WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXVI, NO. 2 *SUMMER 2012*

2012 WASHINGTON SUPER LAWYERS, RISING STAR, AND SEATTLE BEST LAWYERS....18
A HORSE IS A HORSE; OF COURSE, OF COURSE....18
Aurdal v. Burnston, 2012 WL 2018198 (Wash. App. June 5, 2012).
AGGRIEVED APPEAL....20
Russell v. Maas, 166 Wn. App. 885, 272 P.3d 273 (2012).
THAT ROTTEN FALLING DOWN FEELING....20
Sprague v. SAFECO Ins. Co., 174 Wn.2d, 524, 276 P.3d 1270 (2012).
CAROLINE S. KETCHLEY....23
'ROUND MIDNIGHT (PART ONE)....24
Schwartz v. Elerding, 166 Wn. App., 608, 270 P.3d 630 (2012), *rev. denied*, ___ Wn.2d ___ (July 10, 2012).
SPEAKING [OF] OBJECTIONS....26
Teter v. Deck, 174 Wn.2d 207, 274 P.3d 336 (2012).
JERRY'S 2005 CHEVY....27
Lloyd v. Allstate Ins. Co., 167 Wn. App. 490, 275 P.3d 323 (2012).
'ROUND MIDNIGHT (PART TWO)....27
Weaver v. Spokane County, ___ Wn. App. ___, 275 P.3d 1184 (2012).
WILLIAM H.P. FULD....30
LOOKING BACK UP THE ROAD....31
WRONGFUL DEATH GRIEF....31
Garcia v. Strong Trucking Co., 2012 WL 2877652 (Wash. App. July 16, 2012).
LIMITING FIRE SUBRO....32
Trinity Universal Ins. Co. v. Cook, ___ Wn. App. ___, 276 P.3d 372 (2012).
PUT DOWN THAT HORSE....34
Baechler v. Beaunaux, 167 Wn. App. 128, 272 P.3d 277 (2012).
IT'S THE LAW OF THE CASE....35
Washburn v. City of Federal Way, 167 Wn. App. 402, 273 P.3d 462 (Mar. 26, 2012), 2012 WL 2989192 (July 23, 2012).
A PERFECTLY DREADFUL CASE....37
Schorno v. Kannada., 167 Wn. App. 895, 276 P.3d 319 (2012).
QUICKLY, QUICKLY, QUICKLY....38
WILLIAM R. HICKMAN....40
E-MAIL NOTIFICATION....40
REED MCCLURE ATTORNEYS....41

Published and Distributed by: REED McCLURE
ISSN 1064-1378
Two Union Square, 601 Union Street, Suite 1500
Seattle, Washington 98101-1363
206/292-4900
© 2012

INDEX

20-Gauge Shotgun 24
All Risk Policy 20
Breach
- Defined 24
Collapse 20
Coverage
- Official Capacity 38
Courts
- Open 38
Dark Stormy Night 18
Death
- Wrongful 31
- Grief 31
Disgusting 37
Duty
- Defined 24
- To Protect 24
Efficient Proximate Cause 20
Ensuing Loss Provision 20
Erickson, Marilee C. 18, 20, 27
Erroneous Instruction
- Law of the Case 35
Evidence
- Extrinsic 31
- Prejudice 31
Formality and Decorum 26
Fuld, William H.P. 30
Hickman, William R. 18, 40
Hit-and-Run Statute 18
Instructions
- Exception 18, 35
- Specificity 18, 35
Ketchley, Caroline S. 23
Laughing Heir 39
Law of the Case
- Incorrect Instruction 35
Loss
- Time Valued 38

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.

The entire contents are copyrighted. All information as to permission to copy may be obtained from Mary Clifton at 206/386-7060; Fax: 206/223-0152; E-mail: mclifton@rmlaw.com.

CHANGE OF ADDRESS: Please call Mary Clifton at 206/292-4900; Fax: 206/223-0152; E-mail: mclifton@rmlaw.com.

