WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

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BAD FAITH IS VERY, VERY HARD TO PROVE - REDUX

As those of you who attended the 7th Annual Reed McClure Insurance Law Seminar heard, the "nuts and bolts" of Washington Insurance Bad Faith Law are in a state of intense flux at the moment. In theory this should not be surprising since any Common Law rule is subject to change. This is particularly true with regard to Bad Faith because it has just sort of grown up like Topsy, never subject to a defining analysis here in Washington. While this "evolution right before our eyes" is exciting, the fact that millions of dollars can be riding on how the terms are defined or applied can be a bit disconcerting.

What has occurred is that late last winter a unanimous Washington Supreme Court in *Ellwein,* 142 Wn.2d 766 (2001), held that if a policyholder cannot prove bad faith as a matter of law, he cannot prove it at all. In other words, the company is entitled to a summary dismissal of a bad faith claim unless the policyholder proves as a matter of law that there was no reasonable basis for the company's actions.

This change in the law appeared to be clear beyond a reasonable doubt. But then Division I issued the *Griffin* opinion (108 Wn. App. 133 (2001)), the essence of which was: "I can't believe the Supreme Court would change the law."

Then in January of this year the Supreme Court in *Overton,* 145 Wn.2d 417 (2002), cited *Ellwein* for the proposition that bad faith is not easy to prove and the policyholder has a heavy burden.

On May 1, 2002, the Supreme Court denied review of *Griffin* and on May 3, 2002, Division II issued the *Symes* opinion. Division II recognized that *Ellwein* was a change in the law of bad faith and summary judgment. It said it would follow the Supreme Court holdings in *Ellwein*. *Symes* does not even cite *Griffin*. Among the court's holdings:

(1) Policyholders have the burden of proving bad faith as a matter of law.

(2) If there is any issue regarding a "coverage-determining fact", the bad faith claim fails.

(3) *Ellwein* applies to all types of insurance bad faith litigation.

(4) The consequence of *Ellwein*'s plain language is that, henceforth, the issue of bad faith will not be a jury issue.

(5) The fact finder of a bad faith claim will be the trial court, and the jury will only determine damages if bad faith has been proven by the policyholder as a matter of law.

American State Ins. Co. v. Symes of Silverdale, Inc., ___ Wn. App. ___, 45 P.3d 610 (2002).

If we were not all so parochial and narrow-visioned in our view, we would have realized long ago that the *Ellwein/Symes* rule is the rule followed in the majority of jurisdictions. We now join an ever-increasing body of jurisdictions granting summary judgment for insurers on dubious bad faith claims. Although courts still say that bad faith is generally a fact question, the exception has now become the rule as courts realize insurers seldom deny claims without any plausible reason at all. Where the coverage question is not entirely clear, case authority now dictates dismissal.

The doctrine of the "Genuine Dispute" was laid out recently in *Adams v. Allstate Ins. Group*, 187 F. Supp. 2d 1219, 1226 (C.D. Cal. 2002):

While the question of whether an insurer has acted in bad faith is generally one of fact, where there is a genuine issue of an insurer's liability under a policy, a court can conclude that an insurer's actions in denying the claim were not unreasonable as a matter of law. Thus, "under California law, a bad faith claim can be dismissed on summary judgment if the defendant can show that there was a genuine dispute as to coverage."

The genuine dispute doctrine is well settled and often used in insurance bad faith actions brought under California law. The Ninth Circuit has frequently affirmed summary judgment orders in bad faith claims where the trial court's ruling was based on a genuine dispute over insurance coverage. While the California Supreme Court has yet to define the limits of this doctrine, it continues to be applied, on a case-by-case basis, to cases involving both factual and legal coverage issues.

American State Ins. Co. v. Symes of Silverdale, Inc., ___ Wn. App. ___, 45 P.3d 610 (2002).

THE DECKS ARE COLLAPSING!

FACTS:

George decided to remove and repair two decks at his Palos Verdes Estates home. He decided that after being told by a contractor that he had discovered severe deterioration

in the framing members supporting the decks. George believed his decks were in a state of imminent collapse.

