7-20-2017

# Farm Bureau Mut. Ins. Co. of Idaho v. Cook Appellant's Brief Dckt. 44897

# IN THE SUPREME COURT OF THE STATE OF IDAHO

FARM BUREAU MUTUAL INSURANCE COMPANY OF IDAHO,

Plaintiff/Respondent,

vs.

EDGAR WILKINS COOK, JR. and LAURIE FRANCES COOK, husband and wife,

Defendants/Appellants,

and

JOSEPH STANCZAK,

Defendant.

**DOCKET NO. 44897**

## APPELLANT'S OPENING BRIEF

(Bonner County Case No. CV-2016-0590)

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

HONORABLE BARBARA BUCHANAN
DISTRICT JUDGE, PRESIDING

Wes S. Larsen
Craig K. Vernon
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814

James L. Martin
Tyler J. Anderson
Benjamin C. Ritchie
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701

## TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

**Cases Cited:**



**Authorities:**

# I. STATEMENT OF THE CASE

## A. Nature of the Case

This case involves a claim and subsequent lawsuit brought by Joseph Stanczak against Appellants Edgar and Laurie Cook ("Cooks") claiming 1) premises liability and 2) negligent supervision. Stanczak alleged he sustained gunshot-related injuries at the hand of Michael Jesse Chisholm, the caretaker of recreational property owned by the Cooks and known as the Bloom Lake Campground. In response to Stanczak's claims, the Cooks' insurance provider, Respondent Farm Bureau Mutual Insurance ("Farm Bureau"), filed a separate declaratory action against Stanczak and the Appellants. Farm Bureau then moved for summary judgment in the declaratory action on the grounds that Stanczak's claims were not covered under the Cooks' insurance policy with Farm Bureau, and therefore Farm Bureau had no duty to defend or indemnify the Cooks in the Stanczak action. R pp. 8-171, 188-343.

## B. Course of the Proceedings

On May 2, 2016, Farm Bureau filed a Complaint for Declaratory Judgment claiming a lack of a duty to defend the Cooks against Stanczak's claims. R pp. 8-80. Farm Bureau subsequently filed an Amended Complaint for Declaratory Judgment on June 3, 2016. R pp. 81-170. On August 10, 2016, the Cooks filed their Answer, Affirmative Defenses, and Counterclaim, and Stanczak likewise filed his Answer to the Amended Complaint. R pp. 171-181.

On August 18, 2016, Farm Bureau filed a Reply to Counterclaim and Demand for Jury Trial. R pp. 182-187. The district court set a five-day jury trial to begin on January 23, 2018. R p. 3.

On October 20, 2016, Farm Bureau filed a Motion and Supporting Memorandum for Summary Judgment, again declaring there was no coverage under the Cook's policy for Stanczak's injuries because there was no "occurrence" under the liability policy, and that Farm Bureau had no duty to defend or indemnify the Cooks. R pp. 188-242. Stanczak filed a Motion to Strike portions of Farm Bureau's motion on October 21, 2016, because the motion for summary judgment referenced a demand letter from Stanczak to Farm Bureau that was labeled "for settlement purposes only." R pp. 344-353. Farm Bureau filed its response December 14, 2016. R pp. 370-375. A hearing on the motion to strike and Farm Bureau's motion for summary judgment was scheduled for December 21, 2016. R. p. 4.

On December 9, 2016, the Cooks filed a Memorandum in Opposition to Farm Bureau's Motion for Summary Judgment. R pp. 356-369. Stanczak likewise filed an opposition, incorporating and joining the Cooks' arguments. R pp. 354-355. Farm Bureau filed a reply memorandum on December 14, 2016. R pp. 376-398.

Following the December 21, 2016 hearing, the Honorable Barbara Buchanan entered a Memorandum Decision and Order Granting Plaintiff Farm Bureau's Motion for Summary Judgment on January 20, 2017. R pp. 399-427. A final judgment was entered that same day. R pp. 428-429. The judgment was amended on February 24, 2017. R pp. 433-434. The Cooks filed a notice of appeal on March 2, 2017. R pp. 435-438.

**C. Concise Statement of Facts**

This case involves a shooting incident that occurred while Joseph Stanczak and his girlfriend were camping on the Cooks' recreational property on June 28, 2015. R p. 165. During the camping trip, Stanczak accepted Michael Jesse Chisholm's invitation to visit him at the caretaker's cabin. *Id.* During the visit, a verbal argument occurred. *Id.* Stanczak then left the

cabin to return to his campsite. *Id.* However, as Stanczak was walking towards his pickup with his back toward the cabin, Michael Chisholm shot Stanczak in the upper left arm and back, causing life-threatening injuries to Stanczak. *Id.*

Stanczak brought claims against the Cooks for premises liability and negligent supervision. R pp. 166-68. The Cooks' insurer, Farm Bureau, denied a duty to defend the action and provide liability coverage based on exclusions within the Cooks' insurance policy. R p. 85. Following is the relevant information regarding the Cooks' property, their insurance policy, and the pleadings involved in this appeal.

