WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com/newsletter.html ... and Pam Okano's periodic Coverage Column is available at www.wdtl.org/ (see Coverage Uncovered).

LIFE IS NOT RISK-FREE

FACTS:

The plaintiffs' son, Tyler, was injured while using a baby walker. He had been placed in the walker and in less than five minutes, he had moved the walker such that he was able to grab the cord of an electric teapot and pull the teapot over on himself.

Tyler's parents sued Graco, the manufacturer of the walker setting out several claims for relief:

1. Product was defectively designed;
2. Failure to provide adequate warnings.

The trial court dismissed on summary judgment. The Court of Appeals affirmed.

HOLDINGS:

1. Under the Product Liability Act, to establish a design defect claim a plaintiff must show (A) a product, (B) was not reasonably safe as designed, and (C) caused harm to the plaintiff. Two alternative tests may be used to establish that a product was not reasonably safe as designed. The risk-utility test and the consumer expectation test.

2. Under the risk-utility test, liability can be established by showing that, at the time of manufacture, the likelihood the product would cause the plaintiff's harm or similar harms, and the seriousness of those harms, outweighed the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative would have on the product's usefulness.

3. This walker was designed to give a baby mobility, the very feature that makes the product dangerous. The only alternative designs would allow the baby to stand, but not allow the baby to move. That design would result in a completely different product. No feasible alternative design would have prevented the harm here. The risk-utility test is inapplicable.

4. Under the consumer expectation standard, the plaintiff must show the product was more dangerous than the ordinary consumer would expect. Under this test, a manufacturer may not be held liable merely because a product causes harm; rather it must be shown that the product causing the harm was not reasonably safe.

5. The average consumer knows that babies will be able to move in a walker. Mobility was a danger obvious to the ordinary consumer. The plaintiffs cannot establish a design defect under the consumer expectation test.

6. The plaintiffs' contention that the warnings were inadequate because they failed to warn of

every possible injury is legally insufficient. The warnings warned of the risks asserted with mobility. Nothing more was required.

COMMENT:

The opinion is a textbook guide to the most common claims made in a product lawsuit. This opinion gives to the trial court judge the short, plain-English answers to the most common situations presented in a products case.

At the very outset, the opinion recognizes and handles the fact that life is not and never will be "risk free". The opinion sets out that this product, a baby walker, was designed to give a baby mobility. And, it is that very feature that makes the product dangerous. Is there an alternative? Not really. Any product which does not have the inherent characteristic of "mobility" is a different product.

This opinion drives home the fact that under Washington products law, a claimant must do much more than show that a particular product had characteristics that made it dangerous. In a similar way, the court holds that there cannot be a products claim where mobility—the whole point of the product—was the "danger obvious to the ordinary consumer." The Court of Appeals opinion provides the clearest statement of these principles to date.

When the design defect claim fails, the claimant then asserts that the warnings, about the obvious danger, "were inadequate because they failed to warn of every possible injury". This opinion tells the trial court judge that this contention is irrelevant under Washington law.

Thongchoom v. Graco Children's Products, Inc., ___ Wn. App. ___ , 71 P.3d 214 (2003), ordered published Jun. 17, 2003.

WATCH OUT FOR THAT BLOCK!

FACTS:

Jason was a passenger in a pickup driven by Nichole. She operated the vehicle in such a manner that it slid across the center line and collided head-on with a tractor trailer rig. Nichole and Jason were ejected from the pickup. As they lay on the road, the cement blocks which had been on the trailer fell on them.

Jason sued Nichole and the truck company. The truck company moved for summary judgment arguing that it did not have a duty to "accident proof" its truck in anticipation of some other peoples' negligence. The trial court agreed and dismissed.

The Court of Appeals reversed, holding that the truck company had a duty to Jason to secure its load so that it would not detach during a collision.

HOLDINGS:

(1) To establish a negligence cause of action, a plaintiff must prove (1) duty, (2) breach of that duty, stet (3) injury (4) proximately caused by the breach.

(2) The element of proximate cause in a negligence action is divided into two elements: cause in fact and legal causation. A cause in fact is a cause but for which the injury would not have occurred. Legal causation is concerned with how far a defendant's liability should extend based on policy grounds.

