WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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2015 BEST LAWYERS IN SEATTLE

Congratulations to Pam Okano, Jack Rankin, and Bill Hickman. Each made the list of 2015 Best Lawyers in Seattle. Pam and Jack were named for Insurance Law. Bill was named for Appellate Practice.

INCONSISTENT ANSWERS PUBLISHED

It is every trial judge and trial attorney's worst nightmare: After spending a couple of weeks trying a case to a jury, the jury gets the case, goes off to deliberate, and comes back with inconsistent, conflicting answers to the questions in the instructions. That was the situation presented in a recent case. It was already complex enough since it involved a home destroyed by fire, a "he said/she said" conflict as to whether the insured made a misrepresentation when applying for the policy, and another conflict as to whether the insured made a misrepresentation during the adjustment proceeding.

The case was submitted to the jury in a six-page verdict form which contained 17 questions. After a day of deliberation, the jury came back. First, it found that there was a covered loss with damages of about $282,000. In the next question, it found that the insured did not make a material misrepresentation in applying for the policy. In the third question, it found that the insured did make a material misrepresentation during the claim investigation. The form told the jury that if it answered question 3 affirmatively, it should STOP, sign the verdict and go back to the court room.

But it did not stop. It plowed its way into the next set of questions. Here it again found a covered loss and was told to stop, but it did not. Instead, it went to section three where it proceeded to allocate fault. Here, despite having earlier found that the insured made a material misrepresentation during the EUO, the jury allocated 90% of the fault to the insurance company.

Both sides claimed victory.

The trial judge tried to reconcile the answers but eventually gave up and ordered a new trial. The insurance company appealed. The Court of Appeals affirmed the new trial.

HOLDINGS:

1. A court must grant a new trial when verdict interrogatories render the jury's resolution of the ultimate issue impossible to determine.

2. Once a jury renders a verdict, the trial court must declare its legal effect.

3. A court liberally construes a verdict so as to discern and implement the jury's intent, if consistent with the law.

4. If special verdict answers conflict with each other, a court must attempt to harmonize them; where the answers are reconcilable, the trial court must enter judgment accordingly and where the answers are irreconcilable, the trial court must order further deliberations or a new trial.

5. A verdict is irreconcilable when the verdict contains contradictory answers to interrogatories making the jury's resolution of the ultimate issue impossible to determine.

6. In making this determination, this court reads the verdict as a whole, including instructions and may not substitute its judgment for the jury's.

COMMENT:

Opinion runs almost 30 pages trying to unscramble the mess made by the jury's failure to carefully read and follow the instructions. Opinion also contains a discussion of the appealability of an order granting a new trial.

Espinoza v. American Commercial Ins. Co., 2014 Wash. App. LEXIS 2569 (Oct. 23, 2014).

SIDEWALK SLIP-FALL

FACTS:

Josephine was walking in the evening on an Everett sidewalk. She failed to see a 3″ by 2″ hole in the sidewalk. She tripped, fell, and injured her ankle.

PROCEDURE:

She sued the City contending the City was negligent in failing to maintain the sidewalk in a safe condition. The City moved for summary judgment contending that it had no notice that the sidewalk was unsafe.

Josephine responded that the City at least had constructive notice. She submitted an unsworn seven-page report from Joellen ("a human factors engineering consultant") who opined that the "hazardous condition" was not sudden, that it took many years to form and that, therefore, the City had the opportunity to identify the hazard.

The City moved to strike Joellen's report because (1) it was unsworn; (2) it was hearsay; (3) she was not qualified to provide an opinion; and (4) the conclusions were speculative.

The trial court dismissed Josephine's case. The Court of Appeals affirmed.

HOLDINGS:

1. In a negligence action, a plaintiff must prove (a) the existence of a duty, (b) breach of that duty, (c) resulting injury, and (d) proximate cause.

2. Muncipalities have a duty to exercise reasonable care to keep their sidewalks in a condition that is reasonably safe for ordinary travel.

