WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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INDEX

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HEIDI HITS

FACTS:

Brandon poured soda on Heidi and her Jetta. This made Heidi angry. Heidi drove around looking for Brandon. She told her friends she was going to hit Brandon with her Jetta. She found him in an alley. She hit him with her Jetta.

Brandon sued Heidi and her parents, alleging that Heidi had negligently hit him, and that the parents were liable under the family car doctrine.

Heidi and her parents had a liability policy with St. Paul. St. Paul agreed to defend under a reservation of rights, *i.e.*, it reserved the right to not pay. St. Paul filed a declaratory action seeking a declaration that the hit was not covered because the policy did not cover liability arising from intentional acts.

St. Paul moved for summary judgment. Heidi put in a affidavit saying that while she had hit Brandon intentionally, she did not intend to injure him. The court declared that there was no coverage for Heidi or her parents.

On appeal, the court affirmed stating that the St. Paul policy was very, very clear when it said that if the act leading to the injury is intentional then the policy does not cover any resulting injury. The court also found that the parents were not liable under the family car doctrine. 34

HOLDINGS:

1. The St. Paul policy clearly excludes coverage for injury resulting from an intentional act.

2. The family car doctrine does not impose liability; it recognizes an agency relationship. Members of the family who are permitted to drive a family car are viewed as agents of the owners "if it is established that they were using the vehicle in furtherance of a family purpose for which it was maintained."

3. Hitting Brandon intentionally with the Jetta was not a family purpose; Heidi's parents are not liable under the family car doctrine.

COMMENT:

The St. Paul policy is unique in that in addition to the exclusionary contract language, it provides examples. I have always felt that providing examples in an insurance policy was asking for trouble. But this time there were three examples dead on point when it came to the contention, "I meant to hit him, but I did not mean to injure him."

The family car doctrine was a question in a significant number of our cases 35 years ago; now we seldom hear about it. It is useful to remember that it was created out of whole cloth almost 100 years ago by activist judges. The common law of agency did not extend liability to parents when junior took the family car on his personal frolic. So the court responded to this situation by recognizing the fiction called "family car" and making the parents liable for almost all of junior's accidents. This resulted in a double benefit to society: parents paid more attention to their kid's driving; a lot more insurance was sold.

St. Paul Guardian Ins. Co. v. Schultz, 2006 WL 2124691 (Wn. App. 2006).

THE POLICY LIMIT IS THE LIMIT

FACTS:

Michelle had a $50,000 UIM policy with Allstate. She was injured by an uninsured driver. The dispute was submitted to arbitration and the arbitrator awarded $30,000. Allstate requested trial de novo. The jury awarded Michelle over $370,000 plus attorney fees and costs. The trial court judge signed off on a judgment for that amount. The Court of Appeals reversed the judgment and remanded for entry of judgment in the amount of the $50,000 policy limit.

HOLDINGS:

The UIM policyholder's judgment could not exceed the UIM policy limits.

COMMENT:

This was a suit on a contract. The contract said $50,000 was the limit. It is difficult to see how that could be misunderstood.

FURTHER COMMENT:

Allstate was represented on appeal by Reed McClure's Marilee C. Erickson and Terry J. Price.

Marilee Erickson and Terry Price also prevailed in a multi-issue appeal following a three-day jury trial. The case arose out of personal injuries sustained during a roof remodeling project. The opinion reaffirms the Washington rule that objections must be made to the trial court judge and not saved for the appellate court. *Knapp v. Springer*, 2006 WL 3057375 (Wn. App. 2006).

Tribble v. Allstate Property & Cas. Ins. Co., 134 Wn. App. 163, 139 P.3d 373 (2006).

SHE SLIPS; SHE FALLS

FACTS:

Joann was walking through the food court at Northgate. She tripped and fell and was taken to the hospital. She sued the folks who operate the Northgate Shopping Center. At her deposition, she said she did not know how or why she fell. In the incident report, she was quoted as saying she had tripped over her own feet.

The trial court dismissed the case on summary judgment. The Court of Appeals affirmed.

HOLDINGS:

1. A negligence action requires the plaintiff to prove: (1) the existence of a duty, (2) breach of that duty, (3) proximate cause, and (4) a resulting injury.

2. A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only if, he [or she]

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

3. "[A] landowner's duty attaches only if the landowner 'knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk. . . .'" Reasonable care requires the landowner to inspect the dangerous condition and repair or warn invitees of the condition. "Knowledge" requires the plaintiff to show actual or constructive notice of the dangerous condition.

