WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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REED McCLURE ANNOUNCEMENT

Reed McClure is pleased to announce that three attorneys were promoted to Shareholder:

Earle Bravo, Michael Budelsky, and Chris Nye.

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

A CAT NAMED BOO

FACTS:

Boo, a cat, did not come home one morning. At 5:00 a.m., she awoke her owner "meowing loudly." The owner followed the loud meows over to the neighbor's garage. She last heard Boo around 6:15 a.m. Later, she talked with the neighbor and offered to trade Boo for some zucchinis. The neighbor said "I haven't seen a cat." The neighbor did tell the police that he had trapped a feral cat which he released, and it ran away.

Boo's owner launched an all-out search, putting up signs, knocking on doors, and walking trails. But no Boo turned up.

The owner sued the neighbor listing about every tort in the book: bailment, negligence, malicious injury to a pet, trespass, conversion, outrage, gross negligence, and fraud. The trial court dismissed the whole pack of it on summary judgment.

The Court of Appeals reversed in part, saying there was enough evidence to warrant a trial on the claim of trespass to chattels, conversion, and fraud.

HOLDINGS:

1. On an appeal from a summary judgment of dismissal, the appellant is given the benefit of all the evidence, and all the reasonable inferences which may be drawn from the evidence.

2. Conversion is "'the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.'"

3. Trespass to chattels is something less than a conversion. It is the intentional interference with a party's personal property without justification that deprives the owner of possession or use.

4. To establish a fraud claim, the owner must show by clear, cogent, and convincing evidence all of the elements of fraud: "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff."

5. The owner put together enough evidence and inferences to get to a jury.

COMMENT:

"De minimis non curat lex."

I have waited 40-plus years to write that. It means, the law does not concern itself with trifles. However, as this case demonstrates, the law does concern itself with a cat "meowing loudly" at 5:00 a.m.

A few years ago, this would have been treated as the normal aberration which humans can occasionally create. But in the current economic situation, spending taxpayers' money on this claim is an abomination. We are cutting back on our law enforcement, on our human services, our judicial staffing. The opinion in this case is 17 1/2 pages long. It took that judge and his law clerk a not insubstantial amount of time, energy, and money. All supplied by the taxpayers. All that was needed was one paragraph, one sentence, one word: Affirmed.

Damiano v. Lind, 2011 WL 3719682 (Wash. App. Aug. 25, 2011).

EARLE Q. BRAVO

PRACTICE

Mr. Bravo practices in the area of insurance defense, primarily in construction defect and bodily injury claims. His practice includes defending corporations and individuals against claims involving construction defect, premises liability, motor vehicle accidents and product liability.

EDUCATION

Seattle University Law School, J.D., Seattle, WA, 2000

University of Washington, B.A., Political Science, 1993

BACKGROUND

Mr. Bravo was born in the Philippines and raised in the Seattle area. He is licensed to practice in Washington State and the United States District Court for the Western District of Washington and is a member of the Washington State Bar Association. Prior to joining Reed McClure in the spring of 2008, Mr. Bravo worked for over six years as an insurance defense attorney in the Seattle area, handling litigation matters including construction defect, motor vehicle accidents, mold litigation, product liability, premises liability and insurance coverage.

AN OLDIE BUT GOODIE

Sometimes it appears that all the applicable insurance case law was written no more than 10-15 years ago. So when a case comes along which relies almost exclusively on a 44-year-old opinion it catches our attention.

The old case was *Tebb v. Cont'l Cas. Co.*, 71 Wn.2d 710 (1967). It discussed the question of whether renewal of an insurance policy creates a new contract that incorporates later enacted laws, or whether a renewal is only a continuation of the original terms of the policy. Tebb had obtained an accident policy in 1942. It had no grace period. In 1951, the legislature had passed a law requiring insurance policies to provide a 31-day grace period. Tebb did not pay his September 1, 1964 premium and died September 7, 1964. The Supreme Court held that each time a policy is renewed, a new contract is formed. The new contract incorporates any later enacted law, *e.g.*, the 31-day grace period.

