WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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UIM UNLIMITED

FACTS:

Janis was injured when Marcus hit her car. Janis recovered the $25k policy limits from Marcus' liability carrier. Janis made a UIM claim under her own policy, which also had a $25k limit. The dispute went to trial to resolve the amount of Janis' damages. The jury returned a verdict substantially greater than $25k.

Janis' attorney presented a judgment for the full verdict plus costs and attorney fees totaling $114k. The UIM carrier took the position that the policy limits set out in the written contract of insurance was the correct amount. The judge declined to apply the policy limits.

The Court of Appeals reversed, holding that the trial court erred in entering judgment for $114k instead of the $25k UIM policy limit.

HOLDINGS:

1. Under a UIM policy, an insurer is contractually obligated to pay an insured's uncompensated damages up to the limits of the policy or until the insured receives full compensation, whichever occurs first.

2. The court erred by entering judgment for an amount well in excess of the maximum allowed by law–the policy limit of $25,000.

COMMENT:

I thought I had seen just about every imaginable bizarre UIM ruling. But this one went totally off the scale. We are reminded of the Vince Lombardi School of Law: This is a contract.

FURTHER COMMENT:

The UIM carrier was represented on appeal by Reed McClure's Marilee C. Erickson and Terry J. Price.

Dyer v. Allstate Ins. Co., 2005 WL 3462792 (Wn. App. Dec. 19, 2005).

DEFECTIVE ROAD NOT OCCURRENCE

FACTS:

Developer hired contractor to put in roads. Four years later the roads deteriorated and developer sued contractor.

Contractor settled with developer and then asked his CGL carrier for reimbursement. The carrier declined to contribute, saying that faulty workmanship did not constitute an "occurrence."

The trial court found that the damage constituted an occurrence. The Court of Appeals said the property damage was an occurrence. The South Carolina Supreme Court reversed, holding that the CGL policy did not cover damage caused by faulty workmanship. But then it granted rehearing to take another look at the question of whether road deterioration constituted an occurrence. It decided that faulty workmanship does not constitute an "occurrence."

HOLDINGS:

1. A majority of other jurisdictions deciding this issue have held that faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy.

2. A CGL policy is not intended to cover economic loss resulting from faulty workmanship.

3. The damage in the present case did not constitute an "occurrence." If we were to hold otherwise, the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents.

4. Our holding ensures that ultimate liability falls to the one who performed the negligent work instead of the insurance carrier.

COMMENT:

An excellent, albeit succinct, opinion that demonstrates how the contractor's negligent acts constituted faulty workmanship, which was not covered.

L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005).

RISING STARS

Reed McClure is proud to mention that four of its attorneys have been named as 2005 Rising Stars by the magazine Washington Law & Politics:

Jennifer L. Moore
Medical Malpractice

Ryan G. Foltz
Construction

Dan Keefe
Medical Malpractice Defense

Jake Winfrey
Medical Malpractice Defense

THE COMMISSIONER DROPS THE BALL

We are all familiar with the Insurance Commissioner's claim handling regulations. In particular, the one that requires the company to respond within 10-15 days. Here is one where the shoe was on the other foot.

FACTS:

Attorney Jim got sued for a Securities Act violation. His malpractice carrier declined to defend, in part, because the claim was not "professional." So Jim settled with the claimant and sued his carrier, Chicago.

Now to serve a foreign insurer in Washington you send a copy of the summons and complaint to the Insurance Commissioner. (RCW 48.05.200.) Jim did that. The next step is that the Insurance Commissioner is supposed to send the documents on to the company. (RCW 48.05.210.) The Insurance Commissioner did not do that.

So Chicago did not know it had been sued. It did not appear. Jim did not get a notice of appearance, and so he obtained a default, and then a default judgment for $2.186M.

Fourteen months later, Chicago learned of the suit. It moved to vacate the judgment. The trial court vacated, finding a lack of due process.

The Court of Appeals affirmed, finding a failure of due process.

HOLDINGS:

1. Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.

2. We are more likely to reverse a court's decision not to set aside a default judgment than a decision to set aside such judgment.

3. Notice and opportunity to be heard are the basic pillars of due process. Without due process, our proceedings lack fundamental fairness.

