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OAH SEATTLE

NO. 64515-3-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

STATE FARM FIRE & CASUALTY COMPANY, an Illinois corporation,

Respondent,

vs.

KWING ON NG and ERICA M. SUK YEE MAN aka ERICA NG, husband and  
wife and the marital community composed thereof,

Appellants,

and

SON KWON and HYUN KWON, husband and wife and the marital community  
composed thereof,

Defendants.

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COURT OF APPEALS  
STATE OF WASHINGTON  
*[Signature]*

APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Cheryl B. Carey, Judge

BRIEF OF RESPONDENT

REED McCLURE

By Pamela A. Okano

Michael S. Rogers

Attorneys for Respondent

Address:

Two Union Square  
601 Union Street, Suite 1500  
Seattle, WA 98101-1363  
(206) 292-4900

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## **I. NATURE OF THE CASE**

The insured retained workmen to chop down some trees that belonged to her neighbors. The workmen did exactly what the insured asked them to do. Now, in order to obtain insurance coverage for the trees' destruction, the insured claims that chopping them down was an accident. The trial court ruled there was no accident as a matter of law.

## **II. ISSUES PRESENTED**

Did the insured cut down trees by accident when she intended to cut down the trees, she hired workmen to cut down the trees, the workmen did exactly as instructed, and the alleged property damage was the cut down trees?

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

### **A. STATEMENT OF RELEVANT FACTS.**

#### **1. The Underlying Lawsuit.**

Claimants Son and Hyun Kwon filed a complaint for trespass and damages against appellants Kwing On Ng and Erica M. Suk Yee Man aka Erica Ng. (CP 7-11) The complaint alleges that claimants' residential property was bordered on one side by four Douglas firs and that appellant Erica Ng asked claimants if it would be all right to trim one of the trees. (CP 9)

The complaint further alleges that claimant Kwon told appellant Ng that she could trim a branch. Instead, all four trees were cut down to their bases. (CP 9)

The claimants asserted a single cause of action, for timber trespass. (CP 10) The complaint alleged (CP 10):

6.1 The Ng's . . . in committing the above-described acts, have gone onto plaintiff's land damaged and removed timber and shrubs.

6.2 Their acts were wrongful because they intentionally and unreasonably committed the acts while knowing they lacked authorization.

6.3 These acts were also wrongful because they committed acts while knowing that they lacked lawful authority.

During discovery, appellants answered an interrogatory asking for a description of what had happened. Appellants' answer stated in pertinent part that Erica Ng thought she had obtained the Kwons' approval to cut down all four trees. (CP 80) The answer further stated:

Since the original estimate was only for trimming, a new estimate was obtained for cutting down the trees. . . .

The tree company . . . cut . . . 4 trees on Kwon #1 property, which were paid for by defendants. . . .

## **2. The Insurance Policy.**

Respondent State Farm Fire & Casualty Company issued a homeowners insurance policy to appellants. (CP 36-71) The policy

covered damages because of “property damage” caused by an “occurrence.” (CP 55) Specifically, the State Farm insurance policy provides (CP 55) (boldface in original):

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

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

The policy defines “property damage” to mean (CP 42):

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

The policy defines “occurrence” to mean (CP 42):

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

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

during the policy period. . . .

State Farm agreed to defend appellants against the Kwons’ claims under a reservation of rights. (CP 2, 13-14)

## **B. STATEMENT OF PROCEDURE.**

State Farm filed this declaratory action to determine its rights and duties under the policy. (CP 1-11) The company sought a declaration that

it has no duty to defend and no duty to indemnify appellants for the Kwons' claims. (CP 4)

State Farm moved for summary judgment. (CP 18-29) The trial court granted the motion, ruling (CP 107):

1. Plaintiff's Motion for Summary Judgment is hereby granted;
2. Plaintiff State Farm Fire & Casualty Company has no duty to defend defendants Kwing On Ng and Erica M. Suk Yee Man a/k/a Erica Ng in *Kwon v. Ng*, King County Superior Court No. 08-2-35264-1KNT; and
3. Plaintiff State Farm Fire & Casualty Company has no duty to indemnify defendants Kwing On Ng and Erica M. Suk Yee Man a/k/a Erica Ng for any judgment that may be entered against them, or any settlement they might enter into, in *Kwon v. Ng*, King County Superior Court No. 08-2-35264-1KNT.

#### IV. ARGUMENT

The complaint against appellant insureds reads (CP 76):

6.1 The Ng's . . . in committing the above-described acts, have gone onto plaintiff's land damaged and removed timber and shrubs.

6.2 Their acts were wrongful because they intentionally and unreasonably committed the acts while knowing they lacked authorization.

6.3 These acts were also wrongful because they committed the acts while knowing that they lacked lawful authority.

State Farm's investigation showed that regardless of whether the appellant insureds knew they lacked authorization, they deliberately

arranged for the trees to be cut down. In fact, appellant Erica Ng had originally retained a tree company to trim the trees, but later amended the work order, asking the tree company to cut them down instead.

Thus, appellant insureds' cutting down of the trees was deliberate. The question is whether it was an accident. As a matter of law, it was not.

This brief will first discuss the rules governing a liability insurer's duties to defend and to pay. It will then explain that under the policy language, "property damage" must be caused by "accident", why the "property damage" here was not caused by "accident", and analyze Washington case law on what constitutes an "accident." Following that, the brief will identify the flaws in appellant insureds' arguments and explain why those flaws are fatal to their appeal.

