

a

36256-2-II

No. 79168-6

aff

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

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

Petitioners/Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY, an
Illinois Corporation,

Plaintiff/Respondent,

05/10/17 11:03
STATE OF WASHINGTON
SUPERIOR COURT

APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT
Honorable Theodore Spearman, Judge by Designation

BRIEF OF APPELLANTS

Counsel for Petitioners/Appellants:

John Budlong
Law Offices of John Budlong
100 Second Avenue South, # 200
Edmonds, Washington 98020
(425) 673-1944

Malcolm S. Harris
Harris, Mericle & Wakayama,
P.L.L.C.
999 - 3rd Avenue, #3210
Seattle, Washington 98104
(206) 621-1818

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR AND RELATED ISSUES 1

II. STATEMENT OF THE CASE 2

A. The Aldrich’s Market Fire 2

B. The Underlying Property Damage Lawsuit 4

C. Chanel Chadwick’s Policies with State Farm 5

D. State Farm Acknowledged Coverage, Then Denied It After Recognizing the Extent of Its Liability Exposure 6

E. State Farm’s Guidelines for Determining an Accidental “Occurrence” 13

F. The Present Lawsuit 14

G. The Dismissal Rulings 15

H. Notice of Appeal 17

III. ARGUMENT 17

A. The Rules of Insurance Policy Interpretation 17

B. The Aldrich’s Market Fire Was an Accidental “Occurrence” under Washington Law 19

C. The Aldrich’s Market Fire Was an Accidental “Occurrence” under State Farm’s Coverage Guidelines 23

D.	The Aldrich’s Market Fire Was a Covered “Occurrence” under an Objective Definition of “Accident”	24
E.	The <i>Unigard</i> Definition of “Accident” Does Not Apply When an Insured Does Not Expect or Intend Injury or Damage	29
F.	The <i>Detweiler</i> Definition of “Accident” Does Not Apply When the Insured Does Not Expect or Intend to Cause Injury or Damage	32
G.	The Cases State Farm Cites Do Not Justify the Perpetuation of the <i>Unigard</i> Rule	35
H.	The “Willful and Malicious” Exclusion Does Not Apply because Chanel Did Not Intend or Desire any Injury, Distress or Damage	40
IV.	CONCLUSION	43

TABLE OF AUTHORITIES

Washington Cases:

<i>Allstate Ins. Co. v. Bauer</i> , 96 Wn. App. 11, 977 P.2d 617 (1999)	30
<i>Detweiler v. J.C. Penny Cas. Ins. Co.</i> , 110 Wn.2d 99, 108, 751 P.2d 232 (1988)	32-33
<i>Diamaco, Inc. v. Aetna Cas. & Surety Co.</i> , 97 Wn. App. 335, 340, 983 P.2d 707 (1999)	18, 41
<i>Evans v. Metropolitan Life Ins.</i> , 26 Wn.2d 594, 618, 622, 174 P.2d 961 (1946)	35
<i>Federated Am. Ins. Co. v. Strong</i> , 102 Wn.2d 665, 674, 689 P.2d 68 (1984)	16, 31
<i>Grange Ins. Co. v. Brosseau</i> , 113 Wn.2d 91, 776 P.2d 123 (1989)	30, 32
<i>Grange Ins. Assn. v. Authier</i> , 45 Wn. App. 383, 725 P.2d 642 (1986)	30
<i>Hall v. State Farm</i> , 109 Wn. App. 614, 36 P.3d 582 (2001)	42
<i>Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group</i> , 37 Wn. App. 621, 625, 681 P.2d 875 (1984)	38-39
<i>Hayden v. Mutual of Enumclaw Ins. Co.</i> , 141 Wn.2d 55, 64, 1 P.3d 1167 (2000)	18-19, 25, 41, 43
<i>Hayden v. Ins. Co. of N. Am.</i> , 5 Wn. App. 710, 711-12, 490 P.2d 454 (1971)	39
<i>Kitsap Cy. v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 576, 964 P.2d 1173 (1998)	18-19, 40

<i>Lloyd v. First Farwest Life Ins. Co.</i> , 54 Wn. App. 299, 773 P.2d 426 (1989)	29
<i>McMahan v. Mutual Benefit Health & Acc. Assn.</i> , 33 Wn.2d 415, 417, 206 P.2d 292 (1949)	35, 39
<i>McDonald v. State Farm</i> , 119 Wn.2d 724, 731, 837 P.2d 1000 (1992)	17-18, 23
<i>Morrison Fruit Co. v. Scarlett Fruit Co.</i> , 72 Wn. App. 687, 694, 865 P.2d 570 (1994)	15, 31
<i>Pacific Ins. Co. v. Catholic Bishop of Spokane</i> , 2006 WL 1148673, Slip Op. at p. 16	25-26, 38
<i>Queen City Farms v. Central Nat'l Ins.</i> , 126 Wn.2d 50, 65, 882 P.2d 703 (1994)	18, 20-22, 26, 32, 38
<i>Roller v. Stonewall Ins. Co.</i> , 115 Wn.2d 679, 801 P.2d 207 (1990)	25, 29
<i>Ross v. State Farm</i> , 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997)	19, 41
<i>Safeco v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992)	16, 29, 31-32
<i>Safeco Ins. Co. v. Dotts</i> , 38 Wn. App. 382, 685 P.2d 632 (1984)	30, 39-40
<i>Salois v. Mutual of Omaha Ins. Co.</i> , 90 Wn.2d 355, 360, 581 P.2d 1349 (1978)	36
<i>Town of Tieton v. General Ins. Co. of Am.</i> , 61 Wn.2d 716, 380 P.2d 127 (1963)	30
<i>Truck Ins. Exch. v. Rohde</i> , 49 Wn.2d 465, 468-69, 303 P.2d 659 (1956)	16, 31

<i>Unigard Mut. Ins. Co. v. Spokane Sch. Dist.</i> , 20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978)	1, 15, 29-30, 33-34
<i>Western Nat'l Assur. Co. v. Hecker</i> , 43 Wn. App. 816, 822, 719 P.2d 954 (1986)	30
<i>Womack v. Von Rardon</i> , 133 Wn. App. 254, 260-61, 135 P.3d 142 (2006)	42
<i>Yakima Cement Prods. Co. v. Great Am. Ins. Co.</i> , 93 Wn.2d 210, 215, 608 P.2d 254 (1980)	26, 31, 38-40

Cases from other jurisdictions:

<i>Dewitt Const., Inc. v. Charter Oak Fire Ins. Co.</i> , 307 F.3d 1127, 1133 (9 th Cir. 2002)	31
<i>Prosser v. Leuck</i> , 539 N.W.2d 466 (Wis. App.), <i>review denied</i> , 542 N.W.2d 156 (Wis. 1995)	26-28

Statutes and other sources:

WAC 284-50-315(4)	30, 36
<i>Webster's Ninth New Collegiate Dictionary</i> (1989)	41

I. ASSIGNMENTS OF ERROR AND RELATED ISSUES

Assignment of Error 1. The trial court erred in using the definition of “accident” in *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.* to rule that fire damage to appellants’ property was not a covered “occurrence” under State Farm’s homeowners and umbrella policies.¹

Related Issue: The legal test for determining an accidental “occurrence”. Does the *Unigard* rule that an “accident” can never occur when a deliberate act is performed, unless the means are “involuntary” and some “additional unexpected, independent and unforeseen happening occurs”, preclude coverage for negligent, volitional acts that an insured does not expect or intend to result in property damage?