(3) Analysis of the legal causation element of a negligence cause of action requires a determination of whether, as a matter of policy, the connection between the ultimate injury and the act of the defendant is too remote or insubstantial to impose a duty on the defendant to protect the plaintiff from the harm that actually occurred.

(4) A duty can arise from a legislatively created standard of conduct or from a judicially imposed standard.

(5) The violation of a statutory duty is evidence of negligence if the statute's purpose is to (1) protect a class of people that includes the person whose interest was invaded, (2) protect the particular interest invaded, (3) protect that interest against the kind of harm that resulted, and (4) protect that interest against the particular hazard that caused the harm.

(6) A person may be liable for another's injuries due to negligence even if the negligence was not the direct cause of the event but merely added to or enhanced the injuries resulting from the event.

(7) RCW 46.61.655, which imposes a duty to secure a load upon a motor vehicle so that it does not create a hazard to other users of the public highway, creates a legally enforceable, societally recognized duty to secure a load so that it will not detach in the event of a foreseeable occurrence such as a collision.

COMMENT:

This is absurd. The cause of Jason's injuries was Nichole's crappy driving and Jason's failure to use his seat belt.

Skeie v. Mercer Trucking Co., 115 Wn. App. 144, 61 P.3d 1207 (2003).

JURIES DECIDE CREDIBILITY

FACTS:

Kelle was driving eastbound. She stopped at an intersection preparatory to making a left turn. A pickup truck was opposite her signaling to turn left also. She began to make her left turn when M'Liss, going westbound, smashed into her.

M'Liss sued Kelle. The jury found for Kelle. The trial court entered a judgment for Kelle.

The Court of Appeals reversed, concluding that Kelle was negligent as a matter of law because she had a statutory duty to yield to oncoming traffic and a common law duty to see M'Liss's car.

The Supreme Court reversed, saying that the Court of Appeals had substituted its judgment for that of the jury.

HOLDINGS:

(1) It was for the jury to decide whether Kelle failed to yield.

(2) Whether a reasonable person would have seen M'Liss was a credibility determination.

(3) Juries decide credibility, not appellate courts.

COMMENT:

A most unusual opinion. It is a very, very short unsigned "per curiam" decision.

Morse v. Antinellis, ___ Wn.2d ___, 70 P.3d 125 (2003).

NO RESIDENT COVERAGE

FACTS:

Dan separated from his wife and was looking for a place to live. David agreed to let him use an upstairs bedroom in exchange for $300/month and some household chores.
About four months later, Dan fell down the stairs which led to his bedroom. Dan sued David. David had a homeowner's policy with Farmers. It excluded coverage for bodily injury to any resident of the house except a resident employee. Farmers denied coverage pointing out that Dan was a resident and not a resident employee.

Dan and David cut a deal, stipulated to a $180,000 judgment, and David assigned all of his rights against Farmers to Dan. Dan sued Farmers for bad faith. The trial court dismissed the suit against Farmers.
Dan appealed and the Court of Appeals affirmed, holding that Dan was a resident and a tenant and was not an employee.

HOLDINGS:

(1) A term not defined must be given its plain, ordinary, and popular meaning.

(2) The term "resident" means one whose home is in a particular location; a person who lives in a place, as distinguished from a visitor or transient.

(3) One who lives in a rented house or rented room is ordinarily both a resident and a tenant.

(4) An "employee" is a person who works for another in exchange for financial compensation; a person employed by another usually in a position below the executive level and usually for wages.

(5) Dan did chores to pay his rent, not because David was paying him a salary.

(6) Dan was not an employee, he was a resident, and there is no coverage.

COMMENT:

A succinct, clear, step-by-step analysis of the plain meaning of the policy language.

Peters v. Farmers Ins. Co., 2003 Wn. App. LEXIS 356 (Wash. App. Mar. 4, 2003).

ADMITTED BUT NOT LIQUIDATED

FACTS:

After an auto accident, Melvin sued Paul. Paul was insured by SAFECO. In pretrial discovery, SAFECO admitted that certain medical expenses were reasonably necessary. After Melvin got a judgment in his favor, he asked for prejudgment interest on the amounts SAFECO admitted owing.

