WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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WATCH FOR THE STAIR

FACTS:

Carol was standing looking at merchandise displayed on the boardwalk outside a store. The boardwalk ran the length of the front of the store. Two steps, leading down to the street, ran along the length of the boardwalk.

Carol fell down the stairs. She sued the retailer and the property owner. The trial court dismissed her claim on summary judgment. The Court of Appeals affirmed.

HOLDINGS:

1. The party opposing summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value. The nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

2. In order to maintain an action for negligence, a plaintiff must show (a) that the defendant owed a duty of care to the plaintiff; (b) the defendant breached that duty; (c) injury to the plaintiff resulted; and (d) the defendant's breach was the proximate cause of the injury.

3. A person in control of property abutting a public sidewalk is not an insurer of pedestrian safety. However, when that person uses a sidewalk for his own special purposes, he has a corresponding duty to maintain the walk in a reasonably safe condition for its usual and customary pedestrian usage.

4. Any potential risk to pedestrians posed by the merchandise placed near the stairs was obvious. Where an alleged dangerous condition is both obvious and known to a plaintiff, the defendants owe no duty to warn of this condition.

COMMENT:

The opinion shows that while Carol put in a lot of material in response to the motion, all of it was wide of the mark. What Carol needed was evidence that the storeowner's use of the sidewalk created a situation which caused her fall.

Seiber v. Poulsbo Marine Center, 136 Wn. App. 731, 150 P.3d 633 (2007).

TERRY J. PRICE

PRACTICE

Mr. Price's practice is focused on appeals, premises liability and insurance defense litigation.

EDUCATION

University of Washington School of Law, J.D., 2001

Smith College School for Social Work, Northampton, MA, 1991, Major: Clinical Social Work

University of Pennsylvania, Philadelphia, PA, B.A., 1983,
Major: History

CLERKSHIP

Law clerk to the Honorable Christine Quinn-Brintnall, Washington Court of Appeals, Division II, Tacoma, Washington, 2001-2002.

CLASSES/SEMINARS TAUGHT

Mr. Price is a part-time lecturer at the University of Washington School of Law. He has taught *Mental Health and Law* and *Legal Issues at the Beginning of Life*.

REPRESENTATIVE APPELLATE CASES

Vanderpol v. Schotzko and Van, 136 Wn. App. 504, 150 P.3d 120 (2007) (trial court erred when it applied service by messenger rules to dismiss defendant's request for trial de novo after arbitration which was served by mail).

Tribble v. Allstate, 134 Wn. App. 163, 139 P.3d 373 (2006) (reversing trial court's entry of judgment in amount of verdict instead of in amount of underinsured motorist policy limits).

NO MORE SECRETS

FACTS:

There is a provision in the Washington State Constitution which provides that "Justice in all cases shall be administered openly." Some folks (including your editor) felt that this provision was the antithesis of sealed court files. However, those folks were in a distinct minority. Court files were sealed upon agreement of the parties, or upon a showing that was oftentimes less than substantial. One particularly bizarre request was for the sealing of all the papers relative to the prevailing party's application for attorney fees. Everything in the case was open to the public save the attorney fee application.

But "the times they are a-changin'." Thanks to the efforts of the newspapers, the extent of the file sealing was laid out on the front page. The courts responded. The constitutional concept of open access to the courts was found to apply to a private dispute, *e.g.*, a shareholder derivative action. *Dreiling v. Jain*, 151 Wn.2d 900 (2004). And now, in a new case out of Division I, we see the principles of open access applied in an insurance case.

The items were claims and training manuals produced by the insurer. The basis for the assertion of confidentiality was that they were trade secrets. These were subject to a pretrial protective order. But at trial, four excerpts from the manuals were admitted as evidence. The jury found against the insurer. That was appealed and reversed. While the case was on appeal, the plaintiff's attorney decided to disseminate the claims manuals as part of a seminar presentation on bad faith. The insurer objected, taking the position that the documents were still subject to the pretrial protective order. The trial court said that using the documents at trial made them fully open. The insurer filed a CR 15 motion to seal the exhibits as trade secrets. The court granted that. The plaintiff appealed. The Court of Appeals reversed the sealing order.

