WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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NO RECOUPMENT IN WASHINGTON

FACTS:

16 years ago, the California Supreme Court stunned the insurance law community when it ruled that an insurer may recoup reservation of rights defense costs when it is determined that the insurer owed no duty to defend. *Buss v. Superior Court*, 16 Cal. 4th 35, 939 P.2d 766 (1997).

Inasmuch as the California Supreme Court was deemed to be on the cutting edge of the law, particularly tort law and insurance law, the question was raised, "What will Olympia do"? Will Washington follow California? The opinion letters we drafted in response to these inquiries were rather short. That was due in large measure to the fact that the question was based on a fundamental misconception of the role of the Supreme Court in insurance law disputes. The court does not exist to rule in favor of insurance companies. (Witness, for example, the one-way street for attorney fees under the so-called *"Olympic Steamship"* rule.) As a consequence, the answer to the inquiry was not just "no" but "hell no." And so the idea of recoupment of defense costs incurred while defending claims not covered by the policy was put on the shelf, together with other nonstarters.

Then we became aware that the Supreme Court had granted a petition for review on the issue of recoupment, and had heard oral argument in May 2012. And then we waited. Finally, on March 7, 2013, the court issued its opinion on recoupment. We were astounded! Flabbergasted! Oh don't let me mislead you, the result was exactly what I had predicted years before: NO.

What astounded me was that the vote was 5-4. Not only that, but the vigorous 20-page dissent was written by one of the justices who used to represent plaintiffs. It punched numerous holes in the misinterpretations, omissions, and mischaracterizations of the majority opinion, written incidentally, by one of the other justices who used to represent plaintiffs.

Now, while the majority opinion is a flawed piece of work, it does contain a veritable plethora of black letter rules to which the author pays various amounts of lip service.

HOLDINGS:

1. Insurance contracts are imbued with public policy concerns.

2. The insurer's duty to defend is separate from, and substantially broader than, its duty to indemnify.

3. The duty to indemnify applies to claims that are *actually* covered, while 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."

4. If there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.

5. Facts that are extrinsic to the pleadings, but readily available to the insurer, may give rise to the duty. Although this duty to defend is broad, it is not triggered by claims that clearly fall outside the policy.

6. The scope of an insurer's duty to defend is broader than the terms of the policy.

7. When an insured is uncertain of its duty to defend, it may defend under a reservation of rights while seeking a declaratory judgment relieving it of its duty.

8. Because a reservation of rights defense is fraught with potential conflicts, it implicates an enhanced duty of good faith toward the insured.

9. Allowing reimbursement is not consistent with Washington cases regarding the duty to defend, which have squarely placed the risk of the defense decision on the insurer's shoulders.

10. Disallowing recoupment in this instance does not leave insurers without options. An insurer is not forced to undertake the defense if it believes the claims asserted against the insured are not covered at all.

11. Insurers may not seek to recoup defense costs incurred under a reservation of rights defense while the insurer's duty to defend is uncertain.

12. When an insurer undertakes to defend its insured under a reservation of rights, it must pay defense costs until it obtains a judicial declaration that it owes no duty to defend. It cannot unilaterally disavow its financial responsibility in a reservation of rights letter.

Nat'l Sur. Corp. v. Immunex Corp., 2013 Wash. LEXIS 155 (Wash. Mar. 7, 2013).

REED MCCLURE ANNOUNCEMENT

We are pleased to announce that Jason E. Vacha has been promoted to Shareholder.

We congratulate our new shareholder. Together we will continue Reed McClure's strong tradition and long history of providing the highest quality legal services to our clients.

A DOUBLE WHOPPER

FACTS:

Deputy Ed drove his patrol car into a Burger King. He ordered a "Whopper with cheese and drove away with an uneasy feeling." He pulled into a parking lot down the street. He inspected the Whopper. He said he saw what appeared to be a glob of spit on the meat patty. He stuck his finger into it. He did not eat the Whopper.

