WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XL, NO. 1 *A WEIGHTY ISSUE 2016*

Published and Distributed by: REED McCLURE
ISSN 1064-1378
Financial Center, 1215 Fourth, Suite 1700
Seattle, Washington 98161-1087
206/292-4900

INDEX

CHANGE OF ADDRESS: Please call Mary Clifton at 206/292-4900; Fax: 206/223-0152; E-mail: mclifton@rmlaw.com.

COLLAPSING CONDOS

The Ninth Circuit has issued an important opinion dealing with "What does 'collapse' mean under Washington insurance law?" The case arose out of a coverage dispute between the insured homeowners association (i.e., the HOA) and the insurer, State Farm.

The policy was in effect from October 1992 to 1998. The claim was made in 2011 when decay was discovered in the layer of wallboard between the exterior siding and framing of the condos.

The federal district court judge dismissed the case noting that the HOA could not prove there had been an imminent threat that either building would fall down in 1998, when the policies expired, given that the condos were still standing in 2012.

The HOA appealed the dismissal to the Ninth Circuit. The Ninth Circuit had some problem figuring out Washington law. Under the *Erie* doctrine, a federal court is supposed to apply Washington law in a diversity case like this. (We are reminded of the Ninth Circuit judge who, from the bench, complained that he had been up all night reading the Washington cases on "what is an accident.") In any event, the Ninth Circuit decided to get some help from the Washington Supreme Court. It sent to the Temple of Justice in Olympia a certified question:

> What does "collapse" mean under Washington law in an insurance policy that insures "accidental direct physical loss involving collapse," subject to the policy's terms, conditions, exclusions, and other provisions, but does not define "collapse," except to state that "collapse does not include settling, cracking, shrinking, bulging or expansion?"

By a vote of 6-3, the Supreme Court answered the question:

> We conclude that in the insurance contract, "collapse" means "substantial impairment of structural integrity." "Substantial impairment of structural integrity" means substantial impairment of the structural integrity of a building or part of a building that renders such building or part of a building unfit for its function or unsafe and, under the clear language of the insurance policy here,

> must be more than mere settling, cracking, shrinkage, bulging, or expansion.

The dissent pointed out that the majority had departed from common sense:

> By defining "collapse" as "substantial impairment of structural integrity," the majority expands the meaning of "collapse" from its commonsense and traditional definition.

"Collapse occurs when a building falls, crumbles or caves in."

So the case went back to the Ninth Circuit which now had no problem affirming the summary judgment and dismissing the HOA's claim with prejudice. The court adopted a down-to-earth commonsense approach:

> The HOA has not pointed to any evidence that would allow a reasonable jury to find that parts of its condominiums "collapsed" over 17 years ago, given that the condominiums are still standing today. It is simply implausible that some walls of its condominiums became "unfit for [their] function or unsafe" in or before 1998.

COMMENT:

State Farm was represented by Reed McClure insurance coverage/appellate attorney Pam Okano. We asked Pam to share her thoughts on this most significant case:

> This is a case about so-called "lateral" collapse –where a building's lateral force (wind, earthquake) resisting components are damaged. It's a big deal for the insurance companies because the lateral force cases are the next big wave cases from the 1st party property plaintiffs' bar.
>
> Although the Washington Supreme Court adopted the "substantial impairment of structural integrity standard," that court went further to say the building or part of a building must be unfit for its function or unsafe, *i.e.,* that there must be an impairment so severe as to materially impair a building's ability to remain upright.
>
> The 9th Circuit refused to accept that all an insured need do to recover on a collapse claim is get an expert to say there was "substantial impairment of structural integrity" without more. This

is particularly important for so-called lateral collapse cases, in which insureds are claiming that decay and deterioration in the shear walls caused collapse years ago, even though the buildings remain standing straight and true even today.

Queen Anne Park HOA v. State Farm, ___ Fed. Appx. ___, 2016 WL 424736 (9th Cir. Feb. 3, 2016).

PAMELA A. OKANO

2016 Best Lawyers for the Pacific Northwest, Appellate Practice and Insurance Law
2015 Thomson Reuters Washington Super Lawyers list
2014 Best Lawyers in America, Insurance Coverage list
2014 Thomson Reuters Washington Super Lawyers list
2013 The American Lawyer Top Rated Lawyer in Appellate Law list

PRACTICE

Ms. Okano focuses her practice on appeals and insurance coverage matters.

