WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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SUPER LAWYERS 2008

The June 1, 2008 issue of the New York Times contained the announcement of the 2008 Washington Super Lawyers as selected by the magazine Washington Law & Politics. Named to the 2008 list of Super Lawyers from Reed McClure were Pam Okano and William R. Hickman.

The announcement noted that only 5% of Washington attorneys were named to the list. The selection came through an extensive process of balloting, blue ribbon panel review, and independent research.

THE CALL IN THE MIDDLE OF THE NIGHT

FACTS:

At about 1:30 a.m., Denise and nine friends boarded Jacobi's boat. Around 3:00 a.m., Denise and her friend, Lindsay, were holding on to the rear of the boat. They decided to resume swimming. They let go of the boat and started swimming. They swam for a minute or two. They were laughing and talking. "All of a sudden she was gone. We were just swimming, and then she went under. There wasn't a struggle or anything."

Jacobi called 911 right away. The medical examiner's report states that the 911 call came in at 2:58 a.m. Jacobi was on the phone with 911 for the next 15 minutes. Rescue personnel arrived within 20 minutes.

A friend called Denise's father. He told him that Denise had fallen overboard and was missing. The father went to a neighbor's house to arrange to have them watch his other children. He then drove to the lake, a trip he estimated at five minutes.

When the father arrived at the lake, police cars, ambulances, and the fire department were already there. Lights were flashing from a boat on the lake. He knew they were searching for his daughter. He did not want to believe she was in the water. He did not join the search group at Jacobi's dock.

Instead, he got in his car and drove to a friend's house. It was a five-minute drive. It was about 900-1,000 feet across the lake from Jacobi's dock. He arrived there at about 3:45 a.m. He watched the recovery effort from the friend's dock.

At about 6:00 a.m. her body was located and recovered. The police chaplain informed the father that the divers had found his daughter and that she had drowned. He had a partial view of the rescue workers taking his daughter from the water, and taking her to a waiting ambulance.

Denise had drowned about three hours earlier.

The father sued the manufacturer of the boat for negligent infliction of emotional distress. The trial court dismissed the claim because the father was not at the scene at the time of the accident.

On May 16, 2006, Division II published its opinion: *Colbert v. Moomba Sports, Inc.,* 132 Wn. App. 916, 135 P.3d 485 (2006). The court held that, as a matter of law, the

"undisputed facts" do not meet the "shortly thereafter" requirement of a Washington bystander distress claim (132 Wn. App. at 924):

> First, . . . [the father] was not at the scene either to witness Denise's drowning or soon enough thereafter to witness the final seconds of her disappearance under the lake's surface. Instead, he arrived at the accident scene at least 10 to 15 minutes after learning that his daughter has fallen off a boat and disappeared into the lake.
>
> Second, not only was Denise not visible anywhere when [the father] arrived at the lake, but he also arrived only *after* many rescuers were already present and searching for his missing daughter.

The father filed a petition for review to the Supreme Court. It was granted.

The case was argued May 15, 2007. It took the court until February 14, 2008, to decide by a vote of 5-3 that the father did not arrive at the scene of the accident shortly after the drowning. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008).

HOLDINGS:

1. The tort of negligent inflection of emotional distress is a limited, judicially created cause of action that allows a family member to a recover for "foreseeable" intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident.

2. A cause of action for negligent infliction of emotional distress is recognized where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is a material change in the attendant circumstances.

3. While the father may have arrived at the scene within a chronologically short time of victim's death, victim had already drowned, and at no time did father personally experience conditions that could be said to be a continuation of an especially horrendous event.

4. Whether the father arrived on the scene of the accident unwittingly is an appropriate consideration when determining whether he can bring a bystander negligent infliction of emotional distress claim.

5. The kind of shock the tort requires is "the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases the dying words."