Deputy Ed sued Burger King claiming ongoing emotional distress, vomiting, nausea, food aversion, and sleeplessness. The magistrate judge threw the case out. The district court judge affirmed the dismissal. Deputy Ed took his case to the 9th Circuit.

The 9th Circuit, not being sure what to do with this case involving Washington product law, sent it to the Washington Supreme Court to get their "guidance."

The question certified to the Supreme Court was:

> Whether the WPLA permits relief for emotional distress damages, in the absence of physical injury, caused to the direct purchaser by being served and touching, but not consuming, a contaminated food product.

Six justices said "yes" but "only if the emotional distress is a reasonable reaction and manifest [sic] by objective symptomatology."

In a 17-page dissent, three justices revealed the majority opinion to be a house of cards which was not supported by the statute and was in conflict with existing case law. The author summed it up thus:

> Ensuring the financial compensation of people claiming emotional distress because they saw spit on their uneaten hamburgers is not a public policy priority.

Bylsma v. Burger King Corp., 176 Wn.2d 555, 293 P.3d 1168 (2013).

NO INSURANCE ARBITRATION

In an opinion which took some of us by surprise, a unanimous Washington Supreme Court held that RCW 48.18.200(1)(b) prohibits binding arbitration clauses in a Washington insurance policy.

FACTS:

James River Insurance (JRIC) issued two policies to Scarsella, a contractor doing work for WSDOT. Later, WSDOT was added as an insured. Then there was the accident. WSDOT and Scarsella were sued. WSDOT tendered the defense to JRIC, which accepted under a reservation of rights. JRIC informed WSDOT that the policy contained a "Binding Arbitration" clause, and it wanted to arbitrate a coverage question.

WSDOT did not want to arbitrate. It filed a dec action against JRIC seeking a declaration that the "Binding Arbitration" clause was void.

RCW 48.18.200(1)(b) provides:

> (1) No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement. . . . (b) *depriving the courts of this state of the jurisdiction of action against the insurer*; . . . (2) Any such condition, stipulation, or agreement in violation of this section shall be void….

The trial court agreed with WSDOT and declared the "Binding Arbitration" clause to be void. JRIC appealed. The Supreme Court granted direct review, and agreed that the arbitration clause was void.

HOLDINGS:

1. We hold that RCW 48.18.200 prohibits binding arbitration agreements in insurance contracts.

2. Because the arbitration agreements in this case were pre-dispute binding arbitration agreements, the arbitration agreements are unenforceable.

3. Because RCW 48.28.200 prohibits binding arbitration agreements in insurance contracts, we need not reach the issue of whether RCW 48.15.150 prohibits arbitration agreements.

4. RCW 48.18.200(1)(b) prohibits binding arbitration agreements in insurance contracts.

5. RCW 48.18.200 (1)(b) is shielded from preemption by the Federal Arbitration Act under the McCarran-Ferguson Act.

COMMENT:

Well there it is. I guess the court really meant it because it said it at least four times.

We shall wait to see how this impacts the arbitration provisions found in most UIM coverages. Also, I have a recollection that first-party property loss policies contained a dispute resolution procedure that looked a lot like arbitration.

Department of Transportation v. James River Ins. Co., 176 Wn.2d 390, 292 P.3d 118 (2013).

NO GUN COVERAGE

At the risk of gross understatement or over-simplification, we could observe that the media is full of reports of gun violence, gun sales, background checks, and the espoused belief that the way to handle the problem of guns is to have more guns. Be that as it may, we are not surprised to come across an opinion considering the application of a firearms exclusion in a CGL policy, notwithstanding that we have never heard of such an exclusion. The exclusion denies coverage for bodily injury "that arises out of, relates to, is based upon, or attributable to the use of a firearm(s)."

FACTS:

JBC ran Jillian's, a nightclub in Seattle. JBC had a CGL policy from CSI. The policy had a firearms exclusion which excluded coverage for bodily injury that arises out of the use of a firearm. One night someone fired a gun at the nightclub and injured a customer, JJ Mika. JJ sued JBC, asserting that JBC should "have provided enhanced security...given the large number of hip hop/rap patrons."