HOLDINGS:

1. Documents filed with the court in anticipation of a court decision are presumptively open to the public unless the advocate of sealing presents "a compelling interest which overrides the public's right to the open administration of justice."

2. For each particular document that a party seeks to protect, there must be a showing that specific prejudice or harm will result if no protective order is granted. Unsubstantiated allegations will not satisfy the rule. . . . Particularized findings must be made by the trial court to support meaningful review.

COMMENT:

Now, the next thing to get rid of are those cases brought in the name of "John Doe." Justice cannot be "administered openly" if the name of a party is a secret.

Woo v. Fireman's Fund Ins. Co., 137 Wn. App. 480, 154 P.3d 236 (2007).

NO, I INSIST, AFTER YOU

FACTS:

Alek and Steve came to an intersection. Steve had a stop sign; Alek did not. A collision occurred in the intersection.

Alek claimed he was the favored driver and had the right-of-way. Steve said he stopped, waited to see what Alek would do, was waved on by Alek, proceeded into the intersection where he was hit by Alek who had accelerated into the intersection.

The jury found that Alek was at fault. Alek appealed, arguing that, as the favored driver, he should have won. The Court of Appeals affirmed.

HOLDINGS:

1. Credibility determinations are solely for the trier of fact with the opportunity to view the witnesses first hand; a jury is free to believe or disbelieve a witness. We cannot review credibility determinations on appeal.

2. Substantial evidence supports the jury's verdicts finding Alek's negligence contributed to the collision and that Steve's negligence, if any, was not a proximate cause of the collision.

COMMENT:

I always wondered what would happen if you accepted the favored driver's invitation to go first.

Bogdanov v. King, 2007 WL 458064 (Wash. App. Feb. 13, 2007).

DOG BITE SETTLEMENT

FACTS:

Dave's dog bit Mikaila. Dave offered Mikaila $31,837 to settle. She sued. Dave offered $32,843. The case went to mandatory arbitration, and the arbitrator awarded $25,069.47.

Four days later, Mikaila said she accepted Dave's offer from the year before. The trial court concluded that there was a deal because the earlier offer had not been withdrawn.

David appealed. The Court of Appeals concluded that "acceptance" of an offer, after a trial or an arbitration decision, comes too late.

HOLDINGS:

1. Settlement agreements are governed by contract principles subject to judicial interpretation in light of the language used and the circumstances surrounding their making.

2. An offer to form a contract is open only for a reasonable time, unless the offer specifically states how long it is open for acceptance. "[I]n the absence of an acceptance of an offer . . . within a reasonable time (where no time limit is specified), there is no contract." A reasonable time "is the time that a reasonable person in the exact position of the offeree would believe to be satisfactory to the offeror."

3. Implicit in an offer (and an acceptance) to settle a personal injury suit is the party's intent to avoid a less favorable result at the hands of a jury, a judge, or an arbitrator. The defendant runs the risk that the award might be more than the offer. The plaintiff runs the risk that the award might be less than the offer. Both want to avoid risk. Settlements avoid that risk.

4. The offer expired when the arbitrator announced the award and was not subject to being accepted.

COMMENT:

This would be hilarious except for the fact that this is not the first time we have seen it.

Sherrod ex rel. v. Kidd, ___ Wn. App. ___, 155 P.3d 976 (2007).

MIRY KIM

PRACTICE

Ms. Kim practices in the area of general civil litigation and appeals. Her practice includes defending corporations and individuals against claims involving premises liability, motor vehicle accidents, construction defects, professional malpractice, and insurance coverage.
Prior to joining Reed McClure in 2005, Ms. Kim worked as a Deputy Prosecuting Attorney for four years. Ms. Kim has tried many jury trials in district and superior courts. She has also conducted numerous appellate arguments at the Court of Appeals, Division II.

