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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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

Defendants-Appellants,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff-Respondent.

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**OPENING BRIEF FOR APPELLANTS**

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INSLEE, BEST, DOEZIE & RYDER, P.S.  
David J. Lawyer, WSBA # 16353  
Attorneys for Appellants

777 - 108th Avenue N.E., Suite 1900  
P.O. Box C-90016  
Bellevue, Washington 98009-9016  
Telephone: (425) 455-1234  
Fax: (425) 637-0247  
Email: dlawyer@insleebest.com

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## I. INTRODUCTION

This case presents a set of facts that, to the best of Appellants' knowledge, Washington appellate courts have not yet confronted when asked to consider the meaning and scope of the term "accident", as used in liability insurance policies. The Appellants, Kwing Ng and Erica Man, husband and wife, seek to prevent their homeowner's insurance carrier, State Farm Fire & Casualty Company, from withdrawing its defense of the Ngs in a civil action brought by their neighbors, Son and Hyu Kwon, for unauthorized removal of trees from the Kwon property. The trees in question were deliberately cut, as a result of a miscommunication, and belief by the Ngs that the Kwons actually wanted the trees removed and authorized their removal.

The legal issue presented is narrow: under Washington law, where a policy of insurance covers an insured for liability to third parties for bodily injury or property damage caused by an "accident", is an insurer obligated to defend and indemnify an insured if the injury complained of resulted from an insured's voluntary actions, but where the alleged injury was unanticipated and not intended?

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in granting summary judgment declaratory relief to State Farm, to the effect that it has no duty to defend or to indemnify the Ngs against the claims of the Kwons, and finding as a matter of law that, under the factual circumstances presented, the injuries to the Kwons were not the result of an “accident” under the Ng homeowners’ insurance policy.

## **III. STATEMENT OF THE CASE**

The Ngs are homeowners, residing at 13521 SE 52<sup>nd</sup> Street, Bellevue, WA. Their neighbors, the Kwons, reside at 5300 135<sup>th</sup> Place, SE, Bellevue, WA. Although they are in close proximity to one another, the two lots in question do not abut one another, and the Ngs and the Kwons are not well acquainted. CP 92 Ms. Man came to the United States from her native China at the age of eighteen. She speaks Cantonese Chinese as her native language, and English is her second language. The Kwons are Korean, and the Ngs do not know how long the Kwons have lived in the United States. English is also the second language of the Kwons. CP 93

At all times relevant to this proceeding, the Ngs have maintained a policy of homeowners insurance with State Farm. CP 36. The policy contains a typical, third party liability coverage provision, where State Farm agreed to pay up to the limit of liability for the damages for which the Ngs are legally liable, and to provide a defense at State Farm's expense, "if a claim is made or suit is brought ... for damages because of bodily injury or property damage ... caused by an occurrence". CP 55 The Policy defined "occurrence" to mean, "an accident, including exposure to conditions which result in: (a) bodily injury; or (b) property damage; during the policy period". CP 42 The policy does not further define the term "accident".

In the spring of 2008, as part of a plan to perform landscaping activities, Ms. Man made contact with several of her neighbors, proposing to reduce the size and mass of various trees and shrubs on their respective lots, which had become overgrown. CP 93 Ms. Man contacted Alpine Tree Service, a local tree cutting contractor, and asked for an estimate for the cost to trim a variety of trees and shrubs on the Ngs' lot, and on several neighboring lots lying to the south and to the west of the Ngs' property. CP 93

Ms. Man made personal contact with three out of the four neighbors involved, to discuss the plans and to obtain their consent and approval to the proposed activity. Ms. Man was unsuccessful making direct contact with the Kwons, because they were not home when Ms. Man went to their house to discuss the project. Ms. Man left a written note for the Kwons on or about July 18, 2008, along with her name and telephone number, explaining her desire to trim the Kwons' fir trees, and indicating her willingness to pay the contractor for the cost of the trimming. CP 93 At the time she left the note, Ms. Man was not certain how many of the affected trees were located within the Kwon lot, as opposed to the lot of her neighbors Tom Littman and Bianca Peitte, because the trees in question are located close to one another, along the common property line between the Kwons and Littman/Peitte. After she left the note, however, Ms. Man was informed by her neighbors Littman/Peitte that all four of the affected fir trees were located on the Kwon property. CP 93-94

A few days later, on July 22, 2008, Ms. Man received a message on her telephone answering machine from Mr. Kwon, stating that it was okay with him "to cut the trees". Ms. Man was confused by the

message, since her written note had referred only to “trimming” the Kwons’ trees, and Mr. Kwon’s message sounded to Ms. Man like he was authorizing the complete removal of the trees. To avoid any confusion, and to be sure the parties were in agreement, Ms. Man called the Kwons back to ask for a clarification. CP 94

When she called, Ms. Man heard a woman answer the telephone. Ms. Man identified herself, and reported that Mr. Kwon had left a voice mail message for her, authorizing her to remove the trees on the Kwons’ lot. Ms. Man asked to speak to Mr. Kwon. The woman who answered the telephone hung up, but then called back, and identified herself as Mrs. Kwon. In the second telephone call, Mrs. Kwon said that her husband said it was okay to cut the trees. Ms. Man very deliberately confirmed with Mrs. Kwon that the Kwons wanted the four trees on their property removed, and not simply trimmed. Because she was preparing dinner at the time, Ms. Man put Mrs. Kwon’s call on a speaker phone, and the conversation was heard by Ms. Man’s husband and their (then) 13-year-old daughter, Samantha. CP 94

The additional work involved in removing the Kwons’ trees, as opposed to simply trimming them, increased the expense to be paid to

the tree cutter. However, since Ms. Man had offered originally to cover the expense of trimming the trees on the Kwon property, she did not want to irritate the Kwons by asking for financial contribution. Instead, she simply resolved to incur the additional expense. CP 94 There was no advantage for the Ngs to cut the Kwons' trees down and remove them, as opposed to merely trimming them. The Ngs' home is located considerably higher than the Kwons' house, and very limited trimming of the trees on the Kwon property would have accomplished the desired enhancement to the Ngs' view. CP 95

The Kwons have, at all times in the underlying lawsuit, admitted that they authorized the trimming of their trees, but they say they did not desire or authorize that the trees be removed. And yet, cutting the trees down and removing them was intended by the Ngs to benefit the Kwons, not the Ngs. CP 95. Before the tree cutter came to do his work, Ms. Man called the Kwons again, to ask if they wanted to retain the cut up logs for firewood. Mrs. Kwon answered the call, and gave the phone to her husband. When asked the same question, Mr. Kwon told Ms. Man that he did not want the firewood, so she informed him that, by no later than the end of the week, she would have her husband remove the wood

and clean up the Kwons' yard. CP 95 If the Ngs were only intending to perform the limited trimming that the Kwons say they authorized, there would not have been any firewood for removal.

On the afternoon of the tree cutting, Mr. Kwon called the Ngs' house and, when their daughter answered the telephone, he began screaming and yelling at her, indicating he would sue the Ngs. CP 95. On the afternoon of July 30, 2008, Ms. Man spoke to Bellevue Police Officer Scott Montgomery, who had been called by the Kwons, and who confirmed to Ms. Man that the Kwons had admitted to him that they had authorized the cutting. CP 95. That was the reason he did not file a police report. Ms. Man followed up on that conversation by e-mail with Officer Montgomery. Officer Montgomery repeated in e-mail to Ms. Man Mr. Kwon's admission that he had stated it was "okay", but in Officer Montgomery's view, Mr. Kwon had not been clear as to what he had authorized. CP 98-100

The Ngs never intentionally caused any damage to the Kwons' property. CP 95 Through Ms. Man's efforts, they did their best to clarify their understanding of what the Kwons wanted, and to act only in accordance with their authorization. Removing the four trees from their

lot represented an added expense to the Ng household, for no added benefit to them. CP 95 Giving the Kwons the benefit of the doubt, and assuming they really did not want their trees removed, but used language that gave the Ngs the incorrect impression that they did want them removed, the damage caused to them was completely unintentional, and accidental. CP 96 The Ngs did not knowingly and deliberately damage their neighbor's property.

The Kwons commenced a lawsuit against the Ngs in King County Superior Court, seeking damages for trespass and damage to their property. That case currently awaits trial. The Ngs tendered defense of the action to their homeowners' insurance carrier, State Farm, which accepted the defense under a reservation of rights, and then commenced the present action for declaratory relief.

#### IV. ARGUMENT

##### A. The Standard of Review on Appeal is De Novo

When reviewing a trial court's granting of summary judgment, the appellate court engages in the same inquiry as the trial court. *Roller v. Stonewall Insurance Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990). Summary judgment is appropriate only if the pleadings, affidavits,

depositions and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court considers all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

**B. An Insurance Policy Must Be Interpreted In a Reasonable Manner**

The insurance policy in this case requires that State Farm provide a defense and pay for damages for which the insured is legally liable “if a claim is made or a suit is brought against an insured for damages because of...property damage...caused by an occurrence.” CP 55. An occurrence is defined as “an accident.” CP 42. State Farm argues that the injury alleged by the Kwons cannot be an “accident” under the insurance policy because the Ngs’ act of tree cutting was a volitional undertaking. Because the duty to defend is broader than the duty to indemnify, and State Farm alleges it has no duty to defend, State Farm also alleges that it has no duty to indemnify the Ngs, should the Kwons prevail in the underlying action.

“In construing the language of an insurance policy, the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990). Under this rule, the term “accident” is given the fair, reasonable and sensible meaning that the average person purchasing insurance would give it. “An insurer is not relieved of its duty to defend unless the claim

alleged in the complaint is ‘clearly not covered by the policy’... if a complaint is ambiguous, a court will construe it liberally in favor of ‘triggering the insurer’s duty to defend.’” *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007). State Farm implies that the Kwons’ claim for damages would only be covered by the insurance policy if the trees on the Kwons’ property were felled unintentionally, such as by a tree cutter slipping with a running chain saw and cutting down a tree on the Kwon property without actually wanting to cut it down, or if a tree that was intentionally cut down on another neighbor’s property fell unexpectedly in the direction of the Kwons’ property, and took down trees on the Kwon property. According to State Farm, as long as the tree cutter with the chain saw in his hands was awake, and trying to cut down the trees on the Kwons’ property that were felled, the injury to the Kwons cannot be described as having been caused by an “accident”.

This case turns entirely on the meaning of the word “accident” as it is used in the Ngs’ insurance policy (which is not further defined). Because the term “accident” is reasonably susceptible to two or more meanings, it is ambiguous, and the court must interpret its meaning.

There are many definitions of the word and “judging from the plethora of law on the subject, no one of them seems to be perfectly satisfactory to everyone.” *Detweiler v. J.C. Penney Casualty Ins. Co.*, 110 Wn.2d 99, 105, 751 P.2d 282 (1988). Under the Kwons’ complaint in the underlying action, there exists the possibility that the Ngs will be liable to the Kwons for ordinary damages within the scope of the insurance policy, because the law provides a remedy to the Kwons for the negligent or “accidental” removal of their trees. Case law and common sense dictate that State Farm must be prohibited from withdrawing its defense of the Ngs as long as there exists a reasonable possibility that the alleged harm suffered by the Kwons arises from the Ngs’ “accidental” injury to the Kwons’ property.

**C. State Farm Has A Duty to Defend Where Injuries Resulting From An Insured's Intentional Acts Are Not Foreseeable.**

**1. Under Washington Law, an Intentional Action May Qualify As an Accident**

The first level of analysis for the court is to determine whether injuries caused by an intentional action can ever qualify as an “accident” as that term is used in liability insurance policies. The answer is crystal clear, and the answer is yes.

There is a rather finite collection of appellate cases in Washington where the question presented was whether an insured was entitled to a defense or to indemnity by an insurer, under circumstances in which an alleged injury or property damage resulted from an insured’s intentional actions. The reported decisions fall into three categories: (a) those in which the insurer was released from any duty to defend or indemnify the insured<sup>1</sup>; (b) those in which the insurer was required to defend or

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<sup>1</sup> See, e.g., *Safeco v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992); *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990); *Allstate v. Bauer*, 96 Wash. App. 11, 977 P.2d 617 (1999); *Ryan v. Harrison*, 40 Wash. App. 395, 699 P.2d 230 (1985).

indemnify the insured<sup>2</sup>; and (c) those where the question of the insurer's duty rested upon genuine issues of fact in dispute.<sup>3</sup> The first and most obvious conclusion is that, at least under certain circumstances, Washington law will interpret the term "accident", as it is used in insurance policies, broadly enough to cover injuries resulting from intentional acts of insureds. A less obvious conclusion to be drawn from surveying Washington cases on this subject is that the fact patterns are wildly divergent, having almost no factual similarity from one to the next, and no cases presenting facts closely similar to those presented here. But the unifying theme in all of the Washington cases on the subject is that our courts view the evidence to determine the foreseeability of the resulting injury, viewed from the perspective of the insured, to determine when an injury was caused by an "accident", for purposes of liability insurance.

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<sup>2</sup> See, e.g., *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d 43, 164 P.3d 454 (2006); *Nationwide Mutual Ins. Co. v. Hayles, Inc.*, 136 Wash. App. 531, 150 P.3d 539 (2007).

<sup>3</sup> See, e.g., *Fischer v. State Farm Fire & Casualty Co.*, 272 Fed. Appx. 608 (9<sup>th</sup> Cir. 2007); *Detweiler v. J.C. Penney Casualty Ins. Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988); *McKinnon v. Republic National Life Ins. Co.*, 25 Wash. App. 854, 610 P.2d 944 (1980)

## **2. Clearly Foreseeable Injuries resulting from Intentional Acts Are Not Caused By “Accidents”**

Under the first category, where Washington courts have held that an insurer had no duty to defend or indemnify, the cases appear to have at least one factual commonality. In these cases, the insured was actually attempting to inflict injury of some kind to persons or to cause property damage. In *Safeco v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), three companions were making mischief, blowing up mailboxes with firecrackers. One of the victims of the prank, Hap Butler, got into his car with two loaded handguns and went looking for the tortfeasors, engaging in a high speed chase through the streets of Spanaway. When Butler saw a “flash” coming from the truck containing the youths, he proceeded to fire six shots at the truck, and kept shooting after the youths got back into their truck and started to drive away, because he wanted to “make sure they left and didn’t come back”. One of the passengers was struck in the head, and seriously injured. Butler entered an Alford plea in his criminal prosecution, and was sentenced to 18 months in jail for second degree assault.

In the subsequent civil action, Butler argued unsuccessfully that the injury was caused by an “accident”, alleging that the bullet causing

injury was an unintentional ricochet, and was therefore, “an additional, unexpected, independent and unforeseen happening”, which would take it from the realm of intentional acts to that of accidents, under Washington’s prior judicial interpretations of the term. The Supreme Court disagreed, and found that no reasonable person could reach the conclusion that the injury was unforeseeable. The court noted Butler’s long training in use of firearms, and his monthly practice of visiting a shooting range. Based on the **foreseeability** of injury from a shot from the pistol, the court concluded that the injury was not caused by an accident, and Safeco had no duty to defend or to indemnify Butler.

*Roller v. Stonewall Insurance Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990) involved an even more bizarre pattern of facts. In *Roller*, insured Ernest Flattum drove Daniel Roller and his daughter to a babysitter’s home, which happened to be located next door to Roller’s former wife, Dinell McKay. When McKay saw Roller emerging from the babysitter’s house, she became enraged, began yelling obscenities, got into her car, and deliberately rammed her car into Flattum’s car. Roller got out of his friend’s car to call the police, and McKay then deliberately ran him down in the street, causing him to sustain injuries.

Roller made a claim against his friend Flattum, and Flattum tendered the claim to his auto insurance carrier, the policy for which included underinsured motorist coverage. Roller was a passenger “using” Flattum’s vehicle, and therefore was an “insured” under Flattum’s policy. Citing Webster’s Third New International Dictionary to find the popular and ordinary meaning of the word “accident”, the court determined that a loss is “accidental” when it happens without design, intent, or obvious motivation. Under this definition, the court found that the injuries to Roller were not the result of any “accident”. The court paid particular attention to the fact that, if McKay had carried automobile insurance, she would not have had coverage for his claim for the injuries he sustained, because traditional policies do not cover intentional acts by the insured.

In *Allstate v. Bauer*, 96 Wash. App. 11, 977 P.2d 617 (1999), in another extremely unusual fact situation, an insured argued that a death he caused resulted from an “accident”. Returning home late one evening with his 4-year-old son, Bauer was confronted by Morgan, who appeared to be intoxicated. Morgan knocked Bauer and his young son to the ground, and Bauer saw Morgan reach for what Bauer thought was a gun.

Fearing for his own safety and that of his son, Bauer fired multiple shots at Morgan from his own gun, grabbed his son, ran inside his house and called 911. Morgan, who was unarmed, died from the wounds he sustained. In a criminal trial, a jury acquitted Bauer, finding that he acted in self defense. When Morgan's estate brought a wrongful death claim, Bauer tendered defense to his insurance carrier.

The court determined that Allstate had no duty to defend or indemnify. The court rather mechanically reasoned that, because the bullets striking Morgan caused his death, and the bullets striking Morgan's body were not an **unforeseen** happening following Bauer's deliberate act of shooting, Morgan's death was not the result of an "accident".

*Ryan v. Harrison*, 40 Wash. App. 395, 699 P.2d 230 (1985) is a red herring in the list of Washington cases, because it involved the court's application of a specifically negotiated policy exclusion. In *Ryan*, a property owner sought damages when his alfalfa crop was destroyed after a crop duster negligently sprayed the alfalfa field, intending to spray a nearby wheat field. The crop dusting company had

received a substantial decrease in premium for an exclusion from coverage that specifically stated:

This policy does not apply:

...

4. to injury to or destruction of any crops, pastures, trees or tangible personal property to which the aerial application is deliberately made whether in error or not;

The term “deliberately” was not further defined in the policy. Finding that the pilot carefully considered and formed an intention to spray the field he sprayed, his action was “deliberate”, even though he mistakenly sprayed the wrong field. The exclusion that dramatically lowered the company’s insurance premium expressly excluded from coverage damage caused by deliberate application of herbicides, *even if in error*, so the crop duster’s mistake did not bring the claim within the insurance company’s duty to defend or indemnify. Under the analysis of law set forth herein, it is submitted that, without the exclusion relied on by the *Harrison* court, the injury would have been caused by an “accident”, and the insurer would have had a duty to defend. Because of the unique language of the exclusion, however, the court did not need to investigate the **foreseeability** of the injury.

Washington courts will only relieve an insurer from its duty of defense where injuries caused by intentional acts are injuries that were foreseeable from the insured's point of view.

**3. Injuries That Are Not Clearly Foreseeable Are “Accidental”, Even When Caused By Deliberate Acts.**

In *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007), the court faced yet another strange set of facts underlying a claim for insurance coverage. In *Woo*, a dentist played a practical joke on a patient/employee, placing boar tusks in her mouth during a dental procedure while she was anesthetized, and photographing it. Woo had the photos developed, but when he saw them, decided that they should not be shown to the patient. Later, members of Woo's staff gave the photographs to the patient, who left her employment and then filed suit for damages, on the premise that the distress from the practical joke caused bodily injury to her. *Id.* The dentist's insurance policy covered injury caused by an “occurrence”, and occurrence was defined as an “accident”, just as the term is defined in this case. The Court in *Woo* required the insurer to defend, stating that for the injuries not to be considered an “accident,” the dentist would have had to intend the event (photographing of the plaintiff) *in addition to* intending the injuries

alleged in her complaint. *Id.* at 64. Even though the dentist’s physical actions were volitional, and in that sense intentional, the court stated that it was “conceivable that... [the dentist] did not intend the conduct that resulted in... [the plaintiff’s] injuries.”

In *Nationwide Mutual Ins. Co. v. Hayles, Inc.*, 136 Wash. App. 531, 150 P.3d 589 (2007) the Washington Court of Appeals was finally presented with an insurance coverage case involving interpretation of the term “accident” that did not involve an extreme set of facts and bizarre behavior by the insured. In *Hayles*, a sublessor leased agricultural land to a farmer to grow onions. Under the terms of the sublease, the sublessor was to maintain control of the field’s irrigation system, and the farmer would direct the sublessor when to turn the water on and off. The farmer’s onion crop rotted when the sublessor turned the water on after the farmer had told an employee of the sublessor to keep it off. The farmer sued for the damages sustained by loss of his crop, and the sublessor tendered the claim to its insurance carrier. The carrier filed a declaratory judgment action disclaiming coverage.

Just as in this case, the insurance policy in *Hayles* covered property damage caused by an “occurrence”. And just as in the present

case, the policy in *Hayles* defined an occurrence as an “accident”. And just as in the present case, the insurance policy in *Hayles* did not further define the term “accident”. *Id.* at 537. Relying on *Roller v. Stonewall Ins. Co.* (as State Farm does in this case), the insurance carrier in *Hayles* argued that the physical act of turning on the irrigation system was intentional, and therefore, the injury resulting from that act could not be said to have been caused by an “accident”. In disagreeing with the insurer, the *Hayles* court scrutinized the *Roller* decision, and concluded:

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

*Id.* at 538 (emphasis added). The court ultimately decided that there was no evidence to conclude that the sublessor knew or should have known that turning on the irrigation system would damage the crop. “Reasonable minds could conclude only that no one under these circumstances would have anticipated that turning on the water could rot the onions”. *Id.* at 539.

These cases illustrate that Washington courts will find that injury resulting from intentional acts are nevertheless caused by “accidents”

under insurance policies, where the injury is not reasonably **foreseeable** from the point of view of the insured.

**4. Where the Record Does Not Reveal Whether An Injury Resulting From an Intentional Act was Foreseeable or Not, Washington Courts Will Not Summarily Relieve an Insurer of the Duty to Defend.**

In at least three instances, courts in this state have declined to excuse an insurer from a duty of defense, where it cannot be determined from the record on appeal whether or not a particular injury following an intentional act was reasonably **foreseeable**.

In *Fischer v. State Farm Fire & Casualty Co.*, 272 Fed. Appx. 608 (9<sup>th</sup> Cir. 2008)<sup>4</sup>, the Ninth Circuit Court of Appeals was confronted with another bizarre set of facts upon which to determine if an insurer had a duty of defense of its insured. In *Fischer*, Thom Fischer was sued after he engaged in sexual intercourse with Donna MacKenzie. Reviewing a decision by the Washington Court of Appeals on the underlying civil suit, the 9<sup>th</sup> Circuit observed that the jury in the underlying case could have believed that MacKenzie gave her consent

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<sup>4</sup> This is an unpublished decision from the Ninth Circuit Court of Appeals that may be cited, pursuant to FRAP 32.1. Under GR 14.1, it is unclear whether this decision may be cited, since it arises geographically from within the state of Washington, but not from a Washington state court.

under the mistaken belief that her boyfriend, and not Fischer, had climbed into bed with her. The important conclusion reached by the 9<sup>th</sup> Circuit in the insurance coverage case, applying its interpretation of Washington insurance law and citing *Hayles, supra*, is that the harm to MacKenzie was the result of an accident, because “under Washington law, an intentional action may qualify as an accident unless a reasonable person in the insured actor’s position would have been aware of or foresee the harmful consequences of the action. *Id.*”

Similarly, in *Detweiler v. J.C. Penney Casualty Ins. Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988), the court faced another crazy set of facts when asked to decide if an injury was the result of an accident for insurance purposes. Detweiler had spent an evening drinking with a friend. The friend drove off in Detweiler’s pickup truck, prompting Detweiler to leap into the bed of the vehicle, and he was taken on a wild ride through city streets and back roads, until he eventually fell off or was thrown from the vehicle. As it sped past him, Detweiler drew his loaded .357 magnum pistol and fired shots at point blank range at the left rear wheel of the vehicle. Bullet fragments ricocheted and hit Detweiler in the face and neck, causing injury.

Detweiler brought a declaratory judgment action against his auto insurance carrier, seeking recovery under his uninsured motorist coverage. The carrier declined coverage, asserting that Detweiler's injuries were caused by his own intentional acts. Focusing on the policy term "accident", the court first acknowledged that there are many definitions of the word and "judging from the plethora of law on the subject, no one of them seems to be perfectly satisfactory to everyone." *Id.* at 105. The court sarcastically noted that Detweiler's bullets "did precisely what bullets fired at a high velocity do when they hit steel. They shattered into fragments and spattered metal about the target vicinity, including the side of the claimant's head and neck which were turned toward the vehicle". *Id.* at 106. But, focused on the **foreseeability** of the injury resulting from the deliberate act, the court ultimately decided that there was a factual issue as to whether what occurred was an "accident" for which the policy provided coverage, reversed a summary judgment order, and remanded the case for trial.

In *McKinnon v. Republic National Life Insurance Co.*, 25 Wash. App. 854, 610 P.2d 944 (1980), the Court of Appeals was asked to consider whether an insured's death was the result of an accident when

he drowned in Lake Washington after jumping off the Evergreen Point floating bridge, 20 feet down into water that was only approximately 10 feet deep at that location. The victim was reportedly a good swimmer, and was not known to have been in any particular distress.

The life insurance policy excluded coverage in the event of suicide, or any “intentionally self-inflicted injuries”, but covered “accidental bodily injury”. The court quickly concluded that questions of fact prohibited a summary determination that the victim committed suicide. The court determined that Mr. McKinnon’s act of leaping over the railing was an intentional and deliberate act, regardless of his motivation for doing so. *Id.* at 859. But the injury could still be considered “accidental”, for insurance coverage purposes if, after Mr. McKinnon’s leap, another event occurred which was unusual, unexpected or unforeseen, and which would not be normally effected. *Id.* Based on the record before it, the court concluded that a jury could reasonably infer that Mr. McKinnon intended merely to leap to a point of relative safety not realizing the magnitude of his peril caused by a combination of the height of the bridge above the lake and the relatively shallow depth of the water. For these reasons the court of appeals

reversed a summary judgment dismissal of her complaint to recover death benefits under Mr. McKinnon's life insurance policy.

Where **foreseeability** of injury resulting from intentional acts cannot be determined from the record, it is error for a Washington court summarily to relieve an insurer from its duty of defense.

#### **5. The "Foreseeability Rule" In Washington is Consistent With Judicial Interpretations In Many Other States.**

Research reveals that many other jurisdictions have considered this specific question (i.e., the circumstances under which injuries resulting from intentional acts can be "accidents" under insurance law), in fact patterns much less extreme and much closer to the facts presented her. Decisions from the courts of other states are consistent with the theme running through the Washington decisions that **foreseeability** of the injury is the factor that determines when harm resulting from intentional activity is, nevertheless, an "accident" for insurance purposes. Several such cases are summarized below. Many of these cases descend, directly or indirectly, from a venerable United States Supreme Court case, where the Court said: "if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental

means. *United States Mut. Accident Association v. Barry*, 131 U.S. 100, 101, 33 L.Ed. 60, 9 S. Ct. 755 (1889).

In *Standard Construction Co., Inc. v. Maryland Casualty*, 359 F.3d 846 (6<sup>th</sup> Cir. 2004) a paving company entered into a contract with the State of Tennessee to perform paving and road work. In the performance of its work, the contractor dumped construction debris onto various landowners' properties. One such owner complained, arguing that permission had not been given as required by the contract specifications. Due to lack of permission, the contractor had committed trespass and was liable to the landowner for damages. The contractor reasonably, but erroneously, believed that permission had been obtained, through the landowner's daughter. On this basis, the court determined that the injury was indeed the result of an "accident", because the resulting damages were unintended, even though the original acts were intentional. The intentional act of dumping debris on the victim's property had unforeseen and unintended consequences due to the insured's negligence in failing to secure a valid agreement from the property owner. *Id.* at 851.

In *J. D'Amico v. City of Boston*, 345 Mass. 218, 186 NE2d 716 (1962), the Massachusetts Supreme Court considered whether a contractor insured was entitled to a defense where, in the course of performing a contract for widening and paving a street for the City of Boston, the contractor excavated upon private property, uncovering roots of three large trees, leading to their removal for safety reasons. It was disputed whether D'Amico knew the area in question was outside of the City's eminent domain taking, and whether the land owners gave D'Amico permission to remove the trees. When the owners sued, D'Amico's insurer accepted the tender of defense under a reservation of rights, and then informed D'Amico of its intent to withdraw representation, arguing that the injury was the result of intentional acts. The court rejected the insurer's reliance on so called "assault cases", because their facts were so different from the situation of a misunderstanding, leading to property damage. The court held that the trespass by D'Amico by mistake, or without actual intent to invade property upon which it knew it was not entitled to carry on work under its contract, was "caused by accident" within the policy of insurance. *Id.* at 720-21.

In *Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466 5<sup>th</sup> Cir. 2001), a Texas based oil and gas exploration company purchased an oil and gas lease on property owned by a family living trust. In the course of its oil and gas exploration activities, the company discharged saltwater onto the property, damaging it. Finding a duty to defend the insured did exist, the court held that, under Texas law, there is an “accident” when the action is intentionally taken, but is performed negligently, and the effect is not what would have been intended or expected had the action been performed non-negligently. *Id.* at 473-73.

In *Lumber Ins. Co. v. Moore*, 820n F. Supp. 33 (D. NH, 1993), abutting property owners had a dispute when one of the owners cut down trees and built a driveway across a portion of the neighbor’s property. The owner who cut the trees and built the driveway argued that he enjoyed easement rights and therefore had the authority to make the improvements. The neighbor argued that the activities were undertaken outside of the easement location. Interpreting the term “accident” as the operative word in the policy term “occurrence”, the District Court looked to earlier New Hampshire decisions to find that an insured’s intentional acts may be considered accidental if the insured did not intend

to inflict injury and the insured's intentional acts were not inherently injurious. Using this guidance, the District Court determined that cutting down trees under the mistaken belief that that the conduct was authorized is "accidental" if the mistaken belief has a basis in fact. Because the insured had a factual basis for his mistaken belief that his actions were authorized, the court held that the insurer had a duty to defend the insured in the underlying action.

In *Patrick v. Head of the Lakes Coop.*, 98 Wis. 66, 295 NW2d 205 (1980) the Wisconsin Supreme Court considered the issue of insurance for injuries resulting from intentional acts, when a cooperative electric association intentionally cut trees on an owner's private property. The cooperative was cutting trees that interfered with transmission lines and allegedly trimmed more than was necessary to maintain service, or cut trees located outside of its easement. The court quickly concluded that any damage caused by unauthorized trimming and cutting was unintended, and therefore accidental for purposes of insurance coverage, and therefore part of an "occurrence". The court held that the insurer had a duty to defend.

In *NW Electric Power Cooperative v. American Motorists Ins. Co.*, 451 SW 2d 356 (1969), private property owners sued an electric cooperative for damages caused to trees, crops and land, when the cooperative located its line in the middle of a tract, rather than across a corner of it. The insurance carrier declined to defend the insured cooperative on the basis that the damage was caused by voluntary intentional act of the insured, and therefore not by accident. Adopting the “sounder and more generally accepted view” the Missouri Court of Appeals determined that whether or not an injury is accidental is determined from the standpoint of the person insured, and that it is the injury and not the legal liability of the insured which must have been caused by accident. Noting that the cooperative’s employees were on the land owner’s property by virtue of an easement, the court found no evidence that the cooperative either knew of the acts causing the plaintiffs’ damage or directed them to be done. Although the acts producing the results were intentional, where no intent to injure appeared, the resulting harm was “caused by accident” within the policy meaning, and the insurer had a duty to defend. *Id.* at 362.

In *Ferguson v. Birmingham Fire Ins. Co.*, 254 Ore. 496, 460 P.2d 342 (1969), the Oregon Supreme court found no reason to exclude coverage of an insured, when a laborer employed by the insured cleared brush at the insured's instruction, but cleared beyond to property line separating the two properties. In allegations almost identical to the present case, the insurer argued that the complaint alleged facts in order to come within an Oregon statute that permits an award for treble damages for willful and intentionally trespass. The court noted that, without amending the complaint, the plaintiff in the underlying suit would still have a right to recover ordinary damages for a non-willful trespass.<sup>5</sup>

In *York Industrial Center, Inc. v. Michigan Mutual Liability Co.*, 271 N.C. 158, 155 SE2d 501 (1967), a husband and wife obtained a judgment against an insured for damages arising out of a trespass where the insured operated a bulldozer and destroyed trees and shrubs. Although the court found it "obvious" that the insureds intended to cut

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<sup>5</sup> The Oregon statute in question is very similar to RCW 4.24.630 for damage to land caused by intentional trespass, where the trespasser knows he lacks authority, which the Kwons assert in the underlying action in this case. Just as in Oregon, however, the Kwons will be able to recover ordinary damages if they can show injury resulting from trespass, but where they cannot prove the Ngs knew they were acting without authority.

down and destroy each and every tree they did destroy, they did not destroy the trees with the intent to injure or destroy any property rights of the underlying plaintiffs. The court found that the insured's error in crossing a property boundary and invading their neighbor's land was an "unexpected event" that brought the injury within the definition of an "accident" for insurance purposes.

In *Firco v. Fireman's Fund Ins. Co.*, 173 Cal. App. 2d 524, 343 P.2d 311 (1959) an insured was sued for allegedly entering upon lands of the plaintiff and maliciously, wantonly and without leave cutting down and removing trees belonging to the plaintiffs and causing damage. In reversing a trial court determination that the insurer did not have a duty to defend, the California Court of Appeals stated:

... take the trial court's finding that it appears from the complaint the entry of assured upon the lands of the plaintiff in the Humboldt action was intentional, whereas the policy excluded from coverage damage intentionally caused by the assured. The allegations in the complaint do not justify a conclusion that respondent is not obligated to defend, for it may turn out in the course of the action that the entry was unintentional and yet the plaintiff in the Humboldt action would be entitled to recover at least the value of the trees taken. It must be remembered that the attorney ... drafts his complaint in such manner as to warrant recovery of treble damages under section 3346 of the Civil Code if he could prove that the nature of the wrong and the manner of its infliction could be shown to

entitle plaintiff to such damages under the provisions of that section. But if it should turn out that the manner of inflicting the wrong came within the exception provided in that section, which disallows treble damages 'where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser,' then plaintiff could obtain only actual damages. If that should turn out to be the result of the trial of the Humboldt action, then it might well transpire that respondent herein would be liable to pay the judgment for appellant herein as being a loss not excluded upon the ground of intentional injury.

*Id.* at 529. Like the Oregon Court did in *Ferguson*, the California Court of Appeals in *Firco* required the insurer to defend its insured despite language in the complaint that alleged intentional and malicious activity, because the eventual result in the underlying case could result in legal liability by the insured to the claimant even without the alleged malicious intent.

This collection of judicial decisions from all across the United States, descending from a U.S. Supreme Court case decided more than 100 years ago, is consistent with Washington law, when the issue is properly framed. Injury resulting from intentional acts may still be considered an "accident" as that term is used in insurance policies, when the injury was not reasonably foreseeable from the standpoint of the insured. This is the "fair, reasonable, and sensible construction as

would be given to the contract by the average person purchasing insurance.” *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990).

**6. State Farm Must Defend The Ngs Because the Injury Suffered By the Kwons, On This Summary Judgment Record, Was Clearly Not Foreseeable From the Point Of View of the Ngs.**

Ms. Man was led to believe that the Kwons actually wanted the trees at issue to be cut down and removed, and not simply trimmed. The Ngs, after conversation with the Kwons, had to have their tree cutter revise his cost estimate to include the higher charge associated with removing trees instead of just trimming branches. The Ngs did not benefit from this additional work.

The injury that the Kwons assert – the *unauthorized* removal of their trees – is the result of a misunderstanding, and was nothing the Ngs could reasonably foresee. In this sense, under the wealth of case law from Washington and many other jurisdictions, the injury was caused by an “accident”, as the term is used in insurance liability policies. The Ngs and the Kwons do not speak the same native language. The parties were, by necessity, required to use English to discuss the matter. Ms. Man was confused by the Kwons’ use of the word “cut”, in a voice mail

message left in response to her written inquiry about “trimming” their trees. Ms. Man called the Kwons for the specific purpose of getting clarification, and verifying that they wanted the trees removed, and not just trimmed. Taking the evidence in the light most favorable to the Ngs, the removal of the trees occurred either (a) because the Kwons actually and knowingly requested that the trees be cut down in their entirety (in which case there will be no liability to the Kwons in the underlying suit), or (b) because there was an accidental misunderstanding between the two parties (in which case, the Ngs’ policy of insurance affords coverage for property damage suffered by the Kwons).

Washington Courts have analyzed the insurance term “accident” and said, “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.” *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 104, 751 P.2d 282 (1988). State Farm’s unreasonable interpretation of this rule is to conclude that any consequence of a deliberate act is intended, and therefore, not accidental.

State Farm argues that the “means” in the underlying case is the cutting of the trees, and the “result” is the absence of four large trees on the Kwon lot. Nothing could be more natural and foreseeable, State Farm would say.

