WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXIII, NO. 3 *RECORD-SETTING SUMMER 2009*

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.

SUPREME COURT SMACKS LEGISLATURE

Years ago, when "civics" was still a part of the required curriculum in high school (at Kelso, it was called "Contemporary Problems" but civics by any other name was still civics), we all learned that the American form of government was, like Gaul, divided into three parts: executive; legislative; judicial. The legislative branch makes the laws. The executive makes sure the laws are obeyed. The judicial decides arguments about the meaning of laws and how they are applied. Upon these three coequal branches our government is based (never mind that less than 50% of Americans can even name the three branches).

Now let us turn to "tort." Tort is remarkable, if not unique, in that it is judge-made law. Yes, I know making law is not in their job description. But they do it anyway. As a consequence, since the court created tort law, it feels a special affinity to that which it created. And it does not take kindly to legislative meddling. Not unlike a parent's response. The stage was set for a collision during the heyday of tort reform.

TORT REFORM MEETS "THE" COURT

The Legislature can sit in its chambers and legislate about tort reform all it wants, but unless the nine black-robed folks across the oval agree, then it is all in vain. This phenomenon is stunningly demonstrated with what happened to what was supposed to be the crown jewel of the 1986 Tort Reform Act. The cap on runaway jury verdicts, *i.e.*, the cap on noneconomic damage, the cap on pain and suffering awards, was to bring sanity back into the tort arena. At least that is what the Legislature intended.

The Supreme Court had other ideas. But it had a problem. For years, it had been saying that the Legislature had the power to make changes in tort law. The court rose to the occasion. It came up with a theory that when the Washington Constitution said that the right to trial by jury shall remain **"inviolate**," it meant the court should look at the right to trial by jury as it existed in 1889 when Washington became a state. Well, in 1889, there was no statute prohibiting runaway jury verdicts. So, if such a restriction did not exist in 1889, then it could not be constitutional in 1989: *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).

I am not making this up. That is what they ruled. And keep in mind, in 1989 the court was more conservative and more realistic than it is now. What seemed outrageous in 1989 would now be greeted with only moderate surprise.

After demonstrating in *Sofie* that it really was the last word on tort reform, the court has, with one exception, settled down to interpreting and applying the Tort Reform Law. The exception was *Welch v. Southland Corp.*, 134 Wn.2d 629, 952 P.2d 162 (1998). The court said the Legislature did not intend that intentional conduct be considered for purposes of the allocation of fault. Well, of course it did. It makes no sense otherwise.

It took five years but finally a majority on the court was able to write an opinion which solved the problem of what to do when the injury was caused by a combination of negligent acts and intentional acts: *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

And with all of that, by way of background, we get to the *Putman* case. It started when the Legislature made a law. Not surprising. That is their job. And this law provided that if you wanted to sue a health care provider, you had to file with your complaint a statement from an expert that there was a reasonable probability that the defendant's conduct did not follow the accepted standard of care. In other words, claimants had to demonstrate they had at least a colorable claim before invoking the court.

Well, to make a long story short, the Supreme Court was apoplectic. The Court brought out its big guns. This law from the legislative branch was unconstitutional because "it unduly burdens the right of access to courts and violates the separation of powers." The Supreme Court held that the law, RCW 7.70.150, was unconstitutional.

The case is a reminder to the legislative branch that the word "Supreme" in "Supreme Court" means the branches may be equal, but this branch is "Supreme."

Putman v. Wenatchee Valley Medical Center P.S., 166 Wn.2d 974, 216 P.3d 374 (2009).

TRIAL BY JURY V. TECHNOLOGY

Anyone who has sat through a jury trial, as a juror, a party, an attorney, or an observer, becomes very familiar with the admonition which the judge gives the jury at each break and at the end of the day: Do not discuss the case with anyone; do not let anyone tell you about the case; do not do any research, factual or legal. By and large, we have been reasonably secure in our belief that the members of the jury did follow the admonition. Of course, there was the case involving an industrial crane hook in which most members of the jury spent their lunch breaks visiting construction sites in downtown Seattle to see how the hook was used. But most of us took comfort in the belief that the jurors followed the direction of that person in the black robe.

