WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXI, NO. 3 *REALLY WET FALL 2007*

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Published and Distributed by: REED McCLURE
ISSN 1064-1378
Two Union Square, 601 Union Street, Suite 1500
Seattle, Washington 98101-1363
206/292-4900
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THIS NEWSLETTER IS PROVIDED AS A FREE SERVICE for clients and friends of the Reed McClure law firm. It contains information of interest and comments about current legal developments in the area of tort and insurance law. This newsletter is not intended to render legal advice or legal opinion, because such advice or opinion can only be given when related to actual fact situations.

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HAM AND RYE ON COVERAGE

FACTS:

Chanel and her friend Jim found discarded paper in dumpsters in an alley. They lit some pieces, and watched them burn. They lit a few more and then stomped on them. They thought the fire was out.

It wasn't. The fire spread to the adjacent building, burning it down.

Chanel was an insured under the grandparents' homeowner policy. The primary policy covered property damage resulting from an accident. There was an exclusion for property damage that was the result of a willful and malicious act. The PLUP had similar provisions.

The building owner sued. State Farm provided a defense under a reservation but ultimately denied coverage on the ground that the fire was not an accident. It filed a declaratory judgment action.

Chanel settled the property damage lawsuit with a stipulated judgment and a covenant.

In response to State Farm's motion for summary judgment, the trial court stated that the fire was a deliberate act and that she started it with malicious behavior. The Court of Appeals reversed, saying reasonable minds could disagree whether the fire was an accident or whether she acted maliciously in causing the fire.

HOLDINGS:

1. Insurance policies are contracts, and courts seek to determine the contracting parties' intent by resorting to a fair, reasonable, and sensible construction of the contract's language, as the average insurance purchaser would understand it.

2. Determining if insurance coverage exists is a two-step process: an insured must show that a loss is within the scope of her coverage; the insurer then bears the burden of showing that an exclusion applies. Exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance and we will not extend them beyond their clear and unequivocal meaning.

3. The fire is covered only if it was an accident.

4. An accident is never present when a *deliberate act* is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected, and unusual.

5. The Supreme Court has found "many definitions of the word 'accident.'" Judging from the plethora of law on the subject, no one of them seems to be perfectly satisfactory to everyone.

COMMENT:

Unigard Mut. Ins. Co. v. Spokane School Dist. No. 81, 20 Wn. App. 261 (1978), remains good law. Playing with matches, starting a fire, and leaving when you know it is not out is not an accident.

State Farm Fire & Cas. Co. v. Ham & Rye, L.L.C., 2007 WL 2998984 (Wn. App. Oct. 16, 2007).

NOW IT BEGINS: THE ERA OF R-67

An old Chinese blessing (or curse) is: "May you live in interesting times." Times for the insurance industry in Washington will get "interesting" after December 2007. But first, a little background.

Back in the Spring 2007 issue, we reported that WSTLA had been successful in getting the legislature to pass the WSTLA Recovery Act (WRA). Of course, they gave it a warm, fuzzy name like "Insurance Fair Conduct Act." At its core, the WRA creates private causes of action out of six situations for which the Insurance Commissioner could already sanction the offending insurance company. And then it went on to add attorney fee awards and introduce punitive damages.

Well, now, the insurance industry was not going to take that lying down. It gathered up sufficient voter signatures so that the matter was referred to the People. (Washington, having been the epitome of populist states in the late 19th century, a lot of our legislation is voted on by the People either by initiative or referendum.) And so the People were treated to a spirited campaign which pitted the Insurance Industry against the Trial Lawyers. In excess of $10 million was spent on the campaign. They did not need to count too many ballots on election night before it was clear that the People had sided with the Trial Lawyers.

Some other interesting aspects of the new law: (1) It does not apply to health insurance; (2) It applies only to claims made by first-party claimants; (3) The new law does not replace the common law remedies which had been created by the Supreme Court; (4) Does it apply to conduct which predated the effective date of the statute? (5) It does not mention jury trial. Given that the constitutional right to trial by jury,

which shall remain forever inviolate, was frozen in 1889, is there a right to a jury trial under this new statute?

WSTLA v. Washington Insurance Industry

RED LIGHT! RED LIGHT!

FACTS:

On a cold January night, Aaron was driving his wife and infant son home. As they crossed an overpass, the car spun out due to ice. The driver in front saw this and moved out of the way. Aaron's car came to rest perpendicular to the roadway along the inside lane and shoulder. Westbound traffic began to slow in response to the spinout.