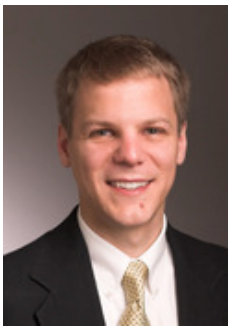
In the current case. the dispute centered on a 3-day hospitalization stay requirement in a nursing care policy. The policy was issued effective October 9, 1986. The 3-day requirement was outlawed by the legislature and the insurance commissioner effective January 1988.

After the insured had paid renewal premiums for more than 20 years, a claim for nursing home benefits was submitted after the insured suffered a stroke and was no longer able to care for herself. The insurance company denied the nursing care benefits claim because the insured had not complied with the 3-day prior hospitalization requirement.

The superior court agreed with the insurance company. But the Court of Appeals reversed, following *Tebb* and remanding on the question of the insurance company's bad faith. The court concluded that under the terms of the policy, upon acceptance of each renewal premium, a new contract was formed.

Bushnell v. Medico Ins Co., 159 Wn. App. 874, *rev. denied*, 172 Wn.2d 1005 (2011).

MICHAEL N. BUDELSKY



PRACTICE

Mr. Budelsky focuses his civil litigation practice on the areas of insurance defense, employment law, medical malpractice defense, and general civil litigation. He also devotes a significant portion of his practice to appellate work, and he has argued cases before all three divisions of the Washington Court of Appeals.

EDUCATION

University of Cincinnati College of Law, Cincinnati, OH, J.D., 1998

Dartmouth College, Hanover, NH, B.A., 1994

BACKGROUND

Mr. Budelsky grew up in Cincinnati, Ohio. He practiced in Cincinnati for five years, focusing primarily on employment law, civil rights law, and general civil litigation. In addition, he litigated administrative proceedings including matters before the EEOC and Ohio Civil Rights Commission. Mr. Budelsky also handled and argued numerous appeals before the Sixth Circuit and the Ohio Court of Appeals.

Mr. Budelsky moved to Seattle in 2004 and became a member of the Washington Bar. Since then, he has concentrated his practice on insurance defense, employment law, medical malpractice defense, general civil litigation, and appellate work.

CARVING UP A RELATIONSHIP

FACTS:

Megan and Jeff were a couple. He was over at her apartment one evening when he began stabbing himself and Megan with a kitchen knife. After that knife broke, he got a second one and kept going. Altogether he stabbed Megan 24 times. Megan filed a lawsuit "sounding in negligence" against Jeff. She alleged that Jeff had some mental issues and that at the time he was stabbing her he did not understand what he was doing. He did not intend bodily injury. Jeff was insured under his parents' homeowners' policy.

The insurance company took the position that it had no duty to defend and no duty to pay. It pointed to an exclusion for physical or mental abuse. The trial judge said Jeff's actions clearly constituted physical abuse and there was no coverage.

Megan appealed, arguing that the term physical abuse contains "an implicit intentionality requirement" and that Jeff did not intend to harm her "when he stabbed her 24 times with two knifes." The Court of Appeals found this reading of the policy to be "plainly unreasonable".

COMMENT:

It should be hard to believe that a lawyer would believe that a court would buy this argument with a straight face. But it isn't.

Those of you with a good memory will recall we mentioned this case a couple of years ago. But like a potato chip it is worth a second bite.

Merrimack Mutual Fire Ins Co v. Ramsey, 117 Conn. App. 769, 982 A.2d 195, *cert. denied*, 984 A.2d 67 (2009).

REED MCCLURE UPDATE

Harvey v. Obermeit, 2011 WL 3805680 (Wash. App. Aug. 29, 2011).

Marilee Erickson and Michael Budelsky convinced Division I of the Court of Appeals to uphold the dismissal of a lawsuit against their clients for insufficient service of process. In a published opinion, the court held that the fact-finding hearing examining the process server's actions was proper and that the defendants did not waive the insufficiency defense by engaging in discovery.

Gusa v. Barnes Lake Park Owners Ass'n, 2011 WL 2419426 (Wash. App. June 14, 2011).