**1. The Cooks' Bloom Lake Property and Michael Chisholm**

The Cooks own rural property in Bonner County, Idaho comprising 200 acres adjacent to Bloom Lake. R p. 401. The property has a small cabin, and a campground located on it. *Id.* The Cooks have owned this property, commonly known as Bloom Lake, for nearly 67 years, and have allowed the public to camp there free of charge since the 1950s. *Id.* About 19 years ago, Michael Jesse Chisholm requested the Cooks allow him to reside in the cabin in exchange for caring for the property; the Cooks agreed. *Id.* The Cooks never paid Chisholm for his work at their property, and considered him a volunteer who they allowed to live on their property. R p. 402. Mr. Chisholm lived at the cabin until the June 28, 2015 shooting incident involving Stanczak. R pp. 404-05. Chisholm was then arrested, executed an *Alford* plea, and was sentenced to a unified term of imprisonment of ten years, with two years fixed and eight years indeterminate. R pp. 405-407.

**2. The Cooks' Insurance Policy**

The Cooks purchased a liability insurance policy from Farm Bureau which included premises liability. *See* R pp. 16-66. The "Country Squire" policy ("Policy") has three separate

coverage sections: Section I (Property), Section II (Liability), and Section III (Automobile), and lists both "Edgar Wilkins Cook, Jr." and "Laurie Frances Cook" as the "insureds." R pp. 16-21. The relevant portions of the Policy are as follows:

> **Agreement**
>
> 1. We will provide the insurance described in this policy and the Declarations if you have paid the premium and have complied with the policy provisions and conditions. . . .
>
> **SECTION II LIABILITY INSURANCE**
>
> **COVERAGE F1 BODILY INJURY LIABILITY . . . .**
>
> If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage**, caused by an **occurrence** 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 (damages includes any awarded prejudgment interest); and
>
> 2. Provide a defense at our expense by counsel of our choice. . . .

R. pp. 22, 43 (emphasis in original).

The definitions portion of the Policy provides that the term "occurrence" means "an accident, including continuous or repeated exposure to the same harmful conditions, which results in unexpected bodily injury or property damage during the policy period." R. p. 24 (emphasis in original excluded). The term "accident" is not defined in the Policy. *See* R pp. 22-25. If no exclusion exists which limits coverage, Farm Bureau is required under the Policy to defend and indemnify its insureds under this broad scope of coverage. R pp. 22, 43.

### 3. Stanczak's Claim and Farm Bureau's Declaratory Action

Besides claims against Chisholm, Stanczak asserted claims against the Cooks, namely premises liability and negligent supervision. R pp. 295-300. In response to Stanczak's demand

letter and this suit, Farm Bureau denied coverage on behalf of the Cooks, finding that no "occurrence" took place under the Policy terms. Alternatively, Farm Bureau claimed even if there was an occurrence, a policy exclusion precluded coverage. R pp. 68-77, 79-80, 142-51, 153-54, 156-61. Through a series of declaratory complaints and answers, Farm Bureau maintained its argument that the Policy did not cover Stanczak's claims against the Cooks. R pp. 8-170, 182-87.

Farm Bureau filed its Amended Complaint for Declaratory Judgment on June 3, 2016, stating its coverage position, followed by its Motion for Summary Judgment and supporting pleadings. R pp. 81-170; 188-343. After the December 21, 2016 hearing on that motion, the district court entered judgment for Farm Bureau. R pp. 428-429. The district court found there was no "occurrence" as defined by the Policy. R pp. 399-427. The district court also held Idaho case law precludes coverage of Stanczak's claims under the intentional act policy exclusion. *Id.*. The district court entered an Amended Judgment on February 24, 2017. R pp. 430-34. The Cooks filed a Notice of Appeal on March 2, 2017. R pp. 435-438.

## II. ISSUES ON APPEAL

1. Did the district court err by considering Chisholm's conduct in determining whether the Cooks had policy coverage?

2. Did the district court err in its interpretation and application of Idaho precedent by failing to consider the Cooks' conduct when applying the definition of an "occurrence" under the Policy?

3. Did the district court err in ruling that Respondent Farm Bureau has no duty to defend the Cooks in the Stanczak action?

## III. STANDARD OF REVIEW

In *State Farm Fire and Cas. Co. v. Doe*, 130 Idaho 693, 946 P.2d 1333 (1997), this Court stated the standard of review for summary judgment:

> When questions of law are presented, this Court exercises free review and is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented. *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 876, 865 P.2d 965, 967 (1993).
>
> Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bunker Hill Co. v. United Steelworkers of America*, 107 Idaho 155, 686 P.2d 835 (1984). A motion for summary judgment must be denied if reasonable people could reach differing conclusions or draw conflicting inferences from the record of the case. *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995). Upon motion for summary judgment, all facts and inferences must be drawn in favor of the nonmoving party. *Perkins v. Highland Enters., Inc.*, 120 Idaho 511, 817 P.2d 177 (1991).

*State Farm Fire and Cas. Co. v. Doe*, 130 Idaho 693, 695, 946 P.2d 1333, 1335 (1997).