That has now been changed by modern technology in the form of iPhones and BlackBerrys. We should have seen it coming when we noticed that attorneys could be sitting in a deposition, and at the same time be texting/e-mailing instructions back to the office. That iPhone is not just a telephone; it is a computer with wireless internet access. While appearing to "check her mail," a juror can do a Google search on the parties, or on the lawyers, or on the judge. And if a juror does not understand some element of the case, he can consult Wikipedia for some further factual background or, God forbid, to even find out what the law really is.

The media has begun to report on such disasters. The best/worst comes out of a federal court in Florida. The criminal drug trial had gone on for eight weeks. The case had been argued. The jury was deliberating. One juror contacted the judge to tell him that another juror had admitted that he had done some research on the case over the internet. The judge goes into damage control mode, hauls the juror in to find out what he researched and whether he had shared the research. What he researched was evidence the judge had excluded. Bad! It gets worse.

In further investigation, the judge discovered that eight other jurors had done the same thing.

He declared a mistrial. Eight weeks of time, energy, and money down the drain.

What is the answer? More emphasis on the "Thou shall nots"; sanction a juror who does it; impound items in the morning. (For centuries, jurors have gotten by without immediate weather, stock market, or e-mail updates.)

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 liability.

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 MOOSE IS IN THE TEMPLE

Those of you born before 1970 have been witness to the change in society's view toward the consumption of liquor and subsequent or contemporaneous driving. A guest leaving a party who displayed difficulty navigating the front steps, or finding his keys, or finding her car was considered a source of amusement and a fitting end to a successful social engagement. No one thought much about what could happen. Civil liability for the provider was rare or nonexistent (*Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759 (1969)).

But attitudes change. The drunk driver became a pariah. And the supplier of the alcohol, whether social or commercial, began to feel the exposure. Then, too, there was an improvement in testing for blood alcohol levels, and legislation which set a BAC first at 0.10% and then at 0.08%.

However, as sometimes happens, with the development of a common law rule, the courts have to play catch-up. That was how the Moose came to the Temple. In many cases, the court had said that the standard for a commercial supplier was serving an "obviously intoxicated" person. That determination was to be made by the person's appearance at the time the liquor was furnished. Under this rule, jurors are not permitted to make an inferential leap of the "driver's BAC was X, so he must have appeared drunk" type.

While stating that it would "not move away from [the] established rule," the court in the Moose case did a good job of undermining it when it held that overservice may be proven by direct or circumstantial evidence, and that BAC and autopsy reports can corroborate evidence of post-service appearance and "support an inference that a defendant appeared" intoxicated when served.

FACTS:

Hawkeye was drinking at the Moose Lodge in Bellingham. An expert opined that he had consumed 21 12-oz. beers, or 30 oz. of 80 proof alcohol, and probably hit 0.32% BAC. He left the lodge, got in his car, drove off, crossed the center line, and struck Bianca's car head-on. Hawkeye died. Bianca and her passengers were injured.

PROCEDURE:

Bianca sued Hawkeye, the Moose Lodge, and the bartender. The jury came back at $14 million. On appeal, the Court of Appeals reversed and vacated the judgment against the Lodge and the bartender (*Faust v. Albertson*, 143 Wn. App. 272 (2008)). It held that plaintiffs had failed to provide specific-in-time observational evidence of the tortfeasor's appearance close to the time of service.

On petition to the Supreme Court, the court said the Court of Appeals erred when it balanced and weighed the evidence. It held that there was enough evidence, when viewed most favorably to the plaintiffs, for the jury to infer that Hawkeye was apparently under the influence when served. It reinstated the $14 million judgment.

HOLDINGS:

1. Overturning a jury verdict by granting a judgment as a matter of law is appropriate only when the verdict is clearly unsupported by substantial evidence.

2. Businesses that violate the statute prohibiting sale of alcohol to any person apparently under the influence of liquor will be civilly liable to third-party victims for damages caused by their patron.

3. Jurors are allowed to consider and weigh circumstantial evidence of the appearance of intoxication when the witness's observation occurred within a short period of time after the alleged overservice.

4. Evidence of the blood alcohol content of a patron is relevant as corroborative and supportive of the credibility of firsthand observations of a patron's apparent intoxication at the time of service.

Faust v. Albertson, 166 Wn.2d 653, 211 P.3d 400 (2009).

A PIP OF A RECOVERY

FACTS:

Loc collided with Dinh. His insurer, Allstate, paid $4,172 in PIP benefits. Loc made a claim against Dinh. He demanded $34,800, but settled for $9,347.54.