COMMENT:

The fundamental disagreement among members of the court was as to foreseeability. The majority—consistent with 20 years of Washington law—said that in this limited tort the question of foreseeability was a legal question to be resolved by the court. The dissent wanted to remove the limitation by making foreseeability a jury question. In that situation, almost all NIED claims would go to the jury.

Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008).

A BIT QUICK ON THE TRIGGER

FACTS:

National insured Bellows, a sub that worked on The Ridge project. The Ridge homeowners sued the developer which in turned sued the general, Sacotte.

Sacotte tendered to all the subs, claiming it was an additional insured under all their policies. It then sued all of them.

National sent the suit to its coverage attorney, S. Attorney S called Sacotte's attorney H on June 1 to enter an informal appearance to prevent a default without notice. Attorney S sent two emails to National confirming that while he could not represent National in this matter, he had informally appeared so as to prevent a default without notice.

A week later, attorney H, on behalf of Sacotte, moved for an order of default without notice to attorney S or to National. Three months later, again without notice, attorney H entered findings, conclusions, and a judgment making National liable for the entire project.

When National found out what attorney H had done, it moved to vacate. The trial court turned it down. The Court of Appeals reversed, saying National had substantially complied with the appearance requirement, was entitled to notice, and was entitled to have the default vacated.

HOLDINGS:

1. Washington courts favor resolving cases on their merits.

2. CR 55(a)(3) requires that notice of a motion for default be given to any party who has appeared in the action for any purpose.

3. A default judgment entered against a party who was entitled to notice will be set aside if notice was not given.

4. A party who substantially complies with the appearance requirement is entitled to notice.

5. Substantial compliance can be accomplished with an informal appearance if the party shows intent to defend and acknowledges the court's jurisdiction over the matter after the summons and complaint are filed.

COMMENT:

The court had a few comments of its own as to the conduct of attorney H:

> 1. He had a "duty as an officer of the court to use, but not abuse the judicial process."
>
> 2. "Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate."

Sacotte Const. Inc. v. National Fire & Marine Ins. Co., 143 Wn. App. 410, 177 P.3d 1147 (2008).

CHRISTOPHER J. NYE

PRACTICE:

Mr. Nye represents defendants in a variety of complex commercial litigation disputes, including construction defect, worksite injury, product liability and personal injury. Mr. Nye also represents the interests of insurance companies, which includes litigating coverage disputes and bad faith cases, as well as providing opinions and advice on insurance coverage matters.

EDUCATION:

University of Washington, B.A., 1991, "With Distinction"
Willamette University College of Law, J.D., 1995

HONORS:

Named "Rising Star" by Washington Journal of Law & Politics for 2007
Recipient, "Random Acts of Professionalism Award", Washington State Bar Assoc., 2003

ADMITTED TO PRACTICE:

Oregon, 1995; Washington, 1999

BACKGROUND:

Following receipt of his J.D. in 1995, Mr. Nye served as a Judicial Clerk in the Clackamas County Circuit Court in Oregon City, Oregon. In 1997, Mr. Nye joined a Portland, Oregon law firm where he spent two years representing plaintiffs in a variety of personal injury and professional negligence cases. After returning to Seattle in 1999, Mr. Nye spent several years litigating in the areas of insurance defense and insurance coverage.

Mr. Nye joined Reed McClure in 2008. He is admitted to practice in federal and state courts in both Washington and Oregon and is a member of the Washington Defense Trial Lawyers. He lives with his two sons in West Seattle.

CHICKEN FAT

FACTS:

Viki was at her Safeway store. She was near the chicken cart when she slipped in a puddle of chicken fat.

There being no history of customers slipping in this chicken fat and Viki being unable to prove that Safeway had notice of the chicken fat, the trial court dismissed the case.

The Court of Appeals reversed and remanded for a trial, invoking the *Pimentel* exception.

HOLDINGS:

1. To establish a negligent failure to maintain business premises in a reasonably safe condition, a plaintiff must generally show (1) the unsafe condition was caused by the proprietor or its employees or (2) the proprietor had actual or constructive knowledge of the condition.

