WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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2014 WASHINGTON SUPER LAWYERS AND RISING STAR 12
A LITTLE FRAUD GOES A LONG WAY 12
Johnson v. Safeco Ins. Co., 178 Wn. App. 828, 316 P.3d 1054 (2013), *rev. denied*, 180 Wn.2d 1006 (2014).
THE CASE OF THE GOLDEN MANURE 14
Wilson Mut. Ins. Co. v. Falk, 352 Wis.2d 461, 844 N.W.2d 380, *rev. granted*, 353 Wis.2d 448 (2013).
MAKING ATTORNEY FEES REASONABLE 15
Berryman v. Metcalf, 177 Wn. App. 644, 312 P.3d 745 (2013), *rev. denied by Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026 (2014).
SIZE DOES NOT MATTER 17
Target National Bank v. Higgins, ___ Wn. App. ___, 321 P.3d 1215 (2014).
TO "USE" OR NOT TO "USE" : THAT IS THE QUESTION 18
National Casualty Co. v. Western World Ins. Co., 669 F.3d 608 (5th Cir. 2012).
DEAD DEER SCAM 19
The Seattle Times, May 29, 2014.
ANOTHER ROTTEN COLLAPSE CASE 20
Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014).
BULLIVANT IMMUNITY 21
Clark Co. Fire Dist. No. 5 v. Bullivant Houser, ___ Wn. App. ___, 2014 Wash. App. LEXIS 977 (Apr. 24, 2014).
ANOTHER BOMBSHELL 21
Miller v. Kenny, ___ Wn. App. ___, 325 P.3d 278 (2014).
FIRST GRADE LESSON 23
Sutton v. Tacoma School District, ___ Wn. App. ___, Wash. App. LEXIS 1049 (Apr. 29, 2014).
HE WHO HESITATES IS LOST 24
Hai v. STL International, Inc., 2014 Wash. App. LEXIS 885 (Apr. 15, 2014).
YOU CAN NEVER HAVE TOO MUCH MONEY 25
Quellos Group, LLC v. Federal Ins. Co., 177 Wn. App. 620, 312 P.3d 734 (2013).
"HONEST MISTAKE" 28
WILLIAM R. HICKMAN 29
E-MAIL NOTIFICATION 29
REED MCCLURE ATTORNEYS 30

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INDEX

2014 Washington Super Lawyers and Rising Star 12
Ambiguous 27
Assault
- Defined 23
Attorney Fees
- Adjustment 15
  - Rare 15
- *Berryman* Rule 17
- Block Entries 15
- *Bowers* Rule 15
- Burden of Proof 15
- *Chuond Van Pham* Rule 15
- *Fetzer* Rule 15
- General Rule 15
- Lawyer Padding Bill 17
- Lip Service 15
- Lodestar 15
  - Adjustment 15
- *Mahler* Rule 15
- Mandatory Arbitration 15
- RCW 4.84.250 17
- Reasonable 15
- Review 15
  - Analysis 15
- Role of Court 15
- Size Does Not Matter 17
Auto
- Non Use of Auto 18
- Use of Auto 18
Battery
- Defined 23
Choice of Law 24
Claim Forfeiture 13
Closing Argument
- Plea for Punitive Damages 21
Covenant Judgment
- Assignment 21

THIS NEWSLETTER IS PROVIDED AS A FREE SERVICE for clients and friends of the Reed McClure law firm. It contains information of interest and comments about current legal developments in the area of tort and insurance law. This newsletter is not intended to render legal advice or legal opinion, because such advice or opinion can only be given when related to actual fact situations.