4. Joann's testimony at deposition establishes that she does not know how or why she fell. Subsequent statements by her to the contrary are simply not persuasive.

COMMENT:

Division I reviewed much of the same law in a slip-and-fall case which arose in the baggage claim area at SeaTac. The claim was dismissed because plaintiff could not produce evidence that the defendant caused an unsafe condition or had notice of an unsafe condition. *Shirey v. Port of Seattle*, 2006 WL 1827996 (Wn. App. 2006).

Sherrick v. Simon Property Group, Inc., 2006 WL 1846446 (Wn. App. 2006).

NO STAIR COVERAGE

FACTS:

Deborah was bringing her 3-year-old to Colleen's daycare. She slipped and fell on an outside stairway.

Colleen had a homeowner's policy with Pemco. It provided broad coverage for personal injury liability. The coverage was limited by an exclusion for bodily injury arising out of or in connection with the policyholder's business. There was also an endorsement stating that coverage for personal liability to others will not apply to the daycare. There was no separate daycare policy.

Deborah sued Colleen for the injuries sustained from the fall on the stairway. Pemco denied coverage and filed a declaratory action.

The trial court agreed with Pemco. The Court of Appeals agreed that the exclusions negated coverage.

HOLDINGS:

1. Because neither Deborah nor Pemco discusses the effect of the daycare endorsement, the court does not either.
2. We review the interpretation of an insurance contract, a matter of law, de novo. Insurance policy language is interpreted the way it would be understood by the average person. Exclusions are strictly construed against the insurer.

3. Generally, where the insured is engaged in an occupation when the accident occurs and the activity which causes the accident relates to performance of the insured's duties, the occurrence falls within the "business pursuits" exclusion.

4. We must conclude that Deborah's injury arose "out of or in connection with" Colleen's daycare business. Deborah had no other purpose for being on the stairs than as a patron of the daycare business. It is immaterial that the stairs were sometimes used for other purposes.

5. But for the business pursuit, the accident would not have occurred.

COMMENT:

The business pursuit exclusion has often presented problems because many policies contained exceptions to the exclusion. It appears that the exclusion language has been simplified and returned to a plain statement of no coverage.

Pemco Mut. Ins. Co. v. Werner, 2006 WL 3059948 (Wn. App. 2006).

MOPPING THE BEETLES

FACTS:

Key and Clorox contracted for Key to make and package "Ready Mop." Among other things, the contract required Key to ship the product on kiln-dried pallets. Key did not do so. As a result, the product started showing up with mold growing on some pallets, and an infestation of beetles on others.

Clorox demanded that Key assume all responsibility for the costs Clorox incurred in repackaging. Key agreed immediately.

Key then notified its CGL carrier St. Paul, which denied coverage for late notice. Key sued St. Paul. The trial court found no coverage because Key failed to notify St. Paul "as soon as possible" after the loss, and because the loss came within the "product" exclusion. The Court of Appeals affirmed.

HOLDINGS:

1. The insurance policy required Key to notify St. Paul "as soon as possible" of any event that may involve coverage under the policy. Under the policy, Key agreed not to "assume any financial obligation or pay out any money without [St. Paul's] consent." Key did not notify St. Paul of the damage until six months after the loss, and after Key settled with Clorox.

2. An insurance company can deny coverage for noncompliance with the requirements of an insurance policy only if the noncompliance results in actual prejudice. The insurer must show prejudice.

3. Actual prejudice requires a showing of some concrete detriment resulting from the delay which harms the insurer's preparation or presentation of defenses to coverage or liability.

4. Because of Key's failure to comply with the notice provisions in the insurance contract, St. Paul had access only to those samples selected by Key.

5. Key put both the nature and extent of the loss beyond St. Paul's ability to fully investigate. While this may well have been a business decision on the part of Key, St. Paul was denied the opportunity to investigate and adjust the loss. St. Paul was prejudiced.

6. Key caused damage to its products by using pallets that did not meet contract specifications. Key admits that it disposed of the evidence needed to evaluate and present a coverage defense under the impaired property provision. St. Paul need only show prejudice to a single defense. The "impaired property" exclusion would have provided that defense.