Pam Okano convinced the Court of Appeals that a condominium association could not be held liable in damages to a unit owner who complained about continuing water intrusion into his unit. The Court of Appeals awarded Pam's client attorney fees on appeal.

Pace v. Davis, 2011 WL 1758377 (Wash. App. May 9, 2011).

Pam Okano convinced the Washington Court of Appeals that summary judgment in favor of a father and grandson and a jury verdict in favor of a son were correct in a jet ski-boat case. There was evidence that the jet ski had the same hull registration number as one owned by the father, but Pam persuaded the court that there was no evidence that the grandson was riding it, that the jury was justified in finding that the son was not riding it, and that the father could not be liable under theories of agency, negligent entrustment, and the family car doctrine.

Certain Underwriters at Lloyd's Londo v. Travelers Property Cas. Co., 161 Wn. App. 265, 256 P.3d 368 (2011).

In a complex insurance coverage case, Pam Okano convinced the Court of Appeals that the $10,000,000 in excess flood insurance provided by Lloyd's kicked in as soon as Pam's client's $1,000,000 flood sublimit was gone. The court reversed the trial court judge, who had ruled that Pam's client's policy provided $11,000,000 in flood insurance.

CLOSE ENOUGH FOR MEDICAL WORK

For many, many years, medical malpractice was a very protected tort. Unlike most run-of-the-mill torts, a bad result was not enough to get you to the jury. You have to have expert medical evidence as to the standard of care and the breach of that standard.

Here, an injured patient sued her doctor as a "general surgeon." But her medical experts were otolaryngologists. Not only were they not "general surgeons", each refused to comment on the "standard of care" for a general surgeon.

That was enough (or rather, not enough) for the trial court judge. He dismissed the case, concluding that the total lack of expert testimony as to the standard of care was fatal to the suit.

The Court of Appeals reversed. It pointed out that while the doctors did not know the standard of care, and had in fact never performed the procedure in question, they had been to medical school.

Leaverton v. Cascade Surgical Partners, P.L.L.C., 160 Wn. App. 512, *rev. denied*, 172 Wn.2d 1005 (2011).

SLIP & FALL

FACTS:

Smith worked on the second floor of an office building. The only access was an exterior concrete staircase. One day Smith was leaving. As she descended to the third step from the top, she felt the step move under her foot. She slipped. She fell. She was hurt. She sued.

PROCEDURE:

The landlord moved for summary judgment arguing that Smith had failed to produce evidence that the landlord had actual or constructive notice of a defect. He pointed out that he used the stairs almost daily, had not noticed any problems, had received no complaints, and the city had inspected. (He replaced the staircase a few days later.) The trial judge dismissed the case.

The Court of Appeals reversed saying there were issues of material fact as to whether the landlord breached his duty of care. The court appeared to be primarily moved by the fact Smith said that before her fall, she had noticed some lower steps were loose.

HOLDINGS:

1. To establish the elements of her negligence claim, Smith had to show: "(1) duty …, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury."

2. A property owner's legal duty to a person entering his property depends on whether the person is a trespasser, licensee, or invitee.

3. Smith was an invitee. A property owner is liable to an invitee for an unsafe condition of the land if the owner has actual or constructive notice of the unsafe condition.

4. The property owner must inspect for unsafe conditions and " 'repair, safeguard[ ], or warn[ ] as may be reasonably necessary for [the invitee's] protection under the circumstances.' "

5. The property owner has constructive notice where the condition "has existed for such time as would have afforded [the owner] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger."

COMMENT:

Yes, you read that right. Because the plaintiff said some other lower steps were loose, the landlord could be charged with constructive knowledge that an upper stair was loose.

Smith v. Winther Properties, LLC, 2010 WL 3565504 (Wash. App. Sept. 14, 2010).

CHRISTOPHER J. NYE

PRACTICE

Mr. Nye represents defendants in a variety of complex commercial litigation disputes, including construction defect, worksite injury, product liability and personal injury. Mr. Nye also represents the interests of insurance companies, which includes litigating coverage disputes and bad faith cases, as well as providing opinions and advice on insurance coverage matters.