JBC tendered the defense of the suit to CSI, which agreed to defend under a reservation. CSI also filed a dec action, arguing that the firearms exclusion barred all of JJ's claims no matter how he "dressed" them up. JJ argued that his negligence claims were outside the exclusion, and that it was ambiguous.

The trial judge agreed with CSI, ruling that the exclusion was binding, applicable, and wholly precluded coverage for all of JJ's claims. The Court of Appeals agreed.

HOLDINGS:

1. Language in an insurance policy is ambiguous if susceptible of two different but reasonable interpretations.

2. Ambiguous policy language must be liberally construed in the insured's favor. That is especially so in the context of exclusionary clauses.

3. A court may not give an insurance contract a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms.

4. The court may not use the "construe against the insurer" rule to make a plain agreement ambiguous.

5. This language is unambiguous. It unequivocally excludes coverage from bodily injury arising from the use of a firearm.

6. JBC's alleged liability for negligence is wholly dependent upon the shooting, an occurrence that is specifically excluded from coverage.

COMMENT:

An interesting opinion. The author could have written a short unpublished opinion and stopped writing after quoting the exclusion and the allegations. But instead, we got a thoughtful analysis and response to each of the theories

sent up by the insured, and the injured party. I wonder when we will see a firearms exclusion in a homeowner's policy.

We should not overlook the Washington case law upon which the court relied: *McAllister v. Agora Syndicate, Inc.*, 103 Wn. App. 106 (2000); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398 (2010).

Capitol Specialty Ins. Corp. v. JBC Entertainment Holdings, Inc., 172 Wn. App. 328, 289 P.3d 735 (2012).

JUST AN HONEST MISTAKE

FACTS:

Mike had a lot of money. Rather than hide it under the mattress or stuff it into a coffee can and bury it in the backyard, he went to a bank and deposited a whole lot of the money at the bank, specifically so that the money would be protected by the FDIC. Kelli, a bank official, prepared a chart that showed how the bank could restructure Mike's accounts so he would have FDIC coverage of $3,000,000. In October 2008, Mike wired in $1,800,000 so his total deposits with the bank were $3M.

About three months later, the bank went into involuntary receivership. The FDIC took over. The FDIC reviewed the accounts and determined that nearly $500,000 of Mike's money was not insured.

Mike sued some bank officials (including Kelli) alleging that they had owed him a duty, had breached that duty, and caused him a loss. The trial court dismissed Mike's claim against the bank officials.

The Court of Appeals affirmed, finding that Mike failed to establish that bank officials were personally liable to Mike. The Supreme Court granted review, and unanimously affirmed, stating that to do otherwise could expose employees of banks "to severe personal liability for honest mistakes."

HOLDINGS:

The individual bank officers and employees are not liable for obligations potentially created on behalf of the bank. Finding otherwise could expose employees of banks and other industries to severe personal liability "for honest mistakes".

COMMENT:

Reed McClure attorney Jack Rankin pointed out: "Ah, the honest mistake doctrine takes root in tort law, 28 years after application by a jury."

The reference is to a case tried by Jack in which an architect had loaded the building plans into his computer upside down. That meant the load bearing beams were at the top while the weak ones were at the bottom. He failed to detail the proper rebar in accordance with the seismic requirements of the UBC. And the plans did not show how much rebar was to be used nor where it was to be put.

And the jury verdict was: "Just an honest mistake."

Annechino v. Worthy, 175 Wn.2d 630, 290 P.3d 126 (2012).

WAIT TILL NEXT YEAR

FACTS:

Phil was injured at a construction site. He was employed by a sub. Phil sued the general, MBC.

Trinity insured the sub. Ohio insured MBC. MBC tendered the defense to Ohio, which accepted and appointed defense counsel. Ohio then tendered the defense to Trinity. Trinity accepted the tender and took over the defense without a reservation.