Assignment of Error 2. The trial court erred, if it ruled that a “willful and malicious” exclusion barred coverage for property damage caused by an insured’s negligence in lighting and failing to completely extinguish discarded materials.²

¹20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978).

²

It is unclear if the trial court denied coverage based on the “willful and malicious acts” exclusion. The trial court granted a summary judgment of noncoverage on grounds that there was no covered “occurrence.” (CP 420-422, RP 4-6) It stated that the insured Chanel Chadwick engaged in “willful and malicious behavior”, but did not expressly rule that this exclusion applied. (RP 4-6)

Related Issue: The legal test for applying a “willful and malicious” exclusion. Does a “willful and malicious” exclusion apply when an insured’s negligent volitional act results in property damage, but the insured did not expect or intend to cause any damage or have any “desire to see another suffer” or “experience pain, injury or distress”?

II. STATEMENT OF THE CASE

A. The Aldrich’s Market Fire.

Appellants Ham & Rye (“H&R”) and Retail Services, Inc. (“RSI”) respectively own and operate the Aldrich’s Market in Port Townsend. They are appealing from a summary judgment ruling that an unexpected and unintended fire which destroyed the Aldrich’s Market was not a covered “occurrence” under a homeowners and an umbrella policy issued by respondent State Farm Fire & Casualty Company.

In August 2003, three 14 year-olds—Chanel Chadwick, James Ellis and Corrine Anderson—went out at night to light fireworks at the Port Townsend High School football field with fireplace lighters. (CP 323, CP 340) On their way home, they saw some old newspapers and discarded cardboard hanging out of dumpsters outside Aldrich’s Market. (CP 325, CP 341-342)

Chanel and James lit some cardboard and watched it go out and turn to ash. (CP 326, CP 342-343) They also lit some newspaper that was in a shopping bag sticking out of a recycle bin. (CP 343-344) They didn't want the fire to spread so they pulled the newspaper out of the bin, then stomped out the flames on the sidewalk and patted out the embers with a sweatshirt. (CP 328, CP 345) They did not put any burned paper back into the trash bins. (CP 327)

After they extinguished the fire on the sidewalk, Chanel and James went back to make sure there was no fire in the dumpster or recycle bin. They did not see any smoke. (CP 345) They believed the fire was out. (CP 328) Corrine asked if they were sure the fire was put out, and Chanel and James said, "Yes." (CP 356) The three walked home believing there was no danger of a fire.

After Chanel's grandfather told her the next morning that Aldrich's Market had burned down during the night Chanel "just started completely freaking out." (CP 347) James testified that when his mother told him the next morning that Aldrich's Market had burned down, he still "just didn't think there was anything that we did that could have caused it." (CP 329) Chanel and James both testified they did not intend to cause any damage to the Aldrich's Market. (CP 326, CP 346) This fact is not in

dispute. State Farm admits Chanel did not intend to cause any property damage: “State Farm admits that Chanel Chadwick did not intend that the ignited material would cause damage to the Aldrich Market building.” (CP 30) State Farm has admitted that its coverage exclusion for “property damage which is either expected or intended by the insured” does not apply. (CP 285-288)

B. The Underlying Property Damage Lawsuit.

In January 2004, H&R and RSI filed a lawsuit in Jefferson County Superior Court, alleging that James and Chanel had “negligently cause[d] a fire adjacent to the H&R property” and that “as a result of fire caused by the defendant’s negligence, the H&R property was entirely destroyed.” (CP 61-64)

C. Chanel Chadwick’s Policies with State Farm.

1. Homeowner’s Policy.

Chanel Chadwick was insured under her grandparent’s State Farm homeowner’s policy, which had a \$100,000 coverage limit. (CP 170) The homeowner’s policy provided:

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

- (a) pay up to the limit of liability for the damages for which the **insured** is legally liable...

(CP 187)

The homeowner's policy defined "occurrence" and "property damage" as follows:

"occurrence", when used in Section II of this policy, means an accident, including exposure to conditions which result in **bodily injury** or **property damage**;

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

(CP 174)

The homeowner's policy contained the following exclusions:

Coverage L [Personal Liability] and Coverage M do not apply to:

- a. **bodily injury** or **property damage**:
 - (1) which is either expected or intended by the **insured**; or
 - (2) which is the result of willful and malicious acts of the insured;

(CP 188)

2. **Umbrella Policy.**

Chanel Chadwick also was insured under State Farm's Personal Liability Umbrella Policy, which had a \$1,000,000 limit. (CP 207) The

umbrella policy provided:

If you are legally obligated to pay damages for a **loss**, we will pay your **net loss** minus the **retained limit**....

The umbrella policy defined "loss" as:

6. **"loss"** means an accident, including injurious exposure to conditions, which results in **personal injury** or **property damage** during the policy period. ...

(CP 210-211)

The umbrella policy contained the following exclusions:

We will not provide insurance:

2. for **bodily injury** or **property damage**:
 - a. which is either expected or intended by you; or
 - b. to any person or property which is the result of your willful and malicious act, no matter at whom the act was directed.

(CP 213)

D. State Farm Acknowledged Coverage, Then Denied It After Recognizing the Extent of Its Liability Exposure.

During State Farm's initial investigation in late February 2004, its coverage analyst Debbie Roy told her supervisor Rich Steward:

based on facts to date - appears will mostly be a damages case - *liab appears to be clear - ins daughter was negligent* - but issues to be careful include - joint tortfeasor - co defendant contrib - *may*

need to open plup [\$1,000,000 Personal Liability Umbrella Policy] due to indication high dollar \$...

clearly kids were in the area playing with fire - co def has informed his ins carrier - believe to be mutual of enumclaw... big damages case - fault free plaintiff and joint and several liability - deepest pocket gets the hit....

(CP 248-249)

On February 26, 2004, Steward confirmed that State Farm's policies covered the fire damage and State Farm would have a large loss if the damage exceeded \$1 million:

Comments: Yes, let's open the PLUP and set reserves at \$500,000. If they can pin the cause on the fireworks, there will be 3 responsible parties. Most likely, the other 2 won't have more than \$300,000 coverage. If damage exceed \$1m, we'll be left with a large chunk. Complete large loss report.

Coverage Issues? No.

(CP 245, CP 248)

Despite its internal assessment that Chanel was "negligent" for "playing with fire" and there were "no coverage issues", State Farm on April 2, 2004 issued a reservation of rights letter, which said it was "questionable" whether the property damage was caused by an "occurrence", or was "expected or intended by Chanel Chadwick", or was "a result of willful and wanton acts" of Chanel Chadwick." (CP 254-256)

On May 3, 2004, attorney John Wiegenstein, whom State Farm had assigned as Chanel's insurance defense counsel, told State Farm that Chanel's liability was clear:

Overall, this looks like a pretty unattractive case from a liability standpoint. I have not yet had an opportunity to speak with Ms. Chadwick, but unless she has a very different version of events from what Ellis told the police and fire departments, I view liability as all but assured...

