WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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IF AT FIRST YOU DON'T SUCCEED

FACTS:

Ron suffers from lung cancer. He claimed it was caused by respirable asbestos released from insulation. He alleged he was exposed to the asbestos in the dust in his father's work clothing. Ron's father had worked at a refinery in 1958.

His claim was dismissed because he was not a "user or consumer" of a defective product. That was reversed on appeal (*Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784 (2005)) because public policy supports extending strict liability to a household family member.

Back in the trial court, the defense came up with a new theory. Strict product liability (which was adopted in Washington in 1969 and 1971) could not be applied retroactively to cover an exposure which occurred in 1958. The trial court agreed and dismissed. The Court of Appeals disagreed, holding that strict product liability has been retroactively applied in lots of previous asbestos cases, and we are not about to change that now.

HOLDINGS:

1. The Washington Product Liability Act (WPLA) does not govern Ron's claim because he was exposed to asbestos before its adoption.

2. In 1969, the Washington Supreme Court, after extensive review of product liability cases beginning in 1913, adopted the strict liability contained in § 402A as the law of this jurisdiction. That decision applied only to the liability of manufacturers.

3. In 1975, the Washington Supreme Court, after further review of product liability cases, extended § 402A strict liability to those in the business of selling or distributing a product.

4. Numerous appellate decisions have applied strict liability to claims arising from exposures to asbestos that occurred before the adoption of § 402A.

COMMENT:

It must be frustrating for defense counsel to keep coming up with these really great legal defenses only to have the court hit them over the head with what amounts to a sack of potatoes.

Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 160 P.3d 1089 (2007).

MANDATORY ARBITRATION v. PRIVATE ARBITRATION

Mandatory arbitration is conceptually distinct from private contractual arbitration. That comes as a surprise to some of us. The distinction arose in a UIM case which was referred to "mandatory arbitration" (e.g., in King County, any case where the claim is for $50,000 or less). The arbitrator concluded he was limited to fixing the amount of damages while coverage issues such as set-off were to be resolved by a judge. (*Price v. Farmers*, 133 Wn.2d 490 (1997))

Not so, said Division One. A mandatory arbitration arbitrator should construe his authority broadly. Leaving questions for the court to resolve is contrary to the purposes of mandatory arbitration. The mandatory arbitration arbitrator "could have decided the coverage issues after determining collision damages."

Mercier v. GEICO Indem. Co., ___ Wn. App. ___, 165 P.3d 375 (2007).

IT WAS JUST A LITTLE PERJURY

FACTS:

In August, Michelle said she was hit in the eye by a couch leg being delivered by Ethan Allen. Later that month, she filed for Chapter 7. (Wonder if she paid for the furniture.) In her filing papers, where she swore under the oath as to what were her assets and what were her debts, she did not list her Ethan Allen claim as an asset. In fact, she listed no assets so that by December, the Bankruptcy Court discharged her debts and said she did not need to pay the $220,000 she owed her creditors. (They were left holding the bag, which, in this case, was empty.)

Two and a half years later, Michelle filed suit against Ethan Allen. Ethan Allen moved for summary judgment, pointing out that Michelle had sworn under oath that she had no claim against Ethan Allen. Peter, the bankruptcy trustee, jumped into the case, arguing that Ethan Allen could not use the judicial estoppel defense against him because he was the real party in interest and he had not made any representation.

The trial court followed *Garrett v. Morgan*, 127 Wn. App. 375 (2005) (*See* XXXIX Wash. Ins. Law Letter 31 (2005)), and applied the doctrine of judicial estoppel to bar Peter from pursuing Michelle's claim.

On appeal, the Supreme Court overruled the *Garrett* decision, indicating that a little perjury on behalf of a plaintiff was not enough to bar her claim.

HOLDINGS:

1. "Judicial estoppel" is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

2. The doctrine seeks to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and waste of time.

3. Courts generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during bankruptcy proceedings and then later pursue the claims after the bankruptcy discharge.