4. The insurance commissioner's neglect is inexcusable. Inexcusable neglect justifies relief.

COMMENT:

Funny, I cannot bring to mind another Washington case where the court ruled that an insurance company was entitled to due process.

Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922 (2005).

RED LIGHT–GREEN LIGHT

FACTS:

Ulysses and Colin collided in a traffic light controlled intersection. Although one was going north and one was going west, they both claimed to have the right-of-way.

A policeman gave Ulysses a ticket. Ulysses fought the ticket in municipal court. He lost.

Colin sued Ulysses, and asked the trial court judge for an order estopping Ulysses from contesting liability because of the municipal court ruling. The trial court ruled that Ulysses was prohibited from arguing that he did not disobey a traffic control device.

The Court of Appeals granted discretionary review and reversed.

HOLDINGS:

1. Collateral estoppel, or issue preclusion, prevents relitigation of any issue that was actually litigated to final conclusion in an earlier lawsuit.

2. Collateral estoppel requires: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the claim is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

3. Washington courts focus on whether the parties to the earlier proceeding had a fair hearing on the exact issue to be decided in the subsequent action.

4. Collateral estoppel is not generally appropriate when there is nothing more at stake than a nominal fine.

5. Traffic courts are not equipped to become the crucial forum in a negligence suit.

COMMENT:

Brings to mind the story told about a certain Seattle Justice Court judge. Four people in one car swore they had the green light. The three people in the other car swore they had the green light. The judge ruled that the United States of America is a democracy and the first car wins 4-3.

FURTHER COMMENT:

Ulysses was represented on appeal by Reed McClure's Marilee C. Erickson and Katina C. Thornock.

McKee v. Martin, 2005 WL 3389650 (Wn. App. Dec. 13, 2005).

CLASSICAL SUBROGATION

FACTS:

Sarith's car was damaged in a collision with Quoc's car. Sarith was insured by State Farm, which paid for the repairs. It then asked Quoc's insurer, Allied, for reimbursement. Allied paid State Farm.

The next year Sarith sent a demand letter to Allied for personal injury, medical specials, and property damage. Allied responded that it was interested in settling the personal injury part but it had already paid for the property damage. Sarith wrote to State Farm demanding that, under *Mahler*, State Farm had to either return the collision payment to Allied or give it to him. He argued that State Farm did not have the right to directly collect the property loss from the tortfeasor or the tortfeasor's carrier. State Farm responded that *Mahler* did not apply, but if Sarith was not made whole by Allied they would talk to him. Sarith settled for less than policy limits.

Sarith then sued State Farm alleging bad faith and CPA violations, and asking for the collision payment and his attorney fees.

The trial court dismissed Sarith's claim on summary judgment. The Court of Appeals said the claim was without merit and held that State Farm had the right to exercise its right of subrogation before its policyholder settled with the tortfeasor's insurer.

HOLDINGS:

1. State Farm had a classic subrogation right to recover damages from the tortfeasor's insurer for property damages it paid.

2. The contract provision allowing this recovery has been expressly approved by our Supreme Court.

3. The subrogation right can be exercised before the issue of personal injury is resolved and is not dependent upon the policyholder being made whole for his personal injury loss.

4. Sarith was not entitled to a pro rata share of attorney fees attributable to the property damage.

COMMENT:

An excellent opinion in which the author patiently reviewed, analyzed, and then rejected each of Sarith's outrageous contentions. The opinion also reveals that the author went back and read *Mahler*, and recognized that it was not a public policy tsunami, obliterating all in its path, but the interpretation of particular language in a particular policy.

Meas v. State Farm Fire & Cas. Co., 130 Wn. App. 527, 123 P.3d 519 (2005).

NO RIGHT TO SETTLE

FACTS:

Moses negligently hit Russell's car. Moses had $25,000 in liability coverage, which his carrier paid.

Russell had UIM coverage with State Farm. That policy had a consent-to-settle clause which provided that there was no coverage if the insured settled with the tortfeasor without State Farm's consent. Russell admitted he breached that clause when he settled with and released Moses.