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INDEX (continued)

Coverage
- Burden 26
- Reasonable 26

Dead Deer Scam 19

Depostion
- Opposing Counsel 21

Erickson, Marilee C. 12, 21

Excess Policy
- Defined 27

Exhaustion of Limits 27

Fraud 12

Fraud During Adjustment
- Penalty 13

Frye Standard
- Analysis 20
- Expert Testimony 20
- Scientific Community Support 20

Hickman, William R. 12, 29

Honest Mistake 28

Immunity
- Defense Attorney 21

Insurance
- Public Interest 13
- Public Policy 13

Jury Verdict
- Bad Faith 21
- Review 21

Manure
- Golden 14

Misrepresentation
- CPA 13

Okano, Pamela A. 12, 18, 29

Outrage
- Defined 23

Outrageous
- Conduct 23

Pollutant
- Exclusion 14
- Waste 14

Primary Policy
- Defined 27

Public Policy
- Insurance 13

Rabbit Hole 18

Rankin, John W., Jr. 12, 28

Reasonable Attorney Fees
- Criteria 21

Significant Relationship 24

Vacha, Jason E. 12

2014 WASHINGTON SUPER LAWYERS AND RISING STAR

Reed McClure is proud to announce that Bill Hickman, Jack Rankin, Pam Okano, and Marilee Erickson were again named to Thomson Reuters' 2014 Washington Super Lawyers list and that Jason Vacha was named to Thomson Reuters' 2014 Rising Stars list.

A LITTLE FRAUD GOES A LONG WAY

FACTS:

Joel owned a home in Edmonds and a rental property in Seattle. In January 2009, the chimney in the Edmonds house caught fire. The house was destroyed. Joel moved into the rental property.

During the adjustment of the loss, a question arose as to the rent cost of the rental property. Joel sent in a letter saying the rent cost of the house was $1,800 per month. The insurance company asked for more documentation of the rental claim. His attorney sent in a lease agreement between Joel and the previous renters. It showed rent of $1,800 a month.

A lawsuit was filed. Joel's deposition was taken. He testified that Mr. Little had signed a lease for the upstairs at $1,800 per month. Joel later admitted he had forged the lease.

Mr. Little said he rented the basement for $750 per month and did not sign a lease.

The trial court said that the undisputed facts established that Joel intentionally misrepresented the terms of the rental agreement he submitted to obtain ALE (additional living expense) benefits. Therefore, he was precluded from any recovery.

The Court of Appeals agreed.

HOLDINGS:

1. The court concluded there was no genuine issue of fact for trial, and under the controlling case law authority:

> (1) an insured who makes a material misrepresentation of fact relating to his claim under a policy of insurance that contains a clause voiding specific coverage entirely for the insured's fraud or misrepresentation, is precluded from recovery on that coverage insurance policy;
> (2) an insured who makes a material misrepresentation of fact relating to his insurance claim is precluded from maintaining tort causes of action such as bad faith and violation of the Consumer Protection Act.

2. **It is well established that if the insured commits fraud with the intent of deceiving the insurance company, the insured forfeits any claim under the policy**.

3. The undisputed findings establish that Joel intentionally misrepresented material facts during the course of his claim with Mount Vernon by submitting a fraudulent lease "in order to obtain ALE benefits under the Mt. Vernon policy."

4. Where the insured intentionally misrepresents material facts during the claims process, the insured is not entitled to pursue bad faith or CPA claims.

COMMENT:

The Washington case law has consistently held that fraud during adjustment of a claim negates any claim under or related to the policy. *See Mutual of Enumclaw Ins. Co. v. Cox*, 110 W.2d 643 (1988).

Also, we should note:

> 48.01.030. Public interest
>
> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Johnson v. Safeco Ins. Co., 178 Wn. App. 828, 316 P.3d 1054 (2013), *rev. denied*, 180 Wn.2d 1006 (2014).

THE CASE OF THE GOLDEN MANURE

Several decades back, the insurance industry (through ISO) switched from a short simple pollution exclusion to a very complex pollution exclusion which had as its end object immunizing the insurance industry from the growing number of claims arising under CERCLA. It was a good idea. It often did not work. Ultimately, the bill for the cleanup of the industrialization of the USA was handed to the insurance industry.

