WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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THIRTEENTH INSURANCE LAW SEMINAR OCTOBER 10, 2014

Reed McClure will be holding its Insurance Law Seminar again on October 10, 2014. The seminar will address the latest insurance and defense topics including the always popular "What's New in the Zoo!"

POLLUTION: STILL WITH US

In a case which received national attention, Division One held that insurers can be required to defend policyholders facing liability under a state pollution cleanup law even if there's no formal lawsuit or administrative action.

The court concluded that policy language requiring insurers to defend "any suit" does not mandate that a complaint or administrative action be filed against a policyholder facing liability under the Model Toxics Control Act.

Adopting the "functional equivalent standards," the court said that an insurer's duty to defend can be triggered as long as a government agency communicates an explicit or implicit threat of "immediate and severe consequences" as a result of the pollution.

While the lawsuit involved 19 insurance companies which insured Gull Industries which owned 200 gas stations, the court held that the duty to defend was never triggered as to State Farm.

State Farm was represented in the litigation by Reed McClure attorney Michael Rogers.

Gull Industries, Inc. v. State Farm Fire & Casualty Co., ___ Wn. App. ___, 326 P.3d 782 (2014).

PARENTAL IMMUNITY

FACTS:

Mike was driving his jet boat towing an inflatable tube. Mike's son, Torre, and two of his friends were riding in the tube. The tube crossed a wake and the three boys were ejected. One of Torre's friends landed on him breaking his neck rendering him a quadriplegic.

Torre sued his father Mike and the manufacturer of the tube. The trial court dismissed Torre's claim against his father on the basis of parental immunity. The Court of Appeals granted review, and reversed the dismissal, holding that the parental immunity doctrine did not apply to the facts of the case.

HOLDINGS:

1. The parental immunity doctrine is a judicially created doctrine that originally operated as a nearly absolute bar to a child's lawsuit for personal injuries caused by a parent, regardless of the wrongfulness of the parent's conduct. The parental immunity doctrine has been subject to extensive critical commentary. Washington has "substantially limited the scope of parental immunity."

2. The primary purpose of the doctrine is to avoid the chilling effect tort liability would have on a parent's exercise of parental discipline and parental discretion. In exercising that right, parents are in need of a "wide sphere of discretion."

3. Washington courts have carved out three exceptions to the parental immunity doctrine. The first is where a parent negligently operates an automobile. The second is where a parent injures his or her child while engaging in a business activity. The third is where a parent engages in willful or wanton misconduct or intentionally wrongful conduct.

4. The Supreme Court has avoided adopting a bright line rule for application of the parental immunity doctrine. The court has stated that the better approach is to make a case-by-case determination of when to apply parental immunity.

5. The modern parental immunity doctrine is intended to "avoid undue judicial interference with the exercise of parental discipline and parental discretion. … Parents have a right to raise their children without undue state interference."

6. At the time of the accident, Mike's relationship with Torre was not primarily that of a parent and child, but of a boat driver and tube rider. The parental immunity doctrine is inapplicable in this case.

COMMENT:

Not sure whether this opinion represents a fourth exception to the immunity doctrine, or an application of existing law. In any event, this brief to-the-point opinion gives readers everything they need to know about the current state of the parental immunity doctrine.

We should note that while the Washington court has never favored any immunity doctrine, it has refused to replace this one with a "reasonable parent" standard of liability.

Indicative of the general attitude toward immunity is the court's ruling that Washington's recreational use immunity statute (RCW 4.24.210) confers immunity only if land is held open to the public solely for recreational use, notwithstanding that nothing in the statute supports this limitation. *Camicia v. Howard S. Wright Constr.*, 179 Wn.2d 684, 317 P.3d 987 (2014).

Woods v. H.O. Sports Co., Inc., 2014 Wash. App. LEXIS 2040 (Aug. 19, 2014).

PAMELA A. OKANO

2014 Best Lawyers in America, Insurance Coverage list
2014 Thomson Reuters Washington Super Lawyers list
2013 The American Lawyer Top Rated Lawyer in Appellate Law list

PRACTICE

Ms. Okano focuses her practice on appeals and insurance coverage matters.