## IV. ARGUMENT

### A. Introduction

This case involves a liability coverage dispute based on the language of an insurance policy. The Cooks purchased their Policy from Farm Bureau to protect them from premises liability. In June of 2015, an event occurred. Michael Jesse Chisholm, who had been living on and caring for the Cooks' Bloom Lake property, unexpectedly shot Joseph Stanczak, a visiting camper, following an argument. Stanczak demanded that the Cooks compensate him for his severe injuries under theories of premises liability and negligent supervision. Farm Bureau denies it has a duty to defend and indemnify the Cooks against Stanczak's claims. Farm Bureau asserts that the Policy language precludes the claims. Specifically at issue is whether there was

an "occurrence" as defined by the Policy which would trigger policy coverage related to Stanczak's claims against the Cooks.

The district court granted summary judgment to Farm Bureau in this matter on alternative grounds, holding:

> [T]he Court finds that there is no genuine dispute left for trial that Chisholm is not an insured under the Policy, and because he is not an insured, he is not entitled to F1 coverage under the Policy; and that, even if Chisholm was found to be an insured under the Policy, there would be no coverage for Stanczak's claims against the Cooks since Chisholm's commission of an intentional act precludes F1 coverage because no "occurrence" occurred.

R p. 411.

For the reasons set forth below, Stanczak claims this ruling was in error.

**B. The district court erred in ruling that there was no coverage under the Policy for Stanczak's claims against the Cooks.**

As referenced above, the district court found the Cooks had no coverage in this matter because Chisholm is not a named insured under the Policy. However, the claims at issue are those brought by Stanczak against the Cooks, not the claims against Chisholm. It is the Cooks' actions that must be considered to determine the existence of an "occurrence." The Cooks' actions and the events that unfolded fall under this Court's definition of the term "accident" in the applicable Idaho Supreme Court precedent, and thus the denial of coverage in favor of Respondent Farm Bureau was an error.

**1. The district court improperly analyzed Chisholm's role as an "insured" under the Policy.**

Coverage F1 (Bodily Injury Liability) under the Policy provides coverage to an insured "[i]f a claim is made or a suit is brought against any insured for damages because of bodily injury or property damage, caused by an occurrence." R p. 43. Coverage F1 only applies to a claim brought against an insured under the Policy.

The district court found that there was no coverage under the Policy for Stanczak's claims against the Cooks, emphasizing in its findings that Chisholm is not an "insured" and alternatively, Chisholm's intentional acts clearly fall outside the scope of an "occurrence." R pp. 411-413. This analysis was performed in error.

Whether Chisholm was an "insured" is irrelevant to the claims at issue in the declaratory judgment. Stanczak's premises liability claims and negligent supervision claims are against the Cooks. As the district court noted, "[u]nder the Policy, an 'insured' is a person named in the Policy Declarations or 'residents of your [the insured's] household, your spouse, your relatives, and minors in the care of you or your relatives'.... The Policy Declarations list only Edgar and Laurie Cook as insureds." R p. 411.

In the recent case of *Fisher v. Garrison Property and Casualty Insurance Co.*, ___ Idaho ____, ___ P.3d ___ (Docket No. 44117-2016, issued May 26, 2017), this Court reiterated:

> "In construing an insurance policy, the Court must look to the plain meaning of the words to determine if there are any ambiguities. This determination is a question of law. In resolving this question of law, the Court must construe the policy 'as a whole, not by an isolated phrase.'" Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 663, 115 P.3d 751, 754 (2005) (citations omitted). "A provision in an insurance contract must be read within the context in which it occurs." Dave's Inc. v. Linford, 153 Idaho 744, 751, 291 P.3d 427, 434 (2012). "Unless a contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage-as opposed to the meaning derived from legal usage-in order to effectuate the intent of the parties." Howard v. Oregon Mut. Ins. Co., 137 Idaho 214, 218, 46 P.3d 510, 514 (2002). An exclusion in the policy must be strictly construed in favor of the insured. Moss v. Mid-Am. Fire & Marine Ins. Co., 103 Idaho 298, 300, 647 P.2d 754, 756 (1982).

*Id.*

The district court erred in its analysis on the issue of who was an "insured." Stanczak clearly made claims against the Cooks for their alleged actions. The clear language of the Policy provides coverage for the Cooks and triggers a duty to defend.

**2. It is the Cooks' alleged conduct that determines whether an "occurrence" existed.**

The relevant portion of the Cooks' Policy guarantees coverage notwithstanding any applicable exclusion, "[i]f a claim is made or a suit is brought against any insured for damages because of bodily injury or property damage, caused by an occurrence." R p. 43. In this case, an action was brought against the Cooks for damages because of Stanczak's bodily injury caused by an occurrence, thus indicating a duty of coverage under the Policy.

An "occurrence" is defined in the Policy as "an accident, including continuous or repeated exposure to the same harmful conditions, which results in unexpected bodily injury or property damage during the policy period." R p. 25. The term "accident" was left undefined. However, in *Mut. of Enumclaw v. Wilcox*, 123 Idaho 4, 843 P.2d 154 (1992), this Court clearly held that "not every word and phrase in an insurance contract needs to be defined in the contract. Rather, insurance policies may contain words or phrases that simply have settled legal meanings or interpretations." *Id.* at 8, 843 P.2d at 158. Further, the *Wilcox* court held that "the word 'accident' as used in an insurance policy . . . and not otherwise defined in the policy, has a settled legal meaning or interpretation." *Id.* at 9, 843 P.2d at 159. The *Wilcox* court adopted the following definitions of the term "accident":

> Accident.
> ....
> *Insurance contract.* An accident within accident insurance policies is an event happening without any human agency, or, if happening through such agency, **an event which, under circumstances, is unusual and not expected by the person to whom it happens**. A more

> comprehensive term than "negligence," and in its common signification the word means an unexpected happening without intention or design.
>
> Black's Law Dictionary 14 (5th ed. 1979).
>
> ac • ci • dent (ak #si dent), *n.* 1. an undesirable or unfortunate happening, unintentionally caused and usually resulting in harm, injury, damage, or loss; casualty; mishap: automobile accidents. 2. any event that happens unexpectedly, without a deliberate plan or cause....
>
> Webster's Encyclopedic Unabridged Dictionary 9 (1989).