Appellate

Ms. Okano has represented parties or amici in appeals before the Washington Supreme Court, Washington Court of Appeals, the United States Court of Appeals for the Ninth Circuit, the Alaska and Montana Supreme Courts, and the Idaho Court of Appeals. She has also briefed appeals before the United States Supreme Court. Her appellate practice involves a wide range of cases including professional liability, insurance coverage, bad faith, tort, commercial, employee discrimination, and contract matters.

Insurance Coverage

Ms. Okano provides clients with opinions and advice on insurance coverage and bad faith matters, drafts policy provisions, and handles coverage and bad

faith cases on appeal. She has dealt with a broad spectrum of coverage issues including construction defects, employment, discrimination, advertising injury, personal injury, sexual harassment and abuse, property damage, automobile liability, professional liability, first-party property and collapse, underinsured motorist, fraud, and bad faith.

EDUCATION

University of Washington School of Law, J.D., 1977

Honors: Order of the Coif, Managing Editor, Washington Law Review

BACKGROUND

She joined Reed McClure in 1985.

She is a member of the following professional organizations:

Washington State Bar Association

Washington Defense Trial Lawyers

Northwest Insurance Coverage Association

Washington Appellate Lawyers Association

Ms. Okano is a frequent speaker on appellate and insurance matters.

PUBLICATIONS

What Do We Cover? Read the Policy!, 36 THE BRIEF 12 (American Bar Association Tort Trial & Insurance Practice Section Winter 2007)

Coverage Uncovered: A Periodic Update of Washington Insurance Coverage Law, www.wdtl.org (2000-Present)

Co-Author, Washington Motor Vehicle Accident Insurance Deskbook (Supp. 1995 & 1998)

Co-Author, Washington Civil Trial & Evidence Manual (4th Ed. 1994)

Co-Author, Washington Civil Practice Deskbook, ch. 12 (1993)

Co-Editor, Washington Motor Vehicle Accident Insurance Deskbook (Supp. 1998)

HONORS AND AWARDS

In addition to the honors listed above:

2010-2014 Thomson Reuters Super Lawyers list

2010-2012 Thomson Reuters Top 50 Women Lawyers list

2001-2009 *Washington Law & Politics* Washington Super Lawyers list

2008 *Washington Law & Politics* Top 10 Washington Appellate Lawyers list

AV rated by Martindale Hubbell

IS IT SAFE ENOUGH?

FACTS:

One summer day Cheri tried to start her parents' jet ski. It blew up.

It exploded due to accumulated gas vapor in the engine compartment. When Cheri engaged the ignition switch, a spark ignited the vapor. The manufacturer does not equip these jet skis with a powered ventilation system (i.e., a blower). Such a system might have prevented the explosion.

Cheri sued the owner of the jet ski, her parents. And the parents sued the manufacturer. The parents' insurer, State Farm, paid Cheri $1.2M. Ultimately, the case was Cheri against the manufacturer. The manufacturer moved for summary judgment, arguing that federal law preempted Cheri's claim. The trial court agreed and dismissed. The Court of Appeals ruled that federal law preempts Cheri's product liability claim: "Because her claim directly conflicts with the Coast Guard's explicit decision, pursuant to Congressional authority, to exempt personal watercraft from the ventilation system requirements, it defeats the purpose of the FBSA and is therefore preempted."

HOLDINGS:

1. Bombardier contends a federal regulation exempting Bombardier from including powered ventilation systems on its jet skis preempts Rollins' state law claim under the WPLA. Rollins alleges Bombardier's jet ski was defectively designed because it lacked a powered ventilation system.

2. Federal preemption doctrine derives from the supremacy clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land."

3. Express preemption occurs when Congress explicitly defines the extent to which it intends to supersede.

4. There is a strong presumption against preemption and "state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress."

5. Federal law impliedly preempts Cheri's state product liability claim because it directly conflicts with federal safety standards.

6. Because Cheri's product liability claim directly conflicts with explicit, uniform safety standards promulgated by the Coast Guard acting within the scope of its congressionally delegated authority, it is preempted.

