WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXII, NO. 2 *SHORT SPRING 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.

A TIME TO CALL IT QUITS

FACTS:

Cliff rear-ended Lea's car. Lea sued Cliff. The case went to mandatory arbitration. The arbitrator awarded $14,538.

Cliff asked for a trial de novo before a jury. The jury awarded $292,298.

Cliff appealed. The Court of Appeals reversed because the trial court had improperly excluded Cliff's expert witness.

Back in the trial court, Cliff decided to withdraw his request for a trial de novo, and indicated he was ready to pay the arbitrator's award and Lea's attorney fees. Lea objected to being limited, arguing that Cliff had waived his right to withdraw his request for trial de novo. The trial court agreed with Lea.

Cliff sought discretionary review. The Court of Appeals granted review, reversed the trial court, and held that Cliff was entitled to withdraw his request for trial de novo because the public policy behind mandatory arbitration requires the court to favor the original arbitration award over continued litigation.

HOLDINGS:

1. A party who has requested trial de novo has the right to unilaterally withdraw the request.

2. Allowing withdrawal is most consistent with the legislative preference for arbitration.

3. We will not add to or subtract from the clear language of a rule, even if we believe that the legislature intended something else but did not adequately express it, unless the addition or subtraction of language is imperatively required to make the rule rational.

4. No amount of past delay justifies future delay.

COMMENT:

We are pleased to note that Cliff was represented by Reed McClure attorney Marilee C. Erickson.

Hudson v. Hapner, ___ Wn. App. ___, 187 P.3d 311 (2008).

WE'RE #2! WE'RE #2! WE'RE #2!

There were high fives, or some variation thereof, all around the Temple of Justice on March 11, 2008. That was the day the *New York Times* ran the story on which state court in the USA was the most influential. The most influential was, according to a study in the U.C. Davis *Law Review*, the California Supreme Court. The *Times* characterized the win as a "landslide."

The study revealed that the California court had been "followed" by other state courts in 1,260 decisions over the past 65 years.

And who, gentle reader, do you think was #2? Yes, you may now pick yourself up off the floor; it was the Supremes in Olympia. The Washington court had been "followed" 942 times.

The least influential court was Kentucky, at 177 cases; the median was 453.

In a subsequent piece in the *Bar News*, Tim Fuller, the reporter of decisions in Washington, stated that Washington lawyers were probably not too surprised with the result. Right. We were not surprised. We were astounded. We were flabbergasted. We were rendered speechless, almost.

ECONOMIC LOSS RULE

Reed McClure's Mike Rogers and Pam Okano scored a reversal of a negligent misrepresentation award. The court noted that "pervasive authority and common sense dictate that a building constitutes a single 'product' or 'property,' not a series of component parts, for purposes of the economic loss rule."

The court pointed out that in *Alejandre v. Bull*, 159 Wn.2d 674 (2007), the Supreme Court had held that where parties "have entered into a contractual relationship, and merely economic losses occur, the economic loss rule bars the complaining party from asserting tort remedies. Instead, the party is limited to the contract remedies that the parties bargained for and agreed upon."

Stieneke v. Russi, 2008 WL 2582977 (Wn. App. July 1, 2008).

ANAMARIA GIL

PRACTICE:

Ms. Gil has fourteen years of litigation experience. Since coming to Reed McClure in 1996, Ms. Gil has focused her practice on personal injury defense litigation, including premises liability, products liability, false arrest, false imprisonment, and motor vehicle accidents. Ms. Gil devotes a significant part of her practice to representing and advising large retailers and property owners in tort-related lawsuits, and also, in contract matters involving tenders of defense, indemnification agreements and additional insured endorsements.

Ms. Gil also has background and experience defending UIM claims, and investigating suspicious loss claims for insurance companies.

EDUCATION:

Northwestern University School of Law, J.D., 1992

University of Washington, Political Science Honors Program, B.A., 1989

BACKGROUND:

Ms. Gil was born an American citizen abroad in Tegucigalpa, Honduras. In her early life, she traveled extensively through Latin America with her family before settling in Seattle.

Ms. Gil is licensed to practice in Washington State and the U.S. District Court, Eastern and Western Districts of Washington.

HONORS AND AWARDS:

Selected, "Rising Star," Washington Law & Politics Magazine, 2001.