This overly literal analysis mischaracterizes the nature of the underlying dispute. Recall, *Detweiler* is one of the cases in which the court could *not* determine from the record whether or not the injury was foreseeable, and the insurer was *not* relieved of its duty of defense. In this case, the “means” that gives rise to the claim by Kwon was a deliberate cutting of trees located on the Kwon lot, based on a mistaken belief that the Kwons authorized it and based on a sincere expectation that the tree removal was a benefit that the Kwons desired.<sup>6</sup> The “result” is that the tree removal was not, in fact, authorized, and therefore the subject of injury. Had the Ngs properly understood the Kwons’ instructions they would not have removed the trees at all. The means was accidental. Had the Kwons actually authorized the removal,

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<sup>6</sup> The Ngs believe and contend in the underlying action that the Kwons knowingly authorized the removal of their four trees, but have since changed their minds and deny authorizing the tree cutting. For purposes of this motion, however, the possibility that the Kwons did not want their trees removed and unwittingly authorized the Ngs to remove them, or that the Ngs mistook the Kwons’ message and believed they had proper authorization is what makes the injury “accidental” for purposes of insurance policy analysis.

there would be no injury. The result was accidental. This combination of unexpected means and result are what causes the Kwon injury to be the result of an “accident” for insurance coverage purposes. It was completely and utterly unexpected and unforeseen that the Kwons would complain about the tree removal and claim to be injured by the Ngs’ actions. *See, e.g., Fischer v. State Farm Fire & Casualty Co.*, 272 Fed. Appx. 608 (9<sup>th</sup> Cir. 2007)(sexual intercourse does not, in itself, cause injury, but *non-consensual* intercourse does). *See also, Lumber Ins. Co. v. Moore*, 820 F. Supp. 33, 35 (D. NH 1993) (“injury results from tree cutting only if the trees belong to someone else and permission to cut has not been obtained from the owners. Thus, tree cutting is not certain to result in injury unless the trees are cut under circumstances which would not support a belief that the tree cutting was authorized”).

This mistaken belief that the actions were authorized by the victim distinguishes the Kwons’ lawsuit from all of the cases relied upon by State Farm. Most of the cases cited by State Farm involve circumstances where the insured’s actions were intended to have negative consequences, either by shooting a gun at something or by vehicular assault. In those cases, the degree of injury was not what the insured

consciously wanted, but in each case the court found the injury to be absolutely foreseeable, and in that sense, not accidental. None of the insureds in the cases relied upon by State Farm could argue, as the Ngs do, that the result was what the insured believed the other party actually wanted and actually authorized.

State Farm ignores the Washington insurance “accident” cases that stress an accident occurs where the resulting damage is unforeseeable and unintended. State Farm mistakenly focuses all of its attention on whether an **action** or **activity** is volitional versus unintentional, and omits from the analysis whether the **damage** or **injury** caused by the intentional act was foreseeable. In the Ngs’ circumstances, even though the removal of trees from the Kwons’ property was volitional, the harm caused was not foreseeable, and in that sense absolutely not intentional. State Farm has a duty to defend because, taking the facts in the light most favorable to the Ngs, it will be shown that the *damage* to the Kwons was unintended, unforeseeable, and therefore caused by accident. *Woo v. Fireman’s Fund Insurance Co.*, 161 Wn.2d 43, 164 P.3d 454 (2006); *Nationwide Mutual Ins. Co. v. Hayles, Inc.*, 136 Wash. App. 531, 150 P.3d 539 (2007).

Factually, the present case is much more similar to *Nationwide Mutual Insurance Co. v. Hayles, Inc.*, 136 Wn. App. 531, 150 P.3d 589 (2007) than to any of the bizarre cases cited by State Farm. In *Hayles*, the court found an insurer had a duty to defend and indemnify its insured for liability for crop damage losses on leased farm land, where the resulting injury was not intended or reasonably foreseeable. This is where State Farm's analysis misses the mark. State Farm must show that the Ngs had "an awareness of the implications or consequences" of their act of cutting down trees on the Kwon property, and not just that the Ngs were awake and conscious when they directed a tree cutter to remove trees on the Kwon property. *Id.*

Taking the evidence in the light most favorable to the non-moving party, the record shows that the Ngs actually, subjectively and reasonably believed that they had the Kwons' permission to remove the trees. The Ngs subjectively and reasonably believed that the trees were not wanted on the Kwon property, and that removing the trees would benefit the Kwons by improving their property, rather than injuring the Kwons by damaging their property. Trees are removed from residential property every day for a wide variety of reasons. Sometimes trees are

diseased or damaged, and dangerous to persons or other property. Sometimes, trees furnish unwanted shade, creating moss or blocking desired sunlight. Sometimes trees grow to sizes too large for their surroundings, making owners feel crowded. Sometimes tree roots heave sidewalks, interfere with foundations or hoard landscape irrigation. Sometimes trees deposit leaves, needles or cones on rooftops or patios or in lawns, adding undesired maintenance for a homeowner.

There exist any number of common reasons a homeowner might desire to remove trees from his or her property. State Farm makes no factual showing that the Ngs should have doubted their belief that the Kwons were asking to have the four trees removed. Rather, State Farm asserts the incorrect conclusion that removal of a tree from another person's property categorically or inherently damages the property. This assumption is flatly wrong. Just as the 9<sup>th</sup> Circuit articulated in *Fischer v. State Farm, supra*, sexual intercourse does not, in itself constitute an injury, although non-consensual intercourse does. Likewise, removal of trees that a property owner desires to be removed causes no injury. It is the *unauthorized* and *unwanted* removal of trees that causes injury. *See, Lumber Ins. Co. Moore*, 820 F. Supp 33, 35 (D. NH 1993)

Based on this evidentiary record, the Kwons signified to the Ngs that they wanted the trees removed, when they did not, in fact, want them removed. The “implications or consequences of the act” of removing the trees was that the Kwons would be upset and deem themselves harmed, while the Ngs believed and had reason to believe the Kwons would be pleased, and consider themselves benefited. The Ngs, under this evidentiary record, clearly did not have an awareness of the implications or consequences of the act of removing the Kwons’ trees. Under the *Hayles* rule, State Farm absolutely has a duty to defend and to indemnify the Ngs.

The definition of an “accident” used in the insurance policy advanced here is the definition that a reasonable insured would expect in their insurance policy. Injury caused by an action taken because of a misunderstanding is an accident. As shown by *Woo* and other cases, misunderstandings have been found to constitute “accidents” by Washington Courts. *See e.g., McKinnon v. Republic Nat’l Life Ins. Co.*, 25 Wn. App. 854, 610 P.2d 944 (1980) (distinguishing between intended means and result where a man’s death could be an accident because he intended to leap to a place of relative safety “without realizing the

magnitude of his peril”). If State Farm wanted to define the term “accident” more narrowly than that word is used in ordinary English, it should have incorporated a more technical definition of that word in the Ngs’ insurance policy. Or State Farm could impose an express exclusion from coverage, like the insurer did in the crop-dusting case of *Ryan v. Harrison*, to exclude coverage for damage caused by deliberate spraying, “whether in error or not”.

To hold otherwise is contrary to common sense and contrary to what a reasonable insured would expect. Such a reading is unreasonable, and is aimed at escaping coverage for unsuspecting insureds, who could never guess that their carrier would take such an unreasonable position when confronted with a claim by a third party that is the result of an “accident” as that term is commonly understood.

**D. The Ngs Are Entitled to Recover Their Reasonable Attorney’s Fees Incurred In This Action**

The Ngs, as Defendants in this declaratory judgment action, have been put to great financial hardship, incurring expense to protect their right under their contract of insurance to a defense in the underlying action. RAP 18.1(a) authorizes an award of fees if “applicable law grants to a party the right to recover reasonable attorney fees”. It is well

settled law in Washington that, when an insured must incur expense to force an insurer to provide a defense or to indemnify under a contract of insurance, the prevailing insured is entitled to an award of attorneys fees.

*See, Olympic Steamship Company, Inc. v. Centennial Insurance Company*, 117 Wn.2d 37, 811 P.2d 673 (1991)

As the *Olympic Steamship* court stated,

We also extend the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured. Other courts have recognized that disparity of bargaining power between an insurance company and its policyholder makes the insurance contract substantially different from other commercial contracts. *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 77 (W. Va. 1986). When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not "vexatious, time-consuming, expensive litigation with his insurer." 352 S.E.2d at 79. Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance contract is irrelevant. In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured.

The right to be defended at the expense of the insurer is a benefit that an insured is entitled to receive as part of the insured's contract of insurance. In many cases, the right to a defense is more valuable than

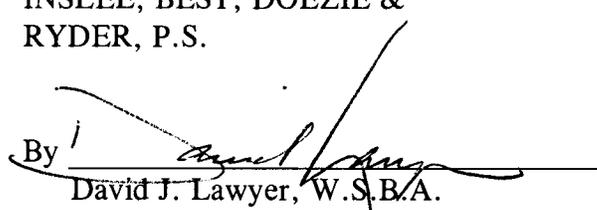
the underlying right to indemnity. In order for the Ngs to be made whole, they must obtain an award of their reasonable attorneys fees incurred in defending themselves against their insurer's efforts to avoid its duty to furnish the Ngs with a defense in the underlying suit.

V. CONCLUSION

Based on all of the foregoing arguments, this court should reverse the trial court's grant of summary judgment and declare that State Farm owes a duty of defense to the Ngs in the underlying civil action with the Kwons. This court should remand this case to the trial court with instructions to make an award of attorneys' fees in favor of the Ngs.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of April, 2010.

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

By 

David J. Lawyer, W.S.B.A.

#16353

Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of April, 2010, I caused to be served a true and correct copy of the following document(s):

1. OPENING BRIEF OF APPELLANTS

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

Michael Simpson Rogers	<input checked="" type="checkbox"/> Personal Service (Legal Messenger)
Reed McClure	<input type="checkbox"/> U.S. Mail
601 Union St., Suite 1500	<input type="checkbox"/> Certified Mail
Seattle, WA 98101	<input type="checkbox"/> Hand Delivered
	<input type="checkbox"/> Overnight Mail
	<input type="checkbox"/> Fax #

Michael M. Yahng	<input checked="" type="checkbox"/> Personal Service (Legal Messenger)
Cornerstone Law Office	<input type="checkbox"/> U.S. Mail
30810 Pacific Highway	<input type="checkbox"/> Certified Mail
South	<input type="checkbox"/> Hand Delivered
Federal Way, WA 98003	<input type="checkbox"/> Overnight Mail
	<input type="checkbox"/> Fax #

DATED this 9<sup>th</sup> day of April, 2010, at Bellevue, Washington.

*Jerilyn K. Kovalenko*  
Jerilyn K. Kovalenko

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LEXSEE 254 ORE. 496, 500

FERGUSON, Appellant, v. BIRMINGHAM FIRE INSURANCE COMPANY, Respondent

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF OREGON

254 Ore. 496; 460 P.2d 342; 1969 Ore. LEXIS 405

November 13, 1968, Argued  
October 22, 1969

**SUBSEQUENT HISTORY:** [\*\*\*1] Petition for Rehearing Denied December 16, 1969.

**PRIOR HISTORY:** Appeal from Circuit Court, Multnomah County. J. R. Campbell, Judge.

**DISPOSITION:** Reversed and remanded.

**LexisNexis(R) Headnotes**

*Insurance Law > Property Insurance > Exclusions > General Overview*

[HN1] Where the insured knowingly assumes control over another person's property, either with or without permission, there are reasons for excluding coverage by the insurer. But there is no valid reason for excluding coverage where the insured, while engaged in a non-business activity, unwittingly exercises control over another person's property and in the course of doing so damages it.

*Civil Procedure > Remedies > Damages > Punitive Damages*

*Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend*

*Torts > Damages > Punitive Damages > Conduct Supporting Awards*

[HN2] The fact that a complaint charges the insured with conduct falling under the exclusion clause of the policy does not necessarily mean that the insurer will not have a duty to defend. A complaint may charge the insured not only with misconduct excluded under the policy, but also with conduct which is covered by the policy. Thus, if a

complaint contains two counts, one based upon willful conduct and one based upon negligent conduct, the insurer would have a duty to defend because of the allegation falling within policy coverage. Similarly, the duty to defend will also arise when the complaint contains only one count which, on its face, falls within a policy exclusion. If the complaint, without amendment, may impose liability for conduct covered by the policy, the insurer is put on notice of the possibility of liability and it has a duty to defend.

*Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Waiver & Preservation*

*Insurance Law > Claims & Contracts > Estoppel & Waiver > Policy Coverage*

*Insurance Law > Claims & Contracts > Estoppel & Waiver > Reservation of Rights*

[HN3] The insurer, when tendered the defense of an action, cannot, as a condition of its assumption of the defense, reserve the right to later question coverage. The insured must expressly or impliedly agree to such a reservation of rights. If the insurer assumes the defense in the face of the insured's refusal to accede to insurer's request for reservation of rights, it is said that the insurer "waives" or is "estopped" to assert the defense of non-coverage. And if the insurer, in order to avoid the loss of its right to question coverage, rejects the tender of the defense, it loses the benefits that accrue from being represented by its own counsel who ordinarily is experienced in the defense of such actions. And if it guesses wrong on the question of coverage, it will be required to pay the judgment and the costs of defense. Thus the insurer is forced to choose between two alternatives either of which exposes it to a possible detriment or loss.

254 Ore. 496, \*; 460 P.2d 342, \*\*;  
1969 Ore. LEXIS 405, \*\*\*

*Civil Procedure > Judgments > General Overview*  
*Insurance Law > Claims & Contracts > Estoppel & Waiver > Policy Coverage*  
*Insurance Law > Property Insurance > Estoppel & Waiver*

[HN4] Where there is a conflict of interest between the insurer and insured and the judgment in the action against the insured can be relied upon as an estoppel by judgment in a subsequent action on the issue of coverage, the control of the action by the insurer could adversely affect the insured if the judgment was based upon conduct of the insured not falling within the policy coverage. Likewise, the insurer could be adversely affected by a judgment based upon conduct for which there is coverage. The judgment should operate as an estoppel only where the interests of the insurer and insured in defending the original action are identical, not where there is a conflict of interests. If the judgment in the original action is not binding upon the parties in a subsequent action on the issue of coverage, there would be no conflict of interests between the insurer and the insured in that the insurer could gain any advantage in the original action which would accrue to it in a subsequent action in which coverage is in issue.

**COUNSEL:** *Donald H. Pearlman*, Portland, argued the cause for appellant. With him on the briefs were Keane, Haessler, Bauman and Harper, and David W. Harper, Portland.

*David N. Hobson*, Portland, argued the cause for respondent. With him on the brief were Phillips, Coughlin, Buell & Phillips, and Jarvis B. Black, Portland.

**JUDGES:** O'Connell, Justice. Perry, Chief Justice, and McAllister, Sloan, Denecke, Holman and Langtry, \* Justices.

\* Langtry, J., did not participate in this decision.

**OPINION BY: O'CONNELL**

**OPINION**

[\*499] [\*\*343] This is an appeal from a judgment dismissing the complaint of Helen L. Ferguson, executrix of the estate of Thomas E. Ferguson in which she sought damages under an insurance policy issued by defendant Birmingham Fire Insurance Company.

The parties filed an agreed narrative statement of the proceedings pursuant to *ORS 19.088*.

Mr. Ferguson purchased from defendant company a policy insuring him in the following terms (among others):

"Coverage L -- Personal Liability: [Insurer agrees] [\*\*\*2] To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, and the company shall defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this endorsement, even if [\*\*344] any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

The following exclusions are recited with reference to Coverage L:

"This endorsement does not apply: \* \*

"(c) \* \* \* to bodily injury or property damage caused intentionally by or at the direction of the insured.

"\* \* \*

[\*500] "(g) \* \* \* to property damage to property used by, rented to or in the care, custody or control of the insured or property as to which insured for any purpose is exercising physical control."

Mr. Ferguson died February 14, 1962. Kenneth W. Guenther and Marva Guenther filed a claim against his estate, contending that about September 1, 1961, Mr. Ferguson had cut four trees on their property. The evidence [\*\*\*3] showed that Mr. Ferguson had employed a laborer to clean brush off the back of his lot. The line separating his lot from the Guenther's adjoining land was unmarked. The laborer cleared beyond the line and in doing so cut down the trees. Ferguson did not exercise any direct control over the workman and did not know that a trespass was being committed. Mrs. Ferguson, as executrix, rejected the claim and notified the Birmingham Fire Insurance Company that the claim had been asserted. In June, 1962, the company informed Mrs. Ferguson that it would not extend coverage under the policy, reciting the two exclusions quoted above, along with others, as the basis for its refusal.

254 Ore. 496, \*; 460 P.2d 342, \*\*;  
1969 Ore. LEXIS 405, \*\*\*

The Guenthers filed a complaint against the estate. Mrs. Ferguson requested that the company defend the action. The company denied that the claim was covered under the policy, but offered to defend on the understanding that its defending and conducting settlement negotiations would not have the effect of waiving its right to deny liability under the policy. Mrs. Ferguson answered that she would not accept the company's offer to defend under a reservation-of-rights agreement. Her response was "We will expect [\*\*\*4] you to defend under the terms of the policy with no reservations." After renewing her demand that the company defend, she defended at her own expense [\*501] and won an involuntary nonsuit at the close of the Guenther case.

The Guenthers again filed the same complaint. Mrs. Ferguson again demanded that the company defend her and the company responded as it had in the first action. The cause went to trial in February, 1965 and the jury returned a verdict for the Guenthers. The jury found that actual damage caused by the trespass was \$ 1,000. In answer to a special interrogatory, the jury found that the trespass was not committed "willfully and intentionally." The judgment was for \$ 2,189, representing double damages as provided for in *ORS 105.815*, and costs. Mrs. Ferguson paid the judgment.

Mrs. Ferguson demanded that the insurance company pay (1) the costs of her defense in the first action (\$ 1,578.10), (2) the cost of her defense in the second action (\$ 1,272.50), and (3) the judgment recovered against the estate (\$ 2,189). The company refused to pay whereupon Mrs. Ferguson brought this action to recover the above amounts plus interest and attorney fees. The case was [\*\*\*5] tried on a stipulated statement of facts.

The trial court dismissed plaintiff's complaint on the ground that the insurance contract did not cover the Guenther actions. This ruling was made upon the ground that plaintiff's employee was exercising physical control over the property damaged and therefore the case fell within the clause of the policy excluding "property damage to \* \* \* property as to which insured for any purpose is exercising physical control."

The trial court felt that the present case was controlled [\*502] by *Crist v. Potomac Insurance Co.*, 243 Or 254, 263, 413 P2d 407 (1966). In that case the insured hired Roberts, the owner of a shovel loader, to load and deck logs at the site of the insured's logging operations. Insured's employee [\*\*345] operated the loader without Roberts' consent and damaged it. We held that the insured, through his employee, exercised physical control over the loader within the meaning of the policy exclusion and that it was "of no consequence that the insured acted without the consent of the owner of the property."<sup>1</sup>

1 The court quoted from *P & M Stone Co. v. Hartford Accident & Indemnity Co.*, 251 Iowa 243, 249, 100 NW2d 28, 31 (1959):

"The operation or attempted operation of a bulldozer is a physical act or acts and one who takes bodily possession of such machine and operates or attempts to operate it is exercising physical control over it.

"The provision of the exclusion clause that such physical control may be exercised 'for any purpose' expressly negatives any limitation in such exercise, and neither this nor any other language in this part of the exclusion clause connotes that the exercise of such physical control must be based upon the legal right to so act or that it is otherwise limited."

[\*\*\*6] In the present case, as in *Crist*, the damage to the property arose out of a trespassory invasion by the insured. It is argued, however, that the conduct of Ferguson's employee did not amount to possession or control of the land but merely the infliction of an injury upon it. To appraise this argument it is necessary to consider the purpose which the exclusion clause was intended to serve.

The reason for adopting this type of exclusion clause is not entirely clear. The first part of the clause excluding coverage as to damage to property in the "care, custody or control of the insured" has long been a standard part of the general liability [\*503] policy.<sup>2</sup> One purpose of this clause was to avoid the "adverse selection of risks." Those buying insurance often seek coverage for certain types of losses common to their particular enterprise. The underwriters felt that the premium of a general liability policy should not be burdened with these special risks; separate policies with appropriate premiums for the risks involved are available.<sup>3</sup> Another reason given for the "care, custody and control" provision is the "moral hazard" involved when property which has been entrusted [\*\*\*7] to the insured's care, custody or control is injured; the insured "feels morally responsible for any damage caused by him and is more interested in seeing the owner is generously compensated by his company."<sup>4</sup>

254 Ore. 496, \*, 460 P.2d 342, \*\*;  
1969 Ore. LEXIS 405, \*\*\*

2 See 7A Appleman, Insurance Law and Practice, § 4493.4 (1942); Anno: Scope of clause excluding from contractor's or similar liability policy damage to property in care, custody, or control of insured, 62 ALR2d 1242 (1958); Cooke, Care, Custody or Control Exclusions, 1959 Ins L J 7; Gowan, Provisions of Automobile and Liability Insurance Contracts, 30 Ins Coun J 96 (Jan. 1963); Levit, Care, Custody and Control: What It Is and What To Do About It, 1957 Ins L J 727; Ramsey, The Care, Custody, Control Exclusion of Liability Insurance Policies, 25 Ins Coun J 288 (July 1958).

3 Gowan, Provisions of Automobile and Liability Insurance Contracts, 30 Ins Coun J 96 (Jan. 1963).

4 Gowan, *supra* note 3, at 103.

In the interpretation of the "care, custody and control" provision as it originally appeared [\*\*\*8] in standard policies the courts held that if the insured did not have *complete* dominion and the *legal right* to control the damaged property the exclusion clause would not apply. To avoid this interpretation the insurers added the clause "or property as to which the insured for any purpose is exercising physical control." <sup>5</sup> Although the latter clause is interpreted as extending the exclusion [\*504] to cases in which the insured's possession is wrongful, it is still necessary to show that the insured was "exercising physical control" before the clause is operative.

5 Gowan, *supra* note 3, at 104.

There remains, however, the crucial question: What kind of control is contemplated under this clause? The answer is not to be found in an abstract analysis of the word "control." We must turn to the reasons for the adoption of the exclusion clause and [\*\*346] determine whether in light of those reasons the policy was intended to exclude coverage in the circumstances of the particular case. We [\*\*\*9] have mentioned the "moral hazard" as one of the factors considered in adopting the exclusion clause. That factor would not be present in the case at bar because Ferguson did not take charge of Guenther's property under circumstances which would generate a feeling of moral responsibility to reimburse him for damage caused to it. It has been observed that one of the purposes in the adoption of the exclusion clause in a general liability policy was to eliminate from coverage the ordinary business risk of damaging property, whether owned by the insured or others, which was used or otherwise involved as a usual incident of carrying on the insured's business. <sup>6</sup> Thus the holding in *Crist* that the damage fell within the exclusion clause can be explained on the ground that the shovel loader was a piece of equipment ordinarily used in carrying on a log-

ging operation. The damage to Guenther's property did not arise out of any business activity carried on by Ferguson; he was simply attempting to clear the brush off the back of his lot.

6 *Elcar Mobile Homes, Inc. v. D.K. Baxter, Inc.*, 66 N J Super 478, 169 A2d 509 (1961); Cooke, Care, Custody or Control Exclusions, 1959 Ins L J 7; Gowan, Provisions of Automobile and Liability Insurance Contracts, 30 Ins Coun J 96 (Jan. 1963).

[\*\*\*10] [\*505] But the exclusion clause is in broad terms and does not by its terms, at least, purport to exclude business risks only. Can we say, then, that Ferguson's non-business activity in clearing the brush on Guenther's land constituted an exercise of control over the property within the meaning of the policy. We think not.

We interpret the phrase "property as to which the insured for any purpose is exercising physical control" to mean property over which the insured assumes control, knowing that it belongs to another. [HN1] Where the insured knowingly assumes control over another person's property, either with or without permission, there are reasons for excluding coverage. <sup>7</sup> But we are unable to think of any valid reason for excluding coverage where the insured, while engaged in a non-business activity, unwittingly exercises control over another person's property and in the course of doing so damages it.

7 For example, see Cooke, Care, Custody and Control Exclusions, 1959 Ins L J 7 at 9.

If our interpretation [\*\*\*11] of the exclusion clause does not comport with the purpose which defendant insurance company intended it to serve, then we would say only that our reading of the clause was made possible by the defendant's employment of ambiguous language in drafting its policy.

Defendant, relying upon *Isenhardt v. General Casualty Co.*, 233 Or 49, 377 P2d 26 (1962), contends that it had no duty to defend the two Guenther suits. *Isenhardt* establishes the rule that the obligation of the insurer to defend is to be determined by the allegations of the complaint filed against the insured. The insurer's knowledge of facts not alleged in the complaint is irrelevant in determining the existence of the duty to defend and consequently the insurer need not speculate [\*506] as to what the "actual facts" of the alleged occurrence may be.<sup>8</sup>

8 In our previous cases we have deemed it significant that the insurance contract obligates the company to defend any suit against the in-

254 Ore. 496, \*; 460 P.2d 342, \*\*;  
1969 Ore. LEXIS 405, \*\*\*

sured *alleging* the injuries covered by the policy. See e.g., *City of Burns v. Northwestern Mutual Ins. Co.*, 248 Or 364, 434 P2d 465 (1967); *McKee v. Allstate Ins. Co.*, 246 Or 517, 426 P2d 456 (1967). See also *Harbin v. Assurance Co. of America*, 308 F2d 748 (10th Cir 1962); *Wilson v. Maryland Casualty Co.*, 377 Pa 588, 105 A2d 304 (1954); Note, *The Duty of an Insurer to Defend its Insured*, 5 Willamette L J 321 (1969).

[\*\*\*12] Defendant claims that there was no duty to defend because the complaint alleged that Ferguson "without the consent or permission of the plaintiffs, and without any legal authority whatsoever, willfully, intentionally, and unlawfully trespassed upon [\*\*347] said premises" and that "by virtue of the provisions of *Section 105.810 ORS* [providing for damages in the case of willful trespass] plaintiffs are entitled to recover triple the amount of damages \* \* \*."

If Guenther's recovery under this complaint were limited to damages arising out of the willful conduct of Ferguson, the policy clearly would not cover the loss and, applying the principle laid down in *Isenhart v. General Casualty Co.*, *supra*, defendant would not have a duty to defend. However, [HN2] the fact that the complaint charges the insured with conduct falling under the exclusion clause of the policy does not necessarily mean that the insurer will not have a duty to defend. A complaint may charge the insured not only with misconduct excluded under the policy, but also with conduct which is covered by the policy. Thus, if a complaint contains two counts, one based upon willful conduct and one based upon negligent conduct, [\*\*\*13] the insurer would have a duty to defend because of the allegation falling within policy coverage.

Similarly, the duty to defend will also arise under [\*507] some circumstances when the the complaint contains only one count which, on its face, falls within a policy exclusion. If the complaint, without amendment, may impose liability for conduct covered by the policy, the insurer is put on notice of the possibility of liability and it has a duty to defend. For example, in an action of trespass brought against the insured, if the complaint alleges a willful entry (in order to support a claim for punitive damages), the plaintiff could, without amending the complaint, recover ordinary damages for a non-willful entry. The insurer, therefore, would have the duty to defend. The innocent trespass may be treated as a "lesser included offense" by analogy to the criminal law.

The present case falls within this principle. Although the Guenther complaint alleged a willful trespass (to bring the intrusion within *ORS 105.810* permitting the recovery of treble damages), the Guenther's, without

amending the complaint, were entitled to recover double damages under *ORS 105.815* for a non-willful [\*\*\*14] trespass. When the complaint in the action was tendered to defendant insurer it was put on notice of the possibility of liability being imposed upon their insured for conduct covered by the policy. The defendant therefore had a duty to defend.

The foregoing analysis of the insurer's duty to defend requires us to amend what we said on this subject in *City of Burns v. Northwestern Mutual Ins. Co.*, 248 Or 364, 434 P2d 465 (1967). In that case the city sought to recover under a liability insurance policy issued to it by the defendant insurance company. The city had paid a judgment in an action brought by Mrs. Hovis, a widow, to recover damages for emotional injury when, without her authorization, the city moved the body of her deceased husband from [\*508] one grave to another. In the action brought by her the complaint alleged that the disinterment "was done willfully, wantonly and maliciously," and therefore entitled "plaintiff to punitive damages in the sum of \$ 10,000." The city tendered to the insurance company the defense of the action which the company refused on the ground that the alleged injury was excluded from coverage under its policy. We said, "[t]he complaint [\*\*\*15] upon which the Hovis case went to trial stated a cause of action for intentional harm and therefore alleged an excluded injury and not one within the policy coverage. The complaint alleged the removal of the body was malicious. This is an allegation that it was done with the intent to harm. Therefore, there was no duty upon defendant to defend Mrs. Hovis's claim against plaintiff at the trial court level." (248 Or at 367-68.) This conclusion was erroneous because the complaint, although alleging a malicious injury would, without amendment, permit a recovery for an unintended injury since it could be analogized to a "lesser included offense." Since the unintended injury fell within the policy coverage the insurer on that issue had a duty to defend.

[\*\*348] Our clarification of the insurer's duty to defend does not, in any way, modify the rule laid down in *Isenhart*. In that case the complaint in the action against the insured alleged the commission of an assault and battery which was outside the coverage of the policy. The complaint, unless amended, would not permit recovery for an unintended harm.

In the present case, when plaintiff tendered to defendant the defense [\*\*\*16] of the Guenther action defendant responded by asserting that the claim was not covered by the policy but offered to defend the action upon the understanding that by assuming the defense [\*509] defendant would not waive its right to later raise the question of coverage. Plaintiff replied, "We will ex-

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1969 Ore. LEXIS 405, \*\*\*

pect you to defend under the terms of the policy with no reservations."

It is generally held that [HN3] the insurer, when tendered the defense of an action, cannot, as a condition of its assumption of the defense, reserve the right to later question coverage. The insured must expressly or impliedly agree to such a reservation of rights.

If the insurer assumes the defense in the face of the insured's refusal to accede to insurer's request for reservation of rights, it is said that the insurer "waives" or is "estopped" to assert the defense of non-coverage.<sup>9</sup> And if the insurer, in order to avoid the loss of its right to question coverage, rejects the tender of the defense, it loses the benefits that accrue from being represented by its own counsel who ordinarily is experienced in the defense of such actions. And if it guesses wrong on the question of coverage, it will be required to [\*\*\*17] pay the judgment and the costs of defense. Thus the insurer is forced to choose between two alternatives either of which exposes it to a possible detriment or loss.

9 It would seem apparent that neither the elements of waiver or estoppel are present in these situations.

What is the justification for imposing this dilemma upon the insurer? [HN4] Where there is a conflict of interest between the insurer and insured and the judgment in the action against the insured can be relied upon as an estoppel by judgment in a subsequent action on the issue of coverage, the control of the action by the insurer could adversely affect the insured if the judgment was based upon conduct of the insured not falling within the coverage of the policy. Likewise, the insurer could be adversely affected by [\*510] a judgment based upon conduct for which there is coverage. But we see no reason for applying the rule of estoppel by judgment in such cases. The judgment should operate as an estoppel only where the interests of the insurer [\*\*\*18] and insured in defending the original action are identical -- not where there is a conflict of interests.<sup>10</sup> If the judgment in the original [\*349] action is not binding upon the insurer or insured in a subsequent action on the issue of coverage, there would be no conflict of interests between the insurer and the insured in the sense that the insurer could gain any advantage in the original action which would accrue [\*511] to it in a subsequent action in which coverage is in issue.<sup>11</sup>

10 \*\*\* The underlying purpose of the doctrine [of estoppel by judgment] is to obviate the delay and expense of two trials upon the same issue -- one by the injured party against the indemnitee and the other by the indemnitee \*\*\* against the indemnitor. This is possible because it

is assumed that the interests of the parties to the contract of indemnity in opposing the injured person's claim are identical; and it is accomplished by giving the indemnitor an opportunity to appear in the first suit on behalf of the indemnitee so that everything that can be offered in exculpation of the indemnitee \* \* \* may be presented. \* \* \*

"It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. \* \* \*

"In accord is Restatement of the Law of Judgments, Section 107(a), where the rights of indemnitee and indemnitor inter se after judgment against one of them are set out, and it is stated that if the third person has obtained a valid judgment against the indemnitee, both indemnitor and indemnitee are bound as to the existence and extent of the liability if the indemnitor has been given reasonable notice of the action and requested to defend; but in Comment (g) it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist." *Farm Bureau Mut. Automobile Ins. Co. v. Hammer*, 177 F2d 793, 799-800 (4th Cir 1949).

[\*\*\*19]

11 " \* \* \* If the [insurer] could not rely on the results of his conduct, there would be no reason for him to assert a defense contrary to the interest of the insured." Comment, Liability Insurer's Duty to Defend Suits for Intentional Injury, 24 Wash & Lee L Rev 271 at 282-283 (1967).

It is argued that a conflict or divergence of interests may exist even though the insurer is free to set up the defense of non-coverage in a subsequent action. It is feared that if the insurer knows that it can later assert non-coverage, it may offer only a token defense in the action brought against the insured, or be less prone to effect a settlement advantageous to the insured.<sup>12</sup>

12 Comment, Liability Insurance Policy Defenses and the Duty to Defend, 68 Harv L Rev 1436 at 1448 (1955).

254 Ore. 496, \*, 460 P.2d 342, \*\*;  
1969 Ore. LEXIS 405, \*\*\*

We think that this danger is minimal. The insurer knows that when it is the defendant in a lawsuit brought by one of its policy holders the jury's [\*\*\*20] sympathy for the insured frequently produces a plaintiff verdict even when the insurer's case is strong. Knowing this, the insurer is not likely to relax its efforts in defending the action against the insured. If the insurer feels certain that it can successfully defend an action brought against it by the insured, it is not likely to accept the insured's tender of the defense in the first place.

We turn now to the disposition of the present case. Since the trial court erroneously held applicable the exclusion clause relating to the insured's control over the property which is damaged, the cause must be reversed and remanded. Defendant still has the right to raise the question of coverage based upon the clause of the policy excluding coverage for intentional conduct; defendant is not barred from raising this question [\*512] of coverage as a consequence of its refusal to defend the Guenther actions.

Plaintiff's insistence that the defendant defend only if it waived the right to later litigate the question of coverage constituted an unreasonable condition to which the defendant had a right to respond by withdrawing from the case. It is true that by the terms of the policy [\*\*\*21] defendant was obligated to defend, but the policy also reserves to the defendant the control over the litigation. The unreasonable condition imposed by plaintiff upon defendant constituted a breach of the contract as we now interpret it.

However, we do not feel that this breach on the part of plaintiff should exonerate defendant from liability if there is coverage. When plaintiff refused to permit defendant to defend the action and at the same time reserve its right to raise the question of coverage, plaintiff was acting in accordance with the rule adopted by most, if not all, courts. Our rejection of that rule and our holding that plaintiff breached his contract when he relied upon that rule should not prejudice plaintiff to any greater extent than is necessary in this case. We hold, therefore, that if on remand the question of coverage is resolved in favor of plaintiff, defendant will be liable for the amount of the judgment in the Guenther actions and the costs of defense.

The record indicates quite plainly that plaintiff trespassed on the Guenthers' land. It would appear, then, that if defendant had defended the action it is not likely that it would have fared any better [\*\*\*22] than plaintiff did on the issue of liability. The only possible disadvantage defendant could have [\*\*350] suffered would have been in not having an opportunity through its own counsel to attempt to obtain a verdict for an [\*513] amount of damages less than those the jury actually found in this case. But the chances that the damages could have been reduced were minimal. The character of the damage was such that it is not likely that defendant could have reduced the verdict by any significant amount.

Reversed and remanded.



LEXSEE 173 CAL. APP. 2D 524, 525

**FIRCO, INC. (a Corporation) et al., Appellants, v. FIREMAN'S FUND INSURANCE COMPANY (a Corporation), Respondent**

Civ. No. 9588

Court of Appeal of California, Third Appellate District

*173 Cal. App. 2d 524; 343 P.2d 311; 1959 Cal. App. LEXIS 1614*

September 1, 1959

**SUBSEQUENT HISTORY:** [\*\*\*1] A Petition for a Rehearing was Denied October 1, 1959, and Respondent's Petition for a Hearing by the Supreme Court was Denied October 28, 1959. Spence, J., was of the Opinion that the Petition Should be Granted.

**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Mendocino County. Hale McCowen, Judge.

Action by an insured logger against the insurer for declaratory relief.

**DISPOSITION:** Reversed with directions. Judgment for defendant reversed with directions.

## LexisNexis(R) Headnotes

*Insurance Law > General Liability Insurance > Obligations > Defense*

[HN1] Where an action is based upon a claim that may or may not be covered by an insurance policy, the insurer is obligated to undertake the defense of the action and to continue such defense at least until it appears that the claim is not covered by the policy. If and when that becomes certain the insurer may turn back the defense.

*Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend*

*Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers*

[HN2] If there be an ambiguity in the language of the insurance policy regarding the insurer's duty to defend, since the choice is between imposing the burden of the defence upon the insurer or the insured, the canon contra proferentem must prevail, especially where the case involves construing an insurance policy.

*Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation*

[HN3] If the facts alleged in a complaint entitle the plaintiff to any relief such relief will be accorded notwithstanding it may appear from the pleading or during the course of the action that the plaintiff cannot receive relief under his theory of the action.

*Real Property Law > Torts > Trespass to Real Property Torts > Premises Liability & Property > General Premises Liability > Duties of Care > Duty on Premises > Trespassers > General Overview*  
*Torts > Premises Liability & Property > Trespass > Remedies > General Overview*

[HN4] Under *Cal. Civ. Code § 3346*, treble damages are disallowed where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser. In such a case, the plaintiff can obtain only actual damages.

**COUNSEL:** Guernsey Carson for Appellants.

Hall, Henry, Oliver & McReavy and Stephen McReavy for Respondent.