COMMENT:

A troubling opinion. We can see Cheri coming down to the dock. She wants to take her parents' jet ski out for a run. She turns it on. It blows up.

It blows up because it did not have a blower.

It did not have a blower because someone at the Coast Guard decided it was safe enough without a blower.

Rollins v. Bombardier Recreational Products, Inc., ___ Wn. App. ___, 2015 WL 9274912 (Dec. 21, 2015).

NASTY ANIMALS

Jay was a farmer. He let his friend and neighbor Rod store some of his livestock on his land. This included a recently purchased ram. One day Jay went out to the pasture to turn on the sprinklers. Just as he touched the valve, the ram butted him from behind, knocking him to the ground. The ram continued to jump up in the air and then he'd hit Jay with his head, knocking him out a couple of times. This went on for 30 minutes.

A neighbor came by to drop off some cantaloupes. She started throwing the cantaloupes at the ram. This distracted the ram so that Jay was able to crawl to the gate. They slammed the gate on the "charging ram."

Jay was 82 years old, suffered a concussion, 5 broken ribs, and a broken sternum and shoulder. He was in the hospital for 16 days.

Jay filed a lawsuit to recover for his injuries. But he did not contend that **this** ram was abnormally dangerous. Nor did he contend that his friend and neighbor Rod was negligent. Instead, he asked the court to change the law and to treat all rams as inherently dangerous animals.

The court was sympathetic to Jay. But it concluded that "Existing Washington common law strikes the appropriate balance in imposing limited strict liability on the owners of domestic animals and otherwise imposing a duty of care commensurate with the character of their animals."

Rhodes v. MacHugh, ___ Wn. App. ___, 361 P.3d 260 (2015).

Along this same line is a case written up in the Seattle Times. It tells us that a King County judge is suing her longtime neighbors after she was violently attacked by the neighbors' donkey while walking her dogs.

The judge had given Bob, the donkey, a carrot. Bob suddenly lunged at the fence knocking down a rotten fence post, and grabbing the judge's dog Scout by the back of her neck with his teeth. When the judge sought to free Scout, Bob went after her. Her hand and wrist were trapped in Bob's mouth. She could hear her bones shattering as Bob repeatedly bit down on them.

She finally got away from Bob and crawled about half a mile to get help.

The plaintiff's lawyer is quoted as saying the suit was filed because the insurance company would not put up enough money to settle.

THE BLACKBERRY CASE

FACTS:

Guy was riding his motorcycle on Avondale. He came to the intersection with 159th. Drivers on 159th are controlled by a STOP sign. Drivers on Avondale do not have a STOP sign.

Christa was driving on 159th. She said she came to a stop. She said she did not see Guy approaching on her left. She made a left turn onto Avondale and did serious damage to Guy and to his motorcycle.

Two years and 360 days later, Guy sued Christa and King County. Now, it is obvious to the casual observer why he sued Christa. She caused the accident. She failed to yield the right-of-way. So, notwithstanding that King County did not cause the accident, Guy sued, alleging that it was the blackberry bushes, i.e., overgrown blackberry bushes, that obstructed Christa's view.

The trial court summarily dismissed the County from the suit. The Court of Appeals affirmed the dismissal of the County.

But not to fear; your Supreme Court is here. It said the old case law was out of date. The County's duty to maintain its roadways in a reasonably safe condition for ordinary travel "is not confined to the asphalt." They sent the case back for a jury trial.

HOLDINGS:

1. In order to recover on a common law claim of negligence, a plaintiff "must show (1) the existence of a duty to the plaintiff, (2) a breach of that

duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury."

2. It is well established that a municipality has the duty "to maintain its roadways in a condition safe for ordinary travel."

3. The legal foundations of the cases relied upon by the County have not "remained solid." Our recent precedent makes it clear that a municipality has "the overarching duty to provide reasonably safe roads for the people of this state to drive upon."

4. A municipality has a duty to take reasonable steps to remove or correct for hazardous conditions that make a roadway unsafe for ordinary travel. This includes hazardous conditions created by roadside vegetation.

5. We reject the notion that continuing to recognize this duty will make municipalities strictly liable for all traffic accidents.

