WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXX, NO. 1 *IT'S A NEW SPRING 2006*

Published and Distributed by: REED McCLURE
ISSN 1064-1378
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THE UNCOVERED MOLD

FACTS:

Marie and her parents bought a home. They insured it with State Farm. Marie lived there for two years before leaving for school in Scotland. The parents rented out the house over the next 26 months. In 2000, the tenants sued, claiming illness caused by mold in the house.

The mold claim was tendered to State Farm, which denied because the homeowner's policy had an exclusion for injuries arising from renting the property. The policyholder disagreed, pointing out that the exclusion for rentals did not apply to rentals "on an occasional basis."

State Farm filed for a declaration of whether there was coverage for the mold claim. The trial court and the Court of Appeals agreed that a continuous rental arrangement over 26 months could not be characterized as "occasional."

HOLDINGS:

1. The insurance policy does not include a definition for the phrase "on an occasional basis," so we look to standard English dictionaries for the term's "plain, ordinary and popular meaning."

2. An "occasional" rental should be interpreted consistent with the purposes of a homeowner's insurance policy, as opposed to a landlord's insurance policy.

3. Homeowner's continuous rental of their house for over 26 months was not an "occasional rental."

COMMENT:

The court did not need to come up with a bright line rule of rental duration because 26 months was beyond legitimate dispute.

FURTHER COMMENT:

State Farm was represented in this case by Reed McClure attorneys Michael S. Rogers and Pamela A. Okano.

State Farm Fire & Cas. Co. v. Piazza, ___ Wn. App. ___, 131 P.3d 337 (2006).

A TICKET TO MT. MERU

FACTS:

Maryanne was on a charter flight from Kenya to Tanzania. The plane crashed into Mount Meru. Everyone was killed.

Her local travel agent had booked her flight from Pasco to Los Angeles and back. The rest of the trip was booked by an Illinois tour operator. The local agent had a deal with an insurance company to provide $100,000 of accident insurance for accidents occurring on a "ticketed trip," provided the ticket was issued by the local agent.

Maryanne's heirs and the insurance company got into a dispute over whether that insurance could be stretched to cover the accident in Africa. The trial court ruled in favor of the insurance company. The Court of Appeals agreed, holding that the insurance applied only to airline tickets actually "issued" by the local travel agent, and that the company's reasonable basis for denial was a complete defense to the bad faith and CPA claims.

HOLDINGS:

1. The terms of a policy are given a fair and reasonable construction. Definitions provided in the policy are controlling. But if a term is undefined, it is given the plain and ordinary meaning found in a standard English dictionary.

2. A reasonable construction of the word "issued" supports the company's view that coverage is limited to tickets purchased directly from the airlines by the local agent, and issued in the local agent's office.

3. In some cases, an insurer that denies liability under a policy for one reason may be estopped from later raising other previously known grounds in an attempt to escape liability. The insured must have been prejudiced by the insurer's failure to raise the other grounds initially.

4. Estoppel may not be applied to extend the coverage of an insurance policy. The rationale for this rule is that an insurer should not be required to pay for a loss for which it received no premium. This rule may be inapplicable if the insurer acts in bad faith. No estoppel arises if the injured party had an equal opportunity to determine the facts.

5. A reasonable basis for denying coverage constitutes a complete defense to any claim that the insurer denied coverage in bad faith or in violation of the CPA.

COMMENT:

A really remarkable opinion. The court went through and disposed of each contention with great attention to the facts and the law. Our summary covers maybe 50% of what the court covered. In addition to its discussion of the WAC regulations, the court also set out this bad faith burden shifting:

1. The insured must come forward with evidence that the insurer acted unreasonably.

2. If it does this, then the burden shifts to the insurer to present a reasonable basis for its action.

3. If it does, then the claim must be dismissed, unless the insured is able to create a question of material fact by presenting evidence that the insurer's alleged basis was not the actual basis for denying coverage.

All in all, certainly one of the significant opinions of 2005.

Rizzuti v. Basin Travel Service of Othello, Inc., 125 Wn. App. 602, 105 P.3d 1012 (2005).

RES IPSA SEWER

FACTS:

At 11 a.m. on Saturday morning, Chuck's toilet began sending sewage into the house rather than out of it. This occurred notwithstanding that the sewer line had been found clear six days before, and that Chuck had installed a backflow prevention device.

It being Saturday, no one was available at the City, so Chuck called 911. A couple hours later, the mayor and an employee arrived and they blasted the obstruction.

Chuck sustained about $16,000 in damages. Chuck sued the City. The trial court dismissed the suit. On appeal, the Court of Appeals held the City was not legally liable because Chuck did not demonstrate negligence.