2. Under the *Pimentel* exception, if the business where an injury occurs is a self-service operation, the plaintiff is relieved of her burden of establishing a proprietor's actual or constructive knowledge of an unsafe condition if she can show that the business' operating procedures are such that unreasonably dangerous conditions are continuous or reasonably foreseeable.

3. *Pimentel* is meant to be a narrow exception.

4. A location where customers serve themselves, goods are stocked, and customers handle the grocery items, or where customers otherwise perform duties that the proprietor's employees customarily perform, is a self-service area. A roasted chicken cart meets this description: customers serve themselves, the chickens are stocked by the store, and customers handle them between the cart and their shopping cart or basket.

COMMENT:

Lovely little opinion laying out the twists and turns of Washington law for a slip-and-fall in a business location. The court went a bit far in commenting that inspection by the manager might not be a reasonable method of protection.

White v. Safeway, Inc., 2008 WL 501472 (Wn. App. Feb. 26, 2008).

CALLING DR. ZHIVAGO, CALLING DR. ZHIVAGO

FACTS:

Vladimir was involved in a car accident with Morgan. The next day, Vladimir went to see his massage therapist Vassili. Now, Vassili had an old school medical degree. Unfortunately, the old school was in Russia. Vassili had no USA medical license.

Vladimir wanted to use Vassili to testify that his injuries were proximately caused by the accident. Morgan objected, saying that Vassili was not competent to give medical testimony. The judge agreed, saying that Vassili could tell the jury that he had graduated from a Russian medical school and that Vladimir had muscle spasms in his back the day after the accident.

The judge then dismissed the case because Vladimir did not provide competent evidence to link his injuries to the accident. The Court of Appeals affirmed.

HOLDINGS:

1. The plaintiff must prove the causal relationship between the accident and his injuries.

2. That requires expert testimony.

3. Massage therapists cannot diagnose medical conditions.

4. Even with his Russian medical degree, Vassili was not competent to provide expert medical opinion.

COMMENT:

This case would have been a good one for a summary judgment motion. This appears to have been the second try at a trial. The first ended after three days with a mistrial. It seems that Vladimir's attorney improperly tried to impeach a defense medical witness by referring to a conviction for indecent exposure. The judge not only granted the mistrial, but also hit the attorney for $6,000 in attorney fees.

Nikolayev v. Oyler, 2008 WL 458649 (Wn. App. Feb. 21, 2008).

SUPERSIZE THAT OPINION

FACTS:

A few of you readers may remember back to the golden age of television when on Sunday evenings at 8 p.m. we were entertained by a man with no perceptible talent who each week gave a "really, really big shew." I was reminded of Ed Sullivan when this really, really big opinion landed on my desk. Checking in at over 40 pages with 48 headnotes, there was something in here for just about everyone.

At the risk of understatement, we shall describe this equitable contribution case as complex. Damning with faint praise, the trial judge's ruling as "generally excellent," the court reversed in part, affirmed in part, and remanded. The fundamental error of the trial judge was, according to the Court of Appeals, to believe that he could force an insurer to pay for a loss it had not contracted to insure. Given that the trial judge had spent 20 years as an insurance attorney, one wonders where he would have gotten such a silly idea.

The policyholder, Polygon, a developer, wisely had a whole lot of insurance with several carriers spread across four years. The problem arose when the primary carrier for the last two years became insolvent, and the excess carrier, Great American, refused to contribute to the settlement of the claims against Polygon. The carriers that "recognized their obligation to contribute financially to the cost of funding the settlement" sued Great American. The trial judge crafted what he felt was a fair and equitable reapportionment. The Court of Appeals told him to try again.

Of particular interest to appellate attorneys is the court's discussion of what is "an aggrieved party" for purposes of determining who may appeal. Also of interest was the court's ruling that while *Olympic Steamship* fees are not permissible in an equitable contribution action, it would not reverse the erroneous attorney fee award against Great American because Great American had not assigned error to the erroneous attorney fee award. (All together now, "That's not fair! What's fair got to do with it?")