Seven months later, Trinity attempted to tender the defense back to Ohio. It pointed out that the only wrongful acts alleged in the complaint were by MBC, and Ohio insured MBC.

Ohio refused to accept the tender. Trinity continued to defend and ultimately settled Phil's claim for $225,000.

In May 2010, Trinity served a summons and complaint on the Office of the Insurance Commissioner against Ohio alleging subrogation, equitable contribution, and insurer bad faith. The OIC sent the complaint to Ohio.

Ohio did not appear or answer. On July 14, 2010, a default judgment in the amount of $764,271 was entered against Ohio and in favor of Trinity.

Trinity then did nothing. It deliberately waited for a year and five days before taking steps to enforce its judgment. It waited to gain a procedural advantage. Ohio then moved to vacate the default judgment. The trial court refused to vacate the default judgment.

On appeal, the Court of Appeals affirmed the default judgment for the defense and indemnity costs. However, it held that Trinity could not make an IFCA, CPA, or *Olympic Steamship* claim.

HOLDINGS:

1. Default judgments are generally disfavored in Washington. Courts prefer to determine cases on their merits rather than by default.

2. A CR 60(b) motion must be brought within one year after the default order or judgment is entered. This one year time limit is strictly enforced and the trial court may not extend the deadline.

3. Washington courts do not consider it deceptive or unfair for a plaintiff to wait a year to collect on a default judgment.

4. We have repeatedly held that when a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, it is not excusable under CR 60(b).

5. An insured may assign its bad faith claims to a third party. An assignee steps into the shoes of the assignor, and has all the rights of the assignor. The assignee's cause of action is then direct, not derivative. But, without assignment, a third party has no right of action against an insurance company for breach of the duty of good faith.

6. Just like the CPA, nothing in the language of IFCA gives third-party claimants the right to sue. And, nowhere does IFCA create an independent right for insurers to bring a claim on their own behalf. While an insured may be able to assign its IFCA claims to a third party, without express assignment, an insurer may not independently assert its insured's IFCA claims.

7. Trinity remains a third party, without standing to assert IFCA and CPA claims against Ohio.

COMMENT:

Fascinating 20-page opinion. The author covered a host of Washington insurance questions. With the benefit of hindsight, there do appear to have been some questionable positions taken.

Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co., 2013 Wash. App. LEXIS 591 (Wash. App. Mar. 18, 2013).

"THERE'S AN APP FOR THAT"

Fifty-some years ago, the Feds adopted the Rules of Civil Procedure. These were designed to streamline litigation and to put an end to trial by ambush. And then the lawyers got involved.

From the District Court for the Northern District of Oklahoma we find this status report on just how well the lawyers have been in undermining the purpose of the discovery rules:

I.

THE CORE OF THE PROBLEM

In our electronic, internet-based world, it is often said that whatever issue confronts us, "There's an App for that." If so, some Apps are fatally flawed and should be recalled. Apparently, Apps have been developed to assist attorneys in drafting and responding to Requests for Production of Documents. The App for document requests generates requests such as "Produce all documents ... related to or referring to, in anyway whatsoever, any communications with any person whatsoever, including but not limited to ..., related to or concerning....whatsoever...."

The App for discovery responses generally:

(1) Responds to every request with "Objection."

(2) Follows with boilerplate objection language, *eg.*, "vague, over-broad, unduly burdensome, not reasonably calculated to lead to discovery of admissible evidence," but doesn't indicate how any of these

> boilerplate objections specifically apply to the request at hand.
>
> (3) Concludes: "Without waiving these objections, see documents A, B and C."
>
> Consider this Order the recall notice for both of these Apps. They don't work. Use may subject attorneys to sanctions under Fed. R. Civ. P. 37. If you have these Apps loaded on your firm network to provide a "go by" in preparing discovery requests, responses or objections, delete them. Now

The judge then goes on to review what had been going on in the case, characterizing it as the "poster child" for what is wrong with the worst of pretrial discovery. The opinion is a must-read if for no other reason than the lame excuses offered: *e.g.*, blame the client; blame the attorney; blame Hurricane Sandy.