So we were moderately surprised to come across an opinion wherein the court took by the horns this significant question: Is cow manure a pollutant under a farmowner's policy?

The farmer in question ran a dairy farm in Wisconsin. He had 600 head of cattle and over 1,670 acres of land. In early 2011, the farmer used manure from his cows as fertilizer for his fields pursuant to a government-approved nutrient management plan. A couple months later, the government notified the farmer that manure from his farm had polluted a local aquifer and contaminated the neighbors' water wells. Some neighbors demanded compensation.

The farmer had an insurance policy which had a pollution exclusion which defined **"pollutant" as any solid, liquid, gaseous irritant or contaminant including waste**. The company denied coverage because manure is a "pollutant". The trial court ruled in favor of the company saying that a reasonable farmer would understand that cow manure is waste.

On appeal, the court said that based on the policy language "we might conclude that manure is a pollutant". But that is not the result we want.

After noting that, while bat guano may be waste, cow manure is something else entirely:

> Manure is a matter of perspective; while an average person may consider cow manure to be "waste," a farmer sees manure as liquid gold.

COMMENT:

Yes. There it is. In Wisconsin, cow manure is gold. And, of course, the exclusion does not apply.

Wilson Mut. Ins. Co. v. Falk, 352 Wis.2d 461, 844 N.W.2d 380, *rev. granted*, 353 Wis.2d 448 (2013).

MAKING ATTORNEY FEES REASONABLE

FACTS:

Washington courts are fond of reciting, "The general rule in Washington, commonly referred to as the "American rule", is that each party to a civil action will pay its own attorney fees and costs." That was the general rule, once upon a time. Note the case of the little old California wine maker who was hauled into a Washington court via the Long Arm Statute, and who prevailed and who, when he asked for his statutorily authorized attorney fees, was told by the trial judge, "I have never awarded attorney fees and I don't intend to start now." (*Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863 (1973).)

But we digress. The recognized exceptions to the "General Rule", i.e., contract; statute; recognized ground in equity, seem to have grown like Topsy. One particular statute (RCW 7.06.060(11)) is responsible. It expressly entitles a nonappealing party in a trial de novo to attorney fees and costs if the appealing party fails to improve his position after requesting a trial de novo.

And this brings us to a most extraordinary opinion. In the mandatory arbitration, the arbitrator awarded $35,724.00. The trial de novo lasted from Wednesday through Tuesday. The jury fixed the damages at $36,542.00. Plaintiff's attorneys presented a bill for 468.55 hours at $300.00 per hour. And they asked for a multiplier of 1.5 to 2.0. The trial court said the hours and rate were reasonable and then doubled it. The total award was $291,950 in attorney fees.

The award was not well received by the Court of Appeals. In a 35-page opinion with a 7-page appendix, the court pointed out that this was a minor soft tissue injury case with a short trial de novo and a fee award of nearly $292,000 was a manifest abuse of discretion. The case was sent back "for meaningful consideration of what constitutes a reasonable fee."

HOLDINGS:

1. The burden of demonstrating that a fee is reasonable is upon the fee applicant.

2. The trial court signed the proposed findings and conclusions without making any changes except to fill in the blank for the multiplier of 2.0. The

findings did not address Farmer's detailed arguments for reducing the hours billed to account for duplication of effort and time spent unproductively.

3. Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.

4. While the trial court did enter findings and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee.

5. To facilitate review, the findings must do more than give lip service to the word "reasonable."

6. A determination of reasonable attorney fees begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

7. A lodestar fee must comply with the ethical rules for attorneys, including the general rule that a lawyer shall not change an unreasonable fee.

8. It was a manifest abuse of discretion for the trial court to accept 468.55 hours as reasonable for this case.

9. While it is certainly helpful to have two attorneys in court, the defendant is not required to pay for a Cadillac approach to a Chevrolet case.