Weinstock, Anderson, Maloney & Chase as Amici Curiae on behalf of Respondent.

**JUDGES:** Van Dyke, P. J. Schottky, J., and Warne, J. pro tem., \* concurred.

\* Assigned by Chairman of Judicial Council.

#### OPINION BY: VAN DYKE

#### OPINION

[\*525] [\*\*312] This is an appeal from a declaratory judgment entered in an action brought by plaintiffs, as assured, against Fireman's Fund Insurance Company, as insurer. The judgment being adverse to plaintiffs, they appeal.

Respondent issued sequential public liability policies designated as "Logger's General Comprehensive Coverage" (hereinafter called "the policy"), containing the following [\*\*\*2] insuring agreements:

". . . To pay on behalf of the assured all sums which the assured shall become legally obligated to pay as damages because of injury to or destruction of property of others, . . . arising out of an occurrence directly connected with the logging operations of the assured or other operations of the assured incidental to such logging operations including but not limited to:

". . . .

[\*526] "2. Damage to or destruction of timberlands and/or standing timber and/or felled and/or bucked timber, the property of others."

The policy further provided:

"7. Defense and Appeal: The company shall:

"(A) Defend in the name of the assured any claim or suit in excess of the 'deductible limits' brought against the assured, even though groundless, false or fraudulent, to recover damages on account of such alleged property damage; . . ."

After the issuance of the policy an action was begun in the Superior Court for the County of Humboldt by Pacific Lumber Company, a corporation, which we will refer to as the Humboldt action, charging that plaintiffs herein, the assured under said policy, had entered upon the lands of the plaintiff and maliciously, wantonly and without leave [\*\*\*3] had cut down and removed 207,480 feet of redwood trees and 263,020 feet of douglas fir to the plaintiffs' damage in the sum of \$ 10,547.65. The prayer was for treble damages. In this action plaintiffs, appellants here, charged, and it was admitted, that when process in the Humboldt action was served upon them they demanded of respondent that it furnish a de-

fense to said Humboldt action, that respondent refused to do so, and that by reason of said refusal appellants would be required to retain counsel to defend themselves in the Humboldt action and might be required ultimately to pay a judgment. It was further alleged that an actual controversy existed between the parties in that appellants contended and respondent denied that the policy obligated respondent to furnish a defense to the Humboldt action.

The trial court found that the complaint in the Humboldt action charged, in substance, that the plaintiffs and appellants herein had intentionally entered upon the lands of the plaintiff in the Humboldt action and had cut down and removed its trees; that the cutting and removal of the quantity of timber involved could only have been accomplished by a series of many separate and intentional [\*\*\*4] acts of human agents, and in so doing appellants must be held to have intended and anticipated the consequences naturally flowing therefrom, i.e., injury to the freehold. The court concluded that the rights and obligations of the parties depended upon the allegations of the complaint in the Humboldt action and the terms of the policy considered together; that the claim asserted in the Humboldt action was a claim for "damage to or destruction [\*527] of timberlands" as said phrase [\*\*313] was used in the said policy; but that the injuries complained of did not arise out of an "occurrence" as that term is used in the policy, and that plaintiffs therefore were entitled to no relief. Judgment in accordance therewith was entered and this appeal followed.

We think that upon a consideration of the allegations of the complaint in the Humboldt action and the insuring clauses of the policy the judgment must be reversed with instructions to the trial court to enter judgment declaring that respondent is obligated to defend the Humboldt action on behalf of its assured.

(1a) Under the policy the obligation of respondent to defend an action brought against its assured is broader than its obligation [\*\*\*5] to pay indemnity. The obligation to defend the assured must arise upon the commencement of the action. At that time it is obvious there may be considerable doubt whether the complaint counts upon a liability of the assured covered by the policy. This can be in part illustrated by the defense provisions of the policy which declare that the defense will be afforded even though the action against the assured be groundless, false, or fraudulent. Also there may be considerable doubt whether the complaint in the action against the assured contains allegations of fact, directly or inferentially stated, that can result in a judgment against the assured which the insurer under its policy would have to pay. Whether, therefore, when the action against the assured is begun, there will come out of it a judgment which the insurer will have to pay, or whether a defense of the action will show it to have been false,

fraudulent, or groundless, so that no judgment can be rendered against the assured are all matters which may not be determinable when the action is begun.

It appears from the record herein that appellants were loggers; that the policy was issued to provide indemnity against damage [\*\*\*6] to or destruction of timberlands and/or standing timber, the property of others, arising out of the assured's logging operations; that the claim sued upon in the Humboldt action arose out of such logging operations and according to the trial court's findings the damage suffered by the plaintiff in the Humboldt action was for damages to or destruction of the timberlands of others as that phrase was used in the policy. But the trial court then found that the claim sued on did not arise out of an "occurrence" as that term was used in the policy. That, however, is something that cannot be [\*528] determined from a consideration of the complaint in the Humboldt action and the policy of insurance. [HN1] We have presented to us, therefore, an action based upon a claim that may or may not be covered by the policy. In such a situation the insurer is obligated to undertake the defense of the action and to continue such defense at least until it appears that the claim is not covered by the policy. If and when that becomes certain the insurer may turn back the defense. This case is closely akin to the case of *Lee v. Aetna Casualty & Surety Co.*, 178 F.2d 750 (and to cases cited therein), [\*\*\*7] wherein the court in an opinion written by Judge Learned Hand said:

"Whether the insurer ought to defend such an action at least until it appears that the claim is not covered by the policy is not free from doubt; but it seems to us that we should resolve the doubt in favor of the insured. In most cases -- the case at bar was one -- it will not be difficult for the insurer to compel the injured party to disclose whether the injury is within the policy; and, if it transpires that it is not, the insurer need go on no longer. There may be cases, however, in which that question will remain uncertain even until the end of the trial, and, if the defendant is right, the insured will be obliged to conduct the defence of a claim which it turns out the insurer has promised to pay. We do not believe that, had the question been presented to the parties in advance, they would have agreed that the promise to defend did not include all occasions in which the insurer eventually becomes liable to pay. The only exception [\*\*314] we can think of is that the injured party might conceivably recover on a claim, which, as he had alleged it, was outside the policy; but which, as it turned out, the [\*\*\*8] insurer was bound to pay. Such is the plasticity of modern pleading that no one can be positive that that could not happen. In such a case of course the insurer would not have to defend; yet, even then, as soon as, during the course of the trial, the changed character of the claim

appeared, we need not say that the insured might not insist that the insurer take over the defence. When, however, as here, the complaint comprehends an injury which may be within the policy, we hold that the promise to defend includes it. Finally, [HN2] if there be an ambiguity in the language of the policy, since the choice is between imposing the burden of the defence upon the insurer or the insured, the canon *contra proferentem* must prevail, especially as the case involves construing an insurance policy. . . .

"It follows that, if the plaintiff's complaint against the [\*529] insured alleged facts which would have supported a recovery covered by the policy, it was the duty of the defendant to undertake the defence, until it could confine the claim to a recovery that the policy did not cover."

(2) Under our liberal rules of pleading it is settled that [HN3] if the facts alleged in a complaint entitle the plaintiff [\*\*\*9] to any relief such relief will be accorded notwithstanding it may appear from the pleading or during the course of the action that the plaintiff cannot receive relief under his theory of the action.

(3) For instance, take the trial court's finding that it appears from the complaint the entry of assured upon the lands of the plaintiff in the Humboldt action was intentional, whereas the policy excluded from coverage damage intentionally caused by the assured. The allegations in the complaint do not justify a conclusion that respondent is not obligated to defend, for it may turn out in the course of the action that the entry was unintentional and yet the plaintiff in the Humboldt action would be entitled to recover at least the value of the trees taken. It must be remembered that the attorney who drafted the complaint in the Humboldt action is not concerned with the relations between the defendant and any insurer that may be obligated to pay the judgment. He drafts his complaint as broadly as he desires. In the Humboldt action the plaintiff's attorney cast his complaint in such manner as to warrant the recovery of treble damages under *section 3346 of the Civil Code* if he could prove [\*\*\*10] that the nature of the wrong and the manner of its infliction could be shown to entitle plaintiff to such damages under the provisions of that section. But if it should turn out that the manner of inflicting the wrong came within [HN4] the exception provided in that section, which disallows treble damages "where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser," then plaintiff could obtain only actual damages. If that should turn out to be the result of the trial of the Humboldt action, then it might well transpire that respondent herein would be liable to pay the judgment for appellant herein as being a loss not excluded upon the ground of intentional injury.

173 Cal. App. 2d 524, \*, 343 P.2d 311, \*\*;  
1959 Cal. App. LEXIS 1614, \*\*\*

(1b) We think that we have a case here where the third party action against the assured appears to have been based upon a claim that might or might not turn out upon the trial of that action to have been one covered by the policy; that, therefore, the duty to defend the action arose when the action [\*530] was begun and will continue until in the proceedings in that case it certainly appears that the claim cannot eventuate in a judgment

which the insurer is obligated [\*\*\*11] to pay. That this state of certainty may not be arrived at until the judgment is actually rendered in the Humboldt action does not relieve respondent from its duty to defend the action.

[\*\*315] The judgment herein is reversed, with instructions to the trial court to enter a judgment in accordance herewith.



1 of 1 DOCUMENT

THOM FISCHER, an individual, Plaintiff - Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, a corporation; et al., Defendants - Appellees.

No. 06-35463

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

272 Fed. Appx. 608; 2008 U.S. App. LEXIS 7584

December 5, 2007, Argued and Submitted, Seattle, Washington  
March 28, 2008, Filed

**NOTICE:** PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**PRIOR HISTORY:** [\*\*1]

Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-05-01487-RSM. Ricardo S. Martinez, District Judge, Presiding. *Fischer v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 27139 (W.D. Wash., Apr. 26, 2006)

**DISPOSITION:** AFFIRMED IN PART; REVERSED IN PART; REMANDED.

**LexisNexis(R) Headnotes****Insurance Law > General Liability Insurance > Coverage > Accidents**

[HN1] Under Washington law, an intentional action may qualify as an accident unless a reasonable person in the insured actor's position would be aware of or foresee the harmful consequences of the action.

**COUNSEL:** For THOM FISCHER, an individual, Plaintiff - Appellant: Hal Thurston, Esq., Attorney, ZENDER THURSTON PS, Bellingham, WA.

For STATE FARM FIRE AND CASUALTY COMPANY, a corporation, STATE FARM INSURANCE COMPANIES, a corporation, Defendants - Appellees: M. Colleen Barrett, Esq., Attorney, BARRETT & WORDEN, Seattle, WA.

DOES, 1 through 20, Defendant - Appellee: No appearance.

**JUDGES:** Before: McKEOWN and CLIFTON, Circuit Judge, and SCHWARZER \*\*, District Judge.

\*\* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

**OPINION**

[\*608] MEMORANDUM \*

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: McKEOWN and CLIFTON, Circuit Judges, and SCHWARZER\*\*, District Judge.

Thom Fischer appeals the district court's order denying his motion for summary judgment and granting State Farm Fire and Casualty Company's motion for summary judgment. We affirm in part, reverse in part, and [\*\*2] remand for further proceedings.

Our decision in this case rests on a bizarre set of circumstances, including the Washington Court of Appeals' reconciliation of seemingly contradictory jury findings in the underlying civil suit. The Washington Court of Appeals held that the jury could find both that Fischer was negligent when he engaged in intercourse with Donna MacKenzie and that MacKenzie had consented to the intercourse. It reasoned that the jury could have "believed she gave consent under the mistaken belief that her boyfriend, not Fischer, had climbed into her bed."

In light of these findings, we conclude that the harm to MacKenzie was a result of an accident. [HN1] Under Washington law, an intentional action may qualify as an accident unless a reasonable person in the insured actor's position would be aware of or foresee the harmful consequences of the action. *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 150 P.3d 589, 593 (Wash. Ct. App. 2007). What caused the harm in this case was not that Fischer engaged in intercourse, but that he engaged in nonconsensual intercourse, which he could not have reasonably foreseen. A reasonable person in his position would not be aware of or foresee the [\*\*3] harmful consequences of [\*609] intercourse with the consenting MacKenzie because he would not be aware of or foresee that her consent was ineffective and based on her mistaken belief that she was with her boyfriend. MacKenzie's mistake as to Fischer's identity constituted an "additional unexpected, independent and unforeseen happening." See *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.* 81, 579 P.2d 1015, 1018 (Wash. Ct. App. 1978). Accordingly, the harm was the result of an accident.

State Farm contends that there is no evidence in the record to support the Washington Court of Appeals' conclusion that Fischer was negligent despite receiving MacKenzie's consent. State Farm had an opportunity to intervene or to provide a defense for Fischer in the underlying litigation and to raise this argument before the Washington Court of Appeals, but it failed to do so. We cannot change or challenge the state court's conclusions. Under the circumstances, State Farm is bound by the findings made in the underlying litigation. See *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350, 353-55 (Wash. 1998) (holding that, in order to avoid "anomalous results, redundant litigation," and to prevent "insurers from picking and [\*\*4] choosing their judgments," an insurer "will be bound by the findings, conclusions and

judgment" of an underlying action in the underinsured motorist context, despite the absence of "technical privacy," "when it has notice and an opportunity to intervene").

State Farm's argument that extending coverage to the unique facts of this case would violate public policy is unpersuasive. The cases State Farm cites all involve circumstances where the harm caused was foreseeable, and that is not the situation here. See, e.g., *Rodriguez v. Williams*, 42 Wn. App. 633, 713 P.2d 135, 138 (Wash. Ct. App. 1986) (denying coverage for actions that were "of such a character that an intention to inflict injury can be inferred as a matter of law").

Finally, we decline to consider State Farm's argument that there was no evidence of bodily injury, as required for coverage under the policy, because it is a question of fact raised for the first time on appeal. See *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987).

As we conclude that the harm to MacKenzie was the result of an accident, we reverse the summary judgment in favor of State Farm on Fischer's claims for declaratory relief and breach of contract. We affirm [\*\*5] the summary judgment in favor of State Farm on Fischer's claims for breach of the covenant of good faith and fair dealing, violation of the Consumer Protection Act, negligence, and outrageous conduct because the district court's decision on these claims did not rely exclusively on its coverage determination and Fischer failed to present any argument or evidence to create triable issues as to these claims' additional elements. Fischer shall recover his costs on appeal.

**AFFIRMED IN PART; REVERSED IN PART;  
REMANDED.**



FOCUS - 9 of 259 DOCUMENTS

**Harken Exploration Company, Plaintiff-Counter Defendant-Appellee, v. Sphere Drake Insurance PLC, also known as Odyssey Re (London) Limited, Defendant-Counter Claimant-Appellant, Commercial Underwriters Insurance Company, Defendant-Appellant.**

No. 00-10517, con w/ 00-10883

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*261 F.3d 466; 2001 U.S. App. LEXIS 18477; 53 ERC (BNA) 1456; 156 Oil & Gas Rep. 585*

August 16, 2001, Decided

**SUBSEQUENT HISTORY:** Rehearing denied by, *Harken Exploration Co. v. Sphere Drake Ins. PLC, 2001 U.S. App. LEXIS 22359 (5th Cir. Tex. Sept. 14, 2001).*

**PRIOR HISTORY:** Appeals from the United States District Court for the Northern District of Texas. 3:98-CV-2112-G. A Joe Fish, US District Judge.

*Harken Exploration Co. v. Sphere Drake Ins. P.L.C., 2000 U.S. Dist. LEXIS 9932 (N.D. Tex. July 13, 2000).*

**DISPOSITION:** Affirmed.

**LexisNexis(R) Headnotes**

*Civil Procedure > Summary Judgment > Appellate Review > Standards of Review*

*Civil Procedure > Summary Judgment > Standards > General Overview*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1] Federal appellate courts review a federal district court's grant of summary judgment de novo, applying the same standard of review as would the district court. Summary judgment is only proper when there is not a genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. The courts must view the evidence in the light most favorable to the non-movant and make all reasonable inferences in her favor. A fact is material if it might affect the outcome of the suit under the governing law. There is a genuine issue

as to a material fact if the evidence is such that a reasonable jury could return a verdict for the non-movant.

*Insurance Law > Bad Faith & Extracontractual Liability*

*Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend*

*Labor & Employment Law > Collective Bargaining & Labor Relations > Discipline, Layoff & Termination*

[HN2] Under Texas Law, an insurer's duty to defend is usually determined solely from the allegations in the most recent petition and the language of the insurance policy. The insured bears the initial burden of showing that the claim against her is potentially within the insurance policy's scope of coverage. If the insurer relies on the policy's exclusions to deny coverage, the burden shifts to the insurer to prove the exclusion applies. If the insurer is successful, the burden shifts back to the insured to show that an exception to the exclusion brings the claim against her potentially within the scope of coverage under the insurance policy.

*Civil Procedure > Federal & State Interrelationships > Erie Doctrine*

*Computer & Internet Law > Civil Actions > Jurisdiction > Conflicts of Laws*

[HN3] Insurance policies are contracts. In diversity cases, the federal courts apply state law rules of construction. Federal courts are bound to apply the law as interpreted by the state's highest court. If the state's highest court has not definitively ruled on a particular issue, it is

the federal court's duty to predict how that court would decide the issue. Intermediate state courts of appeals' decisions can be persuasive, but are not controlling. And federal courts must not expand state law beyond its presently existing boundaries.

***Insurance Law > Bad Faith & Extracontractual Liability***

***Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers***

[HN4] Under Texas law, the general rule is that the insurer is obligated to defend its insured if there is, potentially, a case under the complaint within the coverage of the policy. If there is a doubt as to whether or not the factual allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured's favor.

***Insurance Law > Claims & Contracts > Contract Formation > General Overview***

***Insurance Law > Claims & Contracts > Policy Interpretation > Plain Language***

***Public Contracts Law > Bids & Formation > Offer & Acceptance > Acceptances & Awards***

[HN5] It is well-settled law in Texas that contracts of insurance in their construction are governed by the same rules as other contracts, and that terms used in them are to be given their plain, ordinary, and generally accepted meaning unless the instrument itself shows them to have been used in a technical or different sense.

***Insurance Law > General Liability Insurance > Occurrences***

[HN6] Under Texas insurance law, it is reasonably clear that an accident has two elements: (1) an action and (2) that action's effect—that is, the resulting damage. There are also two factors that influence both elements: (a) an intent or design factor and (b) an expectability or foreseeability factor.

***Insurance Law > General Liability Insurance > Occurrences***

***Torts > Intentional Torts > General Overview***

***Torts > Negligence > Actions > General Overview***

[HN7] The Texas Supreme Court has stated that there is not an accident, for purposes of insurance coverage, when the action is intentionally taken and performed in such a manner that it is an intentional tort, regardless of whether the effect was unintended or unexpected. How-

ever, there is an accident when the action is intentionally taken, but is performed negligently, and the effect is not what would have been intended or expected had the action been performed non-negligently. In other words, if the act is deliberately taken, performed negligently, and the effect is not the intended or expected result had the deliberate act been performed non-negligently, there is an accident.

***Insurance Law > General Liability Insurance > Occurrences***

***Torts > Damages > Compensatory Damages > Property Damage > General Overview***

[HN8] According to the Texas Supreme Court, in determining whether an accident occurred for purposes of insurance coverage, a court is supposed to focus on whether the effect is intended or expected, not whether the negligent performance is intended or expected.

***Insurance Law > Bad Faith & Extracontractual Liability***

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***

[HN9] Under Texas law, if an insurer has a duty to defend any portion of a suit, the insurer must defend the entire suit. Thus, the insurer must defend the insured against the entire suit, including causes of action that would not alone trigger the duty to defend, regardless whether the complaint is pled in the alternative or not, when the underlying plaintiff's factual allegations of negligence are sufficient to trigger the duty to defend.

***Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions***

***Insurance Law > General Liability Insurance > Exclusions > General Overview***

***Insurance Law > Property Insurance > Exclusions > Pollution > Sudden & Accidental Exception***

[HN10] Under Texas law, courts should construe exclusions more stringently than the other parts of an insurance policy or the factual allegations in the complaint. Additionally, courts must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.

***Insurance Law > Claims & Contracts > Contract Formation > General Overview***

***Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers***

[HN11] If multiple interpretations of the policy are reasonable, courts must construe the policy against the insurer.

***Insurance Law > Claims & Contracts > Contract Formation > General Overview***

[HN12] Under Texas Law, when a petition does not contain sufficient facts to enable the court to determine if insurance coverage exists, it is proper to look to extrinsic evidence in order to adequately address the issue.

***Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review******Civil Procedure > Appeals > Standards of Review > De Novo Review******Torts > Damages***

[HN13] The United States Court of Appeals for the Fifth Circuit reviews all issues of law with respect to a trial court's determination of damages de novo. Absent an error of law, however, the court reviews a trial court's award of compensatory damages and the award of defense costs, a question of fact, for clear error.

***Civil Procedure > Summary Judgment > Opposition > General Overview******Civil Procedure > Summary Judgment > Standards > General Overview******Civil Procedure > Summary Judgment > Time Limitations***

[HN14] Federal district courts are empowered to enter summary judgment sua sponte, so long as the losing party has 10 days notice to come forward with all of its evidence in opposition to the motion.

***Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest******Torts > Damages > Interest > General Overview***

[HN15] Ten percent is the appropriate prejudgment interest rate when the parties have not unambiguously and expressly established the amount owed under a contract, in the contract. *Tex. Fin. Code Ann. § 302.003* (Vernon 2000).

**COUNSEL:** For HARKEN EXPLORATION COMPANY, Plaintiff - Appellee (00-10517): Patrick J Wielinski, Daniel T Mabery, Haynes & Boone, Dallas, TX.

For HARKEN EXPLORATION COMPANY, Plaintiff - Counter Defendant - Appellee (00-10518): Patrick J Wielinski, Daniel T Mabery, Haynes & Boone, Dallas, TX.

For COMMERCIAL UNDERWRITERS INSURANCE COMPANY, Defendant - Appellant (00-10517): Tolbert L Greenwood, Kevin C Norton, Evelyn R Leopold, Cantey & Hanger, Fort Worth, TX.

For SPHERE DRAKE INSURANCE PLC, Defendant - Counter Claimant - Appellant (00-10518): James William Walker, Katherine A Grossman, Cozen & O'Connor, Dallas, TX.

**JUDGES:** Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges.

**OPINION BY:** Reynaldo G. Garza.

**OPINION**

[\*469] **REYNALDO G. GARZA**, Circuit Judge:

Sphere Drake Insurance PLC (hereinafter "Sphere") and Commercial Underwriters Insurance Company (hereinafter "Commercial") (collectively hereinafter "Appellants") [\*\*2] appeal the Dallas Federal District Court's ruling that they had a duty to defend Harken Exploration Company (hereinafter "Harken") in Harken's underlying federal and state lawsuits, the award of Harken's defense costs for the underlying lawsuits, and the use of a 10% interest rate to calculate prejudgment interest. For the reasons stated below, we **Affirm**.

**1. Factual and Procedural Background.**

Harken is an oil and gas exploration and production company. On December 15, 1995, Harken purchased an oil and gas lease (hereinafter "Lease") that covered Big Creek Ranch (hereinafter "Ranch") from Momentum Operating Company, Inc. Thereafter, Harken commenced oil and gas operations on the Ranch. The Rice Family Living Trust (hereinafter "Trust") owns the Ranch. D.E. Rice and Karen Rice (hereinafter "Rices") are the Trust's trustees.

On October 24, 1997, the Rices, on behalf of the Trust, sued Harken in Amarillo Federal District Court (hereinafter "Amarillo Court") alleging that Harken polluted the Ranch (hereinafter "Federal Lawsuit"). The Rices asserted causes of action for violation of the Oil Pollution Act,<sup>1</sup> breach of the Lease, breach of the pipeline easement, negligence, [\*\*3] including negligent discharge of saltwater, negligence per se, nuisance, trespass, and equitable relief.

1 33 U.S.C. §§ 2701-2720.

[\*470] Harken notified the Appellants of the claims filed against it and asked the Appellants to defend it in the Federal Lawsuit. Harken carried two separate, successive commercial general liability policies; one issued by each of Appellants. The policy Sphere issued insured Harken from October 1, 1995 through October 1, 1996 (hereinafter "Sphere Policy"). The policy Commercial issued insured Harken from October 1, 1996 through October 1, 1997 (hereinafter "Commercial Policy") (collectively hereinafter "Policies"). The Appellants denied Harken's request and refused to defend it in the Federal Lawsuit.

Harken filed a declaratory judgment action in state court to determine whether the Appellants had a duty to defend it in the Federal Lawsuit. The Appellants removed this action to the Dallas Federal District Court (hereinafter "Dallas Court") based on diversity. The [\*4] three parties, Harken, Sphere, and Commercial, each filed motions for partial summary judgment. Before the Dallas Court ruled on the motions for summary judgment, the Amarillo Court dismissed the Rices' Oil Pollution Act claims and the remaining supplemental state law claims for want of jurisdiction.<sup>2</sup> In response to the dismissal, the Rices sued Harken in state court asserting the same causes of action, minus the Oil Pollution Act claim (hereinafter "State Lawsuit"). Harken notified the Appellants of the State Lawsuit and asked them to defend it in that lawsuit. The Appellants refused. On February 10, 2000, the Dallas Court granted partial summary judgment in favor of Harken.

2 The Rices appealed the dismissal of the Federal Lawsuit to this Court, and we affirmed. *D.E. Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

At this point, Harken had not expressly amended its pleading or its motion for summary judgment to include the State Lawsuit. In its motion for entry of judgment, [\*5] Harken presented the Dallas Court with the State Lawsuit's original petition and asked the court to enter a judgment that the Appellants had a duty to defend it in both the Federal Lawsuit and the State Lawsuit (collectively hereinafter "Lawsuits"). The Appellants responded and presented evidence in opposition. On April 14, 2000, the Dallas Court entered its final judgment. The Dallas Court decided that the Appellants had a duty to defend Harken in the Lawsuits and that by failing to do so breached the Policies. The Dallas Court awarded Harken its defense costs in the Lawsuits (attorneys' fees and court costs), prejudgment interest at 10%, and later, attorneys' fees and expenses in this case.

## 2. Discussion.

The Appellants appeal the Dallas Court's grant of partial summary judgment in favor of Harken. They contend that they do not owe Harken a duty to defend because: 1) there was not an "occurrence" as defined by the Policies; 2) the Saline Clause only obligates the Appellants to indemnify Harken, not defend it; and 3) the property damage alleged did not occur during the Policies' periods. The Appellants, further, contend that the Dallas Court erred when it awarded Harken [\*6] the Lawsuits' defense costs and used a 10% interest rate to calculate prejudgment interest.

### 2.1 The Appellants have a duty to defend Harken.

[HN1] We review a federal district court's grant of summary judgment *de novo*, applying the same standard of review as would the district court. *Merritt-Campbell, Inc. v. RxP Products, Inc.*, 164 [\*471] F.3d 957, 961 (5th Cir. 1999). Summary judgment is only proper when there is not a genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Id.* We view the evidence in the light most favorable to the non-movant and make all reasonable inferences in her favor. *Merritt-Campbell, Inc.*, 164 F.3d at 961; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc.*, 164 F.3d at 961; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). There is a genuine issue as to a material fact if the evidence is such that a reasonable [\*7] jury could return a verdict for the non-movant. *Merritt-Campbell*, 164 F.3d at 961.

The Appellants contend that the Dallas Court erred when it held that the Appellants have a duty to defend Harken. [HN2] Under Texas Law, an insurer's duty to defend is usually determined solely from the allegations in the most recent petition and the language of the insurance policy.<sup>3</sup> *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merch. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). The insured bears the initial burden of showing that the claim against her is potentially within the insurance policy's scope of coverage. *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988). If the insurer relies on the policy's exclusions to deny coverage, the burden shifts to the insurer to prove the exclusion applies. *Federated Mut. Ins. Co.*, 197 F.3d 720, 723, citing *Guaranty Nat'l Ins. Co. v. Vic. Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998), citing *Telepak v. United Services Auto Ass'n.*, 887 S.W.2d 506, 507 (Tex.App.-San Antonio 1994, writ denied). If the insurer is successful, the burden shifts [\*8] back to the insured to show that an exception to the exclusion brings the claim against her potentially within the scope of coverage under the insurance policy. *Federated Mut. Ins.*

Co., 197 F.3d at 723, citing *Guaranty Nat'l Ins. Co.*, 143 F.3d at 193, citing *Telepak*, 887 S.W.2d at 507.

3 [HN3] Insurance policies are contracts. *Amica Mut. Ins. Co. v. Moak*, 55 F.3d 1093, 1095 (5th Cir. 1995). In diversity cases such as this one, we apply state law rules of construction. *Id.* Therefore, Texas's rules of contract interpretation control. See *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). We are bound to apply the law as interpreted by the state's highest court, in this case, the Texas Supreme Court. See *Barfield v. Madison County, Miss.*, 212 F.3d 269, 271-72 (5th Cir. 2000). If the state's highest court has not definitively ruled on a particular issue, it is our duty to predict how that court would decide the issue. *Barfield*, 212 F.3d at 272; *Matheny v. Glen Falls Ins. Co.*, 152 F.3d 348, 353-54 (5th Cir. 1998). Intermediate state courts of appeals' decisions can be persuasive, but are not controlling. *Barfield*, 212 F.3d at 272; *Matheny*, 152 F.3d at 354. And we must not "expand state law beyond its presently existing boundaries." *Barfield*, 212 F.3d at 272 (internal citations omitted).

[\*\*9] [HN4]

"The general rule is that the insurer is obligated to defend [its insured] if there is, potentially, a case under the complaint within the coverage of the policy." *Merch. Fast Motor Lines, Inc.*, 939 S.W.2d at 141. If there is a "doubt as to whether or not the [factual] allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in [the] insured's favor." *Id.*

#### 2.11 The Rices alleged an "occurrence."

The Parties agree that initially under the Policies the Appellants have a [\*472] duty to defend Harken against a suit alleging damages caused by an occurrence. The first step in determining whether the Appellants have a duty to defend Harken against the Lawsuit is to determine whether the Rices alleged an occurrence.

The Policies define occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The Policies, however, do not define accident. Thus, we must give accident its plain, ordinary, [\*\*10] and generally accepted meaning. See *Western Reserve Life Ins. V. Meadows*, 152 Tex. 559, 261 S.W.2d 554, 557 (Tex. 1953) [HN5] ("it is well-settled law in this state that contracts of insurance in their construction are go-

verned by the same rules as other contracts, and that terms used in them are to be given their plain, ordinary, and generally accepted meaning unless the instrument itself shows the them to have been used in a technical or different sense.") (giving "war" its plain, ordinary, and generally accepted meaning); *Gonzalez*, 795 S.W.2d 734, 736 (giving "bodily injury," "sickness," "disease," "death," and "including" their plain, ordinary, and generally accepted meaning).

The Texas Supreme Court has not articulated a hard and fast rule for when an accident occurs. See *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153, 155 (Tex. 1999) ("an injury caused by voluntary and intentional conduct is not an accident just because the result or injury may have been unexpected, unforeseen, and unintended . . . [although,] the mere fact that an actor intended to engage in the conduct that gave rise to the injury does not mean that the [\*\*11] injury was not accidental."). [HN6] It is reasonably clear that an accident has two elements: 1) an action and 2) that action's effect—that is, the resulting damage. See *id.* There are also two factors that influence both elements: a) an intent or design factor and b) an expectability or foreseeability factor. <sup>4</sup> See *id.*

4 Hereinafter intent includes design and expectability includes foreseeability.

[HN7] The Texas Supreme Court has told us that there is not an accident when the action is intentionally taken and performed in such a manner that it is an intentional tort, regardless of whether the effect was unintended or unexpected. See *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973) (finding that there was not an "accident" when the action was a trespass, the removal of soil from the wrong piece of real property, and the effect was the unintended and unexpected resulting hole in the wrong piece of real property); *Federated Mut. Ins. Co., v. Grapevine Excavation Inc.*, 197 F.3d 720, 723-24 (5th Cir. 1999) [\*\*12] (discussing *Maupin*). We also know, however, that there is an accident when the action is intentionally taken, but is performed [\*473] negligently, and the effect is not what would have been intended or expected had the action been performed non-negligently. See *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997) ("accident includes the negligent acts of the insured causing damage which is undesigned and unexpected."); *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 400 (Tex. 1967) (finding there was an accident when the action, the deliberate fumigation of a rice mill was performed negligently, and the effect was neither the intended nor the expected result had the fumigation been performed non-negligently); *Federated Mut. Ins. Co.*, 197 F.3d at

726 (finding there was an accident when the action, the deliberate instillation of parking lot fill material was performed negligently, and the effect was neither the intended nor the expected result had the instillation been performed non-negligently). In other words, if the act is deliberately taken, performed negligently, and the effect is not the [\*\*13] intended or expected result had the deliberate act been performed non-negligently, there is an accident.

The Rices allege: 1) that Harken operated an oil facility on the Ranch; 2) that various lines, tanks, and wells have ruptured, leaked, and overflowed releasing pollutants, including saline substances, and continue to do so; 3) that the pollutants contaminated the Ranch's water, killed their cattle, destroyed vegetation, and generally damaged the Ranch and continue to do so; 4) that Harken negligently, carelessly, and wrongfully polluted the Ranch when it knew or should have known that such actions would cause damage; and 5) that Harken acted and is acting maliciously with subjective and actual awareness that its actions would cause property damage.<sup>5</sup> Applying the Rices factual allegations to what the Texas Supreme Court has told us about accidents, we hold that [\*\*474] the Rices alleged an accident. The operation of the oil facilities is the action deliberately taken, but alleged to have been performed negligently. The contaminated water, dead cattle, etc., caused by the pollutants, including saline substances, are the unintended and unexpected effects of the non-negligent operation of [\*\*14] an oil facility.

5 The Federal Lawsuit's complaint, which is virtually identical to the State Lawsuit's petition states in pertinent part:

Pursuant to oil and gas leases, Harken operates an onshore oil facility on the Trust's land. Harken's facility consists of about 16 wells, storage tanks, tank batteries, pipelines, flowlines, saltwater lines, and other production and operation equipment.

Flowlines connecting Harken's wells and storage tanks ruptured and leaked on numerous occasions and continue to rupture and leak, spilling oil, saltwater, and other pollutants onto the Trust's land surface water, and ground water. Saltwater lines connecting Harken's saltwater tanks and injection wells ruptured and leaked many times and con-

tinue to rupture and leak, spilling saltwater and other pollutants onto the Trust's land, surface water, and groundwater. Harken's storage tanks overflowed and continue to overflow, spilling oil, saltwater, and other pollutants onto the Trust's land, surface water, and groundwater. Harken's wells have leaked and continue to leak both on the surface (for example stuffing-box leaks) and below the surface, contaminating the Trust's property, surface water, and ground water . . . .

Harken's releases damaged and continue to damage the Trust's land, contaminated and continue to contaminate navigable waters (including ground and surface water), killed cattle, and damaged and continue to damage vegetation. Harken polluted and continues to pollute upgradient from the Trust's land, and the runoff from the pollution had entered and continues to enter the Trust's land, damaging the surface, contaminating navigable waters (including ground and surface water), killing cattle, and destroying vegetation. Harken polluted and continues to pollute upgradient from the Trust's land, and the runoff from the pollution has entered and continues to enter the Trust's land, posing a substantial threat of discharge of oil, saltwater, and other pollutants into or upon navigable waters . . . . Through its operations, Harken has damaged the surface, contaminated the water, destroyed vegetation, and killed cattle . . . .

Harken negligently and carelessly released and is negligently and carelessly releasing oil, saltwater, and other pollutants onto the Trust's land when it knew or should have known that doing so would damage the surface, contaminate the water, destroy the vegetation, and kill the cattle . . . . Corporately . . . Harken . . . by [its] negligent[] and careless[] [ac-

tions] . . . knew or should have known that . . . [its actions] would damage the surface, contaminate the water, destroy the vegetation and kill cattle. . . . The pollutants, oil, and saltwater negligently and wrongfully discharged by Harken physically entered the Trust's real property and severely damaged the surface, contaminated the water, destroyed vegetation, and killed cattle . . . .

Malice: Corporately . . . Harken acted and is acting maliciously. Harken . . . had and has had actual, subjective awareness of this risk but, nonetheless, proceeded and is proceeding with conscious indifference to the rights and welfare of the Trust. Corporately . . . Harken, acted and is acting with a flagrant disregard for the Trust's rights and with actual awareness that its wrongful conduct would in reasonable probability, result in property damage. Therefore, the Trust may recover exemplary damages from Harken . . . .

[\*\*15] The Appellants contend that the effect, the contaminated water, dead cattle, etc., is not unexpected because the contaminated water, dead cattle, etc., are the natural and probable consequences of operating an oil facility. We disagree. The Appellants offer no authority for the proposition that contaminated water, dead cattle, destroyed vegetation, and generally damaged land are the natural and probable consequences of operating an oil facility non-negligently, nor have we found any. The Appellants argue that the Rices should have expected the contaminated water, dead cattle, etc., because the Rices alleged that the act of contaminating the water, killing the cattle, etc., was continuing—that is, the negligent performance of the deliberate action was continuing. We disagree. The Policies expressly state that property damage—for example, contaminated water, dead cattle, etc., can be caused by the "continuous or repeated exposure to a condition[.]" Moreover, [HN8] according to the Texas Supreme Court we are supposed to focus on whether the effect is intended or expected not whether the negligent performance is intended or expected. See *Cowen*, 945 S.W.2d at 828; *Orkin Exterminating Co.*, 416 S.W.2d at 400. [\*\*16] Thus, whether the Rices should have ex-

pected the negligent operation of the oil facility because it is continuing is irrelevant, if the deliberate operation of the oil facility, the act, is performed negligently and the effect, the resulting property damage, is not the intended or expected result of operating an oil facility non-negligently.