The trial court ruled that the contract meant what it said, and that Russell was not entitled to UIM benefits because of his breach of contract. Russell appealed, arguing that State Farm should have to show substantial prejudice before it got off the UIM hook.

The New Mexico Supreme Court accepted direct review and held that while State Farm had to show substantial prejudice, Russell's breach of contract gave rise to a presumption of substantial prejudice to State Farm.

HOLDINGS:

1. We hold that for an insurer to justify foreclosing an insured's right to underinsured motorist benefits, the insurer must demonstrate it was substantially prejudiced by the insured's breach of the consent-to-settle provision.

2. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice.

3. State Farm is entitled to summary judgment.

COMMENT:

It is interesting, even enlightening, to read cases from other jurisdictions where the judges act as if an insurance policy is a contract, and a policyholder's breach of contract carries with it a penalty.

State Farm Mut. Auto. Ins. Co. v. Fennema, 137 N.M. 275, 110 P.3d 491 (2005).

A RELEASE OF PRINCIPAL

FACTS:

John struck Charlie with his truck in a crosswalk. John was driving his own truck but was making a delivery for his employer, Clover.

John had a $100k policy. Clover had a $1M policy. Charlie sued both of them. Charlie settled with John for his limits, and an agreement not to execute against John.

Clover moved for dismissal of the case against it on the theory that the settlement operated as a release of any vicarious liability claims against it. The trial court determined that John had been acting within the scope of his employment, that he was covered by Clover's $1M policy, that the $1.1M total coverage was sufficient to compensate Charlie, and therefore the John-Charlie settlement operated to release Clover.

HOLDINGS:

1. Settlement of a personal injury action with a solvent agent releases that agent's vicariously liable principal once the trial court determines the settlement is reasonable.

2. An agent is solvent if he is able to fully compensate the injured plaintiff.

3. A plaintiff may release an insolvent agent and proceed against the principal.

4. John had a total of $1M in insurance available which would have been enough to fully compensate Charlie.

5. John was solvent; Clover is released.

COMMENT:

Good application of what can sometimes appear to be a harsh rule.

Griffin v. Westfall, 2005 WL 1580046 (Wn. App. Jul. 5, 2005).

ANY STRAW IN A FLOOD

FACTS:

Nancy was driving on I-405. Believing she was the object of a conspiracy, she turned her car around, removed her seat belt, and drove head-on into Lanette's car.

Lanette sued claiming negligence. Nancy raised the defense of sudden mental incapacity. The trial court ruled against her. The jury ruled against her. The Court of Appeals ruled against her.

HOLDINGS:

1. Traditionally, courts have relied on several rationales to hold the mentally ill to an objective standard of liability for negligence. The most common justification is that innocent victims should be compensated for their injuries.

2. Another common reason is that the existence and degree of one's mental illness can be difficult to measure and is a major obstacle for applying a mental deficiency defense.

3. There was no evidentiary basis for a jury to find that Nancy was entitled to the defense of sudden mental incapacity.

COMMENT:

Notwithstanding that there was not a shred of Washington law to support the defense, the Court of Appeals treated it as a legitimate appeal. In fact it appears that there were only two opinions, both from Wisconsin, upon which the defense rested. However, the Court of Appeals demonstrated how even those two cases did not support the defense.

Ramey v. Knorr, 130 Wn. App. 672, 124 P.3d 314 (2005).

BULL IN THE BACKYARD

Arturo bought a house from Bull. The house had a defective septic system. Bull disclosed that the system had been pumped and repaired, but failed to disclose that the system had failed. After Arturo moved in, the system failed again. Arturo sued for fraud and negligent misrepresentation. The Court of Appeals reversed the trial court's decision that the case was barred by the economic loss rule. "The economic loss rule bars certain tort claims when a contract exists between the parties that allocates risk and future liability." Because the contract did not contain such a provision, the economic loss rule did not apply.

Bull petitioned for review which was granted. The case was argued in the Supreme Court in September 2005. The issue was whether the economic loss rule, which bars tort claims for purely economic damages arising from a contractual agreement, requires that the contract expressly allocate the specific risk giving rise to the tort claims.

Alejandre v. Bull, 123 Wn. App. 611, 98 P.3d 844 (2005).

