WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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WHO IS THE CLIENT?

FACTS:

When it got involved in a payment dispute arising out of a construction project, the bank that had loaned the money for the project tendered its defense to its title insurer. The insurer accepted the tender and hired the WKDT law firm to defend the bank. (It was the insurer which had "negligently failed to inspect the property before the loan went through.")

The law firm quickly figured out that this was a loser and sought a swift settlement. The insurer did not agree and fired the law firm. The insurer hired a new firm which lost.

The insurer then sued the WKDT law firm for malpractice based on its failure to raise a certain defense. The firm moved for dismissal, arguing that its client was the insured bank, not the insurance company, and it therefore owed no duty to the insurer that would permit the insurer to sue the firm for malpractice.

The trial court did not agree with the firm. However, the Supreme Court granted direct review and held that the firm owed no duty to the insurance company; that the firm's "only client" was the bank. The insurance company could not sue the defense firm for malpractice.

The court drew attention to RPC 5.4(c) which prohibits an insurer from directing or regulating the professional judgment of defense counsel:

> RPC 5.4(c) states, "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal sevices."

Stewart Title Guaranty Co. v. Sterling Savings Bank, 2013 Wash. LEXIS 769 (Wash. Oct. 3, 2013).

RUNNING THE RACE

FACTS:

"Spokane to Sandpoint" is a 185-mile relay race between Spokane, Washington, to Sandpoint, Idaho. It takes place over two days. Robin

Johnson, a lawyer runner, decided to enter the competition. She registered online.

When registering online, the runners electronically acknowledged a general release of liability and waiver. They further waived and released STS from any and all claims or liability arising "out of my participation in this event." Ms. Johnson agreed she read and understood the agreement.

STS provided a race handbook to Ms. Johnson explaining the course. It also posted signs along the race course informing drivers that runners were running on race route roads.

At a point where the race course crossed Highway 2, Ms. Johnson was hit by Ms. Young, and sustained severe injuries.

Ms. Johnson sued STS and Ms. Young. She settled with Ms. Young. In her deposition, Ms. Johnson acknowledged that she understood the release.

When questioned about the online registration process, counsel asked:

> Q. Do you recall whether you clicked yes to the waiver language at all on the registration process?
>
> A. [Ms. Johnson] On the registration process I assume I must have clicked because all that information is there and I did it. Nobody else did it for me.

STS moved for summary judgment, arguing the preinjury waiver and release agreed to by Ms. Johnson was conspicuous and not against public policy and Ms. Johnson could not prove gross negligence. The trial judge agreed and dismissed the case. Ms. Johnson appealed, contending that the release was unenforceable because it was ambiguous, offended public policy, and because STS was grossly negligent. The Court of Appeals disagreed and affirmed dismissal of the case.

HOLDINGS:

1. Parties may, subject to certain exceptions, expressly agree in advance that one party is under no obligation of care to the other, and shall not be held liable for ordinary negligence.

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

3. The general rule in Washington is that a waiver provision is enforceable unless (1) it violates public policy, (2) the negligent act falls greatly below the legal standard for protection of others, or (3) it is inconspicuous.

4. In Washington, contracts releasing liability for negligence are valid unless a public interest is involved. Washington courts have not favored finding a public interest in adult recreational activities.

5. A preinjury waiver and release will not exculpate a defendant from liability for damages resulting from gross negligence.

6. The Johnsons failed to show STS committed gross negligence by failing to exercise slight care.

7. The release executed by Ms. Johnson online clearly sets apart the release language in either italicized letters or in all capital letters or both. The document was conspicuous with a header stating, "WAIVER AND RELEASE OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT."

COMMENT:

Way back in 1974, we handled a case where a scuba diver went down but never came up. (*Hewitt v. Miller*, 11 Wn. App. 72 (1974).) Before he went down, he had signed a written preinjury waiver and release. At the time the law was not clear. However, the *Hewitt* court recognized that "adult recreational activities" were not an area where the court should intrude save in the most extreme situation.

This published opinion brings the law up to date by applying the common law rules to a waiver/release executed online. As far as we can tell, this is the first case to do so.

Johnson v. Spokane to Sandpoint, LLC, 175 Wn. App. 1054 (2013), *ordered published,* 2013 Wash. App. LEXIS 2129 (Wash. App., Sept. 10, 2013).