HOLDINGS:

1. Washington recognizes that a municipality has a duty to exercise reasonable care in the repair and maintenance of the municipal sewage system.

2. The doctrine of res ipsa loquitur creates a presumption of negligence. The doctrine of res ipsa loquitur ("the thing speaks for itself") provides that, in some circumstances, the mere fact that an accident occurred raises an inference of negligence.

3. For the doctrine to apply, the plaintiff must establish three criteria: (1) that the injury-producing occurrence is not the kind that ordinarily happens without someone's negligence; (2) that the injury was caused by some agent or instrumentality under the exclusive control of the defendant; and (3) the injury-producing occurrence is not due to any action by the plaintiff.

4. Chuck did not establish that the City had exclusive control over the sewer and the obstruction that caused the damage.

5. A city is not an insurer of the condition of its sewers; to charge it with damage caused by an obstruction in the sewers, negligence must be proved.

COMMENT:

Oh, tough case. You really have to have empathy for Chuck. He did not do anything to have his home filled with what comes out of sewer pipes. One more example of "s___ happens."

Kempter v. City of Soap Lake, 132 Wn. App. 155, 130 P.3d 420 (2006).

THE GRAND COMPROMISE IS NOT OFFENDED

FACTS:

Bernard worked for FSA driving a forklift inside the warehouse. He worked only inside.

Darrell worked for FSA driving a "yard goat" in the area adjacent to the warehouse. He did not work inside.

One day, Bernard came to work, parked in the FSA parking lot, and walked toward the warehouse in the crosswalk. Darrell, driving the "goat," hit and killed him.

So, there it is. Bernard, an FSA employee, was killed by an FSA employee, while on FSA property, while walking to his job at FSA. The question is, who can the estate sue? If your answer is no one, because of workers' compensation immunity, you are wrong.

It seems there is a little exception to the RCW 51.32.010 immunity. The statute provides that a worker is acting in the course of employment while going to or coming from the jobsite, "except parking area." I suspect the exception was added to the statute at the behest of employers who were tired of paying workers' compensation claims for trip-and-falls in the parking lot. The down side is that the injured employee can sue the employer in tort.

And that is what happened here. The trial court and the Court of Appeals agreed that FSA was not immune to this tort claim by an employee.

COMMENT:

A stunningly lucid opinion which explains the "Parking Lot Exception," the "Pure Parking" cases, the "Mixed-Use" cases and the public policy. As to the latter, it notes that workers' compensation was the product of a grand compromise of 1911, and that grand compromise was not offended by letting the estate sue.

Ottesen v. Food Services of America, 131 Wn. App. 310, 126 P.3d 832 (2006).

WATER PIPE DEFAULT

FACTS:

Bob's house sustained major water damage when a waterline broke. The waterline was labeled with Waxman's name. Bob's insurer, Farmers, paid for the water damage and then asked Waxman for reimbursement. Waxman did not respond affirmatively, so Farmers sued it.

Waxman did not respond to the suit, so Farmers took a default judgment. Several months later, Waxman moved to vacate the default judgment saying that there had been a mix-up with its liability carrier.

The trial court vacated the default judgment. Farmers appealed, and the Court of Appeals reversed because Waxman had failed to present evidence sufficient to support a prima facie defense to the products liability claim.

HOLDINGS:

1. Default judgments are disfavored in the law.

2. A proceeding to vacate a default judgment is equitable in character.

3. An abuse of discretion will be more readily found if a trial court has refused to set aside a default judgment.

4. Waxman failed to show it had any defense to the products claim, which was premised on a piece of pipe that had Waxman's name on it.

COMMENT:

Given the public policy which favors having disputes resolved on the merits rather than by default, and the deference to be accorded the trial court, it is unusual to have the Court of Appeals reverse an order of vacation.

Farmers Ins. Co. v. Waxman Indus. Inc., 132 Wn. App. 142, 130 P.3d 874 (2006).

REGULAR USE OF THE BUS

FACTS:

Claire had been driving a school bus for years. She was involved in a collision while driving the bus.

Claire had an auto policy with State Farm which provided PIP coverage. However, the PIP endorsement said that there was no coverage for bodily injury to Claire if it occurred while she occupied a motor vehicle furnished for her regular use. The UIM endorsement had a similar regular use exclusion.

So State Farm denied the claim. Claire sued. The trial court ruled that Claire's daily use of the bus constituted regular use. The Court of Appeals affirmed holding that the use of the school bus constituted "regular use."