RES IPSA

FACTS:

Plaintiff went into surgery for the repair of a hernia below her navel. When she woke up, she had a broken rib in her upper chest.

She sued the hospital under the common law doctrine of *res ipsa loquitur*. (Exact translation: The thing itself speaks.) Plaintiff swore there was no earlier rib break.

The trial judge dismissed the case because the hospital introduced evidence that, if believed, showed that the broken rib predated the surgery; the Court of Appeals reversed because whether or not there was a preexisting injury was a fact question for the jury.

HOLDINGS:

1. The *res ipsa loquitur* doctrine is composed of three elements: (1) the accident is of a kind that ordinarily does not happen in the absence of someone's negligence, (2) the injuries were caused by an agency or instrumentality under the exclusive control of the defendant, and (3) the plaintiff did not contribute to the injury-causing accident or occurrence.

2. *Res ipsa loquitur* provides a type of circumstantial evidence from which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relationship to it.

COMMENT:

Oh, wonderful textbook example of *res ipsa*: Patient wakes up from surgery with an unexpected broken bone. The case is stunningly similar to one we studied in law school over 40 years ago.

Res ipsa is a classic example of a common law rule. The principle of *res ipsa loquitur* was first put forward by Baron Pollock in *Byrne v. Boadle*, 159 Eng. Rep. 299 (1863). Byrne was struck by a barrel of flour falling from a second-story window. The court's presumption was that a barrel of flour falling out of second-story window is itself sufficient evidence of negligence:

> A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous.
>
> The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible

> for the acts of his servants who had the control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

Lomax v. Yakima Valley Memorial Hospital Ass'n, 2008 WL 2477418 (Wn. App. June 10, 2008).

SELF-INSURANCE IS NOT INSURANCE

FACTS:

Bordeaux developed condominiums in Sammamish. After the project was finished and sold, the happy homeowners sued Bordeaux for extensive construction defects and property damage related to the interior, the exterior, the roof, and the drainage.

Bordeaux had two CGL policies. Each policy had a $100,000 Self-Insured Retention. The policy with AS covered property damage occurring 9/30/2000 to 9/30/2001. The policy with Zurich covered 9/30/01 to 9/30/02.

The homeowners' lawsuit was mediated to a $630,000 settlement. Bordeaux had paid $105,000 in defense costs. AS took the position that Bordeaux had to pay a second $100,000 before AS's duty to pay kicked in. In order not to lose the settlement, Bordeaux paid the $100,000 and then sued AS for reimbursement of the $100,000 and to find out who was entitled to receive funds collected from the subcontributors.

The trial court ruled that Bordeaux had to pay only one $100,000 SIR. It also ruled that the SIRs were not primary insurance and that Bordeaux was entitled to keep the collected funds until it had been made whole. The Court of Appeals affirmed.

HOLDINGS:

1. Washington courts liberally construe insurance policies to provide coverage wherever possible.

2. Coverage exclusions are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning.

3. Washington courts have rejected the argument that self-insurance constitutes insurance.

4. Traditional insurance involves risk shifting; self-insurance involves risk retention.

5. Nothing in the AS contract gives it the right to subrogation for sums that it did not pay, such as the SIRs.

6. The AS policy states that it is obligated to pay covered damages above $100,000. It says nothing about whether or not Bordeaux's obligation to pay the AS SIR is satisfied when it fulfills a similar obligation under some other company's policy.

7. No right of allocation exists for the defense of non-covered claims that are reasonably related to the defense of covered claims. AS has no right to apportion defense costs between the two policies.

COMMENT:

Not much question but that self-insurance is NOT insurance. But the ruling that you can satisfy $200,000 in SIRs by paying $100,000 is a bit bizarre.

Bordeaux Inc. v. American Safety Ins. Co., ___ Wn. App. ___, 186 P.3d 1188 (2008).

REED McCLURE'S APPELLATE DEPARTMENT IS 40 YEARS OLD

May 14, 2008, marked the 40th anniversary of the start of Reed McClure's appellate department. It was on May 14, 1968, that senior partner Roy J. Moceri handed one–day associate William R Hickman three feet of file material and told him the Ninth Circuit brief was due in three weeks, that he (i.e., Mr. Moceri) had four trials scheduled between now and then, and that he (i.e. Mr. Hickman) was going to write the appellant's brief. Pausing at the door, Mr. Moceri closed the short discussion with this advice: "And don't write any goddamn law review article."