After spending $87,000 to repair the decks, George submitted a claim to State Farm, his homeowner's insurer. His State Farm policy insured for direct physical loss to covered property involving the "sudden, entire collapse of" the building or any part of the building. "Collapse" was defined to mean: "Actually fallen down or fallen into pieces."

Upon receipt of the claim, State Farm investigated. It denied the claim pointing out to George that his decks had not "actually fallen down . . . into pieces" and that by repairing the decks prior to submitting the claim, he had prejudiced State Farm by depriving it of the opportunity to inspect the damage.

George sued State Farm for breach of contract and bad faith. Superior Court Judge Soussan G. Bruguera held that public policy dictates that policyholders are entitled to coverage "for collapse as long as the collapse is imminent, **irrespective of policy language."** (Emphasis in original.)

On appeal the Court of Appeals filled four pages with feel-good newspeak, and then without analysis, without citation to a statute, without citation to a regulation, without citation to a legal authority, and without citation to a single legal opinion, announced that "public policy" mandates that State Farm provide coverage for "imminent collapse."

HOLDINGS:

(1) The plain language is unambiguous.

(2) The plain language is susceptible of only one reasonable interpretation.

(3) Under no stretch of the imagination does "actually" mean "imminently."

(4) The contractual language controls.

(5) "We therefore conclude that notwithstanding the language of the collapse provision, public policy mandates that State Farm afford Mike coverage for the imminent collapse of his decks."

COMMENT:

Nothing I can say can adequately convey the monstrous implications of this decision. These three judges have arrogated to themselves the power to declare public policy, a power that resides with the Legislature. They have usurped the power to review and approve insurance forms, a power that resides with the Insurance Commissioner. The

opinion is an affront to our fundamental notion of the separation of powers inherent in our tripartite form of government.

But on the other hand, my contractor said my east deck was going to collapse under the weight of the Guiness. So he fixed it and gave me a bill for $11,000. Where did I put my homeowner's policy?

Rosen v. State Farm Gen. Ins. Co., 2002 Cal. App. LEXIS 4199 (June 3, 2002).

EARLY ON A DARK AND RAINY MORNING . . .

FACTS:

. . . Frank was driving his pickup north on I-5. He lost control and rolled the pickup, coming to rest in the oncoming traffic lanes. He was still in his seat belt hanging upside down. The pickup was insured by Allstate.

Along came Jeffrey, driving his employer's car which was insured by T.H.E. Insurance Company. (I am not making that up.) Jeffrey appraised the situation, parked his vehicle, and sought to effectuate a rescue of Frank. While Jeffrey was talking to Frank, a northbound van slammed into the pickup, killing Jeffrey.

The van driver was underinsured. This dispute was whether Jeffrey's estate had a UIM claim under the Allstate policy or the T.H.E. policy or both or neither. That question turned upon whether Jeffrey was "using" the overturned pickup or his employer's auto when he was killed.

The trial court ruled he was "using" the auto and was not "using" the pickup. The Court of Appeals reversed, ruling he was "using" the pickup and was not "using" the auto.

HOLDINGS:

(1) The interpretation of insurance policy language is a question of law. The policy should be given a fair, reasonable, and sensible construction.

(2) Underlying the UIM statute is a strong public policy to ensure coverage for innocent victims of uninsured drivers. The purpose of UIM coverage is to permit the injured party to recover those damages he or she would have received if the tortfeasor had been insured.

(3) Under the liability provisions of the Allstate policy, any person "using" the vehicle with the named insured's permission is covered. The statutory policy of RCW 48.22.030 vitiates any attempt to make the meaning of insured for purposes of uninsured motorist coverage narrower than the meaning of that term under the primary liability section of the policy.

(4) Case law establishes that "using" is broad and includes all proper uses of a vehicle.

(5) Case law also establishes the general criteria for determining whether a person is "using" a vehicle and thus insured under a UIM endorsement:

(a) There must be a causal relation or connection between the injury and the use of the insured vehicle;

(b) The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;

(c) The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and

(d) The person must also be engaged in a transaction essential to the use of the vehicle at the time.

(6) We conclude that any person buying insurance would reasonably believe that one coming to his or her assistance in this situation would be covered by UIM protection.

(7) Allstate provides UIM coverage to Jeffrey under its policy on the pickup.