4. A bankruptcy debtor has an affirmative duty to disclose all assets, including contingent and unliquidated claims.

5. A trial court may not generally apply judicial estoppel to bar a trustee, standing as the real party, from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings.

6. A trustee has a separate identity from the debtor.

COMMENT:

I am sure that allowing this claim to go forward will help "preserve respect for judicial proceedings."

We note that in *Bartley-Williams v. Kendall*, 134 Wn. App. 95 (2006), the court ruled that while the trustee could pursue the claim for the estate, the claimant was barred from recovering any benefit from the suit in the event of a recovery.

Actually, one might say there is an epidemic of debtors playing fast and loose with the bankruptcy courts. Division III just issued two more judicial estoppel opinions, *Haslett v. Planck*, ___ Wn. App. ___, 166 P.3d 866 (2007) (claim reinstated); *McFarling v. Evaneski*, 2007 WL 2609877 (Wn. App. 2007) (claim barred).

Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007).

NICOLE ROTHROCK

PRACTICE

Ms. Rothrock's practice focuses on appeals and general civil litigation matters.

EDUCATION

Gonzaga University School of Law, cum laude, J.D. 1996
Gonzaga University, magna cum laude, Bachelor of Business Administration, 1990

HONORS

- Gonzaga Law Review, Associate Editor; Associate Editor of the Year, 1996
- American Jurisprudence and CALI awards recipient, Administrative and Property Law

ADMITTED TO PRACTICE

Washington State Bar Association; U.S. District Court, Western District of WA

BACKGROUND

Ms. Rothrock joined Reed McClure in 2006. She has several years' experience managing general civil litigation matters, including products liability, premises liability, personal injury, professional negligence, construction defect, and insurance defense and coverage.

VOLUNTEER ACTIVITIES

- Global Partnerships, International Microfinance and Capital Investment
- Friends of CRS, International Relief and Development, Seattle Chapter
- Art Docent

LANGUAGES

French

WATCH WHERE YOU ARE WALKING

FACTS:

Barbara was staying at the Orchard Inn. She left the lobby to go to the outdoor pool. As she pushed open the door to the pool area, she failed to watch where she was going. As a consequence, she did not see the step down. She fell and was injured.

Barbara sued the Inn. The trial court dismissed because the injuries were caused by failing to look where she was walking.

Division III reversed because whether the Inn should have anticipated that Barbara would not watch where she was going was a jury question.

HOLDINGS:

1. A possessor of land owes its invitees a duty of reasonable care that requires the landowner to inspect for dangerous conditions and to make such repair, safeguards, or warnings as may be reasonably necessary for protection of invitees under the circumstances.

2. A long long time ago in a Galaxy far, far away, the Supreme Court said that the mere fact that there is a step down at the entrance is no evidence of negligence if the step is in good repair and in plain view.

3. In limited circumstances, Restatement (Second) of Torts § 343A creates a duty to protect invitees even from known or obvious dangers. This occurs when a possessor should anticipate the harm despite such knowledge or obviousness.

4. Under this rule, a landowner is liable when an invitee could be expected to be distracted and either fails to notice the obvious or be unmindful of what she has noticed.

COMMENT:

I guess that the old Supreme Court opinion was just too old to be taken seriously anymore.

Coury v. Orchard Inn, 2007 WL 2706278 (Wn. App. 2007).

NO REVERSE ESTOPPEL

FACTS:

George and Helen were driving home one evening when they encountered a tree. It blocked both lanes. Helen called 911 and was told to stay put until help arrived. As they waited, they saw cars approach, slow down, and turn around. Then they noticed another tree which was about to fall on their truck.

So George moved his truck across the road and parked in the northbound lane. And then along came Christina in the northbound lane. She saw the tree but was unable to stop. She drove through the tree and hit the truck. Helen was injured.

