WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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THE TOP 10 REASONS TO USE APPELLATE COUNSEL

Way back in May 1968, we took our first steps toward establishing an appellate department here at Reed McClure. At that time, Mr. Moceri articulated a couple of fundamental reasons for this change: (1) The trial attorney is too busy (*e.g.*, taking depositions, going to motion court; trying cases) to take the necessary time to review, analyze and evaluate the thousands of pages usually found in the Record on Appeal (*i.e.*, Clerk's Papers; VRP; Exhibits). (2) The trial attorney is probably too personally involved in the case (having lived with it for 2-3 years) to approach it objectively.

In the 41 years since that occurred, and the 500 appeals which Reed McClure has handled since then, it has become apparent that there are many more reasons to utilize an appellate specialist when choosing to go on appeal or being dragged into an appeal.

Pam Okano of Reed McClure's appellate department has put together this updated list of reasons to utilize an appellate specialist:

1. **The Rules.** Appellate rules are different than trial court rules. Some aren't even in the rule book. Knowing the rules can make the difference between success and failure on appeal.

2. **The Judges.** Appellate judges are different than trial judges. Not just because they are different people, but also because appeals are structured differently than trials. Appellate judges look for different things than trial judges.

3. **The Tasks**. Appellate tasks are different than trial tasks. Trial counsel takes depositions, answers interrogatories, picks juries, and examines witnesses. Appellate counsel spends most of the time reviewing the appellate record, researching the law, and writing the brief.

4. **The Mindset**. Appellate counsel brings a fresh perspective. The appellate court will look at the case anew. So will appellate counsel. Trial counsel is often so personally invested in the case—and rightfully so—that objectivity suffers.

5. **The Issues**. What was important at trial may not be on appeal. For example, trial counsel may have spent the entire case focusing on a particularly thorny question of proximate cause, which expert witness should be used, or how to get certain exhibits admitted. But on appeal, the big issue may be the jury instruction on the duty of care. Appellate counsel can help identify what the issues should be on appeal.

6. **The Time.** Successful trial counsel is out of the office taking depositions, doing document production, investigating the scene, in mediation, or in a three-week trial. Appellate counsel must be able to devote large blocks of time in the office, reviewing the appellate record, researching the law, and writing the brief.

7. **The Skills.** Most appeals are won on the briefs. Most briefs are too long and boring. A federal appellate court once declared, "Briefs should be written in the English language!" Appellate counsel will not only write in the English language, but will bring imagination and clarity to write a compelling brief that is as brief as possible.

8. **The Knowledge.** Trial counsel don't do appeals often. Appellate counsel do. They know the judges. They know the courtrooms. They know the practices, both written and unwritten, of the appellate courts.

9. **The Standard of Review.** The standard of review establishes how an appellate court will review the case. The standard varies, depending on the type of ruling being appealed. Appellate counsel knows the applicable standard of review.

10. **The Expertise.** Law firms that don't have an appellate practice often hand appeals off to the newest associate in the office. This is because the more experienced trial attorneys are too busy (see #6). But the newest associate has even less appellate experience and expertise than the attorney who tried the case.

For further information on how Reed McClure can assist you on appeal, contact Pam Okano (206-386-7002; pokano@rmlaw.com), Marilee Erickson (206-386-7047; merickson@rmlaw.com), or Mike Rogers (206-386-7053; mrogers@rmlaw.com).

PARENTAL IMMUNITY DOCTRINE

FACTS:

On a cold December night, 3-year-old Ashley wandered outside in her pajamas, and went to an unheated swimming pool located in a far corner of the property. Her stepfather Joel said he found Ashley floating in the pool. She died two days later.

Ashley's mother Stacey had married Joel 88 days earlier. Joel had taken out a $200,000 accidental death insurance policy on Ashley. Stacey was at work when Ashley drowned. Joel was unemployed.

Stacey and her former husband (Ashley's father) sued Joel for the wrongful death of Ashley, alleging negligence, willful and wanton misconduct, and outrage. The police opened a criminal investigation but Joel refused to cooperate.

Joel moved for dismissal, arguing that under the common law Parental Immunity Doctrine he was shielded from liability. Evidence was introduced that Joel and Ashley were not close, that Ashley was not comfortable around him, and that Joel referred to the 3-year-old as "a little bitch." In short, there was a question whether Joel stood in place of a parent. (The technical term is "in loco parentis"; it means in place of a parent.)

The trial judge dismissed the case against Joel. While he said he did not like the Parental Immunity Doctrine (PID), so long as it was the law in Washington, it should apply to stepparents as well as natural parents.

On appeal, the Court of Appeals said that PID would protect Joel since it found no "rare" or "exceptional circumstances."