COMMENT:

An extraordinary, short and sharp analysis and application of Washington law to two troublesome topics: late notice and product exclusion. However, it is the last paragraph of the opinion which should be widely disseminated:

> **Key Tronic argues that its settlement with Clorox was reasonable, making any need for notice to St. Paul superfluous. But this begs the question. St. Paul had a right to independently investigate and decide the validity of the claim. St. Paul is not required to defer to Key Tronic's settlement decisions. St. Paul's ability to evaluate or present defenses to coverage was prejudiced by the lack of notice. The trial court properly denied coverage.**

This recognition that the policyholder's decision to settle with the claimant is not binding on the insurer has been lost sight of by some courts in Washington.

Key Tronic Corp. v. St. Paul Fire & Marine Ins. Co., 134 Wn. App. 303, 139 P.3d 383 (2006).

MILLIONS AND MILLIONS OF BUBBLES

FACTS:

K&M sold over $2 million worth of shampoo to Costco. It turned out to be counterfeit. Costco had to destroy it.

Costco made a claim against K&M to recover the cost of the product plus the cost of dealing with the problem and lost profits. K&M had a CGL policy with Hartford.

Costco demanded arbitration. Because Hartford refused to defend, the proceeding was uncontested.

Costco got an award of $2.4 million and sued Hartford. The superior court ruled that Hartford covered the judgment. The Court of Appeals disagreed, saying the product exclusion negated coverage.

HOLDINGS:

1. Determining whether coverage exists under a general liability policy is a two-step process. The burden first falls on the insured to show its loss is within the scope of the policy's insured losses. If such a showing has been made, the insurer can nevertheless avoid liability by showing the loss is excluded by specific policy language.

2. Each Hartford policy uses the same terminology to exclude property damage arising out of K&M's product. "This insurance does not apply to . . . 'Property damage' to 'your product' arising out of it or any part of it."

3. Coverage exclusions are strictly construed against the insurer and will not be extended beyond their clear and unequivocal meaning.

4. "Your product" means broadly "Any goods . . . distributed" by you. The shampoo distributed by K&M falls unambiguously within that definition.

5. Costco's property damage—its loss of use of the shampoo—arose out of the shampoo. Because the shampoo was counterfeit, Costco was unable to sell it or make any other use of it.

6. When an insured becomes liable for damage to its own tangible product that occurs either by physical injury or loss of use, and such damage arises out of the product, the insured is not covered. This is the long and short of our analysis.

COMMENT:

An interesting opinion in several aspects. First, the court noted that nowhere in the "plethora of cases cited by the parties," could it find a case which interpreted a CGL policy to provide coverage for the type of loss Costco sustained.

Second, the court had to dispose of Hartford's argument that the loss did not come within the insuring agreement. The court rejected Hartford's argument that Costco's inability to sell the counterfeit shampoo was not a loss of use.

Finally, the court's review, analysis, and discussion of the product exclusion in a CGL policy and why such a policy is not a performance bond reviews the key cases out of the "plethora" of cases cited by the parties.

National Clothing Co. v. Hartford Cas. Ins. Co., ___ Wn. App. ___, ___ P.3d ___ (2006).

MORE SHAMPOO

FACTS:

In 1995, Teresa went shopping for shampoo. She walked down the shampoo aisle, stepped into a puddle of shampoo, and slipped and fell.

Her fiancé knew lawyer Tim. Teresa hired lawyer Tim to sue the store. On the last day to file, a complaint was filed. But it named the wrong defendant. It was dismissed.

Teresa got a new lawyer and sued Tim for malpractice. At trial, the jury awarded her $212,000. However, Tim was of the view that she has failed to prove her "case-within-a-case" against the store owner.

The Court of Appeals agreed with Tim that Teresa's new lawyer had failed to prove her case against her old lawyer. So Teresa's case was dismissed.

HOLDINGS:

1. Under the "case-within-a-case" principle, the plaintiff in a legal malpractice claim must prove that, but for the attorney's negligence, the plaintiff would probably have prevailed in the underlying claim.

2. When a plaintiff sues a business owner for failing to correct a dangerous condition, the plaintiff must show either that the defendant caused the condition or that the defendant had actual or constructive notice of the condition.

3. The "self-service" exception eliminates this notice requirement where "the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable."

4. Because Teresa failed to prove the notice element of her underlying slip-and-fall case, Tim was entitled to dismissal.

COMMENT:

Proving the "case-within-the-case" is one of the primary points which differentiates a lawyer malpractice case from a run-of-the-mill tort.

