

36256-2-II

NO. 79168-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE FARM FIRE AND CASUALTY COMPANY, an Illinois corporation,

Respondent,

vs.

CHANEL T. CHADWICK, a single woman,

Defendant,

and

HAM & RYE, L.L.C., a Washington limited liability company; and RETAIL
SERVICES, INC., d/b/a Aldrich's Market, a Washington corporation,

Appellants.

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

BRIEF OF RESPONDENT

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I. NATURE OF THE CASE

The insured teenager and a friend deliberately set fire to cardboard and newspaper from a dumpster. The dumpster was next to a building owned and occupied by appellants. The building burned down because of the fire the teenagers had started. When appellants sued the insured, her insurance company defended her under a reservation of rights and filed a declaratory action seeking a judgment of no coverage. The trial court granted the insurer summary judgment, ruling there was no coverage as a matter of law.

II. ISSUES PRESENTED

- A. Was the deliberately set fire an “accident”?
- B. Does the exclusion for property damage resulting from the insured’s willful and malicious acts apply?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

1. The Fire.

Early on the morning of August 4, 2003, a Port Townsend building owned by appellant Ham & Rye, LLC, burned down. (CP 258) Appellant Retail Services, Inc., operated a grocery store in the building. (CP 258)

The fire had been started sometime after midnight by two 14-year-olds, Chanel Chadwick and her friend, James Ellis. Chadwick and Ellis

and another teenaged friend had been lighting off fireworks with fireplace lighters. (CP 320, 324, 336-37, 339-40) Chadwick regarded what they were doing as “malicious mischief”. (CP 147)

After finishing with the fireworks, the teens felt—in Chadwick’s words—“all excited of letting off [the] fireworks” and “all giddy and stuff like that.” (CP 341) As they were walking home, Chadwick lit both lighters to “look all cool and stuff.” A passing bicyclist told them, “You kids be careful, it’s dry out.” (CP 129-30).

When the teens came to appellants’ building, they stopped because they saw paper and cardboard sticking out of and near a dumpster next to appellant Retail Service’s grocery store. (CP 341-42) Chadwick and Ellis set fire to cardboard sticking out from the dumpster. (CP 327, 342) They then moved to an alcove outside the building and Ellis, whom Chadwick described “still being like hyper”, set fire to newspaper sticking out of a shopping bag in another dumpster. (CP 343)

A newspaper delivery person saw the fire and called 911 at 2:14 am. (CP 279) A neighbor of the store later said that several minutes before discovering the fire, she had heard at least one female and one male voice, sounding like teenagers, and heard footsteps running away. (CP 291-93)

2. The Insurance.

Respondent State Farm Fire & Casualty Co. had issued a homeowners' policy and a personal liability umbrella policy to Chadwick's grandparents, with whom she lived. (CP 2, 12, 169-204, 206-24, 252) Consequently, Chadwick was an insured under the policies. (CP 2-3, 12)

a. The Homeowners' Policy.

The insuring agreement of the homeowners' policy's liability insurance coverage, Coverage L, 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:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
2. provide a defense at our expense by counsel of our choice. . . .

(CP 187) "Occurrence" was defined in the policy to mean:

an accident, including exposure to conditions, which results in:

- a. **bodily injury**; or
- b. **property damage**;

during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one **occurrence**.

(CP 174)

The policy also contained the following exclusions:

1. Coverage L . . . do[es] 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)

b. The Umbrella Policy.

The insuring agreement of 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**. . . .

(CP 212) "Loss" was defined to mean:

an accident that results in **personal injury** or **property damage** during the policy period. This includes injurious exposure to conditions.

(CP 210)

The umbrella policy contained the following exclusions:

We will not provide insurance:

. . . .

2. for **personal 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)

The umbrella policy defined “you” and “your” to “refer to the ‘insured’ as defined.” (CP 210)

3. The Underlying Tort Suit.

Appellants building owner and grocery sued Chadwick (but not her grandparents, State Farm’s policyholders) for damages arising out of the fire. State Farm defended Chadwick under a reservation of rights. (CP 252-56) Ultimately, Chadwick settled the tort suit by agreeing to a judgment and assigning her rights against State Farm to appellants in return for a covenant not to execute. (CP 20-27)

B. STATEMENT OF PROCEDURE.

State Farm filed this declaratory action, seeking a declaration that its policies did not require it to indemnify Chadwick. (CP 1-10) Ham & Rye and Retail Services counterclaimed for a declaration of coverage, and for damages for negligence, breach of contract, and various other extracontractual claims. (CP 17-19)

