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No. 66337-2-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CATHERINE ANDERSON and DONALD ANDERSON, individually  
and as partners in a former marital community, KENDALL DUNN  
and THERESA DUNN, individually, as partners in a marital  
community, and as guardians of A.D., a minor child,

Appellants,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

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MUTUAL OF ENUMCLAW'S RESPONSE BRIEF

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## I. INTRODUCTION

Mr. Anderson sexually molested the Dunn's minor daughter by inappropriately touching her. The Dunns sued the Andersons who tendered the defense of the lawsuit to Mutual of Enumclaw. Mutual of Enumclaw provided a homeowners policy and an umbrella policy to the Andersons that were in effect at the time of the assault. Mutual of Enumclaw analyzed the tender of defense in light of the *Woo* case and defended Ms. Anderson under a reservation of rights to assert its coverage defenses. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43 (2007). Then it brought this declaratory judgment action to determine whether the policies covered the assault under the procedure approved by the State Supreme Court. *Truck Ins. Exchange v. Vanport Homes*, 147 Wn.2d 751, 761 (2002).

The trial in this lawsuit consisted of a stipulation by the parties and legal argument. The stipulation set out the complaint by the Dunns against the Andersons and the two Mutual of Enumclaw policies. In addition, the parties agreed that the underlying homeowners policy provided no coverage and that Ms. Anderson neither expected nor intended the injuries resulting from Mr. Anderson's molestation of the Dunn's daughter. The parties

also agreed that Mr. Anderson did expect or intend the injuries. After entertaining legal argument the court found that there was no umbrella coverage observing that unlike the earlier summary judgment hearing the non-moving party (the Dunns) were no longer entitled to have the evidence and all reasonable inferences from it viewed in the light most favorable to them. See, (CP 5-8 & 3-4).

The Dunns are requesting reversal of the trial court's ruling that there is no coverage under the Mutual of Enumclaw umbrella policy issued to the Andersons for damages caused by Mr. Anderson's molestation of their daughter. For this coverage to exist, the Dunns must prove that Mr. Anderson's act of molestation was an "occurrence."

The Mutual of Enumclaw umbrella policy states:

Occurrence means an accident, which happens anywhere during the policy period, whose effects are neither expected nor intended from the standpoint of any insured, which results in:

- a. personal injury; or
- b. property damage.

(CP 259)

Under this policy language there are several steps that the Dunns must satisfy to show that there was an "occurrence." The first step is that an occurrence must be an "accident." The second step is

that the accident must have occurred in the policy period (not an issue here). And the third step is that the accident must have resulted in “effects ... neither expected nor intended from the standpoint of any insured.” All three steps must be satisfied for coverage to exist. If the Dunns fail to show any one of the steps, there can be no coverage for this loss.

Mr. Anderson’s act of molestation was a deliberate criminal act. Mr. Anderson’s conduct was not accidental as a matter of law. Therefore his conduct is not an “occurrence” under the terms of the policy. Even if the Dunns could get by this first step of the coverage analysis, Mr. Anderson’s intent to cause injury in sexually molesting the Dunns’ daughter is conclusively presumed under the law and therefore there is no coverage for Mr. Anderson or anyone else under this policy.

The Dunns argue that rather than eliminating coverage for intentional injuries the requirement that the injuries be “neither expected nor intended from the standpoint of any insured” is ambiguous and expands coverage. Bypassing the first step of the analysis that the an “occurrence” must be an “accident,” the Dunns say that if a single insured neither expected nor intended the injury the occurrence requirement is met. Under their argument if the

occurrence requirement is met then all insureds are covered including the criminal who intended the injury.

An occurrence must be an accident first. Then the effects of this accident, i.e. the injury or damages resulting from the accident, must not have been intended or expected by either Mr. or Mrs. Anderson. In this case there is no need to determine whether the insureds expected or intended the injury because there was no "accident" and therefore no occurrence. Even if the Dunns could avoid this requirement, which they can't, the Dunns interpretation of the "any insured" language to allow coverage for all if any one insured did not intend the injury is unreasonable and leads to the absurd result that if one insured didn't intend the injury of the intentional act, then all insureds get coverage including the intentional actor. There is no occurrence and therefore no coverage under the Mutual of Enumclaw Umbrella policy for Mr. Anderson's intentional conduct because there is no accident.