10. Block billing entries tend to be obscure.

11. In Washington, adjustments to the lodestar product are reserved for "rare" occasions.

12. The burden of justifying any deviation from the lodestar rests upon the party proposing it.

13. When the granting of a multiplier becomes routine, it undermines our Supreme Court's repeated statement that adjustments to the lodestar should be rare.

14. The attorney fee award required by the mandatory arbitration statute is not intended to put a premium on private litigation of small personal injury claims.

15. Under *Mahler*, meaningful findings and conclusions must be entered to explain an award of attorney fees.

16. Under *Bowers*, the trial court must make an independent evaluation of the reasonableness of the fees claimed and discount for unproductive time.

17. Under *Fetzer*, when an attorney fails to use billing judgment and instead submits a grossly inflated fee request for handling a small case, the court may consider a downward adjustment.

18. Under *Chuong Van Pham*, occasionally a trial court will be justified in making an upward adjustment to account for risk, particularly in cases brought to enforce important public policies that government agencies lack the time, money, or ability to pursue.

19. A party who seeks an upward adjustment bears the burden of proving it is warranted by the arguments rooted in the record, not in rhetoric.

COMMENT:

Not much more to say. Here was a situation which was not supposed to exist: rubber-stamping whatever was submitted. Even after *Mahler*, back in 1998, which said "stop it," it has been the same old procedure. Perhaps a copy of the opinion should be stapled to every brief on attorney fees.

In any event, it is certainly one of the most important opinions of this young century.

Berryman v. Metcalf, 117 Wn. App. 644, 312 P.3d 745 (2013), *rev. denied by Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026 (2014).

SIZE DOES NOT MATTER

FACTS:

Shortly after Division I issued the *Berryman* opinion in November 2013, Division Three, in March 2014, issued a comprehensive review of the issue of attorney fees awarded under RCW 4.84.250. That statute authorizes a trial court to award attorney fees, under certain circumstances, in disputes of $10,000 or less. The Court of Appeals reversed the trial court's award of a reduced fee after the trial court had noted that the amount in controversy was only $2,052.37. It held that in RCW 4.84.250, size does not matter.

HOLDINGS:

1. The size of the controversy must not be considered when fees are awarded under RCW 4.84.250. First, taking into account the size of the dispute conflicts with the purposes behind RCW 4.84.250.

2. Second, Washington courts proclaim the principle that size matters but do not apply it. Cases under contract attorney fees clauses and other statutes profess to apply the "amount in issue" factor, but a careful reading of the cases shows that the disproportionate fee request was based upon padding by the lawyer.

3. Third, decisions under RCW 4.84.250 permit fee awards disproportionate to the amount in dispute.

4. In *Berryman*, 177 Wn. App. 644, our court declared the amount in dispute to be a vital consideration, but many other valid reasons explained the court's reduction in fees.

5. The size of the controversy must not be considered when fees are awarded under Wash. Rev. Code § 4.84.250.

6. The purpose of Wash. Rev. Code § 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims. Use of the word "penalize" is important, since the civil law rarely seeks to penalize a litigant.

7. Considering the amount in issue is an anathema to the essence of the statute.

COMMENT:

The court did note that the trial court is entitled to reduce a fee award if it finds wasteful and duplicative work or excessive time.

Target National Bank v. Higgins, ___ Wn. App. ___, 321 P.3d 1215 (2014).

TO "USE" OR NOT TO "USE" : THAT IS THE QUESTION

"Use of auto" cases have been and continue to be a rich source of dispute and litigation. E.g.: was the hunter using the pickup when he rested his rifle on the hood and shot his hunting partner. I note that Reed McClure attorney Pam Okano (206-386-7002; pokano@rmlaw.com) has handled a multitude of such cases over the years.

And that brings us to a coverage case from the Fifth Circuit. You may ask why would a federal appellate court choose to write and publish an opinion which deals with no federal or constitutional question. It is no more than an insurance coverage case out of Texas governed, under the diversity rule, by Texas law. Well they are federal judges and they can do what they want.