*Wilcox*, 123 Idaho at 9, 843 P.2d at 159 (emphasis added).

With this settled definition in mind, it is the conduct of the insured that is to be analyzed when making the determination of whether or not an "accident," and therefore, an "occurrence," took place. *See Wilcox*, 123 Idaho at 9, 843 P.2d at 159 (holding that the conduct of the insured, Ms. Wilcox, must be looked to and not her ex-husband's conduct for the purposes of insurance coverage); *see also Fisher v. Garrison Prop. & Cas. Ins. Co.*, 162 Idaho 149, 395 P.3d 368 (2017), *reh'g denied* (May 25, 2017) (referencing district court's *Memorandum Decision and Order Re: Cross Motions for Summary Judgment as to Coverage* *8-9 (Feb. 25, 2016), wherein the court precluded summary judgment based on genuine issues of material fact as to whether the intentional loss exclusion applied; the court looked to the knowledge and actions of the insured to determine intent); *see also Safeco Ins. Co. v. White*, 122 Ohio St. 3d 562, 913 N.E.2d 426 (2009) (holding that whether or not an underlying act was intentional must be determined from the perspective of the insured who is sued for negligent supervision).

Ultimately, when properly analyzed under the rules of construction of an insurance policy favoring coverage:

> "The fact that an accident is caused by or is traceable to the act of a person other than the insured does not prevent the occurrence from being an 'accident'.

> When the injury is not the result of the misconduct or the participation of the in[s]ured party, it is, as to him, accidental although inflicted intentionally by the other party."

*Brumley v. Lee*, 265 Kan. 810, 823, 963 P.2d 1224, 1232 (1998) (quoting 10 Couch on Insurance 2d §41 :14 (1982)).

When viewed from the standpoint of the insured, assaults committed by third persons are unexpected events constituting accidents and occurrences under insurance policies. *See* Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 127:21 (3d ed. 2012) ("[W]here the insured is not the assailant but is instead liable based on . . . negligent supervision, or some other negligence theory, the assault may constitute an accident or occurrence, at least from the standpoint of the insured."); *see also National Fire Ins. Co. v. Lewis*, 898 F. Supp. 2d 1132 (D. Ariz. 2012) (medical clinic's CGL "occurrence" policy triggered for sexual assault by physician); *Morris v. Coker*, 923 F. Supp. 2d 863 (W.D. La. 2013) (employer's insurer obligated to cover claim by consultant punched by employee).

In the present case, the district court erred by analyzing Chisholm's actions and focusing on whether he acted intentionally when he shot and injured Stanczak. The Court first decided *if* Chisholm were an insured, he would not have coverage under the Policy because the intentional act exclusion would apply. R p. 411.

This analysis was incorrect. This case involves claims against the Cooks for *their* actions. As set forth above, Chisholm's intent behind the act that caused Stanczak's injury is of no consequence. There was no evidence before the district court that the Cooks intended to negligently supervise Chisholm or take any other action that contributed to Stanczak's injury.

In application of the *Wilcox* definition of "accident" to the present facts, Chisholm's shooting of Stanczak was "an event which, under circumstances, is unusual [to the insured

Cooks] and not expected by [Stanczak] . . . ." *Wilcox*, 123 Idaho at 9, 843 P.2d at 159. The shooting was "an unexpected happening without intention or design [by the Cooks]." *Id.* It was "an undesirable or unfortunate happening, unintentionally caused [by the Cooks] and . . . resulting in harm, injury, damage, [and] loss . . . ." *Id.* It was an "event that happen[ed] unexpectedly, without a deliberate plan or cause [by the Cooks] . . . ." *Id.* The shooting of Stanczak was therefore an "accident" as related to the insured Cooks, and thus an "occurrence" qualifying for coverage under the Policy. The district court erred in finding otherwise.

**3. The district court erred in its interpretation and application of Idaho case law.**

The district court relied on two Idaho Supreme Court cases in its decision,[1] and held that Idaho case law precludes coverage of Stanczak's claims against the Cooks. R pp. 413-423. This holding misapplied the cited law.