INDEX (continued)

Misconduct
- Counsel 26
- Juror 31

Municipal Liability 27

Negligence
- Elements 24

Negligent Supervision
- Elements 24

Objections
- Speaking 26

Okano, Pamela A. 18, 20, 40

Policy
- All Risk 20
- Interpretation 20

Protect the Public Purse 27

Public Duty Doctrine 27, 35
- Exceptions 27

Rankin, John W., Jr. 18

Rot 20

Speaking Objections 26

Subrogation
- Against Insured 32
- Against Non-Insured 32
- Against Tenant 32
- Equity 32

Summary Judgment
- Intertwined Counterclaim 37

Super Lawyers 18

Trial by Jury
- Inviolate 31

Trial de Novo Request 20

Vacha, Jason E. 18, 27

Veterinary
- Malpractice 34
  - Elements 34

Win/Loss Record 31

Wrongful Death 31

2012 WASHINGTON SUPER LAWYERS, RISING STAR, AND SEATTLE BEST LAWYERS

Reed McClure is proud to announce that Bill Hickman, Jack Rankin, Pam Okano, and Marilee Erickson were again named to Thomson Reuters' 2012 Washington Super Lawyers list and that Jason Vacha was named to Thomson Reuters' 2012 Rising Stars list. Pam Okano was also named to the 2012 Thomson Reuters' Top 50 Women Lawyers list.

Seattle Business recently announced in a special supplement to the Seattle Times and the Wall Street Journal that Bill Hickman was named to the 2012 Seattle "Best Lawyers" list for Appellate Practice.

A HORSE IS A HORSE; OF COURSE, OF COURSE

FACTS:

It was a dark and stormy night near Chimacum. The wind blew. A tree blew over. It broke the pen where Phil kept Vega (a horse).

Presented with this opportunity, Vega decided to start a new life elsewhere. Unfortunately for Vega, the road to freedom was currently occupied by a one-ton telephone company utility bucket truck driven by John. Vega lost the encounter. Oddly, the telephone company truck did not have a cell phone, a working radio, or a working flashlight. John left the scene of the accident to get help, not believing that Vega had gone to the big green pasture in the sky.

Moments after John left the scene, Nanette drove up and violently encountered Vega's dead body. She felt sore for a few days. Then it got worse. She saw pain specialists, rehabilitation experts, and physical therapists.

Nanette sued Phil, John, and the telephone company. During the jury trial, the court gave Instruction 18 which was based on portions of Washington's hit-and-run statute RCW 46.52.020. John made a general objection to the instruction arguing that the statute did not apply. The jury found that John was 100% at fault, and that Nanette had sustained damages of $2,714,102.

On appeal, John "persuasively" argued that the hit-and-run statute did not apply because it imposes no duty to stop and stay to <u>prevent further accidents</u>. The court agreed that it was error to give the hit-and-run instruction. But, unfortunately, John's trial attorney did not make that critical point; he simply argued that the statute did not apply. The court then added that the error, in any event, was "harmless" because of the "overwhelming evidence" of John's "wrongdoing."

One judge dissented. She said the objection to Instruction 18 was just fine. And the error in giving an incorrect and misleading instruction was certainly not harmless.

HOLDINGS:

1. The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.

2. A party who fails to apprise the trial court of the specific points of law or the claimed defect in the instruction fails to preserve the issue for appeal.

3. We will reverse for instructional error only if the party claiming error can show prejudice. An error is prejudicial if it presumably affects the outcome of

a trial. When considering an erroneous jury instruction, we presume prejudice subject to a comprehensive record review.

COMMENT:

Hard to imagine what else counsel could have said. The majority's insistence on an elaborate legal analysis, particularly as to an instruction which was given, seemed like a return to a form of practice that existed over 50 years ago. We do note RAP 1.2(c) which provides that "to serve the ends of justice", the appellate court may waive a rule. CR 1 says that the Civil Rules are to be construed to secure the just determination of every case.

Aurdal v. Burnston, 2012 WL 2018198 (Wash. App. June 5, 2012)

AGGRIEVED APPEAL

Reed McClure attorneys Marilee Erickson and Pam Okano convinced Division I of the Washington Court of Appeals to reverse the striking of a trial de novo request and an attorney fee/cost award. The court, in a published opinion, held that a trial de novo request signed only by the aggrieved party's attorney was effective.

Russell v. Maas, 166 Wn. App. 885, 272 P.3d 273 (2012)

THAT ROTTEN FALLING DOWN FEELING

FACTS:

Max bought a house in 1987. In 1995-96, he had an extensive remodel performed. He installed several decks. Six supports known as "fin walls" ran from a concrete pad up through the decks. The "fin walls" were encased in a foam and stucco coating. In 2007, contractors suggested that Max install vents in the fin walls to permit the supports to dry out. In March 2008 when the vents were installed, workers discovered that the fin walls were in an advanced state of decay.

An investigation revealed that the fin walls had inadequate flashing and other construction defects that caused the supports to rot. The decks were in a state of imminent collapse due to impairment of the structural integrity.

Max paid $282,000 to fix the fin walls. His insurance company denied coverage due to exclusions for construction defects and rot damage. There was no collapse exclusion. Max sued. The trial court ruled for the insurance company. Max appealed. The Court of Appeals reversed, concluding that the decks had collapsed and that collapse was not an excluded loss due to the ensuing loss provisions of the policy.