Howard v. Segway, Inc., 2013 U.S. Dist. LEXIS 31402 (N.D. Okla., Mar. 7, 2013).

NO SECOND BITE

FACTS:

Al and Beverly collided. Al was injured. The car Beverly was driving was owned by her parents and insured by PEMCO. Beverly was a permissive user. Beverly also had her own auto insurance through GMAC. PEMCO was primary; GMAC was excess.

Al's attorney (or maybe Al's attorney's paralegal) negotiated a settlement with PEMCO. In exchange for the $50,000 PEMCO policy limits, Al signed a "General Release of All Claims" which, among other things, provided:

> [Al] hereby releases and forever discharges ABRAHAM VAN ASPEREN and MARCELLA VAN ASPEREN, individually and as husband and wife, BEVERLY ANKENY and CHARLEY ANKENY, individually, and as husband and wife; and PEMCO MUTUAL INSURANCE COMPANY . . . from any and all claims and demands, rights and causes of action of any kind that [Al] now has or hereafter may have on account of or in any way arising out of a Bodily Injury claim known and unknown at the present time

> and resulting from an incident that occurred on or about the 7th day of March, 2008, in Renton, Washington.

The next sentence of the release provided:

> "Nothing in this General Release of All Claims applies to the liability insurance applicable to this claim provided by GMAC, the insurance company of Beverly Ankeny and Charley Ankeny."

And so as surely as night follows day, Al and his attorney started a lawsuit against Beverly alleging negligence. Beverly asked for dismissal arguing that Al had released her when he signed the release and took the $50,000.

The trial judge said it was clear that Al had reviewed the release and he had counsel in so doing. He dismissed the case.

Al appealed. The Court of Appeals concluded that the express terms of the release objectively manifested Al's intent to fully release Beverly.

HOLDINGS:

1. We construe releases using the principles governing contracts. Washington courts follow the "objective manifestation" theory of contracts. Under this approach, the focus is on "the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."

2. Evidence of the circumstances surrounding contract formation may be considered if the extrinsic evidence demonstrates objectively manifested mutual intent, and not unilateral, subjective, or undisclosed intent concerning the meaning of the terms of the contract.

3. Al provides no authority that a release of a tortfeasor may split a single negligence claim. Al's express agreement in the release, to fully and comprehensively release his negligence claim against Beverly, is necessarily "incongruous" with retaining that same negligence claim against Beverly.

4. Because an injured party has no claims against the driver's insurer, a release of all claims against the driver cannot reserve any claims by the injured party against the driver's insurer.

5. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.

6. The plain meaning of the phrase "liability insurance applicable to this claim provide by GMAC is not "I do not release my negligence claim against Beverly." The court does not "interpret what was intended to be written but what was written."

7. The release objectively manifests Al's intent to fully release any and all claims he had against Beverly.

COMMENT:

Extrinsic evidence, which was stricken, indicated that the Release had been put together by Al's attorney's paralegal and a PEMCO claim representative. Perhaps if the release had been reviewed by someone who had gone to law school, a red flag might have gone up. Al will have to look elsewhere to make his full recovery.

The opinion should have been published. Several years ago the Washington Supreme Court undermined 100 years of contract law with the *Berg* opinion, which appeared to give the green light to consideration of extrinsic evidence in a dispute over a written contract. This opinion emphatically relegates *Berg* to an obscure footnote of legal history.

Barber v. Ankeny, 2013 Wash. App. LEXIS 396 (Wash. App. Feb. 19, 2013).

HITTING THE RAIL

FACTS:

Tubbs was a passenger on a motorcycle going north on I-5. Vail was the driver. He lost control and collided with a guardrail. Vail died at the scene. Tubbs suffered extreme life-threatening injuries. Tubbs sued Vail's estate.

