WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

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NO VACANCY COVERAGE

FACTS:

Kut and May owned a business building. The tenant was kicked out in early December for failure to pay the rent.

When winter came, the building was vacant. A water pipe froze and burst causing substantial damage to the building. The owners gave notice of the damage to their insurance company. The company investigated and paid out almost $300,000.00. The company investigated some more and found out the building was vacant. The policy excluded coverage for water damage when the building was vacant.

The insurance company told the insured that notwithstanding the lack of coverage, it would not seek reimbursement of the $300,000 already paid, but it would not pay anything more on the loss.

The owner sued the company for the remainder of the claim, i.e., $465,285.26. Both sides moved for summary judgment. The trial court ruled in favor of the owner. The Court of Appeals reversed and ruled in favor of the company because the plain language of the vacancy endorsement unambiguously limits coverage for water damage when the building is vacant.

HOLDINGS:

1. Insurance policies are construed as contracts. Washington courts follow the objective manifestation theory of contracts. The courts look for the parties' intent as objectively manifested rather than their unexpressed subjective intent.

2. An insurance policy is construed as a whole, with the policy being given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.

3. Insurance limitations must be clear and unequivocal. We will find a clause ambiguous only when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.

4. We construe ambiguity in favor of coverage. We cannot create ambiguity where none exists.

5. We will not find a contract provision ambiguous simply because it is complex or confusing.

COMMENT:

Nice clear summary of Washington law.

Lui v. Essex Ins. Co., 2015 Wash. App. LEXIS 725 (Apr. 6, 2015).

A $40,000,000 "WHOOPS"

After a patent infringement trial out in west Texas, AT&T found itself on the wrong end of a $40 Million judgment. Being represented by 18 attorneys at two firms, AT&T filed the usual post-trial motions. The trial judge denied the motions which started the 30-day clock running within which to file a notice of appeal.

Unfortunately, the electronic filing notices emailed to the attorneys mistakenly stated only that a motion to seal the file had been granted. A reading of the attached actual order showed that the motion to overturn the jury verdict had been denied.

AT&T's lawyers did not notice that the 30-day clock had been running until 51 days had passed. AT&T then asked the trial judge for an extension of time to file the notice of appeal. He refused, noting that it was "inexcusable for AT&T's multiple counsel" to fail to read all the underlying orders they received.

AT&T appealed that ruling to the Federal Circuit. A three-judge panel of that court affirmed the trial court leaving the $40 Million judgment in place. AT&T has now asked for an en banc review of the decision.

Two-Way Media, LLC v. AT&T, Inc., 782 F. 3d 1311 (2015).

SNOWY SPOKANE

FACTS:

In the summer of 2008, Ed moved from Southern California to Spokane. That was the year Spokane got about 6 feet of snow. Ed had difficulty negotiating icy and snowy areas of his apartment complex. He documented his difficulties and registered complaints with the complex's management. He took pictures before and after plowing to document his concern. One day Ed went out to get his mail. He planned to walk to the manager's office after he picked up his mail, to complain again about what he considered inadequate plowing, sanding, and de-icing.

After checking his mail, Ed started walking. He made it two steps and was on his back with an injury to his ankle.

The lawsuit followed. The judge dismissed the case concluding that Ed's claim was barred by the doctrine of implied primary assumption of risk. The Court of Appeals affirmed pointing out Ed's prior concerns and complaints demonstrated that he voluntarily encountered the risk.

HOLDINGS:

1. The basis of any negligence action is the failure to exercise reasonable care when one has a *duty* to exercise such care.

2. In order to prevail on a negligence claim, a plaintiff must prove four elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.

3. Landlords have a general duty to keep common areas free from dangerous accumulations of snow and ice.

4. Washington now recognizes four categories of assumption of risk: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable.

5. We will not find a contract provision ambiguous simply because it is complex or confusing.

6. Express assumption of risk and implied primary assumption of risk operate the same way, and arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding specific known risks.

7. No reasonable jury could find that Ed lacked knowledge of the risk, given the complaints he had expressed.

COMMENT:

There is a certain irony in the fact that the more Ed complained about the problem, the more he expressly assumed the risk.

An extremely well written review and analysis of an easily misunderstood question of law. It is very fortunate that it was rescued from "Unpublished" oblivion by an order to publish in part.

Hvolboll v. The Wolff Co., 2015 Wash. App. LEXIS 275, (Feb. 12, 2015), *ordered published in part*, 2015 Wash. App. LEXIS 736 (Apr. 7, 2015).

JOHN W. RANKIN, JR.

Firm President

Mr. Rankin has 39 years of litigation experience. During that period, his practice has emphasized defense of liability claims, including product liability, construction site accident, construction defect, and general liability claims. Mr. Rankin has also defended a wide variety of professionals against malpractice lawsuits, including architects and engineers, attorneys, physicians, insurance and securities brokers.

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

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

BUSINESS RISK EXCLUSION

FACTS:

Western issued a CGL policy to Shelcon Construction. A-2 Venture filed a breach of contract suit against Shelcon, alleging that defective performance by Shelcon that resulted in reducing the value of a property from $8.5 Million to $6.4 Million. Shelcon tendered to Western.

Western noted that the complaint alleged "economic loss" and not "property damage." Thus, there was no duty to defend. The company also noted the business risk exclusion.