(CP 261)

On August 26, 2004, Wiegenstein reported to State Farm that neither Chanel nor James intended or expected to set Aldrich's Market on fire:

I also met with Chanel and learned her version of events. I will not discuss that in detail here, other than to note that Chanel is adamant that there was never any burning of materials in the building or alcove, and that nobody meant to set the building on fire, if that in fact was what actually happened.

(CP 265)

On November 8, 2004, State Farm reported that the estimated damages to Aldrich's Market exceeded the combined \$1,100,000 limits of its homeowner's and umbrella coverage. (CP 273)

On December 17, 2004, Wiegenstein reported to State Farm that James Ellis testified no one committed any willful and malicious acts or expected or intended to damage Aldrich's Market:

[James Ellis] was adamant that there was never any paper lit inside the recycle bins. His testimony was that he and Chanel pulled some paper out of the bins and lit it on the ground, about 2 feet away, and that they stamped the paper out before leaving. He was also adamant that he does not think they caused the fire, and that they definitely did not intend or expect to have the building catch fire and burn down.

(CP 275)

Wiegenstein also told State Farm that James Ellis's insurers Mutual of Enumclaw and Farmers were not contesting coverage and would likely pay their combined \$800,000 limits. Wiegenstein anticipated that State Farm—now faced with clear liability and damages in excess of its combined policy limits—would try “to negotiate a significant discount” of its own liability by adopting a coverage “strategy.” State Farm's strategy was to deny coverage and use MOE's and Farmers' money, instead of its own larger policy limits, to settle the lawsuit against Chanel and James.

Mutual of Enumclaw and Farmers, the two carriers for Ellis, appear to be proceeding without reservation of rights, and so there should be \$800,000 collectively available from them. I do not see either of those carriers trying to defend the liability side of the case (at least in any active way), so once they are comfortable with the damages claims I expect they will be ready and willing to pay up and get the claims against Ellis resolved. ...

State Farm may well desire to attend a global mediation if and when one is set up, and use its coverage position to negotiate a significant discount off the claim, and perhaps that has been the strategy for the coverage team (Debbie [Roy]) all along.

(CP 277)

After Chanel, James and Corrine were deposed, Wiegenstein again reported to State Farm on April 15, 2005 that Chanel was “sunk” on liability:

Chanel Chadwick’s admission that she, James Ellis, and Corrine Anderson *did* burn things in the alcove, coupled with Roberts’ analysis and the eyewitness statements to the task force... simply reinforce my earlier view that we are sunk on the liability side of the case. Barring some great new piece of evidence, I see no way to avoid a liability finding at trial...

(CP 282)

Five months later on September 15, 2005, State Farm denied coverage on two grounds:

“First, the damage was not caused by an ‘accident.’ Second, the damage was caused by Chanel’s willful and malicious acts.”

State Farm did not assert the exclusion it had claimed in its April 2, 2004 reservation of rights letter for “property damage which is either expected or intended by the insured.” (CP 285-288)

On September 30, 2005, Wiegenstein again reported to State Farm that liability was certain and the damages significantly exceeded State

Farm's \$1,100,000 combined policy limits:

Overall, liability still looks all but 100% certain, with little realistic chance of shedding significant portions of fault onto either Corrine Anderson or Security Services Northwest, Inc....

However, barring any radical change in the expert analyses and evidence, in the end I see plaintiffs being able to easily post credible damages numbers totaling \$1.5 million at a minimum, and \$2.2 million or so would also be easy enough to explain to the jury. The numbers could be as high as \$2.5 million or more. As a practical matter, I think we have to view this case as presenting a significant risk of a policy limits loss no matter how the damages evidence turns out, since the defendants have only \$1.9 million in total coverage (putting aside State Farm's coverage issues), and there are \$100,000+ in additional claims that are not part of this case."

(CP 306)

On October 20, 2005, Wiegenstein reported that MOE and Farmers would now pay their limits. He also predicted that State Farm's coverage strategy would doom any chance of settlement for Chanel and leave her with an excess judgment at trial:

The carriers for defendant Ellis have made it clear that they want to resolve the claims against their insured, and the two defense lawyers for Ellis have indicated to me and to plaintiff's counsel that they anticipate having policy limits authority...available for tender to the plaintiffs by the end of October.

From speaking with Ms. Roy recently, and also my recent phase conference with you and Mr. Steward, it seems fairly clear to me that, based on State Farm's coverage position, State Farm's settlement authority on behalf of Ms. Chadwick at the mediation will be minimal, in comparison to both (1) the policy limits and (2)

the likely amount of the judgment that would be entered against Ms. Chadwick at trial. That being the case, it may not be necessary to hold a mediation at all.

(CP 308)

On November 11, 2005, Wiegenstein recommended that State Farm pay its \$1,100,000 combined policy limits to settle the claims against Chanel. (CP 311) At the mediation on November 15, 2005, H&R and RSI offered to settle for State Farm's policy limits. (CP 313) State Farm agreed to pay its \$100,000 homeowner's limit, but refused to pay its \$1,000,000 umbrella limit. (CP 315) There was no settlement.

On December 2, 2005, State Farm paid \$1000 under Chanel's homeowner's policy to settle Dream City Catering's and Northwest Natural Resources' property damage claims resulting from the Aldrich's Market fire, but still denied coverage for any fire damage to Aldrich's Market:

Enclosed herewith are State Farm checks issued to Dream City Catering and Northwest Natural Resources Group in the amounts of \$500.

(CP 317)

E. State Farm's Guidelines for Determining an Accidental "Occurrence."

State Farm's Operation Guide³ contains internal guidelines for determining whether a loss is an accidental "occurrence." It uses a Webster's Dictionary definition of "accident" to determine a covered "occurrence":

I. PURPOSE

This Operation Guide provides guidelines for claim handling involving the "expected or intended" and "willful and malicious" exclusion in Section II of the Homeowners Policy.

II. GENERAL

In accordance with the demands of public policy, liability insurance attempts to indemnify the policyholder for bodily injury or property damage for which the insured is only accidentally and unintentionally responsible.

C. Requirement of an "Accident"

An accident is defined in Webster's Dictionary as: "A happening that is not expected, foreseen or intended. 2. An unpleasant and unintended happening, sometimes resulting from negligence, that results in injury, loss, damage, etc." Webster's New World Dictionary (3rd Ed., 1988).

³(CP 415-417)

Logically, whether something is an accident under Coverage L is determined from the standpoint of the insured.