Stacey asked the Supreme Court to review and, in particular, to abolish PID altogether. After oral argument, it took the court 14 months to issue a 6-3 opinion, sending the case back to the trial court for a trial as to whether Joel had proven a true in loco parentis relationship with Ashley

HOLDINGS:

1. The PID precludes liability for negligent parental supervision.

2. The PID does not preclude liability for a parent's wanton or willful failure to supervise.

3. There is no exception for a wrongful death action.

4. The PID shields a stepparent to the same extent as a biological parent so long as the stepparent does, in fact, stand in loco parentis to the child.

5. There is a genuine issue of material fact as to whether Joel proved he had an in loco parentis relationship with Ashley before she drowned.

COMMENT:

If the case did not arise out of such tragic circumstances, I would be inclined to recommend that you read the majority opinion because it is more enjoyable than the average.

Also worth a read is the dissenting opinion by the Chief Justice. He did not believe that the PID should be extended to stepparents under any circumstances.

I imagine that in a few years, this 5-3 result will be turned around for stepparents and, a few years after that, parents will also lose their common law immunity.

Zellmer v. Zellmer, 164 Wn.2d 147, 188 P.3d 497 (2008).

PRODUCT LIABILITY - REVISITED

Those of you out there with long memories remember the nebulous state of the law when the courts first started toying with the idea that a manufacturer could be liable for harm caused by his product notwithstanding plaintiff's inability to prove common law negligence. Those were wonderful days when just about every products case which went to trial went on appeal. The problem was with the jury instructions. There was no standardization. Just about every court in the country and the Restatement of Torts had their own view of the correct formula.

But all good things must come to an end. And so it was with the automatic appeals in products cases. What killed it off was the legislature which, in the early 1980s, passed the Product Liability Act (RCW 7.72). That meant products liability was no longer a common law tort (*i.e.*, created by the judges), it was a statutory tort (*i.e.*, created by the elected representatives of the people). That meant the judges could no longer fiddle with the words, and the jury instructions would be taken from the statutes.

There are, however, some products cases still out there based on an injurious exposure predating the enactment of the Product Liability Act. Those claims are still governed by the common law. Two of these pre-statute claims were resolved by the court recently.

Both plaintiffs had worked on Navy ships, had been exposed to asbestos, and had developed mesothelioma as a result. They sought damages from several valve and pump manufacturers for failure to warn about the danger of asbestos inhalation.

Now, the problem with the claim was that none of the defendants manufactured, sold, or supplied the asbestos. The asbestos had been applied to the valves and pumps by the Navy.

In the trial court, the judge ruled that the defendants had no duty to warn about the dangers of exposure to asbestos in products manufactured by someone else.

And so up they went to the Court of Appeals, which reversed, saying that the defendants did have a duty to warn of the danger of asbestos because they knew their equipment would be insulated with asbestos.

But that is not the end of the story. The defendants got a hearing in the Supreme Court which, by a 6-3 vote, reversed the Court of Appeals. It held that there was no basis in the common law for imposing strict liability on a manufacturer for failure to warn of the hazards of asbestos insulation where the insulation was manufactured and installed by someone else.

The court pointed out that the determination of duty to warn was a question of law "that generally depends on mixed considerations of logic, common sense, justice, policy, and precedent."

Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

ONE THAT DID NOT GET AWAY

FACTS:

S&L was in the business of importing boating and fishing accessories. In 1994, it applied for a CGL policy from Farmers. On the application, it listed "fishing tackle sales" as its business operation.

In 2001, S&L entered into an agreement with a couple of other entities to develop and build a condominium complex in West Seattle. S&L did not advise Farmers of the change.

In 2005, the homeowners association sued S&L for the construction defects in the condominium. S&L tendered to Farmers which agreed to provide a reserved defense. Farmers then filed for declaratory relief seeking an order declaring that the "fishing tackle sales" policy did not cover claims arising out of the construction of a condominium.

The trial court granted a summary judgment of no coverage. S&L appealed. The Court of Appeals affirmed "because the plain language of the insurance agreement only insures risks arising from" S&L's "sporting good business."

HOLDINGS:

1. We construe insurance polices as contracts. We consider the policy as a whole, and we give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance."

2. If the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists.

3. The expectations of the parties cannot override the plain language of the contract. This includes establishing who is insured, the type of risk insurance against, and the existence of an insurance contract.

4. Determining whether coverage exists under a commercial general liability policy is a two-step process. First, the burden falls on the insured to show the claim is within the scope of the policy's insured losses.

5. The declarations page defines the scope and breadth of the insurance contract.

6. The present policy clearly identifies who is an insured party based on the declaration. Section IV, subsection 6, of the policy, conditions acceptance of the policy by the insurer to verification that the representations contained in the declaration are true. Issuance of the policy is based upon those representations.