3. Before a municipality may be liable for an unsafe condition it did not create, it must have notice of the condition and a reasonable opportunity to correct it.

4. Josephine may not rely on the report to create an issue of fact because the report was not in the form of an affidavit or declaration as required by CR 56(e).

5. The evidence is insufficient to establish a genuine issue of material fact that the City had notice of the sidewalk's condition.

COMMENT:

Good to see the court require that evidence set forth in opposition to a motion for summary judgment be specific and detailed, and not speculative, and be made under penalty of perjury.

Johnson v. Snohomish County, 2014 Wash. App. LEXIS 2646 (Nov. 10, 2014).

A HORSE IS AN EQUINE

FACTS:

Sylvia wished to find a horse for her 8-year-old daughter, Amanda, to ride. She got in touch with Garrett and arranged for a test ride of Taz where Garrett boarded the horse. While Taz was carrying Amanda, she fell off and injured her leg.

Sylvia sued Glover (who provided boarding for the horse) for negligence. Glover denied negligence and affirmatively raised the immunity of the "equine activities statute" (RCW 4.24.530). The trial judge denied Glover's motion for summary judgment. Glover appealed. The Court of Appeals reversed stating that Glover was an "equine activity sponsor" and was immune from liability.

HOLDINGS:

1. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

2. The court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. The purpose of summary judgment under CR 56(c) is to avoid a useless trial.

3. Under the plain language of the statute, an "equine activity sponsor" includes an individual who provides the facilities for an equine activity. Glover provided facilities to board Taz.

4. The plain purpose of the equine activities statute is to limit liability.

5. The statute provides that an equine activity sponsor or an equine professional shall not be liable for the injury to or the death of a participant engaged in an equine activity. RCW 4.24.540(1).

6. By the plain language of the statute, Glover is an equine activity sponsor, immune from liability under the equine activities statute.

COMMENT:

An immunity statute for horses? Did not know it was there. The court mentioned that the "plain purpose" of the statute was to limit liability. Oft-times, such a plain purpose causes a Washington court to give the statute as narrow an interpretation as reasonably possible.

Very pleased to point out that Glover was represented on appeal by Reed McClure appellate attorney Pam Okano.

Weber v. Glover, 2014 Wash. App. LEXIS 2425 (Oct. 6, 2014).

SLIP & FALL AT THE "Y"

FACTS:

Danny joined the "Y". He filled out the front side of the application (Personal & Credit Card information). The backside had a release and waiver of liability

language. He did not sign that. He came back the next day. His card would not let him into the locker room. He signed the release. He got in.

Several months later, a swimmer got lost, could not find the locker room, and dripped water down the hallway outside the pool office door. A supervisor saw the swimmer, sent him to the locker room, and went to the office to get towels to clean up the water. He saw Danny slip and fall on the wet floor. Danny sustained a dislocated kneecap.

PROCEDURE:

Danny sued the "Y" for negligence. The "Y" raised the release and moved for summary judgment. The trial court said the release was valid and enforceable, and that Danny did not introduce evidence of gross negligence. The Court of Appeals agreed.

HOLDINGS:

1. A release is a contract in which one party agrees to abandon or relinquish a claim, obligation, or cause of action against another party.

2. Under Washington law an exculpatory contract clause is valid unless it (a) violates public policy, (b) the defendant's breach constitutes gross negligence, or (c) the clause is so inconspicuous that a reasonable person could find it was signed unwittingly.

3. Washington courts have not favored finding a public interest in adult recreational activities.

4. There is no issue of fact as to conspicuousness.

5. The release and waiver provision is valid and enforceable.

6. Gross negligence has been defined as "negligence substantially and appreciably greater than ordinary negligence," i.e., "care substantially or appreciably less than the quantum of care inhering in ordinary negligence." Gross negligence is "the failure to exercise slight care."