ROTTWEILER AT YOUR SERVICE

Sherry took her Rottweiler, Brandy, into Fred's store to buy some cheese. Another customer complained. Sherry told an employee that Brandy was a service animal. Brandy started circling Sherry. A store employee retrieved the cheese for Sherry. Sherry was upset that she was not allowed to shop on her own. Sherry sued Fred for discrimination and Consumer Protection Act violations.

At trial, the court granted Fred's motion to dismiss at the close of Sherry's case because Sherry failed to show that Brandy was a service animal. The Court of Appeals reversed. The court concluded that evidence Brandy was evaluated for suitability as a service dog, attended basic and intermediate obedience training, and was, at some point, trained to put herself between strangers and Sherry to alleviate Sherry's anxiety, was sufficient to establish Brandy was a service dog.

Storms v. Fred Meyer Stores, Inc., 129 Wn. App. 820, 120 P.3d 126 (2005).

CHIHUAHUAS ATTACK

Last issue we reported on that tough pussycat. Some of you expressed disbelief. Believe me, I do not need to make this stuff up.

This brings us to the sad case of Detective Bill. This Fremont, California, police officer was escorting a perp to his home when suddenly five vicious Chihuahuas escaped from the home and attacked the officer. He managed to escape them and made his way to a hospital.

THE WAGES OF LAWYERING

Being one of the really old people around this place, I can recall the numerous partnership meetings which were devoted exclusively to the question of whether we dared to raise the billing rate of the senior trial litigator from $25 per hour to $30 per hour. (We chickened out and compromised at $27.50.) Nowadays, in reviewing requests for attorney fees by lawyers, who on a good day can find the courthouse, we

routinely see so-called "reasonable" rates on the order of 1,400% greater than what Mr. McClure would charge.

But wait, it gets worse. A Bureau of Labor Statistics report demonstrated that Seattle lawyers are in fact underpaid. A typical Seattle attorney earns less than his or her peers in Fresno or Jackson, Mississippi. Something is really wrong with this picture.

"Death is not the end. There remains the litigation over the estate."
–Ambrose Bierce

STARE DECISIS

Back in the fall of 1964, in the first session of my very first class in law school, the very first thing the professor wrote on the blackboard was "stare decisis." Some of us had a vague idea what it was, but he went on to explain how without "stare decisis" the law had no uniformity, no predictability; the law would be just whatever the most recent judge said it was. We heard that theme repeated many times over the next three years.

And then we landed in Washington and began to practice law. It quickly became apparent that "stare decisis" did not carry the weight out here in the West that it did back East. Sometimes it seemed that no matter how many times an issue came up, it was treated as an issue of first impression. The high point occurred while sitting in the Temple of Justice listening to the general counsel for a small domestic insurance company point out that, inasmuch as the court had just answered the question two years earlier, stare decisis dictated how they must rule this time. The court listened with an increasingly incredulous expression.

And so I was pleased to read a statement of "stare decisis" in a recent Court of Appeals opinion. (Of course, the fact the court had to reach all the way back to 1963 to find it does not mean it has been completely forgotten.)

"Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions–a kind of amorphous creed yielding to and wielded by them who administer it. Take away stare decisis,

and what is left may have force, but it will not be law." State ex rel. State Fin. Comm. v. Martin, 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963). . . .

Does v. Bellevue School Dist., 129 Wn. App. 832, 868, 120 P.3d 616 (2005).

THAT CASE

A surprising number of you called, wrote, or e-mailed asking for the identity of the opinion "whose name cannot be mentioned." I expect the rest of you, in particular the author, immediately recognized the reference. But as Jack Friday used to say "to protect the innocent" we will note that the opinion "whose name cannot be mentioned" did not come from Division II.

___ Wn. App. ___, ___ P.3d ___ (2005).

AN ANNOUNCEMENT

Reed McClure is pleased to announce that as of March 1, 2006, the Editor of the Law Letter, William R. Hickman, will become "Of Counsel" with the firm. After 37 years with Reed McClure (30 years writing the Law Letter), Mr. Hickman will limit 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 including employment law, product liability, insurance coverage/bad faith, admiralty, lawyer malpractice, health care malpractice, municipal liability, and personal injury torts. 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, and 2006.

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