Loc claimed the settlement did not fully compensate him, and asked Allstate to waive its PIP reimbursement claim. Allstate declined.

Loc sued Allstate for refusing to waive its PIP claim. The trial court dismissed Loc's claim, granted Allstate a PIP judgment of $4,172, and ordered Loc to pay attorneys fees for having filed a groundless action.

Loc appealed. The Court of Appeals affirmed that Loc was fully compensated and that Allstate was entitled to pursue its PIP. However, under the rule of *Mahler*, Allstate owed Loc a proportionate share of Loc's attorney fees. It also ruled that Loc's lawsuit was not entirely baseless.

HOLDINGS:

1. A claimant who receives personal injury protection benefits after being involved in a car accident must reimburse his insurer after he had been fully compensated for actual losses suffered.

2. Settling with the tortfeasor is evidence of full compensation. The claimant cannot defeat the insurer's right to reimbursement with conclusory allegations that he settled for less than his actual damages because he was partially at fault.

COMMENT:

Somewhat surprised to see an insured argue that his arm's length settlement with the tortfeasor for less than policy limits was not full compensation.

Pleased to note that Allstate was represented in this case by Reed McClure attorneys Pam Okano and Michael Rogers.

Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wn. App. 195, 211 P.3d 430 (2009).

SPEEDING TO A DISFAVORED COLLISION

FACTS:

Alicia was driving south. She attempted a left turn. Joe was driving north. The speed limit was 30 mph. Joe's speed was estimated to be between 45 mph and 70 mph. Joe was driving because he was the most sober of the three guys in his vehicle.

Alicia saw Joe's truck about a block away when she made her left turn. Joe saw Alicia and saw her turn signal. Joe's truck hit the back of Alicia's SUV. After the collision, Joe and one of his passengers fled from the scene.

PROCEDURE:

Alicia sued Joe. Joe moved for dismissal on the basis that he was the favored driver. Alicia's expert stated that if Joe had not been speeding, Alicia would have been able to make her turn "in complete safety."

The court dismissed Alicia's case. She appealed. The Court of Appeals affirmed because Joe was the favored driver and the disfavored driver (*i.e.*, Alicia) must yield to him.

HOLDINGS:

1. A driver turning left, as a disfavored driver, must yield to an oncoming driver, who is the favored driver. RCW 46.61.185.

2. The primary duty to avoid a collision is on the disfavored driver. *Doherty v. Mun. of Metro. Seattle*, 83 Wn. App. 464, 470, (1996). "A driver must yield to an oncoming vehicle even if it can be shown that the oncoming vehicle was proceeding unlawfully." *Id.*

3. It is well established that excessive speed that merely places two vehicles at the same place at the same time is not enough to prove causation. Excessive speed is not causal because the argument can be made that if the disfavored driver had been going faster, the collision would have been avoided, in the same way that if the favored driver had been going slower, the collision would have been avoided.

4. However, excessive speed can be causal if it prevents the favored driver, between the point of notice and the point of impact, from avoiding a collision. The point of notice is the moment at which the favored driver realizes the disfavored driver is not going to yield.

5. It does not matter what speed Joe was traveling prior to the collision. The inquiry is whether Joe's speed prohibited him from avoiding the collision between the point he realized Alicia was not going to yield and the point of impact.

6. Alicia failed to show that Joe had enough time to avoid the collision. Both drivers stated that Alicia made a quick turn.

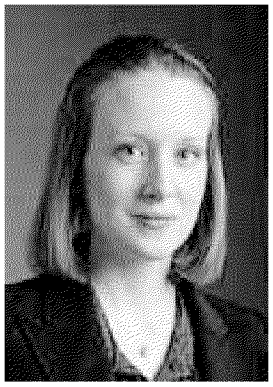
COMMENT:

It is refreshing to see the old favored/disfavored driver dichotomy trotted out and used. However, I remain unconvinced that excessive speed is as irrelevant as the court says it is.

Mossman v. Rowley, 2009 WL 4696210 (Wn. App. Dec. 10, 2009).

DANIELLE M. EVANS

ASSOCIATE



PRACTICE:

Ms. Evans practices in the areas of insurance defense, construction defect, medical malpractice defense, employment law, general civil litigation, and appellate work.