**A. WASHINGTON LAW ON THE DUTIES TO DEFEND AND PAY.**

The Washington Supreme Court has declared, "When the facts or the law affecting coverage is disputed, the insurer may defend under a reservation of rights until coverage is settled in a declaratory action." *American Best Food, Inc. v. Alea London, Ltd.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 963933, at \*2 (Mar. 18, 2010). In recent years, the Court has repeatedly encouraged insurers to file declaratory actions. See *Campbell v. Ticor Title Insurance Co.*, 166 Wn.2d 466, 471, 209 P.3d 859 (2009); *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d 43, 54, 164

P.3d 454 (2007); *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002).

So that is exactly what State Farm has done: it has defended its insureds under a reservation of rights while seeking a declaratory judgment that it has no duty to defend or duty to indemnify.

**1. The Duty To Defend.**

In *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d 43, 52-54, 164 P.3d 454 (2007), the Washington Supreme Court summarized Washington law on the duty to defend: The duty to defend arises when an action is first brought, and is based on the potential for liability. In other words, an insurer has a duty to defend if the complaint against the insured, construed liberally, alleges facts that could, if proven, impose liability upon the insured within the policy's coverage. Ambiguous allegations will be construed liberally in favor of triggering the insurer's duty to defend. *Id.* at 52-53.

**2. The Duty To Pay.**

The duty to defend is broader than the duty to pay. *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002). "The duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint." *America Best Food, Inc.*

v. *Alea London, Ltd.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 963933, at \*2 (2010) (emphasis omitted).

If the policy does not conceivably cover the allegations in the complaint, there can be no duty to pay. In other words, if there is no duty to defend because there could not conceivably be an accident, there is no duty to pay. Appellants do not claim otherwise.

**B. “PROPERTY DAMAGE” MUST BE CAUSED BY “ACCIDENT.”**

Appellant insureds correctly observe:

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.*”

(Opening Brief of Appellants 10) (emphasis added) “Property damage” is defined in the policy as “physical damage to or destruction of tangible property.” (CP 42) “Occurrence” is defined as an “accident.” (CP 42)

Consequently, the policy covers 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 physical damage to or destruction of tangible property caused by an accident.*

The trees here were cut down. Trees are tangible property. Trees cannot be cut down without destroying them as live trees. Thus, when they are cut down, they suffer physical damage or destruction by

definition. *See Leek v. Reliance Insurance Co.*, 486 So.2d 701 (Fla. Dist. App. 1986) (exclusion for “property damage” caused intentionally by insured applied to insureds’ topping of neighbor’s trees).

The question is whether the physical damage or destruction of the trees here was caused by accident. Appellants concede that “[t]he trees in question were deliberately cut.” (Opening Brief of Appellants 1) As will be discussed, the damage to them was not caused by accident as a matter of law. Consequently, the trial court was right when it ruled that State Farm has no duty to defend or indemnify appellants as a matter of law.

### **C. WASHINGTON LAW ON “ACCIDENT.”**

#### **1. Deliberate Acts Are Typically Not “Accidents.”**

Where, as here, the insurance policy does not define “accident”,

Washington courts have repeatedly held:

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

*Safeco Insurance Co. of America v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992) (emphasis added). This has *long* been the law in Washington

and Washington courts have repeatedly employed this test.<sup>1</sup>

Thus, killing an assailant in self-defense, even though justifiable, is not an accident. *Grange Insurance Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989); *Allstate Insurance Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999). Deliberately slapping someone is not an accident, even though the resulting death was not intended. *Safeco Insurance Ins. Co. of America v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984). Nor is illegally terminating an employee an accident, because an employer cannot fire someone by chance. *E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986).

Moreover, pleading negligence does not transform a deliberate act into an accident. Courts will scrutinize a complaint carefully crafted to avoid intentional language and may still, in an appropriate case, find

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<sup>1</sup> See, e.g., *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990); *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989); *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988); *Johnson v. Business Men's Assur. Co. of Am.*, 38 Wn.2d 245, 228 P.2d 760 (1951); *Evans v. Metropolitan Life Ins. Co.*, 26 Wn.2d 594, 174 P.2d 961 (1946); *State Farm Fire & Cas. Co. v. Parrella*, 134 Wn. App. 536, 141 P.3d 643 (2006), *rev. denied*, 160 Wn.2d 1009 (2007); *American Economy Ins. Co. v. Estate of Wilker*, 96 Wn. App. 87, 977 P.2d 677 (1999), *rev. denied*, 139 Wn.2d 1015 (2000); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999); *Diana v. Western Nat'l Assur. Co.*, 56 Wn. App. 741, 785 P.2d 479 (1990); *Lloyd v. First Farwest Life Ins. Co.*, 54 Wn. App. 299, 773 P.2d 426, *rev. denied*, 113 Wn.2d 1017 (1989); *Ryan v. Harrison*, 40 Wn. App. 395, 699 P.2d 230, *rev. denied*, 104 Wn.2d 1003 (1985); *Safeco Ins. Co. of Am. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984); *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 37 Wn. App. 621, 681 P.2d 875 (1984); *McKinnon v. Republic Nat'l Life Ins. Co.*, 25 Wn. App. 854, 610 P.2d 944 (1980); *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.*, 20 Wn. App. 261, 579 P.2d 1015 (1978).

intentional torts. *See New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 794 P.2d 521 (1990).

For example, in *Grange Insurance Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989), the insured was sued for negligence after he killed an assailant in self-defense. The Washington Supreme Court ruled there was no accident as a matter of law so that the insurer had no duty to defend or indemnify.