Appellate

Ms. Okano has represented parties or amici in appeals before the Washington Supreme Court, Washington Court of Appeals, the United States Court of Appeals for the Ninth Circuit, the Alaska and Montana Supreme Courts, and the Idaho Court of Appeals. She has also briefed appeals before the United States Supreme Court. Her appellate practice involves a wide range of cases including professional liability, insurance coverage, bad faith, tort, commercial, employee discrimination, and contract matters.

Insurance Coverage

Ms. Okano provides clients with opinions and advice on insurance coverage and bad faith matters, drafts policy provisions, and handles coverage and bad faith cases on appeal. She has dealt with a broad spectrum of coverage issues including construction defects, employment, discrimination, advertising injury, personal injury, sexual harassment and abuse, property damage, automobile liability, professional liability, first-party property and collapse, underinsured motorist, fraud, and bad faith.

EDUCATION

University of Washington School of Law, J.D., 1977
Honors: Order of the Coif, Managing Editor, Washington Law Review
University of Washington, B.A., 1974

BACKGROUND

Ms. Okano is admitted to practice in the State of Washington; the United States District Court of Washington, Western and Eastern Districts; the United States Court of Appeals for the Ninth Circuit; and the United States Supreme Court.

WET GRASS

FACTS:

Dave slipped and fell on wet grass when he took a shortcut rather than use the concrete stairway. He sued the business which owned the land. He admitted "that rain is common in Washington and that he was not surprised that the grass was wet."

The trial court dismissed Dave's lawsuit. The Court of Appeals affirmed.

HOLDINGS:

1. In order to prevail on his negligence claim, Dave must prove duty, breach, causation, and injury. In a premises liability action, the scope of the duty of care depends on the entrant's common-law status as an invitee, licensee, or trespasser.

2. A proprietor is liable to business invitees for physical harm caused by a condition on land if he or she (1) knows of, or by the exercise of reasonable care would discover, that the condition involves an unreasonable risk of harm; (2) should expect that invitees would not discover the danger or would fail to protect themselves from it; and (3) fails to exercise reasonable care to protect invitees against the danger.

3. A proprietor is not liable to invitees for any condition on land "whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

4. Dave's expert's declaration contains only conclusory allegations, unsupported by any supporting facts or admissible evidence. It does not create the slightest inference that the grassy slope constituted an unreasonably dangerous condition.

5. No published case in Washington has held that wet grass is a dangerous condition that a landlord should expect an invitee to fail to protect themselves against.

COMMENT:

Not every slip and fall means someone was negligent. And yes, it does rain a bit here in Seattle.

Christman v. Eastgate Theatre, Inc., 2014 Wash. App. LEXIS 1485 (Jun. 16, 2014).

AN EXCLUSION OF ANY

FACTS:

A recent Ninth Circuit coverage opinion opened with this sentence:

Does "any" mean "any," or does "any" mean "any one"?

The center of attention was an exclusion which excluded liability of any Assured for assault committed by or at the direction of such Assured. The question was whether the exclusion excluded coverage for innocent co-insureds.

The trial court judge had ruled that the exclusion applied only to the offending priest, and concluded that the exclusion did not foreclose coverage for the Diocese of the sexual abuse claims.

On appeal, two judges said that the exclusion "categorically" excluded coverage for both innocent and non-innocent insureds. The third judge said the "plain language" of the exclusion excluded coverage only for those individuals who committed an assault.

COMMENT:

This is a case worth reading if for no other reason than to see how the construction of insurance policy language can lead to conclusions which are 180 degrees apart.

Interstate Fire & Casualty Co. v. Roman Catholic Church of the Diocese of Phoenix, 2014 U.S. App. LEXIS 14735 (9th Cir. Jul. 30, 2014).

REGULAR USE EXCLUDED

FACTS:

While commuting to work in a Metro van, Vera was injured in an auto accident. She had used the Metro van for three years prior to the accident. She filed a claim for PIP benefits under her auto policy with State Farm. State Farm denied the claim under the "regular use exclusion."