## **II. STATEMENT OF THE CASE**

Mutual of Enumclaw accepts the Dunn's statement of the case.

### **III. THE DUNNS MUST SHOW THE POLICY GRANTED COVERAGE**

The Dunns as the Anderson's assignees have the burden of proving the Anderson claim is covered by the Mutual of Enumclaw policy.<sup>1</sup> *E-Z Loader Boat Trailers v. Travelers Indem. Co.*, 106 Wn.2d 901, 906 (1986). They are required to establish by proof an accident, during the policy period (not an issue here), the effects of which were not expected or intended by any insured. If they fail to prove any one of these elements they have no coverage. *Ibid.* Child molestation is presumed to be an intentional act at law and cannot be an accident. *Rodriguez v. Williams*, 107 Wn.2d 381, 387 (1986).

Mr. Anderson's molestation was intentional not accidental. Without an accident the policy was not triggered.

### **IV. THERE IS NO COVERAGE FOR MR. ANDERSON'S INTENTIONAL INJURY FOR ANY INSURED UNDER THE ANDERSON POLICY**

Washington courts determine objectively whether an accident has happened. An event is either an accident or it is not. Without an accident there is no occurrence.

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<sup>1</sup> Ms. Anderson assigned her policy rights to the Dunns in a covenant Judgment Settlement. See, companion Appeal No. 65602-3.

**1. Whether An Event Is An Accident Is Determined Objectively.**

In Washington, whether an accident has occurred is an objective determination. "Furthermore, pursuant to the commonsense definition, 'accident' is not a subjective term. Thus, the perspective of the insured as opposed to the tortfeasor is not a relevant inquiry. Either an incident is an accident or it is not."

*Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 685 (1990), overruled on unrelated grounds by *Butzberger v. Foster*, 151 Wn.2d 396 (2004). An accident cannot normally arise from a deliberate act unless a startling, second cause intervenes. "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." *Grange Ins. Co., v. Brosseau*, 113 Wn.2d 91, 96 (1989) (Citations omitted).

**2. Without an Accident There Is No Occurrence.**

In cases of sexual molestation, it doesn't matter whether the molester subjectively intended harm because the insured's intention to harm is conclusively presumed as a matter of

law. *Rodriguez v. Williams*, 107 Wn.2d 381, 387(1986). In *Rodriguez* an accidental occurrence definition was not involved but the court made its opinion of the issue clear: “[w]ere this an ‘accidental occurrence’ policy, we would simply deny that coverage existed under the policy because the act of committing incest could not be described as an accidental occurrence.” *Id.* at 384. The Mutual of Enumclaw umbrella policy is exactly the type of “accidental occurrence” policy referenced by the Supreme Court in *Rodriguez*. Thus, there is no coverage because the act of molestation can “not be described as an accidental occurrence.”

A sexual molestation case demonstrates that without an accident there is no occurrence. *Grange Ins. Ass’n. v. Authier*, 45 Wn. App. 383 (1986). In the *Authier* case the insured was accused of sexual molestation of children. The policy contained a definition of occurrence stating “ ‘the occurrence’ means an accident . . . .” *Id.* at 384-385. In addition, the policy contained an exclusion for injury either expected or intended from the standpoint of the insured. *Ibid.* The insurance company resisted coverage. Mr. Authier argued that although his acts were volitional they were not deliberate because he did not intend harm. The court pointed out that under the inferred intent rule Mr. Authier’s intent was a given.

Just like the *Authier* case the Dunns are unable to show that an accident took place. Without an accident there is no occurrence and no coverage.

**3. When The Absence Of An Accident Prevents An Occurrence There Is No Coverage For Innocent Insureds.**

In the absence of an accident, there is no coverage for any insured. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383 (1992). The Butlers argued that Mrs. Butler, an innocent insured, should be covered because Mr. Butler's intentional gunfire was an accident from her point of view. The court rejected this argument (and some earlier Washington cases) reaffirming the *Roller* holding that the existence of an accident is an objective determination unaffected by the subjective intent of an innocent insured. *Id.* at 403.