And in *Allstate Insurance Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999), the insured was sued for negligence after he killed an assailant in self-defense in the mistaken belief that the latter had a gun. Ruling that there was no accident, the court explained, “Neither the State's prosecution of [the insured] under a criminal negligence theory nor the allegations of negligence in the civil lawsuit change the deliberate nature of the shooting”. *Id.* at 16. *See also American Economy Insurance Co. v. Estate of Wilker*, 96 Wn. App. 87, 977 P.2d 677 (1999) (no accident as to insured's alleged negligence in performing sexual abuse witnessed by minor claimants), *rev. denied*, 139 Wn.2d 1015 (2000); *Unigard Mutual Insurance Co. v. Argonaut Insurance Co.*, 20 Wn.App. 261, 579 P.2d 1015 (1978) (no accident as to minor alleged to have been negligent when he set fire to waste basket contents).

Consequently, it is simply not true that “there exists the possibility that the Ngs will be liable to the Kwons . . . 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.” (Opening Brief of Appellants 12)

## 2. “Accident” Is an Objective Term.

The Washington Supreme Court has made clear—

***“[A]ccident” is not a subjective term. Thus, the perspective of the insured as opposed to the tortfeasor is not a relevant inquiry. Either an incident is an accident or it is not.***

*Roller v. Stonewall Insurance Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990) (emphases added).<sup>2</sup> This rule was implied in some Washington decisions even before *Roller* explicitly set forth the objective test. *See, e.g., E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co.*, 106 Wn.2d 901, 906, 726 P.2d 439 (1986) (“resulting discrimination [from termination] which took place here . . . need not have been directly intended by the insured . . . if the results could have been expected from the acts”); *Lloyd v. First Farwest Life Insurance Co.*, 54 Wn. App. 299,

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<sup>2</sup> *Accord, e.g., Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992); *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 138 P.3d 1107 (2006); *State Farm Fire & Cas. Co. v. Parrella*, 134 Wn. App. 536, 141 P.3d 643 (2006), *rev. denied*, 160 Wn.2d 1009 (2007). *See also State Farm Fire & Cas. Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 174 P.3d 1175 (2007).

773 P.2d 426 (1989) (deliberate inhalation of cocaine not accidental, even though results may have been subjectively expected or intended), *rev. denied*, 113 Wn.2d 1017 (1989).

*Safeco Insurance Co. of America v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992), a post-*Roller* case, demonstrates how the objective test works. The insured husband there deliberately shot at a truck whose occupants he believed had just bombed his mailbox. One of the occupants was seriously injured.

Significantly, the insured claimed he had not intended to hurt anyone. Indeed, there was evidence that a ricocheting bullet had hit the victim. Nevertheless, the Washington Supreme Court ruled that even assuming the injury was unintentional,<sup>3</sup> there was no accident as a matter of law, because “no reasonable person could conclude Butler was unaware of the possibility of ricochet, or that a ricochet might hit an occupant of the truck.” 118 Wn.2d at 401.

Even more significantly, as to the insured’s innocent wife, the court ruled there was no “accident” or “occurrence” either:

The Butlers also rely on the holding in [*Federated America Insurance Co. v. Strong*, 102 Wn.2d 665, 689 P.2d 68

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<sup>3</sup> Thus, appellants are wrong when they use *Butler* as an example of a case where the insured was actually attempting to inflict injury. (Opening Brief of Appellants at 15)

(1984)] that whether an event is an accident is determined from the point of view of the insured. That holding was overruled *sub silentio* in *Roller* . . . . In *Roller*, we unanimously held:

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

115 Wn.2d at 685, 801 P.2d 207. In a footnote, we went on to specifically reject the view that “whether an intentional act is an ‘accident’ should be viewed from the perspective of the insured.” 115 Wn.2d at 685 n.4, 801 P.2d 207. Thus, the holding of *Roller* is that whether an event is an accident does not depend on the view of the insured. Applying that reasoning to this case, we hold that Safeco’s policy does not cover Geraldine Butler.

*Id.* at 403.

Similarly, in *State Farm Fire & Casualty Co. v. Parrella*, 134 Wn. App. 536, 141 P.3d 643 (2006), *rev. denied*, 160 Wn.2d 1009 (2007), the insureds’ teenaged son aimed a BB gun loaded with a pellet at his friend and fired. The pellet hit the friend in the eye. There was no dispute that the son did not intend to hurt his friend. Noting that the son’s subjective intent to injure was irrelevant, the court said:

In order for this incident to be considered an accident, both the means and the result must have been unforeseeable and unintended. While there is no dispute that Anthony did not intend to harm his friend, he did intentionally fire the gun. The injury was a foreseeable consequence. The court properly concluded the incident was not an accident.

*Id.* at 541.

Hence, Ms. Ng's averment that "I never intentionally caused any damage to the Kwons' property" is irrelevant to whether there was an accident here. (CP 95) Because "accident" is an objective term, the issue is whether a reasonable person would consider it accidental when the insured retained a tree trimming company to cut trees down and the tree company did exactly what the insured ordered it to do.

### **3. Appellants Ignore Washington "Accident" Law.**

Appellant insureds ignore the foregoing rules. Instead, they claim—

- whether there is an accident depends on "the foreseeability of the resulting injury, *viewed from the perspective of the insured*",

- "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*," and

- "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*." (Opening Brief for Appellants 14, 20, 22-23) (emphasis added).

But the Washington Supreme Court has said, "*the perspective of the insured as opposed to the tortfeasor is not a relevant inquiry*."

*Roller*, 115 Wn.2d at 685 (emphasis added). Appellants’ entire premise is thus wrong.