The exclusion provided that there was no coverage for an insured occupying an auto furnished for her regular use if it was not her car.

The trial court ruled that the regular use exclusion excluded any PIP coverage for Vera. The Court of Appeals agreed.

HOLDINGS:

1. Interpretation of an insurance policy is a question of law that we review de novo. We apply contract principles to our interpretation of insurance policies. We will enforce insurance policy exclusions unless such exclusions are against public policy.

2. A regular use provision is designed "to provide coverage for isolated use [of a vehicle] without the payment of an additional premium, but to disallow the interchangeable use of other [vehicles] which are not covered by the policy."

3. The purpose of the regular use clause is to (A) prevent an insured from receiving the benefits of coverage by purchasing only one policy and (B) provide coverage to an insured when the insured is engaged in the casual or infrequent use of a nonowned vehicle.

4. Our Supreme Court has held regular use exclusions to be clear and unambiguous.

5. Washington courts rarely invoke public policy to override express terms of an insurance policy. Generally, insurance contract provisions do not violate public policy unless such provisions are "'prohibited by statute, condemned by judicial decision, or contrary to the public morals."

6. State Farm's regular use exclusion is not contrary to public policy.

COMMENT:

Most of the opinion is given over to a review and analysis of Washington law which determines when an exclusion does in fact violate public policy. Probably should have been published.

State Farm Ins. Co. v. Rollins, 2014 Wash. App. LEXIS 1803 (Jul. 22, 2014).

FRAUD REVISITED

FACTS:

Last issue (XXXVIII, No. 2, Spring 2014), we reviewed the Washington law that rather clearly held that fraud by the insured during the adjustment of a claim negated all coverage. Well, no sooner was that out the door than Division One of the Court of Appeals came out with an unpublished 21-page opinion which held:

1. Washington auto insurance is mandatory; this establishes a policy of protecting innocent persons on the roadways.

2. Fraud by one named insured does not void either the first-party coverage or coverage for third-party claims unless the insurer has demonstrated prejudice.

3. Washington law treats auto insurance differently than other forms of insurance.

COMMENT:

Came as a bit of a surprise to find out that not all insurance policies are to be interpreted according to the same rules. Division One criticized Division Two for failing to recognize that automobile insurance is different than other forms of insurance. Division One appears to have overlooked RCW 48.01.030 which directs all persons to "abstain from deception" when dealing with insurance.

Angarita v. Allstate Indemnity Co., 2014 Wash. App. LEXIS 1636 (Jul. 7, 2014).

OPEN JUSTICE

FACTS:

The Washington Constitution states that "justice in all cases shall be administered openly, and without unnecessary delay." (Const. art. I, §10). Add the fact that the openness of our courts is of "utmost public importance." It would seem therefore that questions of openness should be resolved in something analogous to a slam dunk.

But we cannot ignore the creative minds of the Supreme Court justices who, when presented with a request to reduce the names of litigants to their initials, split: 4-1-2-2.

The lead opinion said that the circumstances of the case did not warrant redaction of the court records. Another opinion said that the trial court had no authority to alter the existing record.

Four justices wanted to duck the issue altogether and said that the clerk of the court had no standing to bring an appeal because it was not an "aggrieved party."

COMMENT:

The open administration of justice is a vital constitutional safeguard and Washington courts will not allow closure except in extremely unusual circumstances, e.g., cases involving sexual abuse of minors.

However, in the vast majority of cases, "justice in all cases shall be administered openly." (Const. art. I, §10) That means no plaintiff "John Doe." That means no sealing of the court file as a part of a settlement. That means the "names, at length of all the parties." (Laws of 1855 §235 at 174.) It means: "**all** cases shall be administered **openly**."

Hundtofte v. Encarnación, 2014 Wash. LEXIS 569 (Jul. 24, 2014).

TO "USE" OR NOT TO "USE": STILL THE QUESTION

Last issue, we noted the case of *National Casualty Co. v. Western World Ins. Co.*, 669 F.3d 608 (5th Cir. 2012) where the court ruled that EMTs who fatally injured Darlene while loading her onto an ambulance were both using and not using the ambulance.