(8) As to the T.H.E. policy on the auto, Jeffrey has failed to demonstrate the fourth factor, the requirement that the injured person be engaged in a transaction essential to the use of the insured auto.

(9) Also, Jeffrey has not established a causal connection between the insured auto and the injury. Merely having arrived at the site of an accident in the auto does not create a causal connection between the auto and the injury in this case.

COMMENTS:

Fascinating bit of analysis topped by the court's mind-reading as to what an insurance purchaser would think about whether his rescuer would have UIM protection. What would he think? He would think nothing at all because the question never crossed his mind.

If it was up to me, I would leave the coverage determinations right where the trial court judge put them.

Butzberger v. Foster, __ Wn. App. ___, __ P.3d __ (2002), 2002 Wash. App. LEXIS 1213 (Jun. 3, 2002).

UNCERTAIN QUESTIONS OF LAW

FACTS:

While trying to clear up the mess arising from construction defects in a high-rise residential building, Newman and the construction manager hired the OMR law firm to help investigate problems, and to facilitate settlement. It was not retained to pursue litigation.

Eventually, Newman sued the construction manager and the rest of the contractors. After collecting over $4 million from first-party and third-party liability insurers, Newman's claims were dismissed as being untimely under the six-year statute of limitations for breach of warranty claims. Since the limitation period expired while OMR was representing Newman, Newman sued OMR for $1.85 million for failing to advise Newman of the risks of failing to file suit within the limitations period.

The trial court held as a matter of law that OMR's actions were not legal malpractice because OMR's belief that the discovery rule applied to the contract statute of limitations, while incorrect, was fairly debatable. The Court of Appeals concluded that, as a matter of law, application of the discovery rule to the breach of contract statute of limitations was unsettled, and thus OMR did not commit malpractice.

HOLDINGS:

(1) As a general rule, mere errors in an attorney's judgment or in an attorney's trial tactics do not subject an attorney to liability for legal malpractice.

(2) The foregoing rule has found virtually universal acceptance when the error involves an uncertain, unsettled, or debatable proposition of law.

(3) Because application of the discovery rule to a breach of contract claim was unsettled, OMR did not commit malpractice.

COMMENT:

Any other rule would leave counsel for every losing party exposed to a claim for malpractice.

On the same day as this opinion was filed, the court held in another case that an attorney who took the client's house and property as a fee, sold it for 40% more than the fee, gave the complaining witness a one-way ticket to Oklahoma, and got kicked out of the case for witness tampering such that the client had to get a new lawyer, breached his fiduciary duty to his client and had to disgorge the fee.

Newmark Ltd. Partnership v. Oles, Morrison & Rinker, 2002 Wash. App. LEXIS 671 (Apr. 22, 2002).

WHAT DID HE KNOW AND WHEN DID HE KNOW IT

FACTS:

Jerry operated an electrical transformer repair business. In 1976 the EPA found PCB contamination on the site. Jerry was informed of this finding. He denied using any fluids containing PCB's and took the position that even if the soil was contaminated, cleaning it up was not his responsibility.

Jerry had CGL policies in effect from 1977 to 1982. They covered property damage caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to conditions, which results in property damage neither expected nor intended from the standpoint of the insured." Jerry did not tell his insurers about the EPA test results when he purchased the policies.

In 1981 Jerry sold the property to Paul. Paul discovered the preexisting contamination, instituted a cleanup program, and demanded that Jerry contribute. Jerry informed his insurers. When Paul sued Jerry, his insurers rejected the tender on the grounds that there was a known loss and there was no "occurrence".

Jerry sued for breach of contract, bad faith and violation of the Consumer Protection Act. The trial court granted the insurers summary judgment. Division III reversed on coverage, but affirmed on bad faith and CPA.

In a 5-4 decision, the Washington Supreme Court said there was no coverage, no CPA claim, and no bad faith.

HOLDINGS:

(1) Interpretation of insurance policies is a question of law, in which the policy is construed as a whole and each clause is given force and effect.

(2) For coverage under a CGL policy, an insured must show some form of harm caused by an "occurrence."