The trial court granted Western's motion for summary judgment. On appeal, the Court of Appeals ruled that there was no coverage under the CGL because the consequential damages arose out of Shelcon's operations on the site.

HOLDINGS:

1. Insurance policies are liberally construed to provide coverage wherever possible. We determine coverage under the plain meaning of the policy and interpret the agreement to give effect to each provision.

2. It is well settled that the duty to defend under a CGL policy is separate from, and broader than, the duty to indemnify.

3. The duty to indemnify rests on the terms of the policy. On the other hand, the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint. If the allegations in a complaint conceivably trigger coverage and the duty to defend, the court must then determine whether an exclusion clearly and unambiguously applies to bar coverage.

4. Assuming the allegations in the lawsuit A-2 filed against Shelcon triggered the duty to defend, we conclude the defective work and operations exclusion j.(5) precludes coverage.

5. The exclusion for the insured's faulty work is one of the primary business risk exclusions in a CGL policy. The rationale for such an exclusion is that faulty workmanship is not a fortuitous event but a business risk to be borne by the insured.

6. Because the alleged consequential damages arose out of Shelcon's operations on the site, we hold the unambiguous language of exclusion j.(5) bars coverage.

COMMENT:

An extremely lucid review of the business risk exclusions in the CGL policy. Fortunately, the court granted a motion to publish.

We may also note that one of the primary cases relied upon by the court was handled by Your Editor over 40 years ago: *Vandivort Constr. Co. v. Seattle Tennis Club*, 11 Wn. App. 303 (1974).

Western National Assurance Co. v. Shelcon Construction Group, 182 Wn. App. 256, 332 P.3d 986, *rev. denied*, 181 Wn.2d 1024 (2014).

LIMITED ESTOPPEL

FACTS:

Carol's 1994 Lincoln Town Car was sitting outside her house when it caught fire. The fire spread to the house. Carol and State Farm sued Ford for the damages, alleging that the fire was caused by a defective switch in the Lincoln's speed control.

Ford had been sued before over the switch and lost, once in South Carolina and once in Minnesota. Carol took the position that Ford was collaterally estopped to deny that the switch was defective. The trial court ruled that as a matter of law the switch was defective, and the only issue remaining was causation. On appeal, the Court of Appeals reversed, saying there was no identity of factual or legal issue between this case and the cases from South Carolina and Minnesota. Moreover, application of collateral estoppel worked an injustice against Ford.

HOLDINGS:

1. Collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.

2. The party seeking collateral estoppel must establish four elements: (A) the issue sought to be precluded is identical to that involved in the prior action; (B) the issue was determined by a final judgment on the merits; (C) the party against whom the plea is asserted must have been a party to or in privity

with a party to the prior adjudication; and (D) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. The failure to establish any one element is fatal.

COMMENT:

This opinion and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), demonstrate clearly why collateral estoppel is of very limited use in products cases.

State Farm Fire & Casualty Co. v. Ford Motor Co., ___ Wn. App. ___, 346 P.2d 771 (2015).

WORDS OF WISDOM

"A jury awarded appellants Richard and Susan Millies nothing. The undisputed facts show, however, that the Millies are owed at least $25,000 by LandAmerica Transnation d/b/a Transnation Title Insurance Company (Transnation). We wish we could award this sum to the Millies, but court rules and legal precedent demand otherwise because of the manner in which the case was tried before the jury. We affirm the jury verdict and the trial court's denial of the Millies' post trial motions."

COMMENT:

Hard to recall when a court has displayed such candor.

Millies v. LandAmerica Transnation, 2015 Wash. App. LEXIS 38 (Jan. 15, 2015).

NO UIM STACKING

Years ago when UIM was introduced in Washington, the first really big question was whether various UIM policies could be "stacked" so as to increase the available UIM policy limits. This novel idea was given a great deal of momentum because the courts were very fond of stating that UIM questions came loaded with a whole lot of public policy.

Eventually, the question was primarily resolved when the Legislature enacted the UIM anti-stacking statute: RCW 48.22.030(6). Thus, it came as a surprise to see that a UIM claimant had convinced a trial court that she should be able to stack her UIM.

The Court of Appeals noted that the anti-stacking clause was unambiguous and reversed.

HOLDINGS:

1. We construe insurance policies as contracts, so policy provisions are interpreted according to basic contract principles. We must enforce policy language that is clear and unambiguous as written and not create an ambiguity where none exists. An ambiguity exists only when the policy's language on its face is fairly susceptible to two different but reasonable interpretations.

2. Exclusionary clauses, such as an anti-stacking clause, are strictly construed against the insurer. When two constructions of an exclusionary clause exist, one favorable to the insured and one favorable to the insurer, we must adopt the construction favorable to the insured.

3. Anti-stacking clauses allow insurers to prohibit insureds from stacking coverage limits among multiple policies. RCW 48.22.030 governs UIM coverage in Washington.

COMMENT:

The opinion provides a virtual road map on how to analyze the policy language in light of the UIM statute.

Hedges v. American Family Ins., 2015 Wash. App. LEXIS 531 (Mar. 16, 2015).

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 47 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 selected for inclusion on the *Washington Super Lawyers* list for the years 2001, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014.

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