COMMENT:

The trial judge will tell the jury that the County has "the overarching duty to provide reasonably safe roads."

Sounds like a directed verdict.

Wuthrich v. King County, ___ Wn.2d ___, 2016 WL 348070 (Jan. 28, 2016).

A WORD ON THE PECULIAR RES IPSA DOCTRINE

FACTS:

Camille and her daughter went shopping for play structures. They climbed onto a slide in the showroom and slid down together. Camille's left hand was injured during her descent. She sued claiming that the slide was negligently designed. The trial court dismissed. Camille appealed, arguing that dismissal was improper under the doctrine of res ipsa loquitur.

The Court of Appeals affirmed the dismissal.

HOLDINGS:

1. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. An order of summary judgment is reversed de novo.

2. Under the res ipsa loquitur doctrine, a plaintiff is spared the normal requirement of proving specific acts of negligence and the trier of fact is

permitted to infer negligence if the following criteria are met: (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of [a defendant's] negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

3. The test is whether the occurrence "is of a type that would not ordinarily result *if the defendant were not negligent*."

4. The doctrine is disfavored. It is applied sparingly "in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential."

5. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.

6. The doctrine allows the plaintiff to establish a prima facie case of negligence when she cannot prove a specific act of negligence because she is not in a situation where she would have knowledge of that specific act.

COMMENT:

Ah yes: Res Ipsa. One of my all time favorite common law doctrines. I still remember the day in the first year torts class when Professor Willis L.M. Reece introduced us to this most equitable doctrine. It has been around for over 150 years. It was first found in *Byrne v. Boadle* (2 Hurl. & Coat. 722, 159 Eng. Rep. 299, 1863), an English tort law case. A barrel of flour fell from a second story loft and hit the plaintiff on his head. He could introduce no direct evidence of negligence. So the trial court directed a verdict against him.

On appeal, Baron Pollock said:

> It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to provide negligence seems to me preposterous.

The translation of "res ipsa" is "the thing speaks for itself" or "any damn fool can tell that a barrel does not roll out of the window unless someone screwed up."

Palmer v. Rainbow Factory Showroom, 2015 WL 4522640 (Wash. App. July 27, 2015).

PLAY BALL!!

FACTS:

The Washington courts continue their love affair with baseball. Here it was Teresa who sustained serious injuries to her left eye when hit in the face by a foul ball during batting practice. However, her claim of negligence never got to the jury because of the court-created "limited duty rule." Here the court decided whether or not the stadium owner had fulfilled his "limited duty."

And just to keep the door securely closed on Teresa's claim, the court ruled that "Implied Primary Assumption of Risk" barred her claim.

HOLDINGS:

1. Washington follows the limited duty rule. For many decades throughout the United States, the majority of jurisdictions have applied the limited duty rule to define the duty a baseball stadium operator owes to its patrons injured from foul balls before or during a game.

2. The limited duty rule requires baseball stadium operators "to screen some seats . . . to provide protection to spectators who choose it."

3. Washington courts have long imposed a limited duty on baseball stadium operators to screen some seats, generally those behind home plate.

4. The Mariners clearly satisfied its limited duty to screen a reasonable number of seats.

5. Even if the limited duty rule did not apply here, the defense of implied primary assumption of risk would preclude any recovery.

6. Washington recognizes "four categories of assumption of risk: (1) express; (2) implied primary, (3) implied reasonable, and (4) implied unreasonable.

7. Implied primary assumption of risk "occurs when the plaintiff has impliedly consented to assume a duty."

8. Teresa had a full subjective understanding of the specific risk, both its nature and presence, that a foul ball could be hit into section 116 and injure her during batting practice.

9. Teresa is "deemed to have known and understood the risk of such injury where such risk would have been quite clear and obvious to a reasonably careful person under the same or similar circumstances.

10. Even if this particular circumstance of multiple batted balls simultaneously in play could be considered "somewhat bizarre", assumption of the risk precludes recovery here.

11. Teresa's negligence claim is barred by the limited duty rule. Even if the limited duty rule did not apply, Teresa assumed the risk of a foul ball from batting practice entering the stands.

COMMENT:

This opinion goes on for over 14 pages because the court carefully and in detail weighed, reviewed and evaluated the facts of this baseball accident (and the facts of other baseball accidents).