The Appellant, further, assert that the Rices failed to allege an occurrence because Harken's conduct cannot, at the same time, be both negligent and malicious or negligent and knowing. The Appellants argue that the factual allegations that charged malicious or knowing actions in effect transformed the factual allegations that charge negligent actions into malicious or knowing actions because the Rices did not plead malice or knowledge in the alternative. The fact that the Rices plead negligent, malicious, and knowing actions does not in and of itself transform the negligent actions into malicious or knowing actions, and there is nothing in the factual allegations to suggest that Harken's performance was not negligent. [HN9] "If an insurer has a duty to defend any portion of a suit, the insurer must defend the entire suit." *St. Paul Fire & Marine Ins. Co. v. Green Tree Corp.*, 249 F.3d 389, 395. [\*\*17] Thus, the Appellants must defend Harken against the entire suit including causes of action that would not alone trigger the duty to defend, regardless whether the complaint is pled in the alternative or not because the Rices's factual allegations of negligence are sufficient to trigger the duty to defend. See *St. Paul Ins. Co. v. Texas Dept. of Transp.*, 999 S.W.2d 881, 884 (Tex.App.-Austin 1999, pet. denied) ("although the plaintiffs also allege gross negligence and intentional torts, this is not controlling because we must focus on the facts alleged, not the legal theories pleaded . . . that coverage may not be available for some causes of action pleaded does not relieve St. Paul of its duty to defend.").

#### 2.12 The Rices alleged that the release of the pollutants was sudden and accidental.

The Parties agree that "Exclusion (F)" in the Policies narrows the Appellants' initial duty to defend Harken [\*475] against a suit alleging damages caused solely by the discharge, dispersal, release, or escape of pollutants, which would include saline substances, to suits that allege that such discharge, dispersal, release, or escape is sudden and accidental. [HN10] Courts should construe [\*\*18] exclusions "more stringently" than the other parts of an insurance policy or the factual allegations in the complaint. See *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987) ("because this case involves an exception or limitation on Aetna's liability under the policy, an even more stringent construction is required."). Additionally, Courts "must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be

more reasonable or a more accurate reflection of the parties intent." *Id.*

The Rices alleged that the various lines, tanks, and wells ruptured releasing pollutants, including saline substances. The word rupture intimates that the release was sudden. Therefore, since the release was sudden, and we have already determined that the pollution was the result of an accident, the Rices alleged that the release of the pollutants was sudden and accidental.

**2.13 The Saline Clause obligates the Appellants to defend Harken against suits that allege property damage caused by saline substances.**

The Parties agree that "Supplemental [\*\*19] Exclusion Clause # 11-Seepage, Pollution and Contamination" eliminates the limited duty the Appellants have to defend or indemnify Harken against a suit alleging damages caused solely by pollutants, which would include saline substances, regardless of whether the damage is sudden and accidental. The Parties, however, disagree as to the effects of the "Seepage and Pollution Endorsement" (hereinafter "S&P Endorsement") and the "Saline Substances Contamination Hazard Clause" (hereinafter "Saline Clause").

Harken maintains that the S&P Endorsement reinstates the Appellants' duty to indemnify it for damage caused by pollutants, which would include saline substances and that the Saline Clause reinstates the Appellants' duty to defend Harken in actions that allege damage caused by saline substances. Thus, according to Harken, the Appellants have a duty to defend it against an action that alleges that the damages were caused by saline substances and have a duty to indemnify it for the damages caused by pollutants, including saline substances.

On the other hand, the Appellants contend that the S&P Endorsement reinstates the duty to indemnify Harken for damage caused by pollutants, [\*\*20] but not including saline substances. The Appellants, further, assert that the Saline Clause defines pollutants in the S&P Endorsement to include saline substances, though pollution, pollutants, or polluting appears nowhere in it, and merely extends the existing duty to indemnify Harken for damage caused by saline substances. Thus, according to the Appellants, if they have a duty, it is solely a duty to indemnify Harken for damage caused by pollutants, which only by virtue of the Saline Clause, includes saline substances.

The policy can reasonably be read to support both the Appellants' and Harken's interpretation of the S&P Endorsement and the Saline Clause. [HN11] "If multiple interpretations [of the policy] are reasonable, [we] must construe the [policy] against the insurer." *St. Paul Fire &*

*Marine Ins. v. Green Tree Corp.*, 249 F.3d 389, 392 (5th Cir. 2001) (citation omitted); [\*476] see *Barnett*, 723 S.W.2d at 666; *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977). Therefore, we adopt Harken's interpretation and hold that the Saline Clause reinstates the Appellant's duty to defend Harken against actions that allege [\*\*21] an occurrence and damage caused by the sudden and accidental release of saline substances.

**2.14 The property damage alleged occurred during the Policies' period.**

The Policies state that the Appellants will defend Harken against a suit seeking damages for injury to tangible property if the injury "occurs during the policy period." The Appellants contend the property damage that the Rices alleged did not occur during either the Sphere Policy period or the Commercial Policy period. The only relevant reference in the complaint and petition that expressly refers to a date states:

Harken's wrongful conduct is not an isolated incident or a one-time occurrence. A continuous succession of oil leaks and releases has resulted from Harken's . . . negligence, and wrongful conduct, including the use of inadequate equipment without adequate monitoring. Releases and discharges have occurred at least 53 times, including occasions after Harken received notice from D. E. Rice in February 1997, after Harken received notice from the Trust's attorney on July 21, 1997, and after the Trust filed this lawsuit.<sup>6</sup>

<sup>6</sup> There is another reference date in the complaint, "in 1996, the Trust granted a pipeline easement to Harken." Harken, however, did not raise this factual issue before the Dallas Court. Thus, it is waived.

[\*\*22] The Commercial Policy insured Harken from October 1, 1996 through October 1, 1997. A fair reading of the passage above suggests that at least some of the property damage that the Rices alleged occurred between February 1997 and July 1997. Therefore, the Rices alleged property damage that occurred during the Commercial Policy period.

The Sphere Policy insured Harken from October 1, 1995 through October 1, 1996. The complaint and petition are devoid of any express allegation that property

damage occurred during the Sphere Policy period. This, however, does not end our inquiry.

The phrase "continuous succession of oil leaks and releases [which] has resulted from Harken's violations . . . at least 53 times, including occasions after . . . February 1997" alleges that Harken caused the property damage and presumes that at least some of that property damage, if not most, occurred before February 1997. In order for Harken to have caused the property damage, it must have been operating on the Ranch. In order for Harken to have been operating on the Ranch, it would have had to have a lease. Sphere does not dispute that Harken purchased the Lease from Momentum Operating Company, Inc., on [\*\*23] December 15, 1995, but it contends that we may not consider when Harken purchased the Lease because that date is not in the complaint, petition, or Sphere Policy.

In *Western Heritage Ins. Co. v. River Entm't*, a panel of this Court held that [HN12] under Texas Law "when the petition does not contain sufficient facts to enable the court to determine if coverage exists, it is proper to look to extrinsic evidence in order to adequately address the issue." *Western Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 313-15 (5th Cir. 1993), citing *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452-53 (Tex.App.-Corpus Christi 1992, writ denied). Thus, we can consider when Harken obtained the Lease. [\*477] By doing so, it is fair conclude that the damage that the Rices alleged occurred during the Sphere Policy's period. Since the Rices alleged an occurrence and property damage caused by the sudden and accidental release of saline substance during the Policies' periods, the Appellants have a duty to defend Harken against the Lawsuits.

## 2.2 The Dallas Court's award of the Lawsuits' defense costs was not error.

Sphere contends that the Dallas Court awarded Harken "unreasonable" defense costs in the Federal [\*\*24] Lawsuit and should not have awarded Harken defense costs in the State Lawsuit. Commercial does not appeal the Dallas Court's award of the Lawsuits' defense cost.

[HN13] We review all issues of law with respect to a trial court's determination of damages *de novo*. *Boehms v. Crowell*, 139 F.3d 452, 459 (5th Cir. 1998). Absent an error of law, however, we review a trial court's award of compensatory damages, in the instant case the award of defense cost in the Lawsuits, a question of fact, for clear error. *Id.*

With respect to the award of the Federal Lawsuit's defense costs, Sphere argues that they are too high and that there is not sufficient documentation to justify the award. Sphere argues that labels such as "Legal Re-

search" without an explanation of how it relates to the case is insufficient. In light of the deferential standard of review, the award should not be disturbed.

With respect to the defense cost awarded for the State Lawsuit, the Dallas Court awarded them *sua sponte*. Harken neither expressly amended its pleadings or its motion for summary judgment to include the State Lawsuit. Harken merely attached the State Lawsuit's petition and asked the court [\*\*25] to enter a judgment that the Appellants had a duty to defend it in both Lawsuits. In essence, the Dallas Court granted summary judgment *sua sponte* in favor of Harken on the duty to defend the State Lawsuit and awarded damages. Thus, triggering *de novo* review.

[HN14] Federal District Courts are "empowered to enter summary judgment *sua sponte*," *Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 923 (5th Cir. 2001), "so long as the losing party has ten days notice to come forward with all of its evidence in opposition to the motion." *Love v. National Medical Enterprises*, 230 F.3d 765, 770-71 (5th Cir. 2000).

The State Lawsuit's original petition and the Federal Lawsuit's second amended complaint are virtually identical. Harken attached the State Lawsuit's original petition to its motion for entry of judgment. On March 9, 2000, Harken filed the motion. Sphere in its response, argued that the Dallas Court should not include the State Lawsuit's defense costs in the court's final judgment, but did not ask for an extension or a severance. On April 14, 2000, more than one month later, the Dallas Court entered its final judgment and awarded Harken, [\*\*26] as damages, the Lawsuits' defense costs. Sphere had more than ten days to come forward with all of its evidence, it did not ask for an extension or severance, and made arguments against awarding the State Lawsuit's defense costs. For these reasons and the reasons articulated in Section 2.1 *supra*, the award of the State Lawsuit's defense costs was proper.

## 2.3 The Dallas Court's use of a 10% interest rate to calculate prejudgment interest was not error.

The Appellants contend that the Dallas Court erroneously used a 10% interest [\*\*478] rate rather than a 6% interest rate when it calculated prejudgment interest. We review the award of prejudgment interest for an abuse of discretion. *Liberty Mut. Fire. Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326, 339 (5th Cir. 1999).

Six percent is the appropriate prejudgment interest rate when the parties have unambiguously and expressly established the amount owed under a contract, in the contract. *TEX. FIN. CODE. ANN. § 302.002* (Vernon 2000). [HN15] Ten Percent is the appropriate prejudgment interest rate when the parties have not unambi-

261 F.3d 466, \*; 2001 U.S. App. LEXIS 18477, \*\*;  
53 ERC (BNA) 1456; 156 Oil & Gas Rep. 585

guously and expressly established the amount owed under a contract, in the contract. *TEX. FIN. CODE ANN. § 302.003* [\*\*27] (Vernon 2000). Harken and the Appellants did not unambiguously and expressly establish the amount owed under the Policies, in the Policies. Therefore, the use of the 10% interest rate was appropriate.

### 3. Conclusion.

Based on the foregoing, we **Affirm** the Appellants' duty to defend Harken, the award of defense costs, and the use of the 10% interest rate to calculate pre-judgment interest.<sup>7</sup>

<sup>7</sup> Any issue not expressly addressed in this opinion was considered, but deemed to be without merit.



LEXSEE 352 SE 2D 73

HAYSEEDS, INC. v. STATE FARM FIRE &amp; CAS

No. 16782

Supreme Court of Appeals of West Virginia

177 W. Va. 323; 352 S.E.2d 73; 1986 W. Va. LEXIS 598

December 12, 1986, Filed

**PRIOR HISTORY:** [\*\*\*1] Appeal from Mason County.

**DISPOSITION:** Affirmed.

**LexisNexis(R) Headnotes**

*Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence*

[HN1] On appeal of a jury verdict the evidence is construed most strictly in favor of the prevailing party below.

*Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview*

*Evidence > Inferences & Presumptions > General Overview*

[HN2] In a case where the defense made to the action involves the charge of an unlawful act, fraud, or even bad faith, a preponderance of the evidence, as in any other civil case, is sufficient to sustain the charge, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud, or act in bad faith; that is, the preponderance rule continues to operate in such cases, the adverse presumption in favor of honesty and fair dealing merely requiring more evidence to constitute a preponderance than where this presumption does not exist. "Clear and satisfactory," in cases involving fraud or false swearing, may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime.

*Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview*

*Insurance Law > Claims & Contracts > Declaratory Relief > General Overview*

*Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend*

[HN3] Where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation. The Supreme Court of Appeals of West Virginia adopted this rule in recognition of the fact that, when an insured purchases a contract of insurance, he buys insurance -- not a lot of vexatious, time-consuming, expensive litigation with his insurer.

*Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview*

*Insurance Law > Claims & Contracts > Costs & Attorney Fees > Declaratory Judgments*

*Insurance Law > Claims & Contracts > Declaratory Relief > General Overview*

[HN4] Where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney's fees and expenses arising from litigation.

177 W. Va. 323, \*; 352 S.E.2d 73, \*\*;  
1986 W. Va. LEXIS 598, \*\*\*

***Civil Procedure > Remedies > Damages > Punitive Damages***

***Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Actual & Consequential Damages***

***Insurance Law > Property Insurance > General Overview***

[HN5] When a policyholder substantially prevails in a property damage suit against an insurer, the policyholder is entitled to damages for net economic loss caused by the delay in settlement, as well as an award for aggravation and inconvenience. However, in allowing an award for aggravation and inconvenience, the Supreme Court of Appeals of West Virginia does not intend that punitive damages be awarded under another sobriquet.

***Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Punitive Damages > General Overview***

***Insurance Law > Property Insurance > Coverage > Arson & Intentional Loss > Evidence of Arson Torts > Damages > Punitive Damages > Conduct Supporting Awards***

[HN6] Punitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice," the Supreme Court of Appeals of West Virginia means that the company actually knew that the policyholder's claim was proper, but willfully, maliciously, and intentionally denied the claim. The Court intends such to be a bright line standard, highly susceptible to summary judgment for the defendant. Unless the policyholder is able to introduce evidence of intentional injury, not negligence, lack of judgment, incompetence, or bureaucratic confusion, the issue of punitive damages should not be submitted to the jury. Furthermore, a willingness to settle a case of alleged arson can no longer be used as evidence of "bad faith." An offer of settlement can never be used to show "actual malice" nor be used against an insurance carrier in any way.

**COUNSEL:** James R. Watson, Steptoe & Johnson, for Appellant.

Raymond H. Yackel, Oliver & Yackel and James M. Casey, Musgrave, Musgrave & Casey, for Appellee.

**JUDGES:** Neely, Justice.

**OPINION BY:** NEELY

**OPINION**

[\*324] [\*\*74] This case involves a suit by a policyholder against an insurance company to recover the value of a burned building. We granted the appeal because we initially shared the defendant's anxiety that the jury's verdict might have been contrary to the evidence and to clarify our rules on attorneys' fees and punitive damages in property damage cases involving insurance companies. After examining the record we conclude that the jury's verdict for the insured was not erroneous on the underlying question of arson and that the award of consequential damages and attorneys' fees was proper. However, we reverse the award of punitive damages. Additionally, we find it appropriate here to refine and clarify our rules governing attorneys' fees, consequential damages and punitive [\*\*\*3] damages in property damage insurance cases.

I

In August, 1980, James Trovato and Lynn Trovato bought a restaurant in Point Pleasant. The restaurant was located on a main thoroughfare of Point Pleasant in an old Kroger Store building of ten thousand square feet with ample parking. The building had already been converted to a family-style restaurant known as "Kinfolks" with a dining room, two banquet rooms, a kitchen and bath rooms.

[\*\*75] Mr. and Mrs. Trovato paid \$138,000 for the property, which included \$100,000 payment to the original owners and the assumption of \$38,000 in debts. Mr. and [\*325] Mrs. Trovato borrowed a total of \$120,000 under two notes, one of which was secured by the furnishings, equipment, and interior of the restaurant and the other by Mr. Trovato's interest in a mobile home park in Monongalia County. Mr. Trovato had had three years of experience in running a successful restaurant in Morgantown and both he and his wife believed that the purchase of Kinfolks (later Hayseeds) was a good investment.

Before opening the restaurant, Mr. and Mrs. Trovato spent approximately \$20,000 on improvements. They purchased an insurance policy for fire loss and protection [\*\*\*4] from Paul Summerville, a State Farm agent in Point Pleasant, who was also a member of the board of directors of the People's Bank of Point Pleasant where the Trovatos had taken out their loans. Mr. Summerville recommended a policy amount of \$150,000 and Mr. and Mrs. Trovato purchased a policy with that coverage for an annual premium of \$3,344.

When the restaurant first opened in August, 1980, both Mr. and Mrs. Trovato devoted approximately 12 hours a day, six to seven days a week to the restaurant. Although business was not what they had originally anticipated, the restaurant improved steadily beginning in January, 1981. In March, 1981, Mr. and Mrs. Trovato

purchased some video games and opened a video game room in their restaurant building. Eventually they purchased more video games and placed them in outside locations. At this time the video game market was at its peak and Mr. Trovato began devoting an increasing portion of his time to the game business rather than the restaurant.

However, in October, 1981, Hayseeds closed its doors to the public because Mrs. Trovato was pregnant and had medical complications that prompted her doctor to advise her to stop working. Mrs. Trovato [\*\*\*5] had been working between 50 and 70 hours per week in the restaurant as its manager, and when she had to stop working the cost of hiring a substitute manager made it uneconomical to continue operations. Furthermore, Mr. Trovato had become completely engrossed in the video game business and he concluded that the highest and best use of his time was in that enterprise rather than the restaurant business. After Hayseeds closed, Mr. Trovato used the building as a warehouse and office for his video game business. The building was being used for that purpose when, at approximately 2:30 a.m. on 14 April 1982 the building burned down.

The fire, which caused extensive damage to the interior of the restaurant, was investigated by the State Fire Marshal. State Farm received its first notice of the blaze from Hayseeds' insurance agent, Paul Summerville, of Point Pleasant, who stopped at the fire scene on the morning of the fire. Mr. Summerville told State Farm that Hayseeds had been closed for a couple of months and that its equipment was for sale. He further advised State Farm that the property had been advertised for sale in the Huntington newspaper, and that the insured was now in the video [\*\*\*6] game business and had financial problems. State Farm then initiated an investigation to determine whether the building had been burned by the insureds. There was no question at trial that the fire had been deliberately set by an arsonist, and that was the official report of the State Fire Marshal.

When Mr. and Mrs. Trovato filed their claim for property damage with State Farm, State Farm declined to pay on the grounds of arson. Mr. and Mrs. Trovato then brought this action in the Circuit Court of Mason County and, after a lengthy trial, the jury returned a verdict for \$150,000 on the insurance policy itself, \$69,000 for attorneys' fees and consequential damages and \$50,000 for punitive damages. State Farm's assignments of error are that: (1) the overwhelming weight of the evidence favored its position; (2) the trial court should not have instructed the [\*\*\*76] jury that State Farm had the burden of proving its arson defense by clear and convincing evidence; and, (3) the evidence demonstrated that State Farm had more than a reasonable ground for denying the

insured's claim and, therefore, should not be liable for punitive damages.

[\*326] State Farm's position has always been [\*\*\*7] that the circumstantial evidence in this case ineluctably leads any fair-minded person to the conclusion that Mr. and Mrs. Trovato (or one of them) caused the building to be burned. State Farm points to the fact that: (1) the Trovatos had significant financial problems; (2) the mortgage payments were a serious drain on their limited resources; (3) the fire was caused by arson; and (4) the building was locked when the fire was started.

On the other hand, Mr. and Mrs. Trovato have taken the position that their financial problems were similar to those of many small business owners and that their circumstances alone could not lead to the conclusion that they had committed a felony. Buildings are burned down by pyromaniacs, personal enemies, juveniles, and miscellaneous crackpots all the time. The fact that a fire is deliberately set does not necessarily imply that it was set by the owner. At trial State Farm relied entirely on circumstantial evidence. Mr. and Mrs. Trovato, on the other hand, took the stand and testified under oath that they had neither burned the building themselves nor caused someone else to burn it.

Mr. and Mrs. Trovato's claim for punitive damages and attorneys' fees [\*\*\*8] proceeded from their allegations that State Farm failed to make a fair, good faith investigation of the facts and circumstances surrounding the fire. They proved to the jury's satisfaction that the investigation focused only upon circumstances that could justify denial of the claim. In this regard the most serious contention of the plaintiffs was that State Farm failed to make a careful investigation of the plaintiffs' financial condition. Plaintiffs argued that, although the destroyed building was a drain on plaintiffs' income, they were keeping their heads above water and did not need to burn the building.

The record bears out that the plaintiffs authorized State Farm to contact the plaintiffs' accountant, who had access to all plaintiffs' financial information including bank accounts, loans, loan payments, receipts from the video game business, receipts from Hayseeds, receipts from Mundy's (another of plaintiffs' restaurants) receipts from Frontier Bakery in Morgantown (which plaintiffs also owned), tax returns, bank statements, accounting information, personal notes, scrap sheets and other accounting information. Although State Farm admitted that they were authorized to review [\*\*\*9] this information, State Farm conceded that they did not undertake a complete examination of plaintiff's financial condition.

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This is admittedly a close case, but upon a full review of the transcript we are persuaded that there was sufficient evidence that the jury could infer that Mr. and Mrs. Trovato were not at fault in the burning of the building. Furthermore, this is not the type of case where a jury's sympathy is automatically with the plaintiff. Had State Farm proven arson, there is little reason to believe that a local jury would have condoned that common law felony and rewarded the plaintiffs' with punitive damages. Consequently, there is every reason in this case to apply the ancient rule that [HN1] on appeal of a jury verdict the evidence will be construed most strictly in favor of the prevailing party below. Viewed that way, the evidence in this case is sufficient to support the verdict. See, e.g., *Butcher v. Stoll*, 140 W.Va. 31, 82 S.E.2d 278 (1954); *Orr v. Crowder*, W.Va. , 315 S.E.2d 593 (1983).

State Farm contends, however, that the jury would not have returned such a verdict had they not been given Plaintiff's Instruction Number 2, which [\*\*\*10] read as follows:

While such proof of such a defense involves proof of a crime, arson, this is [\*\*77] not a criminal case but a civil action upon a fire insurance policy. Therefore, State Farm need not prove beyond a reasonable doubt that the plaintiff voluntarily and intentionally burned their business. Such proof need only be by a preponderance of the evidence. However, such proof of voluntary and intentional burning should be clear and satisfactory, taking [\*327] into consideration the presumption of innocence in such cases, which the evidence must be sufficient to overcome, and must do more than establish a basis for mere suspicion, speculation or conjecture. Where circumstantial evidence is relied on by State Farm, such evidence must be such as does more than throw a mere suspicion of guilt on the plaintiff, and the inference or presumption to which the facts give rise must be strong and almost inevitable. If the circumstances are such as to be fairly susceptible of two constructions, the one that frees the plaintiff from the imputation of fraud may be accepted.

State Farm specifically complains about the use of the terms "clear and satisfactory," "presumption [\*\*\*11] of innocence," and "almost inevitable." We recognize

that this was by no means a model instruction. See *Morgan v. Ins. Co. of North America*, 146 W.Va. 868, 122 S.E.2d 838 (1961). Nonetheless, given the peculiar nature of the decisional law governing affirmative defenses to actions on insurance contracts, this instruction states the law with sufficient accuracy, under the facts of this case, that there is no reversible error. See *Karr v. Baltimore & O.R. Co.*, 76 W.Va. 526, 86 S.E. 43 (1915); *Bourne v. Richardson*, 133 Va. 441, 113 S.E. 893 (1922).

In *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S.E. 8 (1906) our colleagues on the Supreme Court of Virginia held:

[HN2] "In a case, as in this, where the defense made to the action involves the charge of an unlawful act, fraud, or even bad faith, a preponderance of the evidence, as in any other civil case, is sufficient to sustain the charge, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud, or act in bad faith; i.e., the preponderance rule continues to operate in such cases, the adverse presumption in [\*\*\*12] favor of honesty and fair dealing merely requiring more evidence to constitute a preponderance than where this presumption does not exist.

"We are of the opinion, therefore, that 'clear and satisfactory', in cases involving fraud or false swearing, may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime . . . ."

See also *Mize v. Harford Ins. Co.*, 567 F. Supp. 550 (W.D. Va. 1982); *Carpenter v. Union Insurance Society of Canton, Ltd.*, 284 F.2d 155 (4th Cir. 1960); *Kisting v. Westchester Fire Ins. Co.*, 290 F. Supp. 141 (W.D. Wisc. 1968), *affd.* 416 F.2d 967 (1969); *DiMartino v. Continental Ins. Co. of New York*, 187 La. 855, 175 So. 598 (1937); *Sumrall v. Providence Washington Ins. Co.*, 221 La. 633, 60 So.2d 68 (1952); *Metropolitan Life Ins. Co. v. Stuckey*, 194 S.C. 469, 10 S.E.2d 3 (1940); *Hope v. South Texas Lloyds*, 171 So.2d 837 (1965), *writ ref.* 247 La. 677, 173 So.2d 541 (1965); *Ziegler v. Hustisford Farmers Mut. Ins. Co.*, 238 Wisc. 238, 298 N.W. 610 (1941).

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We now consider the award of consequential damages, including litigation expenses. Initially, it is [\*\*\*13] important to observe that insurance contracts are qualitatively different from other contracts. Not only do policyholders rely upon insurance policies, but a host of third-party creditors rely upon those policies as well. Furthermore, the bargaining power of an insurance carrier *vis-a-vis* the bargaining power of the policyholder is disparate in the extreme. When a policyholder's property has been destroyed -- whether it be a private house or a business structure -- there is an urgent need to rebuild immediately. In the case of [\*\*78] a business, lack of immediate rebuilding may cost the company a significant portion of its skilled employees and may cause employees the loss of their jobs, pensions, and seniority. Although in the case before us it is unlikely that the burned structure will be rebuilt, nonetheless, creditors must be paid and capital must be recouped for other business ventures.

[\*328] There is no question that insureds do burn their own buildings from time to time and that other types of fraudulent claims are made with some regularity; and we are not unmindful that the dismal economic conditions in West Virginia today make arson an attractive expedient to [\*\*\*14] more and more desperate people. Certainly it is not to the benefit of policyholders as a class for insurance companies to pay fraudulent claims. When an insurance company has reasonable grounds to believe that a claim is fraudulent in whole or in part, it is perfectly appropriate for the company to ask a court to decide the issue of the claim's legitimacy.

Unfortunately, in the business of claims settlement we do not have simply two parties--the company that wishes to pay the lowest legitimate amount of money and the policyholder who wants maximum benefits under the policy. Between these two profit-maximizing, rational players, there is an entire corporate bureaucracy composed of agents, administrators, corporate counsel, and local litigating lawyers. This bureaucracy is neither inherently good nor inherently evil, and it performs a necessary function in the insurance industry. Nonetheless, the claims settlement bureaucracy is subject to the same dynamics as every other bureaucracy known to man: its natural tendency is to maximize upward mobility for middle management members of the bureaucracy and to augment the work that the bureaucracy is responsible for doing. In government, this [\*\*\*15] phenomenon is often referred to as "turf protection." The extent to which pernicious dynamics prevail in any particular company's claims bureaucracy differs from company to company and from office to office within the same company. However, a policyholder who runs into an intransigent or unreasonable claims settlement bureaucracy is destined to be sorely put upon.

Although the disparity of bargaining power between company and policyholder (often exacerbated by the dynamics of the settlement bureaucracy) make insurance contracts substantially different from other commercial contracts, efforts to provide greater balance have been halting at best, and have often depended upon fictions such as lack of "good faith" to circumvent general prohibitions against fee-shifting. The unstructured and nebulous nature of the rules concerning good faith settlement of policy claims in property damage cases is directly related to the American rule that both sides of a civil controversy must pay their own attorneys' fees--win, lose, or draw. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). In many social contexts this rule makes eminently [\*\*\*16] good sense; among other things, it makes it uneconomical for creditors to hound insolvent debtors with relentless severity, and it makes it possible for injured victims to sue well financed tort-feasors without fear of resulting personal bankruptcy should they lose. <sup>1</sup> However, the fact that the general rule concerning fees works well *most* of the time does not necessarily imply that the rule works well *all* of the time. Indeed, at last count there were over fifty fee-shifting statutes in the *United States Code* alone. We find property damage cases between policyholders and insurers to be one of the prominent instances where the American rule concerning attorneys' fees works badly.

1 See R. Neely, *Why Courts Don't Work*, McGraw Hill (New York, 1982) pp. 175-186.

In keeping with the American rule, it is generally held that, in the absence of a statutory or contractual provision providing for such recovery, attorneys' fees may not be recovered in an action on an insurance policy. See 22A J. [\*\*\*17] Appleman, *Insurance Law and Practice*, § 14533 (Appleman ed. 1979) and cases there cited; 15A [\*\*79] *Couch on Insurance* 2d § 58:124 (Rhodes ed. 1983) and cases there cited. In response to the American rule, however, numerous state legislatures have enacted statutes entitling prevailing claimants to attorneys' fees when the insurer refuses to settle a claim without just cause. See 15A *Couch on Insurance* 2d, *supra*, § 58:2 and statutes there cited; 15A *Couch on Insurance* 2d, *supra*, § 58:123 and cases there cited; 22A J. Appleman, *Insurance Law [329] and Practice, supra*, § 14532 and cases there cited. These statutes have often been so expressed as to make an award of fees to the successful claimant *automatic*. See *Unionaid Life Ins. Co. v. Bank of Dover*, 192 Ark. 123, 90 S.W.2d 982 (1934); *Akins v. Illinois Bankers Life Assur. Co.*, 166 Kan. 648, 203 P.2d 180 (1949); *Hawkeye Cas. Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951). Moreover, several courts have held that, even in the absence of a statutory or contractual provision, attorneys' fees may be

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awarded to the claimant when the insurer has acted in bad faith, wantonly, [\*\*\*18] or for an oppressive reason. See *Montgomery Ward & Co., Inc. v. Pacific Indemnity Co.*, 557 F.2d 51 (3rd Cir. 1977); *Christian v. American Home Assur. Co.*, 577 P.2d 899 (Okla. 1977); *Mustachio v. Ohio Farmers Ins. Co.*, 44 Cal. App.3d 358, 118 Cal. Rptr. 581 (1975).

Thus it appears that there is a recognition in a substantial number of American jurisdictions of the role of attorneys' fee awards in encouraging the prompt payment of valid claims. See *Meeks v. State Farm Automobile Ins. Co.*, 460 F.2d 776 (5th Cir. 1972); *Universal Underwriters Ins. Co. v. Gorgei Enterprises, Inc.*, 345 So.2d 412 (Fla. App. 1977). As early as 1982 we recognized in principle the propriety of awarding attorney's fees to prevailing claimants in property damage insurance cases. *Nelson v. West Virginia Public Employees Ins. Board*, W.Va. , 300 S.E.2d 86, 95-96 (Neely, J., concurring). We remain convinced that this is the proper rule, and thus reaffirm it today.

In *Aetna Casualty & Surety Co. v. Pitrolo*, W.Va. , 342 S.E.2d 156 (1986), we held in Syllabus Point 2:

[HN3] Where a declaratory judgment action is filed to determine whether an insurer [\*\*\*19] has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation.

We adopted this rule in recognition of the fact that, when an insured purchases a contract of insurance, he buys insurance -- not a lot of vexatious, time-consuming, expensive litigation with his insurer. As our opinion noted:

[HN4] Where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney's fees and expenses arising from litigation.

W.Va. , 342 S.E.2d at 160.

Perhaps due to the "bad faith" exception to the "American rule" governing awards of attorneys' fees, the parties devote considerable argument in this case to the

issue of whether State Farm's refusal to pay was in "good faith" or "bad faith." As Justice [\*\*\*20] Miller noted in *Aetna, supra*, "whether an insurer's refusal to defend was in good or bad faith is largely irrelevant once it has been established that the insurer breached its contract with its insured." 342 S.E.2d at 160. As stated in 7C J. Appleman, *Insurance Law and Practice*, § 4691 (Berdal ed. 1979):

After all, the insurer had contracted to defend the insured, and it failed to do so. It guessed wrong as to its duty, and should be compelled to bear the consequences thereof.

*Id.* at 282-83. Similarly, we consider it of little importance whether an insurer contests an insured's claim in good or bad faith. In either case, the insured is out his consequential damages and attorney's fees. [\*\*80] To impose upon the insured the cost of compelling his insurer to honor its contractual obligation is effectively to deny him the benefit of his bargain.

Accordingly, we hold today that whenever a policyholder must sue his own insurance company over any property damage claim, and the policyholder substantially prevails in the action, the company is liable for the payment of the policyholder's reasonable attorneys' fees. Presumptively, reasonable attorneys' fees [\*\*\*21] in this type of case are one-third of the face amount of [\*330] the policy, unless the policy is either extremely small or enormously large. This follows from the contingent nature of most representation of this sort and the fact that the standard contingent fee is 33 percent. But when a claim is for under \$20,000 or for over \$1,000,000 (to take numbers that are applicable in 1986) the court should then inquire concerning what "reasonable attorneys' fees" are.

It is now the majority rule in American courts that when an insurer wrongfully withholds or unreasonably delays payment of an insured's claim, the insurer is liable for all foreseeable, consequential damages naturally flowing from the delay. See Annot. 47 A.L.R. 3d 314 (1973). Unfortunately, awards of consequential damages currently turn on judicial interpretation of such malleable and easily manipulated concepts as "reasonable," "unreasonable," "wrongful," "good faith" and "bad faith." We believe that the interests of both the parties and the judicial system would be better served by the enunciation of a clear, [\*331] bright line standard governing the availability of consequential damages in property damages insurance [\*\*\*22] cases. Accordingly, we hold today that [HN5] when a policyholder substantially prevails in a property damage suit against an insurer, the policy-

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holder is entitled to damages for net economic loss caused by the delay in settlement, as well as an award for aggravation and inconvenience.

However, in allowing an award for aggravation and inconvenience, we do not intend that punitive damages be awarded under another sobriquet. For example, a large corporation with an in-place, organized collective intelligence that must litigate a claim for several years may suffer substantial net economic loss but little aggravation and inconvenience. On the other hand, a family of five that is required to live for four years in a trailer because an insurance company has declined to pay the fire policy on their \$200,000 house suffers little net economic loss but an enormous degree of aggravation and inconvenience. See *Jarrett v. E. L. Harper & Son, Inc.*, 160 W.Va. 399, 405, 235 S.E.2d 362, 366 (1977) (Neely, J., concurring). One major advantage of this rule is that it encourages a quick trial. In West Virginia there is little reason that property damage claims cannot be tried by a jury in less than six [\*\*\*23] months if both sides cooperate.

#### IV

We now consider the award of punitive damages. Generally, punitive damages are unavailable in an action for breach of contract unless the conduct of the defendant constitutes an independent, intentional tort. *Warden v. Bank of Mingo*, 176 W.Va. 60, 241 S.E.2d 679 (1985); *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W.Va. 87, 44 S.E. 520 (1903); *Horn v. Bowen*, 136 W.Va. 465, 67 S.E.2d 737 (1951); *Short v. Grange Mutual Casualty Co.*, 307 F. Supp. 768 (S.D. W.Va. 1969); *Cotton v. Otis Elevator Co.*, 627 F. Supp. 519 (S.D. W.Va. 1986). Accordingly, it is almost universally held that an insurer is not liable for punitive damages by its refusal to pay on a claim unless such refusal is accompanied by a malicious intention to injure or defraud. See Annot. 47 A.L.R.3d 314 (1973). We believe this is the better rule, and we clearly announce it today.

Accordingly, [HN6] punitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the company actually knew that the [\*\*\*24] policyholder's claim was proper, but [\*\*81] willfully, maliciously and intentionally denied the claim.<sup>2</sup> We intend this to be a bright line standard, highly susceptible to summary judgment for the defendant, such as exists in the law of libel and slander, or the West Virginia law of commercial arbitration. See, e.g., *N. Y. Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) and *Board of Education v. Miller*, 160 W.Va. 473, 236 S.E.2d 439 (1977). Unless the policyholder is able to introduce evidence of inten-

tional injury--not negligence, lack of judgment, incompetence, or bureaucratic confusion--the issue of punitive damages should not be submitted to the jury. Furthermore, a willingness to settle a case of alleged arson can no longer be used as evidence of "bad faith" because the concept of "bad faith" short of actual malice no longer has any place in the law of property damage insurance cases. In fact, to make the matter entirely explicit, an offer of settlement can never be used to show "actual malice" nor be used against an insurance carrier in any way.

2 One example of "actual malice" would be a company-wide policy of delaying the payment of just claims through barraging the policyholder with mindless paperwork. For example, in a claim for household contents in a burned out house, the company should simply pay the face amount of the policy. Since the companies themselves often *require* a certain level of insurance on contents, it shows actual malice to require the policyholder to fill out form after form and argue for months over what, in nearly every case, is a foregone conclusion. Here the actual malice is a desire to keep millions of dollars in claims money at interest within the company. But the same reasoning, of course, would not apply to the fluctuating inventory of an insured warehouse or any other situation where it is reasonable to assume that the value of the insured property -- contents of a jewelry store, for example -- will fluctuate seasonally and the annual premium has been calculated accordingly.