The estate moved for summary dismissal. The trial court expressed concerns that a jury finding of proximate cause would be based on conjecture and speculation, and dismissed the case. The Court of Appeals reversed, saying that speculation was not needed to find Vail negligent.

HOLDINGS:

1. Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

2. In a negligence claim, the plaintiff must establish (1) that the defendant owes the plaintiff a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury.

3. Drivers owe passengers a duty of ordinary care in operation of a motor vehicle.

4. The nonmoving party may not rely on mere speculation or argumentative assertions that unresolved factual issues remain. A cause of action may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.

5. The Estate has not put forth any equally plausible explanations for the motorcycle accident other than Vail's negligence.

6. There are multiple ways in which Vail may have been negligent. This is not a question of speculation.

Tubbs v. Est. of Vail, 2013 Wash. App. LEXIS 392 (Wash. App. Feb. 19, 2013).

AND NOW FOR SOMETHING COMPLETELY SHORT

Without benefit of an in-depth review, I will state that the opinions seem to be getting longer. A 20-page majority opinion will be followed by a 20-page dissent. An unpublished opinion, which in theory should only be dealing with slam-dunk issues, will ofttimes break the 20-page limit. Thus, it is with pleasure that we notice a recent Division One opinion which checks in at 2 pages and 6 lines.

The dispute began when Roger rear-ended Kim. The arbitrator set Kim's damages at about $25,000. Roger requested trial de novo. Kim made an offer to settle: $16,500. That was rejected and the case went to a jury trial. The jury set Kim's damages at $14,761. That was less than the settlement offer. But when the trial costs were added to the jury verdict, the sum exceeded the settlement offer. The trial court awarded Kim her attorney fees.

Roger appealed. The Court of Appeals reversed because in *Niccum v. Enquist*, 175 Wn.2d 441 (2012), the Supreme Court had held that the cost

award was not relevant to the determination of whether or not a party had improved its position after seeking trial de novo.

Reed McClure attorney Michael Budelsky represented the defendant/appellant Lindsay Roger.

Kim v. Roger, 2013 Wash. App. LEXIS 672 (Wash. App. Mar. 11, 2013).

CR 2A REVISITED

FACTS:

A recent auto accident opinion serves to remind that Washington does have a unique rule concerning settlements. It is CR 2A and it provides:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The purpose of rule CR 2A is to give certainty and finality to settlements.

The question arose in a case where the passenger (daughter) was suing the driver (mother). In open court, the parties entered into a stipulated settlement and dismissal. But before payment took place, the mother asked the daughter to sign a release agreement that the parties had not discussed, and that contained hold harmless and indemnity language. The daughter refused to sign. The mother moved to enforce the settlement. The trial court entered an order deeming the release signed.

The daughter appealed. The Supreme Court reversed.

HOLDINGS:

1. The party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement.

2. Settlements are considered under the common law of contracts. CR 2A acts as a supplement but does not supplant the common law of contracts in settlements.

3. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. Determining the intent of the parties is paramount in settlements.

4. Applying the principles of contract law to this settlement agreement, we conclude that the trial court erred by enforcing terms that were not implied within the agreement. There is no indication in the records that the release agreement was intended by the parties.

5. When the daughter agreed to dismiss her claims she only released the mother as to those claims. She did not agree to indemnify or hold Farmers harmless as to any other claims.

Condon v. Condon, 2013 Wash. LEXIS 238 (Wash. Mar. 21, 2013).

DOWN THE UP STAIRWELL

FACTS:

Jessee was taking part in an emergency management exercise. The "after action review" was to take place on the second floor of the City's Old Fire Station. To get to the second floor, she had to go up the staircase. The staircase was wooden except the first two steps were concrete. They did not quite meet the UBC requirements. Also, there was no handrail.

Jessee noticed that there was no handrail. She commented that the stairs were not ADA compliant, and that they looked "unsafe." But she went ahead and successfully climbed the stairs. Coming down was another matter. She misjudged the depth of the concrete steps and fell sustaining bodily injury.