The trial court granted State Farm partial summary judgment, ruling that there was no coverage as a matter of law. (CP 420-22) In its oral decision, the trial court declared, “[I]t was a deliberate act that started this fire, a deliberate act of the insured’s family member” and “the fire was started with a willful and malicious behavior.” (RP 4) The trial court also

granted State Farm's motion to strike the Second Declaration of Malcolm S. Harris, with Exhibits A and B.¹ (CP 423-24)

Appellants thereafter voluntarily dismissed their remaining claims. (CP 425-26)

Ham & Rye and Retail Services now seek direct review. (CP 427-34)

IV. ARGUMENT

Appellants voluntarily dismissed their extracontractual claims. The only issue in this case is therefore whether the State Farm policies, by their terms, provide coverage for Chadwick. “[B]ecause insurance policies are considered contracts, the policy language . . . controls.” *American National Fire Insurance Co. v. B&L Trucking & Construction Co.*, 134 Wn.2d 413, 430, 951 P.2d 250 (1998). As will be discussed, Washington law on the meaning of the State Farm policy language at issue is well-established.

Thus, this Court should disregard appellants' attempt to inject State Farm's claims handling into this appeal. It should also disregard appellants' reference to the decisions and conduct of other insurers. The

¹ Appellants have not appealed that dismissal. Therefore, although the Second Declaration and Exhibits A and B thereto are contained in the clerk's papers, this Court should disregard them. (CP 357-65)

company's claims handling and other insurers' conduct and decisions are irrelevant to what the State Farm policy says. Indeed, the trial court struck evidence of other insurers' conduct and decisions, a ruling that appellants have not appealed. (CP 423-24)

Therefore, this Court's decision depends *solely* on construction of the State Farm policy language in conjunction with the undisputed facts regarding the events leading up to the fire.

Appellants are also wrong when they claim that all they must do is "initially produce *some* evidence that the fire loss was caused by an accidental 'occurrence'" and that then "State Farm . . . must prove that its 'willful and malicious' exclusion 'clearly and unambiguously applies to bar coverage.'" (Brief of Appellants 18) (emphasis added). Under Washington law, appellants must "show [their] loss falls within the scope of the losses insured under the policy." *Olivine Corp. v. United Capitol Insurance Co.*, 147 Wn.2d 148, 164, 52 P.3d 494 (2002). Only if the loss falls within the insuring agreement must the insurer show that an exclusion applies. *Id.* at 165.

Here the questions are (1) whether there was an accident, as required by the insuring agreements of both the homeowners and umbrella policies, and (2) if not, whether the exclusion for property damage resulting from the willful and malicious acts of an insured applies. If there

was no accident, *or* if the exclusion applies, there will be no coverage. Appellants do not dispute that if there is no coverage under the homeowners policy, there will be no coverage under the umbrella policy.

A. THERE WAS NO “ACCIDENT.”

To fall within the insuring agreement of each policy, a claim must be for damages because of property damage resulting from an accident. Neither policy defines “accident.” Where an insurance policy does not define “accident,” this Court has long held:

“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.”²

Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 401, 823 P.2d 499 (1992) (quoting *Detweiler v. J. C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 104, 751 P.2d 282 (1988)). Appellants call this rule the “*Unigard* rule”, evidently in an attempt to suggest the rule is a Division III invention not binding on

² *Accord Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989); *Unigard Mutual Insurance Co. v. Spokane School District No. 81*, 20 Wn. App. 261, 579 P.2d 1015 (1978); *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990); *State Farm Fire & Cas. Co. v. Parrella*, 134 Wn. App. 536, 141 P.3d 643 (2006) (Div. III); *American Economy Ins. Co. v. Estate of Wilker*, 96 Wn. App. 87, 977 P.2d 677 (1999) (Div. I), *rev. denied*, 139 Wn.2d 1015 (2000); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999) (Div. II); *Grange Ins. Ass’n v. Authier*, 45 Wn. App. 383, 725 P.2d 642 (1986) (Div. III), *rev. denied*, 107 Wn.2d 1024 (1987); *Safeco Ins. Co. of Am. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984) (Div. III); *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 37 Wn. App. 621, 681 P.2d 875 (1984) (Div. II).

this Court. But it was this Court that originally adopted the rule more than 50 years ago. *See, e.g., Johnson v. Business Men's Assurance Co. of America*, 38 Wn.2d 245, 228 P.2d 760 (1951); *Evans v. Metropolitan Life Insurance Co.*, 26 Wn.2d 594, 174 P.2d 961 (1946). Since then, all appellate courts in this State have applied it.³

Under the rule, as it has evolved, whether an event is an accident is an objective test that does not depend upon the standpoint of the insured or the victim. *Butler*, 118 Wn. 2d at 403; *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990). “Either an incident is an accident or it is not.” *Roller*, 115 Wn.2d at 685.