The trial court turned him down. He appealed. The Court of Appeals turned him down saying that the medical expenses were not liquidated until the jury was ordered to award them.

HOLDINGS:

(1) Prejudgment interest is awarded to compensate a party who has lost the use of money to which he or she was entitled. Such interest is awardable (1) when the amount claimed is liquidated, or (2) when the amount claimed is unliquidated but is determinable by computation with reference to a fixed standard in a contract.

(2) A claim is liquidated if data in the evidence makes it possible to compute the amount with exactness, without reliance on opinion or discretion.

(3) By their nature, medical expenses are not liquidated until the judge or jury determines that the expenses were reasonably and necessarily incurred.

(4) The only reason the medical expenses were established at trial and included in the directed verdict was because SAFECO admitted—pursuant to CR 36—that the expenses were reasonably necessary.

(5) Unliquidated claims are not rendered liquidated by the fact that the defendant stipulates to the damages or agrees to the reasonableness of a settlement.

(6) The party who responds to a request for admissions by admitting that certain medical expenses are reasonably necessary—and therefore need not be supported by expert testimony at trial—should not be penalized by prejudgment interest on those expenses.

(7) We hold that admissions made pursuant to CR 36 will not expose a party to prejudgment interest on a claim that is otherwise unliquidated.

COMMENT:

A rather insightful and balanced analysis of the question.

Lakes v. Vondermehden, ___ Wn. App. ___, 70 P.3d 154 (2003).

WHERE MICHELLE FELL

FACTS:

Michelle went to shop at Safeway. She slipped on some sugar and fell. She sued Safeway.

Safeway moved for summary judgment pointing out that Michelle in her deposition had said she did not know how the sugar got on the floor and she did not know if any Safeway employee knew of the spill. The trial court refused to grant summary judgment. The court of appeals granted discretionary review, and ordered the case dismissed.

HOLDINGS:

(1) Generally, a possessor of land is not liable to a business invitee for an unsafe condition caused by another, unless the possessor either knew or should have known of the unsafe condition.

(2) There is a narrow exception to this notice requirement, however, "when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." In such cases, the defendant is considered to be on constant notice that spills and hazards will occur in the normal course of business, and a plaintiff can therefore show negligence by demonstrating that the defendant failed to engage in periodic inspections with the frequency required by the foreseeability of the risk.

(3) A plaintiff who slips and falls in a grocery store cannot survive summary judgment by merely raising the inference that the substance causing her fall came from within the store; rather, the plaintiff must show that such spills were foreseeable in the specific area where she fell. The burden is upon the plaintiff to establish that his or her case falls within the exception.

(4) There must be some evidence indicating that the spill was inherently foreseeable in the area where the injury occurred.

(5) There was no evidence that spills were foreseeable in the area where Michelle fell.

COMMENT:

At one point in the development of supermarket slip-and-fall law, it appeared we were headed toward strict, if not absolute, liability. The courts have managed to keep these rules in balance. Also noteworthy in this opinion is that the court granted discretionary review of the denial of a motion for summary judgment.

Linehan v. Safeway Stores, 2003 Wn. App. LEXIS 253 (Wash. App. Feb. 18, 2003).

ALLOCATE THIS

FACTS:

For 13 years, Linda was held captive on a tiny sailboat with a cat and seven big dogs. Her captor was her husband, who was paid by the State to care for her.

After Linda was rescued, she sued the State. She alleged that the State had ignored signs that her husband was abusing her from 1984 through 1997. The State settled for $8.8 million.

The State had an insurance policy with Zurich. It was a claims-made policy with a $5 million SIR, and a retro date of July 1990. The State asked for a contribution.

The company responded pointing out that it believed that 50% of Linda's injuries occurred before July 1990, meaning that only $4.4 million would be covered, and because $4.4 million is less than $5 million, the company owed nothing. The company closed with an invitation to discuss the matter.

