WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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SUPERSEDE THAT JUDGMENT

FACTS:

Weyerhaeuser hired Calloway to repair a railroad trestle near where the railroad crosses the Cowlitz River at Beacon Hill. The trestle caught fire and sustained a lot of damage. Calloway was insured for $1,000,000 by Lexington.

Weyerhaeuser sued Calloway and Lexington defended. The jury verdict was $6,140,984. After obtaining its judgment, Weyerhaeuser filed a writ of garnishment against Lexington. Lexington contested the writ, arguing that the exact amount due was not certain. (The reason it was uncertain is because it was a wasting policy with the cost of defense reducing the amount available for liability limits.) The trial judge said he could do the math, subtracted the defense costs, and awarded Weyerhaeuser $734,484.

Lexington appealed, repeatedly asserting that the writ was not effective because the cost of the defense was an amount which was "in flux." The Court of Appeals was not moved. It affirmed.

HOLDINGS:

1. A liability insurer is subject to garnishment upon the entry of judgment against its insured debtor.

2. As Calloway's liability insurer, Lexington was subject to garnishment upon the trial court's entry of judgment against Calloway.

3. Lexington was required to pay to Weyerhaeuser all amounts due under its obligation with Calloway.

4. A trial court decision may be enforced pending appeal or review unless a party stays enforcement of the judgment by filing a supersedeas bond. Lexington could have filed a supersedeas bond. It did not. It was therefore required to honor the writ.

COMMENT:

Lexington was in a tough spot. There it was with only about $750,000 in coverage, facing a $6 million judgment. The wasting policy involved here has often created problems since the more vigorous the defense presented by defense counsel, the less liability protection there is available for the client, the policyholder.

Although Lexington "repeatedly" asserted that the amount was uncertain, at oral argument it conceded the amount was liquidated. The court also pointed out that Lexington's delay in paying its defense counsel was not an excuse.

Weyerhaeuser Co. v. Calloway Ross, Inc., ___ Wn. App. ___, 137 P.3d 879 (2006).

SUPER LAWYERS

Reed McClure is proud to announce that four of its attorneys have been named as 2006 Super Lawyers by the magazine Washington Law & Politics:

John W. Rankin, Jr.

For 30 years, Jack has been involved in construction litigation including products, personal injury, and professional liability. (206-386-7029)

Pamela A. Okano

Pam specializes in insurance coverage, bad faith, and appeals. (206-386-7002)

Nancy C. Elliott

For 20 years, Nancy has been defending doctors, hospitals, and health care providers. (206-386-7007)

William R. Hickman

After 38 years and 500 appeals, Bill is now available to consult on appeals, conduct arbitrations, and act as an expert witness. (206-386-7011)

A HARD FALL

FACTS:

Jared and Kenny were installing gutters on a house. Kenny was loading the truck when he heard Jared call. He went to investigate and found Jared and his ladder on the ground.

Jared, who did not know what had happened to him, sustained serious injuries.

Jared sued the general contractor alleging negligence. The general contractor moved for summary judgment, arguing that Jared could not prove a breach of duty or proximate cause. The trial court agreed with the general contractor, and so did the Court of Appeals.

HOLDINGS:

1. The moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party meets this initial showing and is a defendant, the burden shifts to the plaintiff. At that point, if the plaintiff fails to make a showing sufficient to establish an essential element of his case, the trial court should grant the summary judgment motion because there can be no genuine issue of material fact in that situation; a complete failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial.

2. To succeed on a negligence claim, the plaintiff must prove: (1) the existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause.

3. Proximate causation requires both cause in fact and legal causation. Cause in fact usually is a question for the jury. But factual causation may become a question of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion. Legal causation presents a question of law.

4. Even if we assume that the evidence before the trial court, when viewed in the light most favorable to Jared, is sufficient to support an inference that the contractor breached a duty owed to him, he has not presented evidence sufficient to prove that the breach was what caused his injuries.

5. The mere fact that a plaintiff sustained an injury does not entitle him to put a defendant to the expense of trial.

6. Without evidence to explain how his accident occurred, Jared could not establish proximate cause.

COMMENT:

This is the kind of opinion that belongs in the law school casebooks: short; succinct; specific. No wasted words. Here no amount of speculation piled on speculation by Jared's "experts" could overcome the fact that no one, including Jared, knew why or how he came to fall off the ladder.

Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 133 P.3d 944 (2006).

EVERYTHING BUT . . .