State Farm's Operation Guide also precludes it from issuing a reservation of rights to deny coverage in cases like this one where the investigative facts do not support a conclusion that the insured "expected or intended injury or damage...":

IV. INVESTIGATION OF EXPECTED OR INTENDED OR WILLFUL AND MALICIOUS INJURY/DAMAGE CLAIMS

Non-Waiver or Reservation of Rights

If the initial report implies the possibility the claimant's damages or injuries may have been caused intentionally, proceed with the investigation to determine the facts. *Only if the investigation of facts gives rise to expected or intended injury or damage should the Non-Waiver be secured or Reservation of Rights be sent.*

(CP 417) (Emphasis supplied)

F. The Present Lawsuit.

On October 27, 2005, State Farm filed this lawsuit, seeking a declaratory judgment that its homeowner's and umbrella policies did not cover Chanel Chadwick for the Aldrich's Market fire. (CP 1-10)

In January 2006, Chanel assigned her claims against State Farm to H&R and RSI. (CP 20-27) H&R and RSI then filed counterclaims, alleging State Farm had breached Chanel's insurance contract and its duty

of good faith by denying coverage for the fire loss. (CP 11-19)

G. The Dismissal Rulings.

On June 2, 2006, the Hon. Theodore Spearman granted State Farm's motion for a summary judgment of noncoverage. (CP 420-422)

The trial court ruled that the fire was not an "accident" as that term is defined in *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.*:

an accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected and unusual.⁴

(RP 4-6)

The term "accident" is not defined in State Farm's policy. In other cases when an insured's negligent volitional act resulted in unexpected and unintended harm, Washington courts (like State Farm's Operations Guide) have used the following dictionary definitions of "accident" to determine if there was a covered "occurrence":

"b: happening or ensuing without design, intent, or obvious motivation or through inattention or carelessness...."⁵

⁴20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978).

⁵*Morrison Fruit Co. v. Scarlett Fruit Co.*, 72 Wn. App. 687, 694, 865 P.2d 570 (1994), quoting from *Webster's Third New International Dictionary* 11 (1969).

An accident is “an undesigned and unforeseen occurrence of an afflictive or unfortunate character.” An “occurrence” is “Any incident or event, esp. one that happens without being designed or expected.”... [T]he terms, ‘accident’ and ‘occurrence,’ are synonymous.⁶

“A loss is ‘accidental’ when it happens without design, intent, or obvious motivation.”⁷

These dictionary definitions of “accident” do not require that some “additional unexpected, independent and unforeseen happening occurs” or that “the means as well as the result must be... involuntary” for there to be a covered “occurrence.” But the trial court applied the *Unigard* definition instead of a standard dictionary definition of “accident.”

After the trial court dismissed the coverage claims, H&R, RSI and Chadwick voluntarily dismissed all the remaining claims in this lawsuit. A dismissal order finally adjudicating all claims by all parties was entered on August 10, 2006. (CP 425-426)

⁶*Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465, 468-69, 303 P.2d 659 (1956), quoting *Webster’s New International Dictionary*, Second Edition.

⁷*Federated Am. Ins. Co. v. Strong*, 102 Wn.2d 665, 674, 689 P.2d 68 (1984), overruled *sub silentio* on a different point of law in *Safeco v. Butler*, 118 Wn.2d 383, 403, 823 P.2d 499 (1992), citing *Webster’s Third New International Dictionary II* (1971).

H. Notice of Appeal.

On August 22, 2006, appellants H&R and RSI timely filed a notice of appeal from the June 2, 2006 and August 10, 2006 dismissal orders. (CP 427-434) On August 28, 2006, appellants filed a Statement of Grounds for Direct Review in the Washington Supreme Court.

III. ARGUMENT

Appellants H&R and RSI are requesting this court to reverse the trial court's summary dismissal and rule as a matter of law that injury or property damage resulting from an insured's negligent, volitional act is a covered accidental "occurrence", if the insured does not expect or intend to cause any injury or property damage. Appellants request the court to rule that a "willful and malicious" exclusion does not bar coverage for an insured who does not intend to cause any injury or property damage or have any desire to see another suffer or experience pain, injury or distress.

A. The Rules of Insurance Policy Interpretation.

In *McDonald v. State Farm*, the Supreme Court set out the "2-step process" for determining coverage under an insurance policy:

Determining whether coverage exists is a 2-step process. The insured must show the loss falls within the scope of the policy's insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.⁸

Under the 2-step process rule, H&R/RSI must initially produce some evidence that the fire loss was caused by an accidental "occurrence." To avoid coverage, State Farm then must prove that its "willful and malicious" exclusion "clearly and unambiguously applies to bar coverage."⁹

"Construction of an insurance policy is a question of law for the courts."¹⁰ Washington courts follow "the principle of reading the insuring and exclusion clauses, *as written*, to determine if coverage exists."¹¹ In *Kitsap Cy. v. Allstate Ins. Co.*, the Supreme Court said the meaning of undefined policy terms can be determined by reference to standard dictionary definitions:

⁸119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

⁹*Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

¹⁰*Queen City Farms v. Central Nat'l Ins.*, 126 Wn.2d 50, 65, 882 P.2d 703 (1994).

¹¹*Diamaco, Inc. v. Aetna Cas. & Surety Co.*, 97 Wn. App. 335, 340, 983 P.2d 707 (1999).

If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition. Undefined terms, however, must be given their ‘plain, ordinary, and popular’ meaning. [Citation omitted]. To determine the ordinary meaning of undefined terms, courts may look to standard English dictionaries.¹²

In *Hayden v. Mutual of Enumclaw Ins. Co.*, the Supreme Court said:

Policies are interpreted as they would be by the average purchaser.... [citation omitted] Policy ambiguities, particularly with respect to exclusions, are to be strictly construed against the insurer. *Diamaco*, 97 Wn. App. at 342 (rule that policy provisions are construed against insurer applies with added force regarding exclusions).¹³

In *Ross v. State Farm*, the Supreme Court held:

[T]he basic principle that applies to exclusionary clauses in insurance contracts is that any ambiguity should be “most strictly construed against the insurer.”¹⁴

B. The Aldrich’s Market Fire Was an Accidental “Occurrence” under Washington Law.

The court initially decides if an accidental “occurrence” either (1) exists as a matter of law, or (2) does not exist as a matter of law, or (3) is a

¹²136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

¹³141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

¹⁴132 Wn.2d 507, 515-16, 940 P.2d 252 (1997), quoting from *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983) (citation omitted), modified on reconsideration, 101 Wn.2d 830, 683 P.2d 186 (1984).

question of fact for the jury.¹⁵ When an insured's negligent volitional acts result in unexpected and unintended harm, there is a covered "occurrence."¹⁶ But when an insured expects or intends harm, there is no "occurrence."¹⁷

In *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, the Supreme Court held that when a negligent volitional act results in unintended and unexpected harm, there is an "occurrence" as a matter of law. This is because an average purchaser of insurance expects coverage in this situation:

However, the average purchaser of insurance would understand that the policy language provides for coverage for damage resulting from most acts of ordinary negligence.... Thus, the driver who intentionally backs a car up, but does so negligently into the path of a vehicle having the right of way, has acted intentionally in a manner where it can be said that objectively an accident may occur. The average purchaser of insurance would reasonably understand from the policy language that coverage was provided under the occurrence clause.¹⁸

¹⁵*Queen City Farms v. Central Nat'l Ins.*, 126 Wn.2d 50, 65, 882 P.2d 703 (1994).

¹⁶*Id.*

¹⁷*Id.* at 71.