The State sued. The trial court granted the State summary judgment. On appeal, the company argued that there was no coverage because all injuries flowed from the appointment of the husband as caregiver in 1984, six years before the policy commenced. Alternatively, the company argued that if there was any coverage, then the court should allocate based on the number of wrongful acts occurring before and after the retro date. The Court of Appeals affirmed because the claim was filed during the policy period, and because the company did not come up with a rational basis for allocation.

HOLDINGS:

(1) In interpreting an insurance contract, our goal is to ascertain and give effect to the parties' intent. We therefore take the purpose of the contract into account and construe the policy as a whole in order to give force and effect to each clause. Any ambiguities must be construed in favor of the insured.

(2) This policy is a "claims-made" policy. Its coverage is triggered by the filing of a claim rather than the occurrence of the injury or property damage for which coverage is sought. Both the claim and the loss must occur within the policy period.

(3) Both the filing of Linda's claim and a portion of her loss took place within the policy period. The policy covered the loss.

(4) In a dispute between an insured who has sustained damages of a continuing nature, and the insurance carriers providing coverage, the burden of apportionment is on the carriers.

Once a policy is triggered, allocability is appropriate only if a rational allocation scheme can be devised by the court or the policy explicitly provides for pro rata allocation.

(5) A court must not add an allocation scheme that the policy does not include. To the extent that the policy is silent or ambiguous regarding allocation, it must be construed in favor of the insured.

COMMENT:

A rather straightforward application of well-known Washington rules.

State v. Zurich Specialties London Ltd., 2003 Wash. App. LEXIS 519 (Wash. App. Apr. 7, 2003).

SHE SAID; HE SAID

FACTS:

Tracy was stopped in midday traffic behind a truck driven by Tony. Tony put the truck in reverse. He started coming toward Tracy. Tracy honked her horn. Tony kept coming. He hit her with such force that she slingshot back and forth. Tony then turned right and left.

Tony said that he hit nobody. He was sitting at the light when he realized he needed to make a right turn, but he was in the left turn lane. So he looked in his mirrors and he looked over his shoulder, and he did not see any car. So he put it in reverse, backed up, put it in drive and made the right turn. Tony said there was no horns nor any sounds of collision.

Tracy, being of the view that the collision caused her extensive injuries, sued Tony. The jury found for Tony. Tracy appealed. The Court of Appeals affirmed.

COMMENT:

(1) The jury resolves conflicting testimony by making credibility determinations.

(2) The driver of a vehicle is not prohibited from backing up on a street, but must exercise ordinary care when doing so. The driver must look backwards upon commencing to back up and must continue to look backwards while backing up.

(3) In Washington, violation of a statute is not negligence per se, rather it is evidence of negligence.

(4) The mental processes by which individual jurors reached their respective conclu-

sions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

(5) A juror's failure to follow the court's instructions inheres in the verdict, and affidavits relating to such alleged misconduct may not be considered.

COMMENT:

A textbook example of a credibility conflict. The jury had to believe someone. They chose to believe Tony. All of Tracy's extensive injuries were caused by something else.

Rudge v. Universal Land Construction, 2003 Wash. App. LEXIS 698 (Wash. App. Apr. 28, 2003).

THE INSURANCE LINGERS ON

FACTS:

Carla and Shanna ran into each other at an auto accident. A few months later, Shanna filed for Chapter 7. She listed Carla as a creditor, referring to the accident. Shortly thereafter, the bankruptcy court discharged all of Shanna's debts.

Three years after the accident, Carla sued Shanna. Shanna's attorney filed a copy of the bankruptcy discharge and asked that the case be dismissed. Carla's attorney responded that he knew he could not get Shanna, he just wanted a crack at Shanna's insurance company.

The trial court dismissed. The Court of Appeals reversed, saying that Carla could sue Shanna for the sole purpose of establishing her liability in order to recover from her insurance company.

HOLDINGS:

(1) Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit. 11 U.S.C.S. § 524(a) prohibits creditors from attempting to collect a debt that has been discharged in bankruptcy. 11 U.S.C.S. § 524(e) states that this injunction applies only to the debtor's personal liability and does not prohibit collection efforts against other entities.

(2) Because the § 524(a) permanent injunction affects only debts for which the debtors are personally liable, the statutory language, on its face, does not preclude the determination of

the debtor's liability upon which the damages would be owed by another party, such as the debtor's liability insurer.