FALLING BOXES

FACTS:

Shirley was a long-haul truck driver. She delivered her load to Lowe's in Longview. While watching a Lowe's employee unload the load, she was injured by falling boxes.

Shirley sued the employee and Lowe's. The Cowlitz County Superior Court concluded that "implied primary assumption of risk" applied to bar her claim, and dismissed the case.

Shirley appealed. The Court of Appeals reversed, concluding that there was no evidence that Shirley consented to relieve Lowe's of the duty of care owed her.

HOLDINGS:

1. There are four varieties of assumption of risk in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable.

2. Express and implied primary assumption of risk apply when the plaintiff has consented to relieve the defendant of a duty regarding specific known risks.

3. Express assumption of risk exists if the plaintiff states that she consents to relieve the defendant of any duty owed.

4. Implied primary assumption of risk is shown by the plaintiff engaging in conduct that implies her consent. The defendant must establish that "'the plaintiff (1) had [knowledge] (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.'"

5. Knowledge and voluntariness are questions of fact for the jury unless reasonable minds could not differ. Implied primary assumption of risk is a complete bar to a plaintiff's recovery.

6. By contrast, implied unreasonable and reasonable assumption of risk are treated as forms of contributory negligence. They apportion a degree of fault to the plaintiff and reduce her damages. They arise where the plaintiff knows about a risk created by the defendant's negligence but chooses to voluntarily encounter it.

7. "The difficulty is to determine in which case the plaintiff's conduct is merely negligent and is covered by comparative fault rules and in which case it manifests a consent to accept the entire risk and is a complete bar to the claim."

8. Shirley did not assume the risk of Lowe's negligence. Shirley may have been contributorily negligent when she stepped closer to the trailer, but this is a question of fact for the jury and should not bar her negligence claim entirely.

COMMENT:

WOW! A veritable three dimensional road map of analysis for any case containing a question of assumption of risk. Dare we call it a "GPS"? Well that might be a bit over the top.

Now how many of you picked up the literary allusion in the title to this article? Coincidently, the accident there occurred abut 100 miles north of the Longview accident. (Hint: Maltese Falcon.)

The only criticism of this opinion is that it was not published. Oh, of course, you could go through it and cherry pick all the key statements with case citations. That is a bit clumsy. Moreover, the fellow in Division Two who put in all the time and effort crafting the opinion gets no credit.

Barrett v. Lowe's Home Center, Inc., 2013 Wash. App. LEXIS 1885 (Wash. App., Aug. 13, 2013).

EXPENSIVE ROOT CANAL

Most of us rate root canal right up there with digging out wisdom teeth as one of our all-time unfavorite events. Recently, here in Seattle, a group of patients fought back and sued the dentist. After a six-day private trial, the court awarded the plaintiffs $35,000,000 for the dentist's negligence in performing multiple, medically unnecessary root canal procedures.

Cox v. Duyzend, King County Superior Court No. 11-2-31164-3 SEA

REED MCCLURE ANNOUNCEMENT

We are pleased to welcome our new Associate, Suzanna Shaub, to the firm.

A LITTLE SLIP AND FALL

FACTS:

Tavai was shopping at Walmart. About 15 feet from a checkout counter, she slipped and fell. She said she saw water where she fell. She filled out an accident report.

A store manager investigated where Tavai fell. He was not able to determine where the water came from. The surveillance video did not show where the accident occurred.

Tavai sued Walmart for her injuries. Walmart moved for dismissal, arguing that it did not have notice of the wet floor and that the "self-service" exception to the notice requirement did not apply. The trial court agreed and dismissed Tavai's case.

The Court of Appeals agreed because Tavai failed to provide evidence that Walmart had notice of the wet floor or a condition resulting in a continuous danger of a wet floor.

HOLDINGS:

1. In a slip-and-fall premises liability case, the plaintiff ordinarily must prove that the defendant had notice of the dangerous condition that caused the fall.

2. Under the limited "self-service" exception to this requirement, notice need not be shown if the dangerous condition is continuous or foreseeably inherent in the nature of the defendant's business or mode of operation.

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

4. In general, the duty to exercise reasonable care to protect invitees from harm is triggered upon the invitee's showing that the premises owner had actual or constructive notice of the hazardous condition.