(3) To be an "occurrence," a harmful event must be neither expected nor intended from the standpoint of the insured. This describes the subjective state of mind of the insured with respect to the property damages. Property damage that is expected or intended by the insured does not warrant coverage.

(4) For purposes of determining whether certain property damage is expected by an insured, the insured must merely be put on notice. If an event causing loss is not contingent or unknown prior to the effective date of the policy, there is no coverage. The dispositive issue is whether the insured had such notice prior to purchasing the policy.

(5) The term "damages" in an insuring agreement refers to the cost of compensating a claimant for damage done to the property. This is different from "property damage." It follows that "damage" must be distinguished from "damages." "Damage" means the actual loss, injury, or deterioration of the property itself. "Damages," on the other hand, means compensating loss or damage.

(6) The determination of whether an "occurrence" has taken place does not depend on whether the damage was to the insured's own property or to that of a third party.

(7) Coverage is not available for property damage caused by contamination that was known to the insured before the policy was purchased but that resulted in liability to a third party afterward.

(8) Coverage was also properly denied under the known-loss principle.

(9) Claims of bad faith are not easy to establish and an insured has a heavy burden to meet. *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 775, 15 P.3d 640 (2001). To succeed, the insured must show the insurer's breach of the insurance contract

was "unreasonable, frivolous, or unfounded." If the insurer's denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for bad faith.

COMMENT:

Truly an extraordinary coverage opinion. Every time I read it I see some new facet or nuance.

We should not overlook that the former president of WSTLA wrote a dissenting opinion. We should not be surprised. I am reminded of the old story of the frog and the scorpion. One day Scorpion met Frog and asked him to carry him across a stream. Frog protested saying, "How do I know you won't sting me? Scorpion says, "Because if I do, I will die too."

So Frog allowed Scorpion to climb on his back and they set off across the stream. Halfway across the stream, Scorpion stings Frog. As he gasped his last breath, and started to sink, Frog asked, "Why did you sting me, for now we shall both surely perish."

To which Scorpion replied: "It's my nature. . . ."

Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 38 P.3d 322 (2002).

GIVE AN INCH AND THEY'LL TAKE A FOOT

FACTS:

In a boundary lawsuit with their neighbors, Brent and Penny learned they did not own as much waterfront land as they thought they had bought. Specifically, they learned they owned one foot less. So they sued the title insurance company. The title company sued Jim, the surveyor who had certified the boundary location prior to issuance of the policy. The title company settled with Brent and Penny and the claim against Jim went to trial.

The trial court found that in the absence of expert testimony, the title company had failed to prove Jim was negligent. The Court of Appeals said there was plenty of evidence of Jim's negligence and reversed.

HOLDINGS:

(1) In general, expert testimony is not necessary to establish standard of care in actions for negligence. But in professional malpractice cases, expert testimony is nearly always required. This is because a trier of fact with ordinary knowledge is often not able

to determine what constitutes reasonable care in the context of complex or highly specialized procedures in the absence of explanation from an expert on the subject.

(2) In rare cases, a professional defendant's conduct is such a gross deviation from standard of ordinary care, that a lay person can easily recognize it.

(3) Expert testimony was not required to prove that Jim's failure to cross-check his work against the original plat fell well below the standard of ordinary care.

(4) Jim's survey does not comport with the legal description and the original plat of the subject property and is therefore clearly erroneous.

COMMENT:

Now, the fact that the lots in the "residence park" were parallelograms or trapezoids and were measured along a curving road might have produced some difficulties. But here, Jim measured from the wrong spot, and then overlooked a dock easement, and a fence agreement, both of which identified and located the correct boundary.

Commonwealth Land Title Ins. Co. v. Hart, 2002 Wash. App. LEXIS 199 (Feb. 4, 2002).

PEEPING FOGLEMAN

FACTS:

While Kelly stayed at Fogleman's home, he secretly videotaped her in the bathroom. After he was convicted under the "secret peeping statute," she sued him for intentional infliction of emotional distress.

Nationwide, Fogleman's homeowner's carrier, provided a defense under a reservation of rights. The jury awarded $83,000 and Nationwide filed a declaratory judgment action seeking relief from any duty to pay the judgment. The Nationwide policy excluded coverage for any injury which is intended by or which may reasonably be expected to result from the intentional acts or criminal acts of the insured. The trial court ruled in favor of Nationwide and the Court of Appeals agreed.

