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1. Summary -- The Trial Court Erred In Granting Summary Judgment In Favor of State Farm

State Farm's approach to the analysis in this case is outcome-oriented, rather than principled. State Farm's objective is to relieve itself of a duty to defend or to indemnify one of its insured, which has been sued. To escape this obligation to protect its insured from liability, and from the expense of being sued to establish liability, State Farm travels through a survey of cases that have no factual similarity whatsoever to the present case. The list of cases was selected because these decisions share the outcome that State Farm desires, where courts have relieved insurance companies from a duty to defend and/or indemnify an insured.¹ By selecting truncated "sound bites" from these cases, State Farm stitches them together to present what is actually just Respondent's eventual conclusion; namely, that if the Ngs acted volitionally, there is no insurance coverage for property damage caused by their actions.

¹ There appears to be one exception, which State Farm may have cited inadvertently, in Respondent's Brief at footnote 1 on page 9. *See, Diana v. Western National Assur. Co.*, 56 Wn. App. 741, 785 P.2d 479 (1990). Diana is thoroughly helpful to the Ngs' position in this case.

The principal problem with State Farm's approach is that State Farm oversimplifies the present case, trying to analogize it to cases of homicides, suicides and violent assaults, where insurance companies have, over many decades, persuaded courts that their policies should not and do not provide coverage. State Farm's effort is unpersuasive. The present case does not resemble the facts of the "assault cases" in any meaningful way. Moreover, the analysis used in the "assault cases" and the rules articulated in them would not lead to the same outcome under the facts of the present case.

Once into the analysis of the present case, State Farm misstates the nature of the "damage" or "injury" in the underlying *Kwon v. Ng* dispute, to make it impossible for the Ngs to argue here that the damage suffered by the Kwons was unforeseeable. Then, State Farm incorrectly characterizes Appellants' arguments to create non-existent conflicts with reported Washington case law. Last, State Farm takes a cursory look at the cases where injury or damage resulting from deliberate acts was not reasonably foreseeable -- which includes cases that most resemble this one factually -- from within and outside of this jurisdiction. But State Farm quickly dismisses them, either by pointing out that they employ a

subjective test of foreseeability, or by returning to the incorrect characterization of the “property damage” in this case.

Using an objective test of foreseeability, and correctly describing the “property damage” that the Kwons claim to have suffered, applying Washington law under existing holdings, this case emphatically calls for a determination that State Farm indeed has a duty to defend and to indemnify its insured. For this reason the summary judgment must be reversed, and the case remanded to the trial court for further proceedings.

2. The “Property Damage” That Kwons Claim to Have Suffered is Damage to Their Real Property

Under the Ngs’ liability policy, “property damage” is defined as:

physical damage to or destruction of tangible property, including loss of use of this property....

(CP 42). State Farm says:

[T]he trees were cut down. Trees are tangible property. Trees cannot be cut down without destroying them as live trees. Thus, when they are cut down, they suffer physical damage or destruction by definition.

Respondent’s Brief at 7-8. By characterizing the property that was damaged in this fashion, State Farm makes the argument essentially tautological. If trees are tangible property, and if the Ngs deliberately

cut down trees, and if cutting down trees damages or destroys them by definition, then the deliberate cutting down of trees cannot be “accidental”.

Applying State Farm’s analysis to *Nationwide Mutual Ins. Co. v. Hayles*, 136 Wn. App. 531, 150 P.3d 589 (2007) (the Washington case that most closely resembles this one on its facts), shows the absurdity of this syllogistic reasoning. Applying water to onions in a field prior to harvest will rot them. Onions are tangible property. Rotten onions are, by definition, damaged or destroyed. Hayles deliberately applied water to an onion crop prior to harvest. Hence, the property damage could not possibly be accidental. Of course, that is not the holding in *Hayles*. The court applied an objective test of foreseeability to reach the conclusion that, even though the act that caused the harm was volitional (indeed, it was expressly contrary to the victim’s instructions), the record showed that the actor had no reason to foresee the damage that would ensue. Thus, the property damage (a ruined onion crop) was the result of an “accident” for insurance coverage purposes, even though the mechanical cause of the damage was a deliberate act.