HOLDINGS:

1. We apply contract principles to interpret insurance policies. We must consider the 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.

2. If the language is clear and unambiguous, we must enforce it as written and not create ambiguity where none exists. We will enforce policy exclusions unless they are against public policy.

3. Washington courts have routinely held that regular use clauses such as this one are clear and unambiguous.

4. Regular use provisions, such as this one, are meant to provide coverage for isolated use of a vehicle without requiring the insured to pay an additional insurance premium to insure that vehicle. But these provisions do not allow the insured interchangeable use of other cars that the insured's policy does not cover.

5. It is clear that the regular use exclusion applies to employer-provided vehicles.

COMMENT:

Despite the abundance of very specific authority, this question keeps coming up.

Hall v. State Farm Mut. Ins. Co., 2006 WL 1075256 (Wn. App. 2006).

TAKE ME OUT TO THE BALL GAME

FACTS:

Delinda went to Safeco Field to watch a Mariners game. She got there early while the players were warming up. Freddy Garcia was playing catch with Jose Mesa who was about 120 feet away. While Delinda was standing in front of her seat four rows up from the field, she turned her head away from the field just as one of Mesa's throws got by Garcia and hit Delinda in the face. She suffered serious injury.

She sued the Mariners. The trial court dismissed her case. The Court of Appeals affirmed the dismissal under the baseball rule of implied primary assumption of risk.

HOLDINGS:

1. In Washington, the law has long been that baseball stadiums have a duty to screen some seats and, as a corollary, a spectator who takes a seat in the unscreened portion of a stadium assumes the risk of being struck by a baseball.

2. A sport spectator's assumption of risk and a defendant sports team's duty of care are accordingly discerned under the doctrine of primary assumption of risk.

3. The doctrine serves as a complete bar to recovery when an injury results from a risk inherent in the activity in which the plaintiff was engaged: "Implied *primary* assumption of risk arises where a plaintiff has impliedly consented to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks."

4. Errant throws into the stands are an inherent risk of baseball; Delinda assumed the risk of a ball entering the stands.

COMMENT:

Remarkable. Not only does baseball have an antitrust exception, it also has a tort exemption.

Taylor v. Baseball Club of Seattle, 132 Wn. App. 32, 130 P.3d 835 (2006).

JUST BEING NEIGHBORLY

FACTS:

Harry owned a home in West Seattle. Between the home and the street was a sidewalk, then a parking strip, also known as a planting strip. In the spring, Harry would plant flowers and add some steer manure. In the fall, he would remove the dead flowers.

One day, Jim came along, riding his bicycle on the sidewalk, between the parking strip and the road. He moved his bicycle from the sidewalk over the parking strip. He crashed and injured himself.

Jim sued Harry, claiming that Harry had used the parking strip for "special purposes" and had failed to maintain it in a reasonably safe condition. Harry took the position he was just being neighborly and had no duty to Jim.

The trial court and the Court of Appeals agreed that Harry was just being neighborly.

HOLDINGS:

1. In order to establish a claim of negligence, the plaintiff must show (1) the existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury.

2. An owner whose property abuts a public right-of-way may be liable for negligence if he fails to exercise reasonable care when he uses the sidewalk for his own special purposes.

3. Planting flowers in the spring, and removing them in the fall is "neighborly maintenance," not a "special use."

COMMENT:

We can always use more "neighborly maintenance."

Lynch v. Clark, 2006 WL 225781 (Wn. App. 2006).

BERT AND AL DO COFFEE

FACTS:

Al came into Bert's coffee shop and purchased a coffee. He sat down in a chair. The chair broke. Al sued Bert.

The trial court dismissed because Al presented no evidence that Bert either actually or constructively knew the chair was defective. Al argued that he did not need to prove knowledge because Bert used old chairs.

The Court of Appeals affirmed because there was no evidence of notice that the chair in question was defective, and no evidence that antique chairs are inherently dangerous.

HOLDINGS:

1. Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was caused by the proprietor or his employees, or the proprietor had actual or constructive notice of the unsafe condition.

2. Reasonable care requires a landowner to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.

3. Constructive notice arises where the condition has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.

4. Al has not shown that there is anything inherently dangerous about running a coffee shop equipped with used furniture. The evidence of one broken chair is not sufficient to establish that antique chairs are inherently or foreseeably dangerous.

COMMENT:

Clear, succinct opinion on a frequent situation. Although a business owner is held to a high standard of care, he/she is not an insurer of the premises.

The opinion also contains a discussion of the Washington rule as to "self-service" areas within a retail establishment.

Fredrickson v. Bertolini's Tacoma, Inc., 131 Wn. App. 183, 127 P.3d 5 (2005).