5. Such "notice need not be shown, however, when 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." This is the "self-service" or *Pimentel* exception.

6. The evidence does not show that Tavai was in a "self-service" area where spills were reasonably foreseeable due to the mode of operation of the store.

COMMENT:

While a slip-and-fall case is not unique, the court chose to publish the opinion. It pointed out that the *Pimentel* exception was not a per se rule and was in fact of a limited reach. The opinion contains a discussion of several Washington cases that involved the *Pimentel* exception.

The opinion closed with a discussion of "spoliation." Tavai argued that Walmart's failure to preserve any video footage was spoliation, i.e., the intentional destruction of evidence. Aside from the disasterous opinion of *Henderson v. Tyrrell*, 80 Wn. App. 592 (1996), there has been very little written in Washington on the subject. After a lengthy review and analysis, the court said that it declined to require a store to retain all video any time someone slips and falls and files an accident report.

Tavai v. Walmart Stores, Inc., 176 Wn. App. 122, 307 P.3d 811 (2013).

ANOTHER DOG BITE CASE, AND ANOTHER, AND ANOTHER

FACTS:

Common law liability for dog bites flows only to the owner, harborer, or keeper of a dog. Margaret was attacked by a pit bull named Jersey.

Jersey had been left loose in an apartment by a clean-up man who owned the dog. He had left to get more cleaning supplies. She had come to check on the condition of the apartment.

She sued Jersey's owners. But they had no money and no insurance. So she sued Randall, the tenant who had hired the clean-up man.

Randall moved for dismissal, arguing that only "owners, keepers, or harborers of a dog" could be liable for a dog bite. The judge agreed and dismissed the case. Margaret appealed.

The Court of Appeals noted that Randall was not the owner, harborer, or keeper of the pit bull, Jersey, and then affirmed the dismissal of Margaret's claim.

HOLDINGS:

1. Under longstanding Washington common law, only the owner, keeper, or harborer of a dog is liable for injuries caused by the dog.

2. Under Washington's strict liability dog bite statute, RCW 16.08.040, only owners are liable for damages.

3. "'Harboring' means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or harborer thereof, as affecting liability for injuries caused by it."

4. "Common law liability for injuries caused by vicious or dangerous dogs is based upon a form of strict liability. . . . Any injury caused by such an animal subjects the owner to prima facie liability without proof of negligence."

COMMENT:

Did not know that there was a Washington case involving a mauling by a Bengal tiger (*Frobig v. Gordon*, 124 Wn.2d 732 (1994)). The big cat escaped during the filming of a commercial and seriously wounded Ms. Frobig. The court held that the owner of the tiger was liable but not the landlord.

Personal note: Very pleased to note that Randall was successfully represented on appeal by Reed McClure attorney Pam Okano.

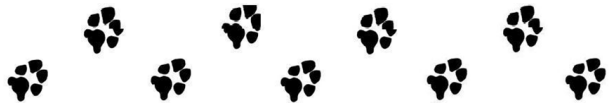
Briscoe v. McWilliams, 2013 Wash. App. LEXIS 2030 (Wash. App., Aug. 26, 2013).

And now we come to the case with the pit bull named Betty. Betty came into Sue's house through an open door. Betty attacked Sue in her bed. Sue fought back with a gun, which misfired, and her walking stick. Sue sustained 20-30 dog bites and multiple surgeries. Betty was put to sleep.

At trial, the judge gave an instruction which allowed the jury to consider whether Sue had been negligent in leaving the door open so that Betty could come in and attack Sue in her bed. The jury allocated 1% of the fault to Sue; 42% to the County, which had failed to act notwithstanding multiple complaints about Betty; and 57% to Betty's owners.

And the case went to the Court of Appeals where you would expect the court to take one quick look at this miscarriage and promptly toss out the contributory fault. But, oh no. All three judges felt it was fine to say that Sue had contributed to her being mauled in her bedroom by a pit bull. One judge did say the County should not be liable for doing nothing.

Gorman v. Pierce County, 176 Wn. App. 63, 307 P.3d 795 (2013).



And now let us turn to the case of *Hendrickson v. Tender Care Animal Hospital*. In this one, Julie brought her dog, Bear, to Tender Care to have him neutered. Bear did not respond well to the procedure and, notwithstanding Julie's cardiopulmonary resuscitation, Bear expired from gastric dilatation volvulus.