**D. DELIBERATE ACTS RESULTING IN UNEXPECTED LEGAL LIABILITY ARE NOT ACCIDENTS.**

Moreover, appellants’ argument is premised on the assumption that it is appellant’s potential *liability*, or their neighbors’ *claim against them*, that must be caused by accident. For example, appellants repeatedly claim—

“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.” (Opening Brief of Appellants 39) (emphasis added).

“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.” (Opening Brief of Appellants 36) (emphasis in original).

“State Farm has a duty to defend because . . . it will be shown that the *damage to the Kwons* was unintended, unforeseeable, and therefore caused by accident.” (Opening Brief of Appellants 40) (bold and italics in original, underscored bold and italics added).

“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.” (Opening Brief of Appellants 42) (italics in original; boldface added).

“The ‘implications or consequences of the act’ of removing the trees was [*sic*] that the *Kwons would be upset and deem themselves harmed . . .*” (Opening Brief of Appellants 43) (emphasis added).

These types of arguments are the *only* way that appellants can claim that the result “was completely unintentional, and accidental.” (Opening Brief of Appellants 8)

But nowhere in the policy does it say that it is the insured’s legal *liability*, or a *claim* that may lead to legal liability, that must be caused by an accident. The policy says *it is “property damage” that must be caused by an accident.*

**1. Washington Law.**

Deliberate acts are generally not accidents even if they may unexpectedly result in a claim or potential legal liability. In *Allstate Insurance Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999), the insured shot and killed his assailant, thinking that the latter had a gun. The insured was mistaken. The victim had no gun. The assailant’s estate sued. As

here, the insurer defended under a reservation of rights but filed a declaratory action before trial in the underlying tort case.

Affirming summary judgment for the insurer, the Court of Appeals explained:

. . . The fact that an insured performs a deliberate act in self-defense in no way negates the deliberate nature of the act.

. . . .

Further, evidence that Bauer mistakenly believed Morgan to be armed does not make the death accidental. We define an outcome as accidental only if both the means and the result were “unforeseen, involuntary, unexpected and unusual.” . . . Here, the means was deliberate; Bauer intentionally shot his gun at Morgan. And the result could be reasonably expected; firing a gun at a person multiple times at close range is likely to cause that person’s death.

96 Wn. App. at 15, 16.

Just as in *Bauer*, the means here was deliberate: The insureds hired and paid a tree cutting company to cut down the trees. And just as in *Bauer*, the injury or damage could be reasonably expected—the trees were cut down. That was exactly what the insureds expected and intended. That the insureds here may have misunderstood the Kwongs’ wishes and that the insureds themselves may not have benefited are irrelevant. The court in *Bauer* ruled that the insured’s mistaken belief there that the victim had a gun did not matter and made no mention, one way or the other, of whether the insured there benefited.

*Ryan v. Harrison*, 40 Wn. App. 395, 699 P.2d 230, *rev. denied*, 104 Wn.2d 1003 (1985), also offers a helpful comparison. There, the insured crop duster deliberately sprayed a field with herbicide. It was the wrong field. Finding no coverage, the court explained:

Red Baron’s pilot knew and, by preparing the plane and loading it with herbicide, carefully considered and formed an intention to spray the wheat field. He was presumably aware of the implications or consequences of doing so, *i.e.*, to kill certain vegetation. He deliberately chose the field that was sprayed, albeit the wrong one. Thus, he made an error. He intentionally released the herbicide thinking he was spraying the wheat field. The release was a deliberate act. *An accident is never present when a deliberate act is performed unless some additional, unexpected, independent and unforeseen happening occurs which produces the damage; “[t]o be an accident, both the means, and the result must be unforeseen, involuntary, unexpected, and unusual.”*

*Id.* at 397-98 (emphasis added).

It is true that the *Ryan* case did not involve an accident or “occurrence” policy. But that case is especially instructive here, because—as the italicized language in the above quote indicates—the court there used “accident” analysis to decide the case. This belies appellants’ claim that “without the exclusion relied on by the [*Ryan v.*] *Harrison* court, the injury would have been [ruled to have been] caused by an ‘accident.’” (Opening Brief of Appellants 19)

Thus, that unintended and unexpected potential legal liability may result from a deliberate act does not convert the deliberate act into an accident. The Washington Supreme Court in *Overton v. Consolidated Insurance Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002), explained why.

In *Overton*, the insured was the former owner of property that the current owner was required to clean up because of pollution. The insured had purchased his insurance policies *after* the Department of Ecology had told him of the pollution. Nevertheless, he claimed that the costs of cleanup were unexpected.

The Washington Supreme Court explained that that was irrelevant:

The meaning of “property damage” is critical to determine whether there was an “occurrence” here. . . . Under the language of the policy, the proper question is whether Spokane Transformer expected the *property damage* that eventually resulted in the cost of cleaning up the Gisselbergs’ property. Instead, the Court of Appeals asked whether Spokane Transformer expected or intended the *cost itself*.

The Court of Appeals seemingly confused the concept of “property damage” with that of “damages.” . . . [T]he term “damages” in an insuring agreement refers to the cost of compensating a claimant for damage done to the property. . . . This is vastly different from “property damage,” which is defined by the policy as “physical injury to or destruction of tangible property.”

It follows that “damage must be distinguished from “damages.”

145 Wn.2d at 428 (italics in original). Although *Overton* did involve a different definition of “occurrence,”<sup>4</sup> *Overton*’s reasoning about “damages” versus “damage” applies here as well.

The policy here provides:

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

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

(CP 55) (italics added). “Occurrence” is defined to mean:

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

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

during the policy period. . . .