The primary case relied on by the district court was *Mutual of Enumclaw v. Wilcox*, 123 Idaho 4, 843 P.2d 154 (1992). In *Wilcox*, twelve anonymous plaintiffs filed suit against Shirley Wilcox ("Shirley"), her ex-husband ("Jay"), the State of Idaho, and ten unnamed employees of the State regarding child sexual abuse perpetrated by Jay. *Id.* at 4-5, 843 P.2d at 154-55. The issue before the *Wilcox* court was whether the claim against Shirley for negligent failure to warn proper authorities met the definition of "an occurrence" under the applicable insurance policies. *Id.* at 8, 843 P.2d at 158. The term "occurrence" was defined in both policies as "an accident . . . ," but the term "accident" was undefined, thus compelling the *Wilcox* court to establish whether the term "accident" "has a settled legal meaning or interpretation."[2] *Id.* at 8-9, 843 P.2d at 158-59. The court stated:

---

[1] *Mutual of Enumclaw v. Wilcox*, 123 Idaho 4, 843 P.2d 154 (1992), and *State Farm Fire and Cas. Co. v. Doe*, 130 Idaho 693, 946 P.2d 1333 (1997).

[2] The *Wilcox* court's adopted definition of the term "accident" is presented in Section B.2 *supra*.

> With this definition in mind, we turn to the alleged acts of Wilcox. **It is her conduct that we must look to, and not to her ex-husband's conduct, because she is the only one whose acts could be covered by the policy in question.** The twelve anonymous plaintiffs in the underlying action have alleged that Wilcox was negligent in failing to report or warn the proper authorities of the child molestation perpetrated upon minors by her ex-husband. Her alleged conduct is the failing to report or warn, while her ex-husband's conduct is the child molestation, **which is intentional conduct** and, thus, clearly not an "occurrence."
>
> **Looking to Wilcox's alleged conduct, we find that it is not an "occurrence" under the policies because it was not the conduct which caused injury.** The injury suffered by the minors is child molestation. While the acts or failure to act by Wilcox may have created or contributed to the environment which permitted her ex-husband's conduct, Wilcox did not commit the acts complained of by the twelve anonymous plaintiffs. Therefore, the Enumclaw Policy and the Wilcox Policy do not provide coverage for Wilcox.

*Wilcox*, 123 Idaho at 9, 843 P.2d at 159 (emphasis added).

The factual scenario leading to the decision in *Wilcox* is significantly different than the present case. In *Wilcox*, the respective acts of child molestation and failure to report were each done by individuals who could be classified as "insureds" under the applicable policies, namely Shirley and her husband, Jay. Furthermore, Shirley's conscious decision not to report Jay's continued abuse of children in the couple's care was clearly intentional, thus making her actions not an "occurrence."

In contrast, Chisholm here was clearly not an "insured" under the Farm Bureau policy, and as noted in Section B.1 above the court must look to the conduct of the insured in analyzing coverage under an insurance policy. Unlike the conduct of Shirley in *Wilcox*, the Cooks' conduct here was not an intentional act.

In reviewing the district court's memorandum decision in the present case, it appears that ambiguous language in the *Wilcox* decision created confusion for the district court. The *Wilcox* court began by referring to the definition of the term "accident," making it clear that it

was the conduct of Shirley that was to be reviewed (and not Jay's intentional conduct) when applying that definition. *Wilcox*, 123 Idaho at 9, 843 P.2d at 159. The referenced definition clearly indicates that an "accident" is "unintentionally caused" and is "an event which, under circumstances, is unusual and not expected by the person to whom it happens." *Id.* With this in mind, the *Wilcox* court then detailed the alleged conduct of both Shirley and Jay, making a determination that Jay's conduct was intentional and therefore not an "occurrence." *Id.* The confusion created by the *Wilcox* court begins here, because instead of applying this analysis and concluding that Shirley's conduct in failing to report to the proper authorities was intentional (and therefore not an "occurrence"), the *Wilcox* court abruptly switched paths and suddenly focused on the "conduct which caused injury," inevitably coming to the conclusion that no "occurrence" existed because Jay's abuse of the children was intentional. *Id.*

As quoted above, the *Wilcox* court stated, "Looking to Wilcox's alleged conduct we find that it is not an 'occurrence' under the policies because it was not the conduct which caused injury. . . . Wilcox did not commit the acts complained of by the twelve anonymous plaintiffs." *Wilcox*, 123 Idaho at 9, 843 P.2d at 159. Yet nowhere in the *Wilcox* court's applied definition of "accident" or the applicable insurance policies' definitions of "occurrence" is there a focus on the "cause of the injury." *Id.* The focus in the definitions of "accident" adopted by the *Wilcox* court is the intent behind the act of the insured, and the unexpected nature of the act. *See id.* To further the confusion, the *Wilcox* court states that Shirley did not commit the acts complained of by the twelve anonymous plaintiffs; but in fact, Shirley did commit the act of failing to report, which *was* complained of by the plaintiffs. *Id.* at 5, 843 P.2d at 155. It was this ambiguous line of analysis coupled with the above-noted factual differences that apparently confused the district court in the case at hand, leading to an error of application of the law. This

Court is requested in this appeal to correct and clarify the ambiguous reasoning of the *Wilcox* court.

Also, in *Wilcox*, both Shirley and Jay were "insureds" under the policies, and thus the respective actions of each would initially be looked to for coverage. By contrast, Chisholm here was not a named "insured" or even an implied insured, and so it is solely the actions of the Cooks (as insureds) that are at issue regarding coverage. And, not only were the Cooks' actions not intentional (unlike Shirley Wilcox's actions in not reporting her husband to the authorities), but the Cooks' negligence also partially caused Stanczak's injuries. Unlike the failure to report by Wilcox, which could have only possibly "created or contributed to the environment" of the ongoing sexual abuse, *Id.* at 9, 843 P.2d at 159, the Cooks' negligent acts as alleged by Stanczak led to the events of the shooting and the injuries to Stanczak. But for their actions in failing to inspect their publicly-used premises and supervise Mr. Chisholm, Chisholm would never have been in a position to shoot Stanczak in the first place.