The gravamen of appellants’ appeal is their contention that the fire was not an accident because Chadwick subjectively did not expect or intend to burn down their building. ***But that an insured may not subjectively intend to cause the harm that eventually occurred is immaterial.***

Thus, this Court held there was no accident as a matter of law when an insured deliberately shot at a vehicle and a bullet ricocheted off the vehicle and hit one of its occupants. *Butler*, 118 Wn.2d at 401. There

³ *See, e.g., Butler*, 118 Wn.2d at 401; *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 96-97, 776 P.2d 123 (1989); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 15, 977 P.2d 617 (1999) (Div. II); *Unigard Mut. Ins. Co. v. Spokane School Dist. No. 81*, 20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978) (Div. III).

was no accident as a matter of law even though the insured claimed he “did not intend to shoot or injure [the victim], and did not foresee that his shots would cause injury.” *Id.* at 400. Indeed, this Court expressly recognized that intent to harm was irrelevant to its conclusion of no accident:

We also do not address Safeco's argument that we should infer an intent to injure Eddie Zenker from the facts of this case. Such an inference is unnecessary to our conclusion that the injury did not result from an accident.

Id. at 402.

Similarly, there was no accident as a matter of law when an insured deliberately slapped someone who later died. *Safeco Ins. Co. of Am. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984). There was no accident as a matter of law even though the insured claimed he “did not intend to hurt the deceased and he was not angry with him.” *Id.* at 384. *See also Western National Assurance Co. v. Hecker*, 43 Wn. App. 816, 719 P.2d 954 (1986) (forcible anal intercourse not an “accident” as a matter of law).

Unigard Mutual Insurance Co. v. Spokane School District No. 81, 20 Wn. App. 261, 579 P.2d 1015 (1978), may present the most helpful comparison. There, an 11-year-old boy deliberately set fire to the contents

of a trash can at school. The fire spread to the building, causing extensive damage.

The school sued the boy, who admitted to intentionally setting the fire. However, he said he “did not intend or expect to cause damage to the school building.” *Id.* at 263.

His parents’ homeowner’s insurance covered property damage caused by an “occurrence.” “Occurrence” was defined to be an accident. The court ruled there was no accident or “occurrence” as to the boy⁴:

The argument that the term “accident” is ambiguous is not well taken. In a long line of cases our courts have said that 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. ***The intentional and deliberate act of William Winkler in starting the fire which caused the school building blaze cannot be said to be involuntary.*** Therefore, as to William Winkler, the damage to the school was not caused by accidental means nor can it be considered . . . an insurable “occurrence.”

Id. at 263-64 (footnotes omitted) (emphasis added).

⁴ Although *Unigard* was decided in a bench trial, there is no indication that the court could not have reached the same conclusion as a matter of law. Appellants’ claim that in that case a trial was required because “there was an issue of fact on whether the insured expected or intended to cause property damage” is simply not true. (Brief of Appellants 33)

The same is true here. The intentional and deliberate acts of Chadwick and her friend in starting the fires that ultimately caused the building to burn down cannot be said to be involuntary. The damage to the building was not caused by accidental means nor can it be considered an insurable accident.

Dictionary definitions of “accident”, as well as the definitions in State Farm’s Operation Guide⁵ (CP 417), also focus on the unintentional nature of the act, not on whether the resulting injury was expected or intended. *See, e.g.,* www.yourdictionary.com/ahd/a/a0040700 (“accident” includes “[a]n unexpected and undesirable event, especially one resulting in damage or harm”) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)); www.askoxford.com/concise_oed/accident?view=uk (“accident’ includes “an unfortunate incident that happens unexpectedly and unintentionally”). Here, the act—setting fire to the paper and cardboard—was intentional.

⁵ The Operations Guide is simply that—a guide to State Farm operations across the country, which recognizes that courts in different states may interpret the same policy provision differently. Thus, the Guide states, “Know the law in your state since case law has altered this interpretation [of the word “accident”] in some states.” (CP 417) Therefore, even if the Guide said what appellants imply that it did, “[u]nilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties’ intentions.” *U. S. Life Credit Ins. Co. v. Williams*, 129 Wn.2d 565, 570, 919 P.2d 594 (1996) (quoting *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994)).