Helen made a UIM claim and sued Christina. At the UIM arbitration, the arbitrators determined that Christina was negligent and Helen was not. They made a $250,000 UIM award.

In the trial court, Helen argued that Christina was barred by the UIM arbitration decision that she was negligent. The trial court said the question of who was negligent was for the jury.

The jury returned a verdict that Christina was not negligent and that George was negligent.

Helen appealed, arguing that under *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267 (2000), Christina was barred from relitigating the issue of negligence. The Court of Appeals held that Helen's arbitration with her UIM carrier was not binding on Christina.

HOLDINGS:

1. In *Fisher v. Allstate Ins. Co.*, 136 Wash.2d 240 (1998), our Supreme Court held that when an insured files an action against the tortfeasor, and the insured also holds a UIM policy, the UIM insurer is bound by the results of the action if the insurer had notice of the insured's action.

2. The *Fisher-Finney* rule is based on an insurer's contractual promise to pay its insured, or another whom its insured has injured. Here, there was clearly an insurance contract between Helen and her UIM insurer. But there was no contract between Helen and Christina and, thus, no privity between Christina and either Helen or Helen's UIM insurer.

3. Thus, Christina had no standing to intervene in the arbitration between Helen and her UIM insurer; therefore, the outcome of that arbitration had no bearing or effect on Christina's interests.

COMMENT:

One does wonder what the arbitrators were thinking when their award is compared to the jury verdict. But there can always be a difference of opinion as to liability and damages.

We note that Christina was represented on appeal by Reed McClure attorneys Marilee Erickson and Terry Price.

Mathioudakis v. Fleming, ___ Wn. App. ___, 161 P.3d 451 (2007).

IT'S ELEMENTARY, MY DEAR . . .

FACTS:

Brian rented a car from Enterprise. The agreement offered three kinds of insurance: Collision; Personal Accident; "Liability." Brian took the first two but expressly rejected and did not pay for #3, Liability.

Brian rear-ended a car driven by Adam. Adam's insurer asked Brian to pay for the damages. It turns out Brian had been remiss in paying his auto liability premiums.

Brian asked Enterprise to cover him. Enterprise pointed out that Brian had rejected the offer to provide liability coverage. Brian sued Enterprise alleging it had a duty to indemnify him, and that it had acted in bad faith.

The trial court dismissed Brian's case. The Court of Appeals, in a published opinion which gave Brian's claim much more credence that it warranted, affirmed.

HOLDINGS:

1. To the extent a rental car agreement contains insurance provisions, it is treated as a stand-alone motor vehicle insurance policy. And when a self-insured vehicle rental company offers liability insurance, it must give the renter the opportunity to expressly accept or reject coverage.

2. There is no dispute Brian rejected liability coverage.

3. The rental agreement did not provide third party liability coverage.

4. The company did not have an obligation under the Financial Responsibility Act to provide minimum third party liability coverage.

5. And to the extent Brian is arguing that this court should require minimum third party liability coverage for all automobile liability policies, as a matter of public policy, our Supreme Court has rejected that argument. *Barkwill v. Englen/Ohio Farmers Indemnity Co.*, 57 Wn.2d 545, 548, 358 P.2d 317 (1961).

COMMENT:

This is the kind of case which makes the general public wonder whether anyone is really in charge. If the court had found coverage here, the next thing you know the Supreme Court would say that assault is covered by a dental malpractice policy. Oh! They did that already.

Shields v. Enterprise Leasing Co., ___ Wn. App. ___, 161 P.3d 1068 (2007).

NO BOVINE, PLEASE

FACTS:

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

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

HOLDINGS:

1. There are five elements of a CPA claim: (1) an unfair or deceptive act or practice that; (2) occurs in trade or commerce; (3) impacts the public interest; (4) causes injury to the plaintiff in her business or property; and (5) the injury is causally linked to the unfair or deceptive act.