A small sampling of the legal pronouncements:

1. If terms are defined in an insurance policy, then the term should be interpreted in accordance with that policy definition. If insurance policy terms are not defined, then they are to be given their plain, ordinary, and popular meaning.

2. An "aggrieved party" entitled to seek review by the appellate court is one whose proprietary, pecuniary, or personal rights are substantially affected. The pertinent

inquiry is whether the trial court entered a judgment that substantially affects a legally protected interest of the would-be appellant.

3. **Washington law does not force insurers to pay for losses that they have not contracted to insure.**

4. In continuous damage situations, each liability insurer is jointly and severally responsible for the liability covered by the policy.

5. An insurer sued for contribution by another insurer cannot be held liable for a sum greater than it would have had to pay its insured.

6. Insurer is not equitably subrogated to insured's rights to recover from third parties until insured has first been made whole.

7. Primary and excess liability insurers whose policies covered full amount of insured's liability in settlement were equitably subrogated to insured with regard to all recoveries from third parties whose wrongful conduct caused insured's losses.

8. A legal or technical meaning will be applied to a term in an insurance policy if it is clear that the parties to the contract intended that the language have a legal or technical meaning.

9. "Costs taxed against the insured" within the meaning of supplementary payments provision of liability policy are taxable costs as that term is commonly used in legal parlance and, therefore, exclude attorney fees.

10. Prejudgment interest is available when (1) an amount claimed is liquidated or (2) the amount of an unliquidated claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard without reliance on opinion or discretion.

11. The fact that a claim is disputed does not render the claim unliquidated for prejudgment interest purposes.

12. Attorney fees incurred by liability insurer as a result of cooperating with insured's prosecution of claims against third parties and litigating the allocation of the proceeds as against another insurer's claims to them did not qualify for a fee award; they were not fees incurred by an insured in an effort necessary to establish coverage.

13. Erroneous attorney fee award was not subject to reversal, where appellant did not assign error to or otherwise appeal from the order. RAP 2.4(a).

MORE COMMENT:

You must forgive me, I get all teary-eyed every time I read #3.

Polygon Northwest Co. v. American Nat'l Fire Ins. Co., ___ Wn. App. ___, ___ P.3d ___ (2008).

DON'T TAKE THE SUV TO TOWN, SHAWN

FACTS:

Shawn took his father's SUV to school without permission. At lunchtime, he decided to drive the SUV to McDonald's. Doug and Ashley were in a separate vehicle behind Shawn.

Shawn was doing 50 mph in a 35 mph zone. He rapidly approached the rear of a truck. Up ahead, John had parked his tractor on the right-hand shoulder. The truck signaled for a left turn. Shawn aimed to pass the truck on the right in the gap between the truck and the tractor. The truck did not turn left. Shawn hit the truck's right rear side. The collision blocked the road. Doug, going 35 mph, was unable to stop and ran into the tractor, injuring John.

John sued Doug and Shawn. Shawn hired an expert who put in a report which said, among other things, that the collision between Doug and the tractor was caused solely by Doug's negligence. The trial court dismissed John's suit against Shawn. The Court of Appeals reversed, noting that, at best, all the report did was identify the genuine issues of material fact which would go to the jury.

HOLDINGS:

1. In an action for negligence, the plaintiff must prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach.

2. Conduct is negligent if it is unreasonable in light of a recognizable danger.

3. "Reasonable" conduct or care is "'that care which an ordinarily reasonable person would exercise under the same or similar circumstances.'"

4. Whether one charged with negligence has exercised reasonable care is a question of fact.

5. An intervening negligent act of another supersedes the original actor's negligence as a proximate cause of an injury only if the intervening negligence is so highly extraordinary or unexpected that it is not within the realm of reasonable foreseeability.