When one sets fire to something, at least some damage is objectively expected. That the ultimately resulting injury—the burning down of appellants’ building—was subjectively unexpected and unintended is irrelevant. *Cf. Ryan v. Harrison*, 40 Wn. App. 395, 398, 699 P.2d 230, *rev. denied*, 104 Wn.2d 1003 (1985) (using so-called *Unigard* accident test to determine no coverage for damage where aerial crop sprayer mistakenly sprayed alfalfa field instead of wheat field).

1. *Queen City Farms* Had Different Policy Language.

Appellants nevertheless claim that *Queen City Farms, Inc. v. Central National Insurance Co.*, 126 Wn.2d 50, 882 P.2d 703 (1994), requires a subjective test to determine whether the insured expected or intended harm. But the *Queen City Farms* policy—unlike the policies here—specifically defined “occurrence” to mean “an accident ***or happening or event . . . which unexpectedly and unintentionally results***” in injury or damage. *Id.* at 64 (emphasis added).

In other words, unlike the State Farm policies here, the insuring agreement in the *Queen City Farms* policy was not limited to accidents and expressly required that the injury or damage—as opposed to the act or omission—be unexpected and unintentional. Where an insurance policy refers to injury expected or intended by the insured (or injury unexpected or unintentionally caused by the insured), the test for expectation or intent

is a subjective one. *Overton v. Consolidated Insurance Co.*, 145 Wn.2d 417, 425, 38 P.3d 322 (2002); *Queen City Farms*, 126 Wn.2d at 64-65. In contrast, whether there is an accident is governed by an objective standard. *Butler*, 118 Wn.2d at 403; *Roller*, 115 Wn.2d at 685. *Queen City Farms* recognized this, saying, “The determination of what constitutes an accident, *i.e.*, whether injury or damage has resulted from an ‘accident,’ is not dispositive on the standard for expectation of the damages.” 126 Wn.2d at 68.

Consequently, because the policy language in *Queen City Farms*—unlike the policies here—specifically made coverage dependent on the insured not intending or expecting the damage or injury, it is hardly surprising that *Queen City Farms* “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.” (Brief of Appellants 31). Appellants’ reliance on *Queen City Farms*, including its discussion of subjective intent and the average purchaser of insurance, is misplaced.

Appellants recognize that the policy definition of “occurrence” in *Queen City Farms* was different than the definition here. (Brief of Appellants 23) Yet they claim this “makes no difference” on the ground the *Queen City Farms* policy simply put the unexpected/unintended

requirement in the insuring agreement rather than excluding expected or intended injury. (*Id.*)

Appellants ignore the fact that the *Queen City Farms* “occurrence” definition was not limited to accidents, but also included the far broader terms of “happening or event.” Even this aside, the fact that the *Queen City Farms* definition expressly included an unexpected/unintended injury clause *does* make a difference.

As appellants recognize, State Farm has not claimed Chadwick subjectively expected or intended the fire to the building. Thus, the company has not raised the expected/intended injury exclusions of its policies as a defense to coverage. Since the State Farm policies’ insuring agreements do not contain an express requirement that injury or damage be unexpected or unintended, the fact that the insuring agreement in *Queen City Farms* did contain such a requirement is a critical distinguishing factor.

2. Appellants’ Other Cases Do Not Apply.

Appellants’ reliance on *Federated American Insurance Co. v. Strong*, 102 Wn.2d 665, 689 P.2d 68 (1984), *overruled sub silentio*, *Roller v. Stonewall Insurance Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990), is puzzling. *Federated American* was overruled precisely because it had held that whether an incident was an “accident” depended upon the

viewpoint of the insured—*i.e.*, a subjective test. As the Washington Supreme Court later explained:

That holding was overruled *sub silentio* in *Roller v. Stonewall Ins. Co.*, 115 Wash.2d 679, 801 P.2d 207 (1990). In *Roller*, we unanimously held

"accident" is not a subjective term. Thus, the perspective of the insured as opposed to the tortfeasor is not a relevant inquiry. Either an incident is an accident or it is not.

115 Wash.2d at 685, 801 P.2d 207. In a footnote, we went on to specifically reject the view that "whether an intentional act is an 'accident' should be viewed from the perspective of the insured." 115 Wash.2d at 685 n.4, 801 P.2d 207. Thus, the holding of *Roller* is that whether an event is an accident does not depend on the view of the insured.

Butler, 118 Wn.2d at 403.

Yakima Cement Products Co. v Great American Insurance Co., 93 Wn.2d 210, 608 P.2d 254 (1980), is of no help to appellants either. That case involved an insured that deliberately manufactured a product that inadvertently turned out to be defective. The policy there, unlike the policy here, defined "occurrence" to mean an accident resulting in "property damage neither expected nor intended from the standpoint of the insured." 93 Wn.2d at 214. Thus, the policy in *Yakima Cement* was more like the policy in *Queen City Farms*. For this reason alone, *Yakima Cement* has no application here.