2. Personal injury claims are not subject to the CPA. The CPA covers only injury to "business or property." If the Legislature had intended to include personal injury

actions within the CPA, it would have used a less restrictive phrase than "business or property."

3. We hold that Mystie's injury of having cow bone used during the procedure, after she specifically requested that it not be used, is the type of injury that, if proven, is subject to the CPA.

COMMENT:

The court said that there was injury to Mystie's property because Dr. Betsy's using the cow bone instead of something else was no different than a car dealer selling a used car as a new one. The reasoning is akin to the medieval treatise on how many angels can dance on the head of a pin.

Michael v. Mosquera-Lacy, ___ Wn. App. ___, 165 P.3d 43 (2007).

SANDY ELORANTO

PRACTICE

Ms. Eloranto is a litigator who defends hospitals, physicians and other health care providers and medical institutions in medical malpractice matters. Ms. Eloranto's practice also includes representing hospitals, physicians, and nurses in medical disciplinary and credentialing matters.

EDUCATION

University of Oregon School of Law, J.D., 1999, Associate Editor Oregon Law Review

Oregon State University, B.S. in Political Science, 1996

BACKGROUND

Ms. Eloranto grew up in Oregon and moved to Colorado following law school. She recently returned to the Pacific Northwest and her license to practice in the State of Washington is currently pending. She is licensed to practice in Colorado where she spent over five years defending medical institutions including Catholic Health Initiatives of Colorado and Boulder Community Hospital, as well as defending a number of physicians and other health care and mental health professionals through various insurance companies including Copic, PPIC, and Chubb. She was active in the Colorado Women's Bar Association, serving as a board member from 2004-2006, and co-chaired the 2005 CWBA Convention.

SAILBOAT "ALLISION"

FACTS:

In 1925, Tacoma erected two towers on opposite shores. Six power lines were strung between them. The lines were 30 feet above the water. In 2003, NOAA issued chart #18448 which noted the location of the lines and their 30-foot clearance above the water.

In August 2004, Scott sailed his sailboat into the area. He did not see the lines. He was looking down, laying his anchor, when his boat drifted with the current, and the ship's mast struck the power lines. Scott was thrown into the water and suffered severe injuries from the jolt of electricity.

PROCEDURE:

Scott sued Tacoma for failure to warn. The trial court dismissed the case on summary judgment. The Court of Appeals affirmed, being of the view that by including the power lines in the NOAA chart, the City had fulfilled its duty to warn.

HOLDINGS:

1. Federal admiralty law applies to this case.

2. The elements of a maritime negligence cause of action are essentially the same as those for a land-based negligence action under common law: (1) the existence of a duty that requires a standard of care to protect against foreseeable risks; (2) a breach of that duty by conduct that falls below a reasonable norm; and (3) a reasonably close causal connection between the breach of duty and the resulting loss.

3. The plaintiff bears the burden of proof of each element by a preponderance of the evidence.

4. The plaintiff in an admiralty negligence cause of action need not prove that the injury was caused solely by defendant's breach. Instead, the plaintiff must show only that defendant's breach caused some of the plaintiff's injury.

5. There is an initial presumption of fault against a party who places an obstruction in a navigable waterway, and that party bears the burden of proving that it adequately warned of the danger such that it did not breach its duty of care.

6. Tacoma has met this burden here by noting the location of the power lines and clearance on the pertinent NOAA chart.

7. Scott is presumed negligent and at fault for having "allided" with a fixed object noted on the NOAA charts.

8. Scott did not overcome this presumption of negligence. He does not show that he operated his vessel taking reasonable precautions under the circumstances. He did not consult the NOAA chart, which clearly showed the location and clearance of the power lines.

9. We are bound by the admiralty rule that any boater, even a recreational one, is charged with knowledge of all warnings and hazards contained in NOAA charts.

COMMENT:

After reading the opinion a time or two, one is left with the impression that the author was having a good time writing the opinion. It is very, very rare that a state court judge has the opportunity to write an opinion applying federal admiralty law.