(3) The 11 U.S.C.S. § 524 injunction does not apply to prohibit a lawsuit against a discharged debtor solely to recover from the debtor's insurer. Consequently, the plaintiff may continue a lawsuit initiated before the bankruptcy was filed or commence a lawsuit after the discharge is granted.

COMMENT:

This is not a particularly surprising result. Over the years, we have defended discharged bankrupts to the extent of their insurance coverage. A couple of times, we even defended corporations which had been administratively dissolved, *i.e.*, no longer existed. The body may have died, but the insurance lingered on.

Arreygue v. Lutz, 116 Wn. App. 938, 69 P.3d 881 (2003).

EXPERT SPECULATION

FACTS:

Janine, on her way to her car, got into the garage elevator. It closed on her head. That caused her to black out, and suffer pain.

Five days later she reported the event to the building manager, who in turn reported it to Otis. Otis sent out a mechanic who found that the retraction system was operating properly. He was unable to reproduce the accident.

Janine sued the building and Otis. The trial court dismissed, and the Court of Appeals affirmed because the plaintiff and her expert witness failed to present specific, nonconclusory facts showing that the defendants were negligent in their operation and maintenance of the elevator.

HOLDINGS:

(1) Plaintiff's expert's theory lacks foundation, and is based upon broad conclusions and speculations.

(2) The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.

(3) Plaintiff's expert's assumptions are too speculative to support an inference of negligence.

(4) Plaintiff's description of the accident does not sustain a negligence claim.

COMMENT:

This case, with its critical reading of the expert's opinion, is the exception, not the rule. Too often, so-called expert's opinions are chock-full of conclusions and speculation. The simple fact is that if you look hard enough you can find an "expert" who will testify that water runs uphill and the sun sets in the east. The first line of defense to this infection of our tort system lies with the trial court judge who must turn a skeptical, if not jaundiced, eye to whatever is labeled "expert."

Sarti v. Unico Properties, 2003 Wash. App. LEXIS 235 (Wash. App. Feb. 18, 2003).

THE PIANO PLAYER

FACTS:

Oberdah owned a 125-year-old piano. He had purchased it years before for $15,000. It was damaged in a fire. He submitted a proof of loss to his fire insurer SAFECO. While SAFECO was investigating, he amended the proof of loss to $900,000. SAFECO sent him a check for $39,025, which he cashed.

Oberdah disputed the amount and demanded appraisal under the policy. He named an appraiser. SAFECO named an appraiser. Oberdah objected to that one so SAFECO named another one. Oberdah objected to that one. SAFECO went to court to get the umpire appointed. The policyholder, Oberdah, objected to the hearing date, and refused to offer an alternative. SAFECO told him it was closing its file because of his failure to cooperate.

Sometime later the policyholder sued SAFECO and SAFECO's lawyer. The trial court dismissed the claims against the lawyer and awarded attorney fees and sanctions. The Court of Appeals affirmed, and added on attorney fees on appeal for a frivolous appeal of the dismissal of a frivolous lawsuit.

HOLDINGS:

(1) Washington law does not allow claims against attorneys under Washington's Consumer Protection Act, and specifically does not allow claims directed at an attorney's competency or strategy.

(2) The filing of a lawsuit is subject to CR 11 sanctions if three criteria are met: (1) The

action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading fails to conduct a reasonable inquiry into the factual or legal basis of the action.

(3) In the context of the filing of a frivolous lawsuit, in deciding whether to impose sanctions, the court should evaluate a party's prefiling investigation by inquiring what is reasonable for the attorney to believe at the time he filed the complaint.

COMMENT:

It does not appear that anyone raised RCW 48.01.030 as a basis for a compensatory award. That statute places on the policyholder a duty of good faith, and upon the policyholder and his attorney a duty to preserve inviolate the integrity of insurance.

Manteufel v. SAFECO Ins. Co., ___ Wn. App. ___, 68 P.3d 1093 (2003).

REJECTED UIM

FACTS:

Bob was driving his employer's truck when he was involved in an accident with an underinsured motorist. The employer had $1 million in liability coverage but only $60,000 in UIM.