We may also note a June 5, 2015 article from the Seattle Times. The headline read" "Life-Threatening Injury to Fan Hit By Bat."

The fan was sitting between home plate and the third base dugout when she was hit by a broken bat which flew into the stands. It hit her on the forehead and the top of her head.

"She bled a lot." She was carried out on a stretcher and taken to the hospital.

Reed-Jennings v. The Baseball Club of Seattle, 188 Wn. App. 320, 351 P.3d 887, *rev. denied*, 184 Wn. 2d 1024 (2015).

REPOSE AND LIMITATION

FACTS:

In 2000, Mason County decommissioned a septic tank. In 2011, Valerie was injured when she fell into a sinkhole she contends was caused by negligent decommissioning.

Valerie sued the county. The county moved for dismissal, arguing that the statute of repose barred her claim. The trial court agreed and dismissed her case.

Valerie appealed. The Court of Appeals affirmed the dismissal, holding that the six-year statute of repose barred the claim.

HOLDINGS:

1. The construction statute of repose provides: "All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.

2. Statutes of repose differ from statutes of limitation because "[a] statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time," whereas a "statute of repose terminates a right of action after a specified time, **even if the injury has not yet occurred.**" (Emphasis added.)

3. The court performs a two-step analysis for a cause of action arising from construction to real property: first, the cause of action must accrue within six years of either substantial completion or termination of services and, second, the claim must be filed within the applicable statute of limitations once the cause of action has accrued.

4. The county substantially completed its work removing the septic tanks in 2000 or 2001. Thus, any claim arising from this project had to accrue in 2007 at the latest.

5. The cause of action did not accrue until 2011 when Valerie fell into the sinkhole.

6. Her claim is barred under the statute of repose.

COMMENT:

I have always been fascinated with the Statute of Repose. Here, the work was done in 2000. Any claim from that work had to be filed by 2006. But Valerie could not sue in 2006 because she was not hurt; she was not hurt until 2011. But by then the six-year statute of limitations had run.

Reminds me of "Catch-22." If you have forgotten that Catch (or probably weren't born), here is an overview:

> Joseph Heller coined the term in his 1961 novel Catch-22, which describes absurd bureaucratic constraints on soldiers in World War II. The term is introduced by the character Doc Daneeka, an

army psychiatrist who invokes "Catch 22" to explain why any pilot requesting mental evaluation for insanity—hoping to be found not sane enough to fly and thereby escape dangerous missions—demonstrates his own sanity in making the request and thus cannot be declared insane.

Anderson v. Mason County, 2015 WL 4249317 (Wash. App. July 14, 2015).

MORE LEGAL CONFLICTS

FACTS:

Ava and Claire were driving through Idaho on their way back from Nevada to Washington. It was 2:00 a.m. The roadway was slick with ice. Ava had the cruise control set at 82 mph in a 75 mph zone.

Ava lost control and rolled the car. Claire was injured.

The accident occurred on March 27, 2011, in Idaho. Ava and Claire were residents of Washington. The statute of limitations in Idaho is two years; the Washington statute of limitations is three years. Claire filed suit in May 2013, i.e., she missed the Idaho statute.

So the question is which law applies: the Washington three year or the Idaho two year? Both the trial court and the Court of Appeals agreed that the law of the state where the accident occurred is the law that applies: *lex loci delicti* (not much of a surprise; it's been that way for years). So Claire's claim was barred by Idaho's two-year statute. But the Washington Supreme Court reversed because there is no conflict between a two-year statute of limitations and a three-year statute of limitations. (I am not making this up.)

The majority of the opinion was taken up with rationalizing how the various conflicts between Washington auto tort law and Idaho auto tort law were not really conflicts.

Woodward v. Taylor, ___ Wn.2d ___, 2016 WL 166491 (Jan. 14, 2016).

ALWAYS SLIPPERY WHEN WET

FACTS:

One day in autumn, Wendy visited the state park of Cape Disappointment. The park is near the beach in Ilwaco. That day it was "drizzling, overcast and

wet." (No real surprise there. That is what it is usually doing on the Washington coast. In fact, Ilwaco gets 81 inches of rain each year.)