**4. Without An Occurrence No Insured Is Covered Even For Negligence That Contributed to the Hazard.**

Without an accident there is no occurrence even for an insured whose earlier negligence was alleged to have been a cause of the injury. This rule relies on a dual premise. First, if the definition of "occurrence," says "an occurrence is an accident," an event must have been caused by an accident to be covered. Second, the cases define occurrence as the injury producing event

not some earlier negligence. The Washington courts have adopted both of these premises. *Briscoe v. Travelers Indem. Co.*, 18 Wn. App. 662, 666 (1977); *Grange Ins. Co. v. Brousseau*, 113 Wn.2d 91, 93 (1989) (if the definition of occurrence says “ ‘occurrence’ means an accident” the injury causing event must be an accident to create an occurrence); *Wellbrock v. Assurance Co. of America*, 90 Wn. App. 234, 242 (1998) (“occurrence” is the injury producing event, not earlier negligence).

In *Wellbrock* a developer negligently excavated and cleared trees from portions of the developed property during the policy period. After the policy expired, a tree damaged by the developer's negligence fell killing Mr. Wellbrock. The court ruled the injuring event, not the earlier negligence was the occurrence. Since the occurrence happened after the policy expired there was no coverage. Insurance policies are only triggered if injury occurs, not for every careless act.

A number of jurisdictions have applied this dual premise to avoid insurance coverage for intentional injuries. These cases are all cases in which an insured was accused of negligent supervision, or failure to warn. The injury was intentionally caused in each case by a co-insured. These cases demonstrate because of the

intentional injuries there was no accident and no occurrence under the insurance policy. Without an occurrence the policy was not triggered and there was no coverage for any insured, including an insured whose negligence was claimed to have in some way contributed to the injury.

In *Mutual of Enumclaw v. Wilcox*, 123 Idaho 4 (1992) the occurrence definition in two potentially applicable policies both began by saying an occurrence was “an accident.” *Id.* at 8. Wilcox was accused of failing to warn injured children’s parents of her former husband’s pedophilia and also failing to protect their children from him. Wilcox had been aware of his earlier inappropriate behavior, but thought it had stopped. The court held there was no accident and denied coverage. *Id.* at 9.

In *Columbia Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124 (5th Cir. 1993) Columbia’s insured, Fiesta, leased business locations to a company which offered financial services to Fiesta’s customers. In actuality, unknown to Fiesta, the financial services company was operating a Ponzi scheme defrauding its customers. Fiesta sought coverage for the customers’ judgment. Because the Ponzi scheme was intentional the injury was not caused by an accident and there was no occurrence and no coverage under the policy. *Id.* at 1128.

In *Farmer's Alliance Mut'l. Ins. Co., v. Salazar*, 77 F.3d 1291 (10th Cir. 1996), Mrs. Salazar was accused of negligently allowing her gang-member son to have a gun which was used in a murder in which both he and a friend participated.

In determining there was no accident and thus no occurrence the court said "we need not reach the issue of whether Ms. Salazar or Manual Corrales actually intended or expected Thomas Byus's death, because intentional murder is not 'an accident'." *Id.* at 1297. The absence of an accident decided the issue.

A California case in which a cab company was accused of negligent hiring and supervision of a cab driver who sexually molested a passenger resulted in a finding of no coverage because the assault, not the hiring or supervision, caused the injury. *American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.*, 756 F. Supp. 1287 (1991). The cab company's policy limited coverage to accidents occurring "on the premises." The cab driver had been hired "on the premises" but the assault occurred elsewhere. The cab company sought coverage arguing that the injury was accidental since the cab company did not intend the injury. The court stated "[h]owever, even if it is accepted that the

act of 'negligent hiring' is the occurrence which gave rise to Shawn's injuries, this is not a risk that is covered by the policy since it is not an 'accident'. The hiring of Woods merely created the potential for injury to Shawn, but was not itself the cause of the injury." *Id.* at 1290.