(CP 42) “Property damage” is defined to mean “physical damage to or destruction of tangible property.” (CP 42)

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<sup>4</sup> “Accident” was defined to mean “an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” Under this definition of “occurrence”, a subjective test governs whether there is an “occurrence”. *Overton*, 145 Wn.2d at 425. See generally *Queen City Farms, Inc. v. Central Nat’l Ins. Co.*, 126 Wn.2d 50, 64-70, 882 P.2d 703, 891 P.2d 718 (1994); *City of Redmond v. Hartford Acc. & Indemn. Ins. Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997), *rev. denied*, 134 Wn.2d 1001 (1998).

Thus, it is the “physical damage to or destruction of tangible property” that must be “caused by an **occurrence**”, *i.e.*, caused by an accident. Although the insuring agreement of the policy mentions “damages”, the policy does not require that “damages” be “caused by an **occurrence**” or accident.

For the policy to mean what appellants claim, the insuring agreement would instead have to read:

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

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

But the policy does not say this. This court may not revise the policy language in the guise of construing it. *Equilon Enterprises, L.L.C. v. Great American Alliance Insurance Co.*, 132 Wn. App. 430, 436-37, 132 P.3d 758 (2006).

The “property damage” here was the *damage and destruction* to the trees when they were cut down, *not damages* suffered by the claimants. Nothing in the policy requires that the insured’s legal liability for damages be caused by an “accident” or “occurrence.” All the policy

requires is that cutting down the trees have been caused by an “accident” or “occurrence” as defined by the policy.

## **2. Other Jurisdictions.**

The Washington courts’ view that deliberate acts are generally not accidents even if they may unexpectedly result in legal liability is not unusual. Indeed, in discussing when there is an “accident” or an “occurrence,” a leading authority on insurance coverage has stated, “[T]he fact that an insured had erroneously believed its actions to be lawful is irrelevant.” 3 A. Windt, *INSURANCE CLAIMS & DISPUTES* § 11:3, at 11-34-11-37 (5<sup>th</sup> ed. 2007).

California courts have adopted this rule. In *Delgado v. Interinsurance Exchange*, 47 Cal. 4<sup>th</sup> 302, 211 P.3d 1083, 97 Cal. Rptr. 3d 298 (2009), the California Supreme Court rejected the argument that an assault committed in the negligent belief that the insured assailant had to act in self-defense was not an “accident.” In so ruling, the court explained:

We also note that in a number of contexts other than those involving claims pertaining to assault and battery, . . . courts have in insurance cases rejected the notion that an insured’s mistake of fact or law transforms a knowingly and purposefully inflicted harm into an accidental injury. . .

....

***[A] purposeful and intentional act remains purposeful and intentional regardless of the reason or motivation for the act.***

*Id.* at 312, 314, 211 P.3d at 1089, 1090, 97 Cal. Rptr. 3d at 305, 306 (emphasis added).

Thus, in California, there was no accident when an insured homeowner built a house that encroached on a neighbor's property in the mistaken belief he owned that property and had a legal right to build on it. *Fire Insurance Exchange v. Superior Court*, 181 Cal. App. 4<sup>th</sup> 388, 104 Cal. Rptr. 3d 534 (2010). In *Fire Insurance*, the court defined "accident" similarly to the way it is defined in Washington:

An accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produce the damage. . . .

Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause injury. The insured's subjective intent is irrelevant. .

..

*Id.* at 392, 104 Cal. Rptr. 3d at 537 (citations omitted).

In *Lipson v. Jordache Enterprises, Inc.*, 9 Cal. App. 4<sup>th</sup> 151, 11 Cal. Rptr. 2d 271 (1992), the insured employer terminated the claimant's employment. The claimant later alleged negligent wrongful termination on the ground that the insured employer had been given erroneous

information that he had wanted to be terminated. The court ruled that there was no accident, explaining:

Royal's position that wrongful termination or breach of contract in the employment setting is not an "occurrence" under a general liability insurance policy is well established in California law. The policy at issue defines "occurrence" as an accident; thus, any intentional conduct, *i.e.*, termination, even if due to a misunderstanding, is not covered as an occurrence. . . . An employment termination, even if due to mistake, cannot be unintentional.

*Id.* at 159, 11 Cal. Rptr. 2d at 276. *See also Chamberlain v. Allstate Insurance Co.*, 931 F.2d 1361 (9<sup>th</sup> Cir. 1991) (California law).

*Argonaut Southwest Insurance Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973), is also illustrative. There the insured had a contract with the State to obtain borrow material for roadway fills. The insured bought borrow material from a seller who did not actually own it. When the true owner later sued for trespass, the insured's liability carrier refused to defend or indemnify. Holding that there was no "accident" or "occurrence", the court explained:

The removal of over 5000 cubic yards of borrow material from the Meyers' property by respondents was intentional and deliberate. Although it may be argued respondents had no intent to injure the Meyers, the removal of the material from the property was done under the authority of the contract with Kipper. The fact damage would occur to the Meyers is not material. . . . Damage complained of here was the removal of the large amount of material from the property.

Respondents did exactly what they intended to do. The fact that they did not deal originally with the owners of the property was the mistake or error.

500 S.W.2d at 635.

In *People v. Helinski*, 203 A.D.2d 659, 610 N.Y.S.2d 376 (1994), the insured was sued for unlawfully entering another's property and building earthen berms on it. The insured claimed that he had either adversely possessed the property or, if he did not own it by adverse possession, that he was mistaken as to the property line. The insured's policy covered an "occurrence", defined as an accident. The court ruled that there was no "accident", explaining:

Harrison argues that even if it could be said that he intended to damage the parcel, because he was operating under the assumption that he owned the parcel, such damage was accidental. We disagree. Clearly, if Harrison erred as to the extent of his property, his acts in changing the landscape of plaintiff's property were intentional, not accidental, and would not constitute an "occurrence" within the meaning of the policy. . . . Put another way, this is not a situation where accidental results flow from intentional causes. Harrison's excavation of the parcel was intentional and the earthen berms and potholes were the contemplated results of those acts. . . .

