly connected to Mr. Dotts' deliberate conduct. It is not unusual to flinch at the sudden prospect of an imminent slap in the face. ***

As stated in *Unigard*, at 265, *public policy prevents an insured from benefiting from his wrongful acts, but where the intentional act was done by one other than the insured, public policy does not prevent coverage.* ***” (*Id.* at 384-87; emphasis supplied)

Therefore, while Nicholas Thornton may not have intended to cause damage, it was entirely reasonably foreseeable that his actions would cause property damage.

2. Under *Allstate v. Peasley*, Thornton’s First Degree Reckless Burning Is A Criminal Act That Is Excluded Under Allstate’s Insurance Contract

Petty’s argument that Allstate’s criminal act exclusion applies only to “serious crimes” is entirely flawed. The Washington Supreme Court’s decision in *Allstate v. Peasley*, 131 Wn.2d 420, 932 P.2d 1244 (1997) regarding the applicability of a criminal acts exclusion, in the context of the insured pleading guilty to a reckless crime, is entirely on point.

In *Allstate v. Peasley*, the Washington State Supreme Court addressed whether a criminal acts exclusion, in the context of a homeowner's insurance contract, applied to not only intentional acts, but also "unintentional" acts. In *Peasley*, the insured was charged with second degree assault after shooting a guest in his home. 131 Wn.2d at 423. Peasley was tried and convicted, but his conviction was overturned by the Court of Appeals after an erroneous jury instruction. *Id.* Peasley then pled guilty to the lesser charge of second degree reckless endangerment. *Id.* Thereafter, the victim sued Peasley. *Id.* Allstate filed a Motion for Summary Judgment seeking a declaration from the Court that the homeowner's insurance contract excluded coverage for Peasley's acts because they were the result of Peasley's "criminal acts." *Id.*

The Allstate exclusion analyzed by the *Peasley* Court, provided as follows: "We do not cover any bodily injury which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person." The exclusion addressed in *Peasley* is substantially similar to the relevant, intentional, or criminal acts exclusion in Allstate's insurance contract set forth in full, above. The *Peasley* court held that the term "criminal

acts” as used in an insurance exclusion, applies to both intentional and unintentional crimes. Therefore, Peasley’s crime of “reckless endangerment” was still considered a “criminal act” and there was no coverage under Allstate’s insurance contract.

The *Peasley* Court addressed the Washington Supreme Court’s decision in *Van Riper v. Constitutional Government League*, 1 Wn.2d 642, 96 P.2d 588 (1939), relied upon by Petty in his Brief. While the *Peasley* court did find that second degree reckless endangerment was a “serious crime” according to the *Van Riper* standard, the Peasley court did find that Allstate’s criminal act exclusion was not restricted to just “serious crimes.” 131 Wn.2d at 428.

In fact, *Peasley* specifically states as follows:

“Van Riper’s holding fails to support Peasley’s reading of the Allstate exclusion in this case. Van Riper’s analysis was context specific, and is not controlling on how this court interprets the word criminal in the context of Allstate’s exclusionary clause.” More importantly, *Van Riper’s* holding did not rest upon the intentional/unintentional distinction as argued by Peasley. Rather, the court’s holding rested upon a distinction between *serious* crimes and *nonserious* crimes.” *Peasley*, 131 Wn.2d. at 427-28.
(Emphasis supplied)

The *Peasley* court noted that its application of the criminal acts exclusion to *reckless* conduct was supported by nearly all other jurisdictions:

“Finally, our reading of the phrase ‘criminal acts’ is supported by nearly every jurisdiction in our country which has examined that phrase. *See, e.g., Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir. 1994) (Allstate’s criminal acts exclusion clause encompasses criminal recklessness); *Allstate Ins. Co. v. Burrough*, 914 F.Supp. 308, 312 (W.D. Ark. 1996) (the clause ‘includes all criminal acts, no matter what the mental state required for their commission’); *Hooper v. Allstate Ins. Co.*, 571 So.2d 1001, 1003 (Ala. 1990); *Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619, 570 A.2d 488, 492 (‘words criminal act are not modified by any descriptive culpability requirement’), *cert. den.*, 122 N.J. 395, 585 A.2d 394 (1990); *Steinke v. Allstate Ins. Co.*, 86 Ohio App. 3d 798, 621 N.E.2d 1275, 1279 (disorderly conduct, a crime with recklessness as an element, triggered the exclusionary clause), *review denied*, 67 Ohio St. 3d 1423, 616 N.E.2d 506 (1993); *Allstate Ins. Co. v. Sowers*, 97 Or.App. 658, 776 P.2d 1322, 1323 (1989) (insured’s resisting arrest fit the criminal act exclusion despite insured’s lack of intent to injure the officer.” *Peasley*, 131 Wn.2d at 429-30.

In *Peasley*, the insured pled guilty to second degree reckless endangerment, which is reckless conduct “which creates a substantial risk of death or serious physical injury to another person.” Similarly, in

the present case, Nicholas Thornton pled guilty to first degree reckless burning which is “recklessly damaging [property] by knowingly causing a fire or explosion.” The *Peasley* court clearly established that Allstate’s criminal acts exclusion precludes coverage for reckless criminal acts, *as a matter of law*.

In addition, even if the Court did determine that the *Van Riper* test applies, Nicholas Thornton’s criminal act of first degree reckless burning is a “serious crime” under the test. According to *Van Riper*, a criminal act is an act done with “malicious intent, from evil nature, or with wrongful disposition to harm or injure other persons or property.” *Van Riper*, 1 Wn.2d at 642. In the present case, Nicholas Thornton’s criminal act plainly meets that standard. The act that Nicholas Thornton pled guilty to, first degree reckless burning, is a *Class C felony*. The Defendants’ argument that this Class C Felony is not a “serious crime” is without any merit, especially in light of the fact that the *Peasley* court held that the crime of reckless endangerment,¹ which

¹ § 9A.36.050. Reckless endangerment

(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but

is a *gross misdemeanor*, was a “serious crime” under the *Van Riper* test. *Peasley*, 131 Wn.2d at 428.

There is simply no reason to require an insurance company to indemnify an insured against criminal acts on the claims assigned by the Thorntons in favor of Petty, pursuant to their release of all claims.

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that creates a substantial risk of death or serious physical injury to another person.

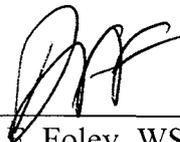
2) Reckless endangerment is a gross misdemeanor”

CONCLUSION

For the foregoing reasons, Allstate respectfully requests that the Court uphold the Trial Court's entry of Summary Judgment in favor of Allstate and against Petty and the Thorntons. Petty has provided no genuine issue of material fact that would preclude the court from entering judgment in Allstate's favor.

Dated this 22nd day of April, 2008.

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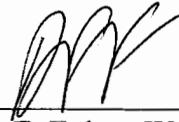
CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I served the foregoing document on the attorneys of record by the means indicated below:

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Dated this 22nd day of April, 2008.



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