These cases stem from the same logic found in Washington cases which require the injury to have been caused by an accident and which separate earlier hazard creating negligence from an injury-producing occurrence. The same logic must be applied in this case. Mr. Anderson's assault is the injury-producing event, and would itself be an "occurrence" had it been accidental. Because it was not accidental there was no occurrence at all and the policy was never triggered.

**V. MS. ANDERSON'S ALLEGED NEGLIGENCE  
WAS NOT AN OCCURRENCE**

In an attempt to create an occurrence from an intentional tort the Dunns argue that the allegation of negligence against Ms. Anderson (failing to warn the Dunns), not the intentional molestation by Mr. Anderson should be the focus of deciding whether there was an accident. This argument is ineffective. First, the policy only grants coverage if neither Mr. nor Ms. Anderson

expected or intended the harm, but Mr. Anderson intended harm. Second, in Washington the occurrence is the injury causing event, not some earlier careless act creating the potential for injury. See, IV. 4. above. As a result, earlier negligence cannot convert an intentional injury into an accident in order to create an occurrence.

#### **VI. THE “NEITHER EXPECTED NOR INTENDED” CLAUSE NARROWS THE GRANT OF COVERAGE**

Washington insurance policies commonly narrow the grant of coverage by requiring the injury to have been unintended and unexpected by insureds. Some policies withhold from the grant of coverage injuries intended by “any insured” or “an insured.” By contrast, other policies exclude, or limit an occurrence, to the intent of “the insured.” These two types of policies have precisely opposite results.

Policies that exclude the intentional acts of “the insured,” or limit occurrences with the intention or expectation of “the insured,” avoid coverage for the intentional actor, but provide coverage for an innocent insured. This is because the policy’s severability clause creates a separate policy for each insured. In each cloned policy if the term is “the insured,” and the insured seeking coverage didn’t commit the intentional act, then there is coverage. *Unigard Mut’l.*

*Ins. Co. v. Argonaut Ins. Co. and Spokane School Dist.* 81, 20 Wn. App. 261, 262 & 265-266 (1978) (Exclusion for injury “which is either expected or intended from the standpoint of the insured.”) (Emphasis added); *Pacific Ins. Co. v. Catholic Bishop of Spokane*, 450 F. Supp. 2d 1186, 1191 & 1205 (2006) (Limiting occurrence to injury “neither expected nor intended from the standpoint of the insured”) (Emphasis added).

A second category of cases, in which the reference is to “an insured” or “any insured”, prevents coverage to all insureds. If the term is “an insured” or “any insured,” then it doesn’t matter who is asking for coverage, if any one insured commits an intentional act, there’s not coverage under the policy for anyone. The phrase “an insured” or “any insured” in each cloned policy refers to all insureds, not just the individual insured for which the policy was created. *Farmers Ins. Co. v. Hembree*, 54 Wn. App. 195, 198 and 200 (1989) (Excluding injury “arising as a result of intentional acts of an insured.”) (Emphasis Added); *USF&G Ins. Co. v. Brannan*, 22 Wn. App 341, 345 and 348 (1979) (Excluding injury “arising out of business pursuits of any insured.”).

The *Hembree* case provides the closest analogy. John and Ruth Hembree babysat children of a neighbor. The Hembree’s

three sons sexually assaulted the children while they were staying at the Hembree's home. The policy did not cover either the liability of the sons or the parents who were accused of negligently supervising their sons. *Hembree*, 54 Wn. App. 200 and 202. The Dunns case is like the case against the Hembrees. Because the policy limits its grant of coverage to unintentional injury neither Mr. nor Ms. Anderson has coverage for this claim.

The Dunns cite and discuss the *Bishop of Spokane* case in support of their case. *Pacific Ins. Co. v. Catholic Bishop of Spokane*, 40 F.Supp. 2d 1186 (2006). (Brief of Appellants', p. 20-21.) Two insurers sold policies to the Diocese, Oregon Auto and CNA. In that case individual priests were accused of molestation and the Diocese was accused of negligently supervising the priests. The case broadly discussed the issues involved, observing that unlike *Butler* and *Roller* the Diocese was not claimed to be a completely innocent insured, but rather was accused of its own negligent tort. Despite these observations the basis for the Oregon Auto portion of the opinion is the language of the occurrence definition in its policies. The definition limited coverage by using the language "expected or intended from the standpoint of the insured." *Catholic Bishop*, 450 F. Supp at 1191 (emphasis added).