The underlying facts are very simple. Darlene was fatally injured during an attempt to load her into an ambulance. The ambulance company had two insurance policies. One provided that it would pay for injuries caused by accident and resulting from the "use" of a covered auto. The other policy excluded coverage for bodily injury arising out of the use of any auto.

Sounds straightforward. It is either one or the other. Either dropping Darlene was "use" of the vehicle or it was non-use of the vehicle. The terms are mutually exclusive.

But wait a minute. We are in the world of insurance coverage litigation. (A location not too far removed from that encountered by Alice when she fell down the rabbit hole.) And in this world an event can both "be" and "not be."

The court noted the rule which states that words which provide coverage are given an expansive construction while words which limit or negate coverage are given a very narrow construction. Thus, when the EMTs dropped Darlene, they could both be using and not using the ambulance.

National Casualty Co. v. Western World Ins. Co., 669 F.3d 608 (5th Cir. 2012).

DEAD DEER SCAM

A grand jury in Philadelphia recently returned an indictment of 41 people for their involvement in an insurance fraud scheme that used dead deer to fake auto accidents. Ron was the mastermind of the $5 million scam, which he ran out of his auto body shop.

Ron coached customers to claim they had struck a deer rather than a car. That way, the insurer would consider them no-fault accidents and pay the claims. Ron stored deer carcasses, blood, and fur in the back of his shop to use as props.

Also indicted were several insurance adjusters, tow truck drivers, and a police officer.

The Seattle Times, May 29, 2014.

ANOTHER ROTTEN COLLAPSE CASE

FACTS:

LCS built condominiums between 1980 and 1994. They discovered a rot problem in mid-2006.

St. Paul insured the premises of LCS under three annual policies from August 1996 to August 1999. They provided coverage for "collapse" that occurred during the policy period.

LCS tendered its claim to St. Paul in July 2007, and sued St. Paul in August 2007. St. Paul moved for summary judgment arguing that LCS's experts had no "generally accepted scientific basis" on which to link the current building decay to a state of "collapse" during the policy periods. The trial court agreed and dismissed the case.

On appeal, the Court of Appeals held that once St. Paul set forth evidence indicating the methodology of LCS's experts was not generally accepted, the burden then shifted to LCS to come forwarded with evidence the methodology was generally accepted. LCS provided no such evidence.

HOLDINGS:

1. For expert testimony regarding novel scientific evidence to be admissible, it first must satisfy the *Frye* standard and then must meet the other criteria in ER 702.

2 Under *Frye*, expert testimony is admissible where.

> (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

3. Both the theory underlying the evidence and the methodology used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under *Frye*.

4. To perform a *Frye* analysis, courts consider four sources of information:

> To determine whether a consensus of scientific opinion has been achieved, the reviewing court examines expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from

other jurisdictions. However, "the relevant inquiry is general acceptance by the scientists, not the courts."

COMMENT:

Too often, the trial court, or even the appellate court, will defer to whatever theory the so-called "expert" comes up with. Here, one expert was a civil engineer who got his information from a fellow engineer. The second was a "wood scientist" from California. Neither could identify any support in the scientific community for their testimony.

The *Frye* rule was set out in *Frye v. United States*, 293 F. 1013, 54 App. D.C. 46 (1923).

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014).

BULLIVANT IMMUNITY

On April 24, 2014, Division II of the Court of Appeals issued a Published Opinion in which it held that the Bullivant Houser firm could not be sued by American Alternative Insurance for the way Bullivant defended the insured.

A nice follow-up to the *Stewart Title* case covered in the Fall 2013 issue.

Clark Co. Fire Dist. No. 5 v. Bullivant Houser, ___ Wn. App ___, 2014 Wash. App. LEXIS 977 (Apr. 24, 2014).