Furthermore, the court in *Yakima Cement* ruled that under the unusual circumstances of that case, it would not apply Washington's traditional definition of "accident." The court explained:

We deal here with an accident within the context of ***a products liability policy***. In the area of products liability, if insurance coverage does not extend to the deliberate manufacture of a product which inadvertently is mismanufactured, and thereafter results in property damage, ***the coverage would be rendered virtually meaningless***.

Id. at 215 (emphasis added). The instant case does not involve a products liability policy or a situation where the coverage would be meaningless if the traditional definition of "accident" is applied.

Pacific Insurance Co. v. Catholic Bishop, 450 F. Supp. 2d 1186 (E.D. Wash. 2006), a federal court decision not binding on this Court, is also inapposite. There the insured was sued for negligently hiring, retaining, and supervising priests who committed sexual abuse. One insurer claimed there could be no coverage for the insured's negligence because third persons' conduct—the perpetrator priests'—was not an accident. *Id.* at 1201. In contrast, here in the underlying lawsuit, there was no claim that Chadwick was negligent in controlling (or not controlling) the conduct of a third person. (CP 62-63)

Another insurer in *Pacific Insurance* claimed the insured's hiring, retaining, and supervising the perpetrator priests were all intentional acts.

But the court there noted that the insurer did *not* argue that the insured intended the acts giving rise to liability—*i.e.*, the perpetrator priests’ sexual abuse. *Id.* at 1206. Here, State Farm is claiming its insured intended the acts giving rise to liability—*i.e.*, the setting fire to the paper and cardboard.

Appellants’ reliance on the golf ball scenario discussed in *Pacific Insurance* is flawed. There the court said that when one intentionally hits a golf ball without shouting the usual warning of “fore”, and the golf ball hits someone, the fact that hitting the golf ball was intentional does not mean that failing to yell “fore” is not covered. 450 F. Supp. 2d at 1206. But in that example, the golfer did not expect or intend to injure or damage *anything* by hitting the golf ball—rather, the golfer hit the golf ball to put it in play.

The same is true for the example appellants cite of the driver who intentionally backs up his car, but negligently runs into a vehicle with the right of way. In that case, the driver had no intent or expectation of causing *any* injury from the mere act of backing up the car. Rather, the driver was backing up the car to drive it somewhere.

In contrast, in this case, as in *Butler*, *Dotts*, and *Unigard*, the insured objectively expected or intended to cause at least some injury or harm when the intentional act was performed, even though the actual injury or harm turned out to be much greater. Indeed, appellants’

complaint against Chadwick and her friend said, “The defendants, although minors, were of an age that the danger of fire should have been known to them.” (CP 62)

Prosser v. Leuck, 196 Wis.2d 780, 539 N.W.2d 466 (1995), does not support appellants’ position at all. That case did not even involve whether there was an accident or an “occurrence.” Rather, *Prosser* dealt with some sort of intentional act exclusion, which the court’s opinion does not even quote.

3. Appellants’ Inference of Harm Argument Misses the Point.

Appellants claim that a whole host of Washington cases using the so-called “*Unigard* rule” should not apply because, according to appellants, the courts there inferred an intent or expectation to harm from the nature of the insured’s deliberate acts. (Brief of Appellants 29-30) It is true that Washington courts have inferred intent to harm the victim in some situations—primarily involving sexual assault or molestation where the policies purported to provide coverage unless the injury was expected or intended by the insured.⁶ But intent to harm appellants’ building is

⁶ For example, in *Rodriguez v. Williams*, 107 Wn.2d 381, 729 P.2d 627 (1986), this Court inferred harm from sexual molestation where the policy excluded injury expected or intended by the insured. Significantly, in so doing, this Court said:

irrelevant to whether there was an accident here. As discussed *supra*, to qualify as an accident, both the means and the result must be unexpected and unintended. Here, the means were deliberate.

Thus, contrary to appellants' argument, intent to damage the school building was not only not inferred in *Unigard*, it was not at issue. Rather, the Court of Appeals upheld the trial court's finding of no accident because the means were intentional:

The intentional and deliberate act of William Winkler in starting the fire which caused the school building blaze cannot be said to be involuntary. Therefore, as to William Winkler, the damage to the school was not caused by accidental means nor can it be considered, under the policy definitions, an insurable "occurrence."

20 Wn. App. at 264. A similar analysis *with respect to the policy's accident requirement* was employed in *Grange Insurance Association v.*

Were this an "accidental occurrence" policy, we would simply deny that coverage existed under the policy because the act of committing incest could not be described as an accidental occurrence.