7. The plain language of the contract indicates that the commercial activity insured was sporting goods distribution. This is the only indication in the policy of the risks that would be covered. We hold Farmers had no duty to defendant against real estate development claims made against Seas & Lakes.

COMMENT:

Whoa!!! We missed this unpublished gem when it came out last fall. Fortunately, it was written up in the FC&S Bulletin. It provides a stunning road map on how to fairly resolve a coverage dispute.

Farmers Ins. Exch. v. Seas & Lakes, Inc., 2008 WL 4542867 (Wn. App. Oct. 13, 2008).

CERTIFIED MAIL IS NOT MAIL

In an opinion only a lawyer could love, the Washington Supreme Court has unanimously ruled that "certified mail" does not meet the statutory requirement of "mailed."

Of course, this is an insurance case, so anything said here is *sui generis*.

The case involved a policyholder, who, on 11 separate occasions, was late with the premium payment. On the 12th time, the policyholder missed the September 2, 2004 due date. On September 29, the company sent a letter via certified mail telling the policyholder the policy would be cancelled if payment was not received by October 19. On October 22, the policyholder's employee was involved in a fatal auto accident. On October 28, the policyholder paid the past due premiums.

The company said, "Too late." But the court said that the cancellation statute (RCW 48.18.290) requires that notice of cancellation be "mailed" and the plain meaning of the word "mailed" does not include certified mail.

Not to put too fine a point on it, but the court has it backwards. "Certified mail" is a subset of "mail." It is a type of mail.

Why is it that when the word "insurance" appears in an opinion, the plain, ordinary meaning of a word is no longer its plain, ordinary meaning?

Cornhusker Cas. Ins. Co. v. Kachman, 165 Wn.2d 404, 198 P.3d 505 (2008).

PAMELA A. OKANO

Ms. Okano has been listed on Washington Law and Politics Magazine's Super Lawyers list every year since 2001.

SHAREHOLDER

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 LITIGATION

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, sexual abuse, property damage, automobile liability, professional liability, first-party property and collapse, underinsured motorists, fraud, and bad faith.

BACKGROUND:

Ms. Okano is admitted to practice in the State of Washington; the United States District Court of Washington, Western and Eastern Districts; the United States Court of Appeals for the Ninth Circuit; and the United States Supreme Court.

She is a member of the following professional organizations:

Washington Defense Trial Lawyers
Northwest Insurance Coverage Association
Washington Appellate Lawyers Association

BREAK A LEG

FACTS:

Greg wanted to try telemark skiing. He purchased telemark skis from Marmot and ski bindings from someone else. He had Marmot mount the bindings on the skis.

The bindings came with a warning. Greg read the warning. The warning said:

> WARNING. Telemark skiing is a hazardous sport. The sport of Telemark skiing and the use of the equipment involve a risk of injury to any and all parts of the body. Voilé release plates **WILL NOT RELEASE OR RETAIN** in all circumstances. It is not possible to predict every situation in which they will or will not release or retain the skier. The use of the Voilé release binding can not guarantee the user's safety or prevention from any injury or death while telemark skiing. The Voilé release binding may reduce chances of injury, but they do not eliminate the risk of injuries to the knee or any other part of the body.

And so Greg went to ski down the mountain which had a thick layer of soft wet snow. Although he had no prior experience using telemark skis, he decided to try a kick turn. He lost his balance, fell, twisted his knee and broke his leg.

Greg sued Marmot, claiming it was all their fault he broke his leg in that they had negligently mounted the bindings. The case got to trial but after the trial judge heard the evidence, he granted Marmot's CR 50 motion for dismissal as a matter of law.

Greg appealed. The Court of Appeals reversed, saying there was enough evidence to allow the jury to determine whether Marmot had negligently installed the bindings and whether the bindings installed by Marmot proximately caused Greg to break a leg.

HOLDINGS:

1. A motion for judgment as a matter of law is appropriate "when viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party."

2. Substantial evidence is evidence that is sufficient to persuade a fair-minded rational person of the truth of the declared premise.

3. The court must treat the nonmoving party's evidence as true and draw all reasonable inferences from that evidence in the light most favorable to the nonmoving party.

COMMENT:

After quoting the "warning" in footnote #2, the court had no further use for it. Read it over. Read it over slowly. It told Greg that this activity was "hazardous," that it involved a risk of injury to all parts of his body, and that the use of the bindings came with no guarantee as to his safety.

Not to be too technical about it, but it sounds to me as if Greg knew and assumed the risk of exactly what happened to him.

Anderson v. Pen-Lock Corp., 2009 WL 429890 (Wn. App. Feb. 23, 2009).