[\*\*\*25] We do not believe that the plaintiffs presented sufficient evidence of malicious intent to injure or defraud to justify the punitive damages awarded below. Although there was some evidence that the company began its investigation with a preconceived disposition to deny the claim, that disposition did not rise to the level of malice that we have just articulated. Accordingly, we reverse the award of punitive damages granted below.

Our reading of the cases throughout the United States on bad faith settlement leads us to conclude that the result that we have just articulated concerning attorneys' fees and damages for economic loss and inconvenience are what many other courts have been trying to achieve by indirect means. But by achieving these desirable results through the *ad hoc* manipulation of highly subjective criteria, the rules have become unpredictable and confusing. Voluntary settlements (which are in everyone's interest) are best encouraged by the articulation of clear, concise, bright line rules.

Accordingly, for the reasons set forth above the judgment of the Circuit Court of Mason County is re-

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versed in part and affirmed in part, and the case is re-  
manded to the circuit [\*\*\*26] court for entry of an ap-  
propriate order.



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**J. D'Amico, Inc. v. City of Boston & others <sup>1</sup>**

- 1 The other defendants are Harold R. Pfeffer and Mary L. Pfeffer and General Accident Fire and Life Assurance Corporation, Ltd.

[NO NUMBER IN ORIGINAL]

Supreme Judicial Court of Massachusetts

345 Mass. 218; 186 N.E.2d 716; 1962 Mass. LEXIS 682

November 5, 1962, Argued

December 7, 1962, Decided

**PRIOR HISTORY:** [\*\*\*1] Suffolk.

Bill in equity filed in the Superior Court on March 28, 1960.

The suit was heard by *O'Connell, J.*

**LexisNexis(R) Headnotes*****Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings***

[HN1] The term "accident" should be given its ordinary meaning as denoting an unexpected, undesigned, and unintended happening or a mishap and as including an event which, according to the common understanding of people in general, would rightly be considered as an accident.

***Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > General Overview***

[HN2] Doubts about ambiguous insurance policy provisions are to be resolved against the insurance company.

**COUNSEL:** *Philander S. Ratzkoff* for the defendant General Accident Fire and Life Assurance Corporation, Ltd.

*Francis V. Matera* for the plaintiff.

*Thomas P. Russell (Gilbert F. Dillon with him)* for the defendants Harold R. Pfeffer & another.

**JUDGES:** Wilkins, C.J., Spalding, Whittemore, Cutter, Kirk, & Spiegel, JJ.

**OPINION BY:** CUTTER**OPINION**

[\*219] [\*\*717] The plaintiff (D'Amico) seeks a declaration that the defendant General Accident Fire and Life Assurance Corporation, Ltd. (General) is bound under an insurance policy issued by it to defend D'Amico against claims of two defendants named Pfeffer, asserted by them (as plaintiffs) in an action in the Superior Court (Suffolk, Law No. 531,446). The case was heard in the Superior Court upon a statement of "all the facts material to the issues." The trial judge concluded that the insurance policy covered "the damages claimed by the . . . Pfeffers" and that General is bound to defend D'Amico in the Superior Court action. A final decree made declarations in accordance with these conclusions. General appealed.

On August 6, 1957, D'Amico made a [\*\*\*4] contract with the city of Boston "for the widening and paving of" Burley Street. In October, 1957, D'Amico's employees started work "as directed by the engineer . . . for the [c]ity . . . [who] established the side line on Burley Street and set stakes for D'Amico to follow." D'Amico then "excavated to the line . . . set by the engineer in accordance with the line of taking by eminent domain, leaving a vertical wall of earth varying in height from . . . [zero] to . . . [six] feet above . . . the street adjoining [\*\*718] the property of the Pfeffers [who owned two

lots on Burley Street]. There were three large trees near the excavation located on the Pfeffer land . . . . Due to the . . . excavation along the line established by the engineer's stakes . . . roots of the trees . . . were uncovered. The [c]ity engineer determined that . . . the trees and the vertical wall . . . [were] unsafe and . . . restake[d] another line northerly of the original line and [\*220] ordered D'Amico's employees to cut the vertical bank back at 45 degree and to remove the trees. It is disputed whether . . . D'Amico had knowledge that the restaked area was outside the eminent domain [\*\*\*5] taking and whether . . . [the] Pfeffers gave permission to the [c]ity of Boston to enter upon the restaked area. D'Amico . . . [cut] back the bank . . . [and cut] down the trees on the Pfeffers' land . . . . [D'Amico's] work . . . under the contract was . . . accepted and D'Amico was paid by the [c]ity . . . for this work in accordance with the unit price established under its contract . . . ."

About one year later D'Amico and the city were made defendants in the action at law, mentioned above, in which the Pfeffers claim "damages caused by the alleged unlawful entry upon their land and the wrongful cutting down and carrying away of three trees and excavating and carrying away . . . earth and fill." Count 2 of the declaration in this action seeks treble damages under *G. L. c. 242, § 7*.<sup>2</sup>

2 *Section 7* provides that a person "who without license wilfully cuts down . . . trees . . . on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only."

[\*\*\*6] General "had issued a policy of insurance known as a Manufacturer's and Contractor's Schedule Liability Policy to . . . D'Amico."<sup>3</sup> On November 27, 1958, General "wrote a so-called 'reservation of rights' letter to D'Amico in which it proffered to defend the case subject to its right to disclaim later . . . . D'Amico did not object to this arrangement. . . . [O]n December 23, 1959, counsel for General . . . advised D'Amico's . . . counsel . . . that coverage was being disclaimed . . . and that General . . . was going to withdraw . . . ." Thereafter D'Amico's own [\*221] counsel entered his appearance. The law action has not been tried.

3 The contract between D'Amico and the city required D'Amico to maintain during the life of the "contract such . . . [p]roperty [d]amage [i]nsurance as shall protect . . . [it] from claims

for property damage, which may arise from operations under this contract . . . and the amount . . . shall be . . . not less than ten thousand . . . dollars for damage on account of any one accident and . . . not less than twenty thousand . . . dollars for damages on account of all accidents."

[\*\*\*7] The policy provided insurance "only with respect to . . . so many . . . coverages . . . as are indicated by specific premium . . . charges." Under coverage "B. Property Damage Liability" in division "1. Premises-Operations" was shown a premium. The description of hazards under "1. Premises-Operations" said merely, "See Schedule Attached." General agreed under coverage "B. Property Damage Liability" that it would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to . . . property . . . caused by accident and arising out of the hazards hereinafter defined" (emphasis supplied). Division "1. Premises-Operations" was defined as "[t]he . . . use of premises, and all operations."<sup>4</sup> Under the heading, "II Defense, [\*\*719] Settlement, Supplementary Payments," it was provided, "With respect to such insurance as is afforded . . . for property damage liability, the company shall: (a) defend any suit against the insured alleging such injury . . . and seeking damages on account thereof, even if such suit is groundless . . . . (b) . . . (2) pay all expenses incurred by the company, all costs . . . in any such [\*\*\*8] suit and all interest on the entire . . . judgment," subject to limitations not here relevant.

4 In an "Extension Schedule (Contractors)" separate premiums were shown against the following items, among others: #23. Street or Road Paving or . . . Surfacing . . . (clearing of right of way, earth or rock excavation, filling or grading . . . to be separately rated). 24. Contractors -- construction or erection -- executive supervisors exercising supervision through superintendents and foremen -- no direct supervision." Among "conditions" of the policy (see fn. 6, *infra*) was item 3 (c), "Assault and Battery. Under coverages A and B, assault and battery shall be deemed an accident unless committed by or at the direction of the insured." Condition 1 of the policy describes the "advance premium stated in the declarations . . . [as] an estimated premium only" and provides that "[u]pon termination of this policy, the earned premium shall be computed in accordance with the company's rules."

1. General contends [\*\*\*9] that "even if D'Amico committed the trespass under a mistake," the injury to the Pfeffers' property was not "caused by accident" and that consequently, it did not arise "out of hazards . . . defined"

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in the policy. "Accident," as used in a somewhat comparable [\*222] policy, has been said to be "a more comprehensive term than negligence, and in its common signification . . . [to mean] an unexpected happening without intention or design." See *Sheehan v. Goriansky*, 321 Mass. 200, 205, holding that liability arising out of wanton or reckless conduct, as opposed to wilful or intentional conduct, was within the "guest" coverage of a motor vehicle liability policy insuring against "liability . . . because of bodily injury . . . caused by accident." In *New England Gas & Elec. Assn. v. Ocean Acc. & Guar. Corp.* 330 Mass. 640, 643, 650-657, the "event insured against was the sudden and accidental deforming . . . of . . . [a] turbine," which seems to have been brought about by the missetting of certain springs about one year before the injury. This court said (pp. 651-653), "The coverage was not limited to accidental means as distinguished from accidental results . . . [\*\*\*10] . . . Although the setting of the springs was done voluntarily and knowingly by those who set them, they did not do so with any deliberate purpose or intent to damage the turbine. . . . [HN1] The term accident . . . should be given its ordinary meaning as denoting an unexpected, undesigned, and unintended happening or a mishap and as including an event which, according to the common understanding of people in general, would rightly be considered as an accident." Recovery was allowed. See *Dow v. United States Fid. & Guar. Co.* 297 Mass. 34, 38, where the insured's death from burns was caused by immersion in a bathtub of scalding water. "Doubtless the insured intended to turn on the water and . . . to get into the tub, but it is . . . highly improbable that he intended to immerse himself in scalding water. . . . [T]he jury could well find that the scalding resulted from unusual or unexpected heat in the water or from some slip, mistake or false judgment . . . as to the physical factors" and hence that it was accidental.

*Haynes v. American Cas. Co.* 228 Md. 394, arose under policy provisions closely similar to those in the present case. During excavation work a contractor [\*\*\*11] pointed out the property line within which work was to be done. His employees [\*223] by mistake encroached upon adjacent property and cut down forty-eight trees. In the circumstances the damage was held to have been "caused by accident." Despite the fact that the physical acts were intentional [\*\*720] and voluntary, they were viewed as causing damage unforeseen by the actor and hence within the insurance coverage. A somewhat comparable case is *Cross v. Zurich Gen. Acc. & Liab. Ins. Co.* 184 F. 2d 609, 610-611 (7th Cir.). There damage was held to have been "caused by accidents," where the insured's employees intentionally used acid in a solution for washing windows in a strength which caused unintended damage, in part at least because of insufficient precautions.<sup>5</sup> Cf. *Thomason v. United States*

*Fid. & Guar. Co.* 248 F. 2d 417, 419 (5th Cir.), but see Judge Rives's dissent at pp. 419-421.

5 Other cases dealing with what constitutes an "accident" are *Minkov v. Reliance Ins. Co.* 54 N. J. Super. 509, 512-515, *O'Rourke v. New Amsterdam Cas. Co.* 68 N. M. 409, 412-417, *Rex Roofing Co. Inc. v. Lumber Mut. Cas. Ins. Co.* 280 App. Div. (N. Y.) 665, 667, *Wolk v. Royal Indem. Co.* 27 Misc. 2d (N. Y.) 478. See *Knight v. L. H. Bossier, Inc.* 118 So. 2d 700, 702-703 (La. Ct. App.); *Messersmith v. American Fid. Co.* 232 N. Y. 161, 165-166; *Johnson Corp. v. Indemnity Ins. Co.* 7 N. Y. 2d 222, 227-229; Appleman, *Insurance Law and Practice*, § 4492. See also *Jernigan v. Allstate Ins. Co.* 269 F. 2d 353, 355-357 (5th Cir.); *Moore v. Fidelity & Cas. Co.* 140 Cal. App. 2d 967, 970-972. Cf. *C. Y. Thomason Co. v. Lumbermens Mut. Cas. Co.* 183 F. 2d 729, 732-733 (4th Cir.); *United Pac. Ins. Co. v. Schaecher*, 167 F. Supp. 506, 508-509 (N. D. Cal.); *Langford Elec. Co. Inc. v. Employers Mut. Indem. Corp.* 210 Minn. 289, 295-298.

[\*\*\*12] General places some reliance on cases holding that certain policies do not cover an insured for a deliberate and intentional assault upon another person. See *Sontag v. Galer*, 279 Mass. 309, 313; *Bowen v. Lloyds Underwriters*, 339 Mass. 627, 629. In the *Sontag* case, this court said, "We do not adopt the contention . . . that an injury is accidentally sustained merely because it may be accidental from the plaintiff's standpoint. It is the state of the 'will of the person by whose agency . . . [the injury] was caused' rather than that of the injured person which determines whether an injury was accidental. . . . [A]n injury caused by the *wilful and deliberate* act of the insured . . . is one for which the . . . company would not be liable . . . under the policy. The policy does not purport to protect [\*224] the insured from her own *intentional and malicious acts*" (emphasis supplied).

The assault cases do not require us<sup>6</sup> to treat D'Amico's trespass as "intentional and malicious." No fact agreed would warrant the conclusion that the trespass occurred with malice or intent to injure another. It could be inferred from the agreed facts that it was [\*\*\*13] based on a mishap or mistake of a type which in the words of the *New England Gas & Elec. Assn.* case (330 Mass. 640, 653) "according to the common understanding . . . would rightly be considered as an accident."

6 We give no weight, in interpreting the term "caused by accident," to § 3 (c) of the policy (see fn. 4, *supra*) providing that "assault and battery" under coverage B shall be deemed an accident in certain circumstances. This provision was proba-

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bly designed to avoid the principle of cases like the *Sontag* case, 279 Mass. 309. The reasons for the insurer's failure to make a similar explicit provision with respect to claims based on the different tort of trespass are wholly obscure. Trespass may occur from an intrusion by mistake (see Restatement: Torts, § 164; Prosser, Torts [2d ed.] § 17) even if it results from a voluntary act. See *United Elec. Light Co. v. Deliso Constr. Co.* 315 Mass. 313, 318. Cf. *Edgerton v. H. P. Welch Co.* 321 Mass. 603, 612-613. Such a trespass by mistake is distinguishable in quality from an intentional assault. Consequently, the presence of an explicit provision as to the latter and the absence of one as to the former does not seem to us of substantial significance.

[\*\*\*14] The authorities just cited lead us to the conclusion that trespass by D'Amico by mistake, or without actual intent to invade property upon which it knew it was not entitled to carry on work under its contract, would be "caused by accident" within the [\*\*721] policy. The declaration in the law action was broad enough (see *Berke Moore Co. Inc. v. Lumbermens Mut. Cas. Co.*, ante, 66, 70; cf. *Fessenden Sch. Inc. v. American Mut. Liab. Ins. Co.* 289 Mass. 124, 127-130; *Stout v. Grain Dealers Mut. Ins. Co.* 307 F. 2d 521, 524-525 [4th Cir.]) to permit the Pfeffers to recover for such a trespass. Accordingly, we hold that it was General's duty under the policy to defend D'Amico.

In reaching this conclusion we are aided by the principle that [HN2] doubts about ambiguous insurance policy provisions are to be resolved against the insurance company. See *Schroeder v. Federal Ins. Co.* 343 Mass. 472, 475. *Joseph E. Bennett Co. Inc. v. Fireman's Fund Ins. Co.* 344 Mass. 99, 103. It was open to General by explicit provision to [\*225] have excluded liability for trespass by mistake, although some question might then have arisen whether the policy, with [\*\*\*15] such an exclusion, would have satisfied the requirements of the city contract (see fn. 3, *supra*). The same principle of interpretation leads us to conclude that "clearing of right of way . . . [and] excavation" was not excluded from the coverage under item 23 of the extension schedule. Such work, we conclude, was comprised in the coverage for "street . . . surfacing." The highly ambiguous parenthetical matter in item 23 (see fn. 4, *supra*) we view as merely stating that a separate rate was to be charged for these operations if such operations were to be undertaken in connection with street surfacing. See *Crook v. Kalamazoo Sales & Serv. Inc.* 82 R. I. 387, 394. Cf. *Clauss v. American Auto. & Ins. Co.* 175 F. Supp. 641, 643-644 (E. D. Pa.). The circumstance (see fn. 4, *supra*), that the policy provided that the premiums shown on the declarations were to be "estimated" premiums only, lends sup-

port to our conclusion. This provision suggests that, if the work of street paving turned out unexpectedly to involve excavation, upon audit of the policy after the work was done, it would be open to General then to charge the correct premium, if it had not originally [\*\*\*16] been charged. If it had been General's intention to exclude excavation and clearing of right of way from the coverage, Item # 23, "Street or Road Paving," that should have been clearly expressed as an exclusion from coverage. See *MacArthur v. Massachusetts Hosp. Serv. Inc.* 343 Mass. 670, 672.

2. General asserts that *G. L. c. 175, § 47*, Sixth (b), as amended through St. 1945, c. 436, and St. 1951, c. 73, <sup>7</sup> prohibits the coverage for which D'Amico contends. Although (see *Everett v. Canton*, 303 Mass. 166, 169) a trespasser is a [\*226] "wrongdoer," we see in cl. Sixth no sufficient indication of any legislative intention that insurance companies shall not insure against property damage arising from trespass by mistake. Such a trespass is not within the statutory language, "deliberate or intentional crime or wrongdoing."

<sup>7</sup> Section 47 provides in part, "Companies may be incorporated . . . for the following purposes: -- . . . Sixth, To insure . . . (b) any person against legal liability for loss or damage . . . on account of any damage to property of another, except that no company may insure any person against legal liability for causing injury . . . by his deliberate or intentional crime or wrongdoing, nor insure his employer or principal if such acts are committed under the direction of his employer or principal . . ." See also *G. L. c. 175, § 150* (as amended through St. 1946, c. 250).

[\*\*\*17] 3. General asserts that in any event it is not bound to defend or indemnify D'Amico against liability for treble damages under *G. L. c. 242, § 7* (see fn. 2, *supra*). As already indicated, General is bound to defend D'Amico against the Pfeffers' claims under this section because their declaration in the law action asserts claims which may be found to have been "caused by accident." [\*\*722] "Of course, upon trial of the law action, it may be established that D'Amico (a) knew that the city was not authorized to disturb the Pfeffers' land and trees, and (b) proceeded to carry out the city engineer's instructions in wilful disregard of that knowledge. Cf. *Moskow v. Smith*, 318 Mass. 76, 78-79. It would then be open to General to contend that it has no obligation to indemnify D'Amico against the Pfeffers' claims. Because this record does not show the extent of D'Amico's knowledge, the trial judge was not, and we are not, in a position to declare the extent of General's obligation to indemnify D'Amico. <sup>8</sup> The final decree thus is too broad in declaring

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that General's policy "cover[s] the damages claimed by the . . . Pfeffers up to the limits of the insurance."

8 We refrain, in the absence of more nearly complete facts, from deciding whether circumstances may exist in which treble damages under § 7 could be recovered from D'Amico and in which it still could be found that the injury was caused by accident. Cf. *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F. 2d 823, 827 (4th Cir.).

[\*\*\*18] 4. The final decree is reversed and the case is remanded to the Superior Court for further proceedings consistent with this opinion. A new final decree is to be entered declaring (a) that General's policy affords coverage to D'Amico for the property damage caused by any trespass upon the Pfeffers' land committed by D'Amico by mistake and without design to cause tortious injury to the Pfeffers, and (b) that no determination can appropriately be made [\*227] on this record of the extent of General's obligation to indemnify D'Amico against liability for property damage inflicted by D'Amico if it shall be shown that D'Amico had knowledge (1) that the restaked area was outside the eminent domain taking and (2) that the Pfeffers had not given the

city permission to enter upon the restaked area. The new final decree shall embody the substance of par. 2 of the final decree here reviewed (declaring General's obligation to defend D'Amico in the law action). In the discretion of the Superior Court, (a) entry of a final decree after rescript may await the final determination of the issues in the law action or may be delayed until the issues in that action have been determined in further [\*\*\*19] hearings in this proceeding (see *G. L. c. 231A, § 1*, inserted by St. 1945, c. 582, § 1), or (b) in the final decree the Superior Court may retain jurisdiction to resolve any issues left open between General and D'Amico after disposition of the law action. In any event a suitable decree may be entered in the Superior Court to provide for the representation of D'Amico at General's expense (in connection with the determination of the issues raised in the law action) by counsel independent of General (see *Newcomb v. Meiss*, 263 Minn. 315, 322; cf. *Stout v. Grain Dealers Mut. Ins. Co.* 307 F. 2d 521, 523-525 [4th Cir.]) and for the payment by General of any expenses heretofore or hereafter caused to D'Amico by General's refusal to comply with its obligation to defend D'Amico. D'Amico is to have costs of this appeal. Costs in the Superior Court are to be in the discretion of that court.

*So ordered.*



3 of 5 DOCUMENTS

**Lumber Insurance Companies, Inc. v. Gerald Allen, Kathleen Allen, Kenneth Moore, Jane Moore**

Civil No. 91-715-B

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE**

*820 F. Supp. 33; 1993 U.S. Dist. LEXIS 5989*

May 5, 1993, Decided

May 5, 1993, Filed

**LexisNexis(R) Headnotes**

*Insurance Law > General Liability Insurance > Coverage > Accidents*

*Insurance Law > General Liability Insurance > Occurrences*

[HN1] The term accident is defined as an undesigned contingency, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be ejected. An insured's act is not an accidental contributing cause of injury when the insured actually intended to cause the injury that results, or when it is so inherently injurious that it cannot be performed without causing the resulting injury.

*Insurance Law > General Liability Insurance > Coverage > Accidents*

*Insurance Law > General Liability Insurance > Occurrences*

[HN2] An insured's intentional acts may be considered accidental if the insured did not intend to inflict injury, and the insured's intentional acts were not inherently injurious.

*Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend*

*Insurance Law > General Liability Insurance > Obligations > Defense*

[HN3] An insurer's duty to defend will be determined by whether the cause of action against the insured alleges

sufficient facts in the pleadings to bring it within the terms of the policy, even though the suit may eventually be found to be without merit.

**COUNSEL:** [\*\*1] For Plaintiff: Doreen F. Connor, Esquire.

For Defendants: Stephen Borofsky, Esquire, Pamela Albee, Esquire.

**JUDGES:** Barbadoro

**OPINION BY:** Paul Barbadoro

**OPINION**[\*33] **ORDER**

Lumber Insurance Company ("Lumber") has filed a declaratory judgment action seeking a determination that it has no obligation to defend or indemnify its insureds, Gerald and Kathleen Allen ("Allens"), in an underlying tort action brought against them by Kenneth and Jane Moore ("Moore"). In [\*34] this Order I rule on the parties' cross motions for summary judgment.<sup>1</sup>

1 The Allens joined in a motion for summary judgment filed by the Moores, who were originally named as codefendants. Because the Moores are no longer parties in this action, see Order dated April 2, 1993, I treat the Allens as moving parties in place of the Moores.

**I. FACTS**

### A. The Underlying Complaint

The Allens and the Moores own abutting properties in Tuftonboro, New Hampshire. The Complaint in the underlying action alleges that the Allens cut down trees and built a driveway on the Moores' [\*\*2] property without their permission. Although the Allens have an easement allowing them to build a driveway on the Moores' property, the driveway was allegedly constructed outside the easement area.

The underlying Complaint states two causes of action against the Allens. Count I alleges that the Allens are liable for negligent trespass and conversion. Count II alleges that the Allens violated *Section 539:1 of the New Hampshire Revised Statutes Annotated* by "willfully and unlawfully" cutting trees on the Moores' property.

### B. The Insurance Policy

When the events alleged in the underlying Complaint transpired, the Allens were insured under a homeowners insurance policy they had purchased from Lumber. The policy provides liability coverage for suits "brought against an insured for damages because of bodily injury or property damage caused by an occurrence." "Occurrence" is defined in the policy as "an accident, including exposure to conditions, which result during the policy period in: (a) bodily injury; or (b) property damage." The policy does not define the term "accident."

## II. DISCUSSION

Lumber argues that it has no duty to defend or indemnify the Allens because the [\*\*3] injuries for which the Moores are seeking compensation were not caused by an "accident." The Allens respond that Count I of the underlying Complaint plainly alleges accidental conduct because it claims that the Allens negligently caused the Moores' injuries. The Allens also argue that Count II alleges accidental conduct even though it seeks to hold them liable for "willful and unlawful" conduct, because the Allens are exposed to liability under Count II even if they cut the trees down on the Moores' property under a mistaken belief that they had the Moores' permission. In order to resolve this dispute, I must first determine the meaning of the term "accident" in the Allens' insurance policy and then apply the term to the causes of action alleged in the underlying Complaint.<sup>2</sup>

2 In ruling on these motions for summary judgment, I am guided by the following standard. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The burden is on the moving party to establish the lack of a genuine, material factual issue, *Finn v. Consoli-*

*dated Rail Corp.*, 782 F.2d 13, 15 (1st Cir. 1986), and the court must view the record in the light most favorable to the nonmoving party. *Caputo v. Boston Edison Co.*, 924 F.2d 11, 13 (1st Cir. 1991). However, once the moving party has made a properly supported motion for summary judgment, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (citing *Fed. R. Civ. P. 56(e)*).

### [\*\*4] A. The Meaning of "Accident"

In *Vermont Mut. Ins. Co. v. Malcolm*, the New Hampshire Supreme Court defined [HN1] the term accident as "an undesigned contingency, . . . a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be ejected." 128 N.H. 521, 523 (1986) (quoting *Guardian Indus. Inc. v. Fidelity & Casualty Co.*, 271 Mich. 12, 18-19, 123 N.W.2d 143, 147 (1963)). The Court went on to hold that "an insured's act is not an accidental contributing cause of injury when the insured actually intended to cause the injury that results . . . or when it is so inherently injurious that it cannot be performed without causing the resulting injury." *Id.* at 523-24. Applying [\*\*35] this test in *Malcolm* and subsequent cases, the Court rejected arguments that an insured's conduct was accidental where (i) the insured sexually assaulted a child, *id.* at 524; (ii) the insured wrongfully discharged an employee, *Jespersen v. United States Fidelity & Guaranty Co.*, 131 N.H. 257, 261, 551 A.2d 530 (1988); and (iii) the insured intentionally [\*\*5] signed conflicting purchase and sale agreements for the same property. *Fisher v. Fitchburg Mut. Ins. Co.*, 131 N.H. 769, 733, 560 A.2d 630 (1989). See also *King v. Prudential Prop. & Casualty Ins. Co.*, 684 F. Supp. 347, 349 (D.N.H. 1988) (intentional kidnapping not covered under a policy limiting coverage to unexpected and unintended damage). Implicit in the Court's rulings, however, is the recognition that [HN2] an insured's intentional acts may be considered accidental if the insured did not intend to inflict injury and the insured's intentional acts were not inherently injurious. *Malcolm*, 128 N.H. at 524; *Jespersen*, 131 N.H. at 260.

The New Hampshire Supreme Court has not determined whether an insured's trespass or conversion will be considered accidental if the insured engages in these acts because of a mistaken belief that his conduct was authorized. However, applying the *Malcolm* two-part test, I conclude that the New Hampshire Supreme Court would determine that the insured's conduct was accidental in such cases if the insured's mistaken belief has a basis in fact. The [\*\*6] first part of the *Malcolm* test

focuses on the insured's subjective intentions and provides that the insured's conduct will not be considered accidental if he intends to injure another by his conduct. *128 N.H. at 523*. A mistaken trespass or conversion easily survives this part of the test because an insured has no intention to injure a property owner if he believes that he has an owner's permission when he enters the property and removes what the owner later claims was wrongly converted.

The second part of the *Malcolm* test focuses on the insured's conduct rather than his subjective intentions. If injury will certainly follow from the insured's conduct, his conduct will not be considered accidental, even if he has no intention to injure. Applying this part of the test to intentional but mistaken conduct, the issue becomes whether the facts would support a belief that the conduct was authorized. If authorized conduct does not injure and the facts would support a belief that the conduct was authorized, injury is not certain to follow from the insured's acts. Thus, an insured's intentional but mistaken trespass or conversion also will survive this [\*\*7] part of the test if the insured's mistaken belief has a basis in fact, because it cannot be said under such circumstances that the insured's conduct will necessarily result in injury.

Two contrasting examples will illustrate the application of the *Malcolm* test to intentional but mistaken conduct. If an insured sets out to clear his property of trees and he inadvertently strays across the unmarked property line and cuts down a neighbor's tree, his conduct would be accidental under *Malcolm*, because he had no intention to injure and, when viewed from the insured's standpoint, his conduct is not certain to injure his neighbor. However, if an insured decides to cut down a tree on property which is clearly marked with no trespassing signs, the insured could not claim that his conduct was accidental under *Malcolm* even if he lacked an intention to injure because injury will certainly follow from the insured's acts.<sup>3</sup>

3 Lumber argues that cutting trees is inherently injurious regardless of the surrounding circumstances because injury necessarily will result from cutting trees on someone else's property. Lumber misunderstands the nature of the injury that will satisfy *Malcolm*. Such injury results from tree cutting only if the trees belong to someone else and permission to cut has not been obtained from the owner. Thus, tree cutting is not certain to result in injury unless the trees are cut under circumstances which would not support a belief that the tree cutting was authorized.

[\*\*8] In reaching this conclusion, I note that courts in other jurisdictions have held under various types of insurance policies that an insured's intentional

acts will be covered if they are committed under a mistaken belief that the acts were authorized. *See, e.g., Vermont v. Glens Falls Ins. Co.*, 137 Vt. 313, 315-16, 404 A.2d 101, 104 (1979) (construing a policy covering damages neither expected [\*\*36] nor intended, the court held that an insured sheriff was entitled to coverage with respect to a wrongful levy claim where the sheriff had a mistaken belief that he was authorized to levy on the property he seized); *Ferguson v. Birmingham Fire Ins. Co.*, 254 Ore. 496, 500-03, 460 P.2d 342, 344-46 (1969) (construing a policy with an exclusion for intentionally caused property damage, the court held that insured was entitled to a defense for a damage claim caused by his contractor's trespass where the trespass was caused by a mistake concerning the location of a property line); *York Indus. Center, Inc. v. Michigan Mut. Liab. Co.*, 271 N.C. 158, 161-64, 155 S.E.2d 501, 504-06 (1967) [\*\*9] (construing a policy covering damages neither expected nor intended, the court held that an insured property owner was entitled to coverage for trespass damages resulting from a mistake concerning the location of the property line); *J. D'Amico, Inc. v. Boston*, 345 Mass. 218, 221-26, 186 N.E.2d 716, 719-21 (1962) (construing an accident policy, the court held that insured was entitled to a defense on a trespass claim where trespass was result of mistake); *Patrick v. Head of Lakes Coop. Elec. Ass'n*, 295 N.W.2d 205, 207-08 (Wis. App. 1980) (construing a policy covering damages neither expected nor intended, the court held that the insured was entitled to coverage on trespass claim where the insured had a mistaken belief that it had authority to cut trees); *Continental Casualty Co. v. Platsburg Beauty & Barber Supply, Inc.*, 48 A.D.2d 385, 386-87, 370 N.Y.S.2d 225, 226-27 (1975) (construing an occurrence policy, the court held that insured was entitled to a defense against a wrongful levy claim where the insured claimed the levy was the result of a mistake); *Firco, Inc. v. Fireman's Fund Ins. Co.*, 173 Cal. App. 2d 524, 525-29, 343 P.2d 311, 312-14 (1959) [\*\*10] (construing an occurrence policy, court held that insured was entitled to a defense for a trespass claim resulting from unauthorized cutting of trees because liability might be found even though the insured operated under a mistaken belief that he had authority to cut the trees). Although other courts have reached a contrary conclusion, *see, e.g., Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.*, 915 F.2d 306, 308-11 (7th Cir. 1990) (and cases cited therein), I do not find these decisions persuasive because they fail to acknowledge the premise recognized by the New Hampshire Supreme Court that intentional acts will be considered accidental if they are not intended to cause injury and are not inherently injurious.

Finally, I find support for my decision in the accepted New Hampshire rule that where language in an insurance policy is ambiguous and one reasonable inter-

pretation favors coverage, the New Hampshire Supreme Court will adopt the interpretation favoring coverage. *Coakley v. Maine Bonding a Casualty Co.*, No. 90-401, 1992 N.H. LEXIS 184, at \*12-13 (Nov. 25, 1992); *Trombly v. Blue Cross/Blue Shield of N.H.-V.T.*, 120 N.H. 764, 771-72, 423 A.2d 980 (1980). [\*\*11] Lumber chose in the present case to leave the term "accident" undefined in its policy. Standing undefined, the term has many possible meanings, some of which would allow coverage for intentional acts committed under a mistaken belief of authorization and some of which would not. Had Lumber wished to limit coverage for intentional acts, it could easily have done so either by providing an appropriate definition of "accident" or by adding an express exclusion for intentional conduct. Since the New Hampshire Supreme Court has not issued a decision defining the term "accident" in this context, and since the term is ambiguous, it is appropriate under New Hampshire law to adopt an interpretation that favors coverage.

#### B. Analysis of the Complaint

In New Hampshire, [HN3] an insurer's duty to defend will be "determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the terms of the policy, even though the suit may eventually be found to be without merit." <sup>4</sup> *United States Fidelity & Guaranty Co. v. Johnson Shoes, Inc.*, 123 N.H. 148, 151-52, [\*37] 461 A.2d 85 (1983). Accordingly, I confine my analysis to the facts [\*\*12] alleged in the underlying Complaint. If I determine from the Complaint that the Allens are exposed to potential liability under any theory for which Lumber's policy provides coverage, Lumber will have an obligation to defend the entire action as long as the covered cause of action remains a viable theory in the case. *Titan Holdings Syndicate, Inc. v. Keene*, 898 F.2d 265, 269 (1st Cir. 1990).

4 The only exception to this rule is inapplicable here because Lumber's duty to defend can be determined solely from the underlying Complaint. *See M. Mooney Corp. v. United States Fidelity & Guaranty Co.*, No. 91-45, 136 N.H. 463, 618 A.2d 793, 1992 N.H. LEXIS 191, at \*8 (Dec. 3, 1992). I also note that Lumber has repeatedly urged me to confine my review to the facts alleged in the Complaint.

Count II of the underlying Complaint pleads a violation of *Section 539:1 of the New Hampshire Revised Statutes Annotated*. In order to be liable under *Section 539:1*, a person must act "willfully and unlawfully." [\*\*13] A person cannot act willfully and unlawfully under *Section 539:1* unless he acts knowingly and not through accident or mistake. *See Hynes v. Whitehouse*,

120 N.H. 417, 420, 415 A.2d 876 (1980). Thus, the Allens cannot be found liable under Count II unless the Moores prove that the Allens knew that they had no right to cut down the Moores' trees. Such conduct necessarily involves an intention to injure. Therefore, it is not accidental under *Malcolm* and the Allens have no right to a defense or indemnification with respect to Count II of the underlying Complaint.

Count I presents a more difficult issue. This count alleges that the Allens are liable for negligent trespass and conversion. Lumber argues that New Hampshire law does not recognize such claims. *See, e.g., Moulton v. Groveton Papers Co.*, 112 N.H. 50, 54, 289 A.2d 68 (1972); *Titan Holdings Syndicate, Ins.*, 898 F.2d at 272; *Muzzy v. Rockingham County Trust Co.*, 113 N.H. 520, 523, 309 A.2d 893 (1973). Accordingly, Lumber contends that I should disregard the Moores' attempt to characterize Count I as a negligence claim and treat it as a claim [\*\*14] for intentional trespass and conversion, which Lumber argues cannot be considered accidental within the meaning of its policy. *See, e.g., Fisher*, 131 N.H. 769 at 772-74, 560 A.2d 630; *Allstate Ins. Co. v. Stamp*, 134 N.H. 59, 63, 588 A.2d 363 (1991).

Even if I accepted Lumber's argument that Count I must be construed as pleading an intentional tort, I cannot accept its contention that it has no duty to defend. Unlike Count II, which could only be proved if the evidence demonstrates that the Allens knew that they had no right to cut down the Moores' trees, the Allens could be held liable for intentional trespass or conversion even if the evidence proves that they cut down the Moores' trees under a reasonable but mistaken belief that their actions were authorized. *See, e.g., Restatement (Second) of Torts*, § 164.cmt. a (1965) ("if the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor"); *see also id.* § 222 A. Accordingly, because I have determined that the term "accident" [\*\*15] in Lumber's policy includes intentional conduct, such as trespass and conversion, which is undertaken because of a mistaken belief grounded in fact that the conduct was authorized, I conclude that Lumber has an obligation to defend the Allens in the present action.

### III. CONCLUSION

The Motion for Summary Judgment filed originally by the Moores and joined in by the Allens (document no. 8) is granted to the extent that it seeks a ruling that Lumber is obligated to provide a defense in the underlying action. <sup>5</sup> Lumber's Motion for Summary Judgment (document no. 11) is granted to the extent that it seeks a judgment that it has no obligation to defend or indemnify

the Allens with respect to Count II of the underlying Complaint. Neither party has provided a sufficient record for me to determine whether or not the undisputed material facts establish that Lumber has a duty to indemnify the Allens as to Count I of the Complaint as a matter of law. Accordingly, I deny both [\*38] parties' Motions for Summary Judgment to the extent that they seek judgment with respect to Lumber's duty to indemnify the Allens on Count I of the underlying Complaint.