Id. at 384. See also, e.g., *Allstate Ins. Co. v. Calkins*, 58 Wn. App. 399, 793 P.2d 452, *rev. denied*, 115 Wn.2d 1024 (1990) (sexual relationship with minor where policy excluded injury intentionally caused by insured); *Standard Fire Ins. Co. v. Blakeslee*, 54 Wn. App. 1, 771 P.2d 1172, *rev. denied*, 113 Wn.2d 1017 (1989) (indecent liberties with patient where policy defined "occurrence" in terms of injury not expected or intended by insured); *Public Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. 701, 740 P.2d 370 (1987) (sexual molestation where policy excluded injury expected or intended by the insured); *Grange Ins. Ass'n v. Authier*, 45 Wn. App. 383, 725 P.2d 642 (1986), *rev. denied*, 107 Wn.2d 1024 (1987) (indecent liberties where policy excluded injury expected or intended from standpoint of insured); *Western Nat'l Assur. Co. v. Hecker*, 43 Wn. App. 816, 719 P.2d 954 (1986) (forcible anal intercourse where policy excluded liability caused intentionally by insured).

Authier, 45 Wn. App. 383, 725 P.2d 642 (1986), and *Western National Assurance Co. v. Hecker*, 43 Wn. App. 816, 822, 719 P.2d 954 (1986).⁷

Intent to harm the victim was also not at issue (nor was it inferred) in *Roller v. Stonewall Insurance Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990). In that case, there was no dispute that the means—the UIM insured's ex-wife had rammed him several times with her car—were deliberate. The court found there was no accident because an accident is not determined from the standpoint of the insured:

This court has determined that "[a] loss is 'accidental' when it happens without design, intent, or obvious motivation." On the basis of this common sense definition, this court has determined that an intentional act can never be an "accident". Furthermore, pursuant to the common sense definition, "accident" is not a subjective term. Thus, the perspective of the insured as opposed to the tortfeasor is not a relevant inquiry. Either an incident is an accident or it is not. McKay's intentional ramming of Roller was not an accident.

Id. at 685 (footnote and citations omitted).

The insureds in *Butler, Brosseau, Allstate Insurance Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999), and *Safeco Insurance Co. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984), unsuccessfully attempted to place their intent to harm the victim at issue. They claimed that although the

⁷ In both *Hecker* and *Authier*, the policies also contained versions of an intentional injury exclusion. In discussing those exclusions, the courts inferred intent to harm.

means were deliberate, there was an additional, unexpected, independent, and unforeseen happening so that there was an accident regardless of the fact that their actions were deliberate. In *Butler* the insured deliberately shot at a vehicle. A bullet ricocheted off the vehicle, striking one of the vehicle passengers. In *Brosseau* and *Bauer*, the insured deliberately shot his assailant in self-defense. In *Dotts*, the insured deliberately slapped the victim “to get his attention.”

In all four cases, the court ruled there was no accident as a matter of law, but not because the court inferred intent to harm the victim. Rather, in all four cases the court found there was no additional, unexpected, independent, and unforeseen happening that would have converted the insured’s deliberate act into an accident. Consequently, intent to harm the victim was irrelevant.

For example, in *Butler*, the court ruled:

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.

Both the Air Force and the Oakland Police Department trained Butler in the use of firearms. Butler belonged to a pistol range and practiced shooting approximately once a month. On the day of this incident, he intentionally fired his gun at an occupied, metal truck. Under the facts of this case, ***no reasonable person could conclude Butler was***

unaware of the possibility of ricochet, or that a ricochet might hit an occupant of the truck.

Id. at 401 (emphasis added). Similarly, the *Brosseau* court said, “[N]othing in the record even remotely suggests that any additional unexpected, independent and unforeseen happening occurred which caused Anderson's death.” 113 Wn.2d at 96-97. *Accord, Bauer*, 96 Wn. App. at 15-16; *Dotts*, 38 Wn. App. at 385-86.

Appellants claim that when an insured commits a deliberate act but does not intend injury or damage, courts find coverage as a matter of law, without requiring involuntary means or an additional, unexpected, independent and unforeseen happening. They further claim that “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.” (Brief of Appellants 31) Wrong on both counts.

In *Butler*, there was no accident even though the insured claimed he did not intend to injure. 118 Wn.2d at 400-01. This Court applied the so-called *Unigard* rule. *Id.* at 401.

In *Dotts*, there was no accident even though the insured did not intend death. 38 Wn. App. at 385. The court applied the so-called *Unigard* rule. *Id.* at 385-86.