The court should reject State Farm's outcome-oriented attempt to describe the "property damage" in a way that, by definition, forecloses insurance coverage. The tangible property that the Kwons claim was damaged in the underlying action is their *real property*. In the underlying action, the Kwons seek damages not only for the cost to replace the trees, but also for mental and emotional injury stemming from the loss of use and enjoyment of their *land*, not their trees.² (CP 75-77) They refer to the destruction of their backyard, and their privacy, and adjacent landscaping that was allegedly harmed by the felled trees. The Kwons are not merely complaining about loss of trees as a commodity, the way a timber company might. The correct inquiry in this case is whether the damage the Ngs caused to the Kwons' *land* was "accidental" under applicable insurance jurisprudence. To approach the issue as State Farm suggests is nonsensical, and ignores the facts of the case.

State Farm does make a useful reference to *Overton v. Consolidated Insurance Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002). *Overton* zeroes in on the important question of foreseeability, in

² This is not to say that eventual liability for other types of damage, such as mental anguish are necessarily covered under the policy. This is only to show that the Kwons do not claim that the harm they suffered was simply four missing trees.

determining whether a given claim falls within the insurance definition of an “occurrence” (i.e., an “accident”). The *Overton* decision correctly illuminates that, to find a given property damage to have been accidentally caused, what needs to be unexpected is not what it costs to remedy some legal liability. Rather, the inquiry is whether “property damage” itself was unexpected, not legal “damages” or the economic measure of what it takes to make a victim whole. The problem is that State Farm just fabricates a definition of “property damage” in this case that removes the case from any real analysis whatsoever.

State Farm gives only the most cursory treatment to any of the cases the cases that highlight the fact that a given act or event is either harmful or not harmful based on the purported victim’s wishes.³ In other words, there are circumstances where the question of whether or not the victim suffers any injury at all depends on what the victim wanted or intended. It appears that no state court in Washington has yet considered

³ State Farm makes very short reference to *Fischer v. State Farm Fire and Casualty Co.*, 272 F. App’x 608 (9th Cir.) in Respondent’s Brief at 36-37. But, through the incorrect characterization of “property damage” as damage to the trees that were removed, State Farm simply dismisses the holding in *Fischer* as irrelevant and inapplicable.

such a case, in the context of determining if personal injury or property damage was accidental for purposes of insurance coverage.⁴

But such cases do exist, and the Ngs have cited several. See, e.g., *Fischer v. State Farm*, 272 Fed. Appx. 608 (9th Cir. 2008)(sexual intercourse causes personal injury only if non-consensual); *Standard Construction Co. v. Maryland Casualty Co.*, 359 F.3d 846 (6th Cir. 2004)(dumping of construction debris on private properties, erroneously believing permission had been granted); *J. D'Amico v. City of Boston*, 345 Mass. 218, 186 N.E.2d 716 (1962)(damage to and removal of trees where permission for removal was disputed); (*New York Industrial Center, Inc. v. Michigan Mutual Liability Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967)(insureds intended to destroy trees and shrubs, but did not intend to destroy any of underlying plaintiff's property rights); *Lumber Ins. Co. v. Moore*, 820 F. Supp. 33 (D. NH 1993)(injury occurs

⁴ *Nationwide Mutual Ins. Co. v. Hayles*, 136 Wn. App. 531, 150 P.3d 589 (2007) arguably gets pretty close. The onion grower reportedly instructed the sublessor not to irrigate the onion crop after a certain point in time. This implies that irrigating the field – a deliberate act – may or may not cause property damage. The reasonable foreseeability of the property damage is the key inquiry. One could add “from the perspective of the insured”, but not to turn the inquiry into a subjective test. This only frames the foreseeability inquiry in context: knowing what the sublessor in *Hayles* knew, was it reasonably foreseeable that irrigating the onion crop would ruin it?

and property is damaged from tree cutting only if trees belong to someone else and cutting is not authorized).

In each of these cases, the court paid special attention to the question of whether the insured who caused the injury had reason to know what the victim of the injury wanted. In response, State Farm argues that cases from other jurisdictions apply a subjective standard, and rejects them as useless to the analysis here.⁵ The Ngs refer to these cases for a different reason: even applying an objective standard of foreseeability, the presence or absence of property damage will, in certain cases, depend completely on what the alleged victim wanted. The taking down of a tree simply does not, as State Farm doggedly asserts, constitute “property damage” as a matter of law. It is only **unwanted and unauthorized** taking of trees that creates any damage. See, e.g., *Lumber Ins. Co. v. Moore*, 820 F. Supp. 33 (D. NH 1993).