Julie sued Tender Care and the vets for negligent misrepresentation, lack of informed consent, professional negligence, reckless breach of bailment contract, and emotional damages arising out of Bear's treatment at Tender Care. The trial judge dismissed them all on summary judgment.

Then on appeal the case took a bizarre turn. First, the court affirmed the dismissal of the reckless breach of bailment contract claim and the claim for emotion damages "because no Washington court has held that such causes of action exist." Such a change must come from the legislature, not the court.

Then the court turned to the doctrine formerly known as the "economic loss rule" but now known as the "independent duty doctrine." (Your editor does

humbly acknowledge that he did not particularly understand the former, and he sure as hell does not understand the latter. (*Cf* Romeo and Juliet, Act. II, Scene 2: "A rose by any other name would smell as sweet.")

The Court of Appeals then looked at the "Independent Tort Doctrine" and ruled that the trial court erred in dismissing the tort claims (i.e., negligent misrepresentation, lack of informed consent, and veterinary negligence). It did so because the Supreme Court "has specifically prohibited lower courts from applying the [independent tort] doctrine unless "the supreme court has approved of the doctrine's application "to a particular tort."

And to demonstrate that it was not making this up, it quoted from a Supreme Court opinion.

> Indeed, in *Eastwood* we directed lower courts not to apply the doctrine to tort remedies "unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise."

And then notwithstanding that lower courts had been prohibited from developing answers to independent duty doctrine, it sent the case back to the trial judge for him to reconsider his earlier answer.

Hendrickson v. Tender Care Animal Hospital, 2013 Wash. App. LEXIS 2193 (Wash. App., Sept. 17, 2013).

A GUN CASE

FACTS:

Kevin took daddy's gun out of the cabinet. He fondled it. He put a bullet into it. He aimed it at himself. He pulled the trigger. Nothing.

He aimed it at his buddy Aidan. He pulled the trigger. BANG!!

The bullet killed Aidan. It went on to hit Chase in the spine.

Kevin's parents had a policy with USAA that provided a $300,000 limit for "Each Occurrence" of "Personal Liability."

So the question is how much money is at play? Is it $300,000? Is it $900,000? Is it something else? How many occurrences? Oh yes, this case arose in Alaska.

The trial judge said $900,00 because there had been a single occurrence and Kevin and his parents were each entitled to a separate per-occurrence policy limit (3 x $300,000 = $900,000).

USAA did not think much of that so it appealed, arguing the policy limit for this accident was $300,000 regardless of the number of insureds.

The Alaska Supreme Court spent 16 pages working its way through the policy provisions and case law from around the country and Alaska. It stated:

> We conclude that USAA's position is most in accord with the express language of the policy, the reasonable expectations of an insured, and case law, and we therefore reverse the superior court's decision.

A few other useful statements:

1. In law, generally, "personal liability" simply means "[l]iability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets."

2. "The time of the occurrence of an accident" is not the time of the negligent act, but the time the plaintiff was actually damaged.

3. There was a single accident in this case – the unforeseen and unexpected firing of the single gunshot that caused all of the plaintiffs' injuries – and therefore a single occurrence for purposes of liability coverage under the USAA policy.

COMMENT:

Having spent 30 plus years writing coverage opinions for insurance companies doing business in Alaska, I was moderately surprised by this result. Back in those bad old days, the first rule of interpretation was: What will return the most money to Alaska. We had one case where the court allowed the insured the benefit of a recovery that was larger than the injured parties' recovery.

Perhaps this opinion by a newly-annointed justice and past editor of the Alaska Bar Rag marks a new era.

United States Auto. Ass'n v. Neary, 307 P.3d 907 (2013).

ANOTHER GUN CASE

FACTS:

A little closer to home, i.e., Tacoma, we have the suit where the estate of Sam sued the school district after Doug (a student) shot and killed Sam in the hallway of a high school.

Doug was diagnosed with paranoid schizophrenia. He also heard voices. And he was unsuccessful in a suicide attempt.

The school district moved for summary judgment, arguing that the school had no reason to believe that Doug might be dangerous. The trial court agreed and dismissed the case.

Sam's estate appealed, arguing that foreseeability was an issue for the jury, not for the court. The Court of Appeals affirmed, saying that Doug's behavior and medical records did not indicate that he was at risk for harming other students.