HOLDING:

As a matter of law, the policy excludes coverage for Kelly's injuries as Fogleman's intentional act of concealing a video camera in his bathroom and filming its occupants

was sufficiently certain to cause injury that Fogleman should have reasonably expected such injury to occur.

COMMENT:

No voodoo psychology or pseudoscience in this cut-to-the-heart-of-the-matter opinion. I expect that most judges in Washington would have no problem reaching the same result. Although there are a couple in Olympia who would want an investigation of Fogleman's unrequited angst as generated by the ambiguity of the non-resolved power figure conflicts of his adolescence . . .

Nationwide Mut. Ins. Co. v. Douglas, 148 N.C. App. 195, 557 S.E.2d 592 (2001).

MEAN STREETS

FACTS:

Lien's best friend was killed by an uninsured motorist while he was helping Lien change a flat tire at the side of the road. Lien was not hit. But she had been standing next to her friend.

Lien did not seek medical treatment that evening. However, in the following weeks, she experienced frequent headaches, felt sick to her stomach, was unable to eat, vomited daily, and suffered hair loss, fragile fingernails, and skin breakouts. She lost 10-15 pounds in a year. She had feelings of depression, anxiety, nightmares, insomnia, and bouts of chronic crying. A clinical psychologist who examined her two weeks after the accident diagnosed chronic posttraumatic stress disorder (PTSD) resulting from the accident.

Lien's insurer Allstate paid PIP but refused to pay UIM. The UIM policy covered damages for "bodily injury" the insured was legally entitled to recover from the owner or operator of an underinsured motor vehicle. "Bodily injury" was defined to mean "bodily injury, sickness, disease or death."

Lien sued for UIM coverage. The trial court granted Allstate summary judgment. Division I reversed.

HOLDINGS:

(1) Interpretation of an insurance contract is a question of law. We construe the policy as a whole and interpret it as an average insurance purchaser would understand it.

Ambiguous terms are resolved in favor of the insured. A term is ambiguous if the language on its face is fairly susceptible to two different but reasonable interpretations.

(2) Washington follows the majority view that in the context of purely emotional injuries, without physical manifestations, the phrase "bodily injury" is not ambiguous. Its ordinary meaning connotes a physical problem.

(3) The Washington Supreme Court has held that "the term 'bodily injury' does not encompass recovery for purely emotional injuries."

(4) No Washington case has decided whether emotional distress with physical manifestations constitutes "bodily injury" in the context of an insurance contract.

(5) We conclude that the term "bodily injury" includes emotional injuries that are accompanied by physical manifestations.

(6) An insurance purchaser would reasonably interpret the term "bodily injury" to include physically-manifested emotional distress. We hold that where there are physical manifestations of PTSD, it qualifies as a "bodily injury" under a UIM policy.

COMMENT:

All in all, an extraordinary piece of legal analysis, legal research, and legal writing. There was none of the "pull the rabbit out of the hat" we see in so many coverage opinions.

Trinh v. Allstate Ins. Co., 109 Wn. App. 927, 37 P.3d 1259 (2002).

THE BABYSITTING BUSINESS - REVISITED

FACTS:

Crystal accidentally set the Hawkinses' house on fire while she was babysitting there. This was her summer job. She worked 4 to 5 days a week, 8 to 10 hours a day. Grange, which wrote the fire policy on the house, paid the loss. Then it asked Crystal to pay up. Crystal's insurer, Farmers, denied coverage based on a business pursuits exclusion. The exclusion excluded coverage for property damage arising from business pursuits. But it excluded from the exclusion part-time services performed by an insured under the age of 21. Part-time was defined to mean no more than 20 hours a week.

Crystal confessed judgment in exchange for a covenant not to execute. Suit was filed against Farmers. Both sides moved for summary judgment. The trial court concluded

that the business pursuits exclusion applied. Crystal appealed, and the Court of Appeals affirmed.

HOLDINGS:

(1) Insurance policies are construed as contracts, meaning they are interpreted as a matter of law. The language of an insurance contract is interpreted the way it would be understood by the average insurance purchaser. Exclusions from coverage of insurance will not be extended beyond their clear and unequivocal meaning.