203 A.D.2d at 660.

*Mindis Metals, Inc. v. Transportation Insurance Co.*, 209 F.3d 1296 (11<sup>th</sup> Cir. 2000), also presents a helpful comparison. In that case, the insured scrap metal company bought railcars to cut up for scrap. Unbeknownst to the insured, the person who sold it the railcars had no

authority to do so. When the true owner discovered the embezzlement, it sought payment for the cars from the insured.

The insured's policies covered "accident" and "occurrence" defined as an "accident." Affirming summary judgment for the insurers, the court explained:

Plaintiff here may have made a mistake of fact and/or an error in judgment, but it at all times acted in a deliberate and purposeful manner. Plaintiff confuses the issues in this case by arguing that it did not intend the result that occurred, namely, the harm to Georgia Central. As Plaintiff rightly points out, many "accidents" involve intentional conduct with unexpected results. *But when we say that the result of the intentional act is unexpected, we are referring to the direct and immediate result, not the . . . legal significance of a particular act. . . .* [I]n this case, Plaintiff intended to damage the railcars—it was cutting them up for use as scrap metal. This action may have occurred due to a mistake as to ownership, but there was nothing "accidental" about it.

*Id.* at 1301 (emphases added) (footnote omitted).

**E. WASHINGTON CASES INVOLVING INJURY OR DAMAGE THAT A REASONABLE PERSON WOULD NOT EXPECT OR INTEND DO NOT APPLY.**

Charging that State Farm's position "is to conclude that any consequence of a deliberate act is intended, and therefore, not accidental," appellants claim that "an intentional action may qualify as an accident." (Opening Brief of Appellants 13, 37) Appellants grossly misrepresent State Farm's position.

Deliberate acts may qualify as accidents *if* a reasonable person would not have expected or intended the bodily injury or property damage. But, the property damage to the trees was reasonably expected here. Therefore, the cases that stand for this proposition do not apply here.

For example, in *Detweiler v. J.C. Penney Casualty Insurance Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988), the insured fired several shots at the rear wheel of his truck, as a thief was driving it away. The bullets fragmented and ricocheted back in his face. He made an uninsured motorist claim.

The trial court granted the insured summary judgment. It was the *insurer* that was arguing there was at least a question of fact whether there had been an accident. 110 Wn.2d at 102. Finding that there were questions of fact, the Washington Supreme Court noted that “[t]he bullets *arguably* did precisely what bullets fired at a high velocity do when they hit steel.”<sup>5</sup> 110 Wn.2d at 106 (emphasis added). In other words, it was not certain that a reasonable person would conclude that injury would occur. Indeed, the court explained—

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<sup>5</sup> Appellants quote the same sentence, but leave out the word “arguably” and then, without any basis whatsoever, impute sarcasm to the Washington Supreme Court. (Opening Brief of Appellants 25)

Under the facts presented, the rapidly moving pickup truck and moving shooter resulted in changing distances between shooter and pickup. Those and other variables inherent in this confused occurrence such as angle of fire, make “accident” a factual issue since reasonable minds could disagree as to whether under the circumstances what happened was an additional, unexpected, independent and unforeseen happening which brought about the injuries.

110 Wn.2d at 108. These types of variables are not present here. The appellant insureds deliberately had the trees cut down.

*McKinnon v. Republic National Life Insurance Co.*, 25 Wn. App. 854, 610 P.2d 944 (1980), does not apply either. In that case, the plaintiff’s husband jumped off the 520 bridge and apparently drowned. There was no evidence of any motivation for suicide. The husband could swim well, and had actually been seen trying to swim after his leap.

The court concluded that whether there was an accident was a question of fact because a jury could find that something “unusual, unexpected, or unforeseen” occurred that might have impaired his ability to swim. Noting that “[c]onsidered by itself, the leap was not necessarily an act injurious to the body,” 25 Wn. App. at 860, the court suggested that it was possible that after the husband jumped off the bridge, but before entering the water, he might have struck a passing boat.

In *Nationwide Mutual Insurance Co. v. Hayles, Inc.*, 136 Wn. App. 531, 150 P.3d 589 (2007), the insured sublessor leased a farm plot to an

onion grower, but maintained control over the plot's irrigation system. The sublessee grower told an employee of the sublessor to stop irrigating so that the onions could dry in the field. After the onions had dried, but before they were harvested, a supervisor of the sublessor turned on the irrigation system. The onions got wet and rotted.

The court affirmed summary judgment for the insured, explaining that "the record provides no evidence that Mr. Hayles knew or should have known that turning on the irrigation system would damage the onion crop" and that "no one under these circumstances would have anticipated that turning on the water could rot the onions." 136 Wn. App. at 538. In contrast, in the instant case, there is no dispute that the appellant insureds deliberately had the trees cut down.

In *State Farm Fire & Casualty Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 174 P.3d 1175 (2007), the insured minor and a friend were setting fire to pieces of paper and cardboard from a dumpster next to the claimant's building. There was evidence that when they left the area, the minor and her friend believed that they had put out the fires they had set. But the fire spread and burned down the claimant's building. The court ruled that whether there was an accident was a question of fact, explaining:

“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.”