Jessee sued the City for negligence. The City moved for summary dismissal, arguing that the dispositive issue was whether Jessee knew the stairs were dangerous but chose to use them anyway. The trial judge agreed that Jessee had voluntarily assumed the risk of injury. The Court of Appeals affirmed.

HOLDINGS:

1. We are here concerned with so-called implied primary assumption of the risk.

2. Implied primary assumption of risk is a complete bar to recovery.

3. The City had to prove implied primary assumption of the risk by showing that Jessee "(1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk."

4. A plaintiff has knowledge if she "at the time of the decision, actually and subjectively knew . . . all facts that a reasonable person in the plaintiff's shoes would want to know and consider" at the time she chose to incur the risk. This requires that the plaintiff have specific, rather than generalized, knowledge of the risk.

5. Jessee had specific knowledge of the risks inherent in descending these cement stairs.

Jessee v. City Council of Dayton, ___ Wn. App. ___, 293 P.3d 1290 (2013).

A REALLY IMPORTANT CASE

The headline may be misleading. But then again, most of life is misleading. Actually, all opinions are important, it's just that some are more important. (*cf.* all animals are equal, but some animals are more equal than others.) Here we have one indicator: It took from the September 22, 2011, oral argument to February 21, 2013, to get out the opinion. Another indication is that the 3 justices who used to represent plaintiffs got together with 2 other justices to form the 5-person majority. The procedure is also telling. The trial court ruled one way; the Court of Appeals issued an emergency stay and reversed. The Supreme Court then accepted discretionary review and reversed the Court of Appeals.

To ensure that our readers get the best analysis of the case, I am setting out an abridged version of the write-up which Reed McClure coverage expert Pam Okano (206-386-7002; pokano@rmlaw.com) prepared for her website "Coverage Uncovered" (http://www.wdtl.org/Default.aspx?tabid=248).

IF YOU THOUGHT COMMUNICATIONS BETWEEN YOU AND YOUR FIRST-PARTY CARRIER CLIENT WERE PRIVILEGED, THINK AGAIN!

Cedell v. Farmers Insurance Co., 176 Wn.2d 686, 295 P.3d 239 (2013), *aff'g in part, rev'g in part*, 157 Wn. App. 267, 237 P.3d 309 (2010) (Div. II)

Facts:

The insured sued his homeowners insurer for bad faith when his fire loss claim was not paid for a year after the loss. The insurer hired an attorney to assist in its coverage determination.

In response to discovery requests, the insurer produced a heavily redacted copy of its claim file, including a privilege log, that cited the attorney-client privilege and work product as bases for more than 200 redactions and withholdings.

The insured filed a motion to compel, claiming that the attorney-client and work product privileges did not apply in bad faith litigation. The insurer moved for a protective order.

The trial court found that the insured was not home at the time of the fire, that both the fire department and the insurer's own fire investigator had concluded that the fire was accidental, that the insurer knew the fire had left the insured homeless, that the insurer had made a one-time offer of $30,000 even though its adjuster had evaluated the loss at $70,000 for the building and $35,000 for contents and the insurer's coverage attorney would be out of town during the acceptance period, that the damage to the house was more than $115,000, and that the insurer had threatened to deny coverage, claiming without explanation that the insured had misrepresented material information. As a result, the trial court ruled that the evidence supported a good faith belief that the insurer had engaged in wrongful conduct sufficient to invoke the fraud exception to the attorney-client privilege.

The trial court conducted an *in camera* review of the redacted documents and decided that the attorney-client privilege would

never apply because "[i]n the context of a claim arising from a residential fire, the insurer owes the insured a heightened duty—a fiduciary duty, which by its nature is not, and should not be adversarial." The trial court also found that the insured was entitled to the insurer's work product. Sanctions and attorney fees were also awarded.

The Court of Appeals granted the insurer discretionary review and an emergency stay. Division II reversed and remanded for further proceedings before a different trial court judge.