¹⁸126 Wn.2d 50, 66, 882 P.2d 703 (1994). If the *Unigard* definition of "accident" were applied to this example, however, there would be no coverage instead of coverage as a matter of law. There was no "additional

In *Queen City Farms*, the Supreme Court also held that an “occurrence” is determined based on the average purchaser rule and a subjective test as to whether the insured expected or intended harm:

To satisfy the “occurrence” definition, and to come within the coverage provision, it must be established that the harm was unexpected or unintended. ...

Because the average purchaser of insurance would understand that coverage is provided for ordinary acts of negligence, the more reasonable construction of the “unexpected and unintended” requirement is that it is determined under a subjective standard.¹⁹

The Supreme Court used a subjective standard to determine whether the harm was expected or intended because it did not want insurers to deny coverage for negligent volitional acts, since harm from such acts almost always is objectively foreseeable:

unexpected, independent and unforeseen happening” which caused the accident other than the insured’s decision to back into another car which had the right of way. Moreover, the insured’s decision to back up was not “involuntary” and the resulting collision, even if “unforeseen” and “unexpected”, would not be “unusual.”

¹⁹*Id.* at 70, 67.

*Moreover, if an objective standard is used, virtually no intentional act would ever be covered. Intentional acts which result in injury generally can be expected to result in injury. An objective standard, especially provided after the fact, would seem to render meaningless the plain language providing for coverage for certain intentional acts.*²⁰

Applying the subjective standard of expectation and the average purchaser rule, the Supreme Court held that the insured's deliberate discharge of hazardous waste into disposal pits was a covered "occurrence" as a matter of law because the insured did not expect or intend the waste to leak from the pits and damage property:

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 discharged or released into the environment, or disperse or escape into the environment, there is coverage for the resulting damage.²¹

Under the subjective expectation standard and the average purchaser rule, the fire damage resulting from Chanel's negligent volitional acts, like the pollution damage resulting from the insureds' negligent volitional acts in *Queen City Farms*, was an "occurrence" as a matter of law.

²⁰*Id.* at 67, quoting *Rodriguez v. Williams*, 107 Wn.2d 381, 386, 729 P.2d 627 (1986) (Court's emphasis).

²¹*Id.* at 92.

State Farm attempts to distinguish *Queen City Farms* by arguing that its policy defined an “occurrence” to mean “an accident...which unexpectedly and unintentionally” results in injury or property damage, while Chanel’s policy defines an “occurrence” to mean an “accident” and has a separate exclusion for property damage “which is either expected or intended by the insured.”²² This distinction makes no difference. The policy in *Queen City Farms* incorporated the “unexpected and unintended” requirement into the insuring clause, which the insured had the burden to prove, rather than into an exclusion, which the insurer has the burden to prove.²³ If anything, the burden on the insured to establish an “occurrence” was greater in *Queen City Farms* than it is here.

C. The Aldrich’s Market Fire Was an Accidental “Occurrence” under State Farm’s Coverage Guidelines.

The Aldrich’s Market fire was an “accident” under the Webster’s Dictionary definition in State Farm’s Operation Guide coverage guidelines. The fire was both “[a] happening that is not expected, foreseen or intended” and “[a]n unpleasant and unintended happening, sometimes resulting from negligence, that results in injury, loss, damage,

²²Answer to Statement of Grounds for Direct Review, p. 11.

²³*McDonald v. State Farm, supra.*

etc.” State Farm did not follow its coverage guidelines when it refused to “indemnify the policyholder for bodily injury or property damage for which the insured is only accidentally and unintentionally responsible... in accordance with the demands of public policy...” (CP 415)

Under State Farm’s coverage guidelines, a reservation of rights to deny coverage under the “expected or intended” or “willful and malicious” exclusions should be sent “*only if the investigation of facts gives rise to expected or intended injury or damage.*” (CP 417, emphasis supplied) State Farm’s investigation determined that Chanel was “negligent” and there was “no coverage issue.” (CP 254-256) State Farm admits Chanel did not expect or intend injury or damage. It abandoned its “expected and intended” coverage defense in its September 15, 2005 coverage denial letter. State Farm’s April 2, 2004 reservation of rights letter and September 15, 2005 coverage denial were unjustified under its own coverage guidelines.

D. The Aldrich’s Market Fire Was a Covered “Occurrence” under an Objective Definition of “Accident.”

Under Washington law, an “accident” or “occurrence” is

determined under an objective standard.²⁴ But that does not affect Chanel's coverage because the objective standard for an "occurrence" is controlled by the "average purchaser" of insurance rule.²⁵ Chanel's acts of lighting and failing to extinguish the cardboard and newspaper completely are equivalent to the insureds' acts in *Queen City Farms* of depositing and failing to contain hazardous wastes completely. Both cases involved negligent volitional acts that resulted in unexpected and unintended harm. Under *Queen City Farms*, both acts were objective "occurrences" as a matter of law because an average purchaser of insurance would reasonably believe they were covered.

In *Pacific Ins. Co. v. Catholic Bishop of Spokane*, the United States District Court for the Eastern District of Washington recently relied on *Queen City Farms* in ruling that when the insured does not expect or intend to cause injury or property damage, the insurer cannot avoid coverage by conveniently characterizing a negligent act as a "deliberate act" rather than as an "accident":

²⁴*Roller v. Stonewall Ins. Co.* 115 Wn.2d 679, 801 P.2d 207 (1990), *overruled on other grounds in Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 869 (2004).

²⁵*Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

[T]here is no doubt that acts of negligence can be accidental and constitute “occurrences.” See *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 215 (1980) (stating that within the context of a products liability policy, coverage would be rendered meaningless if coverage did not extend to the deliberate manufacture of a product which inadvertently is mismanufactured, leading to property damage); *Queen City Farms, Inc.*, 126 Wn.2d at 66 (stating that “[t]he average purchaser of insurance would understand that the policy language provides coverage for damage resulting from most acts of ordinary negligence. ...

The performing of intentional acts does not mean that every such act that results in injury to another is an “intentional” excluded act under a comprehensive liability insurance policy. Clearly, a covered person intentionally striking a golf ball with the intention that it land on its assigned fairway or green, but which sharply diverts from its intended course and strikes a player on an adjacent fairway, does not mean that the intended launching of the golf ball excludes coverage for any negligence involved in failing to warn the adjacent players with a time honored (and expected) “fore!!!”

The Washington Supreme Court recognized, as this court does, that nearly all acts of negligence can be described in terms of deliberate acts, but doing so does not negate coverage.²⁶

Under *Yakima Cement Prods.*, *Queen City Farms* and *Catholic Bishop of Spokane*, the Aldrich’s Market fire was an objective, accidental “occurrence.” Coverage is not negated because it resulted from Chanel’s negligent volitional act.

In *Prosser v. Leuck*, a thirteen year-old boy and two companions broke into a warehouse and intentionally damaged some personal

²⁶2006 WL 1148673, Slip Op. at p. 16.

property.²⁷ The boys found a can of gasoline and cigarette lighter inside, and filled a small plastic bottle with gas. They poured a couple of drops of gas about the size of a quarter on a concrete window sill and ignited it, creating a burn stain on the window sill. While the gas was burning on the window sill, one of the boys sprinkled more gas on the fire, causing the flames to rise. The flames burned the boy's hand, and he dropped the bottle. The insured Leuck kicked the burning bottle down a hole in the floor. The fire quickly spread, causing extensive damage to the warehouse and its contents.