And the rest, as they say, is history. Since that date, the Reed McClure appellate team has been involved in 500-600 appellate procedures. A listing of the citations to Reed McClure's published opinions can be found at http://www.reedmcclure.com/newsletters/rmpublishedopinions_82008.pdf.

EARLE Q. BRAVO

PRACTICE:

Mr. Bravo practices in the areas of insurance defense, primarily in construction defect and bodily injury claims. His practice includes defending corporations and individuals against claims involving construction defect, premises liability, motor vehicle accidents and product liability.

EDUCATION:

Seattle University Law School, J.D., Seattle, WA, 2000

University of Washington, B.A., Political Science, 1993

BACKGROUND:

Mr. Bravo was born in the Philippines and raised in the Seattle 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 2008, Mr. Bravo worked for over six years as an insurance defense attorney in the Seattle area, handling litigation matters including construction defect, motor vehicle accidents, mold litigation, product liability, premises liability and insurance coverage.

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

He lives in West Seattle with his wife and two young daughters.

TRANSITORY TORTS AND SUBJECT MATTER JURISDICTION

FACTS:

Benito worked for Osborne. Matt worked for Neudorfer. Matt dropped a tool on Benito. So far so good. Benito sues Matt and his employer in superior court.

A problem. The job site, the place where the accident occurred, was within the territory of Fort Lewis. For those of you who are challenged in geography, Fort Lewis, an enormous military base, is located in western Washington alongside I-5, south of Tacoma and north of Olympia. The land on which Fort Lewis is situated was once in Washington. But it had been ceded by the State of Washington to the federal government back in 1919.

The defendants moved to dismiss Benito's case, claiming that Washington lacked subject matter jurisdiction over torts committed in a federal enclave. The trial judge agreed and dismissed the case with prejudice.

The Court of Appeals reversed, saying that Washington courts have subject matter jurisdiction over transitory claims when proper personal jurisdiction over the parties is established.

HOLDINGS:

1. Subject-matter jurisdiction over a cause or proceeding is a question of law. A court only has authorization to hear and determine a cause or proceeding if it has jurisdiction over the parties and the subject matter. Absent proper jurisdiction, a court may do nothing more than enter an order of dismissal.

2. State courts have jurisdiction to adjudicate civil causes of action for personal injuries sustained in federal enclaves, so long as proper jurisdiction can be established over the parties.

3. It is a well-established common law proposition that an action in tort for personal injuries is transitory.

4. A claim that is transitory in nature may be tried wherever jurisdiction may be properly established over the parties.

5. So long as Washington courts have proper personal jurisdiction over the parties, it has jurisdiction to adjudicate the claim.

COMMENT:

A delightful little opinion which guides the reader through the confusing landscape of jurisdiction, subject matter and personal.

Mendoza v. Neudorfer Engineers, Inc., ___ Wn. App. ___, 185 P.3d 1204 (2008).

CLOSE, BUT NO CIGAR

FACTS:

On July 20, 2006, 2:30 p.m., 83-year-old Ms. Jones filed a tort claim notice with Spokane County. She claimed a couple of deputies had assaulted her after she yelled at them to stop beating on her son.

On August 4, the County informed Ms. Jones that it found no merit in her claim.

A statute requires a 60-day waiting period between filing the tort claim and starting a lawsuit. Ms. Jones waited until September 18 at 3:25 p.m., the 60th day, to file her complaint.

The County moved to dismiss arguing that she filed one day too soon. The trial judge pointed out that it was technical, and harsh, but he did not write the law. He dismissed Ms. Jones' case. The Court of Appeals affirmed.

HOLDINGS:

1. We are reviewing the interpretation of RCW 4.96.020(4). We must discern the intent of the legislature, starting with the plain language of the statute and its ordinary meaning.

2. The plain language of RCW 4.96.020(4) requires a waiting period of 60 full calendar days between the filing of the claim notice and the commencement of legal action.

3. Where it is provided that a certain result shall not accrue *until after the expiration of a given number of days* from a stated date, then both the first and last days must be excluded, so that the full number of days will be allowed.