HOLDINGS:

1. Foreseeability is normally a jury question, but it may be decided as a matter of law where reasonable minds cannot differ.

2. The Estate has failed to show that the harm caused by Doug was foreseeable.

COMMENT:

Interesting opinion in that the author draws out the fact that the school district is staffed by educators, not medical professionals, and that the district is obligated by federal and state law to provide each student an education with his peers.

Kok v. Tacoma School District, 2013 Wash. App. LEXIS 2512 (Wash. App., Oct. 22, 2013).

MANDATORY ATTORNEY FEES

FACTS:

There are two rules for determining whether there should be an award of attorney fees following mandatory arbitration and trial de novo.

1. A party who appeals the award in a mandatory arbitration and fails to improve his position on trial de novo must pay the attorney fees incurred by the nonappealing party.

2. An offer of compromise by the nonappealing party will replace the amount of the arbitrator' award for the purpose of determining whether the appealing party has improved his position.

So far so good. Let us add some facts. Sunny and Don are involved in an auto accident. Sunny sues Don for bodily injury while Sunny's wife, Suman, sues Don for loss of consortium. The case goes to mandatory arbitration. The arbitrator awards Sunny $28,136; for Suman's loss of consortium, he awards $3,000.

Don requests trial de novo. Sunny and Suman make an offer of compromise for $32,000 for "full and final settlement of all claims." Don rejects the offer and they all go to trial de novo in front of a jury.

The jury comes back at $30,000 for Sunny, and a big zero for Suman's loss of consortium claim.

So what to do about the attorney fee award? The jury's award to Sunny ($30,000) was greater than the arbitrator's award to Sunny ($28,136). However, the jury's total award for both claims ($30,000) was less than what Sunny and Suman offered to accept to compromise both claims ($32,000).

Sunny asked for fees and costs in the amount of $85,727 (lodestar of $42,636 with a multiplier of 2). The trial judge knocked it down to a total award of $49,947.40, including a multiplier of 1.5.

Don appealed. The Court of Appeals reversed the attorney fee award because it was Don who had improved his position, not Sunny and Suman.

> Here, the appealing party was Don. If asked whether his position improved after trial de novo, he would certainly answer "yes. If Don had accepted the offer of compromise, he would have had to pay the Gautams $32,000. By appealing and going through a trial de novo, he reduced his liability to $30,000. Because Don improved his position relative to the offer of compromise, there was no basis for an award of attorney fees and costs under RCW 7.06.060.

Still amazed that to recover a $30,000 jury verdict, a party will invest over $40,000 in attorney fees.

What happens when Sunny gets his $30,000 and gives 1/3 to his lawyer ($10,000), does Sunny still owe the lawyer $30,000?

Gautam v. Hicks, 2013 Wash. App. LEXIS 2402 (Wash. App., Oct. 7, 2013).

FUTURE CASES

Looking at the Supreme Court docket, we see a couple of cases that directly involve insurance.

Insurance – Duty to Defend – Determination – Delay Pending Discovery.

Whether the trial court erred in delaying ruling on an insurer's duty to defend its insured from third-party lawsuits pending further discovery of facts relevant to the issue of coverage.

No. 88673-3, *Expedia, Inc., et al.* (petitioners) *v. Steadfast Ins. Co., et al.* (respondents).

(Not yet set for argument.).

Insurance – Bad Faith – Denial of Coverage – Treble Damages – Actual Damages – What Constitutes – Pretrial Arbitration Award

Whether an amount awarded in arbitration to a plaintiff before he instituted a lawsuit under the Insurance Fair Conduct Act constitutes "actual damages" under the act for purposes of trebling damages pursuant to RCW 48.30.015 (2).

No. 88706-3, *Morella* (plaintiff) *v. Safeco Ins. Co. of Illinois* (defendant). (10/22/13 oral argument)

LOOKING BACK, LOOKING BACK

Back in the Summer 2012 issue, I favorably reviewed a case with the headline "It's The Law of The Case." One point we did criticize was the court's adopting the federal rubric concerning the requirement of a CR 50(b) motion in order to have the CR 50(a) motion reviewed. We felt it was not fair to introduce a new rule that was at variance with Washington practice. We are pleased to note that on October 17, 2013, the Supreme Court issued an

opinion which noted that the Federal rule "never took root in Washington." And that the court could "find no reason to depart from long-followed state rules."