Bob sued the UIM insurer claiming that the UIM limits should be $1 million because the employer had not rejected $1 million UIM limits in writing.

The trial court, after reviewing the UIM selection form on which the employer had put its "X" in front of $60,000 UIM, said the waiver was clear and specific, and that the UIM carrier had met its statutory obligation to provide something in writing regarding the UIM coverage desired by the policyholder. The Court of Appeals affirmed.

HOLDINGS:

(1) In Washington, insurers must provide UIM coverage and must offer UIM coverage limits equal to the insured's liability coverage limits unless specifically rejected.

(2) Insureds may reject UIM coverage altogether or may reject limits as high as the third party liability limits, provided they reject these coverages in writing.

(3) The written rejection under RCW 48.22.030(4) must be "specific and unequivocal." The requirement that an insured reject UIM coverage by an affirmative and conscious act "necessarily implies that the insured is given a choice between rejecting or accepting UIM coverage."

(4) A writing cannot serve as an effective waiver of UIM coverage "if it does not show the amount of coverage the insured has in mind." A writing only declaring the desire for "minimum limits" fails to satisfy the "minimal requirement of specificity."

COMMENT:

A marvelously clear, cogent and concise opinion laying out and applying the rules with no surplus language.

Cochran v. Great West Cas. Co., 116 Wn. App. 636, 67 P.3d 1123 (2003).

CONTRIBUTION IS DEAD, DEAD, DEAD

FACTS:

Ray's fishing boat burned and sank. Ray's insurance agent, D&B, had procured insurance through a surplus line broker, MIMI, which had secured coverage with an offshore underwriter, Liberty. Liberty did not pay. D&B did not pay.

Ray sued D&B, which in turn sued MIMI. D&B and MIMI settled with Ray; D&B paid $100,000; MIMI paid $200,000. D&B pursued its claim against MIMI and the trial court awarded it $100,000 on its Consumer Protection Act claim.

The Court of Appeals reversed, and ordered the case dismissed, holding that any right of contribution or indemnification had been extinguished by the settlement.

HOLDINGS:

(1). RCW 4.22.040 expressly abolished the common law right of indemnity between joint tortfeasors, replacing it with a right of contribution based upon cooperative fault.

(2) RCW 4.22.060(2) is broader; it releases a settling defendant from *all* indemnity and contribution liability, with the sole exception of contractual arrangements to indemnify.

(3) Absent a contractual agreement between the parties, contribution and indemnity rights do not survive settlement.

(4) We hold that D&B's CPA claim was actually a claim for indemnity, and that RCW 4.22.060 extinguished the implied contractual indemnity obligations of a settling defendant, including non-joint tortfeasors.

COMMENT:

This should settle any question as to the viability of contribution claims.

Toste v. Durham & Bates Agencies, 116 Wn. App. 516, 67 P.3d 506 (2003).

WHAT A DIFFERENCE A [STATE] LINE MAKES

FACTS:

Sara was backing out of her driveway when she collided with Matt. Matt sued Sara in small claims court. State Farm defended. Matt got a $2,100 judgment.

State Farm appealed, and a trial de novo was held. Matt got a $2,600 judgment.

Matt sued State Farm, alleging bad faith. Specifically, he noted that it cost State Farm more to appeal the small claims judgment than to pay it, and State Farm sought to punish him for winning.

The trial court granted State Farm's motion for dismissal and added on $7,500 in attorney fees since the law was clear that a third-party plaintiff has no right of direct action against an insurance carrier.

The Idaho Supreme Court affirmed, holding that the law had been clear in Idaho for some time that a third party cannot bring an action for bad faith against the tortfeasor's insurance company. It affirmed the award of attorney fees, and then added on attorney fees on appeal because the law was well settled and the appeal was without foundation.

COMMENT:

I find it remarkable that by driving a few miles east from Spokane one goes from a jurisdiction where the courts project an aggressively anti-insurance company attitude to one where the plain meaning rule and the *stare decisis* rule are still alive.

Graham v. State Farm Mut. Auto. Ins. Co., 67 P.3d 90 (Idaho 2003).