Now, why did we entitle this piece "Sailboat 'Allision'"? I thought you would never ask. Footnote 1 educates all of us by pointing out that an "allision" occurs when a moving vessel collides with a stationary object. In contrast, a "collision" occurs when two moving vessels collide.

Alprin v. City of Tacoma, 139 Wn. App. 166, 159 P.3d 448 (2007).

EVIDENCE 101

FACTS:

Rachelle was driving home after working on the graveyard shift. Coming the other way was a county snowplow. There was snow and ice on the edge of the road. Rachelle drifted across the center line and did a head-on with the snow plow.

Rachelle's estate sued the County, claiming that the County's failure to maintain the road caused Rachelle to overcorrect and to veer into the path of the snowplow.

After a presentation of the plaintiff's case, the court dismissed it as a matter of law. The estate appealed, claiming that it was error not to let a neighbor testify how he thought

the accident happened, and to exclude pictures taken 13 days after the accident. The Court of Appeals found no error and affirmed.

HOLDINGS:

1. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602.

2. Evidence Rule 701 requires lay opinion be limited to that which is "(a) . . . rationally based on the perception of the witness, (b) [and is] helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

3. The neighbor did not have personal knowledge or a perception of how the accident happened. Thus, testimony as to how he thinks the accident occurred would violate both ER 602 and ER 701.

4. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

5. The excluded photographs were taken 13 days after the accident after the snow and ice melted. No testimony discussed where the photographs were taken, whether the pictures showed the impact point, or showed the angle and distance from which the pictures were taken.

6. The pictures were properly excluded because of the change in road conditions, and the lack of foundation.

7. To establish a wrongful death action based on negligence, the plaintiff must establish the existence of a duty, breach, resulting injury, and proximate cause between the breach and the injury. Counties have a duty to ensure "'streets be maintained in a reasonably safe condition.'"

8. The estate failed to establish a breach of this duty or that the alleged breach proximately caused Rachelle's death. She presented no expert testimony that the road was not maintained in a reasonably safe condition and no testimony linking the rutted road condition to the accident.

COMMENT:

A clear, concise opinion that reviews the fundamentals. Some trial judges forget there are Rules of Evidence and let everything in.

Bowers v. Spokane County, 138 Wn. App. 1057, 2007 WL 1567670 (2007).

DETAILS. DETAILS. NEED DETAILS!

FACTS:

Eric was left paralyzed after an auto accident. He sued the hospital where he was cared for after the accident, claiming that the three months of treatment resulted in the development of pressure sores.

The hospital moved for summary judgment pointing out that Eric did not have an expert. In response, Eric submitted the declaration of an R.N. The trial court concluded that the declaration was deficient and dismissed the case. The Court of Appeals affirmed.

HOLDINGS:

1. The elements that must be proved when medical negligence is alleged:

> (a) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which [the health care provider] belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (b) Such failure was the proximate cause of the injury complained of.

2. To prove these elements, a plaintiff must submit competent expert testimony to establish the standard of care and breach thereof, and to prove causation.

3. In medical negligence cases, expert testimony is necessary to establish the standard of care applicable to the medical professionals upon whose actions the allegation of negligence is premised. To defeat a motion for summary judgment, the expert testimony must be based on facts, not speculation or conjecture.

4. There is no evidence set forth to establish what actions the nurses were supposed to have taken, under the particular circumstances of this case, against which a trier of fact could measure the evidence of the actual steps taken—or required steps not taken—by the nurses at Harborview.

5. Th e declaration does not set forth specific facts concerning how the treatment fell below the standard of care.

COMMENT:

The opinion points up that in medical malpractice cases, the court will scrutinize the expert testimony. It will not be enough to make broad sweeping statements that negligence was present: details and specifics are required.

Johnson v. UW Medicine, 138 Wn. App. 1063, 2007 WL 1589453 (2007).