In this respect, State Farm really has missed the entire point in this dispute -- or seeks to divert attention from it. As recited in the Ngs’

⁵ Of course, the *Fischer* case is an exception, because the federal court applied Washington law, which applies an objective test of foreseeability. State Farm rejects *Fischer* on the basis that the insured there could possibly, objectively, have believed that he had the victim’s consent to sexual intercourse. By mis-defining “property damage” in this case, State Farm simply concludes that it was impossible for the damage to be unforeseeable.

Opening Brief, there exist many reasons that property owners might actually desire that trees on their property be removed. See Appellants' Opening brief at 29. State Farm would have the Court conclude that "property damage" has occurred any time a tree is cut down, or perhaps even pruned. Common sense should quickly prevail here, and the court should begin the analysis with the deduction that the "property damage" in this case was alleged damage to the Kwon real property because of the **unauthorized and undesired** removal of trees.

With the term "property damage" correctly defined, the analysis turns to whether that property damage was caused by "accident", despite the fact that the mechanical cause of the cutting of trees was intentional.

3. Injuries Resulting From Intentional Acts Can Be "Accidents" For Purposes of Insurance Coverage

State Farm makes the unremarkable statement that "deliberate acts are typically not "accidents". Respondent's Brief at 8. Frankly, deliberate acts might not ever be "accidents". But that is not the inquiry in this case.

Here, the question is whether the "property damage" that the Kwons claim to have suffered -- as properly defined -- was **accidentally caused**. As if to make a statistical argument, State Farm runs through a

long list of cases in which Washington courts have found that injuries caused as a result of intentional acts were not “accidental” for purposes of triggering insurance coverage and/or defense. *See Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989)(self defense killing); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 123 (1989)(self defense killing); *Safeco Ins. Co. of America v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984)(death inducing slap); *E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986)(gender discrimination and retaliatory discharge); *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 794 P.2d 521 (1990)(physical assault); *American Economy Ins. Co. v. Estate of Wilker*, 96 Wn. App. 87, 977 P.2d 677 (1999)(injury from witnessing child molestation); *Unigard Mutual Ins. Co. v. Spokane School District*, 20 Wn. App. 261, 579 P.2d 1015 (1978)(damage to property from intentionally set fire); *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990)(vehicular assault); *Lloyd v. First Farwest Life ins. Co.*, 54 Wn. App. 299, 773 P.2d 426 (1989)(death from deliberate inhalation of cocaine); *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992)(gunshot injury by angry victim of vandalism); *State*

Farm v. Parrella, 134 Wn. App. 536, 141 P.3d 643 (2006)(injury from intentionally fired BB gun).

All but one of these cases involved personal injury, and not property damage. The lone property damage case involved a fire that a child deliberately set, but that burned out of control, damaging a school building. The common analytical thread running through all of those decisions was the clear foreseeability of personal injury, or destruction of property. Not one of these cases had any element of miscommunication or misunderstanding between the actor and the victim. Not one of these cases involved the situation where the very existence of harm to a victim's person or property depended upon the wishes of the victim. Not one of the cases is even remotely analogous to the present case on a factual level. But in each such case, the conclusion drawn by the court that the injury or property damage was not accidentally caused hinged on the foreseeability of the injury – not necessarily the extent or severity of it, but the fact that even an unintended injury was foreseeable under the factual circumstances.

State Farm ultimately does not deny that injuries resulting from intentional acts *can* be accidentally caused for purposes of insurance

coverage. State Farm cannot deny that proposition, because several reported Washington cases expressly so hold, and many more such cases from other jurisdictions do too.

The issue here is not a matter of applying an objective versus a subjective standard. What is lacking in State Farm's response is any analysis to explain why the factual circumstances presented here do not fall into that category of situations where intentional acts produce personal injury or property damage that is accidental for insurance coverage purposes.

4. The Ngs Do Not Advocate A Subjective Standard For Determining Accidentally Caused Injuries or Damage

Another crucial place in the analysis where State Farm misses the Ngs' argument is the objective nature of the test of foreseeability of harm or injury. The Supreme Court has stated in *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990), the term "accident" is not a subjective term. The Ngs do not contend otherwise.