JUDICIAL ESTOPPEL - ONE LAST TIME - AGAIN

FACTS:

In our last issue, we opined that the Washington Supreme Court had put the last nail into the coffin of that wonderful old doctrine of Judicial Estoppel. But here comes Division III with a published opinion that treats the doctrine as if it is still alive and kicking.

In most of the cases, the doctrine is invoked where a petitioner in bankruptcy fails to list a cause of action, or even a lawsuit, on his list of assets, gets a discharge and then prosecutes his claim. The defendant then invokes judicial estoppel to have the claim dismissed.

What happened here was a policyholder had cross-claimed against his insurer. However, when he filed for bankruptcy, he did not list the claim as an asset. But, he did mention it in the "Statement of Affairs" section. The trial judge said judicial estoppel applied and dismissed the claim against the insurer.

Division III, while recognizing that judicial estoppel still applies in Washington, said that listing the claims in one place was good enough to avoid a dismissal.

HOLDINGS:

1. Judicial estoppel is an equitable remedy calculated to prevent 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.

2. The judicial estoppel doctrine aims to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes, to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings, and to avoid inconsistency, duplicity, and waste of time.

3. A court may properly apply judicial estoppel when the following elements are shown: (a) a party asserts a position that is clearly inconsistent with an earlier position; (b) judicial acceptance of the inconsistant position would indicate that either the first or second court was misled; and (c) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.

Baldwin v. Silver, 147 Wn. App. 531, 196 P.3d 170 (2008).

NO BOVINE, PLEASE

FACTS:

Mystie went to see Dr. Betsy about a dental bone graft procedure. Mystie told her she did not want any cow bone used. She also said she was allergic to Lidocaine.

When the procedure was performed, Dr. Betsy used Lidocaine and cow bone. Mystie ended up in the ER. She sued Dr. Betsy for negligence, battery, and CPA violations. The trial court dismissed the CPA claim because this was obviously a personal injury claim, and personal injury claims are not covered by the CPA.

The Court of Appeals reversed, holding that there might be a CPA claim lurking in this personal injury claim. The court said that there was injury to Mystie's property because Dr. Betsy's using the cow bone instead of something else was no different than a car dealer selling a used car as a new one.

Dr. Betsy asked the Supreme Court to take a second look. It did and reversed the Court of Appeals, pointing out that Dr. Betsy's conduct was not entrepreneurial in nature, and the conduct did not impact the public interest.

HOLDINGS:

1. To establish a Consumer Protection Act violation, the plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act.

2. A plaintiff alleging injury under the Consumer Protection Act must establish all five elements.

3. The CPA attempts to bring within its reach *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.

4. Learned professions are not exempt from application of the Consumer Protection Act.

5. The term "trade" as used by the Consumer Protection Act includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.

6. The question is whether the claim involves entrepreneurial aspects of the practice or mere negligence claims, which are exempt from the CPA.

7. Entrepreneurial aspects do not include a doctor's skills in examining, diagnosing, treating, or caring for a patient.

8. We hold Dr. Betsy's use of cow bone was not an entrepreneurial activity.

COMMENT:

We reviewed the Court of Appeals opinion back in the "Hot Summer 2007" issue. We did not think very much of the court's reach to pull within the Consumer Protection Act a claim which was clearly nothing more than a garden variety tort case.

The Supreme Court opinion, in addition to providing a thorough view of what is and what is not entrepreneurial activity within the "learned professions," also lays out what it takes to satisfy the "public interest" requirement of a CPA claim.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 200 P.3d 695 (2009).

MARILEE C. ERICKSON

SHAREHOLDER

PRACTICE:

Marilee C. Erickson is a shareholder in the Reed McClure law firm. For the past 20 years, Marilee has been representing parties in trial and appellate courts. She focuses her practice on defense of tort claims and insurance disputes, including bad faith claims.

Marilee is a charter member of the Washington Appellate Lawyers Association ("WALA"). She devotes a substantial portion of her practice to appellate matters. She frequently appears in Washington appellate courts. Prior to joining Reed McClure, Marilee served as law clerk at the Washington Court of Appeals, Division II. She is a contributing author of the Third Edition of the Washington Appellate Practice Deskbook.

EDUCATION:

Seattle University, School of Law, 1986, J.D., Honors: *cum laude*

North Park College, 1982, B.A., Honors: *cum laude*

BACKGROUND:

Marilee was born and raised in Mount Vernon, Washington. She is admitted to practice in the State of Washington, the United States District Court for the Western District of Washington, and United States Court of Appeals for the Ninth Circuit.