142 Wn. App. at 16.

In *Ham & Rye*, a jury could have found that a reasonable person would have thought the fires the insured and her friend set had been put out, so that there was no fire that could or would spread. That is not the case here. Here, the appellant insureds deliberately had the trees cut down.

Unlike the foregoing cases, where a reasonable person might not have expected the resulting “bodily injury”, “physical loss”, or “property damage”, there is no question that the insured here did expect and intend to inflict property damage on the trees, *i.e.*, cut them down. That the insured mistakenly thought she had permission to do so is irrelevant, because the policy does not require damages or legal liability to be accidental. Rather, it is the “property damage” that must be accidental.

**F. APPELLANTS’ OTHER ARGUMENTS ARE ALSO MERITLESS.**

Appellants claim that the term “accident” is ambiguous, noting that in *Detweiler*, the Washington Supreme Court observed that “[t]here are

many definitions of the word.”<sup>6</sup> (Opening Brief of Appellants 11-12, citing *Detweiler* 110 Wn.2d at 105) But *Detweiler* did not find “accident” ambiguous. Indeed, appellants have not cited a single Washington case that has.

*Woo v. Fireman’s Fund Insurance Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007), does not support appellants’ position either. As appellants correctly point out, “occurrence” in that case was defined as an “accident.” (Opening Brief of Appellants 20) But what appellants fail to disclose is that unlike the instant case, the policy in that case actually defined the word “accident” to mean “fortuitous circumstance, event or happening that takes place and is *neither expected nor intended from the standpoint of the insured*” 161 Wn.2d at 63 (emphasis added). Thus, the court was required to use a subjective standard of expectation or intention. See *City of Redmond v. Hartford Accident & Indemnity Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997), *rev. denied*, 134 Wn.2d 1001 (1998). Here, because “accident” is not defined, Washington courts use an objective standard. *Butler*, 118 Wn.2d at 401-03; *Roller*, 115 Wn.2d at 684-85.

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<sup>6</sup> The mere fact that courts in some other jurisdictions may define “accident” differently does not render the term ambiguous in Washington. See *Federal Insurance Co. v. Pacific Sheet Metal, Inc.*, 54 Wn. App. 514, 516 n.2, 774 P.2d 538 (1989) (citing *Crunk v. State Farm Fire & Cas. Co.*, 106 Wn.2d 23, 719 P.2d 1338 (1986)), *rev. denied*, 113 Wn.2d 1008 (1989).

Appellants' reliance on cases from other jurisdictions must also fail. *United States Mut. Acc. Ass'n v. Barry*, 131 U.S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (1889), a first-party accidental death insurance case, is inapposite. No reasonable person would have thought the insured would suffer duodenitis (inflammation of a portion of the small intestine), let alone that that duodenitis would result in death, simply by jumping off a walkway. His two companions had already made the jump, without adverse consequences. In contrast, in the instant case, any reasonable person would know that cutting down trees would damage or destroy them.

In *Standard Construction Co. v. Maryland Casualty Co.*, 359 F.3d 846 (6<sup>th</sup> Cir. 2004), the court construed the terms "occurrence" and "accident" as being equivalent to an exclusion for expected or intended injuries:

We reject appellant's 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.

*Id.* at 850. *Standard's* position is contrary to Washington law. In Washington, the exclusion for bodily injury or property damage "expected

or intended” from the standpoint of the insured is governed by a subjective test, but the term “accident” is governed by an objective test. *Compare Butler*, 118 Wn.2d at 401-03 with *Cle Elum Bowl, Inc. v. North Pacific Insurance Co.*, 96 Wn. App. 698, 703-04, 981 P.2d 872 (1999), *rev. denied*, 139 Wn.2d 1019 (2000). The exclusion is not, as it was in *Standard*, equivalent to the term “accident.”

Both *Harken Exploration Co. v. Sphere Drake Insurance PLC*, 261 F.3d 466 (5<sup>th</sup> Cir. 2001), and *Patrick v. Head of the Lakes Cooperative Electric Association*, 98 Wis. 2d 66, 295 N.W.2d 205 (1980), involved a definition of “occurrence” that specifically required any “bodily injury” or “property damage” to be “neither expected nor intended from the standpoint of the insured.” 261 F.3d at 472; 295 N.W.2d at 207. A Washington court would construe that definition to require subjective expectation or intent by the insured before a court would find no “accident.” See *City of Redmond v. Hartford Accident & Indemnity Insurance Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997), *rev. denied*, 134 Wn.2d 1001 (1998).

*Lumber Insurance Cos. v. Allen*, 820 F. Supp. 33 (D.N.H. 1993), did involve a definition of “occurrence” similar to the State Farm definition here. But the *Allen* court said that under New Hampshire law, the focus is “on the insured’s subjective intentions.” 820 F. Supp. at 35.

That is contrary to Washington law, which uses an objective test for determining whether there was an accident. *Butler*, 118 Wn.2d at 401-03; *Roller*, 115 Wn.2d at 684-85.

*N.W. Electric Power Cooperative v. American Motorists Insurance Co.*, 451 S.W.2d 356 (Mo. App. 1969), is also inapposite. There the court said that “whether or not an injury is accidental . . . is to be determined from the standpoint of the person injured.” *Id.* at 361. That is completely contrary to Washington law. Under Washington law, “the perspective of the insured [in *Roller*, the person injured] as opposed to the tortfeasor is not a relevant inquiry.” *Roller*, 115 Wn.2d at 685 (emphasis added).