EDUCATION

Willamette University College of Law, J.D., 1995

University of Washington, B.A., 1991, "With Distinction"

BACKGROUND

Mr. Nye grew up in the Seattle area. Following receipt of his J.D. in 1995, Mr. Nye served as a Judicial Clerk to the Hon. Sid Brockley in the Clackamas County Circuit Court in Oregon City, Oregon.

Mr. Nye joined Reed McClure in 2008. He is admitted to practice in federal and state courts in both Washington and Oregon and is a member of the Washington Defense Trial Lawyers.

HONORS

Named "Rising Star" by Washington Journal of Law & Politics for 2007

Recipient, "Random Acts of Professionalism Award", Washington State Bar Assoc., 2003

NO ARBITRATION

FACTS:

13-year-old Julie was hit by a car while in a crosswalk. She was badly injured. She was an insured under her parents' auto policy which included UIM coverage. She waited until her injuries stabilized when she turned 18. She sent a letter to the UIM carrier demanding the policy limits or arbitration. She sent a second letter demanding the UIM limits or arbitration.

The auto company responded, denying the limits demand and arbitration. The next day, Julie sued the company, demanding arbitration and attorney fees.

The policy provided in part: "Both parties must agree to arbitration." The trial court dismissed, ruling that the policy did not require arbitration unless both parties agreed.

The Court of Appeals affirmed, stating that UIM arbitration was not mandatory under the policy unless both parties agreed to arbitrate.

HOLDINGS:

1. Interpretation of an insurance policy is a question of law reviewed de novo. Insurance policies are construed as contracts, so a policy's terms are interpreted according to basic contract principles.

2. The policy is considered as a whole, and is given a " 'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.' "

3. If the language is clear, the court must enforce the policy as written and may not create ambiguity where none exists.

4. A clause is only considered ambiguous if it is susceptible to two or more reasonable interpretations. If an ambiguity exists, the clause is construed in favor of the insured. However, "the expectations of the insured cannot override the plain language of the contract."

COMMENT:

The court pointed out that the policy's use of the word "must" indicates that it is mandatory for both parties to agree to arbitration before arbitration will be required.

The court also took note of the fact that the company's response was late and had misrepresented the language of the policy. While such "actions cannot be condoned, they do not affect the actual terms of the contract."

Yang v. AIG Specialty Auto, 2010 WL 1854672 (Wash. App. May 11, 2010), *rev. denied*, 170 Wn.2d 1011, (2010).

CHUTZPAH

One of my favorite Yiddish words is "Chutzpah." The classic example of chutzpah is the young man who kills both parents and pleads for mercy because he is an orphan! Now that is a clear demonstration of Chutzpah!

What follows is not too far behind.

FACTS:

Larry was arrested on a felony drug charge. Johnson, a bail bondsman, put up a $50,000.00 bail bond. Larry failed to appear in court. The State told Johnson that Larry was a no-show and thus Johnson would forfeit the entire $50,000 unless Larry showed up in court.

Johnson hired a bounty hunter, James. James subcontracted with Carl to retrieve Larry. Carl got a tip and so he and his partner, Jason, drove to where Larry was supposed to be. When Larry did show up, there was a bit of a confrontation, with Larry ending up with severe injuries and an amputated leg.

Larry sued the bail bondsman and everyone else. The bail bondsman was dismissed by the court, which found that fugitive recovery is not an inherently dangerous occupation and thus Johnson was not responsible for the actions of the subcontractors.

The Court of Appeals affirmed the dismissal, saying that even if fugitive recovery was inherently dangerous, the fugitive Larry still could not sue the bail bondsman.

HOLDINGS:

1. "Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf."

2. But in general, an employer who hires an independent contractor is not vicariously liable for the actions of its independent contractor.

3. "[I]n inherently dangerous situations, an owner [i.e., employer of an independent contractor] cannot delegate his or her duty of care toward 'others' to an independent contractor and escape liability."

4. The "inherently dangerous activity" exception to the rule barring recovery from the entity that hired the independent contractor did not apply to the former fugitive so as to permit recovery from the bail bonds company after the subcontractor injured the fugitive during the bail bond recovery; the former fugitive triggered the bail bond recovery, he actively participated in it, and he was aware of some attendant risk, as he had previously been apprehended on a different bail bond recovery mission.

