WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXII, NO. 3 *OLYMPIC SUMMER 2008*

Published and Distributed by: REED McCLURE
ISSN 1064-1378
Two Union Square, 601 Union Street, Suite 1500
Seattle, Washington 98101-1363
206/292-4900

INDEX

CHANGE OF ADDRESS: Please call Mary Clifton at 206/292-4900; Fax: 206/223-0152; E-mail: mclifton@rmlaw.com.

NO LIMITATION IN ARBITRATION

FACTS:

The Court of Appeals has approved the notion that in Washington, statutes of limitation do not bar a claimant from pursuing a claim in arbitration. Mike had a mismanagement claim against Morgan Stanley. It went to arbitration. The arbitration panel dismissed on the ground the claims were barred by the applicable statute of limitations.

Mike filed suit and moved to vacate the award. The superior court agreed with Mike that the award was erroneous, stating that in Washington statutes of limitation do not bar a claimant from pursuing a claim submitted to arbitration.

The Court of Appeals, in an unpublished opinion, agreed, citing two Supreme Court opinions for the proposition that where the statute of limitation refers to an "action," it contemplates a prosecution in court, not an arbitration. *Auburn v. King County*, 114 Wn.2d 447 (1990); *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126 (1967).

COMMENT:

Perhaps it is only me, but I find the concept of not applying a statute of limitation to a claim to be surprising, and the court's decision not to publish this opinion inexplicable.

Broom v. Morgan Stanley DW, Inc., 2008 WL 4053440 (Wn. App. Sept. 2, 2008).

MICHAEL S. ROGERS

SHAREHOLDER

PRACTICE:

Mr. Rogers has a general litigation and appellate practice emphasizing insurance coverage and extracontractual litigation matters.

INSURANCE COVERAGE LITIGATION

Mr. Rogers represents insurance companies in coverage litigation, including commercial general liability, automobile and first-party property coverage areas. Mr. Rogers also defends "bad faith" claims brought by policyholders relating to claims handling and defense obligations.

INSURANCE DEFENSE LITIGATION

Mr. Rogers defends suits involving damage to real property and significant personal injury claims.

EDUCATION:

University of Washington School of Law, J.D., 1986

University of Washington, B.S. (Physics), 1983

BACKGROUND:

Mr. Rogers was born in Seattle, Washington. He is admitted to practice in the State of Washington, the United States District Court, Eastern and Western Districts of Washington, United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

OPEN AND OBVIOUS DANGER

FACTS:

Stefani rented a two-story unit in a duplex. While moving in, she opened a window in the second floor living room. While she was attending to her youngest in another room, her five-year-old fell out the open window, landing on the concrete patio below.

A lawsuit was filed against the owner, alleging code violations. The defendants moved for dismissal, arguing that the window was not defective and that it was an open and obvious danger. The trial court denied summary judgment. The owner appealed. The Court of Appeals reversed, finding that the window constituted an open and obvious danger that barred liability from attaching to the owner.

HOLDINGS:

1. The traditional common law rule is that, absent a repair covenant, a landlord is not liable to a tenant for "injuries caused by apparent defects after exclusive control has passed to the tenant."

2. Generally, a landlord has no duty to protect a tenant from open and obvious dangers.

3. There was no building code violation; no breach of an implied warranty of habitability; no breach of a statutory duty.

COMMENT:

In an effort to circumvent the common law rule, the plaintiffs threw a bushel basket of arguments at the court, including the argument that the second floor window was the "functional equivalent of a patio door."

Reed McClure's Pam Okano represented the landlord on appeal. Plaintiffs have petitioned for review by the Washington Supreme Court.

Neely v. Reid Co., LLC, 2008 WL 2974318 (Wn. App. Aug. 5, 2008).

RUBY IS NOT HUMAN

FACTS:

Arlene paid $550 for a toy poodle. She named her Ruby. A few months later she brought Ruby to the vet to check on a urinary tract infection. The vet performed a cystocentesis. (Don't ask; you don't want to know.)

Anyway, about a minute after the needle was inserted, Ruby collapsed. "Despite efforts to resuscitate[!] . . ., Ruby died."

Arlene filed what she called a "wrongful death" suit. (There is no such cause of action.) She included claims of negligence, conversion, breach of bailment, negligent hiring, negligent misrepresentation, trespass, breach of fiduciary duty, NIED, and violation of CPA. The vet answered, saying she did nothing wrong, and then moved to have the court apply the Medical Malpractice Act (ch. 7.70 RCW) to the suit with the desired result being that all of Arlene's claims except negligence would be barred.

The trial court agreed that the Medical Malpractice Act applied to vets.

Thereafter, the parties engaged in intense motion practice by which the vet sought to limit Ruby's value to between zero and $200, and Arlene sought to establish that Ruby was worth more than $10,000. Among the items filed by Arlene was a declaration from Dr. Nitschke, "an expert in the field of interspecies communications."