5 In a footnote to a supplemental memorandum of law filed after oral argument, Lumber suggests for the first time that the motion for summary judgment originally filed by the Moores

and joined in by the Allens seeks summary judgment only with respect to Lumber's claim that the Allens' conduct was not accidental. Lumber's argument on this point is contradicted by the plain language of the motion which seeks judgment as a matter of law on all issues.

[\*\*16] SO ORDERED.

Paul Barbadoro

United States District Judge

May 5, 1993



111 of 137 DOCUMENTS

**N. W. Electric Power Cooperative, Inc., a Missouri Corporation, Respondent, v.  
American Motorists Insurance Company, an Illinois Corporation, Appellant**

No. 25203

Court of Appeals of Missouri, Kansas City District

451 S.W.2d 356; 1969 Mo. App. LEXIS 522

December 1, 1969

**PRIOR HISTORY:** [\*\*1] From the Circuit Court of Clinton County

Civil Appeal From Action for Damages (Monetary Recovery)

Judge John M. Yeaman

**DISPOSITION:** Affirmed.

LexisNexis(R) Headnotes

***Insurance Law > General Liability Insurance > Coverage > Accidents***

[HN1] It is to the cause or means of an act to which the court must look, not the result, to determine if it was accidental.

***Insurance Law > General Liability Insurance > Coverage > Accidents***

[HN2] Whether or not an injury is accidental under a liability policy provision is to be determined from the standpoint of the person injured. That is, it is the injury and not legal liability of the insured, which must have been caused by accident.

***Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers***

***Insurance Law > General Liability Insurance > Coverage > Accidents***

***Labor & Employment Law > Employer Liability > Third Party Insurers***

[HN3] "Accident" is a word of varied meaning and of no fixed legal signification. When standing alone and unqualified in a policy of indemnity insurance, it is ambiguous, and the meaning of the word most favorable to the insured should be accepted.

***Civil Procedure > Trials > Opening Statements > General Overview***

***Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > Noncommercial Insureds***

[HN4] An insurance policy is an instrument of practical uses. Its very quiddity is the promise of indemnity it contains. If reasonably possible, it will be construed to furnish the designed protection, not to deny it. The policy provisions should be resolved, as well, in the light of those reasonable expectations and purposes of the average businessman in making the contract.

***Insurance Law > Claims & Contracts > Policy Interpretation > General Overview***

[HN5] While ordinarily, the mere designation of a policy as a "comprehensive general liability policy" does not have the effect of affording a measure of protection broader than the expressed provisions of the policy, it becomes proper to consider that designation in arriving at the intention of the parties.

***Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings***

***Insurance Law > Claims & Contracts > Policy Interpretation > Plain Language***

***Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > Reasonable Person***

[HN6] The understanding of an ordinary man is the standard to be used in construing an insurance policy. Words used in them are to be given effect in their plain, ordinary and popular sense.

***Insurance Law > General Liability Insurance > Coverage > Accidents***

[HN7] To the average person, that which occurs unexpectedly is called an accident. Also, an event, which is brought about intentionally, is not an accident. In its more general sense the term "accident" does not exclude human fault called negligence, but is recognized as an occurrence arising from the carelessness of men, and the fact that the negligence of the person injured contributed to produce the result will not make it any less an accident. When used without restriction in liability policies, "accident" is held not to exclude injuries resulting from ordinary, or even gross, negligence. It does, however, exclude injuries resulting from the insured's wilful misconduct. The court adopts as the definition of "injury to or destruction of property caused by accident" to mean injury to or destruction of property not intentionally inflicted, but caused by the negligence of the insured.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN8] Judgments, including judgments by agreement, are conclusive of matters adjudicated and are not subject to collateral attack except upon jurisdictional grounds. Under the rule of collateral estoppel and res judicata even though the judgment may have been erroneous, the issues may not be relitigated.

**JUDGES:** Shangler, J. Howard, P.J. concurs. Hall, S.J. concurs. Cross, J., not participating.

**OPINION BY:** SHANGLER

**OPINION**

[\*358] Plaintiff N.W. Electric Power Cooperative, Inc., a supplier of electrical power with operations in Missouri and Arkansas, was insured by defendant American Motorists Insurance Company against liability imposed upon it by law for damages because of injury to property "caused by accident". This action, the culmination of a dispute which has beset the parties for some

time, represents the second appeal to this court by defendant from judgments, in each instance of \$2,862.48, in favor of plaintiff. In those actions, plaintiff sought, and recovered, certain costs incurred when defendant refused to defend a suit brought against plaintiff by Donald C. Pharis and Helen E. Pharis, and then refused to satisfy the judgment which ensued. Although we recount only those salient facts necessary to a rational discussion of the issues presented, we must recede somewhat in time to do so. Our previous opinion is reported in *Northwest* [\*2] *Electric Power Co-operative, Inc. v. American Motorists Insurance Company, Mo. App., 346 S.W.2d 701.*

In 1951, Donald C. Pharis and Helen E. Pharis, his wife, granted plaintiff an easement for the construction of a transmission line over their land. After it had been erected, they sued plaintiff Cooperative for damages, alleging in their petition that the line had been located in the middle of their tract rather than across a corner of it as plaintiff had represented it would do. The Pharises claimed damage had been done to their trees, crops and land and sought both actual and punitive damages. Defendant American Motorists initially refused to defend the Cooperative in that action, disclaiming that the damages were "caused by accident", but then agreed to defend under a reservation of rights. Plaintiff Cooperative became distrustful of the fitful interest manifested by the defendant insurer in the defense of the Pharis action, and so assumed its defense. In any event, it had learned through defendant insurer's attorney that defendant did not intend to satisfy any judgment which might be obtained by Mr. and Mrs. Pharis. Thereafter, the Pharis petition was amended to allege the [\*3] grant of an easement 100 feet wide to the Cooperative and that in the construction of the transmission line, "defendant accidentally and negligently got off the right of way granted to defendant", causing damage to the Pharis land, trees, etc. The Cooperative, in its answer, admitted the execution of that easement and construction of the transmission line. Judgment was entered for Mr. and Mrs. Pharis for \$1,750.00, and was satisfied by the Cooperative.

Thereupon, plaintiff sued and recovered a judgment against defendant for \$2,862.48 as reimbursement for expenses attending the defense of the Pharis suit and for the satisfaction of that judgment. The appeal from that judgment was to this court. We reversed, because "(the) (Pharis) [\*359] judgment upon which plaintiff relied does not decide the precise fact that determines coverage, i.e., whether or not the damage was caused by accident".

The case was retried to the court upon remand. Numerous exhibits used in the previous trial were received in evidence as well as the deposition of Mr. Pharis and the greater portion of the transcript of the prior trial. Additionally, the plaintiffs presented the testimony of

Jim Galligher, [\*\*4] plaintiff's field engineer, and that of Mr. Pharis himself. Evidence was adduced tending to establish the nature of the occurrence occasioning plaintiff's damages. Plaintiff once again had judgment for \$2,862.48 and defendant once again appeals.

Defendant contends the judgment is fallible in two respects. Firstly, that there was no evidence that plaintiff's damages were caused by accident within the meaning of the insurance policy. Secondly, that there was a failure of proof as to the damages sustained by the Pharises.

The evidence bearing directly upon the manner in which the damage to the Pharis property was occasioned is limited to the testimony of Mr. Galligher, plaintiff's field engineer, and of Mr. Pharis himself. Mr. Galligher testified from several drawings which depicted a well-defined right-of-way over the Pharis property. Mr. Pharis testified that, as the right-of-way was located on "extremely rough ground", he permitted the Cooperative access to it by means of his private road. In constructing the transmission line, the Cooperative used many types of heavy equipment. In the course of their use, they went beyond the confines of both the private road and the 100 [\*\*5] feet easement. The land was so extensively damaged thereby as to still be visible "twelve or fifteen years later". Trees standing outside the range of the easement were felled; his gates and fences were also damaged. This evidence established the Cooperative's negligence, as broadly pleaded, and a technical trespass, as well. It remains to be determined, howsoever designated, whether these acts of the Cooperative are comprehended within the policy term "accident".

The policy in question is one of "Comprehensive General Liability". The provision of our immediate concern reads:

"Coverage B-Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, *caused by accident.*" (Emphasis added)

Defendant's first major contention is, in effect, that whatever damages the Pharises may have suffered, they were not "caused by accident" within the policy provisions. This argument contains three cognate components: (1) "Accidental means" and "accidental cause" are synonymous, and "caused by accident" is equivalent to both. [\*\*6] <sup>1</sup> Therefore, [HN1] it is to the cause (or means) of an act to which we must look, not the result, to

determine if it was accidental. <sup>2</sup> (2) It follows, it is further argued, that even if the result be unexpected, if it attends the doing of an intentional act, it cannot be accidentally caused. <sup>3</sup> Neither may an effect which is the natural and probable consequence of a voluntary act be said to have been brought about by accidental [\*\*360] means. <sup>4</sup> (3) Defendant's ultimate deduction is that since the damage suffered by the Pharises was caused by a "voluntary intentional act" of plaintiff in moving off the permitted way and easement, "it was not caused by accident". The fortuity that such "voluntary intentional act" may have had unexpected and detrimental results for the Pharises makes no difference. These three conjunctive points are so subtly interrelated that a consideration of any one necessarily involves the consideration of the other two.

1 *Caldwell v. Travelers Insurance Company, Mo., 305 Mo. 619, 267 S.W. 907* (accident insurance policy); *Pope v. Business Men's Assurance Co., Mo. App., 235 Mo. 619, 131 S.W.2d 887* (accident insurance policy).

[\*\*7]

2 *Murphy v. Western and Southern Life Insurance Co., Mo. App., 262 S.W.2d 340* (accident insurance policy); *United States Mutual Accident Association v. Barry, 131 U.S. 100, 9 S. Ct. 755, 33 L. Ed. 60* (accident insurance policy).

3 *Caldwell v. Travelers Insurance Co., supra*; *Aubuchon v. Metropolitan Life Insurance Co., (8 C.C.A.), 142 F.2d 20* (life insurance policy -- double indemnity).

4 *Callahan v. Connecticut General Life Ins. Co., Mo., 357 Mo. 187, 207 S.W.2d 279* (life insurance -- double indemnity).

It will be noted that the Missouri authorities cited in support of these positions all involve policies of accident insurance or of life insurance with double indemnity provisions. The distinctions such cases make and the definitions they contain have generally not been applied in the construction of liability policies. *Chemtec Midwest Serv. Inc. v. Insurance Company of North America, (U.S.D.C., W.D. Wis.), 288 F. Supp. 763, 8*; Annotation, 166 A.L.R. 469. To hold otherwise would be to introduce factitious considerations of ends and means, distinctions "impossible of proper application", [\*\*8] inevitably tending to absurd solutions. *White v. Smith, Mo. App., 440 S.W.2d 497, 506*; Mr. Justice Cardozo's dissent in *Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491, 499, 54 S. Ct. 461, 3, 78 L. Ed. 934, 938*.

To support its conjunctive argument that the Pharises' damages were not "caused by accident" because they were "the natural consequences" of the acts of the Cooperative's employees, and were thus readily foreseeable, defendant relies principally on Neale Const. Co.,

Inc. v. United States Fidelity & Guaranty Co. (10 C.C.A.), 199 F.2d 591 (1952) and *Hardware Mutual Cas. Co. v. Gerrits (Florida)*, 65 S.2d 69. In Neale, the court construed "accident" as used in a liability policy and as declared by the state courts of Kansas. It was there held that the breaking of certain wires as a result of defective spinning by a contractor was not an "accident" because "the natural and ordinary consequence(s) of a negligent act do not constitute an accident". In *Hutchinson Water Co. v. United States Fidelity and Guaranty Co.* (10 C.C.A.), 250 F.2d 892, 894 (1957), however, the same court poignantly acknowledged the virtual *reductio ad absurdum* which the holding in Neale had made [\*\*9] of the role of liability insurance policies containing such a provision.

"Apparently we did not contemplate whether this logic would lead us. For, if the policy did not cover the loss because the natural and probable consequences of the negligent act did not constitute an accident, then by the same logic, there would be no liability where the damage was the unexpected, hence unforeseen result of the negligent act. In the first instance, the damage would be foreseeable and therefore not accidental; in the latter instance, the damage would not be foreseeable and hence no liability upon the insured for his negligent acts. In either instance, the insurer would be free of coverage and the policy would be rendered meaningless."

The rationale in the Gerrits case, also cited by defendant on this point, must be deemed to be repudiated by the holding in *Hutchinson Water Co. v. United States Fidelity and Guaranty Co.*, supra. To ascribe to "accident" this meaning defendant contends for "would manifestly defeat the purpose of the policy which is to protect against liability . . .". *Minkov v. Reliance Insurance Co. of Phila.*, 54 N.J. Super. 509, 514-15, 149 A.2d 260; *Haynes v. American* [\*\*10] *Casualty Co.*, 228 Md. 394, 179 A.2d 900, 903; *Aerial Agricultural Service of Montana, Inc. v. Till*, (U.S.D.C., N.D. Miss.) 207 F. Supp. 50, 55.

In support of its third conjunctive argument that the Pharises' damages, although unexpected, were the result of the Cooperative's [\*\*361] intentional act and therefore not caused by accident, defendant cites *Thomason v. United States Fidelity and Guaranty Company* (5 C.C.A.), 248 F.2d 417, 419. That case bears a resemblance to our own. A bulldozer operator erroneously failed to observe iron stakes which marked the property

line, went beyond them, and damaged the adjoining property. The insurer was held not to be liable for the damages to the property as (at page 419) "the injury was the natural result of the (voluntary and intentional) act". Neither was there any insurance "against liability for damages caused by mistake or error". In a dissent, which has become as celebrated as the principal opinion, Judge Rives retreated significantly from the majority's position (pps. 420-421):

"(The) fact that an injury is caused by an intentional act does not preclude it from being caused by accident if in that act 'something unforeseen, unusual [\*\*11] and unexpected occurs which produces the result.'"

Yet, the distinction the dissent attempts is too recondite, and one difficult of practical application. It continues to require, as does the majority, that the means employed be accidental for injury to have been "caused by accident".

The sounder and more generally accepted view, however, is that "[HN2] whether or not an injury is accidental (under such a liability policy provision) . . . is to be determined from the standpoint of the person injured". *Cross v. Zurich General Accident & Liability Ins. Co.*, supra, p. 611 (7th Cir.); *Fox Wisconsin Corp. v. Century Indemnity Co.*, 219 Wis. 549, 263 N.W. 567. That is, it is the injury and not legal liability of the insured which must have been "caused by accident".

In *Haynes v. American Casualty Co.*, supra, damage was caused when the insured contractor's employees, contrary to directions, encroached upon another's land and felled some trees. The court held that such damage was "caused by accident" within the meaning of the contractor's liability policy, despite the intentional nature of the contractor's employees' acts in cutting the trees. The insurer relied on the holding in the [\*\*12] *Thomason* case and, additionally, made all those other arguments here presented. The court stated, at p. 903:

"In the instant case there was a technical trespass, of course, through the unwitting and heedless act of the insured's employees in going upon the land of another, contrary to the insured's instructions, and cutting the trees, but here, . . . it cannot be contended that injury to the property of another was intentional. To argue that, because the means employed were not accidental, the resulting damage cannot be construed as being 'caused by accident', though the damage was in no way rea-

sonably anticipated, is to rely upon a fine distinction which would never occur to, or be understood by, the average policy holder."

The rationale of the Haynes case is sound and is particularly appropriate to the factual situation we are considering. The Cooperative's employees were on the Pharis land by virtue of the easement license and the permission to use the private road. Although the Pharises' recovery against the Cooperative was based upon a pleaded theory of negligence, plaintiff's employees were doubtless guilty of a technical trespass, as well. 87 C.J.S., Trespass [\*\*13] §, pp. 959, 60. <sup>5</sup> There was no evidence, however, that the Cooperative either knew of the acts causing Pharises' damage or directed them to be done. Neither was there [\*362] any evidence that such acts of the employees were motivated by an intent or purpose to injure. Under the circumstances of this case, although it be said that the acts producing the results were intentional, where no intent to injure appears, the resulting harm was "caused by accident" within the policy meaning. *Cross v. Zurich General Accident & Liability Ins. Co.* (7 C.C.A.), 184 F.2d 609, 611; *Rothman v. Metropolitan Casualty Insurance Co.*, 134 Ohio St. 241, 16 N.E.2d 417, 117 A.L.R. 1169 (involving wanton misconduct). See, *Annotation*, 2 A.L.R.3d 1238, Liability Insurance -- Wilful Injury, and, particularly, *Jernigan v. Allstate Insurance Co.*, (5 C.C.A.) 269 F.2d 353, 357, holding that death resulting from an assault was "caused by accident" within the provisions of an automobile liability policy. See, also, *Annotation*, 33 A.L.R.2d 1027, Liability Insurance -- Assault -- Accident.

5 Both the affinity and distinctions between trespass and negligence as forms of action are clearly explained in *Mawson v. Vess Beverage Co.*, Mo. App., 173 S.W.2d 606. See also, 87 C.J.S., Trespass, Sec. 105, p. 1061; 1 C.J.S., Actions §, p. 1078.

[\*\*14] In *White v. Smith*, Mo. App., 440 S.W.2d 497, the Springfield Court of Appeals had occasion to consider for the first time in this state whether unintended results of intended acts were "caused by accident" as that term was used in a liability policy. In the course of the operation of his slaughterhouse, the insured caused waste materials to be drained from its lagoon so that it overflowed into an adjoining property owner's well and contaminated it. The property owners had judgment on the theory of nuisance and garnished the operator's liability insurer. The policy was one of general liability insurance and contained a provision indemnifying against damages "caused by accident". The insurer contended the damages were not caused by accident, but were "the

natural consequence(s)" of the insured's intentional acts. The court made this definitive answer (pages 507, 508):

"It is true that, as a matter of public policy, a liability insurance contract does not afford coverage for damage intentionally inflicted by the insured, that is, for damage resulting from acts consciously and deliberately done by the insured, 'knowing that they were wrong, and intending that harm result from [\*\*15] said acts.' *Crull v. Gleb*, Mo. App., 382 S.W.2d 17, 21(3). But neither policy nor principle excludes from the category of damages 'caused by accident' for which coverage is afforded by a liability insurance policy, even damage which might be, for other purposes, regarded as *constructively* intentional or damage resulting from wanton and reckless conduct. No doubt instant defendant's acts were intended, but the trial court in the nuisance action found (and the record in the garnishment proceeding is to the same effect) that the *result*, i.e., the *damage* for which a monetary judgment was rendered, was not intended. 'There is a vast difference between an intended *act*, and an intended *result*.' *Murray v. Landenberger*, 5 Ohio App.2d 294, 215 N.E.2d 412, 415-416. (Citing other cases) In the often quoted language of *Mr. Justice Cardozo in Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432, 433, 19 A.L.R. 876, 878: 'Injuries [and damages] are accidental or the opposite, *for the purpose of indemnity*, according to the quality of the *results* rather than the quality of the *causes*.' That instant defendant's acts were *intended* did not exclude [\*\*16] the *unintended* result from coverage under the policy in suit. To entertain a contrary view would work an exclusion from coverage of many, if not most, claims for damages arising out of the negligence of insureds and thus defeat the primary purpose for which liability insurance coverage is purchased. *Mofat v. Metropolitan Cas. Ins. Co. of New York*, D.C. Pa., 238 F. Supp. 165, 171; *Messersmith v. American Fidelity Co.*, *supra*, 133 N.E. at 433."

The policy issued to plaintiff Cooperative by defendant American Motorists was one of General Compre-

hensive Liability. Although by riders of exclusion plaintiff Cooperative was not entitled to all such coverages, the printed portion of [\*363] the policy, under "Conditions", specifically insured, inter alia, against liability arising from the use of automobiles, products hazards, contractual warranties and assaults and batteries. The only definition of "accident" contained in the policy is found in paragraph 3, "Conditions . . . (d) Assault and Battery. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured". Unless we are to conclude that the policy was intended to insure against [\*\*17] assaults and batteries only -- an absurd hypothesis -- then as to all the other incidences of comprehensive coverage under the policy, "accident" remains undefined. [HN3] "Accident" is a word of varied meaning and of no fixed legal signification. When standing alone and unqualified in a policy of indemnity insurance, it is ambiguous, and the meaning of the word most favorable to the insured should be accepted. *Soukop v. Employers' Liability Assur. Corp., Mo., 341 Mo. 614, 108 S.W.2d 86, 91; Rose v. National Lead Co., Mo. App., 94 S.W.2d 1047, 1052*. If we adopt that definition of "accident" for which defendant contends, it would exclude damage resulting from negligence and from the type of conduct which occasioned injury to the Pharises. This may not be allowed, as it would result in no coverage at all, and it would also be to say that plaintiff intended it so.

[HN4] An insurance policy is an instrument of practical uses. Its very quiddity is the promise of indemnity it contains. If reasonably possible, it will be construed to furnish the designed protection, not to deny it. *Giokaris v. Kincaid, Mo., 331 S.W.2d 633, 639; 86 A.L.R.2d 925; Schmidt v. Utilities Ins. Co., Mo., 353 Mo. 213, [\*\*18] 182 S.W.2d 181, 183; 154 A.L.R. 1088*. The policy provisions should be resolved, as well, in the light of those reasonable expectations and purposes of the average businessman in making the contract. Appelman, Insurance Law and Practice, Vol. 13, 1969 Supp., p. 149. In his opening statement, counsel for plaintiff informed the court that the insurance in question was purchased as an incident to the installation of "about 1000 miles of (transmission) lines". (Defendant did not challenge this statement.) As these lines were to be constructed upon rights-of-way, plaintiff could reasonably expect that occasional damage might result in the manner it did, and that when that happened, the damages would be covered by its policy from defendant. [HN5] While ordinarily, the mere designation of a policy as a "comprehensive general liability policy" does not have the effect of affording a measure of protection broader than the expressed provisions of the policy, it becomes proper to consider that designation in arriving at the intention of the parties. Couch 2d, Insurance, Vol. 10, p. 688. Considering the broad designation of the policy and that it

was intended to cover all of plaintiff's operations [\*\*19] in Missouri and Arkansas, it seems unlikely that an average purchaser would conclude that the policy was intended to have that narrow coverage contended for by defendant, in the absence of clear language to the contrary. *Chemtec Midwest Services, Inc. v. Insurance Company of North America, supra, p. 769*. Defendant's contention that because Pharises' damages resulted from the intentional acts of the Cooperative they were not "caused by accident" is not supported by the policy provisions. It contains no such limitation, and none can be implied. Even wilful and intentional injuries caused by assault and battery are not excluded from coverage when caused by the Cooperative's employees and not instigated by the insured. There is no basis for the inference that injury from intentional acts, not done by the insured or at its direction, is necessarily excluded from its coverage.

[HN6] The understanding of an ordinary man is the standard to be used in construing an insurance policy. Words used in them are to be given effect "in their plain, ordinary and popular sense". *State ex rel. Prudential Ins. Co. of America [\*364] v. Shain, Mo., 344 Mo. 623, 127 S.W.2d 675, 677; Rex Roofing Co., [\*\*20] Inc. v. Lumber Mutual Casualty Co., 280 A.D. 665, 116 N.Y.S.2d 876, 877*. [HN7] To the average person, that which occurs unexpectedly is called an accident. *Moore v. Fidelity and Casualty Company of New York, 140 Cal.App.2d Supp. 967, 295 P.2d 154, 157*. See, also, definition of "accident", Webster's New International Dictionary (2d Edition, Unabridged). Also, as popularly understood, an event which is brought about intentionally, is not an accident. "In its more general sense the term ('accident') does not exclude human fault called negligence, but is recognized as an occurrence arising from the carelessness of men, and the fact that the negligence of the person injured contributed to produce the result will not make it any less an accident . . .". 1 C.J.S., Accident, pp. 439, 440; 38 Am. Jur., Negligence, p. 647. When used without restriction in liability policies, "accident" has been held not to exclude injuries resulting from ordinary, or even gross, negligence. Appelman Insurance Law and Practice, Vol. 7A, pps. 4-8. It does, however, exclude injuries resulting from the insured's wilful misconduct. 45 C.J.S., Insurance §, p. 887. Accordingly, we adopt as the definition of "injury [\*\*21] to or destruction of property . . . caused by accident", as used in plaintiff's policy, to mean injury to or destruction of property not intentionally inflicted but caused by the negligence of the insured. Our definition is in accord with that declared by the *Springfield Court of Appeals, White v. Smith, supra, 440 S.W.2d at p. 508*. See, also, *Chemtec Midwest Serv. Inc. v. Insurance Co. of North America, supra, 288 F. Supp. at p. 769; Cross v. Zurich General Acc. & Liab. Ins. Co., supra, 184 F.2d at p. 611; Bundy Tubing Co. v. Royal Indemnity Co. (6 C.C.A.), 298 F.2d 151, 153;*

*Corbetta Construction Co. v. Michigan Mutual Liability Company*, 20 A.D.2d 375, 247 N.Y.S.2d 288, 292-293; *Koehring Co. v. American Automobile Ins. Co. (7 C.C.A.)*, 353 F.2d 993, 996. Under similar definitions of "caused by accident" as provided in liability insurance policies, damages caused by the negligence of the insured have been held to be covered,<sup>6</sup> as well as those caused by a trespass committed by the insured's employees without his instigation,<sup>7</sup> damages for breach of warranty,<sup>8</sup> and for products hazards.<sup>9</sup> The evidence supports the conclusion that the insured operated negligently and in such other [\*\*22] fashion as to result in an event which to the Pharises was unexpected and unforeseen. The damages for which they had received judgment were "caused by accident" within the meaning of the Cooperative's policy of comprehensive general liability insurance.

6 E.g. *Cross v. Zurich General Accident and Liability Insurance Co.*, *supra*, 184 F.2d at p. 611; *Annotation 7 A.L.R.3d 1262, 1265*, Liability Insurance -- "accident".

7 *Haynes v. American Casualty Co.*, *supra*, 179 A.2d at p. 903.

8 *Bundy Tubing Co. v. Royal Indemnity Co.*, *supra*, 298 F.2d at p. 153.

9 *Guerdon Industries, Inc. v. Fidelity & Casualty Co. of N.Y.*, 371 Mich. 12, 123 N.W.2d 143.

The second major point of alleged error defendant raises is that there was "a failure of proof as to the damages sustained by the Pharises". We reject this contention. The amount of damages suffered by the Pharises,

or by the Cooperative for that matter, was never an issue in either of the two trials between these parties, or upon the appeals from the judgments [\*\*23] rendered in them. Our mandate in *Northwest Electric Power Cooperative, Inc. v. American Motorists Insurance Corporation*, *supra*, 346 S.W.2d l.c., at p. 704, directed a re-trial to determine "whether or not the damage was caused by accident". *How* the damage was caused, *not how much* damage resulted, was the issue remaining. All others had been adjudicated on the former appeal and have become the law of the case. *Adams v. Mason, Mo.*, 421 S.W.2d 276, 278.

[\*365] The defendant, in effect, invites us to peer once again behind the Pharis judgment. This time, he asks us to assess whether the evidence in the Pharis trial supported the amount of \$1750 given in judgment. We refuse to do this. [HN8] Judgments, including judgments by agreement, are conclusive of matters adjudicated and are not subject to collateral attack except upon jurisdictional grounds. Under the rule of collateral estoppel and res judicata even though the judgment may have been erroneous, the issues may not be relitigated. *Payne v. St. Louis Union Trust Co., Mo.*, 389 S.W.2d 832, at 836 and 50 [\*\*24] C.J.S., Judgments, p. 55.

The judgment is affirmed.

Howard, P.J. concurs.

Hall, S.J. concurs.

Cross, J., not participating.



LEXSEE 295 N.W.2D 205, 207

**Charles R. Patrick, Plaintiff, v. Head of the Lakes Cooperative Electric Association,  
Defendant-Appellant and Cross-Respondent, Federated Rural Electric Insurance  
Company, Defendant-Respondent and Cross-Appellant**

No. 79-1452

Court of Appeals of Wisconsin

*98 Wis. 2d 66; 295 N.W.2d 205; 1980 Wisc. App. LEXIS 3171*

**April 8, 1980, Submitted on Briefs  
June 24, 1980, Decided**

**PRIOR HISTORY:** [\*\*\*1] Appeal and Cross-Appeal from a judgment of the Circuit Court for Douglas County: Henry N. Leveroos, Judge.

**DISPOSITION:** *By the Court.* -- Judgment modified and as modified, affirmed with directions to additionally allow taxation of costs on the cross-claim.

**LexisNexis(R) Headnotes**

*Contracts Law > Defenses > Ambiguity & Mistake > General Overview*

*Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers*

*Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > Reasonable Person*

[HN1] The construction of an insurance policy is a question of law. The court independently determines questions of law without deference to the conclusions reached by the trial court. The court's objective in construing an insurance policy is to ascertain and carry out the intention of the parties. When ambiguous, an exclusionary clause in an insurance contract should be strictly construed against the insurer. The test of coverage is not what the insurer intended to cover, but what a reasonable person in the position of the insured would have understood to be covered. The words used in an insurance contract should be given their common everyday meaning, and should be interpreted reasonably so as to avoid absurd results. Finally, there is a public policy in Wisconsin

against the avoidance of coverage by an insurer, and the reasonable expectations of coverage by an insured should be honored.

*Insurance Law > Claims & Contracts > Policy Interpretation > General Overview*

[HN2] The purpose of using "occurrence" rather than "accident" in insurance policies is to expand coverage. Its use permits consideration of the state of mind of the actor as it relates to the resultant damage, rather than only as it relates to causation. Its use affords coverage for an intended act and an intended result if they cause damage unintended from the standpoint of the insured.

*Business & Corporate Law > Cooperatives > General Overview*

*Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers*

*Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > General Overview*

[HN3] "Control" is an ambiguous term and must be strictly construed against the insurer. The purpose of the exclusion of property over which the insured has physical control is to avoid coverage of property that should be covered separately under a different type of insurance that contemplates a different type of risk.

**Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > General Overview****Real Property Law > Limited Use Rights > Easements > Interference**

[HN4] The holder of an easement has no possessory interest in trees growing in the easement.

**Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview**

[HN5] When a party sues on a contract, that party is generally not entitled to actual attorney's fees.

**Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview**

[HN6] On appeal, the court reviews attorney's fees independently. Factors to be considered in awarding attorney's fees are: the amount and character of the services; the labor time, and trouble involved; the character or importance of the litigation; the amount of money or value of property involved; the professional skill necessary; and the standing of the attorney in the profession. When an insurer refuses to defend, it does so at its peril. It loses the right to control the defense or the settlement of the action. The insured then has the right to defend in whatever way it sees fit. As long as this defense is reasonable and coverage is found, the insurer must pay for the defense.

**COUNSEL:** For the defendant-appellant and cross-respondent the cause was submitted on the briefs of *Jeffrey A. Lee, David M. Weiby, and Davis, Witkin, Weiby & Maki, S.C.*, of Superior.

For the defendant-respondent and cross-appellant the cause was submitted on the briefs of *James L. Cirilli and Borg, McGill, Peterson, McDonald & Cirilli* of Superior.

**JUDGES:** Donlin, P.J., Foley, J., and Dean, J.

**OPINION BY:** FOLEY

**OPINION**

[\*67] [\*\*206] Federated Rural Electric Insurance Company refused to defend Head of the Lakes Cooperative Electric Association, its insured, in an action brought by Charles Patrick for damages resulting from the Cooperative's intentional cutting of Patrick's trees. Some or all of the trees were within an unrecorded easement held by the Cooperative over Patrick's property. The trial court ruled that Federated had a duty to defend and awarded the Cooperative defense fees and costs of \$ 2,545.67. Both parties [\*\*\*2] have appealed the judgment, Feder-

ated claiming that it had no duty to defend and the Cooperative that it is actually entitled to attorney's fees [\*68] and costs of \$ 6,219.95. We agree with the trial court that Federated had a duty to defend. As to the amount [\*\*207] of the judgment, however, we have the obligation to make an independent review of the attorney's fees and costs. Based on that review, we modify the judgment to award the Cooperative \$ 5,122.95, their fees and costs for defending the Patrick action, plus their taxable costs on their cross-complaint against Federated.

Federated claims that it did not have a duty to defend because: (1) The act of cutting trees was an intentional act not covered by the policy; and (2) since the trees that were cut were on a Cooperative easement, they were in the physical control of the Cooperative and excluded from coverage. The insurance policy provided that the claimed damage, to be covered, must result from an "occurrence." An "occurrence" is defined as:

An accident occurring within the policy period, including continuous or reported exposure to conditions, which results in Personal Injury or Property Damage neither [\*\*\*3] expected or intended from the standpoint of an Insured.

The policy excluded:

[D]amage to property owned, used or otherwise in the physical control of an insured . . .

[HN1] The construction of an insurance policy is a question of law. *RTE Corporation v. Maryland Casualty Company*, 74 Wis.2d 614, 247 N.W.2d 171 (1976). We independently determine questions of law without deference to the conclusions reached by the trial court. *American Mutual Liability Insurance Company v. Fisher*, 58 Wis.2d 299, 206 N.W.2d 152 (1973). Our objective in construing an insurance policy is to ascertain and carry out the intention of the parties. *Home Mutual Insurance Company v. Insurance Company of North America*, 20 Wis.2d 48, 121 N.W.2d 275 (1963).

[\*69] When ambiguous, an exclusionary clause in an insurance contract should be strictly construed against the insurer. *Meiser v. Aetna Casualty and Surety Co.*, 8 Wis.2d 233, 98 N.W.2d 919 (1959). The test of coverage is not what the insurer intended to cover, but what a reasonable person in the position of the insured would have understood to be covered. *Ehlers v. Colonial Penn Insurance Company*, 81 Wis.2d 64, 259 N.W.2d [\*\*\*4] 718 (1977). The words used in an insurance contract should be given their common everyday meaning, *Schmidt v. Luchterhand*, 62 Wis.2d 125, 214 N.W.2d 393 (1974), and should be interpreted reasonably so as to avoid absurd results. *Olguin v. Allstate Insurance Company*, 71 Wis.2d 160, 237 N.W.2d 694 (1976). Finally, there is a public policy in Wisconsin against the avoid-

ance of coverage by an insurer, and the reasonable expectations of coverage by an insured should be honored. *Handal v. American Farmers Mutual Casualty Company*, 79 Wis.2d 67, 255 N.W.2d 903 (1977).

Federated contends that "occurrence" and "accident" are synonymous terms. This construction defeats the purpose of using the term "occurrence." It also does not take into consideration the portion of the policy definition of occurrence that requires consideration of whether the result of the accident was "expected or intended from the standpoint of the insured."

The term "occurrence" originally came into use in insurance policies because a restrictive construction of the term "accident" proved unsatisfactory to the insured, the public, and the courts. [HN2] The purpose of using "occurrence" rather than "accident" [\*\*\*5] was to expand coverage. 7A Appleman, *Insurance Law and Practice* § 4492 (1979). Its use permits consideration of the state of mind of the actor as it relates to the resultant damage, rather than only as it relates to causation. 7A Appleman, [\*70] *supra* § 4492.02. Its use affords coverage for an intended act and an intended result if they cause damage unintended from the standpoint of the insured.

In this case, the cutting of trees and resulting damage to the trees was intended by the Cooperative. Any unauthorized cutting, which is the basis for Patrick's action, was unintended. The employees of the Cooperative intended to trim trees that were interfering with transmission lines. The lines ran over Patrick's property, but were [\*\*208] on an unrecorded easement held by the Cooperative. The easement authorized the Cooperative to trim trees that interfered with its lines. The employees of the Cooperative did not intend to trim more than was necessary to reasonably maintain service, and did not intend to cut or trim trees located outside of the Cooperative's easement. As a cause of action existed only for damages due to unauthorized trimming and cutting, any [\*\*\*6] damage was in fact unintended. Under these circumstances, Patrick's action claims an occurrence covered by the policy.

Federated's second argument is that since the Cooperative cut trees on its own easement, the property was under the Cooperative's "physical control" and is excluded from coverage. The Wisconsin Supreme Court has held that [HN3] "control" is an ambiguous term and must be strictly construed against the insurer. *Meiser, supra*. In strictly construing the term here, in light of its purpose in the policy and honoring the reasonable expectations of coverage of the Cooperative, we conclude that the Cooperative did not have physical control over the trees.

The purpose of the exclusion of property over which the insured has physical control is to avoid coverage of property that should be covered separately under a different type of insurance that contemplates a different [\*71] type of risk. 7A Appleman, *supra* § 4493.03. In this case, if coverage were excluded, we know of no other type of insurance the Cooperative should have been required by Federated to purchase to cover this risk.

Also, the ambiguity inherent in the term "control" becomes patently apparent [\*\*\*7] when the interests of the respective parties are considered. Patrick owned the property. He had the right to cut the trees and regardless of who cut them, they were his. The Cooperative, [HN4] as holder of the easement, had no possessory interest in the trees. 25 *Am. Jur. 2d Easements & Licenses* § 72, *et seq.* (1966). Its interest was limited and contingent, existing only to the extent that Patrick's trees interfered with its transmission lines. The Cooperative could reasonably expect that this limited and contingent interest would not exclude coverage. This interest does not put the trees in the control of the Cooperative as we strictly construe the term.