7. No reasonable jury could have found the YMCA grossly negligent.

COMMENT:

This excellent opinion covers all aspects of current Washington law on releases. It shows that the court's view on the topic has remained consistent for over 40 years. (*See Hewitt v. Miller*, 11 Wn. App. 72 (1974).) Too bad it was not published. But you can pull it up and print it and get the benefit of all the legal research done by the judge's law clerk.

DeAsis v. Young Men's Christian Assoc., 2014 Wash. App. LEXIS 2201 (Sept. 4,; 2014).

A REAL SWINGER: THE GRANDE REVIEW

A longtime reader and fan (yes, the two are not mutually exclusive) sent us a 47-page law review article containing 410 footnotes and citations to three times that many cases. The subject of the article was accidental death coverage for death arising from autoerotic activity. In the 38 years we have been publishing our Law Letter, we have, on several occasions, raised this question, usually under the headline "A Real Swinger" or some obscure reference to the "Serbonian Bog." Perhaps the references were too obscure as, notwithstanding having 410 footnotes to work with, the author overlooked our contributions to legal literature on this topic.

But let us not quibble about who said what about whom when there is no denying that the author, Mr. Gary Schum, an employee of Combined Insurance Company of America, is now the expert on coverage for autoerotic asphyxiation. (For those of you who may have forgotten, "Autoerotic asphyxiation is usually achieved by a person exerting pressure on the arteries of his neck to constrict oxygen flow to the brain while engaging in sexual stimulation.")

And having done all the work so as to be entitled to be considered "The Expert", Gary was now in the position to speak with authority from the mountaintop The result of his research and analysis would be a boon to any judge (or any judge's law clerk) presented with an autoerotic asphyxiation problem.

Gary concluded that the conduct was "simply too dangerous" to provide coverage under an accidental death policy.

Schuman, *Fatal Attraction: Autoeroticism and Accidental Death Insurance Coverage*. Tort Trial & Insurance Practice Law Journal, Winter 2014 (49:2).

"EXPERT BIOMECHANICAL TESTIMONY"

Doctor Tencer has a doctorate in mechanical engineering and was a professor in the biomechanical engineering department at the UW for 23 years. He does not have an MD. For many years, he has been offered as an expert witness (usually by the defense) in auto cases where there was a question about the forces involved in low-speed impacts. The results were mixed.

In some cases, the Court of Appeals affirmed the admission of Tencer's testimony. In other cases, it affirmed the exclusion of Dr. Tencer's testimony.

Eventually, the question of the admissibility of Dr. Tencer's expert testimony landed in the Supreme Court. In a 5-4 decision, the majority upheld the trial court's admission of the testimony. The four justices who concurred in the result said they wrote "to caution" that the decision was "not an endorsement of Tencer or the use of biomechanical engineers" in soft tissue auto accident cases. The author pointed out that she was "dubious whether an expert can testify about the forces involved." However, she conceded that the trial court judge was in a better position to make the decision of whether ER 702-705 allowed the admission of Tencer's testimony.

Johnston-Forbes v. Matsunaga, 181 Wn. 2d 346, 333 P.3d 388 (2014).

STEPHANIE J. CHRISTENSEN

PRACTICE

Ms. Christensen's practice focuses on insurance defense litigation, including personal injury, motor vehicle accidents, and premises liability.

EDUCATION

Seattle University School of Law , J.D., 2011

- Global Justice Advocacy Program in Johannesburg, South Africa, 2010

University of Washington, B.A., History, 2008

- Comparative History of Ideas Program in Rome, Italy, 2007

BACKGROUND

Prior to joining Reed McClure in the fall of 2014, Ms. Christensen was an associate at a civil litigation firm in Bellevue. Ms. Christensen is admitted to practice in the State of Washington and is a member of Washington Defense Trial Lawyers and the Washington State Bar Association.

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 46 years with Reed McClure, Mr. Hickman limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter.

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

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

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).

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

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