FACTS:

Richard was riding his motorcycle when he was hit and killed by an underinsured driver. Richard had five primary policies with Farmers. Four of them covered cars, and the fifth covered the motorcycle. And there was an umbrella policy. It provided that UIM coverage was provided to the extent that such coverage is a part of the underlying insurance.

While conceding that none of the five primary policies provided UIM coverage in this case, Richard's estate argued that there must be UIM coverage in the umbrella policy because it was not expressly excluded. Farmers responded that the umbrella policy provided only excess UIM, and since there was nothing to be in excess of, there was no UIM.

The trial court and the Court of Appeals both agreed with Farmers.

HOLDINGS:

1. We construe an insurance policy as a whole, giving full force and effect to each clause. Where policy language remains clear and unambiguous, we enforce the provisions as written and do not modify the policy or create ambiguity where none exists. Ambiguity exists if the policy is susceptible to more than one reasonable interpretation.

2. We do not engage in a "strained or forced construction" that would lead to absurd results. Nor do we interpret policy language in a way that extends or restricts the policy beyond its fair meaning or renders it nonsensical or ineffective.

3. We must apply the definitions set forth in an insurance policy. But we give undefined terms their plain, ordinary, and popular meaning, as defined in standard English dictionaries.

4. An average purchaser of insurance would understand that the umbrella policy expands the amount, not the scope, of UIM coverage, thus providing excess UIM coverage over the underlying coverage only if the insured qualifies for UIM coverage through the underlying policy.

5. The Estate's interpretation would lead to absurd results.

6. But the name given to an insurance policy is not necessarily controlling as to whether the policy is excess or primary. A policy's function, not its name, determines its character. A primary policy provides coverage immediately upon the occurrence of an accident, while an excess policy provides coverage only after exhausting the primary coverage.

7. With respect to UIM coverage, the underlying insurance is primary and the umbrella insurance is excess insurance that does not provide UIM coverage unless a primary insurance policy does.

8. The trial court properly relied on its common sense, to infer the parties' reasonable expectations regarding the scope of coverage. In doing so, the trial court applied a form of analysis routinely used in construing insurance policies.

COMMENT:

And this shall be known as the "kitchen sink" opinion, *i.e.*, the Estate attorney threw in everything but the kitchen sink. Fortunately, Division II had its collective thumb on the in-sink-erator switch and sent the arguments where they belonged. Approving the trial court's reliance on common sense was a nice touch. We don't see too much use of common sense in most coverage litigation.

At about the same time, over in Division III, it was handling its own motorcycle/UIM case. Here it found that the Montana Supreme Court's "simplistic conclusion" was incompatible with Washington law. *McIllwain v. State Farm Mut. Auto. Ins. Co.,* ___ Wn. App. ___, 136 P.3d 135 (2006) (UIM claimants must prove fault in order to prove that they are legally entitled to recover UIM).

Christal v. Farmers Ins. Co., ___ Wn. App. ___, 135 P.3d 479 (2006).

LOOK! AN ACTIVIST JUDGE

FACTS:

Max was a 2-year-old tomcat. He was catnapped from his porch by some neighborhood boys who thought it would be way cool to set Max on fire. They did. The vet put Max to sleep.

Max's owner sued the boys and their parents. She (or, rather, her lawyer) came up with 16 liability claims. One family got 9 of the 16 claims dismissed, and then settled. The other families were defaulted. Max's owner got a $5,000 default judgment. The judge said it was for the value of Max and the owner's emotional distress.

Not satisfied, the owner took an unopposed appeal. In a very carefully worded opinion, Division III affirmed the judgment and said it was taking the lead in holding that malicious injury to a pet can support a claim for, and be considered a factor in measuring, a person's emotional distress damages.

HOLDINGS:

1. The nuisance, outrage, and waste claims were all properly dismissed.

2. Division II has held that there is no claim for negligent infliction of emotional distress arising from injury to a pet.

3. For the first time in Washington, we hold malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages.

COMMENT:

The technical term for this opinion is "camel's nose under the tent." The next time we see a similar situation, the court will have forgotten a key component of the case, *i.e.*, that the owner's emotional distress also arose from the harassment of her son by the neighbor boys. The next time around, this case will be cited for the proposition that Washington recognizes the recovery of emotional distress damages arising from the loss of a pet. That is how the common law works.

Womack v. Von Rardon, ___ Wn. App. ___, 135 P.3d 542 (2006).