Wendy looked at a "yurt" in the park that was built on an elevated wooden deck. As she descended down the wet wooden ramp from the yurt, she slipped, fell, and fractured her knee. After Wendy's fall, the park department cleaned and treated the ramp and installed traction pads.

Wendy sued the park. The park moved for dismissal, asserting that because the injury-causing condition was not latent, the park was immune from liability under the "Recreational Land Use" Statute (RCW 4.24.210(4)(a)). The superior court agreed and dismissed Wendy's case. She appealed, arguing that there was an issue of fact as to whether the injury-causing condition was latent. The Court of Appeals affirmed the dismissal.

HOLDINGS:

1. Washington's recreational land use statute aims to encourage landowners to open their lands to the public by modifying the common law duty owed to invitees, licensees, and trespassers. Landowners who open their land to the public for recreational purposes, free of charge, are generally not liable for unintentional injuries to such users.

2. However, the statute creates an exception where an injured party may overcome this immunity by showing the injuries were sustained "by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted."

3. The injury-causing condition was the wet, wooden ramp. The slipperiness of the ramp is the danger the condition imposed, not the condition itself.

4. An injury-causing condition is "latent" if it is "not readily apparent to the recreational user." The condition itself, not the danger it poses, must be latent.

5. Here, reasonable persons could not disagree that the wooden ramp as well as its injury causing aspect—its wetness—were obvious.

6. Reasonable persons could not differ in concluding that the wet, wooden ramp was not a latent condition.

COMMENT:

Short, to the point, crystal clear opinion.

By the way, a "yurt" is the traditional nomadic home of Mongolia. Not sure why one would wind up in Ilwaco.

Dickie v. Washington State Parks & Recreation Commission, 2015 WL 9303250 (Wash. App. Dec. 22, 2015).

JUDICIAL ESTOPPEL – AGAIN – AND AGAIN – AND AGAIN

It comes as a bit of a surprise to note that we have written about a dozen articles on the somewhat obscure legal doctrine of judicial estoppel. You would think we would have just about tapped the well dry. But never underestimate the ingenuity of litigants, lawyers, and judges to keep spinning out countless variations on the theme of the bankrupt who wants his discharge in bankruptcy but does not want to share the recovery from his non-disclosed personal injury claim.

Recently, Division I published an opinion which points up that while the doctrine sounds simple, its application has become complex. Here, Arp filed for Chapter 13 protection in July 2008. The bankruptcy court confirmed the Chapter 13 plan in December 2009. Then in October 2010, Arp sustained severe injuries when rear-ended by an SUV. The injuries were physical and mental. Arp did not report his tort claim in the Chapter 13 proceedings. In March 2012, Arp was discharged and in April 2012 the case was closed.

Then Arp sued the SUV driver. The defendant raised judicial estoppel. The trial court dismissed Arp's case because Arp's personal injury claim was an asset of the bankruptcy estate, and Arp had a duty to disclose it.

On appeal, the Court of Appeals reversed and sent the case back for more fact finding:

> Judicial estoppel is an equitable doctrine to be applied by the trial court through its exercise of discretion on a case-by-case basis after evaluating the pertinent factors. Because the trial court did not do this, we reverse and remand.

The opinion contains an up-to-date review of the judicial estoppel case law. Significant cases include *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535 (2007); *Garrett v. Morgan*, 127 Wn. App. 375 (2005); *Miller v. Campbell*, 164 Wn.2d 529 (2008), and *Hamilton v. State Farm*, 270 P.3d 778 (9th Cir. 2001).

Arp v. Riley, ___ Wn. App. ___, 2015 WL 9461609 (Dec. 28, 2015).

JUDICIAL ESTOPPEL ONE LAST TIME (MAYBE)

Within a month of releasing the *Arp* opinion, the Court of Appeals published another judicial estoppel opinion. However, this time the result was different. This time the court concluded the claim was barred:

> Courts apply the equitable doctrine of judicial estoppels to protect the integrity of the judicial process by precluding a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Here, the appellant-debtor knew all of the facts that gave rise to his potential claim of legal malpractice at the time he filed for bankruptcy, yet he failed to disclose it until almost three years after receiving a discharge from the bankruptcy court.