In addition to her WALA membership, Marilee is a member of the following professional organizations:

King County Bar Foundation, President (1999-2000)
King County Bar Association
Washington Defense Trial Lawyers

RELEASES REVISITED

FACTS:

Seventy-four-year-old Anne signed up for a 60-day membership at Mieko's Magnolia Fitness. In the agreement she signed, but probably did not read, was a provision that waived all risk of loss, damage, or injury and released Mieko's from liability.

The first two visits to the gym and use of the treadmill and bicycle were uneventful. On the third, Anne made an appointment with a personal trainer to learn how to use the weight machines. This did not go well. Anne ended up on the floor, badly bruised, with a cracked vertebra.

Anne sued Mieko's. The trial judge dismissed the case saying there was nothing ambiguous about the release, the language is very clear, and "I don't think any reasonable person could say that this is not conspicuous."

The Court of Appeals disagreed, concluding that reasonable persons could disagree as to whether the release was conspicuous.

HOLDINGS:

1. The function of a waiver provision is to deny an injured party the right to recover damages from the person negligently causing the injury.

2. The general rule in Washington is that a waiver provision is enforceable unless (a) it violates public policy, (b) the negligent act falls greatly below the legal standard for protection of others, or (c) it is inconspicuous.

3. Factors in deciding whether a waiver is conspicuous include: whether the waiver is set apart or hidden within other provisions, whether the heading is clear, whether the waiver is set off in capital letters or bold type, whether there is a signature line below the waiver provision, what the language says above the signature line, and whether it is clear that the signature is related to the waiver.

COMMENT:

At first glance, it does not seem right that the jury will decide whether unambiguous language in a written contract will be given effect. However, the fact is that releases are not favored in Washington. Moreover, there are cases that have upheld releases, so there are examples of how to draft an enforceable, conspicuous release. What did in Mieko's was the fact that the only provisions in the contract that were in capital letters or bold font had to do with the member's financial obligations.

If the Release were as prominent as the authorization for EFT, this case might have stayed dismissed.

Johnson v. Ubar, LLC, 2009 WL 807521 (Wn. App. Mar. 30, 2009).

MORE DOGGY CASES

Last issue we commented on the case of a toy poodle named Ruby (*Sherman v. Kissinger*). This time, it is "the saga of Harlee, the lost Pomeranian," and Joe-e, the Yorkshire terrier.

Harlee went missing, ended up in an animal shelter, and was adopted. The original owner filed a **replevin action** [!!!] against the adopter. The trial court ruled for the adopter but the Court of Appeals reversed and remanded the case for a trial on the issue of whether Harlee had been found within the city limits or whether he had been found out in the country. Upon that factual determination, the question of Harlee's ownership would turn.

The court complained that useful "case law is scarce." Well, that is no surprise.

Joe-e, like Harlee, also went missing. He was brought to a vet by a Good Samaritan. After some tests, it was decided to put Joee to sleep. Later, the owner sued the vet for negligence.

The parties managed to raise a host of legal issues. It ended up in the Court of Appeals which held that the medical malpractice act does not apply to vets. However, the court sent the case back to the superior court for more work on the measure of damages for the loss of Joe-e.

Graham v. Notti, 147 Wn. App. 629, 196 P.3d 1070 (2008) (Harlee); *Sexton v. Brown*, 2008 WL 4616705 (Wn. App. Oct. 20, 2008) (Joe-e).

LANDLORD LIABILITY

FACTS:

Reed McClure's Pam Okano successfully represented the landlord in a recent Court of Appeals proceeding. The court agreed with her argument that the hiring of a maintenance person at the apartment complex was not the proximate cause of the harm done to a minor tenant. The harm did not result from his job as a maintenance person.

HOLDINGS:

1. To prevail in a suit for negligent hiring, the plaintiff must prove that (a) the employer knew or, in the exercise of ordinary care, should have known that the employee was unfit when hired, and (b) the negligently hired employee proximately caused the plaintiff's injuries.

2. An employer's duty is limited to preventing the tasks, premises, or instrumentalities entrusted to an employee from endangering foreseeable victims.

Thompson v. Wang, 2008 WL 4967997 (Wn. App. Nov. 24, 2008).

SLIPPING AND FALLING

FACTS:

Rod used the urinal in the men's room at the gas station. When finished, he stepped onto the tile floor, slipped and fell onto his back; he struck his head on the urinal and was knocked out. When he awoke, his back was wet. He told the cashier he fell in the men's restroom and left.

Three years later, Rod sued. The station owner moved for summary judgment on the basis that Rod had no evidence to show that the station owner had notice of the specific dangerous condition. The trial court dismissed the suit, and the Court of Appeals affirmed.