JUST THE FACTS, MA'AM, JUST THE FACTS

FACTS:

Tiffany was riding with Jeff when the pickup encountered black ice, hit a telephone pole, and rolled over. Tiffany was injured. She sued Jeff, claiming he was negligent when confronted with the ice.

Jeff testified in his deposition that he steered in the direction of the skid but could not regain control. In her deposition, Tiffany said that Jeff may not have corrected his steering when the truck started to slide. In her affidavit in opposition to Jeff's motion for summary judgment, Tiffany stated that Jeff did not correct.

The trial court dismissed and the Court of Appeals affirmed.

HOLDINGS:

(1) Actionable negligence occurs when a party's breach of a duty owed to another proximately causes harm.

(2) When a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with a declaration that merely contradicts, without explanation, previously given clear testimony.

(3) Speculative inferences and conclusory statements are insufficient to defeat summary judgment.

COMMENT:

Holding No. 3 should be put on a plaque and hung in every courtroom in the state.

Shugar v. Anderson, 2003 Wash. App. LEXIS 134 (Wash. App. Feb. 3, 2003).

BE CAREFUL WHAT YOU WISH FOR

FACTS:

Back in 1980, George and Carla started dating. She had just graduated from law school and was working at becoming a CPA. George was a music industry executive. When they began to discuss marriage, George remembered a friend who had lost everything in a divorce. So George insisted on the following conditions for marriage:

1. Carla would always be fully employed.

2. Each party's income and property would be treated as separate property.

3. Each party would own a home to return to if the marriage went on the rocks.

4. Carla would not get fat.

And so they married and lived happily ever after. Well, not quite. They did marry and they did live according to the rules George laid down. What happened was that Carla left the wonderful world of accounting and joined a Seattle litigation law firm. By the year 2000, she was taking down over $1 million a year. In contrast, George was still in the $40,000-$50,000 range. And then George lost his job and the marriage went on the rocks.

Not being able to resolve matters, George and Carla ended up in court where George argued that all the property should be treated as community property, and denied that there had been a valid prenuptial agreement.

The judge did not buy it. He enforced the oral prenuptial agreement, and ordered George to pay child support in an amount slightly greater than he was earning from his two part-time jobs.

The Court of Appeals affirmed.

COMMENT:

Okay, I know it has nothing to do with insurance or torts. But sometimes a case comes along which is so awful that it cries out to be shared. As my father used to say, "Some people are just too smart for their own good."

Dewberry v. George, 115 Wn. App. 351, 62 P.3d 525 (2003).

REED MCCLURE IS PLEASED TO ANNOUNCE

That the Seattle-based magazine "Washington Law & Politics" has named four Reed McClure attorneys as "Super Lawyer for 2003."

PAMELA A. OKANO

Pam graduated from the UW in 1974 (Phi Beta Kappa) and the UW Law School in 1977 (order of the Coif; Law Review). The primary focus of her practice is insurance coverage, insurance bad faith, and appeals. She has been with Reed McClure since 1985. Her email address is pokano@rmlaw.com and her phone number is 206.386.7002. More information about Pam is available at the firm's new website http://www.rmlaw.com.

SHERRY H. ROGERS

Sherry obtained her bachelor of nursing degree in 1970 from Atlantic Union College and received her law degree from the University of Puget Sound Law School in 1986. She is a trial attorney. The primary focus of her practice is the defense of health care providers. She joined Reed McClure in 1998. She can be contacted at srogers@rmlaw.com and 206.386.7030. More information about Sherry may be obtained by visiting the firm's new web site at http://www.rmlaw.com.

NANCY C. ELLIOTT

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LITERARY PUTDOWNS FROM THE E-MAILBAG

"He is a self-made man and worships his creator."
- John Bright

"A modest little person, with much to be modest about."
- Winston Churchill

"I have never killed a man, but I have read many obituaries with great pleasure."
- Clarence Darrow

"He is not only dull himself, he is the cause of dullness in others."
- Samuel Johnson

"His mother should have thrown him away and kept the stork."
- Mae West

"Some cause happiness wherever they go; others whenever they go."
- Oscar Wilde

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