CHIEF JUSTICE HONORED

Washington's Chief Justice, Gerry Alexander, has been recognized for his lifetime of service to the law. The Ninth Circuit Inns of Court awarded him its 2006 Professionalism Award in recognition of his "sterling character and unquestioned integrity." He has served Washington as a superior court judge, a Court of Appeals judge, and a Supreme Court Justice. He is the only Washington judge to receive the award.

In this fall's election, he is being challenged by an individual who has never been a judge, but who has amassed an enormous war chest from special interest groups. We shall learn whether Lincoln was correct.

DON'T TAKE YOUR GUN TO TOWN

FACTS:

Tony arranged a meeting with Jimmy. He brought his gun. He emptied the chamber just shooting. He went back for more ammo. He found pellets. He dropped one down the barrel.

As Jimmy arrived, Tony shot from the hip, as a prank, from 162 feet away. He hit Jimmy in the eye. He really did not mean to.

Jimmy's parents' homeowner's carrier denied coverage and filed a Declaratory Judgment Action. After a trial, the judge concluded that Tony intentionally pulled the trigger, but did not intend to hurt Jimmy. However, the intentional act could not be an accident. The Court of Appeals agreed that the act was deliberate and, thus, not an accident.

HOLDINGS:

1. The policy covers damages because of bodily injury caused by an "occurrence." An "occurrence" means an accident that results in bodily injury.

2. For purposes of liability insurance, "an accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected and unusual."

3. "[A]n outcome [is] accidental only if both the means and the result were 'unforeseen, involuntary, unexpected, and unusual.'"

4. A prudent person would know that shooting a loaded gun could cause injury. Because the injury was foreseeable, the act was not an accident.

COMMENT:

An opinion that is dead-on target. Shooting a loaded gun aimed at someone or something is highly, very highly, likely to result in injury or damage.

Indicative of the lack of merit to the claim was the introduction of the Farmers Act of 2006 (Sub. H.B. 2415). This piece of feel-good legislation was introduced and passed after Farmers denied UIM coverage in a high-profile case and was excoriated in the newspaper for its conduct. The court brushed this aside, pointing out that the new legislation applied to UIM, not liability, and was in any event consistent with prior case law on UIM. Not mentioned was the fact that legislation passed in 2006 is irrelevant to a shooting which occurred in 2003.

This opinion should have been published.

A caveat: not every shooting case will be excluded. Some shootings will fall within the definition of an "occurrence."

State Farm Fire & Cas. Co. v. Parrella, 2006 WL 1462889 (Wash. App. 2006).

TEMPUS FUGIT

FACTS:

In December 1996, some of Mel's buildings were damaged in a heavy snowfall. The collapse and sagging allowed water to damage the personal property in the buildings.

Within a month Mel's homeowner's carrier paid the policy limits for the structural damage to the buildings. Notwithstanding repeated requests from the company, Mel did not file an inventory for about three years, claiming a loss of about $75,000. By this time (December 1999) Mel noted that he had discarded all the damaged items. Through 2000 the company continued to request additional information and documentation. Finally, in March 2001, the company informed Mel that it was done and it was

denying his claim for his failure to provide information. The company also noted that the policy had a one-year suit limitation.

More that three years later (April 2004) Mel sued the company for breach of contract, bad faith, and Consumer Protection Act violations. The trial court dismissed everything on summary judgment. On appeal, Mel argued the company should not be able to rely on the one-year suit limitation clause. The Court of Appeals did not agree.

HOLDINGS:

1. Policy limitations are valid and enforceable.

2. The elements of equitable estoppel are (1) an act that is inconsistent with a later claim; (2) another party's reasonable reliance on the act; and (3) injury to the other party that would result if the first party is permitted to repudiate the earlier act.

3. Equitable estoppel is not favored The party asserting estoppel must prove each of the elements by clear, cogent, and convincing evidence.

4. Even if it is assumed that estoppel might apply until the company denied Mel's claim on March 21, 2001, Mel waited more than three years after the denial before filing this action.

COMMENT:

Holy Cow! Some of us are slow to come to grips with situations, but this guy waited almost eight years. Enough is enough.

Gerry v. American Economy Ins. Co., 2006 WL 1672888 (Wash. App. 2006).

TMJ EXCLUDED

FACTS:

Within two weeks Darla was involved in two auto accidents. Both of the other drivers admitted liability but disputed damages. The dispute went to a jury trial and the jury awarded Darla $6,220 for her injuries.