LEVI BENDELE

PRACTICE

Mr. Bendele is a litigator who defends businesses and individuals against a wide variety of personal injury and property damage lawsuits. His practice encompasses the following areas: automobile liability, premises liability, construction safety, construction defect, product liability, extra-contractual litigation, institutional insurance bad faith, examinations under oath, Fair Credit Reporting Act, Fair Debt Collection Practices Act, and Consumer Protection Act.

As many of his clients have insurance policies, and because many of his cases involve multiple defendants with interrelated contractual obligations, Mr. Bendele regularly handles issues involving tenders of defense and indemnification agreements. A smaller focus of his practice involves automobile coverage, construction coverage, CGL and D&O coverage, and appeals.

Prior to coming to Reed McClure, Mr. Bendele worked as a family law attorney and in automobile claims for a leader in the insurance industry. He has negotiated and settled hundreds of cases in the Seattle area. His experience with a wide variety of legal issues and resolution settings allows him to assess and negotiate settlements in cases that should be disposed of and, on the other hand, work up and prosecute matters that should be defended in a cost-effective and timely manner.

SPEAKER

Where Did The Arbitration Clause Go?
Lorman Education Services
Auto Insurance in Washington: Uninsured, Underinsured, and Accident

Pet Torts: When Cats Don't Have Nine Lives
Reed McClure Ninth Insurance Law Seminar

Primary Liability Coverage in the Rental-Vehicle Context
Reed McClure Eighth Insurance Law Seminar

EDUCATION

University of Denver College of Law, Denver, CO
Juris Doctor

Judge James T. Starkweather Memorial Scholarship
John Phillip Linn Labor Law Award
American Jurisprudence Awards in Torts and Unincorporated Associations

University of Colorado, Boulder, CO
Bachelor of Arts, Political Science
Bachelor of Arts, Mathematics

BACKGROUND

Mr. Bendele is licensed to practice in Washington State and Colorado, and is a member of the Washington State Bar Association.

WITNESS IMMUNITY

FACTS:

Angela went to see Dr. Bob for an evaluation of depression. After an exam, Dr. Bob concluded that she was not depressed. She was merely stressed out from her husband's nightly drinking.

When Angela became involved in a parenting plan dispute with her husband, she asked Dr. Bob for a letter. He provided one which said that her stressed-out condition was related to her husband's alcoholism. It was introduced at the hearing but the judge said he would not consider it in figuring out what was wrong with the husband.

But the husband sued Dr. Bob for defamation, outrage, and Consumer Protection Act violation. The trial court dismissed the whole case on summary judgment. The Court of Appeals affirmed, concluding that the doctrine of witness immunity made the content of the letter absolutely privileged.

HOLDINGS:

1. The *Restatement (Second) of Torts* 1977) provides that a witness to a judicial or quasi-judicial proceeding "is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding."

2. In Washington, "As a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony." "The purpose of the rule is to preserve the integrity of the judicial process by encouraging full and frank testimony."

3. "Guardians, therapists and attorneys who submit reports to family court are absolutely immune."

4. Statements do not need to be made under oath or in a courtroom to be protected by absolute immunity.

COMMENT:

The opinion contains citations to a number of Washington cases which have had to apply this rare example of absolute privilege.

Humphreys v. Klem, 139 Wn. App. 1027, 2007 WL 1810248 (2007).

QUICKLY, QUICKLY, QUICKLY

The "faulty workmanship" exclusion in a St. Paul "all-risks" policy was carefully analyzed in a Division I opinion. The Court noted that the policyholder was missing the point by arguing that the faulty workmanship exclusion did not apply because the loss was "fortuitous." Under an "all-risks" policy, all fortuitous losses are covered unless a specific exclusion applies. Relying in part on *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7 (1999), the court concluded that damage to the city's sewage lagoon by a dredging contractor was caused by faulty workmanship and thus excluded.