6. Ordinarily, whether an independent cause is reasonably foreseeable is a question of fact for the jury.

COMMENT:

Always good to go back and revisit the basics of a negligence claim.

VanWieringen v. Leifeste, 2008 WL 176379 (Wn. App. Jan. 22, 2008).

IT JUST KEEPS GOING AND GOING

FACTS:

In January 2000, Rick, a lawyer, filed a medical malpractice case against several doctors on behalf of Elizabeth. That case was dismissed for lack of expert testimony. An appeal from that ruling was dismissed as frivolous.

Elizabeth got a new lawyer, Larry, her husband, who filed a petition for review to the Supreme Court. That was denied in November 2002.

Four years later (February 2006), Larry, the lawyer, filed a legal malpractice suit against Rick. Rick, who had gone through bankruptcy, did not appear or answer the complaint. So an order of default was entered against Rick. A copy of that order was sent to Rick's malpractice carrier. The carrier hired a defense attorney who had the default vacated. Next, he had the suit dismissed because it was barred by the statute of limitations.

Elizabeth and Larry appealed, contending the default should not have been vacated, and the suit had not been filed late. The Court of Appeals said not only was there no error, but the appeal was frivolous, and Rick was entitled to an award of attorney fees.

HOLDINGS:

1. A legal malpractice action must be started within three years.

2. Elizabeth did not file until 2006, more than five years after her cause of action accrued.

3. Elizabeth was on notice as a matter of law that she was damaged when the trial court dismissed her medical malpractice action.

COMMENT:

A finding of a frivolous appeal has been heretofore a rather rare occurrence. Here, we see a litigant who got hit with this "rare occurrence" twice. Perhaps this reflects a change in attitude by the Court of Appeals. In the early days of the court, the idea of a "frivolous appeal" was anathema.

Spokoiny v. Guarnero, 2008 WL 921843 (Wn. App. Apr. 7, 2008).

JASON E. VACHA

PRACTICE:

Mr. Vacha practices general civil litigation, appellate litigation, insurance coverage (including litigation of bad faith and extra-contractual claims) and insurance defense.

EDUCATION:

University of Washington School of Law, J.D.
Gonzaga University, B.A., History, cum laude.

BACKGROUND:

Mr. Vacha was raised in Spokane, Washington. He is admitted to practice in the State of Washington and the United States District Court for the Western District of Washington.

Mr. Vacha has experience representing insurance carriers in complex insurance coverage and alleged bad faith matters. He also has experience representing corporations in asbestos, toxic tort, products liability, personal injury and breach of contract claims.

CLERKSHIP:

Law Clerk to the Honorable Elaine Houghton, Chief Judge, Washington State Court of Appeals, Division II, Tacoma, WA 2003-2004.

TEMPUS FUGIT

FACTS:

In April 1992, Andrea was injured in an auto accident. She hired lawyer Doug to sue Joe. He filed suit two days before the statute ran. The case was set for trial in March 1997, but Doug did not show up. This was probably because Doug had never been able to serve Joe. The case was dismissed.

Andrea called Doug 10 to 15 times, asking what had become of her case. Doug told her the court was too busy. Finally, in 2005, Andrea called the clerk's office and was informed that her case had been dismissed in 1997.

Andrea hired lawyer Bob to sue lawyer Doug. Bob discovered that 10 years earlier, State Farm had made a $100,000 UIM offer which Doug had not accepted. The State Farm money was still on the table and Bob picked it up for Andrea.

A malpractice suit was filed against Doug seeking delay damages for the 10-year delay in receiving the $100,000. Doug admitted liability, but contended that the damage calculation had to factor in his 40% contingent fee.

The trial court agreed with Doug and said Andrea's damages were $30,511.58. He also made an award of attorney fees against Doug. The Court of Appeals said he was wrong on both counts. The damage award should have been $117,519.31 and Doug was not liable for attorney fees.