The Supreme Court granted discretionary review and reversed the Court of Appeals. It concluded that the advanced decay of the fin walls was not a separate ensuing loss that would have been covered. Justice Alexander concurred in the result but added the commonsense view that it was clear that Max's "deck did not collapse."

HOLDINGS:

1. Interpretation of the language of an insurance policy presents an issue of law that is reviewed de novo. Insurance contracts are construed in accordance with the meaning understood by the typical purchaser of the insurance.

2. The policy at issue here is an "all risk" policy that provides coverage for all losses except those that had been excluded.

3. The purpose of an ensuing loss provision is to limit the scope of an exclusion from coverage; losses caused by the excluded peril will be covered unless they are subject to their own specific exclusions.

4. Stated simply, "rot" describes the *process* of deterioration.

5. A "collapse," whether consisting of a loss of structural integrity or a plunge to the earth, is the end result of the deterioration that constitutes "rot." It is not a new and different peril.

6. There is no coverage here for the fin walls because of the policy exclusions for rot and defective workmanship. If there had been losses other than to the fin walls, coverage would have existed under the ensuing loss provisions of the policy. The only loss was to the deck system itself. That loss resulted from rot caused by construction defects.

COMMENT:

I do believe that this is the first case since 2005 where a majority of the Washington Supreme Court has ruled 100% in favor of an insurance company. The vote was 5-4.

This opinion must not be read in isolation. On the same day that Max's case was filed (i.e., May 17, 2012), the court filed its opinion in *Vision One, L.L.C. v. Philadelphia Indem. Ins. Co.*, 174 W.2d 501 (2012). Here, the court did find coverage for collapse under the ensuing loss provision. The opinion is a must read for anyone doing coverage work in Washington. The 25-page opinion discusses a myriad of topics: All-Risk Insurance Coverage; Named Perils Coverage; Ensuing Loss; Causation; and Efficient Proximate Cause Rule.

Sprague v. SAFECO Ins. Co., 174 Wn.2d, 524, 276 P.3d 1270 (2012)

CAROLINE S. KETCHLEY

PRACTICE

Ms. Ketchley's practice focuses on insurance defense litigation including motor vehicle accidents, products liability, premises liability, sexual abuse claims, wrongful death and survivorship claims, and jobsite injuries.

EDUCATION

Chapman University School of Law, J.D. 2008

University of Massachusetts - Amherst, National Student Exchange 2001-02

Western Washington University, B.A. 2003

BACKGROUND

Ms. Ketchley is a native of the Pacific Northwest. She is admitted to practice in the State of Washington and the U.S. District Court for the Western District of Washington. She is a member of the Defense Research Institute, Washington Defense Trial Lawyers, the Washington State Bar Association and the Young Lawyers Division.

'ROUND MIDNIGHT (PART ONE)

FACTS:

Joey was out driving, 'round midnight. Joey was 17. Joey had been drinking. Joey had a 20-gauge shotgun in the truck. It was his dad's truck. Joey got the truck stuck in a citizen's driveway. The citizen came out to investigate. He realized that Joey had been drinking and pulled the keys out of the ignition. One thing then led to another. Joey pulled the shotgun out of his father's truck and, holding it by the barrel, used it to bash in the citizen's face.

Citizen incurred $40,000 in medical bills. Joey pleaded guilty to second degree assault and served nine months.

After the citizen learned that Joey's parents had purchased the shotgun for Joey as a gift and allowed him to keep it in dad's truck, he sued mom and dad. Citizen asserted claims of negligent supervision, negligent furnishing of a firearm to Joey, general negligence, and for RCW 4.24.190 parental strict liability (which has a $5,000 cap on liability).

The parents moved for summary judgment pointing out, among other things, that Joey had taken a firearms safety course, he had a hunting license, he never did it before, he was almost a straight-A student, he had high test scores on college entrance exams.

In response, the citizen pointed out that, among other things, Joey had been drinking that night, Joey had been disciplined a year earlier for underage drinking, and Joey had been disciplined at school.

The trial judge said there was no evidence that Joey's assault of the citizen was foreseeable, and dismissed his lawsuit. The Court of Appeals affirmed.

HOLDINGS:

1. The elements of a negligence action are duty, breach, proximate cause, and damage or injury. Duty is the duty to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is the failure to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is also called negligence.

2. At common law a private person does not have a duty to protect others from the criminal acts of third parties.

3. Citizen did not present evidence creating a genuine issue of material fact that the parents failed to exercise ordinary care.