(2) The common "business pursuit" exclusion is unambiguous.

(3) In order to constitute a business pursuit, the activity in question must (A) be conducted on a regular and continuous basis, and (B) be profit motivated.

(4) When Crystal started the fire, she was babysitting on a regular and continuous basis.

(5) Crystal's employment with the Hawkinses would be considered her summer occupation. Crystal's babysitting was profit motivated.

COMMENT:

The opinion also pointed out that the exclusion used the term "an insured" rather than "the insured." Thus the exclusion broadly excludes coverage for all damage caused by any insured under the policy.

Leanderson v. Farmers Ins. Co., 111 Wn. App. 230, 43 P.3d 1284 (2002).

WATCH OUT FOR THAT TREE!

Hancock owned 100 acres of land with trees on it. Hancock hired NBI to log the land. NBI subcontracted the cutting to Timberline.

Doug worked as a choker setter for NBI. He was seriously injured when a tree felled several days earlier by Timberline upended and struck him as NBI's employees were hauling it out. NBI was in charge of the operation. No Timberline employees were on the site the time of the accident.

Doug sued Timberline, and the trial court dismissed, finding that Timberline owed no duty to Doug. The Court of Appeals affirmed.

On appeal, Doug argued that because logging was a notoriously dangerous occupation that Timberline owed him a common law duty of reasonable care. The Court of Appeals pointed out that no Washington case addressed the question of whether the common law duty of care that a subcontractor owes to its employees extends to employees of the general contractor. The court could not find any reason for such a duty to exist and concluded that there was no such duty.

Elway v. Timberline Logging Inc., 2002 Wash. App. LEXIS 151 (Jan. 28, 2002).

VISITOR LIABILITY

FACTS:

Kate went to visit Ben. Ben told her to go outside and see his flowers. As she did, she slipped and fell through a hole on the crumbling edge of the concrete porch. From prior visits, Kate was aware of the hole in the porch.

Ben did not own the house. He rented it from Elroy. Ben had asked Elroy several times to fix the porch. A week after the accident, Elroy fixed the hole.

Kate sued Elroy, the owner. The trial court dismissed and the Court of Appeals affirmed.

HOLDINGS:

(1) A landlord's duty to his tenant's guests or invitees is no greater than his duty to the tenant himself.

(2) Washington law retains the distinction between invitees and licensees.

(3) A possessor of land owes a duty of reasonable care to licensees where there is a known dangerous condition on the property and the occupier can reasonably anticipate that his licensee will not discover or realize the risks.

(4) An invitee "is . . . entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry." Reasonable care requires the landowner to inspect for dangerous conditions, "followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances."

(5) It is the "possessor of the land," not the title owner, who bears responsibility for dangerous conditions on the premises.

(6) Because Elroy the owner was not the possessor of the porch, Kate's common law claim fails.

COMMENT:

Years ago Kate's contributory negligence would have been a complete bar to the claim. Times change.

Wade v. Hulse, 2002 Wash. App. LEXIS 436 (Mar. 14, 2002).

THE ESTOPPED INSURER

FACTS:

A law firm, which we will refer to as B&S, had a malpractice policy with a company, which we will refer to as CIC. Among the exclusions was one for "the return of fees or other consideration paid to" B&S.

DFJ sued B&S for malpractice. As part of the damages sought, it listed "legal fees." B&S tendered to CIC which assigned the defense to SCC&B. CIC did not issue a reservation of rights letter.

After a year or so of pre-trial discovery, CIC got a copy of DFJ's discovery response which made perfectly clear that DFJ wanted a return of the fees it had paid B&S, claiming the legal services were of no value.

Nine months later CIC informed B&S for the first time that it was disclaiming coverage with respect to any award for return of legal fees.

B&S sued CIC. The trial court granted B&S summary judgment noting that the delay of over two years in raising the coverage question was unreasonable as a matter of law, and that prejudice to B&S was presumed because CIC controlled the defense for over two years. The Court of Appeals affirmed.