HOLDINGS:

1. Generally, the measure of damages for legal malpractice is the amount of loss actually suffered as a proximate cause of the attorney's conduct.

2. Aim of any award of damages for legal malpractice must be to place successful plaintiffs, as nearly as possible, in the position they would have occupied had their attorneys capably and honestly represented them.

3. A negligent attorney is not entitled to have the damages awarded to a successful legal-malpractice plaintiff reduced by the amount stated in the negligent attorney's contingent-fee contract.

4. Breach of fiduciary duty in the legal-malpractice context is not a recognized equitable basis for an award of attorney fees.

COMMENT:

It turns out we have never had this issue arise in Washington before. The opinion says that there is "sharp disagreement" as to the correct answer. The court noted that in Washington damage awards "should fully compensate plaintiffs." Accordingly, the modern majority rule adopted by the Restatement (3d) of the Law Governing Lawyers—which generates a larger recovery—is the correct rule.

Shoemake v. Ferrer, ___ Wn. App. ___, 182 P.3d 992 (2008).

PAY THE PREMIUM

FACTS:

Doug had a life insurance policy with Safeco. He missed a payment and the policy lapsed two months later. With his agent's help, he made a late payment and got the policy reinstated. He missed the next payment. He got a past due reminder. He did not pay. He got a notice of lapse in April 2001. He did not respond.

In November 2001, Doug was diagnosed with leukemia. He asked his agent about the life insurance. The agent checked and found the policy had lapsed. The agent tried to get Safeco to reinstate the policy. Safeco took a pass. The agent informed Doug in January 2002 that the policy had lapsed in April 2001. Doug died in May 2003.

The widow filed suit in January 2006 against the agent, alleging that the agent had a duty to inform them that the life insurance policy had lapsed. The trial court dismissed. The Court of Appeals affirmed, saying the evidence did not reveal a course of conduct establishing a duty owed by the agent to tell Doug his policy had lapsed. The court also pointed out that the widow did not file suit within the three-year statute of limitation.

HOLDINGS:

1. Generally, an insurance agent or broker assumes only those duties normally found in any agency relationship. Those duties include the obligation to exercise good faith and carry out instructions.

2. However, an enhanced duty can arise when the insurance agent and the customer have a special relationship.

3. A special relationship arises when (1) an agent holds himself out as a specialist and receives a special fee on top of the premiums normally paid by the customer, or (2) there is a long-standing relationship with some interaction regarding coverage, coupled with the insurance agent giving advice and the customer's detrimental reliance on that advice.

4. The agent helped Doug one time with regard to the cancellation of the life insurance policy. This evidence is insufficient to create a duty based on the agent's conduct.

5. A statute of limitation period starts when a cause of action accrues. A cause of action accrues when the person can ask the courts for judicial relief.

6. Generally, a cause of action accrues when the wrongful act occurs, but sometimes the harm is unnoticed and the statute does not run until the plaintiff discovered the damage.

7. The cause of action accrued before Doug died.

8. The harmful act occurred when the policy lapsed and when Doug learned of the lapse. The statute started running in January 2002.

COMMENT:

Concise, basic review of the law of liability of agents. It would seem to the casual observer that the statute started running when the company advised Doug of the lapse, *i.e.*, April 2001.

Flaugh v. Basin Ins. Assoc., 2008 WL 934102 (Wn. App. Apr. 8, 2008).

ACTUAL CASH VALUE

FACTS:

Actual cash value is a term used in the majority of first-party property policies. As such, it is a term which by now should be free of ambiguity. It is, but as a recent gem of an opinion from Division I indicates, some clever arguments mixed into some Supreme Court dictum can create the appearance of confusion.

Laura suffered a fire loss. The policy stated that covered loss to property will be settled "at actual cash value." The policy defined ACV as "fair market value of the property at the time of the loss."