If the *Wilcox* court's paragraph[3] regarding the conduct that caused injury (cited above) were viewed as dictum and removed from that decision, the outcome would have been the same; there was no "occurrence" due to the intentional nature of Shirley's actions, and there was no "occurrence" because the person causing the alleged injuries was another insured, Jay. *Wilcox*, 123 Idaho at 9, 843 P.2d at 159. Yet the case at hand is different. Looking to the intent behind the Cooks' actions creates a clear "occurrence" under the Policy because the Cooks' actions were not intentional, and were thus "an accident" under the *Wilcox* definition. *See Wilcox*, 123 Idaho at 9, 843 P.2d at 159. Unfortunately, the district court here looked to the cause of injury in relation to the acts of Chisholm, a non-insured third-party, and concluded that

[3] The second-to-last full paragraph of the *Wilcox* decision.

his actions were intentional and thus there was no "occurrence." This is clearly an erroneous interpretation and application of the *Wilcox* analysis.

Not long after deciding *Wilcox*, the Idaho Supreme Court yet again tackled the issue of whether there was an "occurrence" creating liability under relevant insurance policies in *State Farm Fire and Cas. Co. v. Doe*, 130 Idaho 693, 946 P.2d 1333 (1997). In *Doe*, the Doe defendants operated a day care from their residence. The Roes' young daughter attended this day care service and the Does' thirteen-year-old son engaged in inappropriate sexual conduct with her. *Id.* at 693-94, 946 P.2d at 1333-34. The Roes brought suit against the Does alleging multiple legal theories due to the Does' association with the sexual abuse perpetrated by their son. *Id.* at 694, 946 P.2d at 1334. The *Doe* court reviewed the district court's ruling on whether there was an "occurrence" under the applicable insurance policy which created a duty on the Does' insurer to defend and cover the Does' acts of negligence and failure to report. *Id.* at 695-696, 946 P.2d at 1335-36.

In its decision, this Court cited *Wilcox*, applying the definition of "accident" adopted therein and noting the following *Wilcox* statement: "Ms. Wilcox's failure to report or warn the proper authorities of the child molestation perpetrated upon minors by her ex-husband was 'not an "occurrence" under the policies because it was not the conduct which caused injury.'" *State Farm Fire & Cas. Co. v. Doe*, 130 Idaho 693, 696, 946 P.2d 1333, 1336 (quoting *Wilcox*, 123 Idaho at 9, 843 P.2d at 159). The court then analyzed the facts of *Doe* as follows:

> The facts in this case clearly show that the abuser understood the sexual nature of his conduct as well as its wrongfulness. He threatened the child by telling her that a "green monster" would get her if she told anyone of his behavior. The conduct occurred in the downstairs bathroom of the residence in a location where his conduct would not easily be detected. The Does' son's conduct was not "without intention or design." *Wilcox*, 123 Idaho at 9, 843 P.2d at 159. An accident is an unexpected event which is the result of unintentional conduct or an intentional act which results in unexpected consequences. The district court

> found the facts established "intentional acts of sexual abuse." There is no other reasonable interpretation of the facts. **This intentional conduct, with consequences that could be expected, cannot be characterized as an accident.** Therefore, there was no "occurrence" within the meaning of the policy.

*Doe*, 130 Idaho at 695-696, 946 P.2d at 1335-36 (footnotes omitted) (emphasis added). It is noteworthy that the *Doe* court never discusses the actions of the parent *Does*, but only discussed the actions of the minor perpetrator.

The factual differences of *Doe*, in comparison to the case at hand, are the same as with *Wilcox*. In *Doe*, the Does' son, who intentionally committed the acts of sexual abuse, would clearly be an "insured" under the applicable insurance policies, just like the ex-husband would be in *Wilcox*. The acts causing the harm were not perpetrated by a non-insured third-party, but rather by someone who was an immediate family member of the named insured. Because of this significant difference, based on the given definition of the term "accident" and this Court's analysis in *Wilcox*, it is only logical that in a scenario involving a non-insured third-party such as here, the Court should look to the intent and unexpected outcome of the event from the view of the "insured," separate from the actions of the third-party.

These two Idaho Supreme Court decisions upon which the district court relied both involve two insured parties; one that committed the intentional act that caused harm, and the named party who did not commit the intentional act. The two cases also both involve acts of sexual abuse committed by a family member where the involvement of the person being sued (Ms. Wilcox and the parent Does) were not a direct cause of the injury. In fact, the *Doe* court does not even discuss the actions of the parent Does, but focuses only on the intentional acts of the perpetrator son. The facts of the case at hand are distinguishable from those in the precedent relied upon by the district court.