HOLDINGS:

1. A possessor of land owes a duty of reasonable care to invitees with respect to dangerous conditions on the land.

2. Washington has adopted the RESTATEMENT (SECOND) OF TORTS § 343 as the test for determining landowner liability to invitees:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (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. Mere presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner.

4. "It is well established . . . that something more than a slip and a fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the floor."

5. There is no issue but that the owner took reasonable steps to maintain the restroom and ensure the safety of its restroom.

COMMENT:

The opinion demonstrates that these cases are extremely fact driven. Although the court found that there were issues of fact as to the first and second elements, when it came to the third, the owner was able to prove that the restrooms were subject to regular and frequent cleanings and inspections.

Francis v. Chandler Enterprises, Inc., 2008 WL 5235680 (Wn. App. Dec. 16, 2008).

A REALLY BIG PACKAGE FROM THE SUPREME COURT

In the fall of 2008, the Washington Supreme Court issued three important insurance opinions. By calling them important we do not mean to imply they are correct, just that they are really, really important.

JUST THE FAX, MA'AM

FACTS:

Onvia was sued for fax blasting. That's sending mass unsolicited faxes. Within the month, Onvia tendered to St. Paul by "ironically" fax. St. Paul said it never got the fax.

Plaintiff amended its complaint 7 months later. Onvia sent a copy to St. Paul. St. Paul then denied coverage and a defense.

Onvia settled for $17.515 million with the usual assignment and covenant not to execute. The trial court found the settlement reasonable!

Plaintiff then sued St. Paul. The district court ruled St. Paul had no duty to defend or coverage as a matter of law. The only questions left were whether there was a cause of action for "procedural" bad faith (St. Paul's failing to timely acknowledge and act

on the tender it never received) and, if so, what the remedy was. The district court certified the questions to the Washington Supreme Court.

HOLDINGS:

1. Washington insurance bad faith law derives from statute, regulation, and common law.

2. Liability insurers generally owe their insureds two main benefits: a duty to defend and a duty to pay. Related to these is the duty to settle.

3. The duty of good faith is not specific to either of these main benefits, but permeates the insurance arrangement. An insurer must deal fairly with an insured and give equal consideration to the insured's interest *in all matters*.

4. Although the good faith duty between and insurer and insured is akin to a fiduciary relationship, it is not a true fiduciary relationship because the insurer must give equal, not greater, consideration to its insured.

5. In the third-party context, an insurer can be in bad faith even though there is no coverage.

6. In the third-party context, an insurer can be in bad faith even though there is no duty to defend.

7. Under the WAC regulations, every insurer has a duty to act promptly, in both communication and investigation, in response to a claim or tender of defense.

8. A third-party insured has a cause of action for bad faith claims handling independent of any duty to defend, settle, or indemnify. An insured may also bring a Consumer Protection Act claim premised on claims handling regulation violations, absent a duty to defend, settle, or indemnify.

9. Because of the insurer's lack of action following the original tender, this case is similar to and governed by *Coventry Assocs. v. American States,* 136 Wn.2d 269, 961 P.2d 933 (1998), even though *Coventry* was a first-party case.

10. Consequently, there is no presumption of harm and no estoppel to deny coverage. Plaintiff must prove actual harm. Its damages are limited to the amounts incurred as a result of the bad faith as well as general tort damages.

COMMENT:

It could have been worse. This may be about as close to a win that an insurance company is going to get down in Olympia.

St. Paul Fire & Marine Insurance Co. v. Onvia, Inc., 165 Wn.2d 122, 196 P.3d 664 (2008).

SELECTIVELY TENDERING LATE

FACTS:

When the insured was sued, it tendered to Mutual of Enumclaw and Commercial Underwriters. It did not tender to USF because, refreshingly enough, the insured's attorney felt the insured knew of the potential suit before the coverage was bound.

MOE and CU settled the underlying litigation and obtained an assignment from the insured. MOE and CU then sued USF for equitable contribution and subrogation.

USF moved for summary judgment claiming the selective tender rule applied. That's legalese meaning the insured gets to decide which insurer is on the hook. The trial court agreed and dismissed the claims.

The Court of Appeals reversed, saying trial was necessary because the late tender rule applied. That's legalese meaning the insurer not tendered to is still on the hook unless it can show prejudice by not being tendered to. The Washington Supreme Court said the Court of Appeals was right about subrogation, but wrong about contribution.

HOLDINGS:

1. Equitable contribution is the right of one party to recover from another for a common liability. Contribution permits an insurer to recover from another insurer when both are independently obligated to indemnify or defend the same loss.

2. Contribution is a right of the insurer, independent of the rights of the insured.

3. An insurer may not seek contribution from another insurer that has no obligation to the insured.

4. The duties to defend and indemnify do not become legal obligations until a claim for defense or indemnity is tendered.