Under that language when the severability clause cloned the policy “the insured” only referred to the intentional tortfeasor in his policy<sup>2</sup>. As a result the other insureds had coverage. The court based its finding squarely on the policy language.

Although this issue has resulted in a split of authorities among states, this court is persuaded by the jurisdictions that maintain a conceptual separation between the intent of the employee and the intent of the employer, especially because diocese’s alleged policy’s coverage language is defined in terms of *the* insured,” rather than “*an* insured” or “*any* insured.” Washington courts read “*the* insured” to act like a separability clause, directing that the policy be construed as applying to each insured. Also, because Washington courts strictly construe comprehensive general liability policies when insurers attempt to constrict coverage, this court refuses to extend *Roller* and *Butler* beyond their particular facts and different policies to preclude comprehensive general liability coverage for the diocese as a matter of law.

*Catholic Bishop*, 450 F.Supp.2d at 1205.

Because the Oregon Auto definition of occurrence avoided coverage for injury expected or intended by the insured only the intentional tortfeasor lacked coverage.

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<sup>2</sup> There was apparently no severability clause in the policy. The court, however, treated it as if there was a severability clause saying “Washington courts read “*the* insured” to act like a separability clause, directing that the policy be construed as applying to each insured.” *Id.* at 1205.

## **VII. THE “OCCURRENCE” DEFINITION IS NOT AMBIGUOUS**

### **1. The Definition Is Unambiguous Because The Dunn’s Interpretation Is Unreasonable.**

The Dunn’s argument claims the policy is ambiguous. They say that the phrase “neither expected nor intended by any insured” can be read two ways and leap to the conclusion that it is ambiguous requiring the court to adopt the meaning most beneficial to the insured. Their argument omits the step that defeats their logic. An ambiguity exists only if there is more than one reasonable meaning.<sup>3</sup>

When language presents more than one potential meaning the court must interpret the words’ meaning and then construe their legal impact. *Berg v. Hudesman*, 115 Wn.2d 657, 663 (1990). Both interpretation and construction are tasks for the court. *E.g.*, *Farmers Ins. Co. of WA v. Grellis*, 43 Wn. App. 475, 477 (1986).

For purposes of insurance coverage ambiguity exists when there is more than one reasonable meaning for the language. *E.g.*, *Weyerhaeuser Co. v. Aetna Casualty & Surety Co.*, 123 Wn.2d

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<sup>3</sup> Their argument fails for two reasons. First, the language they claim is ambiguous is not applicable to this case because the coverage analysis ends at the first part of the occurrence definition. There is no accident. Second, even if the Dunns somehow reach the subsequent test contained in the phrase “neither expected nor intended . . . .”, this language is unambiguous. There is only one reasonable meaning of this phrase in the context of the entire policy.

891, 897, (1994). When policy language appears to be ambiguous the court must try to determine whether the ambiguity is only apparent or whether it is actual:

“. . . where the language of a contract is ambiguous or susceptible of more than one meaning, it is the duty of the court to search out the intent of the parties by viewing the contract as a whole and considering all of the circumstances surrounding the transaction, including the subject matter and the subsequent acts of the parties. . . .”

*Boeing Airplane Co. v. Fireman's Fund Indemnity Co.*, 44 Wn.2d 488, 496 (1954) (citations omitted) (overruled on the requirement for ambiguity as a prerequisite for application of the context rule by *Berg v. Hudesman*, 115 Wn.2d 657, 666-668 (1998)).

To satisfy this obligation the courts look to several rules which are considered aids to interpretation. *Harris, Washington Insurance Law* § 6.03 (Third Ed. 2010).

## **2. The Average Insurance Purchaser Disagrees With The Dunns.**

When interpreting insurance policy language to determine whether an ambiguity exists the court will read it in a manner consistent with how it would be understood by the average insurance purchaser. *E.g., Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171 (2005). The Dunns say the policy

provides coverage for the failure of any one insured to either expect or intend the injury. If the failure of one insured to expect or intend the injury is all that's required for an occurrence the policy would provide coverage for all insureds, including the criminal. The average insured would be quite surprised to learn that any insured might be covered for an act of sexual molestation, let alone the criminal. Further, providing insurance coverage for sexual molestation is against public policy.