Then along came Jim. He was driving a full-size pickup. The cruise control was set at 70 mph. He was in the outside lane. As the truck in front of him slowed drastically, he saw other brake lights ahead. He accelerated around the truck. He broadsided Aaron's car. He killed Aaron. The truck driver did not see Jim attempt to brake.

The trial court held that, based on the undisputed facts, the accident was unavoidable. The Court of Appeals reversed, noting that there was a question whether "a reasonable person would speed blindly onto a curve when the traffic all around him is stopping."

HOLDINGS:

1. There is an issue of fact as to whether a reasonable person would have slowed with the flow of traffic, rather than have accelerated around the semitruck, not knowing why the traffic had slowed.

2. There is ample evidence that other vehicles immediately ahead of Jim were able to come to a stop before reaching the stopped vehicle. Whether Jim could not stop to avoid the collision is an issue for the jury.

COMMENT:

Unavoidable accident was rarely found before the adoption of pure comparative fault, and almost never since then.

Vertefeuille v. Restucci, 2007 WL 3261644 (Wn. App. Nov. 6, 2007).

MICHAEL N. BUDELSKY

ASSOCIATE

PRACTICE:

Mr. Budelsky practices in the areas of medical malpractice defense, insurance defense, employment law, general civil litigation, and appellate work.

EDUCATION:

University of Cincinnati College of Law, Cincinnati, OH, J.D., 1998

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BACKGROUND:

Mr. Budelsky grew up in Cincinnati, Ohio, and went on to graduate from Dartmouth College with a degree in Government. He then worked for a year in Washington, D.C., as an intern for U.S. Representative Robert Portman. While in law school, Mr. Budelsky was a member of the Law Review and participated in a judicial externship with Federal District Court Judge Bertelsman. Mr. Budelsky practiced in Cincinnati for five years, focusing primarily on employment law, civil rights law, and general civil litigation. In addition, he litigated administrative proceedings including matters before the EEOC and Ohio Civil Rights Commission. Mr. Budelsky also handled and argued numerous appeals before the Sixth Circuit and the Ohio Court of Appeals. Mr. Budelsky moved to Seattle in 2004 and became a member of the Washington Bar. Since then, he has focused his practice on medical malpractice defense, insurance defense, general civil litigation, and appellate work.

ICE AND SNOW IN CONCERT

FACTS:

Three vans had been rented to transport 34 Chinese dancers from Spokane to Portland. The first van was driven by Heng. The second van was driven by his brother Heng (we will call him Heng #2). The third was driven by Fuhe.

They left Spokane in February during a severe winter storm. The highway was covered with ice and snow. Heng was in charge. He told the others to follow him. Heng #2 could not read English road signs, did not have a map, had never driven on ice and snow, and had not traveled the route before.

The vans proceeded at 70 to 75 mph, passing other vehicles on the road. Heng #2 lost control and flipped the van. Two passengers were killed. Yong, a passenger, sued the two Hengs for negligence.

The trial court dismissed Heng, finding that he had no duty to a passenger in the second van. The Court of Appeals reversed, saying that there was an agent/principal relationship between driver #1 and driver #2, that the drivers were acting in concert, and that driver #1 violated the duty he owed to the plaintiff passenger.

HOLDINGS:

1. Washington has abolished joint and several liability. RCW 4.22.070(1). However, the legislature has carved out three exceptions to joint and several liability, two of which are pertinent here: (1) where both tortfeasors are acting in concert, or (2) when a person is acting as an agent of another. RCW 4.22.070(1)(a).

2. The essential elements of an agency are control and consent. The existence of agency always depends on the facts and circumstances of each case.

3. The drivers agreed to follow the lead driver and did so. The facts, viewed in a light most favorable to Yong, support a finding of both control and consent. Agency is then a question of fact for the jury.

4. Defendants who act in concert are also jointly responsible for each other's conduct. RCW 4.22.070(1)(a). Acting in concert means consciously acting together in an unlawful manner.

5. All tortfeasors must actively engage in the conduct but there is no requirement that they intend to harm the plaintiff. A plaintiff must show a tacit agreement among the defendants to act in concert.

6. All of the vans traveled in formation at speeds that were unsafe. All drivers sped and passed cars on dangerous snowy and icy roads in violation of RCW 46.61.400.

COMMENT:

One of the few cases we have had which addresses the "acting in concert" exception.