Schmidt v. Coogan, ___ Wn. App. ___, ___ P.3d ___ (2006).

PAMELA A. OKANO

Pam Okano's paper, entitled "What Do We Cover? The Insuring Agreement", is scheduled to be published in the winter edition of The Brief, a publication of the American Bar Association's Tort Trial & Insurance Practice Section.

Ms. Okano focuses her practice on appeals and insurance coverage matters. Among her recent wins in the Court of Appeals are:

SERVICE OF PROCESS

Seo-Jeong v. Kostenko

http://www.courts.wa.gov/opinions/
index.cfm?fa=opinions.showOpinion&filename=573331MAJ

MEDICAL MALPRACTICE

Leighton v. Urology Northwest, P.S.

http://www.courts.wa.gov/opinions/
index.cfm?fa=opinions.showOpinion&filename=566423MAJ

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QUICKLY, QUICKLY, QUICKLY

Last issue we reviewed the case of when Tony shot Jim. That opinion, which discusses why shooting a gun at another individual is not an accident, has now been published.

State Farm Fire & Cas. Co. v. Parrella, 134 Wn. App. 536, 141 P.3d 643 (2006).

A medical malpractice plaintiff filed her lawsuit three years and a day after the last alleged negligent act. The defense said that was too late. The trial judge said there was a fact question as to whether the statute was tolled for the four days the plaintiff was in the ICU after the surgery.

The defense sought discretionary review of the trial judge's denial of the summary judgment motion. The Court of Appeals granted review, reversed the trial court, and dismissed the case. The court held that a four-day incapacity period cannot be a tolling event as a matter of law.

Reed McClure's Pam Okano represented the defendant on appeal.

Rivas v. Eastside Radiology Associates, ___ Wn. App. ___, 143 P.3d 330 (2006).

Sometimes things just don't work out. Here is how Division II described the aftermath of a birthday party observed in a bar: "Jeffrey, the designated driver for the evening, had passed out, was then awakened, but was unable to drive." Brian was intoxicated but felt "good enough to drive." Half a mile later, he flipped the car.

This published opinion has the first discussion of a passenger's contributory negligence for riding with an intoxicated driver, and whether Washington's RCW 5.40.060(2) precludes contributory negligence in that situation. Good analysis of a less than clear topic.

Hickly v. Bare, ___ Wn. App. ___, ___ P.3d ___ (2006).

A Florida court relied on cases from Nebraska and Oregon to conclude that mold damage was a direct physical loss caused by a named peril within the meaning of the homeowner's insurance policy. The court said that in this day and age mold is a damage "commonly resulting" from the discharge of water.

Fisher v. Certain Underwriters, 930 So.2d 756 (Fla. App. 2006).

Division I set out a succinct statement of medical evidence.

> Evidence is generally admissible so long as it is relevant, that is, that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." However, evidence without adequate foundation is not relevant, because it is not useful in making material facts more or less likely. Where the subject matter of testimony is beyond the common knowledge and understanding of the average person, expert testimony is appropriate to assist the jury. "Medical facts in particular must be proven by expert testimony unless they are 'observable by [a layperson's] senses and describable without medical training.'" Medical expert testimony may not be speculative; the opinion must be grounded on a reasonable medical certainty.

Unfortunately, it then held that the jury (which evidently was from Mars) would not understand that plaintiff's MS and umbilical hernia might affect his ability to earn a living.

Gray v. Robinson, 2006 WL 2664239 (Wn. App. 2006).

A couple of years back the Supreme Court held that a client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003). In an effort to avoid that prohibition, a client agreed to prosecute a claim of attorney in his own name for the benefit of the adversary. The Court of Appeals ruled that such an agreement was rendered invalid by the rationale of *Kommavongsa*.

Kim v. O'Sullivan, 133 Wn. App. 557, 137 P.3d 61 (2006).

William R. Hickman has become "Of Counsel" with the firm. After 38 years with Reed McClure, Mr. Hickman now 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 is 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 NASD Dispute Resolution Program. He was named a "Washington Super Lawyer" in 2001, 2003, 2005, and 2006.

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com/newsltr.htm ... and Pam Okano's Coverage Column is available at www.wdtl.org/ (see Coverage Uncovered).

For up-to-date reports on Reed McClure attorneys, please visit our website at www.rmlaw.com

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