4. In order to establish a claim of negligent supervision against parents for the acts of a minor child, the plaintiff must establish that (1) the child has a dangerous proclivity, (2) the parents know of the child's dangerous proclivity, and (3) the parents fail to exercise reasonable care in controlling that proclivity.

5. Notwithstanding Joey's illegal drinking, and other conduct, there was insufficient evidence to support citizen's claim of negligent supervision.

6. Washington has adopted *Restatement (Second) of Torts* §390, which provides that "[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm … is subject to liability for physical harm resulting therefrom."

7. There was no evidence presented from which a reasonable jury could find that in providing a shotgun, for hunting, to this safety-trained, licensed, apparently-law-abiding, historically reasonable 17-year-old—a young man old enough to enlist in the armed forces—the parents knew or had reason to know that it was likely he would use it in a manner involving an unreasonable risk of physical harm.

COMMENT:

I wonder would it make any difference if instead of giving Joey a shotgun his father had given him a tire iron? The court in pumping up this kid's character seems to completely set aside the fact that he had been illegally drinking and driving. The opinion bears a striking resemblance to the argument the defense attorney would have made to the jury, if there had been a trial.

Schwartz v. Elerding, 166 Wn. App., 608, 270 P.3d 630 (2012), *rev. denied*, ___ Wn.2d ___ (July 10, 2012)

SPEAKING [OF] OBJECTIONS

FACTS:

Ron had surgery for a tumor performed by Dr. Deck. The abdominal aorta was lacerated during the procedure. Eventually, Ron ended up with pain in his leg that interfered with his ability to engage in his usual activities.

Ron sued Dr. Deck.

After several false starts, the case came on for trial. The judge had some very strong ideas as to how counsel was to try their case in his courtroom. He wanted "a high level of formality and decorum." He did not want any "speaking objections." If you want to object say "objection", and cite the rule number. In addition, nothing was to be shown to the jury or witness unless it had been shown to opposing counsel. And counsel must ask permission before showing anything to the jury.

It appears that defense counsel had some difficulty with these rules. Counsel continued to make speaking objections, repeatedly attempted to put non-admitted exhibits before the jury, and to elicit testimony regarding matters the court had ruled inadmissible.

Eventually, the case was submitted to the jury and it returned a defense verdict for Dr. Deck. The trial judge granted a new trial in part because defense counsel's misconduct throughout the trial prevented a fair trial.

Dr. Deck appealed the new trial order. The Court of Appeals reversed. Ron petitioned the Supreme Court for review. The Supreme Court reversed the Court of Appeals and reinstated the order for a new trial.

HOLDINGS:

1. The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury. Persistently asking knowingly objectionable questions is misconduct.

2. Repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important.

3. Misconduct that continues after warnings can give rise to a conclusive implication of prejudice.

4. Defense counsel repeatedly violated the evidence rules.

5. Speaking objections can be another method of exposing the jury to inadmissible evidence and inappropriate argument.

COMMENT:

This case was tried in King County Superior Court. Federal district court has always had a high degree of formality, whereas the superior court was the place for a more rough and tumble effort to obtain truth and justice. Speaking objections were the bread and butter of experienced trial counsel. It was the standard method of conveying a message to the jury or to the witness.

Teter v. Deck, 174 Wn.2d 207, 274 P.3d 336 (2012)

JERRY'S 2005 CHEVY

Reed McClure attorneys Jason Vacha and Marilee Erickson persuaded Division I of the Washington Court of Appeals to affirm dismissal of the policyholder's claims alleging bad faith and unfair or deceptive acts. The court, in a published opinion, held that Allstate did not breach any duty owed to the insured, and that the insured's other theories of inadequate payments for his property damage claim were unfounded.

Lloyd v. Allstate Ins. Co., 167 Wn. App. 490, 275 P.3d 323 (2012)

'ROUND MIDNIGHT (PART TWO)

FACTS:

Duane was out walking, 'round midnight. It being February in Spokane, there was snow on the sidewalk. Duane was having a hard time maintaining his balance on the snow piles. Deputy Mark observed Duane stumbling along. He had a chat with Duane and observed that he was obviously intoxicated. Mark told Duane not to walk in the street or at least walk facing traffic. Duane started walking through a parking lot. The deputy left.

About 90 minutes later, a drunk driver hit Duane about 100 yards from where he had spoken to the deputy. 17 months later, Duane died of his injuries. His estate sued Spokane County alleging that Deputy Mark acted negligently

by not protecting Duane despite having actual knowledge that Duane was incapacitated and in danger of serious physical harm. The trial court granted the County's motion and dismissed the complaint based on the public duty doctrine, concluding that none of the four exceptions to the public duty doctrine applied.