Laura made an ACV claim. The company paid the ACV. But then Laura wanted the sales tax on the ACV. The company declined, so the parties went to court.

In the trial court, the confusion arose because of two Supreme Court opinions. The first, *Solomon*, a 1982 opinion, had set out a definition of ACV based, not on Washington common law, but on a California statute. The second, *Hess*, a 1992 opinion, had severely criticized the author of the *Solomon* opinion for borrowing from another state's statutory definition.

So, when presented with this anomaly, together with two lawyers each arguing the judge had to rule in his client's favor, the judge took the default position and ruled in favor of the policyholder. The Court of Appeals reversed, holding that ACV, defined as fair market value, does not include sales tax.

The court disposed of *Solomon* and *Hess* by pointing out that in both cases, the issue was "replacement coverage," not ACV, and thus the commentary on ACV was dicta in both cases. That said, the court pointed out that the key concept was "indemnification." Sales tax is reimbursable only when actually concurred by the policyholder.

Since Laura did not pay any sales tax, she was not entitled to be reimbursed for it.

Holden v. Farmers Ins. Co., 142 Wn. App. 745, 175 P.3d 601 (2008).

QUICKLY, QUICKLY, QUICKLY

Last issue we pointed out that one of the open questions on R67 (a/k/a WSTLA Recovery Act) was whether it would be given retroactive effect. The Federal District Courts for Western Washington and Eastern Washington have both ruled that the statute does not apply retroactively.

HSS Enterprises, LLC v. AMCO Ins. Co., 2008 WL 312695 (W.D. Wa. 2008).
Malbco Holdings, LLC v. AMCO Ins. Co., 2008 WL 1883887 (E.D. Wa. 2008).

The U.S. Court of Appeals for the 10th Circuit found the Washington Supreme Court opinion of *Safeco v. Butler*, 823 P.2d 499 (Wash. 1992), to be of assistance in determining whether a shooting was an "accident" within the meaning of a homeowners policy.

In the case, a father believed a young man had been messing with his daughter. He drove over to have some words with the young man. On the way, he noticed his 9 mm pistol was in the pickup with him. He had some words with the boy's mother at the door, and sought to gain entry by shooting the door. The bullet ricocheted and hit the mother in the chest. The father then chased the young man through the house, out the back door and into the yard. He shot three more times. They all missed.

The father got 15 years in prison. And the court held that the shooting was not an accident.

Shelter Mut. Ins. Co. v. Wheat, 2008 WL 55992 (10th Cir. 2008).

The courts in California continue to hold that where a company provides a defense to a policyholder (even under a reservation of rights), the policyholder may not settle without the company's consent. If the policyholder goes ahead and settles, then the company has no obligation to indemnify the policyholder for the settlement.

State Farm Fire & Cas. Co. v. D&G Autosound, Inc., 2007 WL 4442881 (Cal. App. 2007).

A CASE OF DEAD MOOSE

FACTS:

The moose was in the middle of the road. The moose was dead. Of that there was no doubt. He was not resting. He was not stunned. He had ceased to be. He had expired. He had shuffled off his mortal coil. He had been hit by an oil truck.

Shawn came driving along. He had had a bit to drink. He hit the moose, rolled his truck, and injured his passenger, Shannon.

Shawn was charged with DWI and pled "no contest."

Shannon sued the oil company, and the oil company sued Shawn, seeking an allocation of fault.

Among the issues in the case was what effect should be given to Shawn's DWI conviction. The trial court gave none. The Alaska Supreme Court said the DWI conviction established Shawn's negligence and recklessness. But the conviction did not establish whether his negligence was a proximate cause of the accident.

HOLDINGS:

A conviction based on a no contest plea will collaterally estop the criminal defendant from denying any element in a subsequent civil action against him that was necessarily established by the conviction, as long as the prior conviction was for a serious criminal offense.

Moore v. Peak Oilfield Service Co., 175 P.3d 1278 (Alaska 2008).

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 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, 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

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