Darla appealed, claiming the trial court erred in excluding her temporomandibular jaw (TMJ) evidence, and in admitting evidence of her injuries sustained in a prior auto

accident. The Court of Appeals affirmed the judgment, holding that the TMJ expert was properly excluded, the injuries from the prior accident were relevant and properly admitted, and the verdict was within the range of the evidence.

HOLDINGS:

1. Expert testimony of the dentist regarding causation of the TMJ condition was properly excluded where the dentist's testimony was based exclusively on the motorist's recollection that the condition was fixed and stable before her accidents.

2. Where the motorist's preexisting injuries mirrored her alleged injuries from her accidents that prompted the present lawsuit, her preexisting injuries were highly relevant.

3. The injured motorist failed to preserve for appellate review the claim that the amount of the jury's verdict was inadequate, where she failed to file an additur motion or ask for a new trial.

4. Determining damages is for the jury, and courts will not interfere with a jury's damage award absent an abuse of discretion.

COMMENT:

More often than we would like to see it, we see trial court judges admitting into evidence anything which comes from the mouth of a witness with letters after his name. A good, commonsense opinion that treats the value of evidence as evidence, and not as plastic.

Torno v. Hayek, ___ Wn. App. ___, 135 P.3d 536 (2006).

FIBROMYALGIA EXCLUDED

FACTS:

After an auto accident, Tami and Adam sued Gertrude, claiming that the accident caused Adam's fibromyalgia. Prior to trial, Gertrude moved to exclude Adam's expert medical testimony which linked the accident to the fibromyalgia. The trial court granted the motion, finding that the proposition that trauma caused fibromyalgia was not generally accepted in the relevant scientific community. There being no other

proof of causation, the lawsuit was dismissed. The Court of Appeals affirmed, finding that this expert testimony was subject to the *Frye* test and was inadmissible under *Frye*.

HOLDINGS:

1. A witness qualified as an expert may testify on the basis of "scientific, technical, or other specialized knowledge" if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue."

2. The admission of novel scientific evidence involves two related inquiries: (1) whether the scientific principle or theory from which the testimony is derived has garnered general acceptance in the relevant scientific community under the *Frye* standard; and (2) whether the expert testimony is properly admissible under ER 702.

3. In examining a *Frye* question, the court must determine: "(1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community."

4. If there is significant dispute in the relevant scientific community about the validity of the scientific theory, it may not be admitted.

5. Given the clear disagreement in the relevant scientific community as to the cause of fibromyalgia, which conflict has also been recognized in other jurisdictions across the country, the trial court properly concluded the proffered expert testimony was subject to the *Frye* test and was inadmissible.

6. Until medical science determines with sufficient reliability and acceptance that a causal relationship exists between trauma and fibromyalgia, such evidence is inadmissible.

COMMENT:

While one swallow does not make a summer, perhaps this case indicates that the courts are finally going to crack down on the voodoo expert testimony that has poisoned our litigation system for the past couple of decades.

Grant v. Boccia, ___ Wn. App. ___, 137 P.3d 20 (2006).

THE SKY IS NOT FALLING

FACTS:

The bank had an engineer inspect one of its buildings. The engineer said the building was about to fall down and needed to be evacuated. The bank evacuated the tenants from the building.

The bank hired another engineer that said the first engineer was wrong. There was no threat to the structural integrity of the building. The tenants moved back in.

The bank sued engineer number one for malpractice and then settled. The bank then sued its first-party property loss insurers to recover for economic losses associated with the evacuation.

The trial court dismissed the case on summary judgment because there was no actual physical damage. The Court of Appeals agreed, saying that a reasonable but incorrect perception of an imminent covered loss will not support coverage.

HOLDINGS:

1. Insurance contracts are construed as contracts. Washington courts consider the insurance policy as a whole and give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." Insurance policies are liberally construed to provide coverage for the insured whenever possible. Undefined terms are given their plain, ordinary, and popular meanings. If the plain meaning is not clear, a dictionary definition can be used for clarification.

2. The expectations of the insured cannot override the plain language of the contract.

3. The plain language of the "perils insured against" clause requires a direct physical loss of or damage to insured property. The language of this clause specifies that the loss must be "direct physical loss." The clause does not use the word "loss" in the abstract. The "time of an occurrence for insurance coverage purposes is determined by when damages or injuries took place."