Urbick v. Spencer Law Firm, ___ Wn. App. ___, 2016 WL 394018 (Feb. 1, 2016).

APPEAL PROCEDURE - 101

FACTS:

Gene sued Andy following an altercation. He alleged he was riding his bicycle when Andy's car hit him. Gene claims that he was severely injured when Andy got out of his car and "repeatedly punched and kicked him."

The case was tried to a jury, which entered a special verdict finding that any negligence by Andy was not a proximate cause of Gene's injuries. Gene did not like that result. So he appealed. However, he appealed without an appellate attorney. A pro se on appeal is held to the same standards as an attorney. The Court of Appeals affirmed the jury verdict in large measure because Gene did not follow the rules on appeal.

HOLDINGS:

1. A party seeking appellate review has the burden of providing the court with all evidence in the record relevant to the issues. Without an adequate trial record, the court cannot review challenged evidence and trial court rulings in their proper context. An insufficient record on appeal generally precludes appellate review.

2. An appellate court will not search through the record for evidence relevant to a litigant's arguments. The appellate court will decline to consider issues unsupported by cogent legal argument and citation to relevant authority.

COMMENT:

Good example of the type of case which should end in the Superior Court.

Palmer v. Lee, 2015 WL 7260012 (Nov. 16, 2015).

RESERVING RESERVATIONS

A recent opinion from the Superior Court of Pennsylvania provides a good review of what it takes to issue an effective reservation of rights letter. Here, the policy had a controlled substance exclusion. The suit alleged wrongful use and distribution of controlled substances at a party.

In short, the exclusion was spot-on the allegations in the complaint. However, the insurer was estopped to raise the exclusion because it sent the reservation of rights letter to the named insured when it should have been sent to the named insured's adult child. Moreover, the reservation was sent seven months after the complaint was filed. That was too late.

Erie Ins. Exch. v. Lobenthal, 114 A.3d 832, 2015 Pa. Super 78 (2015).

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 47 years with Reed McClure, Mr. Hickman limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter.

Mr. Hickman has been involved in over 500 appellate proceedings involving a wide spectrum of civil litigation. He was a Fellow in the American Academy of Appellate Lawyers.

Mr. Hickman is a member of the Commercial Panel of the **American Arbitration Association**, and is also a public arbitrator in the **FINRA** Dispute Resolution Program. He was selected for inclusion on the *Washington Super Lawyers* list for the years 2001, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, and 2015.

Remember, selected back issues of the Law Letter and up-to-date reports on Reed McClure attorneys are available on our web site at www.rmlaw.com.

E-MAIL NOTIFICATION

As a general rule, the printed goldenrod version of the Law Letter lands in your inbox about three weeks after a .pdf version is posted on Reed McClure's website. If you would like to receive notification of when it is posted, please send your name and e-mail address to Mary Clifton (mclifton@rmlaw.com).

REED MCCLURE ATTORNEYS

TODD J. Allen ..... tallen@rmlaw.com 206/386-7006
EARLE Q. Bravo ..... ebravo@rmlaw.com 206/386-7165
MARILEE C. Erickson ..... merickson@rmlaw.com 206/386-7047
WILLIAM H.P. Fuld ..... wfuld@rmlaw.com 206/386-7097
WILLIAM R. Hickman ..... whickman@rmlaw.com 206/386-7011
CAROLINE S. Ketchley ..... cketchley@rmlaw.com 206/386-7124
CHRISTOPHER J. Nye ..... cnye@rmlaw.com 206/386-7022
PAMELA A. Okano ..... pokano@rmlaw.com 206/386-7002
JOHN W. Rankin, Jr. ..... jrankin@rmlaw.com 206/386-7029
MICHAEL S. Rogers ..... mrogers@rmlaw.com 206/386-7053
SUZANNA Shaub ..... sshaub@rmlaw.com 206/386-7077
JASON E. Vacha ..... jvacha@rmlaw.com 206/386-7017
STEPHANIE J. Yedinak ..... syedinak@rmlaw.com 206/386-7003

WHERE TO FIND US:

REED McCLURE
FINANCIAL CENTER
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087

OUR TELEPHONE NUMBERS:

main: 206.292.4900
fax: 206.223.0152

www.rmlaw.com