The opinion also has a down-to-earth analysis of the duty which the lead driver owed to the passenger in the second van.

Tao v. Li, 140 Wn. App. 825, 166 P.3d 1263 (2007).

WITH STEEL YOU CAN HEAL

FACTS:

Seventy-eight-year-old Emma had a hernia. Dr. Jim performed the repair surgery. It was the second time he had done the procedure. While he was performing, he accidentally perforated her intestine. He fixed that. Three days later, the surgical incision was leaking and the fix to the intestine had broken down. He repaired all that.

A couple years later, a CT scan revealed an abscess near Emma's spine. She sued Dr. Jim.

At trial, her expert said "watchful waiting" was a viable alternative to surgery. Dr. Jim's expert said this kind of hernia was always treated surgically and that "watchful waiting" led to dead patients. He also said there was no connection between the surgery and the abscess two years later.

The jury found for Dr. Jim. Emma appealed. The Court of Appeals affirmed.

HOLDINGS:

1. A patient may recover for a doctor's failure to obtain informed consent even if the medical diagnosis or treatment was not negligent. The basis for such a claim is that patients have the right to make decisions about their medical treatment.

2. To prevail on a claim for failure to secure informed consent, Emma had to establish that: (1) Dr. Jim failed to inform her of a material fact relating to treatment, (2) she consented to the treatment without being aware of or fully informed of such fact, (3) a reasonably prudent patient under similar circumstances would not have con-

sented to the treatment if informed of such fact, and (4) the treatment in question proximately caused the injury. RCW 7.70.050(1).

3. Emma's signature on the consent form is prima facie evidence of informed consent. RCW 7.70.060. The consent form disclosed the potential risks and complications of the surgery, as well as the alternative of nontreatment.

4. To prove medical malpractice, Emma had to establish that her "injury resulted from the failure of a health care provider to follow the accepted standard of care." Violation of the standard of care is established by showing that 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 he belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(1).

5. A patient must produce expert testimony to establish whether the practice questioned is reasonably prudent. Expert testimony is also required to establish causation.

COMMENT:

With liability this thin, Emma should have stopped after she had her shot at the jury. Actually, it appears her shot at the jury was a gift.

Housel v. James, ___ Wn. App. ___, 172 P.3d 712 (2007).

A LITTLE MORE JUDICIAL ESTOPPEL, PLEASE

In our last issue, we mentioned the veritable deluge of judicial estoppel cases. Those come about when a bankruptcy debtor is a bit less than candid in listing (or, rather, not listing) his assets. The landmark case (*Garrett v. Morgan*, 127 Wn. App. 375 (2005)) involved a plaintiff who, a month after swearing he had no assets, filed a medical malpractice suit. Division II took him at his word and ruled that he had no malpractice claim.

Since the last issue, Division III has published one of its judicial estoppel cases.

FACTS:

Crystal rear-ended Jim's car in August 2004. Jim was injured. Two months later, Jim filed for Chapter 7. He did not list the claim against Crystal. Three months later, Jim

was declared by the bankruptcy court to be free, free, free from all his debts. By this time he had had 31 adjustments by his chiropractor. Nine months after discharge, Jim sued Crystal.

The trial court summarily dismissed because plaintiff Jim had failed to list the claim as an asset of the bankruptcy estate. The Court of Appeals affirmed because a debtor who fails to disclose a personal injury claim while in bankruptcy cannot later assert that claim in a different court.

HOLDINGS:

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

2. The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes and to avoid inconsistency, duplicity, and waste of time.

3. The integrity of the bankruptcy system depends on full and honest disclosure of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding.

4. A debtor's failure to disclose a personal injury claim in a bankruptcy proceeding generally precludes a later lawsuit on the same claim under the doctrine of judicial estoppel.

COMMENT:

I find it ironic that in all the cases, no matter what the result, the court never seems to find it particularly significant that the whole problem arose from an individual lying to a federal officer (*e.g.*, a federal judge).

McFarling v. Evaneski, 141 Wn. App. 400, 171 P.3d 497 (2007).

AND THE JUDICIAL ESTOPPEL JUST KEEPS ROLLING IN

Within a week or so of our writing up the *McFarling* case, Division I published another one in October (*Ingram*) which was followed by an opinion from Division II (*Skinner*). In the *Ingram* case, plaintiff told the bankruptcy court that the value of his personal injury claim was "unknown" but believed to "be less than $5,000.00." He got his discharge in February 2005. He filed suit in June 2005. He listed special damages of almost $150,000! That is a 30-fold increase in four months. And that's just the specials.