Eventually, the case got so convoluted that both sides appealed. The Court of Appeals held that the medical malpractice statute does not apply to vets, and that there were questions of fact as to what, if anything, Ruby was worth.

HOLDINGS:

1. Whether the Medical Malpractice Act applies to veterinarians is a question of law. The objective of statutory interpretation is to ascertain and carry out legislative intent. Statutes such as the Medical Malpractice Act that are in derogation of the common law, must be construed narrowly.

2. Based on the plain and unambiguous language of ch. 7.70 RCW, we conclude the act applies only to human health care, and does not apply to veterinarians.

3. Legislative history supports our conclusion that the Medical Malpractice Act does not apply to veterinary care.

4. Because the Medical Malpractice Act does not apply to veterinarians, we reverse the trial court's dismissal of the claims of breach of bailment contract,

negligent misrepresentation, conversion, trespass to chattels, and the breach of fiduciary duty.

5. In *McCurdy v. Union Pac. R. Co.*, 68 Wn.2d 457, 413 P.2d 617 (1966), the Washington Supreme Court sets forth a three-part analysis for the measure of damages for the loss of personal property.

> If the property is a total loss the measure of damages is the value of the property destroyed or damaged. This is its market value, if it has a market value. If the property is damaged but not destroyed, the measure of damages is the difference between the market value property before the injury and its market value after the injury. (Again, if it has a market value.) If the property does not have a market value, then if a total loss, the measure of damages is the cost to replace or reproduce the article. If it cannot be reproduced or replaced, then its value to the owner may be considered in fixing damages.

McCurdy, 68 Wn.2d at 467.

6. It is well established that a pet owner has no right to emotional distress damages or damages for loss of human-animal bond based on the negligent death or injury to a pet.

7. The trial court should be mindful of the case law that precludes establishing damages on the basis of sentiment or loss of companionship.

8. There are material issues of fact concerning whether there was a market value for Ruby, whether Ruby can be replaced, and whether Arlene is entitled to present evidence of the intrinsic value damages for the loss of Ruby.

COMMENT:

I have a great deal of difficulty taking seriously this expenditure of time, energy, and money. One is reminded of what Crowley wrote a hundred years ago: the first indicator of the collapse of a civilization is when it starts making decisions with its heart instead of its head.

Sherman v. Kissinger, ___ Wn. App. ___, ___ P.3d ___ (2008).

COLLISION IN AISLE 5

FACTS:

Pat was shopping at Costco. She was hit by a shopping cart. The cart was operated by 7-year-old Victoria.

Pat sued Victoria and her father Yichung. At trial, each side proposed a jury instruction on negligent parental supervision. In a Solomon-like response, the trial judge gave both instructions.

The jury concluded that no one was negligent. Pat appealed. The Court of Appeals affirmed, finding that Yichung's instruction was correct, and that Pat's instruction was premised on the jury finding Victoria negligent, which it did not.

HOLDINGS:

1. An instruction that contains an erroneous statement of the applicable law is a reversible error where it prejudices a party.

2. Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law.

3. Washington courts consistently require a plaintiff to show the child has a "habit" or "proclivity" for dangerous conduct regardless of whether the child is alleged to have acted negligently or intentionally.

COMMENT:

A trial has sometimes been described as a proceeding in which two lawyers each attempt to convince the judge to make mistakes favoring their client. Here, the judge did a fine job of making sure that the ultimate resolution of the dispute was made by the jury.

Paulson v. Huang, 2008 WL 3824773 (Wn. App. Aug. 18, 2008).

JOHN W. RANKIN, JR.

SHAREHOLDER

PRACTICE:

Mr. Rankin has more than 30 years of litigation experience. During that period, his practice has emphasized defense of liability claims, including product liability, construction site accident, construction defect, and general liability claims. Mr. Rankin has also defended a wide variety of professionals against malpractice lawsuits, including architects and engineers, attorneys, physicians, insurance and securities brokers.

In addition, Mr. Rankin has had substantial involvement in insurance coverage analysis and coverage litigation, particularly in the areas of construction defects and failures, construction site injuries, and general liability.

Mr. Rankin holds a Bachelor of Science degree in Mechanical Engineering. This background assists him immeasurably in litigation of construction and product liability claims. His experience in this field includes structural failures, air pollution, electrical and electronic systems, wastewater plants, utility construction and design, work site injury claims and many others.

EDUCATION:

University of Washington School of Law, J.D., 1975

University of Washington, B.S. in Mechanical Engineering, 1969

BACKGROUND:

Mr. Rankin was born in Ayer, Massachusetts. He served in the United States Navy from 1969-1972.

Mr. Rankin has been admitted to practice in the State of Washington, and the United States District Court, Eastern and Western Districts of Washington.