The warehouse owner brought suit against Leuck and Cerdarburg Insurance, who insured Leuck's parents under a homeowner's policy. Cedarburg argued that its intentional act exclusion barred coverage. It claimed that no reasonable insured would expect coverage for damage resulting from a thirteen year-old's horseplay.

The Wisconsin Court of Appeals disagreed and held the fire damage was a covered, non-excluded occurrence based on a jury verdict that Leuck did not intend to cause any fire damage:

Because a fire destroying the building and its contents is so far removed from burning small amounts of gasoline on a window sill,

²⁷539 N.W.2d 466 (Wis. App.), *review denied*, 542 N.W.2d 156 (Wis. 1995).

we conclude that the destruction of the building did not result from an intentional act as that term is used in the insurance policy. We therefore conclude that the court erred when it applied the principles of fortuity to preclude Prosser from recovering under the insurance policy.²⁸

The Court also ruled that “expecting harm in the form of a small stain on the window sill is insufficient to satisfy the intent to harm requirement.”²⁹

This case presents more compelling conditions for coverage than *Prosser v. Leuck*. Unlike Leuck, Chanel Chadwick did not break into a building or damage any personal property. In *Prosser v. Leuck*, the Wisconsin court held that lighting drops of gas on a concrete window sill inside a building and leaving a small stain does not create any expectation of harm to the warehouse and its contents. Certainly, Chanel’s lighting and failing to fully extinguish scraps of discarded paper and cardboard outside Aldrich’s Market did not create any expectation of harm to the building.

State Farm “agrees that Chadwick did not intend to cause fire damage to the building”, but it now contends that it has not “admitted that

²⁸*Id.* at 469.

²⁹*Id.*

Chadwick did not expect or intend property damage.”³⁰ It evidently contends that Chanel expected or intended to damage the discarded cardboard or newspaper. This argument is meritless because under *Prosser v. Leuck*, burning discarded paper and cardboard did not “create any expectation of harm” or result in intentional property damage to Aldrich’s Market.

E. The *Unigard* Definition of “Accident” Does Not Apply When an Insured Does Not Expect or Intend Injury or Damage.

In certain cases, courts will infer from the nature of an insured’s deliberate acts that the insured expected or intended harm to occur, even though the insured denies any subjective intent to cause harm. These cases typically involve intentional torts or crimes of arson, assault, molestation, drug abuse or other wanton or reckless acts.³¹ In these cases,

³⁰Answer to Statement of Grounds for Direct Review, p. 2, n. 1.

³¹See *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.*, 20 Wn. App. 261, 579 P.2d 1015 (1978) (insured firebug intentionally started a blaze inside a school and fled without telling anyone); *Roller v. Stonewall Ins. Co.* 115 Wn.2d 679, 801 P.2d 207 (1990), *overruled on other grounds in Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 869 (2004) (insured ex-wife deliberately rammed a vehicle occupied by her ex-husband and intentionally ran over him after he exited the vehicle); *Safeco v. Butler*, 118 Wn.2d. 383, 823 P.2d 499 (1992); (insured driver deliberately fired six shots into the cab of a truck and injured an occupant with a ricocheting bullet); *Lloyd v. First Farwest Life Ins. Co.*, 54 Wn. App. 299, 773 P.2d 426 (1989) (insured’s deliberate nonmedical

courts have applied the *Unigard* rule that an accident can never result from a deliberate act unless some “additional unexpected, independent and unforeseen happening occurs” and “the means as well as the result must be... involuntary.”³² When the *Unigard* definition of “accident” is used, a covered “occurrence” is never found. This is because when an insured performs a deliberate act, the “means” are never “involuntary” or “accidental.”³³

On the other hand, when the insured commits a deliberate act but does not expect or intend injury or property damage to occur, the courts

inhalation of cocaine caused a ruptured cerebral aneurysm); *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989) (insured deliberately shot claimant in self-defense); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999) (same); *Safeco Ins. Co. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984) (insured deliberately backslapped victim and was convicted of manslaughter); *Grange Ins. Assn. v. Authier*, 45 Wn. App. 383, 725 P.2d 642 (1986) (insured deliberately molested two minors); *Western Nat'l Assur. Co. v. Hecker*, 43 Wn. App. 816, 822, 719 P.2d 954 (1986) (forcible, nonconsensual anal intercourse); *Town of Tieton v. General Ins. Co. of Am.*, 61 Wn.2d 716, 380 P.2d 127 (1963) (Town's decision to construct a sewage lagoon with foreknowledge that it might contaminate adjacent landowner's well).

³²20 Wn. App. at 264-65.

³³See cases cited in fn. 31, *supra*. This is why the Washington Insurance Commissioner has prohibited “accidental means” clauses in disability insurance policies: an “accidental means” clause, like *Unigard's* “involuntary means” test, results in illusory coverage. WAC 284-50-315(4).

apply dictionary definitions of “accident”, which do not require “involuntary means” or an “additional unexpected, independent and unforeseen happening” as conditions to coverage. When a dictionary definition of “accident” is used in these cases, coverage is found as a matter of law.³⁴

Washington courts have never applied *Unigard’s* definition of “accident” in cases where the insured did not expect or intend to cause injury or property damage. In *Queen City Farms*, the Supreme Court noted that the *Unigard* definition is not used to determine if there was an “accident” where the insured’s negligent volitional act was not expected or intended to cause any harm:

³⁴See e.g. *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 215, 608 P.2d 254 (1980) (“The appropriate definition of “accident”, as a source and cause of damage to property, is “an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.”); *Federated Am. Ins. Co. v. Strong*, 102 Wn.2d 665, 674, 689 P.2d 68 (1984), *overruled sub silentio* on a different point of law in *Safeco v. Butler*, 118 Wn.2d 383, 403, 823 P.2d 499 (1992), *citing Webster’s Third New International Dictionary II* (1971) (“A loss is ‘accidental’ when it happens without design, intent, or obvious motivation”); *Dewitt Const., Inc. v. Charter Oak Fire Ins. Co.* 307 F.3d 1127, 1133 (9th Cir. 2002), applying Washington law, (“[T]he inadvertent act of driving over the buried mechanical and site work fits squarely within the policies’ definition of “occurrence,” as there is no indication in the record that the damage was caused intentionally.”); and *Morrison Fruit Co. v. Scarlett Fruit Co.* and *Truck Ins. Exch. v. Rohde* (definition of “accident” quoted above at p. 15-16).

Some of the cases relied upon by the insurers involve the rule that an "accident" is an unusual, unexpected and unforeseen happening, and that where the insured acts deliberately, no accident occurs unless there is an additional unexpected, independent and unforeseen happening which caused the harm. *E.g.*, *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 776 P.2d 123 (1989); *Safeco Ins. Co. v. Butler*, 118 Wash.2d 383, 823 P.2d 499 (1992). Again, these cases do not concern the standard for expectation of the resulting harm.³⁵

The trial court erred in applying the *Unigard* definition of "accident" because State Farm admits Chanel did not expect or intend to damage Aldrich's Market. Since the *Unigard* definition does not apply, the trial court should have applied the dictionary definitions of "accident" and the subjective standard of expectation and found a covered "occurrence" as a matter of law.