BACKGROUND

Ms. Kim was born and raised in Seattle, Washington. Ms. Kim is admitted to practice in the State of Washington and the United States District Court for the Western District of Washington. She has served as a board member of the Asian Bar Assication of Washington and the Korean American Bar Association. She has served as a member of the Washington State Joint Judicial Evaluations Committee and assisted in evaluating individuals seeking either appointment or election to judicial office. She has also served as Treasurer and most recently as Vice President of the Asian Bar Association of Washington.

EDUCATION

University of Washington School of Law, J.D., 2001
Reed College, OR, B.A., History, 1997

LANGUAGES

Korean

THE UNCOVERED MECHANIC

FACTS:

Delia took her car to Larson Automotive for the shop to replace the ABS sensor. After the work was done, John, the mechanic, took the car for a test drive. He ran over Michelle, a pedestrian.

Michelle sued John, Delia, and Larson. A dispute arose as to whether John, the mechanic, was insured under Delia's policy with Grange as a permissive user, or whether he was excluded as being a person employed in the business of maintaining motor vehicles. The trial court and the Court of Appeals concluded that John was excluded.

HOLDINGS:

1. It is undisputed that John is a mechanic for Larson Automotive. As such, he is employed in the business of maintaining motor vehicles.

2. The definitions unambiguously support the conclusion that the repair performed in this case was within the policy definition of "maintain." Thus, John is not an "insured" under the policy.

COMMENT:

Nice, clear, succinct opinion which should have been published. One more chapter in the never-ending effort of personal lines auto carriers to limit coverage.

Grange Ins. Ass'n v. Hegyes, 2007 WL 1121775 (Wn. App. Apr. 16, 2007).

WSTLA WINS BIG IN OLYMPIA

After years of having its way in the Temple of Justice, WSTLA has now extended its sphere of influence across the oval and up the steps into the Legislative Building. As soon as you read the first section of ESSB 5726 (2007), you will feel compelled to check your wallet. I suppose that calling it the "Insurance Fair Conduct Act" made it easier to sell than would the more accurate "WSTLA Recovery Act" (WRA).

One way to read the 2007 WRA is as a legislative finding that the Office of the Insurance Commissioner has not been doing much of a job in protecting the citizens of Washington. At its heart, what the WRA does is create private causes of actions out of six situations for which the OIC could already sanction the offender. And then it adds on attorney fees, litigation costs, and punitive damages of up to three times the actual damages.

We do note that the 2007 WRA does not apply to health insurers. It appears that at least one part of the insurance industry still has some clout in the legislature. This exception is all the more ironic when we consider that this new statute only applies to a "first party claimant." Last time I checked, all health policies are first party policies.

And speaking of "first party," I can foresee that WSTLA's next agenda item will be to convince some judge that where the legislature said "first party," it meant to include "third party" claims.

We may also note that the statute contains no provision for a jury trial. This may be reflective of the fact that the right to trial by jury was frozen in Washington as it existed in 1889. Or maybe they just forgot to put it in.

Further analysis of the 2007 WRA can be obtained from Levi Bendele (lbendele@rmlaw.com; 206-386-7154).

NO FREE RIDE TO THE COURT OF APPEALS

An extremely horrific accident along the interstate in Indiana has led to a published opinion in Washington dealing with Oregon indemnity law and a very seldom visited aspect of appellate procedure in Washington.

Genie hired Market to coordinate delivery of Genie lifts to purchasers. Market selected System to haul two Genie lifts from Washington to North Carolina. In Indiana, the two Genie lifts fell off the System truck. Unfortunately, it was at that same spot that the Pierce family was on the side of the road fixing a flat tire.