4. If we exclude the day Ms. Jones filed her tort claim, July 20, only 59 calendar days elapsed before she filed her lawsuit on September 18.

5. Where time requirements are concerned, failure to comply with a statutorily set time limitation cannot be considered substantial compliance with the statute.

COMMENT:

I always find it refreshing, if not surprising, when a Washington court applies the claim statute exactly as written even if it means a claimant will not get his day in court.

We would be remiss if we did not note the case of *Estate of Connelly v. Snohomish County PUD*, ___ Wn. App. ___, 187 P.3d 842 (2008), where a school district sought to limit its liability by not designating anyone to receive service of the claim, and then argued that the claimant had not filed a claim. (I am not making this up.)

Jones v. County of Spokane, 2008 WL 2333116 (Wn. App. June 5, 2008).

QUICKLY, QUICKLY, QUICKLY

Over a year ago, the Supreme Court heard argument in the *Zellmer* case. This case presented the court with the opportunity to decide whether or not it would keep the parental immunity doctrine or abolish it in favor of a reasonable parent standard.

A six-person majority reaffirmed that the doctrine bars liability for negligent parental supervision. The majority refused to carve out an exception for wrongful death. And it did expand the immunity to shield a stepparent. The 25-page opinion carefully reviews Washington's 103-year history with parental immunity.

In a six-page dissent, Chief Justice Alexander argued that the immunity should not be extended to stepparents. He pointed out that the doctrine was on its way out, and that public policy did not warrant extending such immunity to a stepparent.

Zellmer v. Zellmer, ___ Wn.2d ___, 188 P.3d 487 (2008).

Division I issued an unpublished opinion in which it held that there was no coverage for a lawyer who had purchased a "claims made" malpractice policy without disclosing that he had recently failed to file a client's dog bite case within the statute of limitations.

Nordquist v. Lumberman's Mut. Cas. Co., 2008 WL 2314102 (Wn. App. June 2, 2008).

In a case out of Arkansas, the court noted that the majority rule allows an insurer who defends a claim for which coverage did not exist to recover the cost of defense from the policyholder, provided the insurer expressly reserved the right to recoup the

expenses. The minority rule is that unless there is a recoupment provision in the policy, a unilateral reservation of rights letter cannot create a right to reimbursement.

Medical Liability Mut. Ins. Co. v. Alan Curtis Enterprises, Inc., ___ S.W.3d ___, 2008 WL 2205868 (Ark.) (2008).

In a published opinion, Division I has held that a reasonableness hearing in a contract case is not subject to the same factors as a reasonableness hearing in a tort case. The question arose after the policyholder and the claimant agreed that $8,344,993 was a nice number for the insurer to pay. The trial judge said it was reasonable. On appeal, the court said the insurer was not entitled to the full protection of the numerous *Glover/Chaussee* factors. In fact, "The insurer's interest relates only to the existence of bad faith, collusion and fraud in the settlement agreement."

The Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC, ___ Wn. App. ___, 187 P.3d 306 (2008).

Most of us do not read carefully (or at all) the little tiny print that comes on so many items we purchase. We have been lulled into a sense of security that the courts would protect us from any prejudicial adhesion contract. After all, how much actual bargaining went on? A recent Supreme Court opinion indicates that the court is more willing to treat the fine print as an enforceable contract.

Here, Jack and his mother Bernice booked passage on the MS *Amsterdam* going from Valparaiso, Chile, to San Diego in March 2004. The fine print on the ticket provided, among other things, that any lawsuit had to be filed in the federal court for the Western District of Washington, and any such lawsuit had to be filed within one year of the injury. As happens from time to time, there was an outbreak of what can be called "severe gastrointestinal disease." Jack and Bernice experienced "severe symptoms."

The next year, in March 2005, Jack, Bernice, and Susan (Jack's wife) filed suit in Seattle. But not in federal court; in superior court.

The trial court, the Court of Appeals, and the Supreme Court all agreed that the forum selection clause in the ticket was valid, and that Jack and Bernice were in the wrong court and out of luck. But Susan, who was not a passenger, was free to pursue her loss of consortium claim.

Oltman v. Holland America Line USA, 163 Wn.2d 236, 178 P.3d 981 (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 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
MIRY Kim	**206/386-7124**	**mkim@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