In their Brief, Respondents point to three passages from Appellants' Opening Brief where Appellants use the phrases "perspective of the insured", "insured's point of view", or "point of view of the insured". This is not an indicator of a subjective standard. Each one of

those three passages is preceded by the term “foreseeability” or “foreseeable” in reference to the injuries. The Ngs are not arguing that, simply because they did not **subjectively** understand what the Kwons really wanted, the injury to the Kwons’ property was “accidental” for purposes of triggering insurance coverage. The Ngs argue that, under the facts and circumstances of this case, **a reasonable person** would have mistaken the Kwons’ true wishes. It makes sense to go on to say a reasonable person “in the Ngs’ position” would have mistaken the Kwon’s true wishes. That does not turn the analysis into a subjective one. It only means a reasonable person who had the same information that was available to the Ngs would have lacked a proper understanding of the Kwons’ true wishes.

The *Hayles* case is directly applicable here. An employee of a sublessor, in contravention to the express instructions of the onion grower, irrigated an onion crop and destroyed it. The court concluded that the record contained “no evidence that Mr. Hayles [i.e., the insured] knew or should have known that turning on the irrigation system would damage the onion crop”. *Nationwide Mutual Insurance Co. v. Hayles*, 136 Wn. App. 531, 538, 150 P.3d 589 (2007). The court did not

impose upon the insured the onion grower's experience and knowledge pertaining to onion farming. The *Hayles* court, though employing an **objective** test of foreseeability, considered the question from the standpoint, or perspective, of the insured.⁶

The important inquiry, as Washington courts have said over and over again, is whether the injury was reasonably foreseeable.⁷ Using the phrase "from the point of view of the insured" is perhaps a poor choice of vocabulary in light of the *Roller* decision, but even State Farm will have to admit that that phrase is scattered throughout the reported decisions in various contexts. The Ngs do not, by any stretch, argue that an absence of subjective intent to cause harm to the Kwons or their property makes the injury accidental, although that question of the Ngs' subjective intent is central to the issues in the underlying case between the neighbors. In *Diana v. Western Nat'l Assurance Co.*, 56 Wn.App. 741, 785 P.2d 479 (1990), and in *Nationwide Mutual Insurance Co. v.*

⁶ See also, *Diana v. Western Nat'l Assurance Co.*, 56 Wn.App. 741, 745, 785 P.2d 479 (1990). Although cited by respondent, the case is a "property damage" case that supports the Ngs. The Court of Appeals reversed summary judgment in favor of the insurer, finding it to be in a class of cases that must be determined by their particular facts and the closeness of the relationship between the deliberate act and the injurious result.

⁷ See Appellants' Opening Brief at 10 - 19.

Hayles, 136 Wn. App. 531, 538, 150 P.3d 589 (2007), the courts applied an objective test to the question of foreseeability of harm, but definitely considered that question from the viewpoint or position of the insured.

5. The *Hayles* and *Fischer* Cases Control The Outcome in This Case.

Ultimately, the outcome in this case turns on analysis of *Nationwide Mutual Insurance Co. v. Hayles*, 136 Wn. App. 531, 538, 150 P.3d 589 (2007), and *Fischer v. State Farm*, 272 Fed. Appx. 608 (9th Cir. 2008). *Fischer* teaches us that the same deliberate act might or might not produce injury that is recognized under the law. In that case, the deliberate act was sexual intercourse. Here, it is the removal of trees. In both cases, there is only harm that the law recognizes where the deliberate activity was not authorized or consented to. The present case cannot be analogized to the collection of cases involving physical assaults, vehicular assaults, arson, ingestion of illegal drugs and other actions *designed* to inflict bodily harm or property destruction.

And *Hayles* tells us that where property damage has occurred as a result of a deliberate act, the question of whether or not the property damage was nevertheless caused by accident, for insurance purposes, is

whether or not the insured reasonably should have foreseen that the deliberate act would cause the property damage.

Synthesizing the two cases, the Ngs would not have a right to indemnity from their insurer if, under the factual circumstances presented, they knew or should have known that the Kwons did not want their trees removed, because the unwanted and unauthorized removal of trees causes damage – the desired removal of trees does not. On the summary judgment record before the court, accepting the facts in the light most favorable to the Ngs, the only permissible conclusion is that the Ngs did not have reason to know that the Kwons wanted to retain the four fir trees and had not authorized their removal, and therefore did not have reason to know that removal of the trees would cause cognizable damage to the Kwons’ real property. Thus, the “property damage” was accidentally caused, within the meaning of the insurance contract.