The estate appealed, arguing that all four exceptions did apply. The Court of Appeals affirmed the dismissal, finding that the County did not owe an individual duty to Duane.

HOLDINGS:

1. As a result of the 1967 enactment of RCW 4.96.010, which did away with Washington's shield of absolute sovereign immunity, local governments may be liable for damages arising out of their tortious conduct or the tortious conduct of its employees. The public duty doctrine provides a framework to determine when a governmental entity owes a duty to a plaintiff alleging negligence.

2. Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).

3. There are four exceptions to the public duty doctrine: (1) failure to enforce; (2) legislative intent; (3) special relationship; and (4) rescue doctrine.

4. Failure to enforce applies where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take correct action despite a statutory duty to do so, and the plaintiff is within the class the statute intends to protect. The statute must create a mandatory duty to take specific action to correct a violation.

5. Because Duane does not fit the definition of incapacitated or gravely disabled by alcohol, Deputy Mark did not have knowledge of a statutory violation and did not have a duty to act under RCW 70.96A.120(2). The failure to enforce exception does not apply.

6. The legislative intent exception applies when the terms of a regulatory statute demonstrate a clear legislative intent to identify and protect a particular class of persons.

7. In considering the plain language of chapter 70.96A RCW, the chapter does not reference a clear legislative intent to protect a particular group of persons. Instead, the statute's purpose is to protect the health of all of the citizens of the state of Washington.

8. The special relationship exception applies when (1) there is a direct contact or privity between the public official and the injured plaintiff, which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) give rise to justifiable reliance on the part of the plaintiff.

9. The instruction to walk facing traffic was not an assurance of safety but, at most, a recitation of traffic laws as a way to lessen the potential for harm.

10. The rescue doctrine exception creates a duty when a governmental agent undertakes a duty to aid or warn a person in danger, the government agent fails to exercise reasonable care, and the person to whom the aid is rendered relies on the offer to render aid.

11. The record does not support the conclusion that Deputy Mark gratuitously undertook a duty to aid or warn Duane.

COMMENT:

Excellent analysis of a topic which is ofttimes greatly misunderstood. The opinion also contains (albeit subliminally) a recognition that the judiciary does have a continuing duty to protect the public purse.

Weaver v. Spokane County, ___ Wn. App. ___, 275 P.3d 1184 (2012)

WILLIAM H.P. FULD

PRACTICE

Mr. Fuld's practice focuses on insurance defense litigation including motor vehicle accidents, products liabilty, premises liablity, wrongful death and construction defect litigation.

EDUCATION

University of Washington School of Law, JD 2008

Whitman College, BA 2003

BACKGROUND

Before joining Reed McClure Mr. Fuld spent three years as staff counsel for the Liberty Mutual Group where he tried cases to defense verdicts in King, Pierce and Kitsap counties. Prior to Liberty Mutual, Mr. Fuld was an associate at Dorsey and Whitney LLP. Mr. Fuld also spent time working for Judge Ken Kato (ret) of the Washington State Court of Appeals and externing at the King County Prosecuting Attorney's office.

Mr. Fuld is admitted to practice in Washington and the U.S. District Courts for the Western and Eastern Districts of Washington. He is a member of the Washington Defense Trial Lawyers, King County Bar association and is also a board member of Lawyers Helping Hungry Children.

LOOKING BACK UP THE ROAD

In the last 10 years, property/casualty insurers have prevailed in the Washington Supreme Court about 12% of the time. Contrast that with the prior 10 years, where property/casualty insurers prevailed in the Washington Supreme Court about 32% of the time. The last time a property/casualty insurer won a case outright in the Washington Supreme Court was 2005.

One does wonder (speculate) as to what could have caused such a dramatic reorientation. It is safe to say that insurers have never felt welcome in the Temple of Justice, but dropping from winning one in three cases to losing almost 9 out 10 is, on its face, inexplicable.

WRONGFUL DEATH GRIEF

FACTS:

Felicia was killed when her vehicle collided with a truck driven by Jacob. Felicia was 78 and survived by two adult children. The estate sued for wrongful death. Liability was admitted. The only question was damages. The estate's attorney asked for $2.5M per child. The defense attorney said $50,000 to $100,000 per child would be fine. The jury said $75,000 per child.

Post-trial, the estate learned that one juror during deliberation had said that the families of soldiers who die in Afghanistan get $100,000 and that no one should get more. The trial judge found that this was improper extrinsic evidence. But it was not prejudicial. The estate appealed.