HOLDINGS:

(1) An insurer who undertakes the defense of an insured may be estopped from asserting a defense to coverage, no matter how valid, if the insurer unreasonably delays in disclaiming coverage and the insured suffers prejudice as a result of that delay.

(2) Prejudice to an insured may be presumed where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense.

(3) In such cases, though coverage as such does not exist, the insurer will not be heard to say so.

(4) Proof of prejudice may be implied where the insurer has complete control of the defense.

COMMENT:

While the court was applying New York law the same result would obtain in Washington. Here, the court has said that 10 months of controlling the defense without a reservation of rights estops the company from denying coverage.

Bluestein & Sander v. Chicago Ins. Co., 276 F.3d 119 (2nd Cir. 2002).

ONE DRIZZLY JANUARY MORNING . . .

FACTS:

. . . Renee went into Burger King. The pavement outside was slightly wet. Inside, she stepped onto a doormat. When she stepped off the doormat onto the tile floor, she slipped and fell. There was an even slickness to the water on the floor, implying that the floor had been mopped. There were no "Wet Floor" signs posted.

Renee sued Burger King. The trial court dismissed on summary judgment. The Court of Appeals reversed, saying there were fact issues about negligent mopping.

HOLDINGS:

(1) The plaintiff in a negligence action must establish (1) a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury.

(2) It is undisputed that Renee has presented sufficient evidence to proceed to trial on the causation and damage elements. Determination of duty is a question of law.

(3) Renee was an invitee. An invitee is a business visitor who enters on land for a purpose related to the business of the owner. The owner owes the duty of ordinary care to its invitees, which means maintaining the premises in a reasonably safe condition, and the affirmative duty of discovering dangerous conditions.

(4) A landowner is liable for harm caused to its invitees by a condition on its land if it

(a) knows or by the exercise of 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.

(5) The landowner's duty attaches only if the landowner knows or should have become aware of the dangerous condition. A landowner is presumed to know of a condition that it or its employees create.

(6) The mere presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner. Negligence cannot be inferred from the fall alone. Where there is evidence of more than mere water on the floor, then material questions of fact arise as to the existence of an unsafe condition known to the owner.

(7) Burger King does not dispute that it was a rainy day, and its employees testified that they knew the floor of the Burger King was slippery when wet. Therefore, Renee satisfied her burden of presenting sufficient evidence that the dangerous condition was reasonably foreseeable to survive summary judgment.

(8) Under Renee's evidence, the jury could find that Burger King's employees mopped the floor negligently, thereby creating the dangerous condition, and failed to follow the Burger King policy of posting "Wet Floor" signs after mopping.

COMMENT:

The opinion is a veritable treasure trove of case law dealing with slip-and-fall in commercial establishments. It is a must-read for anyone doing research in the area. Too bad it was not published.

We should note that Renee's claim was substantially enhanced by the fact that she had two on-the-spot independent witnesses who could back up her story as to the exact conditions at the time of the fall.

The opinion also reminds us of *Kangley v. United States*, 788 F.2d 533, 535 (9th Cir. 1986), where the Ninth Circuit recognized that in Tacoma, "it is often wet outside."

Escobar v. Burger King, 2002 Wash. App. LEXIS 138 (Jan. 25, 2002).

A REAL SWINGER - PART IV

Those of you blessed/cursed with long memories will recall that back in the late 70's, early 80's, we ran a series of articles on autoerotic asphyxiation (AEA) which asked the question, was it accidental or was it suicidal? At about the time that the legal discussion was heating up to a room temperature level, the cases just disappeared off the radar screen. I blamed this on the federal court's new-found delight in issuing unpublished opinions. (A legal oxymoron.)

However, so far this year we have spotted two such opinions: one from our own Ninth Circuit and one from the Southern District of New York. Naturally, the conclusions reached are as far apart legally as they are geographically. What makes this of more than passing interest is that both cases involve ERISA insurance policies. As you know, under ERISA, the federal courts are charged with developing a uniform common law for ERISA insurance policies. Given the maverick reputation of the Ninth Circuit, the likelihood that it will be swayed or influenced by some of the conservative or reactionary circuits back east is between slim and none.

