WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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LIMITATION ON EUO

In *Tran v. State Farm*, 136 Wn.2d 214 (1998), Supreme Court Justice Alexander and five other justices recognized that insurance companies need to take an EUO in many claims in order to avoid paying dubious or suspicious claims. Fifteen years later, with a 90% change in the court personnel, the court has turned *Tran* on its head and set out a new set of rights and obligations that encourage an insured not to cooperate, and make it nearly impossible for an insurer to obtain a summary judgment of no cooperation.

> Noncooperation does not absolve an insurer of liability unless the insurer was actually prejudiced.
>
> An insurer is required to show prejudice before denying an insured's claim for noncooperation.
>
> For purposes of noncooperation by an insured, prejudice is an issue of fact that will seldom be established as a matter of law.
>
> For purposes of noncooperation by an insured, prejudice will be presumed only in extreme cases.
>
> For purposes of noncooperation, an insurer must show actual prejudice, which is seldom established as a matter of law and requires the insurer to produce affirmative proof of an advantage lost or disadvantage suffered.

COMMENT:

The author of the majority opinion said that *Tran* was controlling. It is a bit difficult to discern in which way.

The dissent pointed up the fallacy in the majority opinion:

> "The majority holds an insured individual with a questionable claim frustrates the company's claim investigation for months by refusing to submit to an EUO as required by the insurance policy may still bring suit against the insurance company for denying his claim based on his noncooperation. Today's decision invites insureds to put minimal effort into complying with the terms of their insurance policies, expecting the company to pay."

Staples v. Allstate Ins. Co., 176 Wn.2d. 404, 295 P.3d 201 (2013).

NO RECOUPMENT – PART II

FACTS:

In the Spring 2013 issue, we reviewed *National Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872 (2013), which, by a 5-4 vote, said insurers defending under a reservation of rights must pay defense costs until a judge says there is no duty to defend. There can be NO recoupment of defense costs under a reservation of rights defense while the duty to defend is uncertain.

One of our readers brought to our attention that in November 2013 an insurer filed a new endorsement form which provided:

> If we initially defend an insured or pay for an insured's defense but later determine that none of the claims ("claims"), for which we provided a defense or defense costs, are covered under this insurance, we have the right to reimbursement for the defense costs we have incurred.
>
> The right to reimbursement under this provision will only apply to the costs we have incurred after we notify you in writing that there may not be coverage and that we are reserving our rights to terminate the defense or the payment of defense costs and to seek reimbursement for defense costs.

Not sure this would square with the holding in *Immunex*. The current rumor is that the carrier has withdrawn the endorsement.

RAS SYNDROME

RAS Syndrome (short for "redundant acronym syndrome syndrome") refers to the use of one or more of the words that make up an acronym in conjunction with the abbreviated form, thus in effect repeating one or more words.

A person is humorously said to suffer from RAS syndrome when he or she redundantly uses one or more of the words that make up an acronym with the abbreviation itself. Usage commentators consider such redundant acronyms poor style and an error to be avoided in writing, though they are common in speech. For writing intended to persuade, impress, or avoid criticism, usage guides advise writers to avoid redundant acronyms as much as possible, not

because such usage is always "wrong", but rather because most of one's audience may *believe* that it is always wrong.

OTHER EXAMPLES:

- ATM machine (automated teller machine machine)
- LCD display (liquid crystal display display)
- PIN number (personal identification number number)

A LITTLE LESS TORT REFORM

As part of its efforts at tort reform, the Legislature enacted RCW 4.16.190(a). It had the effect of eliminating tolling of the statute of limitations for minors in the context of medical malpractice claims.

By a vote of 7-2, the Supreme Court threw out the statute saying:

> *Wash. Rev. Code § 4.16.190(2)*, which eliminates tolling of the statute of limitations for minors in the context of medical malpractice claims, violates the privileges and immunities clause in *Wash. Const. art. I, § 12*.
>
> *Wash. Const. art. I, § 12*, the privileges and immunities clause, provides that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

COMMENT:

Those of you who have attended the Reed McClure Insurance Law Seminars will recall that I have espoused the opinion that our Supreme Court has found the concept of "tort reform" to be anathema to our common law system. In a nutshell, the court is of the view that it, and not the legislature, will have the final word on tort law. No more was this clearer than when the court pulled a very, very old rabbit out of a hat and declared the cap on noneconomic damages to be unconstitutional because it did not exist in 1889.