The Court of Appeals reversed. While it held that the Wrongful Death Statute, RCW 4.20.020, did not allow recovery for grief, and the award did not indicate passion or prejudice, the appeal to patriotism was so prejudicial that the estate would get a second bite at the apple of damages.

HOLDINGS:

1. Causes of action for wrongful death are provided for statutorily, rather than in the common law.

2. Over a century ago, the Washington State Supreme Court expressly construed the wrongful death statute (RCW 4.20.020) as not allowing for recovery for grief.

3. Juries have considerable latitude in assessing damages. A damage award will not be lightly overturned. An award for loss of love, care, companionship, and guidance is extremely subjective and difficult to calculate with any certainty.

4. It is misconduct for a juror to introduce extrinsic evidence into deliberations.

5. Any doubt that the misconduct affected the verdict must be resolved against the verdict. Extrinsic evidence is information that is outside all the evidence admitted at trial, either orally or by document.

6. "[A] new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." Any doubt must be resolved against the verdict. Appeals to patriotism are prejudicial and forbidden.

COMMENT:

We do recall that in Washington the right to trial by jury shall remain inviolate. Nothing in there about having jury trials until you get a result you like. This is particularly true in the fixing of personal injury damages. When the legislature in the tort reform law sought to put a cap on noneconomic damages, the court was quick to declare that unconstitutional.

Garcia v. Strong Trucking Co., 2012 WL 2877652 (Wash. App. July 16, 2012)

LIMITING FIRE SUBRO

FACTS:

Corrine rented an apartment in Regal Ridge. Her husband Chris had recently been released from prison and was living in a halfway house. The owner of the 10-unit apartment house had purchased a fire policy with Trinity.

One day in May, Chris visited the apartment. Corrine was at work; the children were at school. Chris had a cigarette out on the balcony. He dropped his butt into a plastic pail. It caught on fire and set the apartment house on fire.

Damage to Corrine's unit was about $50,000. Damage to the complex was over $800,000.00.

Trinity paid the bill.

Trinity sued Chris and Corrine claiming a right to equitable subrogation to recover the amount paid for the loss. Corrine moved for dismissal arguing that she should be considered an additional insured under Trinity's fire policy. Chris argued that while he was not a tenant, he was married to a tenant. The trial court agreed and dismissed.

On appeal, the court noted that the rule in Washington, and the trend nationwide, is that the tenant is a coinsured with the landlord under the landlord's fire policy, absent a specific provision in the lease to the contrary. It affirmed dismissal of Trinity's equitable subrogation claim.

HOLDINGS:

1. The right to subrogation is grounded in equity rather than strict legal criteria. Indeed, it represents "'moralistic basis of tort law as it has developed in our system.'"

2. The equitable doctrine of subrogation seeks to impose responsibility for a loss on a party who "in equity and good conscience, [should] bear it.

3. The *Sutton* line of cases requires the court to presume that the tenant is a coinsured with the landlord absent an express agreement to the contrary. Under this rule, there is no right to subrogation over and against the negligent tenant.

4. Here, there is no agreement express or implied that Corrine would not be covered by the landlord's insurance policy. The presumption, then, under the *Sutton* line of cases, is that she is covered by that policy and is not subject to the insurer's subrogation claim. Trinity, then, has no right to seek subrogation from its coinsured Corrine.

COMMENT:

So far so good. The opinion presents a useful and balanced review and analysis of the question of a tenant being a coinsured.

However, when it gets to Chris, the court goes off the rails. Remember it was Chris whose incredible thoughtlessness not only caused $800,000 in damages, but who exposed all the folks living in the complex to potentially catastrophic personal injury and death. While the court found case law from all over the country dealing with the tenant, apparently it could not find a

single case where a court extended insulation from equitable subrogation to a non-resident, non-tenant, non-guest, spouse.

The *Sutton* case is from Oklahoma: *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Civ. App. 1975).

Trinity Universal Ins. Co. v. Cook, ___ Wn. App. ___, 276 P.3d 372 (2012)

PUT DOWN THAT HORSE

FACTS:

Mary called Dr. Tony to come out and check one of her horses. He checked her out and ultimately recommended that she be put down. (The horse, not Mary.) She (Mary, not the horse) wanted a second opinion. They called Dr. Michelle. She agreed with Dr. Tony. The doctors left drugs with Mary and an hour later she put the horse down.

Mary sued the doctors for malpractice. The doctors moved for summary judgment. Mary asked for a continuance, so she could depose the doctors. The superior court judge concluded that no useful information would be gained from taking depositions, and dismissed the case.

The Court of Appeals affirmed, pointing out that Mary did not show what additional discovery would show, and that Mary failed to show that any loss was proximately caused by the vets.