5. An insurer seeking contribution does not stand in the shoes of its insured and thus cannot tender a claim to another insurer.

6. The selective tender rule preserves the insured's prerogative not to tender to a particular insurer.

7. The late tender rule is premised on the idea that insurance is affected by public policy considerations including that policies should afford the maximum protection possible to innocent third parties, consistent with fairness to the insurer.

8. The late tender rule's rationale does not apply to equitable contribution since the insurer to whom the tender was made has already fully covered the loss.

9. An insurer that has expressly agreed to cover an entire loss is not harmed because it has to do so.

10. Because the insured chose not to tender to USF, USF had no legal obligation to defend or indemnify at the time of the settlement Thus, MOE and CU have no right to equitable contribution.

11. Subrogation is the principle whereby an insurer that has paid a loss under its policy is entitled to its insured's rights and remedies against a third party as to that loss.

12. There are two types of subrogation: conventional, which arises by contract, and equitable, which arises by operation of law.

13. An insurer entitled to subrogation stands in the shoes of its insured Similarly, an assignee steps into the shoes of its assignor.

14. An insurer that receives a full contractual assignment of its insured's rights may bring a conventional subrogation claim to enforce those rights.

15. The late tender rule permits MOE and CU to pursue their conventional subrogation claim.

16. Under the late tender rule, the insured had the right to tender its claim at any time, so long as the late tender does not prejudice its insurers. MOE and CU obtained this right through the assignment from their insured.

17. The selective tender rule does not apply to conventional subrogation because conventional subrogation depends on the contractual assignment of the insured's right against the insurer. By assignment to MOE and CU, the insured knowingly relinquished its right to control enforcement of its insurance contracts.

18. The late tender rule applies to conventional subrogation. Although MOE and CUIC may pursue subrogation, USF may try to show it was prejudiced by the late tender.

19. Whether late notice prejudiced an insurer is a question of fact and will seldom be decided as a matter of law.

20. It is not enough for the insurer to show it lost the opportunity to conduct a meaningful evaluation. The insurer must show breach of the notice condition had an identifiable and material detrimental effect on its ability to defend its interests.

COMMENT:

We thought for sure an insurer would finally get to win a case in Olympia, but this was a split decision. A jam-packed opinion. Insurers who get a tender from their insureds

need to see whether they can get an assignment of rights against the nonparticipating insurer. And the court has reaffirmed that a late notice defense will usually be virtually impossible to prove.

Mutual of Enumclaw Insurance Co. v. USF Insurance Co., 164 Wn.2d 411, 191 P.3d 866 (2008)

IT CANNOT GET WORSE

FACTS:

Mutual of Enumclaw insured T&G. T&G did the exterior siding on a condo. When the condo sued for defective construction, MOE defended T&G under a reservation of rights.

MOE believed only "spot" repairs costing $300,000 were necessary. The condo believed the building had to be completely stripped and re-sided.

After denial of its summary judgment motion on the statute of limitations, T&G entered into a $3.3 million stipulated judgment with the usual assignment and covenant.

At the reasonableness hearing, MOE said the settlement wasn't reasonable because, among other things, T&G had a good statute of limitations defense. The trial court thought a jury was likely to reject the statute of limitations defense, the building had to be completed stripped, and the settlement agreement was reasonable. Later the trial court decided $3.3 million wasn't reasonable after all and reduced it to $3 million.

In the subsequent coverage action, the trial court ruled against MOE, relying heavily on the results of the reasonableness hearing in the underlying construction defect case.

HOLDINGS:

1. An insurer is generally bound by the findings, conclusions, and judgment entered in a suit against the tortfeasor when it has notice and an opportunity to intervene.

2. MOE and its insured had the same interest in advancing the insured's statute of limitations defense. Once the insured lost its summary judgment motion on the issue, both the insured and the insurer were at risk for an adverse judgment.

3. The rule that a good faith settlement establishes the insured's presumptive damages when the insurer denies a defense in bad faith applies even if the insurer is ***not*** in bad faith. The fact of settlement establishes liability and the amount of settlement is the presumptive damages, absent fraud or collusion.

4. Presumptive damages are not necessarily covered damages.

5. An insurer is not entitled to litigate factual questions resolved in the liability case by judgment or by arm's length settlement.

6. Settling without MOE's consent did not release MOE unless it could show it was actually prejudiced, which it did not.

7. The insurance policy covered property damage, not breach of contract damages.

8. "Property damage" does not necessarily mean tangible damage to tangible property, but can also include consequential damages.

9. Removing and repairing undamaged siding to repair damaged interior walls is property damage, since the interior walls were not installed by T&G.