ANOTHER BOMBSHELL

On April 28, 2014, the Division I of the Court of Appeals published a 55-page opinion in which it affirmed a jury verdict awarding $13 million in damages and $7 million in interest to the assignee of the bad faith causes of action where the total net amount of the covenant judgment was $4.15 million.

In the course of ruling against Safeco on every substantive legal issue raised by Safeco, the court drove home the point that in an insurance bad faith case, the amount of a reasonable covenant judgment sets a floor, not a ceiling, on the damages a jury may award.

It being such a big case, addressing over 15 legal issues, I asked one of our bad faith/coverage experts (Marilee C. Erickson; 206-386-7047; merickson@rmlaw.com) to provide us with a summary:

- Appellate procedure – failure to argue or provide legal authority for argument can be waiver of issue on appeal.
- Assignment of bad faith claims and effect of covenant judgments.
- Attorney fee awards: in addition to reaffirming settled rules (e.g. findings required, abuse of discretion standard of review, the opinion has the following holdings on attorney fees – (a) reasonable hourly rate not limited to local rates if case involves difficult or novel issues or requires special skills. $450 an hour deemed reasonable; (b) no per se rule requiring contemporaneous time records—reconstructed time records are permitted; (c) segregation of time for CPA, tort, bad faith, and negligence may not be required in extra-contractual claims because claims are interrelated; and (d) significant risk of case and quality of representation can justify upward adjustment, *i.e.*, 1.5 multiplier.
- Carrier's bonus and incentive compensation can be discovered and may be admissible.
- Closing argument that asks jurors to "protect the public interest" and enforce the public "compact" that insurers must act in good faith is allowed in bad faith case. Difference between golden rule argument and send-a-message argument.
- Damages in bad faith actions.
- Interpretation of settlement agreement – subjective intent rarely relevant.
- Loss reserves—discoverable and can be admissible in bad faith trial involving insured's duty to adjust and settle claim where loss reserves are inconsistent with carrier's settlement position.
- Misconduct of counsel – what constitutes and whether it is prejudicial.
- Post-judgment interest on bad faith verdict is calculated at tort rate in RCW 4.56.110(3)(b).
- Statutory cost under RCW 48.84.010 – only statutory costs are allowed in bad faith action.
- Under what circumstances can opposing counsel be deposed?

- Whether a policy is a new policy or renewal policy for purposes of written rejection of UIM under RCW 48.22.030(3)?

It makes one's blood run cold to imagine deposing opposing counsel, or asking the jury to send a message (a/k/a) punitive damages, or putting the reserves in as evidence or putting in evidence of incentive compensation. This case will have an impact for years to come.

Miller v. Kenny, ___ Wn. App ___, 325 P.3d 278 (2014).

FIRST GRADE LESSON

FACTS:

A first grade teacher got into a classroom disturbance with a first grade special ed student. Just then the little girl's grandmother walked in. The student's grandmother sued the school and the teacher for assault, battery, and outrage.

The trial court dismissed, ruling that the grandmother failed to present evidence showing that the teacher's conduct was intentional.

On appeal, the court reversed the dismissal of the battery and assault claims because there were issues of fact but affirmed the dismissal of the outrage claim.

HOLDINGS:

1. A battery is the intentional infliction of harmful or offensive bodily contact with the plaintiff. More specifically, a battery is "'[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such contact."

2. Even if there has been no bodily contact, a defendant may be liable for assault when she acts with an intent to put another person in immediate apprehension of harmful or offensive contact, and that person has such an apprehension. The apprehension must be of imminent contact.

3. Treating grandmother's testimony as true, we hold that genuine issues of material fact exist with regard to the assault and battery claim.

4. To prevail on a claim for the tort of outrage, also known as intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant engaged in extreme and outrageous conduct, (2) the defendant intentionally or recklessly inflicted emotional distress on the plaintiff, and (3) the conduct actually resulted in severe emotional distress to the plaintiff.