JUDICIAL ESTOPPEL - ONE LAST TIME

FACTS:

The Washington Supreme Court has now effectively slammed the courthouse door on the defensive use of judicial estoppel a/k/a "Don't lie to the court or you will be sorry." In a unanimous decision, it held that if the bankruptcy trustee is in the case, judicial estoppel does not bar the trustee from pursuing a debtor's claim that was not disclosed during the bankruptcy. In addition, if the trustee pursues the claim and makes a recovery, it will be up to the bankruptcy judge to decide whether or not to apply judicial estoppel.

The rulings arose in the context of a sexual abuse case. Mike alleged he was abused by his stepfather Pat between 1975 and 1984. Mike went through Chapter 7 bankruptcy in 1998. He did not list the abuse claim against Pat among his assets. In 2002, when Pat was on his deathbed, Mike began to speak about the abuse for the first time.

Mike sued Pat's estate. The estate moved for dismissal because Mike had failed to list the claim in his bankruptcy. The superior court agreed and dismissed. The Court of Appeals disagreed, holding that the unique nature of abuse claims indicated that judicial estoppel should not be applied. After that, the bankruptcy was reopened, the Supreme Court granted review, and the trustee was substituted as the real party in interest.

HOLDINGS:

1. The substitution of the bankruptcy trustee relates back to the time of the original filing.

2. The doctrine of "'[j]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceedings and later seeking an advantage by taking a clearly inconsistent position.'"

3. The purpose of the doctrine is "'to preserve respect for judicial proceedings'" and "'to avoid inconsistency, duplicity, and . . . waste of time.'"

4. Judicial estoppel can be used to prevent a party from pursuing a claim that he or she had an obligation to disclose in bankruptcy and failed to do so.

5. The doctrine of judicial estoppel generally has no application against a debtor when the bankruptcy trustee has been substituted as the real party in interest.

6. If the bankruptcy trustee obtains a judgment against the Estate, that award will be distributed in bankruptcy court in accordance with federal bankruptcy law. The bankruptcy court will be in the best position to determine Mike's right to recover damages in light of his initial failure to disclose the claim in bankruptcy court.

COMMENT:

The court has generally treated judicial estoppel as a "technical defense for litigants seeking to derail potentially meritorious claims" notwithstanding the application of the doctrine by the U.S. Supreme Court and the Ninth Circuit. For the time being, I guess we will assume that the only time judicial estoppel can be used in state court is when the trustee refuses to become a party to the case.

Before closing the book, if not the door, on this short-lived chapter of Washington prudent justice, we will refer one last time to the judicial estoppel case in which the defense attorney marshaled such an egregious set of facts that even a court which did not want to was compelled to apply the doctrine and bar the claim: *Garrett v. Morgan*, 127 Wn. App. 375 (2005).

Miller v. Campbell, ___ Wn.2d ___, 192 P.3d 352 (2008).

QUICKLY, QUICKLY, QUICKLY

Last issue, we commented on the case of *Oltman v. Holland America* as an example of the Washington Supreme Court making a decision based on the fine print in the cruise tickets. As a result, Jack and his mother Bernice were out of luck because they had filed their gastrointestinal lawsuit in the wrong court. It appears that Jack and Bernice had also filed a suit in federal court. That one was also dismissed, as the fine print required that any suit for personal injury be filed within one year of the injury.

But on appeal, the Ninth Circuit reinstated the federal lawsuit, holding that the contractual one-year limitation period in the ticket should have been equitably tolled because of the timely filing in wrong court and the prompt filing in federal court as soon as the state court action was dismissed.

Oltman v. Holland America Line, Inc., 538 F.3d 1271 (9th Cir. 2008).

And while we are on the subject of really fine print, we must note the case of *McKee v. AT&T Corp.*, ___ Wn.2d ___, 191 P.3d 845 (2008). This is a case which should never have happened. It started because the phone company was collecting a municipal tax from a customer who did not live in the municipality. As soon as it was brought to their attention, they should have refunded the few dollars involved. Instead, they grabbed their shovels and started digging. The net result was a precedent-setting opinion (remember, Washington is #2 in precedent-setting opinions) which wiped out

as unconscionable and unenforceable almost all of AT&T's unilaterally-drafted dispute resolution provisions. While a casual reading of the opinion brings out many indicia of corporate arrogance, this statement really summed it up:

> AT&T seems aghast that it may have to comply with the laws of 50 different states, but that is precisely what every other company that competes in a free, competitive, and open market must do.

McKee v. AT&T Corp., ___ Wn.2d ___, 191 P.3d 845 (2008).