COMMENT:

Nice analysis of a heretofore unheard of bizarre situation. The court relied heavily on *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965).

Stout v. Johnson, 159 Wn. App. 344, 244 P.3d 1039, *rev. granted*, 171 Wn.2d 1035 (2011).

DISCRETIONARY REVIEW

Discretionary review is an extraordinary remedy. However, there is very little case law on the topic. Recently, Division III had the opportunity to review and analyze the topic. Unfortunately, it did it in the context of an unpublished opinion. That being the case, we feel compelled to share it with you.

The question arose in a modestly complex construction statute of repose case (RCW 14.16.310). One of the contractors felt very strongly that the statute was a complete bar to the claim against him. He moved for judgment on the pleadings. Denied. He moved for summary judgment. Denied. He moved for reconsideration. Denied.

He moved for discretionary review, arguing that the trial court judge had committed obvious error. The commissioner agreed and granted discretionary review. A year later, the case came up before Division III. It ruled that the commissioner was wrong.

Here is how the court explained it:

> Discretionary review is an extraordinary procedure that should only be granted in exceptional cases. *Right-Price Recreation LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 820, 21 P.3d 1157 (2001), RAP 2.3. Here, the claims is that the judge's decision is "obvious error" that rendered further proceedings useless. . . . Discretionary review anticipates that there is something more than simply that the trial judge got it wrong. Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV.. 1541, 1546 -47 (Oct. 1986). We conclude that this appeal does not meet the criteria for discretionary review.
>
> The superior court's ruling did not render further proceedings useless. Indeed, further proceedings might well have proved useful. The trial judge could have revisited his rulings at any number of junctures in the proceeding or the lawyers and their clients, with or without the assistance of a mediator, could have settled the case. The trial process has to be allowed to play out before courts of review step in.

However, since the case had been pending in the Court of Appeals for almost a year, the court said it would review the case. It ruled that the trial court was wrong and the contractor should be dismissed.

Clasen Fruit & Cold Storage, Inc. v. Frederick Michael Construction Co., 2011 WL 3198827 (Wash. App. July 28,2011).

NOT A SOFT BALL

FACTS:

Tiffani went to watch her daughter's middle school softball game. She arrived during the first inning. The screened seating area behind the backstop was occupied by ball players. There being no seats available, she proceeded to sit behind the foul line between third base and home plate. While helping her children set up lawn chairs, Tiffani was hit in the mouth by a line drive.

Tiffani had attended many other baseball and softball games. She knew that foul balls might go into the stands and that a spectator could get hit.

She sued, alleging that the school district negligently failed to provide a safe spectator area. Although the district did not plead a CR 8(c) affirmative defense of assumption of risk of injury, it moved for summary judgment on that basis. The trial court granted the motion and dismissed Tiffani's claim.

The Court of Appeals affirmed saying that the mandatory CR 8(c) affirmative defense was not really mandatory, and that a spectator who sits in an unscreened area at a baseball game assumes the risk of being struck by a baseball.

HOLDINGS:

1. A baseball field proprietor has a duty to screen some seats but does not have a duty to screen all seats.

2. Generally, screening the seats behind home plate is sufficient.

3. If a spectator sits in an unscreened area at a baseball game, the spectator assumes the risk of being struck by a baseball.

COMMENT:

I never cease to be amazed by the degree the courts will go to to protect the "grand old game."

Williams v. Richland School Dist. No. 400, 2011 WL 2306001 (Wash. App. June 7, 2011).

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 43 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 named a "Washington Super Lawyer" in 2001, 2003, 2005, 2006, 2007, 2008, 2009, 2010, and 2011.

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 remodeled website at www.rmlaw.com

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As a general rule, the printed goldenrod version of the Law Letter lands in your inbox about three weeks after a .pdf version is posted on Reed McClure's website. If you would like to receive notification of when it is posted, please send your name and e-mail address to Mary Clifton (mclifton@rmlaw.com).

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