EDUCATION:

Rutgers School of Law – Newark, J.D., Newark, New Jersey, 2007

Honors: Business Editor, Women's Rights Law Reporter

Alfred University, B.A. in Art and Culture, Alfred, New York, 2002

Honors: cum laude

BACKGROUND:

Ms. Evans was born and raised in Portland, Oregon. Prior to joining Reed McClure, Ms. Evans served as a judicial law clerk to the Hon. Jaime D. Happas, a designated mass tort judge in the Superior Court of New Jersey. Many of the mass torts before the court were complex products liability cases arising from injuries allegedly caused by pharmaceutical products. Often the mass torts had parallel litigation before the Federal multi-district litigation and other state courts. A representative opinion is *Bailey v. Wyeth, Inc.*, 2008 WL 5196846 (N.J. Super. Law Div. July 11, 2008).

In addition to her experience with complex civil litigation, Ms. Evans has experience with dispute resolution. During law school Ms. Evans served as a mediator for the Special Civil Division of Superior Court in Essex County, New Jersey. She also interned at the dispute resolution division of the Financial Industry Regulatory Authority.

WATCH OUT FOR THAT CUB'S FOOT

FACTS:

Shortly before Christmas 2004, Cub Scout Pack No. 696 was Christmas caroling at a hospital complex. As Kate, a hospital employee, passed the carolers, one of the scouts stuck out a leg and tripped her.

She sued the regional and national Boy Scouts organizations. She alleged that the regional and national organizations exercised apparent authority over the local scout packs.

The defendants moved for summary judgment, arguing that they did not have supervisory authority over local activities. Relying on *Mauch v. Kissling*, 56 Wn. App. 312 (1989), the trial court dismissed the case. The Court of Appeals affirmed.

HOLDINGS:

1. The national scouting organization charters regional organizations, which in turn charter local organizations. The local groups organize and control themselves, selecting leaders and making decisions on activities for the scouts.

2. There is no factual basis for finding that Pack No. 696 or its leaders were acting at the behest of the regional or national scouting organizations when the caroling activity was scheduled or conducted.

3. The fact that Pack No. 696 was chartered by a national organization did not mean that it was acting under the control of that organization.

COMMENT:

I don't know if I am more disillusioned by the fact the tripper was a Christmas caroler, or a cub scout, or both. In my memory, a scout is "trustworthy, loyal, helpful, *etc.*, *etc.*," and is always prepared.

Gordon v. Boy Scouts of America, Inc., 2009 WL 4912720 (Wn. App. Dec. 22, 2009).

EMPLOYEE DISHONESTY

Division I of the Court of Appeals recently had occasion to deal with a type of policy we do not see very often: Employee Theft Coverage. Aside from having unique language in the policy, the case also had a very odd fact pattern.

The policyholder was a car dealership which employed a guy named Casino as finance manager. He had a gambling problem. (No surprise there.) Casino had been stealing for three months when they wised up. Well, that is not right. They did not fire him. Instead, he confessed that on seven occasions he had stolen a total of $21,590. Based on his promise to repay and not steal again, they kept him on as an employee.

It turned out he had stolen on nine occasions, not seven. And he continued to steal while paying back the earlier thefts.

Based on his promise to repay and not to steal again, they kept him on as an employee. Casino continued to steal after the second agreement. They fired him and made a claim against their dishonest employee insurer.

The Court of Appeals' nine-page discussion of what the unique policy language meant against this unique factual backdrop does not lend itself to our format. Therefore, after noting that the trial court ruled 100% in favor of the insurer, and the Court of Appeals ruled 100% in favor of the policyholder, we will recommend that you read the opinion in front of a roaring fire with a cup of warm holiday spirits.

S&K Motors, Inc. v. Harco National Ins. Co., 151 Wn. App. 633, 213 P.3d 630 (2009).

FOLLOW-UP

In the "Short Spring 2008" issue, we reviewed the case of *Hudson v. Hapner*, 146 Wn. App. 280 (2008), which held that a party who has requested trial de novo following mandatory arbitration has the right to withdraw the request because of public policy. That seemed intuitively obvious. But for some reason the Supreme Court has granted a petition for review so it may examine the public policy behind mandatory arbitration. *Hudson v. Hapner*, 165 Wn.2d 1048 (2009). It has been set for argument on January 26, 2010. In the "Olympic Summer 2008" issue, we highlighted the unpublished opinion *Broom v. Morgan Stanley*. We felt it was noteworthy because it reached the remarkable

conclusion that it was an error of law for an arbitrator in a private arbitration to apply the applicable statute of limitation and dismiss the claim. The Supreme Court granted review and the case should be argued January 28, 2010.