4. When engineer number one recommended evacuation, there was no actual physical loss to the property and no actual damage to the property. While the bank acted on a reasonable belief that the property was at risk of collapse, there was no actual risk or actual peril.

5. Sue and labor clauses require an insured to take action to prevent or mitigate damage to covered property. A covered loss does not have to actually occur in order to invoke coverage under a sue and labor provision.

6. "The purpose of the sue and labor clause is to reimburse the insured for those expenditures which are made primarily for the benefit of the insurer to reduce or eliminate a covered loss."

7. Under the language of the Policies, a reasonable but incorrect perception of imminence of covered loss does not suffice as a basis for coverage under the sue and labor provision. To obtain coverage under the sue and labor provision in this case, the insured's actions must have been taken to protect insured property from a risk of covered loss that was imminent in fact.

8. Because there was in fact no imminent risk of covered loss, the bank's actions were not taken to prevent a "covered loss."

COMMENT:

Sometimes it seems as if the universe of insurance coverage disputes is populated entirely by automobile UIM cases. There are few which discuss the "perils insured against" language of first-party property damage policies, and even fewer that discuss the "sue and labor" clauses. Of the few that do, it sometimes appears as if the author views it as an opportunity to complete that long overdue paper on existentialism.

n stunning contrast, this opinion sets out the language, the rules, and the law and then mixes them together with succinct clarity that even the casual observer will understand. It should have been published.

Washington Mutual Bank v. Commonwealth Ins. Co., 2006 WL 1731318 (Wash. App. 2006).

MORE GUNS

FACTS:

Kathy was going to take her two sons to school. She got in the pickup, closed the door, started it, and put on her seat belt. Her 14-year-old got in the passenger seat and put on his seat belt. The 9-year-old opened the rear driver-side door. He saw two shotguns laying on the rear seat with the barrels facing him.

Kathy told him to go get his father. The father came out, opened the other door, lifted the shotguns off the seat. As he began to exit, one of the shotguns fired, killing Kathy.

After a trip to the federal district court, which found coverage, then to the Fourth Circuit, the case was back before the Supreme Court of South Carolina to answer this question:

> Did Kathy's death arise out of the ownership, maintenance, or use of a motor vehicle such that the auto policy provides coverage for the accidental firing which occurred while unloading the shotguns from a stationary vehicle.

The court said Kathy's death did not arise out of the use of the vehicle. The pickup was not actively involved in causing the injury. The truck was "merely the site of the injury."

COMMENT:

My goodness! How could that gun fire all by itself?

We would expect the same coverage result here in Washington, the vehicle was merely the situs of the accident.

Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E.2d 475 (2006).

QUICKLY, QUICKLY, QUICKLY

The process of passing the costs of the industrialization of the United States off on the insurance industry continues. It was years ago, in *Boeing v. Aetna,* 113 Wn.2d 869 (1990), that the Court opened the doors of Washington courthouses and welcomed all polluters to come to Washington to extract the cost of doing business from their CGL carrier. It soon became apparent that these coverage actions involving multiple sites, multiple years, multiple companies, multiple policy forms, successor policyholders, and strict liability were, to say the least, extraordinarily complex. And then, when some companies settled out, the nonanswerable question of whether the policyholder had been made whole arose. The Court issued a couple of opinions to encourage the companies to get out their checkbooks. *Weyerhaeuser Co. v. Commercial Union,* 142 Wn.2d 654 (2000); *Puget Sound Energy v. Alba Gen. Ins. Co.,* 149 Wn.2d 135 (2003). Evidently that was not enough of a cudgel to get everyone to pay up. So now we see a new instrument by which to extract settlement money. ("We have ways of making

people talk.") It is to bar the non-settling insurer from seeking contribution against those insurers which had settled. Relying upon the two amorphous concepts of "public policy" and "equity," Division I recently released a published opinion that makes all of this sound legitimate.

Puget Sound Energy v. Certain Underwriters at Lloyd's, London, 2006 WL 1980407 (Wash. App. 2006).

Pet torts are really a hot topic. (Our associate, Levi Bendele (206) 386-7154; lbendele@rmlaw.com, is our expert on such things.) However, the other day we saw where an owner used a pet to commit a tort. To be specific, she used a dead Chihuahua to assault the lady who sold her the dog. (It appears that, unlike the parrot, the Chihuahua was alive when sold.)