This case is not as outrageous as *Sofie*. But it does show the power of the medical/hospital lobby in the legislature.

Schroeder v. Weighall, 179 Wn.2d 566, 316 P.3d 482 (2014).

SUZANNA SHAUB

PRACTICE

Ms. Shaub's practice focuses on insurance defense litigation, including products liability, premises liability, personal injury, motor vehicle accidents, wrongful death, and construction defect. She also has experience in insurance coverage matters and appellate litigation.

EDUCATION

University of Washington School of Law, J.D., 2008

- Senior Articles Editor for the Washington Journal of Law, Technology & Arts
- Executive Board of the Moot Court Honor Board

Washington State University, B.A., Business Law, 2005

- *Summa cum laude*
- Honors College Graduate

BACKGROUND

A lifelong Washington resident, Ms. Shaub was raised on a wheat farm near the small town of Endicott. She attended Washington State University, receiving her Bachelor of Arts degree in Business Law. She then earned her Juris Doctor degree from the University of Washington School of Law. While in law school, Ms. Shaub worked as a law clerk for the Washington State Office of the Attorney General and a King County Superior Court Judge.

Prior to joining Reed McClure in 2013, Ms. Shaub practiced for five years at a boutique insurance defense firm in Seattle. She is admitted to practice in Washington and the U.S. District Courts for the Western and Eastern Districts of Washington, and is a member of the Washington Defense Trial Lawyers.

Ms. Shaub's personal interests include cooking, boating, and spending time with her husband and young son.

CLAIM WAS JUST A LITTLE LATE

FACTS:

Keith was rolling into the operating room when he fell off the gurney. The surgery proceeded. He suffered perhaps two strokes during the procedure. That was on May 29, 2008. Three years later, on May 25, 2011, Keith filed suit.

The next day, Keith's lawyer mailed a letter to the hospital inviting it to engage in mediation. The hospital was served on August 25; the doctor on October 3. The 90-day period for service expired August 23.

The defendant moved to dismiss the action as time barred. The trial court said the mediation letter was ineffectual because the lawsuit was filed prior to the mediation request. The case was dismissed, and Keith appealed. The Court of Appeals affirmed.

HOLDINGS:

1. The medical malpractice statute of limitations is within three years of the act alleged to have caused injury (RCW 4.16.350(3)).

2. RCW 4.16.170 provides that a statute of limitations is commenced when the complaint is filed.

3. RCW 7.70.110 provides:

> The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

4. RCW 7.70.110 tolls the statute of limitations only if the request for mediation is made prior to filing the medical malpractice complaint.

5. Because the request for mediation was made after the filing of the suit, the statute was not tolled.

COMMENT:

Probably sounded like a good idea at the time. However, the statute is crystal clear that the tolling takes place only if the mediation request precedes the filing.

Dixon v. Yakima HMA, LLC, 2013 Wash. App. LEXIS 2752 (Dec. 5, 2013).

NO DUTY TO DEFEND

The Washington Court of Appeals found no duty to defend where the insured deliberately assaulted another driver in a road rage incident. The Court reviewed Washington law on duty to defend.

> Scope of Duty to Defend
>
> Our Supreme Court has repeatedly confirmed that insurers have a broad duty to defend. These cases emphasized the following rules:
>
> 1. The duty to defend generally '"must be determined only from the complaint.'" The insurer cannot rely on facts extrinsic to the complaint to deny a duty to defend.
> 2. A duty to defend exists if the facts alleged in the complaint against the insured, if proven, would trigger coverage under the policy.
> 3. If the complaint is ambiguous, it must be construed liberally in favor of triggering a duty to defend.
> 4. The duty to defend is based on the *potential* for coverage. The duty is triggered if the insurance policy *conceivably* covers the allegations in the complaint.
> 5. The insured must be given the benefit of the doubt and a duty to defend will be found unless it is clear from the face of the complaint that the policy does not provide coverage.
> 6. **"[I]f there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend."**

COMMENT:

The insured pursued the injured party for some time. When stopped at a light, the insured left his car, beat the injured party with a thermos, and left him bleeding and unconscious in the street.