F. The *Detweiler* Definition of "Accident" Does Not Apply When the Insured Does Not Expect or Intend to Cause Injury or Damage.

In *Detweiler v. J.C. Penny Cas. Ins. Co.*, the Supreme Court applied *Unigard's* "additional unexpected, independent and unforeseen happening" requirement, but not its "involuntary means" test in a case involving a "confused occurrence."³⁶ In *Detweiler*, the insured

³⁵*Queen City Farms v. Central Nat'l Ins.*, 126 Wn.2d 50, 68, 882 P.2d 703 (1994).

³⁶110 Wn.2d 99, 108, 751 P.2d 232 (1988).

deliberately shot at the wheel of a moving vehicle and was injured by ricocheting metal fragments. The result was involuntary because the insured did not intend to injure himself, but the means were not involuntary because the insured intended to shoot the wheel:

Although the result of claimant's action (being struck by metal fragments in the neck, face and eye and sustaining injuries therefrom) was doubtless unintended, the means (shooting bullets from a gun at a nearby steel target) were obviously intended.³⁷

In *Detweiler*, the Supreme Court held it was for the jury to determine whether there was an accidental "occurrence" as a question of fact:

There was, therefore, a factual issue as to whether what occurred here was an "accident" for which the automobile insurance policy provided UM coverage. The trial court erred in determining this issue as a matter of law.³⁸

Even in *Unigard*, a trial was required to determine if a school fire was an accidental "occurrence" because there was an issue of fact on whether the insured expected or intended to cause property damage.³⁹ In *Unigard*, an 11 year-old boy broke into a school and set fire to the

³⁷*Id.* at 108-09.

³⁸*Id.*

³⁹20 Wn. App. 261, 579 P.2d 1015 (1978).

contents of a trash can inside the building. The boy previously had set a fire that burned two garages. He knew the trash fire was spreading out of control because he went to a fountain to get water to douse it. The fountain was dry, but the boy nevertheless ran away without telling anyone about the blaze, which burned down the school. In court, the boy testified he intended to light the fire, but did not expect or intend to damage the school building.

The trial court found, however, that the school fire “resulted from the deliberate acts of the boy” and therefore was not a covered “accident.”⁴⁰ This decision was affirmed because there was “substantial evidence from which 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.”⁴¹

Unigard is easily distinguished from this case. Chanel did not have any history of setting fires. She did not break and enter, or start a fire in a building, or know it could spread. Instead, she checked to see that all lighted cardboard and paper was put out and told Corrine Anderson

⁴⁰*Id.* at 263.

⁴¹*Id.* at 264-65.

that it was out. It is uncontradicted that she did not intend to burn Aldrich's Market or expect a fire would occur after she departed.

Unlike *Detweiler* and *Unigard*, this case does not involve a "confused occurrence" that requires a trial on whether there was an accidental "occurrence." There is no factual dispute because it is admitted that Chanel did not expect or intend to damage Aldrich's Market. Since neither the *Unigard* nor the *Detweiler* coverage tests apply, the trial court should have ruled that the property damage to the Aldrich's Market was a covered "occurrence" and "loss" under State Farm's policies as a matter of law.

G. The Cases State Farm Cites Do Not Justify the Perpetuation of the *Unigard* Rule.

State Farm argues that the *Unigard* rule should be followed because it is consistent with two earlier Supreme Court decisions holding that "an accident is never present" except when "the means as well as the result [are] unforeseen, involuntary, unexpected and unusual" and "some additional, unexpected, independent and unforeseen happening occurs which produces the injury..."⁴² But there are several good reasons why the

⁴²See *Evans v. Metropolitan Life Ins.* 26 Wn.2d 594, 618, 622, 174 P.2d 961 (1946), *McMahan v. Mutual Benefit Health & Acc. Assn.*, 33 Wn.2d 415, 417, 206 P.2d 292 (1949) cited in State Farm's Answer to Statement of Grounds

Evans and *McMahan* cases do not justify perpetuating the *Unigard* rule of automatic coverage preclusion. The accidental death benefit policies in *Evans* and *McMahan* contained “accidental means” clauses which do not exist in Chanel’s policy with State Farm. A Washington court should not interpolate *Unigard’s* “accidental means” test into Chanel’s policy with State Farm, especially in view of later insurance regulations and case law, which condemn rather than approve of meaningless, illusory insurance coverage.⁴³

Also, the second half of the *Evans-Unigard* rule that an “accident is never present” unless “some additional, unexpected, independent and unforeseen happening occur[s] which produces the injury...” is in conflict with *Queen City Farms* and other cases cited above, which hold that “policies are interpreted as they would be by the average purchaser” of insurance, and that undefined policy terms like “accident” must be given their “plain, ordinary, and popular” meaning as commonly understood or as defined in standard English dictionaries. There is not an average

for Direct Review at pp. 7-9.

⁴³See e.g. WAC 284-50-315(4)’s prohibition of “accidental means” clauses in disability policies and *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 360, 581 P.2d 1349 (1978)(policyholders purchase “not the pieces of paper constituting the policy, [but] the potential benefits and security of coverage.”

purchaser of insurance in Washington state who understands or imagines that homeowner's coverage for a negligent volitional act depends on whether some "unusual ..., additional, unexpected, independent and unforeseen happening occurs which produces the injury..."

These *Evans-Unigard* conditions for an "accident" were created by Supreme Court justices 60 years ago. They predate, or at least did not follow, the "average purchaser" or "plain, ordinary and popular meaning" rules of insurance policy construction. At least three of these conditions are unrelated to what the average purchaser of insurance would expect or understand. They bear no resemblance to the Webster's dictionary definition of "accident" used in State Farm's Operation Guide coverage guidelines—*i.e.* "A happening that is not expected, foreseen or intended" or "[a]n unpleasant and unintended happening, sometimes resulting from negligence, that results in injury, loss, damage, etc."

There is not even a rational basis for saying accidents must be "unusual" or that they can only occur when there is "some additional [and] independent" happening which produces the injury. Accidental harms resulting from volitional acts are common, not unusual occurrences. Accidental harms often occur from single, dependent events, rather than "some additional, independent" happening. As *Queen City Farms* and

Pacific Ins. Co. v. Catholic Bishop of Spokane demonstrate, single, dependent happenings such as deliberately backing up a car and unintentionally hitting another vehicle or deliberately driving a golf ball and unintentionally hitting someone in another fairway can be “accidents.” In those cases, as in this one, there is coverage as a matter of law, unless injury or property damage was expected or intended by the insured.

The *Evans-Unigard* conditions for an “accident” are legal relics which are inconsistent with modern legal authorities like *Yakima Cement Prods. Co.*, *Queen City Farms* and *Catholic Bishop of Spokane* and with current public policies disfavoring illusory coverage. State Farm ignores the *Unigard* rule when it pays little covered losses like Dream City Catering’s and Northwest Natural Resources Group’s \$500 claims. (CP 317) It should not be allowed to conjure up the *Unigard* rule to deny coverage whenever it wants to avoid paying a large covered loss like the Aldrich’s Market fire.