One Genie lift hit Mr. Pierce, cutting off his leg. The other hit the Pierce car, setting it on fire with the Pierces' young son trapped in the burning car.
The Pierces sued Genie, System, and Market in Illinois. After the preliminaries were out of the way, the case settled for $15.6 million. Genie paid $4 million; Market paid $4 million; System paid $7.6 million.

Meanwhile, back in Seattle, Genie sued Market and System for indemnity, and Market sued System for indemnity. The trial court dismissed all the indemnity claims.

Genie filed a notice of appeal as to the dismissal of its two claims. Market did not file a notice of appeal concerning the dismissal of its claim against System. While the case was on appeal, Genie and Market settled, and Genie dropped its appeal of the order dismissing its claims against Market. Three months after Genie filed its brief, Market filed a "Joinder" in the brief arguing that if the court were to reinstate Genie's claim against System, then Market's claim against System should also be reinstated.

The Court of Appeals said the trial court was wrong on the indemnity question, and Market's failure to file a notice of appeal barred it from receiving any affirmative relief. The court reversed the order and reinstated Genie's indemnity claims against System. But as to Market's indemnity claim against System, which arose under the same contract language that applied to Genie, the court declined to grant relief. After an 11-page discussion of those very, very, very few times that relief will be granted without a notice of appeal, the court said:

> Allowing Market a free ride to the appellate court on Genie's coattails would create a precedent undermining the finality of many judgments.

Moral: File the notice of appeal.

Genie Industries Inc. v. Market Transport Ltd., ___ Wn. App. ___, 158 P.3d 1217 (2007).

QUICKLY, QUICKLY, QUICKLY

Division I has held that Washington's "late tender rule" may be utilized by two settling insurers against a nonparticipating insurer, notwithstanding that the policyholder chose not to tender to that insurer. The rule set out in *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417 (1999), *rev. denied*, 140 Wn.2d 1009 (2000), provides that a late tender does not relieve an insurer of its obligations to the policyholder absent actual prejudice.

Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 137 Wn. App. 352, 153 P.3d 877 (2007).

Division II concluded that a 10-month delay in reporting a homeowner's accidental water release did result in actual and substantial prejudice. The delay put the nature and the extent of the loss beyond the insurer's ability to fully investigate and hampered its ability to control remediation costs.

Stone v. Safeco Ins. Co., 2007 WL 831728 (Wn. App. Mar. 20, 2007).

Farmers Insurance, not too surprisingly, wrote a policy which provided collapse coverage when caused by the "weight of . . . animals." A farrier was hired to shoe a horse. He tied the horse to a vertical support beam. The horse took strong exception to having nails pounded into its foot. As a consequence of his activity, the support pole fell, and the roof collapsed. The court ruled the collapse was caused by the horse's exertion of force, not the horse's weight.

Gibson v. Farmers Ins. Co., 2007 WL 1180999 (Wn. App. Apr. 23, 2007).

In another Farmers case, Division I followed *Albee v. Farmers Ins. Co.*, 92 Wn. App. 866 (1998), *rev. denied*, 137 Wn.2d 1027 (1999), which holds that the policy requirement of an IME in a PIP case was reasonable. The Court held that the claimant's failure to attend two scheduled IMEs allowed Farmers to deny coverage in good faith.

Smith v. Famers Ins. Co., 2007 WL 512538 (Wn. App. Feb. 20, 2007).

WILLIAM R. HICKMAN

William R. Hickman has become "Of Counsel" with the firm. After 39 years with Reed McClure, Mr. Hickman now limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter. Mr. Hickman has been involved in over 500 appellate proceedings involving a wide spectrum of civil litigation. He is a Fellow in the American Academy of Appellate Lawyers.

Mr. Hickman is a member of the Commercial Panel of the American Arbitration Association, and is also a public arbitrator in the NASD Dispute Resolution Program. He was named a "Washington Super Lawyer" in 2001, 2003, 2005, 2006, and 2007.

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

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