The Cooperative argues that it is entitled to \$ 6,219.95 in actual attorney's fees and defense costs incurred both for the defense of the Patrick action and for its cross-claim against Federated. The trial court awarded \$ 2,500 attorney's fees and a portion of the defense costs. We conclude that the Cooperative is entitled to the full amount of its defense expenses totaling \$ 4,286.25 attorney's fees, \$ 570.81 for lost employee time and expenses, and \$ 265.89 taxable costs. The Cooperative is, however, only entitled [\*\*\*8] to statutory fees and costs on its cross-claim, which was submitted to the court following the successful conclusion of the Cooperative's defense of the Patrick action.

The cross-claim is akin to any other legal action and, except in limited circumstances not applicable here, actual attorney's fees are not recoverable. In this case, the [\*72] cross-claim was heard in a totally separate hearing after the conclusion of the trial. The fees incurred by the Cooperative in pursuing the cross-claim are readily separable from the fees incurred in defending against Patrick's claim. Federated only had a duty under the insurance contract to provide a defense against that claim. The Cooperative action against Federated was on that contract and for the fees it incurred in providing its own defense. [HN5] When a party sues on a contract, that party is generally not entitled to actual attorney's fees. The Cooperative, therefore, although entitled to actual attorney's fees for the defense of the Patrick claim, is only entitled to statutory fees on its cross-claim.

[HN6] On appeal, we review attorney's fees independently. *State v. Sidney*, 66 Wis.2d 602, 225 N.W.2d

98 Wis. 2d 66, \*; 295 N.W.2d 205, \*\*;  
1980 Wisc. App. LEXIS 3171, \*\*\*

438 (1975). Factors to be considered [\*\*\*9] in awarding attorney's fees are: the amount and character of the services; the labor time, and trouble involved; [\*\*209] the character or importance of the litigation; the amount of money or value of property involved; the professional skill necessary; and the standing of the attorney in the profession. *Herro, McAndrews & Porter, S.C. v. Gerhardt*, 62 Wis.2d 179, 214 N.W.2d 401 (1974).<sup>1</sup> When an insurer refuses to defend, it does so at its peril. It loses the right to control the defense or the settlement of the action. The insured then has the right to defend in whatever way it sees fit. As long as this defense is reasonable and coverage is [\*\*73] found, the insurer must pay for the defense. 7C Appleman, *supra* §§ 4681, 4682, 4683.

1 Furthermore, we agree with the statement made by Reserve Judge Harry Larsen, who testified as an expert witness at the hearing on the reasonableness of the attorney's fees. Judge Larsen said:

I happen to be of the mind that a lawyer who tries a case of this kind has the absolute duty to not overlook any detail; that he should be extremely diligent in his preparation of the case; that he should be in the position to meet every possible eventuality; that he should leave no stone unturned; that he should guard against everything . . . .

[\*\*\*10] We have reviewed the statement submitted by the Cooperative's attorney with these factors in mind and conclude that both the time spent and the amount charged for the defense of the Patrick action were reasonable. The defense was fairly complex involving is-

sues of real property law, tort law, and insurance law. Counsel billed ninety-seven hours at \$ 40 to \$ 45 per hour. Although the total bill might be considered disproportionate in relation to the claimed damages, a successful defense was important to the Cooperative because it held over 1,000 unrecorded easements similar to the one involved here. No doubt, had Federated defended, it could have settled for less than it is now obligated to pay. Since it decided not to defend, it cannot complain that the Cooperative made the decision to vigorously defend.

The Cooperative also claims that it is entitled to recover \$ 570.81 of the \$ 1,536.83 in other expenses it incurred as a result of the litigation. The insurance policy provides that Federated will pay "[t]he policyholder's reasonable expenses in assisting Federated in the defense of any claim, including an employee's loss of earnings up to \$ 50 per day."

The trial court [\*\*\*11] ruled that because no employee lost wages, the Cooperative could not recover. On the basis of this construction of the policy, only if the Cooperative had withheld \$ 50 per day from each employee whose time was spent in court would Federated have to pay. This would be an absurd result and should be avoided. *Olguin, supra*. The question is not whether an employee lost wages, but whether the Cooperative sustained a loss because it had to pay wages to employees for time spent in the litigation as opposed to working at Cooperative business. It did, and it is therefore entitled to the claimed \$ 570.81.

[\*74] *By the Court.* -- Judgment modified and as modified, affirmed with directions to additionally allow taxation of costs on the cross-claim.



FOCUS - 7 of 259 DOCUMENTS

STANDARD CONSTRUCTION CO., INC., Plaintiff-Appellee, v. MARYLAND  
CASUALTY CO. and NORTHERN INSURANCE CO. OF NEW YORK, Defen-  
dants-Appellants.

No. 02-6039

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

359 F.3d 846; 2004 U.S. App. LEXIS 4226; 2004 FED App. 0068P (6th Cir.)

December 11, 2003, Argued

March 4, 2004, Decided

March 4, 2004, Filed

**SUBSEQUENT HISTORY:** Rehearing denied by, Rehearing, en banc, denied by *Std. Constr. Co. v. Md. Cas. Co.*, 2004 U.S. App. LEXIS 9227 (6th Cir., May 10, 2004)

**PRIOR HISTORY:** [\*\*1] Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 01-02006. Diane K. Vescovo, Magistrate Judge.

**DISPOSITION:** Affirmed.

## LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Appellate Review > Standards of Review*

*Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1] An appellate court reviews the district court's grant of summary judgment de novo, employing the same legal standard applied by the district court. The same standard applies where the district court denies summary judgment based upon purely legal grounds. The district court's findings of fact are reviewed under the clearly erroneous standard. *Fed. R. Civ. P. 52(a)*.

*Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions*

*Insurance Law > General Liability Insurance > Exclusions > Burdens of Proof*

*Insurance Law > Property Insurance > Coverage > Arson & Intentional Loss > General Overview*

[HN2] In order to find that an intended or expected acts exclusion applies, it must be established that the insured intended the act and also intended or expected that injury would result. These are separate and distinct inquiries because many intentional acts produce unexpected results and comprehensive liability insurance would be somewhat pointless if protection were precluded if, for example, the intent to cause harm was not an essential (and required) showing. The intent itself may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm. It is immaterial that the actual harm was of a different character or magnitude or nature than that intended.

*Insurance Law > General Liability Insurance > Coverage > Accidents*

[HN3] The ordinary meaning of the term "accident" is an event which is unusual and not expected by the person to whom it happens. Further, an accident is generally understood as an unfortunate consequence which befalls an actor through his inattention, carelessness, or perhaps for no explicable reason at all. The result is not a product of desire and is perforce accidental.

*Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview*

*Insurance Law > Property Insurance > Coverage > Real Property > General Overview*

***Torts > Products Liability > Breach of Warranty***

[HN4] Coverage, in the context of an insurance policy that excludes "property damage" to "impaired property" arising out of a defect, deficiency, inadequacy, or dangerous condition in "your product" or "your work," is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained. Further, property damage claims of third persons resulting from the insured's breach of an implied warranty are covered unless the claimed loss is confined to the insured's work or work product.

***Insurance Law > General Liability Insurance > Coverage > Damages******Insurance Law > General Liability Insurance > Coverage > Property******Insurance Law > General Liability Insurance > Exclusions > General Overview***

[HN5] The "your work" exclusion does not apply if there is damage to property other than the insured's work.

***Insurance Law > General Liability Insurance > Coverage > Personal Injuries******Insurance Law > General Liability Insurance > Coverage > Property******Insurance Law > General Liability Insurance > Persons Insured > Third Parties***

[HN6] General liability policies are not "all-risk" policies. They provide an insured with indemnification for damages up to policy limits for which the insured becomes liable as a result of tort liability to a third party. The risk insured by these policies is the possibility that the insured's product or work will cause bodily injury or damage to property other than the work itself for which the insured may be found liable.

***Insurance Law > General Liability Insurance > Coverage > Personal Injuries******Insurance Law > General Liability Insurance > Exclusions > Work Product******Insurance Law > Property Insurance > Exclusions > General Overview***

[HN7] "Business risk" exclusions do not purport to bar coverage for personal injuries or for physical injury to other property which are caused by the insured's product or work.

***Insurance Law > General Liability Insurance > Coverage > Property******Insurance Law > General Liability Insurance > Exclusions > General Overview***

[HN8] When read together, business risk provisions exclude coverage when there has been no physical injury to tangible property other than the insured's work.

***Insurance Law > General Liability Insurance > Obligations > Defense***

[HN9] By refusing to defend, the insurer gives up its contractual right to control the defense, and the insured may negotiate a reasonable settlement.

**COUNSEL:** ARGUED: J. Robert Hall, MECKLER, BULGER & TILSON, Chicago, Illinois, for Appellants.

J. Brooke Lathram, BURCH, PORTER & JOHNSON, Memphis, Tennessee, for Appellee.

ON BRIEF: J. Robert Hall, Michael M. Marick, MECKLER, BULGER & TILSON, Chicago, Illinois, for Appellants.

J. Brooke Lathram, BURCH, PORTER & JOHNSON, Memphis, Tennessee, for Appellee.

**JUDGES:** Before: ROGERS and COOK, Circuit Judges; BERTELSMAN, District Judge. \* BERTELSMAN, D. J., delivered the opinion of the court, in which COOK, J., joined. ROGERS, J., delivered a separate concurring opinion.

\* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

**OPINION BY:** William O. Bertelsman

**OPINION**

[\*847] [\*\*\*2] BERTELSMAN, District Judge. Defendants, Maryland Casualty Company and Northern Insurance Company of New York, appeal the district court's judgment in favor of plaintiff, Standard Construction Company. The district court ruled that defendants owed plaintiff both a duty to defend and a duty to [\*\*2] indemnify under certain commercial general liability insurance policies. For the reasons set forth, we AFFIRM the district court's judgment.

***Factual Background***

Standard Construction Company is an asphalt paving contractor. Maryland Casualty Company and Northern Insurance Company of New York insured Standard [\*848] from January 1, 1990 through January 1, 1993,

under three [\*\*\*3] successive one-year commercial general liability ("CGL") and umbrella policies, respectively.

In March 1990, Standard entered into a contract with the State of Tennessee to perform paving and road work as part of a road-widening project on Highway 64 near Arlington, Tennessee. Under the contract, Standard was responsible for the clearing and removal of certain debris, to be performed in accord with specifications issued by the Tennessee Department of Transportation. These specifications required Standard to remove debris from the construction area; to take ownership of the debris and dispose of it elsewhere; to secure written permission from landowners prior to dumping the debris on any private property; and to make reparations for any damage to private or public property that might occur during disposal.

[\*\*3] Standard subcontracted this disposal work to Ronald S. Terry Construction Company. Terry's superintendent, Gene A. Bobo, obtained written permission from six owners of the property adjacent to Highway 64 to dump on their property construction debris from the road-widening project. With respect to a seventh property owner, the then 90-year old Cassella Love, Bobo obtained a similar agreement signed by Love's daughter, Louise Poole, in Love's name.

Terry, believing that it had Love's permission, proceeded to dump construction debris, including trees, corrugated metal pipes, concrete chunks with exposed steel, and asphalt, on Love's property. At that time, Love's property, which was zoned commercial, was the subject of condemnation proceedings brought by the State in connection with the widening project. William H. Fisher, an attorney representing Love in the condemnation action, retained an engineer to inspect Love's property. The engineer opined that the debris dumped on Love's property rendered the land unsuitable for development.

[\*\*\*4] After receiving the engineer's report, Fisher wrote to Standard by letter, dated May 22, 1992, demanding that the company cease dumping on [\*\*4] Love's property, revoking any authority Standard may have had for such dumping, and requesting that Standard remove the debris. Fisher also stated that Love suffered from senile dementia and that her ability to enter into a binding contract was questionable.

After attempting unsuccessfully to locate a copy of the first Love agreement, Standard obtained a second dumping agreement, signed either by Love or by Poole in Love's name, dated June 17, 1992. Handwritten on the agreement was the notation: "agree to asphalt driveway + dump 2 loads of dirt in front yard." Thereafter, Standard paved Love's driveway and spread dirt on her land.

On November 22, 1994, Love, by and through her daughter, filed suit in Tennessee state court against Standard, Terry, Bobo and the State of Tennessee. Love asserted various claims for damage to her property, including a claim for trespass. Standard tendered defense of the *Love* case to Maryland and Northern, but the insurers denied coverage on several different grounds. Following amendments to the *Love* complaint, the insurers again refused to defend Standard. Standard eventually settled the *Love* matter for approximately \$ 200,000.

On January 5, 2001, Standard [\*\*5] filed the instant declaratory judgment action alleging that the insurers breached their duties to defend and indemnify Standard in connection with the *Love* lawsuit. The parties consented to the jurisdiction of United States Magistrate Judge Diane K. Vescovo, pursuant to 28 U.S.C. § 636(c).

[\*849] After discovery, the parties filed cross-motions for summary judgment. By order, dated May 15, 2002, Magistrate Judge Vescovo granted summary judgment in Standard's favor as to the duty to defend, ruling that property [\*\*\*5] damage resulting from trespass would constitute a covered claim under the applicable policies and that certain "business risk" exclusions relied upon by the insurers were inapplicable to claims by a stranger to the construction contract for damages resulting from a trespass. Magistrate Judge Vescovo denied the motions as to the duty to indemnify, however, finding that there were genuine disputes of material fact as to whether a contract was entered into between Love and Standard (through Terry) so as to trigger the business risk exclusions.

Magistrate Judge Vescovo conducted a bench trial on June 17 and 18, 2002, after which she entered Findings [\*\*6] of Fact, Conclusions of Law, and a Judgment in Standard's favor. Specifically, Magistrate Judge Vescovo found that Terry's disposal of construction debris on Love's property constituted a trespass because, although Terry (and Standard) believed it had Love's permission to dump the debris, in reality such consent was lacking because Love herself was incompetent to enter into any agreement and because her daughter, Poole, had neither actual nor implied authority to do so on Love's behalf. Thus, no contract between Love and Standard ever existed, and Terry's dumping on the property was wrongful.

Magistrate Judge Vescovo also concluded that Standard had acted reasonably in settling the *Love* case and that Standard had not impaired the insurers' subrogation rights.

The trial court awarded Standard \$ 244,750 for its *Love* defense costs; \$ 200,000 for its settlement costs; and \$ 6,487.30 in pre-judgment interest.

The insurers now appeal the grant of partial summary judgment to Standard on the issue of the duty to defend, the denial of summary judgment on that issue to the insurers, and the judgment in favor of Standard on the duty of indemnification.

[\*\*\*6] *Analysis*

A. [\*\*7] Standard of Review

[HN1] We review the district court's grant of summary judgment *de novo*, employing the same legal standard applied by the district court. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003) (citation omitted). The same standard applies where the district court denies summary judgment based upon purely legal grounds. *Id.* The district court's findings of fact are reviewed under the clearly erroneous standard. *See Fed. R. Civ. P. 52(a)*.

B. Applicable Law

The district court held that Tennessee law was applicable, and neither party contests this ruling. Throughout the opinion and briefs, however, citations are made to authorities of many jurisdictions, since the policy provisions and cases interpreting them are reasonably uniform. We agree with this approach.

C. Scope of Coverage

1. "Occurrence"

The insuring agreement of these policies<sup>1</sup> states, in pertinent part:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend [\*\*8] [\*850] any "suit" seeking those damages. . . . [\*\*\*7]

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and

(2) The "bodily injury" or "property damage" occurs during the policy period.

The policies further define "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident," however, is not defined. In addition, the policy excludes from coverage "bodily injury" or "property damage" that is "expected or intended from the standpoint of the insured."

1 The relevant terms in the Maryland and Northern policies are identical.

Appellants argue that there was no coverage under the policies because Standard intended to dump the debris on Love's land. This situation, it asserts, does not fit the policy's definition of an "occurrence."

The district court held that [\*\*9] the dumping was an "occurrence" or "accident" within the meaning of the policy because, while the dumping was intentional, the fact that it was done without permission, thus making it wrongful, was not intended by the insured.

We agree with this conclusion. As pointed out by the trial court, "if the resulting damages are unintended, the resulting damage is accidental even though the original acts were intentional." (J.A. at 169) (Order) (quoting *State Farm Fire and Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1075 (Fla. 1998)).

A Supreme Court of Tennessee opinion relied upon by the trial court is instructive. In *Tennessee Farmers Mut. Ins. Co. [\*\*\*8] v. Evans*, 814 S.W.2d 49 (Tenn. 1991), the court, after noting several approaches to this issue by various courts, held:

After carefully weighing the implications of the several approaches discussed in the preceding paragraphs, this Court is persuaded that the best approach, and the one that should be adopted in Tennessee, is that followed by a majority of the states that have had an opportunity to construe the language involved in this case. That is, [HN2] in order to find that an intended [\*\*10] or expected acts exclusion applies, it must be established that the insured intended the act *and* also intended or expected that injury would result. These are separate and distinct inquiries because many intentional acts produce unexpected results and comprehensive liability insurance would be somewhat pointless if protection were precluded if, for example, the intent to cause harm was not an essential (and required) showing. . .

359 F.3d 846, \*; 2004 U.S. App. LEXIS 4226, \*\*;  
2004 FED App. 0068P (6th Cir.), \*\*\*

. The intent itself may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm. It is immaterial that the actual harm was of a different character or magnitude or nature than that intended.

*Id.* at 55-56 (citation omitted) (italics in original).

We reject appellants' argument that *Evans* is "irrelevant" because the court there was construing an exclusion rather than a coverage term. As the trial court here noted, the "expected or intended" language of the exclusion discussed in *Evans* was historically part of the definition of "occurrence." Moreover, whether expressed as part of the definition of "occurrence" or stated as a separate exclusion, the point is the same.

Moreover, [\*\*11] this court recently reached a similar conclusion in a case where it had occasion to comment at length on the meaning of "occurrence/accident" in liability [\*851] policies. *See Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503 (6th Cir. [\*\*\*9] 2003) (applying Kentucky law). There, the insured, a carpet-cleaning company, hired an individual as a carpet cleaner, but it negligently failed to perform a background check on him. *Id.* at 505. The individual subsequently gained entrance to a customer's home to clean her carpet and, using knowledge of the premises gained in that endeavor, later broke into the home and murdered the homeowner. *Id.* The homeowner's estate sued the insured carpet-cleaning company.

The insurance company argued that this scenario did not constitute an "occurrence" under the policy because both the hiring and murder were intentional. The policy at issue defined "occurrence" exactly as the policies do here: as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

This court rejected the insurance company's argument. First, we held that the term "accident" was not ambiguous, [\*\*12] observing that [HN3] the ordinary meaning of that term is "an event which . . . is unusual and not expected by the person to whom it happens." *Id.* at 507 (quoting Black's Law Dictionary (5th ed. 1979)). Further, we noted that an "accident is generally understood as an unfortunate consequence which befalls an actor through his inattention, carelessness or perhaps for no explicable reason at all." *Id.* (quoting *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986)). "The result is not a product of desire and is perforce accidental." *Id.*

In *Westfield*, the insured deliberately hired a person, but that act had unforeseen and unintended consequences

due to the insured's negligence, thus bringing the event within the definition of "occurrence" for purposes of its liability insurance.

In the instant case, the insured deliberately dumped debris on Love's property, but that act too had unforeseen and unintended consequences due to the insured's negligence in failing to secure a valid agreement from the property's owner. [\*\*\*10] We thus agree with the trial court that, as a matter of law, the act falls within the definition of "occurrence."

[\*\*13] 2. "Property Damage"/The "Your Work" Exclusion

Appellants also assign as error the district court's holding that the underlying *Love* action sought recovery for "property damage" under these liability policies. As defined in the policies, "property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of the property; or
- b. Loss of use of tangible property that is not physically injured.

The policies exclude coverage, however, for "property damage" to "impaired property" arising out of a "defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work.'"

Appellants' contention, as we understand it, is that because Standard was performing work pursuant to a contract with the State, the tort it committed against Love -- a stranger to that contract -- is not covered either because it was caused merely by faulty workmanship and/or because the injury arose out of Standard's "work."

We agree with the district court's resolution of this issue. The trial court reasoned that, since Love was a third person, not a party to Standard's contract with the State, the damage to her property from the wrongful dumping [\*\*14] was not subject to the exclusion for "your [the insured's] work."

This principle was derived from the decision of the Supreme Court of Tennessee [\*852] in *Vernon Williams & Son Constr., Inc. v. Continental Ins. Co.*, 591 S.W.2d 760 (Tenn. 1979). There, speaking of this type of coverage, the court pointed out: [HN4] "The coverage is for tort liability for physical [\*\*\*11] damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." *Id.* at 764 (citation omitted) (emphasis added).

Further, "it clearly appears that *property damage claims of third persons* resulting from the insured's breach of an implied warranty are covered unless the claimed loss is confined to the insured's work or work product." *Id.* (emphasis added).

In the instant case, it is not the *manner* in which the dumping was performed (the "work") that is faulty or caused damage, but rather that the dumping itself at the location in question was unauthorized. Some damage to Love's land inevitably resulted. The damage was to the land, not to the insured's "work." Therefore, [\*\*15] there is coverage for "property damage" and the "your work" exclusion does not apply. *Accord Standard Fire Ins. Co. v. Chester-O'Donley & Assocs.*, 972 S.W.2d 1, 10 (Tenn. App. 1998) [HN5] ("The exclusion does not apply if there is damage to property other than the insured's work.") (discussing extensively the history of this policy language and many other cases and texts); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 791-95 (N.J. 1979) (extensive discussion).<sup>2</sup>

2 The discussion of the general principle underlying business risk exclusions, *infra*, is also pertinent to this subsection.

### 3. Exclusion 2j(5)

Appellants also assign as error the district court's conclusion that the exclusion found in section 2j(5) of the policy does not apply to Standard's claim. This exclusion precludes coverage for property damage to: [\*\*\*12]

That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf [\*\*16] are performing operations, if the "property damage" arises out of those operations.

As previously noted, at the conclusion of the indemnification trial, the district court found as a fact that there was no permission by Love for Terry to dump debris on her land, and that Standard thus had no contract with her. Therefore, it held that the dumping was a trespass. This finding is not clearly erroneous.

The district court further held that Exclusion j(5) was not applicable, since it was not intended to apply to claims by third parties, but only to claims by the entity with which the insured construction contractor had expressly contracted. (J.A. at 19-22) (Findings of Fact and Conclusions of Law). Thus, the district court further held that whether Love was a third-party beneficiary of Stan-

dard's construction contract with the State was immaterial.

We agree with these conclusions. Appellants cite *Vinsant Elec. Contractors v. Aetna Cas. & Surety Co.*, 530 S.W.2d 76 (Tenn. 1975), and *Standard Fire Ins. Co. v. Chester-O'Donley & Assocs.*, 972 S.W.2d 1 (Tenn. App. 1998). Neither of these cases, however, is of help to the insurers because neither involved [\*\*17] a third party. Rather, both were actions by the owner with whom the insured construction company had contracted.

The Tennessee court describes general liability policies as follows:

[HN6] General liability policies are not "all-risk" policies. . . . They provide an insured [\*853] with indemnification for damages up to policy limits for which the insured becomes liable *as a result of tort liability to a third party*. . . . The risk insured by these policies is the [\*\*\*13] possibility that the insured's product or work will cause bodily injury or *damage to property other than the work itself* for which the insured may be found liable.

*Standard Fire*, 972 S.W.2d at 6-7 (citations omitted) (emphasis added).

The *Standard Fire* court further cites with approval an article by Peter J. Neeson and Phillip J. Meyer entitled "The Comprehensive General Liability Policy and Its Business Risk Exclusions: An Overview." *Id.* at 7 n. 8. There, the learned authors state:

The [HN7] Business Risk exclusions do not purport to bar coverage for personal injuries or for physical injury to other property which are caused by the insured's product or work.

[\*\*18] Peter J. Neeson & Phillip J. Meyer, *The Comprehensive General Liability Policy and Its Business Risk Exclusions: An Overview*, 79-80, reprinted in *Reference Handbook on the Comprehensive General Liability Policy* (American Bar Ass'n 1995).

We agree with these observations and also with the authors' application of these principles to construction projects:

In every construction project, the owner and contractor incur risks or exposure to loss. Some of these risks can be shifted to insurers -- others cannot. The owner has the risk that the contractor will fail to properly perform his contractual obligations. This risk can be shifted by the owner either securing, or requiring the contractor to provide, a performance bond. The owner likewise has the risk the project may be destroyed by fire, explosion or the like during construction. The contractor may have a similar risk. Either or both may shift that risk to an insurer by acquiring a builder's risk policy. Again, such [\*\*\*14] losses are generally beyond the effective control of either the contractor or owner . . . [The] risk of third party personal injury or property damage claims due to defective workmanship [\*\*19] or materials may be shifted by the contractor purchasing a comprehensive general liability insurance policy. . . . However, in addition to and apart from those risks, the contractor likewise has a contractual business risk that he may be liable to the owner resulting from failure to properly complete the building project itself in a manner so as to not cause damage to it. This risk is one the general contractor effectively controls and one which the insurer does not assume because it has no effective control over those risks and cannot establish predictable and affordable insurance rates.

*Id.* at 81-82 (quoting *Knutson Constr. Co. v. St. Paul Fire and Marine Ins. Co.*, 396 N.W.2d 229, 234 (Minn. 1986)) (emphasis added).

Thus:

[HN8] When read together, these [business risk] provisions exclude coverage when there has been *no physical injury to tangible property other than the insured's work.*

*Standard Fire*, 972 S.W.2d at 12 (emphasis added).

In other words, there *is* coverage where there has been physical injury to tangible property that is not the insured's work. As we have pointed out earlier in this opinion, [\*\*20] we agree with the district court's view

that Love's tangible real property is not the insured's "work," and that it was physically damaged by having the construction debris from the road-widening project dumped on it. Therefore, this exclusion does not apply. See *Thommes v. [\*854] Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 159-60 (Minn. App. 2001) (holding that j(5) exclusion did not bar coverage for claim against insured by third party arising out of insured's damage [\*\*\*15] to third party's property), *aff'd*, 641 N.W.2d 877 (Minn. 2002). Cf. *Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1134-35 (9th Cir. 2002) (holding that j(5) exclusion did not bar coverage for damage to subcontractors' work because damage did not arise from insured's performing operations on subcontractors' work).

#### D. Other Issues

The insurers also claim that the district court erred in holding that they were not prejudiced by a delay in notice. We find no error in this conclusion.

Appellants further challenge the district court's ruling that, by refusing to defend Standard against the underlying action by Love, appellants waived any right to control [\*\*21] the settlement. We believe, however, that the district court's ruling on this issue was correct. See, e.g., *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 970 (8th Cir. 1999) (noting that [HN9] by refusing to defend, the insurer gives up its contractual right to control defense, and insured may negotiate reasonable settlement); *Cambridge Mut. Fire Ins. Co.*, 1997 ME 94, 692 A.2d 1388, 1391-92 (Me. 1997) (similar); *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai'i*, 76 Haw. 277, 875 P.2d 894, 913 (Haw. 1994) (by breaching duty to defend, insurer forfeits any right to control defense costs and strategy; insured is then entitled to negotiate reasonable settlement).

For the foregoing reasons, the district court's judgment is affirmed.

**CONCUR BY:** Rogers

#### CONCUR

[\*\*\*16] ROGERS, Circuit Judge, concurring. I concur in the majority opinion. I write separately to explain why, in my view, the seemingly applicable "j(5)" exclusion does not apply in the circumstances of this case.

The insurance policies in this case, in the "j(5)" exclusion, exclude coverage for "property damage" to

That particular part of real property on which you or any [\*\*22] contractors or subcontractors working directly or indi-

rectly on your behalf are performing operations, if the "property damage" arises out of those operations.

Notably, the policies do not define "performing operations" or "operations."

Two canons of constructions are crucial to my resolution of this issue. First, the insurer bears the burden of showing that an exception applies. *Interstate Life & Acci. Ins. Co. v. Gammons*, 56 Tenn. App. 441, 408 S.W.2d 397, 399 (Tenn. Ct. App. 1966). Second, ambiguous insurance contracts, and, in particular, ambiguous language limiting coverage, are construed in favor of the insured. *American Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000); *Interstate Life & Acc. Ins. Co.*, 408 S.W.2d at 399.

The insurers argue that the j(5) exclusion applies because, under Standard's contract with the State of Tennessee, Standard was required to dispose of construction debris. As explained in the majority opinion, Standard entered into a contract with the State of Tennessee to perform paving and road widening work as part of a state project to widen Highway 64 from two to five lanes. [\*\*23] In the contract, Standard [\*\*\*17] agreed to "clear and grub" vegetation and debris, to remove "structures and obstructions," and to dispose of this material "outside the limits of view from the project." Regarding the "clearing and grubbing," Standard was required to "make all necessary arrangements with property owners for obtaining suitable disposal locations," and the cost involved was "included in the unit price bid

for other items of [\*855] construction." Regarding the removal of "structures and obstructions," the contract provided that, "if the material is disposed of on private property, [Standard] shall secure written permission from the property owner."

While in my view the question is close, the term "operations" is ambiguous in that it is not clear whether Standard was "performing operations" on Ms. Love's property when it dumped debris there. It is true that Standard was required under the contract to dispose of construction debris and to obtain permission from any property owners on whose property Standard chose to dispose of the debris. However, Standard was not obligated to dispose of the debris in any particular fashion--Standard owned the debris once it was removed [\*\*24] and could dispose of it in a number of ways. It was not necessary for Standard to dump debris on Ms. Love's property in order to fulfill its contract to widen the highway. The requirement that Standard obtain permission before it dumped debris on private land simply served to shield the State of Tennessee from liability to third parties. As the district court found, "work on Ms. Love's property was an additional duty or task that Standard was to undertake through additional contracts with adjacent landowners." Or as Standard argues, it was "hired" to widen a road--not to perform work on Ms. Love's land.

Thus, given that the canons of construction favor coverage, and that, as explained in the majority opinion, coverage in the present case coincides with the underlying purpose of CGL insurance, the district court properly concluded that the j(5) exclusion does not apply.



LEXSEE 131 US 100

## UNITED STATES MUTUAL ACCIDENT ASSOCIATION v. BARRY.

No. 240.

## SUPREME COURT OF THE UNITED STATES

*131 U.S. 100; 9 S. Ct. 755; 33 L. Ed. 60; 1889 U.S. LEXIS 1807*

Argued April 9, 1889.

May 13, 1889, Decided

**PRIOR HISTORY:** ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

THIS was an action at law brought in the County Court of Milwaukee County, in the State of Wisconsin, by Theresa A. Barry, a citizen of Wisconsin, against the United States Mutual Accident Association, a New York corporation, to recover \$5000, with interest thereon at seven per cent per annum, from July 15th, 1883, on a policy of insurance issued by the defendant on June 23d, 1882. The case, after answer, was removed by the defendant into the Circuit Court of the United States for the Eastern District of Wisconsin. The material parts of the policy are set forth in the margin.<sup>1</sup>

<sup>1</sup> No. 794.

Division AA.

\$5000.

The United States Mutual Accident Association of the City of New York.

This certificate witnesseth, That The United States Mutual Accident Association, in consideration of the warranties and agreements made to them in the application for membership and of the sum of four dollars, do hereby accept John S. Barry, by occupation, profession, or employment a physician residing in Vulcan, State of Michigan, as a member in division AA of said association, subject to all the requirements and entitled to all the benefits thereof. The principal sum represented by the payment of two dollars by each member in division AA of the association, as provided in the by-laws (which sum, however is not to exceed five thousand dollars), to be paid to

Theresa A. Barry (his wife), if surviving (in the event of the prior death of said beneficiaries, or any of them, said sum shall be paid as provided in the by-laws), within sixty days after sufficient proof that said member, at any time within the continuance of membership, shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof. . . . Provided always, That this certificate is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to. . . . Provided always, That benefits under this certificate shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the certificate, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death. . . . And these benefits shall not be held to extend . . . to any case of death . . . unless the claimant under this certificate shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the member or of any other person.

The complaint, after setting forth the terms of the policy and averring that it was delivered by the defendant to John S. Barry, alleged, "that, on or about the 20th day

of June, 1883, and while said policy was in full force and effect, at the town or village of Iron Mountain, in the State of Michigan, and while the said John S. Barry was attending to the duties of his profession, to wit, that of a physician, and wholly without his fault, it became necessary for him to step or jump from a platform or walk to the ground beneath, about four feet downwards, and, in doing so, and in alighting upon said ground, he unexpectedly received an accidental jar and sudden wrenching of his body, caused by said jump or step downward and by coming in contact with the said ground beneath, as aforesaid, all of which was unexpected on his part and wholly without his fault or negligence; that the said jarring of his person and wrenching of his body, caused as aforesaid, was the immediate cause of, and directly produced, a stricture of the duodenum, from the effects of which the said John S. Barry continued to grow worse until, on the 29th day of June, 1883, he, on account of the same, died."

Issue was joined, and the case was tried by a jury, whose verdict was, that they found the issue in favor of the plaintiff, and assessed the damages to her at the sum of \$5779.70; and a judgment was entered for her for that amount, and \$189.35 costs, being a total of \$5969.05. To review this judgment the defendant has brought a writ of error.

At the trial the plaintiff offered in evidence the policy or certificate, to which offer the defendant objected, for the reason that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled and the defendant excepted. The defendant objected also that the complaint alleged no assessment, and the court received the evidence subject to the objection. The plaintiff then proved, without objection, by the secretary of the defendant, that on the 23d of June, 1882, there were 804 members in division AA in the association, and on the same day in 1883, 4803 members, and on the same day in 1884, 5626 members; that, during June and July, 1883, the defendant, in case of a death in division AA, could have levied a two-dollar assessment on at least 4803 members, that number being then insured in that division; that the only members who were exempt from the two-dollar death assessment were those who became members subsequent to the death for which the assessment was made; that, if the defendant had desired to pay the loss occasioned by the death of Barry the amount to be paid would have been \$5000; that the assessment levied next prior to June 29th, 1883, was levied June 1st, 1883; that if, at the time a death was reported, and a claim was proved, there were sufficient funds to the credit of division AA, the loss was paid from those funds, without making a specific assessment; that, if there were not sufficient funds at that time, an assessment was made; and that, on June 29th, 1883, the defen-

dant had on hand, belonging to class AA, \$2060.15. The witness then produced the by-laws of the defendant for 1882-1883, the material parts of which are set forth in the margin. <sup>1</sup>

1 Art. 1, sec. 3. The object of this association is to collect and accumulate a fund to be held and used for the mutual benefit and protection of its members, (or their beneficiaries,) who shall have sustained while members of the association bodily injuries, whether fatal or disabling, effected through external, violent and accidental means.

Art. 7, sec. 1. Upon sufficient proof that a member of one of the divisions of this association shall have sustained bodily injuries effected through external, violent and accidental means within the intent and meaning of these by-laws and the conditions named in the certificate of membership, and such injuries alone shall have occasioned death within ninety days from the happening thereof, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which deceased belonged at the time of such death, and shall pay the amount so collected, according to the following schedule of classification . . . to the person or persons whose name shall, at the time of the death of such member, be found recorded as his last designated beneficiaries, if surviving. To members of division AA not exceeding \$5000.

In the proofs of death furnished to the defendant was the following, in the evidence of the attending physician: "12th. What was the precise nature of the injury and its extent? Inflammation of the duodenum, from jarring (jump)."

The plaintiff's husband was a physician 30 years of age at the time of his death. He was, at the time of the injury, strong and robust, weighing from 160 to 175 pounds, about six feet high, and in good health. With two other physicians, Dr. Crowell and Dr. Hirschmann, he visited a patient, on June 20th, 1883, who lived in a house behind a drug store. On coming out of the house they were on a platform which was between four and five feet from the ground, and if they got off from the platform it was but a short distance to the back part of the drug store, where they desired to go. The other two jumped from the platform first, and alighted all right. Dr. Hirschmann testifies: "Just after we had jumped Dr. Barry jumped, and he came down so heavy that it attracted our attention, and we both turned around, and we both remarked that it was a heavy jump, and I asked him, 'Doctor, are you hurt?' and he said, 'No; not much.' I have an indistinct recollection of his leaning against the plat-

form when he jumped, but not sufficiently to state positively. If I were to jump I would jump and strike on my toes, and if I had any distance to jump would allow my knees to give. The way Dr. Barry came down it sounded to us as if he came down solid on his heels, so much so that we both turned around and remarked, 'Doctor, you came down heavily.' And I asked him, 'Are you hurt?' and he said, 'No; not much.' I heard the noise. It was a singular jump and sounded like an inert body. We then went with him to the drug store." Hirschmann drove home with him. He appeared ill on the way, and when he arrived home was distressed in his stomach, and vomited, and from that time on retained nothing on his stomach, and passed nothing but decomposed blood and mucus, and died nine days afterwards. There was much conflicting testimony as to the cause of death, and as to whether it resulted from duodenitis or a stricture of the duodenum, as alleged in the complaint, and from an injury caused by the jump. The issue presented to the jury sufficiently appear from the charge of the court.

At the close of the evidence on both sides, all of which is set forth in the bill of exceptions, the defendant moved the court to direct a verdict for it, on the ground that there was no evidence to sustain a cause of action. The motion was denied and the defendant excepted.

The plaintiff then, by leave of the court, amended her complaint by alleging that, at the time of Dr. Barry's death, and from that time, and for the balance of the year 1883, and including the time, as provided for in the policy, in which the said insurance was to be paid to the plaintiff herein, there were insured by it in class AA, the same class in which said Doctor Barry was at the time insured, 4803 members or persons upon whom the defendant could have levied an assessment, under its by-laws and rules, of the two dollars per head, making an amount exceeding the plaintiff's claim of \$5000. This amendment was objected to, but the defendant took no exception.