State Farm’s heavy reliance on *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990) is misplaced, because State Farm incorrectly concludes that the Ngs are trying to apply a test of subjective intent to cause harm as the controlling inquiry. The reality is that this case is far more complex, subtle, and nuanced than State Farm will

admit. In *Roller*, an ex-wife ran her ex-husband down with her car, causing him serious bodily harm. The victim tried to access the uninsured motorist coverage of his friend's auto insurance policy to compensate him for his injuries. The "purpose of the underinsured motorist statute is to permit the insured party to recover those damages he or she would have received if the tortfeasor had been insured." *Id.* at 685.

Finding that Roller would have received no coverage for his injuries if the ex-wife had been insured, because "traditional policies do not cover intentional acts by the insured," the request for coverage under the friend's UIM policy was denied. *Id.* at 686. The record before the *Roller* court did not require the court to get into the question of how reasonably foreseeable it was that the ex-wife's intentional vehicular assault would cause personal injuries to the ex-husband. In *Roller*, it was patently obvious that no "accident" had occurred by anyone's definition.

The situation in the present case is completely different, once the "property damage" is correctly articulated as damage to the Kwons' land and not damage to trees that the Kwons seemingly desired to have

removed. It is only when the court goes into this analysis that the rule of

Hayles becomes so very clear:

By use of the term “intentional,” however, *Roller* does not mean that an accident must be caused by an unconscious, nonvolitional act. To prove that an intentional act was not an accident, the insurer must show that it was deliberate, meaning done with an awareness of the implications or consequences of the act.

Nationwide Mutual Insurance Co. v. Hayles, 136 Wn. App. 531, 538, 150 P.3d 589 (2007). What proof has State Farm offered, to show that the Ngs’ act of commissioning the removal of trees on the Kwon property was done “with an awareness of the implications or consequences of the act”? What has State Farm presented to show that the Ngs either knew or should have known that the Kwons actually wanted to retain their fir trees, and that the removal of them would be viewed as harming their real property, and not improving it? Where, on this summary judgment record, is it shown that the Ngs intentionally took down trees that they knew the Kwons did not authorize them to remove?

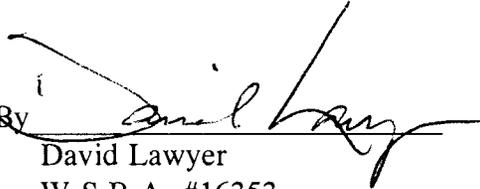
These are rhetorical questions. The answer is clear. There is no such evidence. The Ngs actually (subjectively), and reasonably (objectively) believed that they were acting in accordance with the

Kwons' wishes and instructions. Accepting these facts, it is impossible to conclude as a matter of law that the Ngs took action in removing trees "with awareness of the implications or consequences of the act". For this reason, *Hayles* controls the outcome of this analysis, and the summary judgment must be reversed, and the matter remanded to the trial court to proceed to trial, where the primary issue will be whether any factual evidence exists to support State Farm's position that the Ngs should have known that the Kwons did not want their trees removed. The Ngs are entitled to an award of their reasonable attorneys fees on appeal.

Respectfully submitted this 17th day of June, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

KWING ON NG and ERICA M. SUK YEE MAN NG,

Defendants-Appellants,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff-Respondent.

**CERTIFICATE OF SERVICE
OF REPLY BRIEF OF APPELLANTS**

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FILED
2009 DEC 11 10:00 AM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2010, I caused to be served a true and correct copy(ies) of the following document(s):

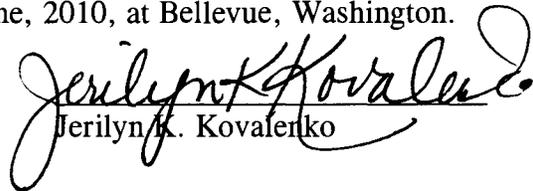
1. REPLY BRIEF OF APPELLANTS; AND
2. CERTIFICATE OF SERVICE

to the individual(s) named below in the specific manner indicated:

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DATED this 11th day of June, 2010, at Bellevue, Washington.


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