### 4. Other appellate courts have decided similar fact patterns differently from the district court here.

To further distinguish the difference between the *Wilcox* and *Doe* cases and the case at bar, it is helpful to look to and compare other court decisions. Similar to *State Farm v. Doe*, in *Offhaus v. Guthrie*, 140 Ohio App. 3d 90, 746 N.E.2d 685 (2000), parents were sued for their involvement in their child's intentional actions causing injury. *Id.* at 91, 746 N.E.2d at 686. Specifically, the parents were sued for negligence in giving their juvenile child access to a gun when he subsequently murdered a neighbor with it. *Id.* at 92-93, 746 N.E.2d at 687. Focusing on the acts of the child, the *Offhaus* court noted that there is no duty to defend or indemnify when "the acts of the insured [parents] were intentional." *Id.* at 94, 746 N.E.2d at 698 (citing *Noftz v. Ernsberger*, 125 Ohio App. 3d 376, 382, 708 N.E.2d 760, 764 (1998)).

Comparatively, when faced with similar circumstances to the case at hand, where there is an intentional act by a non-insured third-party that causes injury paired with the unintentional, negligent conduct of an "insured" party, courts generally separate the different individual actions and analyze the claims specifically against the "insured" when determining coverage. For example, in *Nationwide Mutual Fire Ins. Co. v. Pipher*, 140 F.3d 222 (3rd Cir. 1998), a property owner's insurer argued that there could be no "occurrence," and thus no duty to defend or indemnify the insured, when a painter hired by the insured murdered a tenant at the building. *Id.* at 223-24. The underlying claims against the property owner included premises liability and negligent hiring. *Id.* at 226. The *Pipher* court stated:

> Although [the tenant's] death was the direct result of a third party's intentional conduct, the complaint alleges that the insured's own negligence also played a significant part in her death. . . . "[T]he fact that the event causing [bodily injury or damage to property] may be traceable to an intentional act of a third party does not preclude the occurrence from being an 'accident.'"

*Id.* at 225 (quoting *Mohn v. American Cas. Co. of Reading*, 458 Pa. 576, 326 A.2d 346, 348 (1974)). The *Pipher* court noted that from the insured's standpoint, the assault resulting in death was "unexpected, entirely fortuitous, and, therefore, an accident." *Pipher*, 140 F.3d at 226; *see also Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503 (6th Cir. 2003) (insured's negligent hiring and retaining of former employee who murdered customer was a qualifying "occurrence" under the policy; the court found that the insured's conduct and actions must be evaluated, not those of the perpetrator of the intentional act).

Like the facts of *Pipher*, in this case a non-insured third-party, Mr. Chisholm, intentionally injured Stanczak on the insureds' property, and Stanczak subsequently alleged that the insureds' own negligence played a significant part in his injury under theories of premises liability and negligent supervision. Therefore, when viewed from the standpoint of the Cooks as insureds, the injury they caused and the claims against them would not be precluded by the Policy if the Cooks' actions amounted to an "accident."

The district court erred when it held that Idaho case law precludes coverage of Stanczak's claims against the Cooks. There are clear factual differences in this case, because the act of shooting was done by a third-party who was not an "insured," and the claims against the Cooks alleged that their own negligent acts played a significant part in Stanczak's injuries. In light of these distinct differences and the apparent confusion caused by the pattern of analysis in the *Wilcox* and *Doe* cases, this Court should reverse the district court's decision and properly look to the injury from the viewpoint of the Cooks when determining if an "accident" occurred.

**5. From the standpoint of the insured, the events leading to Stanczak's injuries fall under this Court's definition of an "accident"; therefore an "occurrence" existed, triggering coverage for Stanczak's claims against the Cooks.**

When the facts of this case are correctly applied to the Court's adopted definition of "accident," it is evident that an "accident" existed here. Summarized from *Wilcox*, an "accident" is "an event which, under circumstances, is unusual and not expected by the person to whom it happens" and is "an undesirable or unfortunate happening, unintentionally caused and usually resulting in harm, injury, damage, or loss . . . ." *See Wilcox*, 123 Idaho at 9, 843 P.2d at 159.

As shown in Section B.2 above, in applying this definition, the events of this case plainly qualify as an "accident;" "an event . . . not expected by the person to whom it happens." When Stanczak visited the Cooks' property to camp and was invited to their cabin by Mr. Chisholm, Stanczak was not expecting to be shot. The event was completely unexpected by the person to whom it happened.

Furthermore, when properly viewed from the standpoint of the insured, the injury to Stanczak was clearly "unintentionally caused." *See generally Wilcox*, 123 Idaho 4, 843 P.2d 154 (1992); *Fisher v. Garrison Prop. & Cas. Ins. Co.*, 162 Idaho 149, 395 P.3d 368 (2017), *reh'g denied* (May 25, 2017); *Nationwide Mutual Fire Ins. Co. v. Pipher*, 140 F.3d 222 (3rd Cir. 1998). The Cooks did not intend through their actions for Stanczak to become injured, but that is exactly what happened due to the Cooks' negligence. Without their actions of agreeing to allow Chisholm to stay on their property and negligently failing to supervise him and inspect the premises for dangers, the injuries would not have occurred. The Cooks certainly did not intend to cause Stanczak's injuries; their actions were unintentional. The events of Stanczak's injuries were therefore "an undesirable or unfortunate happening, unintentionally caused."