Well, you might think this would be a bit of a red flag. But not for Division I. It put the blame on the bankruptcy trustee for failing to verify the value of the claim and on the bankruptcy court for allowing him to retain his claim as a personal asset. Mr. "Less Than Candid" was "now free to make out of [the claim] whatever he can."

A month later, Division II stepped up to the plate and belted out an 18-page opinion in an apparent effort to ensure that at least in one part of the state the court would not lose sight of the purposes served by judicial estoppel:

> The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time.

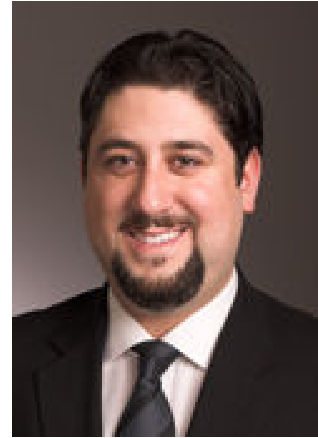
In this case, a businessman named Matt filed for bankruptcy but failed to disclose an estimated $1,000,000 claim. That was too much for both the trial court and Division II. They ruled that Matt would not be allowed to pursue his undisclosed claim.

Finally, we note that since May 31, there have been six judicial estoppel opinions.

Ingram v. Thompson, 141 Wn. App. 287, 169 P.3d 832 (2007).

Skinner v. Holgate, ___ Wn. App. ___, 173 P.3d 300 (2007).

MICHAEL G. HOWARD



ASSOCIATE

PRACTICE:

Mr. Howard practices in the areas of insurance defense, construction defect and general litigation.

EDUCATION:

DePaul University Law School, J.D. with Honors, Chicago, IL, 2001, Dean's Scholar

University of Washington, B.A., Psychology, 1998

BACKGROUND:

Mr. Howard was born and raised in the Chicago area. He is licensed to practice in Washington State and the United States District Court for the Western District of Washington and is a member of the Washington State Bar Association. Prior to joining Reed McClure in the spring of 2006, Mr. Howard worked for over four years as an insurance defense attorney in the Seattle area, handling litigation matters including construction defect, motor vehicle accidents and premises liablity.

His current practice focuses on complex litigation matters with an emphasis on construction litigation and insurance defense work. Mr. Howard's litigation experience includes defending developers, general contractors, subcontractors, security companies, and various other corporate entities.

THE "S" CURVE

FACTS:

Jason and Eric were snowmobiling. Jason failed to negotiate an "S" curve and ended up in a gully with a damaged snowmobile. They tried to fix it. They removed the sign which warned of the "S" curve and used the metal stake holding the sign as a pry bar.

Bob came along an hour later. It was snowing and the conditions were "flat white." Bob did not negotiate the "S" curve, went off the trail, crashed, and sustained injury.

Bob sued Jason and Eric, claiming their negligent actions caused the accident. The trial court dismissed the case, holding that Bob had failed to show that the actions of Jason and Eric were a proximate cause of the accident. The Court of Appeals reversed, holding that the "intensely factually driven" issues of proximate cause and negligence were for the jury.

HOLDINGS:

1. Negligence requires a specific duty owed by the plaintiff to the defendant. A plaintiff must then show that a breach of the duty proximately caused his or her injury.

2. Proximate cause has two elements: cause in fact and legal causation. Cause in fact refers to the "but for" consequences of an act and is "generally left to the jury."

3. The proximate cause of an accident is that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred.

4. A jury could conclude that the conduct of Jason and Eric caused Bob's accident. The question of whether "but for" the actions of Jason and Eric, Bob would not have been injured is "generally left to the jury."

COMMENT:

Classic case of compelling defense arguments causing the trial judge to try the case himself.

Eyerly v. Allen, 2007 WL 3349119 (Wn. App. Nov. 13, 2007).

REVENGE OF THE LUG NUT

The wire services carried this story in November 2007:

> A man trying to loosen a stubborn lug nut blasted the wheel with a 12-gauge shotgun, injuring himself in both legs.
>
> The 66-year-old man had been repairing a Lincoln Continental for two weeks at his home. He had gotten all but one of the lug nuts off the right rear wheel before getting frustrated. Then he grabbed the handyman's helper. No, not duct tape. A shotgun.
>
> From about arm's length, the man fired the shotgun at the wheel and was "peppered" in both legs with buckshot and other debris, with some injuries as high on his body as his chin.
>
> Fire personnel treated the man at the scene before he was taken to the hospital with injuries described as "severe but not life-threatening."