HOLDINGS:

1. Doctors of Veterinary Medical are professionals who, like other professionals, must be properly schooled, pass an examination, and then be licensed.

2. Veterinary science is a profession, the practice of which includes prescribing or administering drugs and treatments. It also includes performing operations and manipulating or applying apparatuses or appliances to cure, lessen, or correct animal disease or injury.

3. Veterinarians practice a profession that requires extensive scientific training, clinical experience, and a license from the state before they can

practice. Their opinions and the opinions at issue here are then expert opinions and necessarily only subject to criticism by other veterinarians.

4. To make out a prima facie case, the plaintiff must show the standard of care, a breach of that standard of care, and damages that proximately resulted from that breach. Summary dismissal is required absent a showing of any of these requirements. This requires expert opinions.

5. Here there is no showing of any breach of the standard of care that contributed to the loss of this animal.

COMMENT:

Not too surprising that a claim against a vet would be treated the same as a claim against another professional.

Baechler v. Beaunaux, 167 Wn. App. 128, 272 P.3d 277 (2012)

IT'S THE LAW OF THE CASE

FACTS:

Paul and Baerbel had a relationship. It left a bit to be desired. She had the police serve Paul with an order restraining him from contacting her. Less than four hours later, the police were back and found that Paul had stabbed Baerbel 18 times.

The estate sued the City for wrongful death. The City denied liability citing the public duty doctrine. The jury was told that the City had a duty to exercise ordinary care in the service and enforcement of protection orders (Instruction 12). The jury returned a $1.1 million verdict for the estate. The Court of Appeals, in a published 32-page opinion, affirmed the judgment on the jury verdict.

HOLDINGS:

1. The City's failure to make a CR 50(b) motion at the end of the trial prohibits appellate review of the City's CR 50(a) motion made at the end of plaintiff's case-in-chief.

2. The City's failure to object to the substance of Instruction 12 and its failure to assign error to the instruction makes the instruction the "Law of the Case."

3. Under the "Law of the Case", instructions not objected to are treated as the properly applicable law whether correct or not.

4. There was sufficient evidence for the jury to find that the City had breached the duty set out in Instruction 12.

COMMENT:

The opinion is very detailed factually, procedurally, and legally. The reader will probably learn more about protection orders than they want to know.

The opinion is a must read for anyone doing jury trial work. Its application of the "Law of the Case" doctrine points up with stunning clarity the necessity of making an objection which apprises the trial court of the specific points of law or the claimed defect in the instruction. Without that, the error will not be preserved for appeal.

The court's embrace of the federal rubric concerning the requirement of a CR 50(b) motion in order to have the CR 50(a) motion reviewed is a surprise. In response to the City pointing out that it was not fair to introduce the new rule, "because it has never been applied in Washington", the court said counsel should have read a 2006 U.S. Supreme Court opinion which dealt with <u>Federal</u> civil procedure. The court seemed to have lost sight of the fact that the rules of federal civil procedure are similar <u>but not identical</u> to the Washington rules of civil procedure. They also overlooked RAP 1.2(c) and CR 1.

CAUTION: After we had finalized this issue, the Court of Appeals issued an order withdrawing the opinion filed in March 2012, and substituting a new opinion. In our next issue, we will examine whether the new opinion has made any substantive change.

Washburn v. City of Federal Way, 167 Wn. App. 402, 273 P.3d 462 (Mar. 26, 2012), 2012 WL 2989192 (July 23, 2012)

A PERFECTLY DREADFUL CASE

FACTS:

Amy, an adult, sued Kevin, a minor, for the torts of outrage, negligent infliction of emotional distress, defamation, assault, and battery. Amy alleged that during a 4-1/2 year period Kevin sexually and physically assaulted her.

Kevin counterclaimed for childhood sexual abuse, and moved for partial summary judgment. The trial court granted Kevin's motion, finding Amy strictly liable on Kevin's childhood sexual abuse claims.

Amy petitioned for discretionary review. The commissioner denied it. Amy filed a motion to modify. The appellate court granted the motion on the sole issue of whether Amy was liable for child sexual abuse against Kevin as a matter of law.

The Court of Appeals reversed. It noted that the claims of Kevin and Amy were inextricably intertwined. Both parties' theories of the case cannot be true. Therefore, partial summary judgment on Kevin's claim of childhood sexual abuse was inappropriate. The court also pointed out that a separate cause of action for childhood sexual abuse did not appear to exist in Washington.