In *Unigard* there was no accident even though the insured child did not intend to burn down the school. 20 Wn. App. at 263.

In *State Farm Fire & Casualty Co. v. Parrella*, 134 Wn. App. 536, 141 P.3d 643 (2006), there was no accident even though the insured did not intend to harm anyone. There the insured teenager aimed a BB-gun at his friend and fired. It was meant to be a prank. However, the BB struck the friend in the eye.

The insured had not intended to even hit his friend, let alone hurt him. Applying the so-called *Unigard* rule, the court ruled there was no accident.

State Farm agrees with appellants that “this case does not involve a ‘confused occurrence’ that requires a trial on whether there was an accidental ‘occurrence.’” (Brief of Appellants 35) But appellants are simply wrong in claiming there must be coverage because “[t]here is no factual dispute because it is admitted that Chanel did not expect or intend to damage Aldrich’s Market.” (*Id.*) Washington law is clear that whether there was an “accident” does not depend on whether the insured subjectively expected or intended the damage that occurred.

4. There Is No Reason To Overturn Well-Established Case Law.

Appellants candidly admit they are asking this Court to overturn the so-called “*Unigard*” rule. What they fail to disclose is that they are asking this Court to overturn its “accident” rulings in *Butler*, *Brosseau*, *Roller*, and *Detweiler*, among others, and rulings of the Courts of Appeals in *American Economy Ins. Co. v. Estate of Wilker*, 96 Wn. App. 87, 977 P.2d 677 (1999) (Div. I), *rev. denied*, 139 Wn.2d 1015 (2000); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999) (Div. II); *Grange Ins. Ass’n v. Authier*, 45 Wn. App. 383, 725 P.2d 642 (1986) (Div. III), *rev. denied*, 107 Wn.2d 1024 (1987); *Safeco Ins. Co. of Am. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984) (Div. III); and *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 37 Wn. App. 621, 681 P.2d 875 (1984) (Div. II)..

Thus, under appellants’ view, it was an accident when Hap Butler deliberately aimed at a vehicle and fired 6 shots, one of which inadvertently ricocheted and hit one of the vehicle occupants. Under appellants’ view, it was an accident when Harry Dotts deliberately delivered a backhanded slap to his victim’s head, even though Dotts was only seeking to get the victim’s attention and did not intend to hurt, let alone kill, him. Under plaintiff’s view, it was an accident when William

Winkler deliberately set fire to the contents of a trash can and ended up burning down the school building.

The average purchaser of insurance would never think Hap Butler's and Harry Dotts' victims were injured by accident. The average purchaser of insurance would never think the school William Winkler burned down was burned down by accident. The average purchaser of insurance here would not think appellants' building was burned down by accident.

Appellants cites to WAC 284-50-315(4), which prohibits the use of an accidental means test for individual disability policies. But this case involves a homeowners liability policy, not a disability policy. The Legislature is presumed to know this Court's decisions. *In re Marriage of Gimlett*, 95 Wn.2d 699, 702, 629 P.2d 450 (1981). If the Legislature or, for that matter, the Insurance Commissioner had wanted to change the well-established law on what constitutes an "accident" for the purposes of liability policies, they easily could have done so. Neither has. *See Parrella*, 134 Wn. App. at 542.

B. EVEN IF THERE WERE AN ACCIDENT, THE WILLFUL AND MALICIOUS ACTS EXCLUSION APPLIES.

This Court does not even need to decide the accident question. This is because even if there were an accident, the exclusion for property

damage “which is the result of willful and malicious acts of the **insured**” applies. (CP 188) Since Chadwick was an insured and since setting fire to paper or cardboard from the dumpster was willful and malicious, the exclusion removes any coverage.

“‘Willful’ refers to an intentional behavior.” *Vioen v. Cluff*, 69 Wn.2d 306, 323, 418 P.2d 430 (1966); *see also State v. Nelson*, 17 Wn. App. 66, 72, 561 P.2d 1093, *rev. denied*, 89 Wn.2d 1001 (1977); *State v. Russell*, 73 Wn.2d 903, 907, 442 P.2d 988 (1968). “Malicious” means “‘having, or done with, wicked or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse.’” *Keathley v. State Farm Fire & Casualty Insurance Co.*, 594 So.2d 963, 965 (La. App. 1992) (quoting BLACK’S LAW DICTIONARY 863 (5th ed. 1979). “Malicious act” has been defined to mean “[a]n intentional, wrongful act performed against another without legal justification or excuse.” BLACK’S LAW DICTIONARY 977 (8th ed. 2004).