Obviously, the gentleman is a leading candidate for the 2007 Darwin Award. Although, at 66, his ability to make a significant difference in the gene pool is problematic.

But, on a more fundamental level, the clock is now ticking. We expect that within three years the Supreme Court will rule that injuries caused by discharging a shotgun at a lug nut from two feet away are injuries caused by "accident."

LIMITED LANDLORD LIABILITY

FACTS:

Chris rented property to Roseann. One day, Roseann started a fire in a burn barrel. The next day the wind picked up and blew hot ash into the grass. That fire spread and burned down a small forest on the neighbor's land.

The neighbor sued the landlord, Chris, and the tenant, Roseann. The trial court dismissed Chris because generally a landlord is not responsible for the negligent conduct of a tenant. The Court of Appeals affirmed.

HOLDINGS:

1. Generally, a landlord is not responsible for injuries to third parties for conditions created by the tenant after the property has been leased.

2. And by statute, it is the tenant's duty, not the landlord's, to avoid a nuisance on the rental property. RCW 29.18.130(5). A tenant also has a duty to not "engage in any activity at the rental premises that is . . . [i]mminently hazardous to the physical safety of other persons on the premises." RCW 59.18.130(8)(a).

COMMENT:

The neighbor's attorney tossed up a host of arguments but none could overcome the principle that the landlord, having no control over the tenant, has no liability for what the tenant does.

English v. Casselberry, 2007 WL 4348259 (Wn. App. Dec. 13, 2007).

QUICKLY, QUICKLY, QUICKLY

In a lengthy opinion, the Supreme Court went back and performed extensive reviews of the two pillars of Washington bad faith law: *Tank v. State Farm*; *Safeco v. Butler*. The court held that Mutual of Enumclaw's issuance of a subpoena to the arbitrator conclusively demonstrated that Mutual of Enumclaw had a greater concern for its monetary interests than for the policyholder's financial risk. This violation of the #4 Tank criterion was bad faith.

Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007).

Evidently, refusing to follow the lead of Division III, Division II followed the old rule and dismissed a slip-and-fall claim:

> [T]he "mere fact that a step up or down, or a flight of steps up or down, is maintained at the entrance or exit of a building is no evidence of negligence, if the step is in good repair and in plain view." *Tyler v. F.W. Woolworth Co.*, 181 Wash. 125, 127 28, 41 P.2d 1093 (1935).

Weron v. Granite Service, Inc., 2007 WL 4171142 (Wn. App. Nov. 27, 2007).

In a 17-page unpublished opinion, Division I enforced the general rule that an insurance agent is not liable for inadequate coverage except when there exists a "special relationship" between the policyholder and the agent. The relationship will be found only if (1) the agent holds himself out as an insurance expert and receives extra compensation for advice or (2) there is a long-standing relationship, some type of interaction on the question of coverage, and reliance on the agent's expertise.

Lipscomb v. Farmers Ins. Co., 2007 WL 4633317 (Wn. App. Oct. 29, 2007).

In an opinion affirming a CR 11 sanction award against the plaintiff's attorney and adding on a little more for the appeal, the court had this advice:

1. "Blind reliance" on a client's assertions seldom constitutes a reasonable inquiry.

2. Where attorneys are confronted in court proceedings with unassailable and difficult facts, they should change their position rather than the facts.

Babcock v. St. Joseph's Hospital, 2007 WL 4157786 (Wn. App. Nov. 26, 2007).

Notwithstanding the Washington rule that personal injuries are not recoverable under the Consumer Protection Act, Division III has published an opinion allowing a lady to sue her surgeon under the Consumer Protection Act. All she has to do is allege that the shoulder surgery was unnecessary and that he did it for financial gain.

Ambach v. French, 2007 WL 4171102 (Wn. App. Nov. 27, 2007).

In a published opinion dealing primarily with whether a reasonableness hearing should be conducted in the tort case or in the declaratory judgment action, the court noted that the cost to remove and clean up around a Leaky Underground Storage Tank (*i.e.*, LUST) in a residential setting was $61,415.63.

Martin v. Johnson, 141 Wn. App. 611, 170 P.3d 1198 (2007).

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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 May 8, 2008. Watch for Further Information.

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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