5. "Any claim of outrage must be predicated on behavior 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

6. To sustain an outrage claim, the defendant's conduct must be so offensive as to lead an average member of the community to exclaim "'Outrageous!'"

7. Outrage requires that the defendant either intended to cause emotional distress or recklessly caused such distress.

8. To prevail on an outrage claim, a plaintiff is required to come forward with evidence that he or she actually suffered *severe* emotional distress as a result of the defendant's conduct.

COMMENT:

A clear orderly review and analysis of three very fundamental common law torts.

I still find it difficult to envision how a first grade teacher could lose his cool in dealing with a first-grader.

Sutton v. Tacoma School District, ___ Wn. App ___, 2014 Wash. App. LEXIS 1049 (Apr. 29, 2014).

HE WHO HESITATES IS LOST

FACTS:

Hai, a resident of Texas, tripped over a table in a sporting goods store in Dallas in February 2009. He sued the store owner "TSA" in December 2011 in Tacoma.

The statute of limitations in Texas is two years; the statute of limitations in Washington is three years.

The trial court dismissed on the grounds that Texas law should govern the dispute and that the suit is time barred by Texas' two-year statute. On appeal, after conducting an exhaustive choice of law analysis, the court concluded the contacts in this case favored application of Texas law.

HOLDINGS:

1. As a general matter, Washington courts analyze choice of law questions in a three-step process. First, "[a]n actual conflict between the law of

Washington and the law of another state must be shown to exist before Washington courts will engage in a conflict of law analysis."

2. If such a conflict exists, we then apply the "'most significant relationship' test, set forth in the *Restatement (Second) of Conflict of Laws* § 145 (1971)." "Under this approach, the rights and liabilities for the parties are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."

3. Finally, *if the contacts are evenly balanced*, the last step of the analysis "involves an evaluation of the interests and public policies of the concerned states to determine which state has the greater interest in determination of the particular issue."

4. The contacts in this case favor application of Texas law.

COMMENT:

In addition to the conflict between the limitation periods, the court was able to identify a host of other conflicts.

An extraordinary opinion which provides an excellent guide to the analysis of a choice of law question. Unfortunately, it was not published.

Years and years ago when your editor was in law school, choice of law or "conflict of law" questions were on the cutting edge. Ten years before that, the analysis was short: accident occurred in Texas; Texas law applied. That gave the law a great deal of predictability and cut out the forum shopping.

Hai v. STL International, Inc., 2014 Wash. App. LEXIS 885 (Apr. 15, 2014).

YOU CAN NEVER HAVE TOO MUCH MONEY

FACTS:

"Q" was a Seattle-based investment management company. It developed a tax shelter labeled "POINT." The shelter gave wealthy clients the opportunity to offset large capital gains by acquiring securities with built-in losses. "Q" used two offshore shell companies and a "paper" portfolio of over $9 billion in U.S. stocks to create "fake" capital losses. In total, the POINT transactions protected about $2 billion from federal taxes and generated about $65 million in fees to "Q".

"Q" purchased three layers of insurance. The primary layer was with AISLIC: an investment management policy with a $10 million limit subject to a $2.5

million SIR. It was claims made and had no duty to defend. "Q" obtained a first layer of excess from Federal in the amount of $10 million after exhaustion of the AISLIC policy. It also obtained a second layer from Indian in the amount of $20 million after exhaustion of the AISLIC and Federal policy limits.

Six "Q" clients used the POINT tax shelter. All were audited by the IRS. The IRS disallowed all of them. The clients began to get restless. "Q" entered into settlements with the clients.

Eventually, the U.S. Attorney came after "Q's" CEO with a 42-page indictment charging conspiracy to defraud the IRS, tax evasion, and wire fraud. "Q's" CEO pleaded guilty to defrauding the IRS of $240 million in taxes.