HOLDINGS:

1. These counterclaims are heavily intertwined and many genuine issues of material fact remain.

2. When a counterclaim raises issues that are inextricably interwoven or intertwined with those raised in the complaint, partial summary judgment is not appropriate.

3. Granting partial summary judgment in favor of Kevin's childhood sexual abuse claim all but eliminates Amy's intertwined counterclaim that Kevin was the sole perpetrator of sexual misconduct.

4. The parties assume, without analysis, that there exists in Washington a separate civil cause of action for childhood sexual abuse. We disagree.

COMMENT:

Certainly one of the more disgusting factual patterns we have seen. In order to demonstrate the extent of the factual conflict, the court was forced to lay out the details of a horrific 4-year sexual relationship.

Schorno v. Kannada., 167 Wn. App. 895, 276 P.3d 319 (2012)

QUICKLY, QUICKLY, QUICKLY

Division One ruled that where an insurance policy explicitly provides coverage for the personal liability of a corporate officer incurred for acts performed in his official capacity as such, the policy does not insure against losses incurred where the officer acts in his personal capacity. Moreover, a guaranty executed by a corporate officer that secures the indebtedness of the corporation is not executed in the officer's official capacity.

Sauter v. Houston Casualty Co., ___ Wn. App. ___, 276 P.3d 358 (2012).

In a published opinion, Division One wrote that a covered loss is valued as of the time of the loss, not the time the repairs are made. The question arose because the building code which mandated the repairs was repealed before the repairs were undertaken.

No Boundaries, Ltd. v. Pacific Indemnity Co., 160 Wn. App. 951, 249 P.3d 689 (2011).

Article I, §10 of the Washington State Constitution requires that "justice in all cases shall be administered openly." This mandate guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases. Even when no party opposes a closure request, the trial court has an independent obligation to safeguard the open administration of justice. In short, redacting or sealing a court record is proper only in the most unusual and compelling circumstances.

Hundtofte v. Encarnacion, 2012 WL 2877525 (Wash. App. July 16, 2012)

Audrey and her first husband had 3 children. They divorced in 1964. Later that year, Audrey married Carl. He had 4 children from a previous marriage. They raised all 7 children together. Carl died in 1994. Audrey remarried in 2002. That husband died in 2005. Audrey died in a 2007 car accident. One of Audrey's children filed a wrongful death action.

Carl's children sought to participate as statutory beneficiaries. The estate opposed, arguing that Carl's children were not Audrey's "stepchildren" under RCW 4.20.020 and thus not entitled to recover under the wrongful death statute.

The court framed the question: Are the children of a decedent's predeceased spouse considered "stepchildren" under RCW 4.20.020 entitling them to a share of the wrongful death action? It then took 12 pages to answer "yes."

The opinion reads like a fact pattern out of a law school exam. No matter how many times I read the opinion, the fact remains Carl's children were not Audrey's stepchildren after Carl died and Audrey married her third husband. The effect of the ruling is to reduce Audrey's children's share from 1/3 to 1/7 of the recovery.

The Germans have a phrase "the laughing heir" (*der lachende erbe*): it means a person who is too distant a relative to grieve and overcome the joy of inheriting.

In re Estate of Blessing, 174 Wn.2d 228, 273 P.3d 975 (2012).

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 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 remodeled website at www.rmlaw.com

E-MAIL NOTIFICATION

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).

REED MCCLURE ATTORNEYS

EARLE Q. Bravo	ebravo@rmlaw.com	206/386-7165
MICHAEL N. Budelsky	**mbudelsky@rmlaw.com**	**206/386-7008**
MARILEE C. Erickson	merickson@rmlaw.com	206/386-7047
DANIELLE M. Evans	**devans@rmlaw.com**	**206/386-7185**
WILLIAM H.P. Fuld	wfuld@rmlaw.com	206/386-7097
WILLIAM R. Hickman	**whickman@rmlaw.com**	**206/386-7011**
CAROLINE S. Ketchley	cketchley@rmlaw.com	206/386-7124
CHRISTOPHER J. Nye	**cnye@rmlaw.com**	**206/386-7022**
PAMELA A. Okano	pokano@rmlaw.com	206/386-7002
JOHN W. Rankin, Jr	**jrankin@rmlaw.com**	**206/386-7029**
MICHAEL S. Rogers	mrogers@rmlaw.com	206/386-7053
JASON E. Vacha	**jvacha@rmlaw.com**	**206/386-7017**

WHERE TO FIND US:

REED McCLURE
TWO UNION SQUARE
601 Union Street, Suite 1500
Seattle, WA 98101-1363

OUR TELEPHONE NUMBERS:

main: 206.292.4900
fax: 206.223.0152

www.rmlaw.com