Having brought you up to date on the law of dead dogs, we had hoped to bring you an up-to-date report on the law of dead cats. This was because when Earl's cat died, he sued the manufacturer of the cat's food. Unfortunately, the dispute devolved into a procedural quagmire so bad that Earl filed an appeal. The commissioner of the Court of Appeals ruled that the matter was appealable as a matter of right. Notwithstanding that the manufacturer did not move to modify that ruling (i.e., appeal), the three-judge panel said Earl's adverse determinations were not appealable.

So we have a significant disconnect between the commissioner and the court on something as basic as "what is appealable?" Also, the court said it would "encourage litigants to move" to modify erroneous decisions by commissioners. But, since that opinion is unpublished, no one will read the admonition.

Earl v. Menu Foods Income Fund, 2008 WL 2896662 (Wn. App. July 29, 2008).

Those of you who have a long memory or are old, or both, remember back in 1970 when ISO sold the insurance industry the pollution exclusion clause for the standard CGL policy. It received mixed reactions from the courts as it had a "sudden and accidental" exception and it had too many words. After 15 years of being beat up, ISO came out with the "absolute pollution exclusion" (APE). While the new version made it clear the insurance industry did not want to pay for the CERCLA clean-ups, this did not prevent many courts (including Washington) from handing the insurance industry the bill for cleaning up the mess made by the industrialization of the United States.

In light of the foregoing, it was a bit of a surprise to come across the *Martinelli* case where the court applied the APE to deny coverage on a $70M claim. The insured had been negligent in his maintenance of a levee around a salt water pond. When the levee failed, 60 acre-feet of salt water spread over the neighbor's olive orchards and grape vineyards. This resulted in a lot of dead trees and vines.

The opinion has a good history and analysis of the APE.

National Fire Ins. Co. v. Martinelli, 2008 WL 2725070 (E.D. Cal. 2008).

In a remarkable opinion out of Alaska, the court held that "injury in the same accident" cannot be reasonably construed to refer to injuries that result from viewing a dead or injured person away from an accident scene. The claimants were the parents of a 17-year-old who was killed by an uninsured drunk driver. The parents were not at the accident scene. They first saw their daughter at the hospital after she had died.

The court pointed out that the parents were not injured in an accident. Rather, they were injured as a result of the death of their daughter in an accident. As a consequence, the separate per-person UIM limits were not available to them.

Anyone faced with a question involving stacking UIM limits in a NIED context will find the court's analysis and research useful.

State Farm Mut. Auto. Ins. Co. v. Dowdy, 192 P.3d 994 (Alaska 2008).

We recently came across the sad case of lawyer McClellan who was reprimanded for being a bit too candid in a petition for rehearing. He stated:

> Sadly, the ramifications of the court's decision reads (sic) like a bad lawyer joke . . . "When is it okay for a lawyer to lie? When his lips are moving to an insurance adjuster. . . ."

In re McClellan, 754 N.E.2d 500 (Ind. 2001).

E-MAIL NOTIFICATION:

As a general rule, the printed goldenrod version of the Law Letter lands in your inbox about three weeks after a .pdf version is posted on Reed McClure's website. If you would like to receive notification of when it is posted, please send your name and email address to Mary Clifton (mclifton@rmlaw.com).

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 40 years with Reed McClure, Mr. Hickman limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter.

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

Mr. Hickman is a member of the Commercial Panel of the American Arbitration Association, and is also a public arbitrator in the NASD Dispute Resolution Program. He was named a "Washington Super Lawyer" in 2001, 2003, 2005, 2006, 2007, and 2008.

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

REED MCCLURE ATTORNEYS

EARLE Q. Bravo	206/386-7165	ebravo@rmlaw.com
MICHAEL N. Budelsky	**206/386-7008**	**mbudelsky@rmlaw.com**
SANDY M. Eloranto	206/386-7024	seloranto@rmlaw.com
MARILEE C. Erickson	**206/386-7047**	**merickson@rmlaw.com**
ANAMARIA Gil	206/386-7061	agil@rmlaw.com
WILLIAM R. Hickman	**206/386-7011**	**whickman@rmlaw.com**
MICHAEL G. Howard	206/386-7012	mhoward@rmlaw.com
CHRISTOPHER J. Nye	**206/386-7022**	**cnye@rmlaw.com**
PAMELA A. Okano	206/386-7002	pokano@rmlaw.com
JOHN W. Rankin, Jr.	**206/386-7029**	**jrankin@rmlaw.com**
MICHAEL S. Rogers	206/386-7053	mrogers@rmlaw.com
EARL M. Sutherland	**206/386-7045**	**esutherland@rmlaw.com**
JASON E. Vacha	206/386-7017	jvacha@rmlaw.com

WHERE TO FIND US:

REED McCLURE
TWO UNION SQUARE
601 Union Street, Suite 1500
Seattle, WA 98101-1363

OUR TELEPHONE NUMBERS:

main: 206.292.4900
fax: 206.223.0152

www.rmlaw.com