And that, dear reader, spells "Conflict." Conflict between the circuits. And when you have a conflict between the circuits on a federal question like ERISA, do you know who has to resolve the conflict? Yes! The United States Supreme Court!

Oh, I can feel the excitement in the air that day as the widows and lawyers assemble with their silken ropes, luggage straps, neckties, and other miscellaneous homemade fail-safe

devices (which failed). Since the real supremes still refuse to televise their arguments (unlike those folks in Olympia who want the voters to know what they have to put up with), this piece of legal history will be performed before a live (mostly) albeit small audience.

The first case (*Cronin v. Zurich American Ins. Co.*, 189 F. Supp. 2d 29 (S.D.N.Y. 2002)) came out in January. It involved Phil, who was found dead in his hotel room while on a business trip. He was hanging by his neck from a luggage strap suspended from a hook on the back of the bathroom door. The coroner listed it as a "botched autoerotic asphyxiation." Judge Hellerstein tells us that AEA is the practice of limiting the supply of oxygen to the brain in an attempt to heighten sexual pleasure by exerting pressure on the arteries of the neck while engaging in sexual self-stimulation.

There were two accidental death policies on Phil, and his widow wanted her money. The judge said that the widow could not have the money because Phil's death was not accidental, and it resulted from self-inflicted injury.

The judge's grasp of contemporary recreational activities can be seen in this pronouncement: "Accidental death insurance policies are not underwritten to reward willful deviances that risk the practitioner's own life." That would pretty much exclude (without benefit of an exclusion) mountain climbing, technical rock climbing, SCUBA diving, hang-gliding, ultra-light flying, and walking your dog in Central Park after dark.

On the other hand, we have the 2-1 decision from the Ninth Circuit (*Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir. 2002)). The vast difference in point of view between the east coast and the best coast is demonstrated initially by the fact that Judge Hellerstein's definition of AEA is incorrect from an anatomical point of view, to wit: pressure is not applied to the arteries going to the brain; pressure is applied to the veins carrying blood from the brain. Now, perhaps some might call that the picking of nits. But in my view, if you cannot get the details of the procedural mechanism correct, how in the world will you be able to construct a stable legal edifice thereupon?

In this case, Gerald told his wife he was going out for cigarettes. No, no, no. Wrong story. Gerald said he was going to the cleaners. He never returned. Three days later, CHPs noticed his van on an empty street next to a vacant lot. Gerald was sitting behind the passenger seat with one end of a necktie around his neck, and the other end tied to the sliding door hinge. Gerald was dead. The coroner said the death appeared to be the "accidental" result of AEA. His widow said she thought he had stopped doing that.

There was an accidental death policy purchased by the employer, which made it an ERISA policy. The parties ended up in court, and the district court ruled that death by AEA was not suicide but fell within the exclusion for intentionally self-inflicted injury.

After writing an opinion which appears to cite and analyze every U.S. case which has considered the question (including *Cronin*), the Ninth Circuit concluded that the suicide exclusion did not apply. As to the other exclusion, the court pointed out that "voluntary risky acts resulting in injury are not necessarily acts that result in 'intentionally self-inflicted injury.'"

Stay tuned. I am sure that with both *Cronin* and *Padfield* being published, other courts will be losing their reticence about publishing their views on this topic.

Cronin v. Zurich American. Ins. Co., 189 F. Supp. 2d 29 (S.D.N.Y. 2002).

Padfield v. AIG Life Ins. Co., 290 F.3d 1121 (9th Cir. 2002).

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

WELCOME!

Reed McClure is pleased to announce that John D. (Jake) Winfrey III has joined the firm as an associate. Jake graduated from the School of Law at Seattle University *cum laude* in 1999. He clerked for U.S. District Court Judge Thomas Zilly, and has been practicing with the Meyer Fluegge firm in Yakima. Jake's undergraduate degree is from the University of Washington.

While in law school, Jake was a Dean's list and Trustee Scholar, participated in the Jessup and Tausend moot court competitions, and received two CALI awards for excellence. While with the Meyer Fluegge firm Jake's practice was primarily litigation support, motion practice, and discovery, and writing.

We are extremely pleased to have Jake join the Reed McClure team, and to provide assistance for our clients and their variety of litigation problems.

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