Appellants’ reliance on *Ferguson v. Birmingham Fire Insurance Co.*, 254 Or. 496, 460 P.2d 342 (1969), is puzzling because that case did not even involve an “accident” or an “occurrence” policy. In *Ferguson*, the policy excluded property damage caused intentionally by or at the direction of the insured. Since the case did not involve the term “accident”, it is completely unpersuasive. Indeed, had the case been decided under Washington law, a subjective standard would most likely have been used. *See, e.g., Safeco Insurance Co. of America v. McGrath*, 63 Wn. App. 170, 817 P.2d 861 (1991); *Kenna v. Griffin*, 4 Wn. App. 363, 481 P.2d 450 (1971).

*York Industrial Center, Inc. v. Michigan Mutual Liability Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967), also involved policy language unlike the policy language here. The policy had originally covered “accident”, but the insured had paid an additional premium to convert the policy into an “occurrence” policy, with “occurrence being defined as:

an unexpected event or happening or a continuous or repeated exposure to conditions which results . . . in . . . injury to or destruction of property . . . *provided the insured did not intend that injury . . . or destruction would result.*

155 S.E.2d at 502 (emphasis added). Such language would justify using a subjective measure of the insured’s intent. *Cf. City of Redmond v. Hartford Accident & Indemnity Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997), *rev. denied*, 134 Wn.2d 1001 (1998).

*J. D’Amico, Inc. v. City of Boston*, 345 Mass. 218, 186 N.E.2d 716 (1962), used a subjective test of “accident” contrary to Washington’s objective test. The court said:

“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 determined whether an injury was accidental.”

*Id.* at 223, 186 N.E.2d at 720 (quoting *Sontag v. Galer*, 279 Mass. 309, 313, 181 N.E. 182 (1932)). Furthermore, the Massachusetts test is contrary to the Washington rule that “the perspective of the insured as

opposed to the tortfeasor is not a relevant inquiry.” *Roller*, 115 Wn.2d at 685.

*Firco, Inc. v. Fireman’s Fund Insurance Co.*, 173 Cal. App. 2d 524, 343 P.2d 311 (1959), is not persuasive. First, that opinion does not even say how the policy there defined “occurrence.” If, as many older policies did, “occurrence” was defined in terms of property damage “neither expected nor intended from the standpoint of the insured”, the decision has no relevance here. Second, even if “occurrence” was defined similarly to the State Farm definition of “occurrence”, *Delgado v. Interinsurance Exchange*, 47 Cal. 4<sup>th</sup> 302, 211 P.3d 1083, 97 Cal. Rptr. 3d 298 (2009), discussed *supra*, has tacitly overruled *Firco*. Indeed, *Firco* has not been cited with approval in a published case for the principle relied upon by appellants for decades.

The unpublished Ninth Circuit case, *Fischer v. State Farm Fire & Casualty Co.*, 272 F.App’x 608 (9<sup>th</sup> Cir. 2008), is very different factually. Unlike cutting down a tree, which automatically results in physical injury or destruction to the tree, consensual sexual intercourse usually does not result in “bodily injury”. Consequently, when the insured had what appeared to be consensual intercourse with the victim, but the victim mistakenly thought the insured was her boyfriend, a reasonable person could find that any “bodily injury” was not foreseeable.

In contrast, in the instant case, cutting down the trees automatically resulted in their being physically damaged or destroyed. Trees cannot be cut down without physically damaging or destroying them. Therefore, their damage or destruction was reasonably foreseeable.

Finally, appellants not only request reversal, but also a declaration that State Farm has a duty to defend them. But appellants never moved for summary judgment and thus are not entitled to declaratory relief on appeal even if this court were to reverse.

**G. ATTORNEY FEES ON APPEAL ARE NOT RECOVERABLE UNLESS APPELLANTS PREVAIL.**

Appellants claim attorney fees and costs in the trial court and on appeal under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). But as discussed *supra*, appellants are not entitled to a defense or coverage. A party who does not establish that he or she is entitled to coverage is not entitled to *Olympic Steamship* fees or costs. See *Stouffer & Knight v. Continental Casualty Co.*, 96 Wn. App. 741, 756, 982 P.2d 105 (1999), *rev. denied*, 139 Wn.2d 1018 (2000).

**V. CONCLUSION**

“Accident” is an objective term. It does not depend on the perspective of either the victim or the insured. Either an incident is an accident or it is not.

Despite the number of times appellant insureds disavow intending to cause damage, they clearly did: they instructed the tree company to cut down the trees, and the tree company did exactly as instructed. The insureds expected and intended the trees to come down. Cutting down the trees was no accident, as a matter of law.

This court should affirm.

DATED this 10<sup>th</sup> day of May, 2010.

**REED McCLURE**

By 

**Pamela A. Okano**

**WSBA #7718**

**Michael S. Rogers**

**WSBA #16423**

**Attorneys for Respondent**

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That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on May 10, 2010, affiant deposited in the U.S. Mail postage prepaid, copies of the following documents:

1. Brief of Respondent; and
2. Affidavit of Service by Mail:

to the following parties:

David J. Lawyer  
Inslee Best Doezie & Ryder, P.S.  
777 – 108<sup>th</sup> Avenue N.E., #1900  
P. O. Box 90016  
Bellevue, WA 98009-9016

Gregory E. Gladnick  
4711 Aurora Avenue North  
Seattle, WA 98103

DATED this 10<sup>th</sup> day of May, 2010.



CATHI KEY

SIGNED AND SWORN to before me on May 10, 2010, by Cathi Key.



Print Name: Leone Powers  
Notary Public residing at Ino. Co., WA  
My appointment expires 8/11/2010

067824.099400/258356