Washburn v. City of Federal Way, 2013 Wash. LEXIS 856 (Wash., Oct. 17, 2013).

In the Spring 2013 issue, we reviewed a suit between two insurers. After the opinion came out, one of the insurers noticed that it had failed to include some pertinent policy language in the trial court record so it filed a motion to admit additional evidence. To my surprise, the court granted the motion and withdrew its opinion. However, in August, the court published a substitute opinion which still held that an insurer without an assignment from its insured cannot pursue an IFCA claim or a CPA claim.

Trinity Universal Inc. Co. v. Ohio Cas. Ins. Co., 176 Wn. App. 185, ___P.3d ___ (2013).

UNPUBLISHED OPINIONS

The idea of a Washington intermediate appellate court was raised as far back as 1929, when the state's Judicial Council suggested the establishment of such a court. However, nothing happened until the mid-1960s, when work began on a Court of Appeals.

A Constitutional Amendment was passed on November 5, 1968, authorizing the legislature to create a Court of Appeals. A Court of Appeals, with three divisions was established on May 12, 1969.

One of the unique aspects of the Court of Appeals was that it could issue an opinion, file it in the court file, and mail it to the parties, but not "publish" it. The opinion was issued but it was "unpublished."

At first, this was difficult to explain to clients who, not having gone to law school, had trouble understanding how an opinion could be both issued and unpublished at the same time. Reminds one of Schrodinger's cat or a zombie opinion, i.e., an undead opinion.

To remedy the situation, the court issued/published a rule which provided that a party may not cite as an authority an unpublished opinion of the Court of Appeals (GR 14.1(a).) It also said that "unpublished opinions" would not

be printed in the official reports. In contrast, all Supreme Court opinions are published.

The only way you could find out what the court had said in an unpublished opinion was to go to the clerk's office and read the spindle opinions. I did that. And when I found a useful unpublished opinion, I bought a copy and utilized the analysis and citations. But I had to present it as my analysis since the rule prohibited me from citing the true author.

That was then. And now here we are 40 years later and this is what the court recently said:

> CITATION TO UNPUBLISHED OPINIONS
>
> As a preliminary matter, we address Colley's objection to the hospital's citation to two unpublished opinions of this court. The hospital attached the opinions and discussed them in the brief of respondent. Colley's criticism of this practice is well-founded. Citing an unpublished opinion is a violation of Washington court rules. "A party may not cite as an authority an unpublished opinion of the Court of Appeals." GR 14.1(a).
>
> There are cogent arguments for permitting citation to unpublished opinions and many courts do. See Jessie Allen, *The Right to Cite: Why Fair and Accountable Courts Should Abandon No-Citation Rules* (Brennan Ctr. For Justice at N.Y. Univ. Sch. Of Law, Judicial Independence Ser., 2005), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_35429.pdf
>
> But so long as Washington court rules forbid citation of this court's unpublished opinions, we will not look kindly upon the hospital's facile explanation that the opinions were cited as "illustrative" and "persuasive," not as "authority." See Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P.3d 1273 (2005). That rationale swallows the rule. If one party cites an unpublished opinion, then in fairness the other party must be allowed to explain why the opinion is neither illustrative nor persuasive, creating a controversy that the appellate court will find difficult to resolve without citing the unpublished opinion.

> We recently explained, "If a party finds a helpful analysis in an unpublished opinion, the proper way to present it is to cite the authorities relied on in the unpublished opinion and show how they apply." State v. Nysta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012), review denied, 177 Wn.2d 1008 (2013). This suggestion, while admittedly a workaround, enables a party to confront the Court of Appeals with its previous decisions without violating GR 14.1(a).

And then in a true action of irony, the court put this advice in an unpublished opinion.

Colley v. Peacehealth, 2013 Wash. App. LEXIS 2081 (Wash. App., Sept. 3, 2013).

2014 BEST LAW FIRMS, BEST LAWYERS

Reed McClure has been designated one of 2014's "Best Law Firms" for appellate law by U.S. News & World Report and Best Lawyers.

Pam Okano has also been named to the 2014 Best Lawyers in America list for Insurance Coverage.

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 45 years with Reed McClure, Mr. Hickman limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter.

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

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

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com . . . and

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

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