The Washington Supreme Court granted review.

Holdings:

A year and a half after oral argument, a divided Washington Supreme Court affirmed in part and reversed in part. The majority, authored by Justice Chambers, made the following rulings:

1. Except for UIM claims, insureds in a 1st-party bad faith case are entitled to access to the claim file.

2. In UIM cases, the insurer is entitled to counsel's advice in strategizing vis-à-vis the same defenses the tortfeasor could have raised.

3. In UIM and other 1st-party bad faith cases, there are limits to the attorney-client privilege, including the civil fraud exception. A showing of actual fraud is not necessary to show the civil fraud exception. In first-party cases, bad faith "may" often be tantamount to civil fraud.

4. A first-party insurer has a quasi-fiduciary duty to its insured.

5. In non-UIM first-party cases, there is a rebuttable presumption of NO attorney-client privilege or work product privilege between the insurer and its counsel, insofar as the insured is concerned.

6. The insurer may rebut the presumption by showing its counsel was not engaged in quasi-fiduciary tasks (*e.g.,* investigating,

evaluating, or processing the claim). Providing advice on whether coverage exists is NOT one of these quasi-fiduciary tasks.

7. Once the insurer makes the showing required in #6, the trial court must make an *in camera* review of the claims file and must redact communications from counsel that reflect mental impressions of counsel, UNLESS they are directly at issue in the insurer's quasi-fiduciary responsibilities to its insureds. The trial court must also determine if the attorney-client privilege applies and then determine whether there are any exceptions to that privilege that would allow the insured to pierce the privilege.

8. If the insured asserts the civil fraud exception to the privilege, the insured must show that a reasonable person would have a reasonable belief that bad faith has occurred. In that event, the trial court must perform *in camera* review of the allegedly privileged materials. If that review discloses a finding that there is a foundation to permit a claim of bad faith to proceed, the attorney-client privilege is deemed waived.

9. In UIM cases, there is no presumption of no attorney-client privilege, but the privilege may continue to be pierced, "among other ways", by the procedure outlined in #8.

10. If counsel for the insurer takes sworn statements, corresponds with the insured, or negotiates with the insured, those are part of the quasi-fiduciary duties of investigating, evaluating, negotiating, and processing the claim.

11. If counsel for the insurer is acting in multiple roles for the insurer, the insurer may wish to keep separate files to avoid commingling of different functions.

The 4-person dissent authored by Justice Alexander, and joined in by Chief Justice Madsen and Justices Owens, and J. Johnson, would have held:

1. While a 1st-party, non-UIM insurer has a quasi-fiduciary duty to its insured, this means that it must give its insured's interests equal consideration, not more consideration. Such an insurer has

a duty to its shareholders and other policyholders not to dissipate its reserves through payment of meritless claims.

2. First-party, non-UIM insurers should be entitled to the attorney -client privilege absent an applicable exception such as the civil fraud exception. Actual fraud is not required for the civil fraud exception.

3. Affording the insurers of the attorney-client privilege would not permit them to hide their entire claim files by employing attorneys as adjusters, because the privilege does not apply to the extent the attorney is not acting in the capacity as an attorney.

4. Communications related to an attorney's aiding ongoing or future bad faith are discoverable if an *in camera* review uncovers a foundation in fact of such wrongful conduct, so long as the party seeking disclosure makes a factual showing adequate to support a good faith reasonable belief that such conduct has occurred.

Comment:

I initially thought it could have been worse. The more I think about it, maybe not.

Pam, thank you for laying this all out for us.

PUGET SOUND REGION'S BEST LAWYERS FOR 2013

The January 2013 issue of Seattle Business named Reed McClure attorneys Bill Hickman and Marilee Erickson in a feature story on "The Puget Sound Region's Best Lawyers for 2013."

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 45 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, and 2012.

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).

For up-to-date reports on Reed McClure attorneys, please visit our website at www.rmlaw.com

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