"Q" then sought reimbursement from the three carriers for the $35 million in settlements and the $45 million in defense costs. AISLIC determined that it did indeed owe "Q" some coverage. Under one policy, it paid $5 million and, under another policy issued a few years later, $10 million. This, however, left a gap. "Q" agreed to pay the gap.

Federal and Indian took the position that under the express terms of the policies, the failure to exhaust primary coverage was an absolute bar to excess coverage. The trial court ruled that under the plain and unambiguous language of the policy, the carriers were entitled to summary judgment for failure to exhaust the underlying coverage and policy limits. On appeal, the court affirmed, saying that the exhaustion language was clear and must be enforced as written.

HOLDINGS:

1. A policy should be read as a whole and given a fair, reasonable, and sensible construction as would be given by the average person purchasing insurance.

2. The burden of establishing coverage under an insurance policy is on the insured claiming coverage.

3. A court interprets an insurance policy as a whole, giving force and effect to each clause, with no part interpreted in isolation.

4. An insured's expectations cannot override the plain language of the insurance contract.

5. A provision in an insurance contract is ambiguous only if, on its face, it is fairly susceptible to more than one reasonable interpretation.

6. Unambiguous insurance policy language will be enforced as written. A court will not modify an unambiguous insurance contract or create ambiguity where none exists.

7. An excess insurance policy provides coverage that is over and above the coverage that is available through an underlying policy. The critical and distinctive feature of an excess insurance policy is that it provides coverage only after primary coverage is exhausted.

8. When the primary insurer has not paid full coverage, the insured's willingness to pay the difference between the primary insurer's liability limit and the lesser amount actually paid by the primary insurer cannot trigger the excess insurance coverage.

9. When the terms of an insurance policy attach coverage immediately on the happening of an accident, the policy is primary. When the terms of an insurance policy provide coverage only after primary coverage is exhausted, it is excess.

10. A provision in an excess insurance policy requiring exhaustion of underlying policy limits before excess coverage is triggered is not the equivalent of a cooperation or notice requirement.

11. There is no public policy justification for overriding a provision in an excess insurance policy unambiguously requiring exhaustion of underlying policy limits before excess coverage is triggered.

COMMENT:

These rich #@#@ made a ton of money. But that was not enough for them. Oh no. These guys figured out a way to shift millions and millions in taxes to the rest of us.

One of the few insurance cases which gives some insight into the super-rich.

Quellos Group, LLC v. Federal Ins. Co., 177 Wn. App 620, 312 P.3d 734 (2013).

"HONEST MISTAKE"

A while back, we reviewed a Washington Supreme Court case in which the Court ruled that employees of a bank which had lost $500,000 of Mike's money were not liable for obligations created on behalf of the bank. It said

this because otherwise the employees of the bank might be exposed to severe personal liability "for honest mistakes."

We always thought the rule was that you got sued when you made "an honest mistake," and went to jail when you made a dishonest one.

My partner Jack Rankin (206-386-7029; jrankin@rmlaw.com) who got caught up in the "honest mistake" anomaly years ago, sent over a short piece by Harry Plotkin. He writes about jury verdicts (www.yournextjury.com). He notes that in jury interviews he has found that many jurors will tell you that negligence is intentionally doing something harmful. You can obtain a copy at www.yournextjury.com/jurytip.pdf.

Here is another item to chew over:

> And even though it may not be legally relevant to liability, your jurors are absolutely persuaded by whether or not the defendant seems to care now, after the plaintiff's injury. Jurors award far less in damages when they believe that a defendant is sorry, has learned its lesson, and has made efforts to fix the problem. Defendants often worry, for example, that recalling a product or making a change will be interpreted as a sign of liability – "if the product was safe, why did they change it right after the injury?" – but in my experience, making fixes and changes reduces juror anger and damages. Yet few things get jurors angrier and awarding higher damages (compensatory too, not just punitives) than when plaintiff's counsel can show the jury that the defendant still doesn't care, hasn't learned its lesson, is still doing the same thing, hasn't changed, and is defiant.

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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.

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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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