Chadwick’s setting fire to the paper or cardboard was indisputably intentional, wrongful, and done with mischievous intentions or motives and without just cause or legal justification or excuse. Therefore, she acted willfully and maliciously.

Significantly, the willful/malicious acts exclusion, by its terms, requires only that the insured’s *acts, not the resulting injury*, be willful

and malicious. Intentional or expected injury is instead the focus of the exclusion for bodily injury or property damage which is either expected or intended by the insured. State Farm does not contend that the expected/intended injury exclusion applies here.

Hall v. State Farm Fire & Casualty Co., 109 Wn. App. 614, 36 P.3d 582 (2001), *rev. denied*, 146 Wn.2d 1021 (2002), is illustrative of how the willful/malicious acts exclusion works. There the insured and claimant were engaged in an argument. When the insured pulled a gun, the claimant grabbed for it with one hand and punched the insured in the face with the other hand. During their struggle, the gun went off, severely injuring the claimant.

The policy at issue contained substantially the same willful/malicious acts and expected/intended injury exclusions as are at issue here. The insurer took the position that the willful/malicious acts exclusion would apply so long as the insured's acts leading up to the shooting were willful and malicious. The insured argued that the willful/malicious acts exclusion could not apply unless the firing of the gun was malicious and willful. The Court of Appeals agreed with the insurer, explaining:

The policy's general language extends coverage only to accidents. Thus, for the willful and malicious acts

exclusions to have any meaning, they must apply to some unintended and accidental injuries. . . .

. . . .**[T]he willful and malicious acts exclusions at issue here do *not* require an intent to injure.** If they did, they would be superfluous, since the policies contain separate exclusions for injuries “expected or intended” by an insured.

Id. at 620 (emphasis added). *Hall*’s interpretation of the exclusion is followed in many jurisdictions.⁸

Nevertheless, appellants argue the willful/malicious acts exclusion does not apply on the ground that “Chanel did not intend to damage Aldrich’s Market” and “she did not willfully and maliciously cause property damage.” (Brief of Appellants 41) This argument is directly contrary to *Hall*’s holding that the exclusion does “not require an intent to injure.” 109 Wn. App. at 620. And under appellants’ approach, the willful and malicious acts exclusion would simply be duplicative of the expected/intended injury exclusion.

Appellants correctly observe that the exclusion “must be construed ‘as written.’” (Brief of Appellants 41) (quoting *Diamaco, Inc. v. Aetna*

⁸ See, e.g., *Thorn v. American States Insurance Co.*, 266 F. Supp. 2d 1346 (M.D. Ala. 2002), *aff’d*, 66 Fed. Appx. 846 (11th Cir. 2003) (exclusion applied to intentional acts alleged to be negligent regardless of lack of subjective intent to injure); *State Farm Fire & Casualty Co. v. Martin*, 186 Ill.2d 367, 710 N.E.2d 1228 (1999) (exclusion applied where insured arranged for arson fire which inadvertently killed firefighters); *State Farm Fire & Casualty Co. v. Barker*, 143 Ohio App. 3d 407, 758 N.E.2d 228 (2001) (exclusion applied where insured deliberately threw rock at car and inadvertently hit passenger).

Cas. & Sur. Co., 97 Wn. App. 335, 340, 983 P.2d 707 (1999), *rev. denied*, 140 Wn.2d 1013 (2000)). But then they ignore this rule and read the exclusion as if it read:

Coverage L does not apply to:

a. . . . **property damage:**

. . .

(2) willfully and maliciously caused by
the **insured**;

That is not what the exclusion says. Instead, the exclusion removes coverage for “property damage” “which is the *result* of *willful and malicious acts* of the **insured**” (CP 188) (boldfaced italics added). The trial court was correct when it ruled that “the fire was started with a willful and malicious behavior.” (RP 4) Even if there were no “accident,” the willful and malicious acts exclusion removes coverage as a matter of law.

V. CONCLUSION

The average purchaser of insurance would not say, “Too bad about that accident down at Aldrich’s.” The average purchaser would not call what happened an “accident”, because the acts of the insured and her friend in lighting the fire that eventually spread to the store were not only deliberate, but also willful and malicious. Subjective intent to cause the harm that ultimately occurred is irrelevant.

Under these circumstances, the trial court was absolutely right when it said, “[I]t was a deliberate act that started this fire, a deliberate act of the insured’s family member,” and “the fire was started with a willful and malicious behavior.” There was no accident and even if there were, the willful and malicious acts exclusion precludes coverage.

This Court should affirm the summary judgment in State Farm’s favor.

DATED this 31st day of January, 2007.

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