City of Oak Harbor v. St. Paul Mercury Ins. Co., 139 Wn. App. 68, 159 P.3d 422 (2007).

The Ninth Circuit does not handle too many Washington coverage questions, and when it does, the result is at best problematic. I mean, after all, how do you expect three lawyers from California to understand the enigma that is Washington insurance law? But this summer, after 11 months of meditation, they issued an opinion of which at least half was correct.

The case involved earthquake coverage in the sum of $5 million.

When the policy was renewed, Murphy got involved: A "clerical error" reduced the coverage to $500,000. No one noticed that year or the next. But then in February 2001, we had one of our periodic Puget Sound earthquakes. The policyholder put in a claim for $8 million. The company dug out the policy and said, "Aha! You've only got $500K in coverage."

A lawsuit was filed in federal court and the judge agreed with the insurance company that the policy clearly provided only $500,000. Well, what the policy clearly provided did not bother the 9th Circuit too much. It ruled that the clerical error gave rise to a mutual mistake and therefore the policy should be reformed to reflect the parties' mutual intent that there be $5 million in earthquake coverage.

Then, in one of life's little ironic coincidences, the policyholder was back in federal court a month later. This time, he was sentenced to seven years in prison for income tax evasion.

Caliber One Indem. Co. v. Wade Cook Financial Corp., 491 F.3d 1079 (2007).

In *Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 306 (1996), the Court held that the work of subcontractors is necessarily included in exclusions pertaining to faulty work or defective products of the contractor. Under Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general. 81 Wn. App. at 305.

What brings this to mind are two unpublished opinions from Division I. In both, the Court reviewed the rationale for the *Schwindt* rule in detail, and demonstrated why the exclusion for claims arising from work performed "by the named insured" also excludes coverage for claims arising from work performed by a subcontractor.

In the second case, (*Red Oaks*), the Court made these insightful comments on the question of good faith.

1. Mutual of Enumclaw did not have any duty to immediately seek judicial resolution of the coverage issues. An insurer can wait for a resolution of the underlying action before seeking a declaratory judgment as to coverage issues without violating the duty of good faith.

2. The duty of full disclosure also obligates an insurer to disclose the policy provisions it relies upon in denying a claim. WAC 284-30-330(13).

3. By setting forth its rationale for its reservation of rights in its letter to Sundquist, MOE complied with the insurer's duty of good faith.

4. If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend.

5. The duty to give equal consideration to the insured's interests in all matters does not require an insurer to abandon its own rights under the insurance contract. MOE's "refusal" to settle claims against its policyholder based on its coverage position was properly premised on its correct analysis of its coverage obligation.

6. We decline to rule that an insurer's refusal to pay out a settlement negotiated by its insured, at a time when the insurer contests whether the applicable policy covers the loss, amounts to a breach of the duty of good faith, simply because the insured might eventually face greater financial liability for non-covered losses.

Both opinions are worth a careful read.

Mutual of Enumclaw Ins. Co. v. MacPherson Constr. & Design, 2007 WL 2029284 (Wn. App. 2007).

Red Oaks Condominium Owners Ass'n v. American States Ins. Co., 2007 WL 2171435 (Wn. App. 2007).

IT'S BACK!!!!!

Yes, the Critically Acclaimed Washington Insurance Law Seminar Put On for Insurance Industry Personnel by Real Insurance Law Lawyers Is Returning.

After a Short Absence Reed McClure's Insurance Law Seminar Will Return in May 2008. Watch for Further Information.

WASHINGTON SUPER LAWYERS 2007

The Seattle based magazine, Washington Law & Politics has released its 2007 list of Washington Super Lawyers. On the list we are very pleased to find three Reed McClure attorneys:

Pamela Okano: Appeals; Insurance coverage
Jack Rankin: Construction; Personal Injury
Bill Hickman: Appeals Consultation

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/newsletter.html . . . 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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