The purchaser took the dog to the vet, who said the dog was too young to have been separated from its mother. But before it could be returned, it died. The lady went back to the puppy farm where, among other things, she hit the breeder over the head numerous times with the dead dog. She finally drove away, waving the dead puppy out of the sunroof and hurling threats at the breeder.

Angry Owner Uses Dead Puppy as a Weapon, http://msnbc.msn.com/id/13205576/

Last issue we mentioned the Division II opinion which held that a school bus driver did not have UIM coverage for injuries she sustained while driving her assigned school bus because such use was "regular use" and was thus excluded. It has now been published.

Hall v. State Farm Mut. Ins. Co., ___ Wn. App. ___, 135 P.3d 941 (Wash. App. 2006).

Now ordinarily we are of the view that a federal judge (in particular, a federal district court judge) is just about as close to God as you are going to get on this Earth. So it is a bit surprising that a federal district court judge, down in Florida, had to resort to extreme measures to get a couple of litigation attorneys to schedule a 30(b)(6) deposition. Since they could not, or would not, agree, he ordered them to meet and engage in one game of "rock, paper, scissors." The winner thereof could select the location of the deposition. He might have insured future reasonable conduct if he had set the "game" to be played in the federal lockup, rather than on the steps of the courthouse.

Avista Management, Inc. v. Wausau Underwriters Ins. Co.

In the never-ending battle among general contractors, subcontractors, and their insurers to shift the risk of loss for anything that occurs on the job site (or anywhere else for that matter), Division I has issued an opinion which tips the scales in favor of the general contractor at the expense of the subcontractor. The court said that while the indemnification agreement limited the subcontractor's liability with respect to tort claims, it did not restrict its liability to only tort claims. In our Fall issue, our associate, Ryan Foltz ((206) 386-7024 rfoltz@rmlaw.com), will explore the significance of this and other new developments in the construction/insurance area.

MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders, Inc., ___ Wn. App. ___, ___ P.3d ___ (2006).

Try, if you will, to imagine being an appellate court judge. Here, after years of laboring in the vineyards of private practice, you have reached the level of Cardozo, Hand, Douglas, Horowitz, and Wright. And what do you find? A backbreaking load of depressing criminal appeals, augmented by civil appeals in which it appears that both counsel had as their goal leading the trial judge into error in their favor. So what do you do, O frustrated appellate judge, when presented with a super OTW legal question? You grab that ball and run for the end zone.

That was exactly what Judge Coleman of Division I did when presented with this question: Was there a right to trial by jury in Washington on a claim of promissory estoppel in 1889? (Do not forget, dear reader, that law is the only learned profession which moves forward by keeping both eyes firmly on the past.) He wrote an opinion where he was able to sprinkle such law school terms as "writ of assumpsit," "quasi contract," "quantum meruit," and the origins of "promissory estoppel lie in the early equity decisions of England's Chancery courts." Ultimately, he said that because a promissory estoppel claim arose from equity, not common law, that there was no right to have it tried to a jury in 1889.

Why is 1889 significant? That is because in 1989, our Supreme Court, when it gutted the Tort Reform Act, said that the right to trial by jury was frozen in 1889, when the state constitution was adopted. (*Sofie v. Fibreboard Corp.,* 112 Wn.2d 636 (1989).)

Kim v. Dean, ___ Wn. App. ___, 135 P.3d 978 (2006).

A teenage bout of "push me-push you" resulted in the female player falling off the boat ramp, down a rocky embankment, and into the river where she drowned. The male player pled guilty to involuntary manslaughter. His liability carrier denied coverage, saying there was no "occurrence," and, furthermore, the "push" comes under the "intended or expected harm" exclusion. The Indiana Supreme Court reviewed the facts and the law and concluded that there were factual issues as to whether the death was cause by an "occurrence," and whether there was an intent to harm. A nice, balanced legal analysis.

Auto-Owners Ins. Co. v. Harvey, 842 N.E.2d 1279 (Ind. 2006).

A federal judge in Ohio, with a forgiving nature and too much time on his hands, has written and published a seven-page opinion which held that Safeco did not act in bad faith or in breach of contract because it settled the claims against its policyholder. He noted that the insurer's duty to defend includes the right to settle, rather than litigate claims, and that many courts have held that there is an implied obligation of good faith which requires that a company accept any reasonable settlement offer.

Vintilla v. Safeco Ins. Co., 417 F. Supp. 2d 922 (N.D. Ohio 2006).

William R. Hickman has become "Of Counsel" with the firm. After 38 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, and 2006.

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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