**3. The Dunn's Strained Interpretation Would Create An Absurd Result.**

Two related rules to aid in interpretation bear on this issue. The first counsels the court to avoid a strained or forced interpretation that would lead to an absurd result and the second counsels the court to base its interpretation on a common sense approach to the language. *E.g.*, *Washington PUD Utilities System v. PUD No.1*, 112 Wn.2d 1, 11 (1989) (avoid absurdity); *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 92 (1990) (Common Sense).

It is not possible to reconcile the Dunns odd interpretation of the occurrence clause with this concept. Their interpretation flies in the face of the normal insurance requirement that a covered event be fortuitous. It would provide coverage for intentional injury, not

only for co-insureds, but for the criminal himself, an interpretation that can only be viewed as creating a moral hazard by creating coverage for child molestation. See, *Detweiler v. J.C. Penney Casualty Ins. Co.*, 110 Wn.2d 99, 105-106 (1988) (Insuring against intentionally caused injuries would violate public policy).

The Dunns offer an alternative meaning for “neither expected nor intended from the standpoint of any insured.” Rather than narrowing coverage to avoid paying for intentional injuries the Dunns say this phrase means that so long as one insured fails to intend or expect the injury the policy is triggered by an occurrence. If the policy is triggered then all insureds, including the criminal, are covered for intentionally caused harm. Their interpretation is an absurdity that would astonish the average purchaser of insurance. Failing the test of reasonableness their interpretation fails to transform the language into an ambiguity. Because the language is not ambiguous there is no basis for interpreting this language to provide coverage for Mr. Anderson and Ms. Anderson.

**4. Cloning The Policy Through The Severability Clause Does Not Expand Coverage To Pay For Intentional Injuries.**

The Dunns argue that we must determine whether an accident occurred from the perspective of Ms. Anderson who

neither expected nor intended the injuries. They say this follows from the severability clause which applies the cloned policies separately to each insured. This argument fails to account for the actual effect of the severability clause. The severability clause clones the policy for each insured importing precisely the same language into each policy. *Caroff v. Farmers Ins. Co.*, 98 Wn. App. 565, 573 (1999). As a result, each of the Andersons received a policy that limited coverage to accidental injuries

Importing the language “neither expected nor intended from the standpoint of any insured” into Mr. Anderson’s policy necessarily includes him in the group defined by “any insured.” Importing the phrase into Ms. Anderson’s policy causes the same result. Mr. Anderson is among those defined by the group of “any insured” in her policy. Since Mr. Anderson intended the injury neither cloned policy covers the assault.

The application of a severability clause does not in and of itself change the meaning of the policy’s language. There is no automatic ambiguity created by the severability clause. In the Mutual of Enumclaw policy the meaning suggested by the Dunns would create coverage for all insureds including the insured that

caused injury by an intentional crime. No reasonable insured could have expected that result.

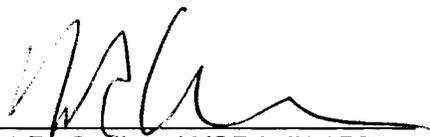
## VII. CONCLUSION

Mutual of Enumclaw's policy unambiguously requires an accident to trigger the policy. Mr. Anderson's act of sexual molestation was not an accident. There is no coverage under the policy. Further, no negligent conduct by any other insured is covered under the policy because there is no accident and, in addition, Mr. Anderson expected or intended the injury as a matter of law.

Mutual of Enumclaw asks the Court to affirm the trial court's judgment.

Respectfully submitted this 16th day of June, 2011.

HACKETT, BEECHER & HART



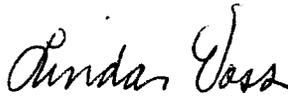
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CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on June 16, 2011, I sent for delivery a true and correct copy of: Mutual of Enumclaw's Response Brief by ABC Legal Services to:

Clerk, Court of Appeals, Division I  
One Union Square, 600 University Street  
Seattle, WA 98101

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