The defendant then demanded that the court submit a special verdict in the case, as provided by the rules of practice in the State of Wisconsin, and, as a question upon such special verdict, requested the court to submit the following question: "Whether the death of Dr. Barry was caused by duodenitis?" The demand was refused and the defendant excepted. The defendant then asked the court to submit, in connection with the general verdict, the special question as to whether the assured died of duodenitis. The request was refused and the defendant excepted.

The defendant then requested the court to charge the jury as follows: "It appears from the evidence in this case that by the policy in suit the defendant company accepted John S. Barry as a member of class AA, and in effect

agreed to levy an assessment of two dollars upon each member of said class and to pay the same to the plaintiff if said John S. Barry should die of bodily injuries, effected through external, violent and accidental means, but in no event to pay more than \$5000. Before the plaintiff can recover in this case she must show that the defendant, when it received the proof of death on or about July 15th, 1883, either had cash on hand belonging to class AA, or levied an assessment upon the members, and by that means the defendant received money which belonged to class AA. By the evidence in suit it appears that there were over 4000 members belonging to class AA during the months of June and July, 1883, who were subject to assessment of two dollars per man, and that, on June 1st, 1883, an assessment was made upon members belonging to class AA, and that on June 29th, 1883, the defendant had on hand \$2060.15 belonging to class AA, and that an assessment was then pending and in process of collection. This evidence does not show any cash on hand belonging to class AA on July 15th or at any later date, nor is there any other evidence in the case which would show that fact or that any assessment was levied. Therefore the plaintiff cannot recover in this action, and you are instructed to return a verdict for the defendant." The court refused to give this instruction and the defendant excepted.

The defendant then separately requested the court to charge the jury to find for the defendant because no accident within the true intent and meaning of the policy occurred to Dr. Barry; and that he did not die from duodenitis; and that they must find for the defendant if he, in jumping, alighted squarely on his feet, or if they found that the jump did not result in the obstruction or occlusion of the duodenum; and that there was no evidence of any wrenching, twisting, or straining of the body in the jumping; and that, considering the character of the injury alleged in the case and the difficulty attending its proper investigation, great weight should be given by the jury to the opinion of scientific witnesses accustomed to investigate the causes and effects of injury to the alimentary canal, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries in science and the most perfect methods of treatment and investigation.

The court refused to give these instructions severally, and the defendant excepted to each refusal.

The defendant also separately requested the court to charge the jury that their verdict must be for the defendant if they found that the alleged injury was not sustained by Dr. Barry, or that the injury was not effected through violent means, or through accidental means, or through external means, or that death occurred directly or indirectly in consequence of disease or bodily infirmity,

or partly or wholly from disease, or not from duodenitis; and that they were not at liberty to speculate as to what occurred in the jump, but must be governed by the evidence of witnesses on the trial.

The court refused to give these instructions severally, except as contained in its general charge, and the defendant excepted to each refusal. This makes it necessary to set forth the parts of the charge to the jury which are involved in the several requests. They are as follows, and the defendant excepted at the time separately to each part which is contained in brackets:

"By the terms of the certificate it was provided that, to entitle the beneficiary to the sum of five thousand dollars, the death should be occasioned by bodily injuries alone, effected through external, violent and accidental means; also, that the benefits of the insurance should not extend to any injury of which there was no external and visible sign, nor to any injury happening, directly or indirectly, in consequence of disease, nor to any death or disability caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the certificate, nor to any case except where the injury was the proximate or sole cause of the disability or death. "The issue between the parties may be briefly stated: It is claimed by the plaintiff that on the occasion mentioned by Dr. Hirschmann, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the certificate; that the deceased, at the time of the alleged accident, was in sound physical condition and in robust health; and that the alleged injury was the proximate and sole cause of death.

"The defendant, on the other hand, denies that the deceased sustained any injury that was effected through accidental means, and also contends, that, if any injury was sustained, it was one of which there was no external or visible sign, within the meaning of the policy, and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case, therefore, resolves itself into three points of inquiry:

"First. Did Dr. Barry sustain internal injury by his jump from the platform on the occasion testified to by Dr. Hirschmann?

"Second. If he did sustain injury as alleged, was it effected through external, violent and accidental means, within the sense and meaning of this certificate, and was it an injury of which there was an external and visible sign?

"Third. If he was injured as claimed, was that injury the proximate cause of his death?

"To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirma-

tive, and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

["The first question (viz., Was the deceased, Dr. Barry, injured by jumping from the platform?) is so entirely a question of fact, to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the question, you will consider all the circumstances of the occurrence as laid before you in the testimony; the apparent previous physical condition of Dr. Barry; the subsequent occurrences and circumstances tending to show the change in his condition; the relation in time which the first developments of any trouble bore to the time when he jumped from the platform; the nature of his last sickness; and the symptoms disclosed in its progress and termination.]

"Further, you will inquire what evidence, if any, did the post-mortem examination and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury furnish of an actual physical injury; [what connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of the post-mortem investigations. The question is before you in the light of all proven facts, for determination. The court cannot indicate any opinion upon it, without invading your exclusive province; and by your ascertainment of the fact the parties must be bound.]

["There is presented in the case a train of circumstances. Do they or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus you may properly pursue the inquiry, guided by and keeping within the limits of the testimony.]

"If you find that injury was sustained, then the next question is, Was it effected through external, violent and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent and accidental. Did an accident occur in the means through which the alleged bodily injury was effected?

["The jumping off the platform was the means by which the injury, if any was sustained, was caused.]

["Now, was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground?]

["The term 'accidental' is here used in its ordinary, popular sense, and in that sense it means 'happening by

chance; unexpectedly taking place; not according to the usual course of things;' or not as expected.]

["In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.]

["But if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted from the accident or through accidental means.]

["We understand, from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control, in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body, in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.]

"And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. [But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.]

"Of course it is to be presumed that he expected to reach the ground safely and without injury. [Now, to

simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not as expected, happen, in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed, in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means.]

"You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury. Taking it all into consideration and applying to the facts the instruction of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means. The defendant claims that, if Dr. Barry did sustain injury, it was one of which there was no external and visible sign, within the meaning of the certificate of insurance, and therefore, that the plaintiff is not entitled to recover. [Counsel are understood to contend that no recovery could be had under a certificate of insurance in the form and terms of this one, if the injury was wholly internal. In that view the court cannot concur. It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury; and, with this understanding of the meaning of the certificate of insurance, and upon the evidence, you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question whether what are claimed here to have been external and visible signs were, in fact, produced by -- were the result of -- the injury, if any was sustained.]

"The next question is, if Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the certificate of insurance according to its letter and spirit, it must be held

that, if any other cause than the alleged injury produced death, there can be no recovery, so that, to entitle the plaintiff to recover, you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found, it must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury -- I mean a disease or derangement of the parts not necessarily produced by the injury -- or if the alleged injury merely brought into activity a then existing, but dormant, disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

"It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform caused some displacement in the duodenum; that it became occluded, to use the expression that has been used by witnesses; that there was constriction and occlusion of that intestine, which was accompanied with consequent inflammation -- in short, that the deceased had duodenitis, as the direct result of the alleged original injury, and in consequence died. This contention is urged upon all the circumstances of the case, and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the alleged developments of the autopsy. It is contended in behalf of the defendant, that there was no constriction, occlusion, or inflammation of the duodenum; that the deceased did not have duodenitis; and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes, with some undiscovered organic trouble not occasioned by violence or sudden injury; that the conclusions of the physicians who made the post-mortem examination were erroneous; and that the microscopic examination of the parts in New York demonstrated such alleged error.

Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted, for reasons urged in argument and which I need not repeat.

"Now, between these conflicting claims weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this certificate of insurance; but if the deceased received an internal injury which in direct course produced duodenitis, and thereby caused his death, then the injury was the proximate cause of death.

"In considering this case you ought not to adopt theories without proof, nor to substitute bare possibility for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence; where the weight of credible testimony proves the existence of a fact, it should be accepted as a fact in the case. Where, if at all, proof is wanting and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

"There has been considerable testimony given by physicians, what we call expert testimony, and in the consideration of that testimony it is your province to determine which of these medical witnesses is right in his statement, opinion, or judgment. It is purely a question of fact for you, which of these physicians was most competent to form a judgment as to the cause of Dr. Barry's death. Who has had the best opportunities for forming a judgment as to the cause of death?

"All this is to be taken into consideration by you in weighing and deliberating upon this evidence. . .

"I am asked to instruct you that, before the plaintiff can recover, she must show that when the defendant received the proofs of death, on or about July 15, 1883, it either had cash on hand belonging to class AA, or that it levied an assessment upon the members, and by that means received money which belonged to class AA. This construction of the certificate is upon the theory that, to entitle the plaintiff to recover, it is essential to show either that it had money on hand with which to meet this loss, or that it has made an assessment from which the loss can be paid.

"This instruction I must decline to give you, for the reason that it appears from the evidence that there were more than a sufficient number of members in class AA to pay the five thousand dollars on this certificate, if an assessment were to be made; and I regard it the duty of the association to make the assessment when the death

loss is proved, and where the case is one upon which the association is liable to pay the loss.

"Now, to sum up the case, if you find from the evidence that the deceased, on the 20th day of June, 1883, sustained a bodily injury, and that such injury was effected through external, violent and accidental means, and was one of which there was an external and visible sign, and that the injury was the proximate or sole cause of death, then the plaintiff should have a verdict in her favor.

"If, on the contrary, you find either that the injury was not sustained, or that, if it was sustained, it was not effected through external, violent and accidental means, or was an injury of which there was no external and visible sign, or that it was not the proximate or sole cause of death, then your verdict should be for the defendant.

"If you find the plaintiff entitled to recover you will render a verdict in her favor for the sum of five thousand dollars, with interest at 7 per cent, computed from the 15th of September, 1883, to the present time, adding the interest to the principal, so that your verdict will show the gross sum."

After the charge had been given, a jurymen inquired: "Is there any evidence showing that the association did make an assessment after receiving proof of Dr. Barry's death?" The court replied: ["There is some proof on that subject. You need not take that into consideration at all, for I have instructed you that if you should find the facts as I have stated them to you the plaintiff is entitled to recover. You need not take into consideration the matter of assessment."] The defendant excepted to the part in brackets.

### LexisNexis(R) Headnotes

*Civil Procedure > Judicial Officers > Judges > Discretion*

*Civil Procedure > Trials > Jury Trials > Verdicts > Special Verdicts*

[HN1] See Wis. Rev. Stat. tit. 25, ch. 128, § 2858 (1878).

*Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings*  
*Insurance Law > Life Insurance > Accidental Death > General Overview*

[HN2] The term "accidental" used in an insurance policy in its ordinary, popular sense, means happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected.

### SYLLABUS

A certificate or policy issued by a Mutual Accident Association stated that it accepted B. as a member in division AA of the association; "the principal sum represented by the payment of two dollars by each member in division AA," not exceeding \$5000, to be paid to the wife of B. in 60 days after proof of his death, from sustaining "bodily injuries effected through external, violent and accidental means." B. and two other persons jumped from a platform four or five feet high, to the ground, they jumping safely and he jumping last. He soon appeared ill, and vomited, and could retain nothing on his stomach, and passed nothing but decomposed blood and mucus and died nine days afterwards. In a suit by the widow to recover the \$5000, the complaint averred that the jar from the jump produced a stricture of the duodenum, from the effects of which death ensued. At the time of the death the association could have levied a two dollar assessment on 4803 members in division AA; Held,

(1) It was not error in the court to refuse to direct the jury to find a special verdict, as provided by the statute of the State;

(2) The issue raised by the complaint as to the particular cause of death was fairly presented to the jury.

(3) The jury were at liberty to find that the injury resulted from an accident;

(4) The policy did not contract to make an assessment, nor make the payment of any sum contingent on an assessment or on its collection; and the association took the risk of those who should not pay.

**COUNSEL:** Mr. B. K. Miller, Jr., for plaintiff in error.

I. The court erred in not directing a special verdict.

The Revised Statutes of Wisconsin, 1887, § 2858, provides: "The court in its discretion may, and when either party at or before the close of the testimony and before any argument to the jury is made or waived shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions in writing, relating to only material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact, to be stated as aforesaid. In every action for the recovery of money only or specific real property, the jury may in their discretion when not otherwise directed by the court render a general or a special verdict."

If requested in proper time it is obligatory upon the judge to submit a special verdict; "the court shall direct the jury

131 U.S. 100, \*; 9 S. Ct. 755, \*\*;  
33 L. Ed. 60, \*\*\*; 1889 U.S. LEXIS 1807

to find a special verdict." *Schatz v. Pfeil*, 56 *Wisconsin*, 429; *Fenelon v. Butts*, 53 *Wisconsin*, 344. This is the general rule in States where a similar rule is in force. This statute is binding on the Federal Courts. Rev. Stat. § 914; *Indianapolis, &c. Railroad v. Horst*, 93 U.S. 291, 301.

There are two forms of procedure in Wisconsin: one by an ordinary special verdict, in which the jury decides all the facts, and upon which a judgment is rendered as in *Easton v. Hodges*, 106 U.S. 408; the second method is by submitting a general verdict and adding certain special questions.

In the case at bar a special verdict was demanded, and when that was refused a special finding was requested.

The error assigned refers only to the refusal of the court to submit a special verdict. The refusal to submit a special finding in addition to the general verdict was clearly not error in view of the decision in *Indianapolis Railroad Co. v. Horst*, 93 U.S. 299. It would seem, that a particular form of rendering a verdict was certainly a "form or mode of proceeding" within the true intent and meaning of the statute. *Chateaugay Ore & Iron Co., Petitioner*, 128 U.S. 544.

II. The trial court erred in not restricting the case to the issues made up by the pleadings.

The issue by the pleadings was "accidental death from duodenitis." The issue submitted by the court was accidental death from anything.

The complaint alleges that deceased jumped off a low platform and "unexpectedly received an accidental jar and sudden wrenching of his body caused by said jump." "That the said jarring of his person and wrenching of his body caused as aforesaid was the immediate cause of and directly produced a stricture of the duodenum from the effects of which . . . [he] died." The answer denies this. So the issue certainly was whether the insured died of duodenitis caused by an accident.

It is general rule that the allegata and probata must agree. If a party plead with too great particularity he must make his proof accordingly.

The plaintiff alleged an accidental injury to duodenum. The defendant denied such an accident. The proof was directed almost entirely to this question. The court left it generally to the jury to say whether there was any accidental injury of any kind; thus submitting to the jury questions not raised by the pleadings or covered by the evidence.

III. There was no evidence to support the verdict because no accident was shown.

The policy was to insure Dr. Barry against death by accident, provided he "shall have sustained bodily injuries effected through external, violent and accidental means . . . and such injuries alone shall have occasioned death." "Provided, always, that benefits under this certificate shall not extend to hernia nor to any bodily injury of which there shall be no visible sign nor to any bodily injury happening directly or indirectly in consequence of disease nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease . . . nor to any case except where the injury is the proximate or sole cause of the disability or death . . . nor to any case of death or personal injury unless the claimant, under this certificate, shall establish by direct and positive proof that the said death or personal injury was caused by external, violent and accidental means."

The court instructed the jury as follows: "Now, was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground?"

Again, "Was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground or in the act of alighting? Did he or not alight on the ground just as he intended to? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement or in the act of alighting on the ground? These are points directly pertinent to the question in hand."

Again. "But if, in jumping or alighting on the ground, there occurred from any cause, any unforeseen or involuntary movement, turn or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstances which interfered with or changed such a downward movement as he expected to make or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means."

There is no evidence that any one of these things happened. So far as the evidence goes, Dr. Barry voluntarily jumped off the platform, alighted squarely on his feet

without falling, in fact did exactly what he intended to do and in the way intended.

An "accident" is defined to be "an event from an unknown cause," or "an unusual and unexpected event from a known cause." The death in this case was not caused by such an accident. *Southard v. Railway &c. Assurance Co.*, 34 Connecticut, 574; *McCarthy v. Travellers' Insurance Co.*, 8 Bissell, 362.

If there was an accident it does not follow from the evidence that he died therefrom.

After the jump they all went to a drug-store and met some gentlemen there. The deceased drove all the way home. He was ill that night and continued ill till the date of his death, and although he may have died of an obstruction of the bowels or even from duodenitis, there is absolutely no evidence that his death was caused by the jump. It is a clear case of post hoc propter hoc.

IV. No recovery at law was recoverable in this action, certainly not for more than nominal damages.

The policy of insurance provided that "the principal sum represented by the payment of \$2 by each member in division AA . . . as provided in the by-laws," should be paid to Mrs. Barry.

The by-laws provide that "the board of directors shall . . . order an assessment of \$2 upon each person . . . and pay the amount so collected." No evidence of an assessment was offered or given.

The contract between the parties is not that the defendant will absolutely pay \$5000 or any other sum, but that it will levy an assessment and pay over the proceeds thereof. Plaintiff's remedy was clearly in equity for a specific performance and even if an action at law will lie it would be for breach of covenant; the damages would be merely nominal. *Curtis v. Mutual Benefit Life Ins. Co.*, 48 Connecticut, 98; *Eggleston v. Centennial Mutual Life Association*, 18 Fed. Rep. 14; *Smith v. Covenant Benefit Association*, 24 Fed. Rep. 685; *Covenant Benefit Association v. Sears*, 114 Illinois, 108; *In re La Solibarger v. Union Mutual Aid Association*, 72 Iowa, 191; *Bailey v. Mutual Benefit Association*, 71 Iowa, 689; *Newman v. Covenant Mutual Benefit Association*, 72 Iowa, 242; *Tobin v. Western Mutual Aid Society*, 72 Iowa, 261.

Mr. William F. Vilas for defendant in error.

Mr. George McWhoeter and Mr. C. B. Bice filed a brief for defendant in error.

## OPINION BY: BLATCHFORD

### OPINION

[\*119]

[\*\*761] [\*\*\*66] MR. JUSTICE BLATCHFORD, after stating the case as above reported, delivered the opinion of the court.

(1) When the trial took place, in December, 1885, the following provision of the state statute was in force in Wisconsin, (Rev. Stat. of Wisconsin, 1878, 760, § 2858, title 25, c. 128:) [HN1] "The court, in its discretion, may, and when either party, at or before the close of the testimony and before any argument to the jury is made or waived, shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact to be stated as aforesaid. In every action for the recovery of money only, or specific real property, the jury may, in their discretion, when not otherwise directed by the court, render a general or a special verdict."

It is contended, for the defendant, that the court erred in refusing its demand to submit a special verdict in the case, as provided by the rules of practice in the State. It is, however, [\*120] conceded, in the brief of its counsel, that the refusal to submit a special question in connection with the general verdict, was not error, in view of the ruling of this court in *Indianapolis Railroad Co. v. Horst*, 93 U.S. 291, 299. In that case this court adhered to its views expressed in *Nudd v. Burrows*, 91 U.S. 426, 442, that the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading, nor a form or mode of proceeding, within the meaning of § 5 of the act of June 1, 1872, 17 Stat. 197, now § 914 of the Revised Statutes, and further said that the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common law powers with which in that respect he is clothed. This principle has been uniformly applied since by this court; and we are of opinion that it covers the demand made in this case that the court should submit a special verdict, as provided by the rules of practice in the State of Wisconsin, and should submit the particular question mentioned in that connection.

(2) It is also urged as error that the court did not restrict the case to the issue made by the pleadings; that that issue was, that the assured died from "a stricture of the duodenum," produced by the accident; and that the

issue submitted by the court was accidental death from anything. The court very properly refused to instruct the jury that the assured did not die from duodenitis; and its response to the request to instruct them that if they found he did not die from duodenitis, their verdict must be for the defendant, was, that it refused to give that instruction "except as contained in the general charge." It is contended, however, for the defendant, that, in the general charge, the jury were charged, in effect, that, if the assured sustained internal injury of any kind by his jump, and died therefrom, the plaintiff could recover. But we do not so understand [\*\*762] the charge. In a part of it, before set forth, and not excepted to by the defendant, the court distinctly laid before the jury the issue as to the constriction or occlusion of the duodenum, and the contentions of the two parties in regard thereto, and told the jury that they must judge between those conflicting claims, weighing and giving due consideration to [\*121] all the testimony, and that if the deceased received an internal injury which in direct course produced duodenitis, and thereby caused his death, then the injury was the proximate cause of death.

[\*\*\*67] (3) It is further urged that there was no evidence to support the verdict because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that [HN2] the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;" that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means. The jury were further told, no exception being taken, that, in considering the case, they ought not to adopt theories without proof, or substitute bare possibility for positive evidence of facts testified to by credible witnesses; that where the weight of credible testimony proved the existence of a fact, it should be accepted as a fact in the case; but that where, if at all, proof was wanting, and the deficiency remained

throughout the case, the allegation of fact should not be deemed established.

In *Martin v. Travellers' Ins. Co.*, 1 Foster & Fin. 505, the policy was against any bodily injury resulting from any accident or violence, "provided that the injury should be occasioned [\*122] by any external or material cause operating on the person of the insured." In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered.

In *North American Ins. Co. v. Burroughs*, 69 Penn. St. 43, the policy was against death "in consequence of accident," and was to be operative only in case the death was caused solely by an "accidental injury." It was held that an accidental strain, resulting in death, was an accidental injury within the meaning of the policy, and that it included death from any unexpected event happening by chance, and not occurring according to the usual course of things.

The case of *Southard v. Railway Passengers' Assurance Co.*, 34 Connecticut, 574, is relied on by the defendant. That case, though pending in a state court in Connecticut, was decided by an arbitrator, who was then the learned district judge of the United States for the District of Connecticut. But if there is anything in that decision inconsistent with the present one, we must dissent from its views.

(4) It is contended that no recovery at law could be had on this policy, or, at most, only one for nominal damages, on the ground that the contract of the defendant was not to pay any sum absolutely, but only to levy an assessment and pay over the proceeds; and that the remedy of the plaintiff was solely in equity, for a specific performance of the contract.

The policy says: "The principal sum represented by the payment of two dollars by each member in division AA of the association as provided in the by-laws," not to exceed \$5000, "to be paid" to the wife. Although the by-laws state that the object of the association "is to collect and accumulate a fund" for the purpose named, and that, on the requisite proof of bodily injury to, and the death of, a member of a division, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which the deceased belonged at the time of his death, and pay the amount so collected, according to the prescribed schedule of classification, to the proper beneficiary, the policy [\*123] does not contract to make an assessment, nor does it make the payment of any sum contingent on an assessment, or on the collection of an assessment. It agrees to pay a principal sum represented by the payment of two dollars for each member in division AA, within

131 U.S. 100, \*; 9 S. Ct. 755, \*\*;  
33 L. Ed. 60, \*\*\*, 1889 U.S. LEXIS 1807

sixty days after proof of death. The association always knows the number of members which is to be multiplied by two. It has sixty days in which to make the assessment and collect what it can, before making any payment, but it takes the risk as to those who do not pay in time or at all. The liability to assessment is all that concerns the beneficiary, not the making or collection of an assessment; and the liability to assessment only measures the amount to be paid under the policy.

In view of the amendment made to the complaint at the trial which was not excepted to, and of the testimony of the secretary of the defendant, the charge of the court

on the subject of an assessment was proper, and so was the verdict.

In the cases cited by the defendant either the policy was different from the present one, in providing only for levying an assessment and paying the amount collected, or there was no proof [\*\*763] of the assessable number of members.

We see no error in anything excepted to by the defendant, and the judgment is

Affirmed.



LEXSEE 271 N.C. 158, 161

**YORK INDUSTRIAL CENTER, INC. and YORK BUILDING COMPANY v.  
MICHIGAN MUTUAL LIABILITY COMPANY**

[NO NUMBER IN ORIGINAL]

**SUPREME COURT OF NORTH CAROLINA**

*271 N.C. 158; 155 S.E.2d 501; 1967 N.C. LEXIS 1169*

**July 24, 1967, Filed**

**PRIOR HISTORY:** [\*\*\*1] Appeal by defendant from *Canaday, J.*, at the Second January 1967 Regular Session of Wake.

The plaintiffs were insured under a policy of liability insurance issued by the defendant. Dr. Louis N. West and wife obtained judgment against the present plaintiffs in the Superior Court of Wake County for damages for trespass upon their land by driving and operating a bulldozer thereon, resulting in the destruction of trees and shrubs. The present plaintiffs paid the judgment and demanded reimbursement therefor from the defendant. Upon the defendant's denial of liability therefor under its policy, this action was entered. The parties waived trial by jury and consented that the judge hear the evidence and find the facts. The amount of the plaintiffs' recovery, if any, was stipulated.

The facts found by the court, which are significant upon this appeal, are as follows:

"5. That the general liability coverage under said policy as originally written obligated the defendant \* \* \* 'To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, \* \* \* caused by accident'; that \* \* \* the plaintiffs [\*\*\*2] \* \* \* upon the payment of an additional premium \* \* \* secured an endorsement to the policy where the word 'occurrence' was substituted for the word 'accident' in the policy, and occurrence was defined in the policy as follows:

"Occurrence means an unexpected event or happening or a continuous or repeated exposure to conditions which results during the policy period in \* \* \* injury to or destruction of property \* \* \* provided the insured did not intend that injury \* \* \* or destruction would result. \* \* \*

"6. That in the late Spring of 1958, the plaintiffs were the owners of and interested in the development of a tract of land located on the east side of U. S. Highway 1A (known as the Old Wake Forest Road), Raleigh, North Carolina; that said tract lay to the south and east of the property of Louis N. and Betsey John West; that J. W. York, who was President of both plaintiff corporations, in furtherance of the developments of the York property, employed John C. Castleberry, a registered engineer and an expert in the field of land surveying, to make a survey of the York property and to establish and mark the dividing line between the York property and the West property; that Castleberry [\*\*\*3] \* \* \* established the south line of the West property \* \* \*; that as he surveyed said south line, he followed the line \* \* \* to an old existing iron stake \* \* \* approximately 21 feet short of the length of the south line as called for in the West deed; that Castleberry searched for an iron pipe or other evidence of a corner to the east of the old existing iron pipe along the same course but was una-

271 N.C. 158, \*; 155 S.E.2d 501, \*\*;  
1967 N.C. LEXIS 1169, \*\*\*

ble to find any further sign of the south-east corner of the West property; \* \* \* that Castleberry turned the angle called for in the West deed at the point of the old iron to run in a northerly direction the eastern line in the West property; \* \* \* that in establishing the lines dividing the York and West property, which lines were the south and east lines of the West property, Castleberry chopped the survey line and placed stakes thereon at intervals of approximately 200 feet.

"7. That Castleberry was instructed to, and in fact did point out to W. H. Gilliam, who was engaged by the plaintiffs to clear and grade their property, the location of the Wests' southern and eastern property lines; that thereafter Gilliam cleared and graded the York property along the south line of West, and along [\*\*\*4] the east line of West for a distance of 200 -- 250 feet north from West's southeast corner; that Gilliam never crossed the line staked by John Castleberry on either the southern or eastern sides of the West property. \* \* \*

"9. \* \* \* [T]hat West instituted an action entitled *L. N. West and Betsey John West v. York Industrial Center, Inc., et al.*, alleging that York had carelessly, negligently, willfully, wrongfully and unlawfully damaged the West property; that York filed answers denying the allegations in the West complaint, praying that the Court appoint a surveyor under *G.S. 38-4* to determine the true boundary lines of West and York \* \* \*; that said action was tried at the June 1960 Term of Wake County Superior Court, and resulted in a verdict against the plaintiffs herein \* \* \*

"10. That the survey by the Court-appointed surveyors in the action of *West v. York* showed that the eastern line of the West property as located by Castleberry was approximately 21 feet west of the eastern line of the West property as established by the Court-appointed surveyors \* \* \*

"11. That judgment was entered on said verdict against the plaintiffs herein \* \* \*; that York demanded that [\*\*\*5] the defendant herein pay said judgment but that the defendant herein refused to do so;

that \* \* \* the plaintiffs herein paid [the judgment].

"12. That during the grading and clearing along the eastern line of the West property as established by Castleberry, which is the area where the West property was damaged, the plaintiffs herein were acting under the belief that the grading and clearing was being done on property owned by them; that the plaintiffs at no time graded, cleared or went upon the lands of the Wests with knowledge that said land was in fact owned by the Wests and not by the plaintiffs."

Upon these findings of fact, the court concluded that York's entry upon the property of the Wests was "an unexpected event or happening within the meaning of the policy issued by the defendant," that York did not intend to damage or destroy the property of the Wests within the meaning of those terms as used in the policy issued by the defendant, and that the damage to the Wests' property by the plaintiffs herein constituted an occurrence within the meaning of the policy issued by the defendant. The court accordingly gave judgment in favor of the plaintiffs for the amount of their [\*\*\*6] damage as stipulated.

In the action brought by the Wests against the present plaintiffs, the jury found that the present plaintiffs did "trespass upon the land of the" Wests. In that action, as the result of a motion by the present plaintiffs, the then defendants, for a bill of particulars and for an order requiring the Wests to make the allegations of their complaint more definite and certain and to strike certain portions thereof, the Wests filed a response stating that their complaint contained only a single cause of action, which was "one for damages growing out of trespass." All of the pleadings, motions and responses in the suit by the Wests against the present plaintiffs were offered in evidence at the hearing of the present case.

**DISPOSITION:** Affirmed.

#### LexisNexis(R) Headnotes

*Contracts Law > Defenses > Ambiguity & Mistake > General Overview*  
*Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers*

271 N.C. 158, \*; 155 S.E.2d 501, \*\*;  
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[HN1] In the construction of a policy of insurance, ambiguous provisions will be given the meaning most favorable to the insured. Exclusions from and exceptions to undertakings by the company are not favored. Nevertheless, it is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties.

***Insurance Law > Claims & Contracts > Policy Interpretation > General Overview***

[HN2] When a word is defined in an insurance policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit.

***Insurance Law > Claims & Contracts > Policy Interpretation > General Overview***

[HN3] Exceptions from coverage otherwise provided by a policy of insurance are to be strictly construed against the insurer.

***Real Property Law > Torts > Trespass to Real Property Torts > Premises Liability & Property > Trespass > General Overview***

[HN4] In the absence of negligence, trespass to land requires an intentional entry thereon. It does not, however, require that such entry be wilful and an action for trespass lies even though the entry was made under a bona fide belief by the defendant that he was the owner of the land and entitled to its possession or was otherwise entitled to go upon the property.

**COUNSEL:** *Holding, Harris, Poe & Cheshire for defendant appellant.*

*Manning, Fulton & Skinner for plaintiff appellees.*

**JUDGES:** Lake, J.

**OPINION BY:** LAKE

**OPINION**

[\*161] [\*\*504] The appellant states in its brief that in this case there is no issue of fact. As it concedes, the evidence is sufficient to [\*162] support the findings of fact by the trial judge. These are, therefore, conclusive. *Sherrill v. Boyce*, 265 N.C. 560, 144 S.E. 2d 596.

The determinative question is, Does the policy issued by the defendant insure the plaintiffs against liability for damage to the land of a third person by the insured's entry thereon and [\*\*\*9] acts thereon due to a *bona fide* mistake as to the location of the boundary line between the land of the insured and the land of such third person? The basic principles to be applied in answering this question were recently stated by us in *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436, as follows:

"It is well settled that, [HN1] in the construction of a policy of insurance, ambiguous provisions will be given the [\*\*505] meaning most favorable to the insured. Exclusions from and exceptions to undertakings by the company are not favored. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410; *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845. Nevertheless, it is the duty of the Court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties. *Hardin v. Insurance Co.*, 261 N.C. 67, 134 S.E. 2d 142; *Richardson v. Insurance Co.*, 254 N.C. 711, 119 S.E. 2d 871; *Pruitt v. Insurance Co.*, 241 N.C. 725, 86 S.E. 2d 401."

The policy, as originally issued, provided coverage against legal liability for the payment of damages because of injury to or destruction of property "caused [\*\*\*10] by accident." Subsequently, it was amended by the attachment of a rider providing for the substitution of the word "occurrence" for the word "accident" and defining "occurrence." For this change in the policy, the plaintiffs paid a substantial additional premium. The necessary inference is that the parties intended that the policy, as amended, would provide substantial additional protection to the policyholder; that is, they intended that the word "occurrence," as defined in the rider, would bring within the protection of the policy substantial risks not included under the original limitation to damage to property "caused by accident."

[HN2] Since the word "occurrence" is defined in the amended policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit. Substituting this agreed definition of "occurrence" for the word "accident" in the policy, the under-

taking of the defendant is thus stated in the contract of the parties:

"To pay on behalf of the insured all sums which the [\*\*\*11] insured shall become legally obligated to pay as damages because of [\*163] injury to or destruction of property, \* \* \* caused by an unexpected event or happening \* \* \* which results during the policy period in \* \* \* injury to or destruction of property \* \* \* provided the insured did not intend that injury \* \* \* or destruction would result. \* \* \*"

We turn first to the proviso which excepts from the coverage, otherwise provided by the policy, liability of the insured for injury to or destruction of property intended by him. This, like other [HN3] exceptions from coverage, otherwise provided by a policy of insurance, is to be strictly construed against the company.

It is obvious that the plaintiffs intended to cut down and destroy every tree which they did destroy on the land of the Wests. It is equally clear that they did so in the belief that these trees and shrubs belonged to them and not to the Wests. That is, the plaintiffs did not destroy the trees with the intent to injure or destroy any property right of the Wests. A fair construction of this excluding clause in the policy is that it is intended to remove from the protection otherwise afforded by the policy only the liability [\*\*\*12] of an insured who wilfully damages property, knowing that he has no right to do so. Therefore, if the judgment rendered against the plaintiffs was for damage to the land of the Wests "caused by an unexpected event or happening," the proviso does not eliminate the plaintiffs' claim from the coverage of the policy.

The basis of the plaintiffs' present claim against the defendant is a judgment rendered against the plaintiffs in favor of the Wests for trespass. [HN4] In the absence of negligence, which is not shown in [\*506] the present case, trespass to land requires an intentional entry thereon. *Schloss v. Hallman*, 255 N.C. 686, 122 S.E. 2d 513. It does not, however, require that such entry be wilful and an action for trespass lies even though the entry was made under a *bona fide* belief by the defendant that he was the owner of the land and entitled to its possession or was otherwise entitled to go upon the property. See *Lee v. Stewart*, 218 N.C. 287, 10 S.E. 2d 804; 52 Am. Jur., Trespass, §§ 7, 35; 87 C.J.S., Trespass, § 5; *Restatement, Torts*, 2d, § 164; Prosser on Torts, 3d ed., § 17. Consequently, there is no inconsistency between the claim of the plaintiffs for [\*\*\*13] reimbursement for their payment of the judgment rendered against them for

trespass and their contention that they "did not intend" the injury or destruction of the property of the Wests, which was the basis for such judgment against them. The testimony of the plaintiffs' witnesses Castleberry, Gilliam, Edwards and York, the admission of which the defendant assigns as error on the ground of irrelevance to any issue in the present action, was relevant to this question of the plaintiffs' intent [\*164] to injure or destroy the property of the Wests. It showed a *bona fide* effort by the plaintiffs to determine the location of the boundary of the West property so as to avoid injury to it. This assignment of error is, therefore, without merit.

We are brought next to the question of whether the injury to or destruction of the property of the Wests was caused by "an unexpected event or happening" within the meaning of the policy issued by the defendant. The cause of the injury to the property of the Wests was the crossing of the boundary line by the plaintiffs and their acts subsequent thereto without knowledge of such crossing. This invasion of the land of the Wests was, in turn, [\*\*\*14] due to the error of the surveyor in locating the line. This error of the surveyor was "an unexpected event" within the meaning of this policy.

In *Haynes v. American Casualty Co.*, 228 Md. 394, 179 A 2d 900, employees of a contractor, by mistake, crossed a boundary, entered the property of another person and cut down trees thereon. The court held the damage so done was "caused by accident" within the meaning of the liability insurance policy there in question, which was similar to the original policy issued by the defendant here. In *J. D'Amico, Inc., v. City of Boston*, 345 Mass. 218, 186 N.E. 2d 716, an excavating contractor, following lines established for his guidance by the city engineer, went over the line of an adjoining property owner and destroyed trees on his land. The contractor, having been sued by the landowner, brought a proceeding to compel his liability insurer to defend the claim made against him by the property owner. The policy was similar to the one originally issued to the defendant here. The Supreme Court of Massachusetts, though reversing a judgment in favor of the insured on grounds not presented in the matter before us, said, "[T]respass by D'Amico [\*\*\*15] by mistake or without actual intent to invade property upon which it knew it was not entitled to carry on work under its contract, would be 'caused by accident' within the policy." A like result was reached under a like policy in *McAllister v. Hawkeye-Security Ins. Co.*, 68 Ill. App. 2d 222, 215 N.E. 2d 477. See also *Gray v. State (La. App.)*, 191 So. 2d 816.

The policy issued by the defendant in this case, as amended, was designed to provide coverage substantially more extensive than that limited to liability for damages "caused by accident." We hold, therefore, that the invasion of the land of the Wests by the plaintiffs, and the

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resulting damage thereto and liability therefor, was "caused by an unexpected event or happening," namely, an error as to the location of the boundary line, and that such injury to the land of the Wests was not intended by the plaintiffs. Consequently, the liability of the plaintiffs to the Wests for such damages [\*\*507] was

[\*165] within the coverage of the policy and there was no error in the denial of the defendant's motion for non-suit or in the entry of the judgment for the plaintiffs.

Affirmed.