From an abstract point of view there really is no good reason why an arbitrator would not apply an applicable statute of limitation. But you must remember this case is in the Washington Supreme Court. The court believes that claimants should have their claims heard. As noted elsewhere in this issue, in the *Putman* case, the court declared unconstitutional the requirement that a med/mal claimant obtain a Certificate of Merit before filing suit.

MORE ARBITRATION

Last issue, we discussed several of the increasing number of arbitration cases which are ending up in our judicial dispute resolution forum. Somehow, we overlooked a dandy out of Division III: *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn. App. 527, 208 P.3d 1133 (2009).

Here, the parties had a written contract which provided that disputes would be resolved by arbitration, and that "all arbitration shall be binding." A dispute arose when Little did not pay its bills. Sales filed suit. Little answered, asking that the case be dismissed because it should be arbitrated. Sales then filed for mandatory arbitration. Little again asked for dismissal. The superior court judge said mandatory arbitration was good enough.

Little sought discretionary review and the commissioner denied it. But a panel accepted review and reversed, saying that "binding arbitration" is consistent with private arbitration, and is not consistent with mandatory arbitration.

HOLDINGS:

1. Arbitration is a statutory proceeding. Both the rights of the parties and the power of the court are governed entirely by statute.

2. Chapter 7.06 RCW authorizes courts to impose mandatory arbitration of civil suits for small claims. Under this statutory scheme, parties have the right to request a trial de novo.

3. Conversely, private arbitration is governed by chapter 7.04A RCW, Washington's uniform arbitration act. Under this statute, the parties may seek court confirmation of the award. Unlike mandatory arbitration, there is no provision for court review of the award. Disappointed parties may not request a trial de novo.

4. By agreeing to binding arbitration, the parties consented to a final resolution of any dispute under chapter 7.04A RCW, which does not provide for de novo review.

5. Binding arbitration by its very definition is inconsistent with the de novo review allowed under the mandatory arbitration statute.

COMMENT:

We should not overlook the contract provided that Little would pay attorney fees. Under Washington law (RCW 4.84.330), that unilateral attorney fee provision is transformed into a bilateral provision. That means the prevailing party is entitled to fees. In this case, that was Little.

IN THE GOOD OLD SUMMERTIME

Those of you with a keen eye may have noticed that you are reading the Summer 2009 issue. Well, nothing too remarkable there, aside from the fact that it is now January 2010. And, if you have an inquiring mind (and we assume all of our readers do), you may well ask what happened? "The dog ate the text" and "The computer lost it" come to mind. But those are not particularly original. So, let us try, "Global Warming."

Yes, Global Warming. As most of you know, Seattle is renowned for its temperate climate: never too hot; never too cold. A place of gray overcast sky where the angels' tears fall with some regularity. A place not unlike Dublin, which gave rise to the observation: "Being Irish, he had an abiding sense of tragedy, which sustained him through temporary periods of joy."

Here in Seattle, the recorded temperature had never hit 100°: Well, in the summer of 2009, it not only hit 100°, but it kept going right on up to 103°. This had an impact on the inhabitants, *e.g.*, the webbing between our toes dried out.

In any event, with the weather having returned to something normal, we will commence work on the Fall 2009 issue.

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 41 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 **FINRA** Dispute Resolution Program. He was named a "Washington Super Lawyer" in 2001, 2003, 2005, 2006, 2007, 2008, and 2009. He can be reached at whickman@rmlaw.com.

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

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 e-mail address to Mary Clifton (mclifton@rmlaw.com).

REED MCCLURE ATTORNEYS

EARLE Q. Bravo	206/386-7165	ebravo@rmlaw.com
MICHAEL N. Budelsky	**206/386-7008**	**mbudelsky@rmlaw.com**
MARILEE C. Erickson	206/386-7047	merickson@rmlaw.com
DANIELLE M. Evans	**206/386-7185**	**devans@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

SAVE THE DATE!!!!!

The Critically Acclaimed Washington Insurance Law Seminar Put On for Insurance Industry Personnel by Real Insurance Law Lawyers Is Coming Soon.

Reed McClure's Eleventh Insurance Law Seminar

Will be held May 26, 2010,
at Cedarbrook Conference Center.

Watch for Further Information.