IF ALL ELSE FAILS, READ THE INSTRUCTIONS

FACTS:

Carrie and Mary were involved in an automobile accident. Carrie sued. The only issue was damages, *i.e.*, how much was Carrie hurt.
The jury verdict said:

1. Past economic damages	$21,290.72
2. Future economic damages	$0
3. Past and Future non-economic damages	$21,290.72

Whoever drafted the jury verdict form had not supplied a line or a space where the jury could record the total damages.

Out in the hall, after the verdict, the lawyers chatted with the jury. One of the lawyers pointed out how the jury had made identical awards for two very different types of damages. The jurors said, "Oh no, that's not right. $21,290.72 is the <u>total</u> verdict."

At the presentation hearing, plaintiff's attorney presented a judgment for $42,581.44 while defense presented a judgment for $21,290.72 and some affidavits from members of the jury. The judge signed the plaintiff's judgment, and commented that the law is clear that the fact that jurors don't understand what their job is, doesn't negate their verdict.

The Court of Appeals reversed and ordered a new trial, holding that the presiding juror's declaration indicated a clerical error.

HOLDINGS:

1. The jury verdict form could not be corrected by the trial judge.

2. Our State allows juror affidavits or declarations to impeach a verdict as long as the information provided does not relate to a factor that "inheres in the verdict."

3. Generally, a fact "inheres in the verdict" if it relates to the effect of evidence or events upon the mind of a juror, or is directly associated with the juror's reasons, intent, motive, or belief, when reaching the verdict.

4. Whether the presiding juror correctly recorded and communicated the jury's verdict does not relate to how or why the jury reached its verdict. This fact does not inhere in the verdict.

5. The irregularity in the verdict mandates a new trial.

COMMENT:

A super job of negating what would have been a miscarriage of justice.

Marvik v. Winkelman, 126 Wn. App. 655, 109 P.3d 47 (2005).

QUICKLY, QUICKLY, QUICKLY

Reed McClure's Pam Okano was the leadoff speaker at an American Bar Association seminar entitled "Emerging Issues in Homeowners' Insurance." Pam got it started with her back-to-basics presentation entitled "What Do We Cover? The Insuring Agreement." Some of the other high-level presentations included: "The Chicken or the Egg: Concurrent Causation"; "What the Heck is an 'Ensuing Loss?'"; "Lost in Cyberspace: Emerging Technology Losses in the Homeowner's Context"; "Sea World in My Basement"; and of course "The Emerging Trend of Alleging 'Institutional Bad Faith.'"

Division I issued, but did not publish, an opinion which cogently explained the term "aggregate limit." The policyholder had sustained two separate $170,000 losses. The limits were $200,000 per site and $300,000 aggregate. The court said $300,000 was all there was.

Marzolf v. Red Shield Ins. Co., 2006 WL 1029648 (Wn. App. 2006)

Reed McClure attorney Earl Sutherland sends this along as his nomination for shortest judicial opinion:

> J.H. Gillis, Judge.
>
> The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v. Higgins Rack Coating and Manufacturing Co., Inc.* (1969), 17 Mich.App. 259, 169 N.W.2d 326. He didn't. We couldn't.
>
> Affirmed. Costs to appellee.

Denny v. Radar Industries, Inc., 28 Mich.App. 294, 184 N.W.2d 289 (1970).

Additional insured endorsements are innocuous little items which have given rise to many disputes, a lot of opinion letters, but not too many useful legal opinions. They arise when "X" goes to his CGL carrier to get an AIE so that "Y" is an insured under X's policy but only with respect to liability arising out of, for example, X's operations or premises owned by or rented to X. There being a universe of potential factual situations, it is difficult to identify hard and fast rules.

Division I of the Court of Appeals recently published an AIE opinion which demonstrated how the basic rules of insurance construction can be utilized to reach a result which is probably consistent with what the parties had in mind in the first place.

Equilon Enterprises, LLC. v. Great American Alliance Ins. Co., ___ Wn. App. ___, 132 P.3d 758 (2006).

Welcome Aboard

Dan Keefe has been elected as a shareholder and will continue his work in medical malpractice defense.

Michael Budelsky has joined the firm as an associate. He is a 1998 graduate of the University of Cincinnati Law School. He was in private practice in Cincinnati before moving to Seattle in 2004.

Michael Howard has joined the insurance defense team at Reed McClure. Prior to joining the firm, the DePaul Law School graduate was an insurance defense attorney in Seattle for four years.

William R. Hickman has become "Of Counsel" with the firm. After 37 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.

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