This time, we have a case where a Good Samaritan removed an injured passenger from a vehicle that had been involved in an accident. Proving that no good deed goes unstoned, the passenger sued the Good Samaritan.

Did the Good Samaritan have coverage? That turned on whether she was "using" the car when she unloaded the injured passenger. A majority of a 9th Circuit panel applying California law concluded that unloading an injured passenger from an auto constitutes "use" of that auto.

The court did indicate that it realized that this was a bit of a stretch:

> To be sure, the idea that Torti "used" Watson's car is counterintuitive: unloading an injured passenger is not the way most people "use" a car. But we are not asked to decide what "use" of a car means to most people: we are asked to decide what "use" of a car means in the insurance policies at issue here. Insurance policies are free to define words in idiosyncratic ways.

In any event, the Good Samaritan was taken care of. See also *Luke* 10:29-37.

Encompass Ins. Co. v. Coast National Ins. Co., 2014 U.S. App. LEXIS 15634 (9th Cir. Aug. 13, 2014).

NEVER A LEVEL PLAYING FIELD

In a unanimous 15-page opinion, the Washington Supreme Court held that in a litigated coverage dispute the duty to defend should be resolved first. About the only surprise there is that it was unanimous.

So let us review the rules the court cited:

1. The duty to defend is different from and broader than the duty to indemnify. While the duty to indemnify exists only if the policy covers the insured's liability, the duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint. The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.

2. Exclusionary clauses in the insurance contract are most strictly construed against the insurer.

3. An insurer may never put its own interests ahead of its insured's.

4. The duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. A court will construe an ambiguous complaint liberally in favor of triggering the duty to defend.

5. Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination. An insurer must defend its insured until it is clear that a claim is not covered under the policy.

6. The duty to defend generally is determined from the insurance contract and the underlying complaint. There are two exceptions to this rule, and both favor the insured. First, if coverage is not clear from the face of the complaint but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt on the duty to defend. Second, if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered.

7. Extrinsic facts may also be used to trigger the duty to defend; the insurer may not rely on such facts to deny its defense duty.

Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, ___ P.3d ___ (2014).

FALLING BOXES IS PUBLISHED

In the Fall 2013 issue, we reviewed an opinion out of Division Two as to which we said:

> "WOW! A veritable three dimensional road map of analysis for any case containing a question of assumption of risk."

Our only complaint was that it was not published. We are now pleased to report that the court has recognized the importance of the opinion and ordered it published.

Barrett v. Lowe's Home Centers, Inc., 179 Wn. App 1, 324 P.3d 688 (2013), amended, ordered published, 2014 Wash. App. LEXIS 249, *rev. denied*, 180 Wn.2d 1016 (2014).

REED McCLURE SPEAKS

Marilee Erickson recently spoke on Tips for Writing Memorable and Influential Appellate Briefs at the WSBA Litigation Section CLE--The Convincing Litigator: Persuasive Techniques to Influence Case Outcomes.

On June 26, Mike Rogers and Marilee Erickson spoke at a Northwest Insurance Coverage Association panel presentation on the recent *Miller v. Kenney & Safeco* decision, which addressed, among other things, the effect of covenant judgments on damages in bad faith claims. Mike served as moderator and Marilee spoke as a member of the panel.

Bill Hickman presented an update on Washington insurance case law developments at the May 15, 2014, annual Education Day seminar held by the Northwest Chapter of the Association of Insurance Compliance Professionals.

Pam Okano and Mike Rogers spoke at WDTL's Insurance Law seminar in Seattle on May 2, 2014. Jason Vacha, Chair of the Insurance Practice Section of WDTL, chaired the seminar. Pam presented her annual Insurance Law Update. Mike discussed the *Cedell* case, which limits the attorney-client privilege for insurance companies.

Bill Hickman presented an update on Washington insurance case law developments at the February 6, 2014, Pacific Northwest Chartered Property Casualty Underwriter Society Chapter meeting.

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 46 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.

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com . . . and

Pam Okano's
Coverage Column is available at www.wdtl.org/
(see Coverage Uncovered).

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E-MAIL NOTIFICATION

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