The company was of the view that what happened was not an "auto accident."

United Servs. Auto. Ass'n v. Speed, ___ Wn. App. ___, 317 P.3d 532 (2014).

A LITTLE FRESH AIR

FACTS:

Tom rented a house from Paul. He repeatedly asked Paul to repair windows which could not be opened because they had been painted shut. There was a fire one night. Tom's wife died of smoke inhalation after the inoperable windows prevented her from escaping the fire.

Tom sued. The trial court dismissed the case, saying that Tom could not prove cause in fact. The Court of Appeals reversed because the evidence created a genuine issue of material fact regarding the wife's cause of death.

HOLDINGS:

1. Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment.

2. Issues of negligence and proximate cause are generally not susceptible to summary judgment.

3. The plaintiff cannot rest a claim for liability on a speculative theory. The plaintiff, however, need not prove cause in fact to an absolute certainty.

4. It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable."

5. As tenants who notified Paul of the defective condition and gave him permission to enter the home to make repairs, they are entitled to sue Paul.

COMMENT:

Not sure how much the trial judge felt Tom should have to prove. Besides the forensic evidence indicating the wife died from being trapped in the room, he submitted the testimony of the Chief Medical Examiner who said the wife would have lived if she had been able to open a window and had had access to fresh air.

Martini v. Post, 178 Wn. App. 153, 313 P.3d 473 (2013).

NOT A GOOD SHOT

FACTS:

Phyllis decided to undergo elective cosmetic facial injections to help her look "more rested." The clinic's "receptionist" recommended a mix of "Botox" and "filler". When Phyllis came in to the clinic she was introduced to Dan and was told Dan would perform the procedures. Dan was not an MD; Dan was a CPA, (i.e., certified physician's assistant, PA-C).

Phyllis was led to believe that she would get Botox in her glabellar region, and the filler (Restylane) around her naso-labial folds. Midway through the procedure, Dan announced he had extra "Restylane" and decided to shoot it into Phyllis' glabellar region. Dan was not aware that Restylane was not FDA -approved for use in the glabellar region.

That evening Phyllis began experiencing redness on her glabellar region which progressed quickly to blistering sores and green pustules. Phyllis went back to the clinic. Dan treated her for an infection. That did not work. Phyllis went elsewhere and eventually found a provider who correctly diagnosed the problem as necrosis. By that time, the necrosis had left deep non-treatable scarring.

Phyllis sued the clinic for lack of informed consent and medical negligence. The case went to the jury which returned a defense verdict.

Phyllis appealed. The Court of Appeals affirmed, finding no reversible error.

HOLDINGS:

1. We review the court's choice of jury instructions for abuse of discretion. Discretion is abused when it is exercised on untenable grounds or for untenable reasons.

2. The legal accuracy of an instruction is reviewed de novo; an erroneous statement of the law is reversible error where it prejudices a party.

3. Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.

4. Instruction 9, patterned off 6 Washington Practice: Washington Pattern Jury Instructions: Civil 105.02 at 589 (2012) (WPI), adequately informed the jury on the applicable standard of care for both physicians and certified physician's assistants who hold themselves out as dermatology specialists.

COMMENT:

A bit of a surprise.

Paetsch v. Spokane Dermatology Clinic, 2013 Wash. App. LEXIS 2903 (Wn. App. Dec. 26, 2013).

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William R. Hickman is "Of Counsel" with the firm. After 45 years with Reed McClure, Mr. Hickman limits his practice to consulting on civil appeals, conducting arbitrations, acting as an expert witness, and writing the Law Letter.

Mr. Hickman has been involved in over 500 appellate proceedings involving a wide spectrum of civil litigation. He was a Fellow in the American Academy of Appellate Lawyers.

Mr. Hickman is a member of the Commercial Panel of the **American Arbitration Association**, and is also a public arbitrator in the **FINRA** Dispute Resolution Program. He was selected for inclusion on the *Washington Super Lawyers* list for the years 2001, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, and 2013.

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Pam Okano's
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