State Farm also contends that “[o]ther cases applying the *Unigard* rule have also held there is at least a potential for coverage.”⁴⁴ But that is not true of the examples it provides. In *Harrison Plumbing & Heating*,

⁴⁴Answer to Statement of Grounds for Direct Review, p. 10.

Inc. v. New Hampshire Ins. Group, the Court of Appeals quoted the *Unigard* rule, but applied the dictionary definition of “accident” in *Yakima Cement Prods. Co.* in ruling that there was a fact issue on whether the insured’s improper excavations caused covered property damage.⁴⁵ In *Hayden v. Ins. Co. of N. Am.*, the Court of Appeals did not apply *Unigard*’s “involuntary means” test.⁴⁶ In *McMahan v. Mutual Benefit Health & Acc. Assn.*, the Supreme Court applied the “accidental means” test adopted in *Evans v. Metropolitan Life Ins.* and ruled there was no coverage as a matter of law.⁴⁷

State Farm’s reliance on *Safeco Ins. Co. v. Dotts* for the proposition that “an accident is ‘never present’ when a deliberate act is performed absent an ‘independent’ unforeseen act,” is misplaced. In *Dotts*, Division III acknowledged that the *Unigard* rule does not apply in product liability cases:

⁴⁵37 Wn. App. 621, 625, 681 P.2d 875 (1984), citing *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wash.2d 210, 608 P.2d 254 (1980), which applied a dictionary definition of “accident” and found coverage as a matter of law.

⁴⁶5 Wn. App. 710, 711-12, 490 P.2d 454 (1971).

⁴⁷33 Wn.2d 415, 417, 206 P.2d 292 (1949).

With products liability, if coverage did not extend to deliberate acts, that is, deliberate product manufacture, insurance policies would be meaningless.⁴⁸

But *Dotts* does not explain why the *Unigard* rule should treat product manufacturers differently from all other policyholders whose negligent volitional acts result in unexpected and unintended harm. All insureds, not just product manufacturers, should be exempt from automatic coverage preclusion under the *Unigard* rule.

H. The “Willful and Malicious” Exclusion Does Not Apply because Chanel Did Not Intend or Desire any Injury, Distress or Damage.

State Farm’s “willful and malicious” exclusion also merits review, if the trial court used this exclusion as an alternative basis for granting summary judgment. The term “willful and malicious”, like the term “accident”, is not defined in State Farm’s policy. To determine the meaning of undefined terms, courts may look to standard English dictionaries.⁴⁹ Malice means:

⁴⁸38 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).

⁴⁹*Kitsap Cy. v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

the desire to see another experience pain, injury or distress. Malice implies a deep-seated desire often unexplainable desire to see another suffer.⁵⁰

State Farm's "willful and malicious" exclusion must be construed "as written."⁵¹ For the exclusion to apply, State Farm must prove "clearly and unambiguously" that Chanel's acts were both "willful" *and* "malicious."⁵² Any question as to whether the exclusion applies must be "most strictly construed against the insurer."⁵³

State Farm admits that Chanel did not intend to damage Aldrich's Market. It necessarily follows that she did not willfully and maliciously cause property damage. There is no evidence that Chanel had any "desire to see another experience pain, injury or distress" when she lit and negligently failed to completely extinguish the discarded paper and cardboard.

⁵⁰*Webster's Ninth New Collegiate Dictionary* (1989).

⁵¹*Diamaco, Inc. v. Aetna Cas. & Surety Co.*, 97 Wn. App. 335, 340, 983 P.2d 707 (1999).

⁵²*Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

⁵³*Ross v. State Farm*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997), *quoting from Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983) (citation omitted), *modified on reconsideration*, 101 Wn.2d 830, 683 P.2d 186 (1984).

The Court of Appeals recently interpreted the “willful and malicious” exclusion in *Hall v. State Farm*.⁵⁴ In that case, State Farm’s insured got out of his vehicle, yelled racial and gang epithets, then confronted and pointed a loaded gun at the victim. The insured made no effort to defuse the confrontation or mitigate against the occurrence of harm. In a resulting struggle, the gun accidentally discharged and injured the victim. The insured pleaded guilty to assault.

In the civil lawsuit, the jury found that the insured had engaged in willful and malicious acts which resulted in injury. Based on that verdict, the trial court entered a judgment of noncoverage under the “willful and malicious” exclusion, and the Court of Appeals affirmed.

In *Hall v. State Farm*, the insured’s epithets, confrontation and brandishing a loaded gun provided evidence of a “desire to see another suffer” or “experience pain, injury or distress.” Accordingly, it was a jury question whether the insured’s conduct, which met the elements of the intentional tort of outrage, were “willful and malicious.”⁵⁵

⁵⁴109 Wn. App. 614, 36 P.3d 582 (2001).

⁵⁵See *Womack v. Von Rardon*, 133 Wn. App. 254, 260-61, 135 P.3d 142 (2006) (“The tort of outrage requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) plaintiff’s resulting actual severe emotional distress.”)

State Farm cannot prove its exclusion applies in this case, however, because it admits Chanel did not willfully damage Aldrich's Market and because lighting and failing to completely extinguish discarded cardboard and newspaper is not a "malicious" act. The trial court should have ruled that State Farm failed to meet its strict burden of proving that its "willful and malicious" exclusion "clearly and unambiguously applies to bar coverage."⁵⁶

IV. CONCLUSION

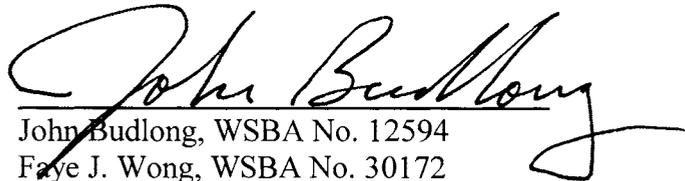
Average purchasers of insurance rightly believe that negligent volitional acts will be covered so long as the insured does not expect or intend to cause harm. Applying the *Unigard* definition of "accident" to negligent volitional acts results in meaningless, illusory coverage.

The trial court erred in applying the *Unigard* definition of "accident" to eliminate Chanel Chadwick's coverage for a negligent, volitional act that she did not expect or intent to result in property damage. It also erred, if it ruled that a "willful and malicious" exclusion barred coverage for lighting and negligently failing to completely extinguish discarded materials.

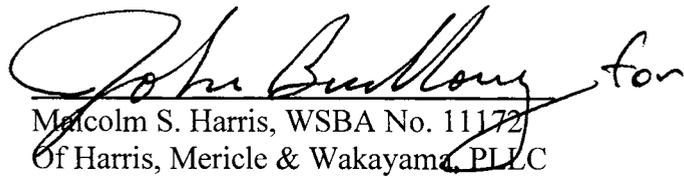
⁵⁶*Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

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. If the court concludes there is a genuine factual dispute on either of these issues, then appellants ask that the summary judgment be reversed and that the case be remanded for trial.

RESPECTFULLY OFFERED this 16th day of November, 2006.



John Budlong, WSBA No. 12594
Faye J. Wong, WSBA No. 30172
Of Law Offices of John Budlong



Malcolm S. Harris, WSBA No. 11172
Of Harris, Mericle & Wakayama, PLLC

Attorneys for Appellants H&R and RSI