10. This case is like *Dewitt Constr. v. Charter Oak.,* 307 F.3d 1127 (9th Cir. 2002).

11. Impaired property is the underlying interior walls, not T&G's siding.

12. All damages reasonably necessary to mitigate impaired property are covered.

13. Although the coverage court may rely on the factual findings in the underlying action, where the issues presented in the latter differ from the issues before the coverage court, the coverage court must determine whether the damages are covered.

14. If the siding must be removed to repair damage to interior walls caused by T&G, there is coverage for the cost of removal and replacement of the siding.

15. Remand is required on the impaired property and work exclusions because the record does not reveal whether the trial court relied solely upon the liability court's global settlement or concluded all damages were for impaired property, not for T&G's work.

COMMENT:

If this opinion makes your eyes cross, join the club.

How could the damaged interior walls be "impaired property" when replacing the insured's siding wouldn't fix them? And if the insured's work wasn't damaged, how could the work exclusion apply?

Why did the court cite *DeWitt*, another awful opinion? Consequential damages aren't "property damage" per se. The policy covers damages "because of" covered property damage, so damages consequential to that property damage are covered.

Since when does collateral estoppel apply to settlements? Now that that appears to be the law for insurance companies, reasonableness hearings have a whole new meaning.

And is *Wear v. Farmers Insurance Co.,* 49 Wn. App. 655, 745 P.2d 526 (1987), where then Judge Alexander properly held that an insurer defending its insured under a reservation of rights is not bound by the results in the underlying action unless the insurer and the insured share the same interests, still good law?

Mutual of Enumclaw Insurance Co. v. T & G Construction, Inc., 165 Wn.2d 255, 199 P.3d 376 (2008)

FOLLOW-UP

Last issue, we reported on the strange case of Morgan Stanley. It was "strange" because the result did not fit my view of how the world should be structured, *i.e.*, it held that statutes of limitation do not apply in arbitration. We notice that on April 1, 2009, the Supreme Court agreed to review this issue.

Broom v. Morgan Stanley DW, Inc., 2008 WL 4053440 (Wn. App. Sept. 2, 2008), *rev. granted* (April 1, 2009).

MORE FOLLOW-UP

Last issue, we reported on Pam Okano's win in a personal injury claim against a landlord. We are pleased to note that the Supreme Court has declined to review the opinion which held:

1. The traditional common law rule is that, absent a repair covenant, a landlord is not liable to a tenant for "injuries caused by apparent defects after exclusive control has passed to the tenant."

2. Generally, a landlord has no duty to protect a tenant from open and obvious dangers.

Neely v. Reid Co., LLC, 2008 WL 2974318 (Wn. App. Aug. 5, 2008), *rev. denied* (2009).

QUICKLY, QUICKLY, QUICKLY

Division I has ruled that an agreement to settle "all claims" does not include a claim for attorney fees because under the relevant statute a claim for attorney fees is not a claim for damages but is a claim for costs. You really have to read this one.

McGuire v. Bates, 147 Wn. App. 751, 198 P.3d 1038 (2008).

In a dispute between two insurers, the federal court in Spokane held that the privilege section of Washington's Mediation Act (RCW § 7.07, *et seq.*) is much narrower than we thought. He ruled that statements made about coverage during mediation of the insured's liability were admissible.

Mutual of Enumclaw v. Cornhusker Cas. Ins. Co., 2008 WL 4330313 (E.D. Wash.).

In a $97 million coverage dispute, the Ninth Circuit set out a standard of review we had not seen before. In affirming the trial court's affirmance of a coverage decision by an arbitration panel, the court said it agreed that the grounds for the arbitrators' award drew their essence from the policy and plausibly interpreted it. Essence! What the hell is the essence of a written contract?

The Upper Deck Co., LLC v. American International Specialty Line Ins. Co., 549 F.3d 1210 (9th Cir. 2008).

The peril of pro se was demonstrated in a recent medical malpractice suit. The pro se plaintiff missed the 90-day notice of intent to sue a health care professional (RCW 7.70.100(1)) and the 60-day notice of intent to sue a public hospital (RCW 4.96.020).

Chen v. Isola, 2008 WL 4838785 (Wn. App. Nov. 10, 2008).

Division II has issued a published opinion which reiterates the new rule in Washington that two years of negotiating between the injured party and the liability carrier will not excuse the liability carrier from hiring counsel and making a court appearance when the policyholder does get sued. The court said the trial court was correct in refusing to vacate the $900,000 default judgment against the policyholder. The message is clear: When your policyholder is sued, hire a lawyer to represent it.

Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392, 196 P.3d 711 (2008).

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Pam Okano's Coverage Column is available at www.wdtl.org/ (see Coverage Uncovered).

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