Correctly applying the facts to the "settled legal meaning and interpretation" of an "accident" illustrates that there was an "accident" in this case and therefore an "occurrence," thus triggering coverage under Section II of the Cooks' Policy. Even if this Court does not find enough factual evidence on this matter to hold that the Cooks' actions were unintentional, in light of the above, there are enough genuine issues of material fact to preclude summary judgment as to whether or not an "accident" occurred.

**C. The district court erroneously granted summary judgment on Farm Bureau's claim for declaratory judgment.**

This Court should reverse the district court's decision of summary judgment in favor of the Respondent. In light of the terms of the Policy and the correct application of Idaho case law, Farm Bureau has a duty to defend the Cooks and there remains a question of fact whether there is coverage for the Cooks for the claims against them.

Incorrectly looking to whether Chisholm was an "insured" and applying his actions to the definition of an "accident" produced an incorrect outcome in this case. The negligent conduct of the Cooks was the cause of the alleged injuries, and their conduct should be reviewed separate and apart from the acts of Chisholm, as the Cooks are the "insureds." When correctly applying the issue at hand from the standpoint of the insured, it is clear there was an "accident" and therefore an "occurrence" that would trigger liability under Section II of the Policy.

Based on these facts, liberally construing all facts and drawing all reasonable inferences in favor of the Cooks, it is apparent that the district court erred in finding "no genuine dispute" on Farm Bureau's liability. This Court should therefore reverse the decision of summary judgment and remand for further proceedings.

**D. Public policy dictates that Farm Bureau provide liability coverage for the Cooks' negligence.**

A major reason that individuals like the Cooks purchase liability insurance coverage for property they own is to protect them from liability exposure in the event someone is injured on the property due to the insured's negligence. Insureds do not draft the insurance policies for which they pay premiums, and the typical insured is not trained in insurance law and is not an expert in contract interpretation. When a situation such as the Stanczak shooting arises due to the negligence of the insureds, it is reasonable for the insureds to expect that the liability coverage for which they have been paying will apply, especially when the policy drafted by the insurer does not explicitly exempt coverage based on the actions of a non-insured third-party. As this Court observed in *Moss v. Mid-Am. Fire & Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982):

> This Court has long recognized that insurance policies are contracts of adhesion, not subject to negotiation between the parties, and hence **must be construed most strongly against the insurer.** Abbie Uriguen Olds. Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1973); Stephens v. New Hampshire Ins. Co., 92 Idaho 537, 447 P.2d 14 (1968); Scharbach v. Continental Cas. Co., 83 Idaho 589, 366 P.2d 826 (1961); Rollefson v. Lutheran Brotherhood, 64 Idaho 331, 132 P.2d 758 (1942). **The provision at issue today is one which seeks to exclude the insurer's coverage. Such an exclusion must be strictly construed in favor of the insured.** Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (Alaska, 1976); Mission Ins. Co. v. Nethers, 119 Ariz. 405, 581 P.2d 250 (Ariz.App.1978); State Farm Mutual Auto. Ins. Co. v. Partridge, 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973); Northwestern Nat. Ins. Co. v. Phalen, 597 P.2d 720 (Mont.1979); Conner v. Transamerica Ins. Co., 496 P.2d 770 (Okl.1972); McDonald Industries, Inc. v. Rollins Leasing Corp., 26 Wash.App. 376, 613 P.2d 800 (1980). See also Bonner County v. Panhandle Rodeo Ass'n Inc., 101 Idaho 772, 620 P.2d 1102 (1980); Farmers Ins. Group v. Sessions, 100 Idaho 914, 607 P.2d 422 (1980). **Hence, the courts have held that the burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage.** Goforth v. Franklin Life Ins. Co., 202 Kan. 413, 449 P.2d 477 (1969); Anderson v. Nationwide Life Ins. Co., 6 Kan.App.2d 163, 627 P.2d 344 (1981); Harvey's Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 606 P.2d 1095 (1980).

*Moss v. Mid-Am. Fire & Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982) (emphasis added).

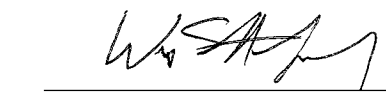
To hold that there is no coverage under the Policy for Stanczak's claims against the Cooks would in essence expose all insured citizens of Idaho to personal liability under similar circumstances, contrary to the insureds' understanding regarding the liability coverage for which they pay. Such a decision would allow Farm Bureau and insurance companies like it to benefit financially from the policies they draft at their insureds' expense. Public policy therefore dictates that Farm Bureau cover the claims asserted by Stanczak under the Cooks' Policy, especially given that Stanczak's injuries stem from an "occurrence" and "accident" with respect to the negligent actions of the insureds, the Cooks.

## V. CONCLUSION

Based upon the argument presented herein, the trial court's grant of summary judgment should be reversed. The Cooks are insureds under the Policy. Further, the alleged negligence falls under the definition of an "accident" and therefore an "occurrence" under the Policy, requiring that Farm Bureau defend the Cooks against and provide coverage for Stanczak's claims.

*RESPECTFULLY SUBMITTED* this 20th day of July, 2017.

JAMES, VERNON & WEEKS, P.A.



WES S. LARSEN
Attorney for Appellants/Defendants

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

James L. Martin
Benjamin C. Ritchie
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile