WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXVI, NO. 1 *WINTER 2012*

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

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

INSURANCE LAW SEMINAR

Reed McClure's Twelfth Insurance Law Seminar will be held Thursday, May 17, 2012 at the Cedarbrook Lodge, Seattle, Washington.

Registration begins at 7:30 a.m. with the program starting at 8 a.m.

More details to follow.

THE DOME OF SLUDGE

FACTS:

In May 2004, a digester dome at Spokane's sewage treatment plant collapsed. The collapse dropped city worker Cmos into the 100-degree sewage sludge, where he died in excruciating physical pain in darkness and utter helplessness. "One of the most disgusting and terrible deaths imaginable."

Co-worker Evans was thrown from the top of the dome and drenched with sewage sludge. He suffered a fractured pelvis, fractured vertebra, and sludge aspiration causing a 20% reduction in lung capacity.

Everyone agreed that the City was negligent. The problem was that the City was the employer of the injured workmen and was thus immune under the Workers Comp Act. But not to fear, there was someone else on the jobsite: The engineering firm CH2M which had been hired by the city in 1998 as an engineering consultant for a 10-year upgrade and retrofit of the sewage plant.

CH2M contended that it and its agents were also immune under RCW 51.24.035. However, the Supreme Court, after a very lengthy review and analysis of workers comp immunity, and the liability of design professionals, concluded that CH2M was liable for the workers' injuries.

HOLDINGS:

1. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers.

2. Third-party tortfeasors were not parties to the grand compromise. Injured workers may sue such tortfeasors.

3. The immunity found in RCW 51.24.035(1) is limited by its terms to a design professional performing professional services "on a construction project."

4. Existence of construction somewhere on sewage plant campus did not trigger "design professional" immunity for the firm under Industrial Insurance Act.

5. "The Code of Hammurabi of Babylon provided that a builder who constructed a house for a man, but did not make his work strong, with the result that the house that he built collapsed and so caused the death of the owner of the house, should be put to death."

COMMENT:

Wasn't that a nice touch for the author of the opinion to quote the Code of Hammurabi? He left out the section which says that a judge who blunders in a law case is to be expelled from his judgeship forever and heavily fined. Life was tough back then in 1780 B.C.E.

Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 257 P.3d 532 (2011).

THE WONDER OF JURISDICTION

FACTS:

Delbert, a Washington resident, was an employee of an Idaho company which was a sub on an Idaho school remodel as to which L&K, a Washington corporation, was the general contractor. Delbert was working on the roof when he lost his balance and fell 35 feet. He sustained severe injuries.

Delbert put in an Idaho Workers Comp claim. Idaho accepted the claim and started paying him. When the payments stopped, Delbert sued L&K in the Spokane Superior Court. (That's in Washington.) The judge dismissed the case for "want of jurisdiction." The Court of Appeals affirmed. The Supreme

Court reversed, saying that the Court of Appeals was "confused by the Idaho courts' apparent conflation of the term 'jurisdiction' with factual issues." There was really no question but that the Spokane Superior Court had jurisdiction (Washington Const. art. IV, §6).

The case serves as a reminder that "jurisdiction" can be a tricky concept. A Washington superior court has jurisdiction in all cases in which jurisdiction shall not have been by law vested exclusively in some other court. In contrast, a federal district court is a court of limited jurisdiction. You have to show that you are worthy. In other words, you must show diversity of citizenship and an amount in controversy in excess of $75,000, or a question under the Federal constitution, or the law of admiralty, or a question under a Federal statute. Establishment of federal jurisdiction cannot be waived. Nor can federal jurisdiction be established by agreement. We have seen cases in active litigation for up to 10 years when some federal judge suddenly discovered there was no federal jurisdiction to hear the case. At that point, the judge (or the 3 judges if in the Court of Appeals) has no choice but to kick the case and the parties out in the street with the admonition to go try a state court.

Anyway, back to Delbert. The first matter to be solved was which law (the law of Idaho or the law of Washington) would be used to determine Delbert's tort claim against L&K. (Interestingly, a concurring justice pointed out that the majority "strongly hints at the result it wishes" the court to reach.) So we will leave you with some of the basic definitions set out by the court.

1. *Jurisdiction*: Washington superior courts have jurisdiction by grant of authority from the Washington State Const. art. IV, §6.

2. Subject matter jurisdiction does not turn on agreement, stipulation, or estoppel.

3. Where one state resident sues another in tort, the superior courts of Washington State have subject matter jurisdiction.

4. *Res Judicata*: Res judicata is a doctrine of claim preclusion. It bars relitigation of a claim that has been determined by a final judgment.

5. Res judicata applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties,

and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication.

6. *Collateral Estoppel*: Collateral estoppel is a doctrine of issue preclusion. It bars relitigation of issues of ultimate fact that have been determined by a final judgment.

7. Collateral estoppel requires that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice.

Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 254 P.3d 818 (2011).

A LITTLE MORE JURISDICTION

No sooner had we written the foregoing than we became aware that the Congress in the other Washington had tinkered with (i.e., screwed around with) 28 USC §1441, the fundamental federal statute defining "diversity" for purposes of diversity of citizenship jurisdiction. Specifically, Congress amended 28 USC §1441(c). It became effective on January 6, 2012.

Now it is clear from reading the amendment and comparing it to the original language that:

a) the change discriminates against insurers;

b) the change does not discriminate against insurers;

c) the change makes no substantial change;

d) the change makes a substantial change that foreshadows the end of civilization as we know it.

We will let you know in the next issue.

INSURANCE DROUGHT CONTINUES IN OLYMPIA

It has been some time since an insurance company received a favorable ruling from the Washington Supreme Court. To be specific, the last time an insurance company received a 100% favorable ruling was *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165 (2005). And the losing streak continues with a December 22, 2011 opinion *Moeller v. Farmers*.

The question presented was whether an auto insurance policy provided coverage for the post-accident, diminished value of a repaired car. Five justices signed off on an opinion that said the policy language allowed recovery for diminution in value and that this was an appropriate case for a class action.

To obtain some small insight into just how far into error the majority strayed, we will set out a sampling of comments from the dissenting opinion:

1. The court strays from fundamental rules of contract interpretation.

2. The court rewrites the parties' contract.

3. The court creates a responsibility that lies nowhere within the contract.

4. The court's construction reflects tort law and "an abstract concept of fairness."

5. The decision is based on a fallacy.

6. The majority utilizes a "contrived interpretation of clearly worded provisions."

7. The majority concludes that "or" is an inclusive disjunctive.

8. "The absurdity of this reading is obvious."

9. "This is deeply flawed analysis."

10. The opinion flies in the face of the clear terms of the contract.

11. "This offends due process."

And so it goes. Might as well point out that this case arose out of a November 1998 accident. That's right: 13 years. And now it's going back to the superior court for further handling.

Moeller v. Farmers Ins. Co., 2011 WL 6778518 (Wash. Dec. 22, 2011).

SEEING WHAT IS THERE

FACTS:

Diana was driving south on Aurora Avenue. As she came to the intersection with 170th Street, the traffic on her right (a van and two cars) came to a stop for a pedestrian, Frank, who was crossing Aurora in a marked crosswalk. However, because Diana was not paying attention or looking ahead, she did not see the stopped traffic or Frank.

Diana hit Frank at about 27 to 30 m.p.h. Frank died the next day.

Frank's estate sued Diana and the State. The claim against the State was that the accident would have been avoided if the State had installed different equipment at the intersection.

The State moved for summary judgment pointing out that the intersection was reasonably safe for ordinary travel, and that the sole proximate cause of Frank's death was Diana's failure to pay attention to what was going on around her. Both sides submitted affidavits from experts. The trial judge concluded that when you consider logic, common sense, justice, policy, and precedent, the conclusion is that there was no legal causation. The Court of Appeals agreed.

HOLDINGS:

1. A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case. If the defendant shows an absence of evidence to establish the plaintiff's case, the burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial.

2. While we construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, if the plaintiff " 'fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial,' " summary judgment is proper.

3. The nonmoving party may not rely on speculation or "mere allegations, denials, opinions, or conclusory statements" to establish a genuine issue of material fact.

4. To establish negligence, the Estate must prove (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, and (3) injury proximately caused by the breach.

5. A municipality has a duty to exercise ordinary care to "build and maintain its roadways in a condition that is reasonably safe for ordinary travel."

6. To defeat summary judgment, a showing of proximate cause must be based on more than mere conjecture or speculation.

7. In order to hold a municipality liable for failure to provide a safe roadway, the plaintiff must establish "more than that the government's breach of duty *might* have caused the injury."

8. The Estate's claim that WSDOT should have installed different technology, and the argument that the roving eyes device would have prevented the collision, are based on speculation and as a matter of law are too attenuated to impose liability.

COMMENT:

Classic case of a distracted driver. She was talking to her son who was sitting in the passenger seat. Nothing the State could have done would have caused her to see what was right in front of her.

The opinion quotes at length from Diana's testimony and from the trial judge's oral opinion. The latter provides a clear road map of analysis for any judge or counsel presented with a similar situation.

Garcia v. State, Dept. of Transp., 161 Wn. App. 1, ___ P.3d __ (2011).

2011 *WASHINGTON SUPER LAWYERS®*

Reed McClure attorneys Marilee Erickson, Jack Rankin, Pam Okano, and Bill Hickman were selected for inclusion in the 2011 *Washington Super Lawyers*. In addition, Pam Okano was selected for inclusion in "Washington: The Top 50 Women."

A MAN OF FEW WORDS

FACTS:

Stella was involved in a low-speed collision in a Safeway parking lot. She waited 3 years to file suit. She sued the driver's father rather than the driver Miles. After the 3-year statute of limitations had run, the father answered the complaint pointing out that he was not the driver.

Six months later, Stella moved to add Miles as an additional defendant. The trial court said, "No way. . . . nope, not going to happen."

The Court of Appeals reversed, saying that the trial court's failure to explain was an abuse of discretion.

HOLDINGS:

1. The purpose of notice pleading is to "facilitate a proper decision on the merits." The trial court should freely grant leave to amend "when justice so requires."

2. A trial court's failure to explain its reason for denying leave to amend may amount to an abuse of discretion unless the reasons for denying the motion are apparent in the record.

3. Liability under the family car doctrine arises when (1) the car is owned, provided, or maintained by the parent, (2) for the customary conveyance of family members and other family business, and (3) at the time of the accident, the car is being driven by a member of the family for whom the car is maintained, (4) with the parent's express or implied consent.

4. The trial court abused its discretion by failing to explain its denial of Stella's motion.

COMMENT:

This case points up that waiting to the last minute to file suit can give rise to some almost fatal consequences. The invocation of the Family Car Doctrine is a bit of a stretch. Also blaming the "man of few words" judge is disingenuous. He did not create the problem. He had no obligation to explain anything. He had an obligation to rule. Anything else would be superfluous.

The criteria is what "justice so requires." The statute says sue the tortfeasor within 3 years. Justice requires that the statute be followed. Justice does not require that the court amend the statute so that the time limit is 3 years plus 6 months.

Watson v. Emard, 2011 WL 6793780 (Wash. App. Dec. 28, 2011).

THE CHILDREN'S RECOVERY

Back in 1984, the Washington Supreme Court changed Washington common law when it held that a child may maintain a lawsuit for loss of parental consortium. At the time, it expressed concern that such claims might result in multiple lawsuits. So it said that such a child's claim "must be joined with the injured parent's claim, unless the child can show that joinder was 'not feasible'."

It took almost 20 years before the court was faced with a case which would force them to explain what they meant by "not feasible." The "explanation" is found in four separate opinions showing the justices splitting 4-1-1-3.

The lead opinion said it was a question of fact as to whether it was feasible for the children to join their parent's lawsuit. One justice said "joinder" was always a question of law, not fact. Another said the lead opinion was confusing as to whether Washington was recognizing claims for loss of consortium based on a parent's temporary injury. And 3 justices opined that it was clear that joinder was not possible because the children did not have a guardian ad litem.

COMMENT:

This must have been a very frustrating case for counsel. When you read the Court of Appeals opinion and the Supreme Court opinion, you will not find

one iota of evidence as to why it was not feasible for the children's claims to be joined with, and tried with, the father's claim.

Moreover, what guidance is the court giving to a trial judge with its 4-1-1-3 "explanation"?

Kelley v. Centennial Contractors Enterprises, Inc., 169 Wn.2d 381, 236 P.3d 197 (2010).

AN ABUNDANCE OF COVERAGE

FACTS:

Jon was in an accident while driving Paul's car with Paul's permission.

Country Mutual (CM) insured Jon while driving a non-owned vehicle. SAFECO insured Paul and extended coverage to any person using Paul's car with permission. So Jon was insured by both CM and SAFECO.

SAFECO paid the claims against Jon. But CM refused to share. So SAFECO sued CM for contribution. CM took the position that its coverage on the driver was excess to the coverage on the car. The trial court agreed with CM. SAFECO appealed. The Court of Appeals reversed stating that each company was liable for a pro-rata share of the damage.

HOLDINGS:

1. Generally, when two policies each contain an "other insurance" clause purporting to make the policy excess over the other policy, our courts have disregarded the clauses as "mutually repugnant."

2. However, this general proposition only applies to policies containing similar provisions at the same coverage level.

3. Both policies contain language making each policy excess. As such, both clauses must be disregarded and each insurer is responsible for its pro-rata share of the loss.

COMMENT:

It has been several years since we have had a court try to resolve the problem of dueling excess other insurance clauses. Here, the court reached back to 1969 to find a similar situation: *Pac. Indem. Co. v. Federated Am. Ins. Co.*, 76 Wn.2d 249 (1969).

SAFECO also argued that it was entitled to *Olympic Steamship* fees. CM did not contest this claim. But the court said SAFECO was not entitled to fees under *McRory v. Northern Ins. Co.*, 138 Wn.2d 550 (1999), because SAFECO did not get an assignment of rights from its insured.

A must-read opinion for anyone dealing with conflicting "other insurance" provisions.

SAFECO Ins. Co. v. Country Mutual Ins. Co., 165 Wn. App. 1, 267 P.3d 540 (2011).

TRUTHFUL NOT DEFAMATORY

FACTS:

Warren was operating a construction crane when it collapsed. The collapse killed a person in a nearby apartment building. The newspaper ran a series of stories about the accident. Among other things, it was reported that Warren had a history of drug abuse, that he had completed rehab after his last arrest, that he had 6 drug convictions, and that he had convictions for domestic violence, soliciting, and marijuana possession.

Warren's drug test came back negative. Six months later it was determined that the collapse was caused by a flawed engineering design. Warren did not cause the collapse.

Warren sued the newspaper for defamation. He argued that the articles falsely implied that his drug use was a factor in the collapse. The newspaper moved to dismiss, arguing that Washington does not recognize a claim for defamation by implication based on juxtaposition of truthful statements. The court denied the motion.

The newspaper moved for reconsideration. The court denied the motion.

The Court of Appeals accepted discretionary review and ordered Warren's claim dismissed.

HOLDINGS:

1. A private individual plaintiff alleging defamation must show falsity, unprivileged communication, fault, and damages.

2. The falsity prong of a defamation claim is satisfied with evidence that a statement is probably false or leaves a false impression due to omitted facts.

3. A plaintiff may not base a defamation claim on the negative implication of true statements.

4. Defamatory meaning may not be imputed to true statements. Courts must give words their "'natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader.'" The "defamatory character of the language must be apparent from the words themselves."

COMMENT:

A short, to-the-point opinion which does not waste the reader's time. It clearly demonstrates that *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 826 P.2d 217 (1991) sets out the rule in Washington and that *Mohr v. Grant*, 153 W.2d 812, 108 P.3d 768 (2005) did not expand the defamation tort to include defamation by implication through juxtaposition of truthful statements.

This case serves as a reminder that while many aspects of the English common law were imported to the colonies, some were not. The law on defamation was one which did not make the trip. The rule over there is still much as Chief Justice Mansfield said in 1787: "The more 'tis a truth, sir, the more 'tis a libel."

Yeakey v. Hearst Communications, Inc., 156 Wn. App. 787, 234 P.3d 332, *rev. denied*, 170 Wn.2d 1014 (2010).

UNCOVERED PIZZA

FACTS:

Solomon was a pizza delivery man for Mad Pizza. He got involved in an auto accident with Joy. Joy sued Solomon and Mad.

When the insurance situation was examined, it was found that Mad Pizza was not mentioned in the application or in the policy. The policy insured West Coast Pizza, a related but separate corporate entity. The insurance company (NCIC) refused to defend. West Coast Pizza filed for declaratory judgment seeking a declaration that the NCIC policy provided coverage.

The trial court found no coverage and the Court of Appeals agreed.

HOLDINGS:

1. Interpretation of an insurance contract is a question of law that is reviewed de novo by this court. If a policy is clear and unambiguous, the court must enforce it as written.

2. Ambiguity exists only where the policy language is susceptible to different interpretations, each of which is reasonable. Where the policy language is ambiguous, "the language of the policy must be construed in favor of the insured."

3. Insurance policies are contracts. Thus, the principles of contract interpretation apply. "'The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.'"

4. The National Continental policy language clearly indicates that West Coast Pizza was the only named insured; Mad Pizza was named nowhere within the policy.

5. Mutual mistake will support reformation of a contract where the contracting parties had identical intentions but the writing materially varies from that intent. Contracts are not reformed for mistake; writings are. The mistake must be proved by clear, cogent, and convincing evidence, and if doubts exist as to the parties' intent, reformation is not appropriate.

6. The record does not reflect that National Continental intended to insure Mad Pizza.

COMMENT:

This was certainly one of the more lucid and informative insurance opinions issued in 2011. And there was a bonus. In footnote 2, the court pointed out that it would have been proper to dismiss this lawsuit because West Coast Pizza's claim was not "justiciable." It was not justiciable because West Coast was not a party to the underlying tort action. The RCW Chapter 7.24 requirement of a justiciable controversy is ofttimes overlooked by counsel and the court. A good place to look is *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 259 P.3d 280, 288-89 (2011). Or pull up this opinion on the web and read it.

West Coast Pizza Co., Inc. v. United National Continental Ins. Co., 2011 WL 7118737 (Wash. App. Dec. 12, 2011).

DOUBLE INDEMNITY

FACTS:

A grease fire damaged the Silvers' home. They were insured by Farmers. Repairs were made. The company issued a check directly to the homeowners. The homeowners cashed the check but did not pay the contractors.

One of the contractors sued the Silvers, who in turn sued Farmers for bad faith and CPA violation. Farmers paid the contractor, and sued the Silvers for failing to forward the payment in the first place.

The trial judge dismissed the case because the homeowners could not prove Farmers caused any damages. The Court of Appeals ruled that the homeowners failed to establish bad faith, CPA violation, or breach of contract.

HOLDINGS:

1. Breach of contract and bad faith claims depend on proof of four common elements: duty, breach, causation, and damages.

2. In addition to these elements, a bad faith claim also depends on proof that the breach complained of was unreasonable, frivolous, and unfounded.

3. To maintain these claims and avoid summary judgment, the Silvers had to produce evidence raising genuine issues of material fact as to each element of each claim.

4. As a matter of law, the Silvers failed to raise a genuine issue of material fact as to any of their claims.

COMMENT:

An absolutely delightful case to read. Here, Farmers did more than it was supposed to, and was still sued for bad faith and CPA violation.

Refreshing to see that the court saw through the conduct of the policyholder. Sometimes you wonder whether bad faith should be a two-way street. Actually, we wonder why bad faith does not cut both ways.

Baldwin v. Silver, 2011 WL 6822265 (Wash. App. Dec. 29, 2011).

REBECCA D. CLAWSON

PRACTICE

Becky Clawson is an associate with Reed McClure. Her practice includes all aspects of civil litigation and government contract work.

EDUCATION

University of Denver Sturm College of Law, J.D., 2005

Willamette University, B.A., 2002

BACKGROUND

Ms. Clawson earned her undergraduate degree in International Studies from Willamette University in Salem, Oregon in 2002. She graduated from the University of Denver Sturm College of Law in 2005. After law school, Becky worked in the fashion industry until she decided to sit for and pass the Washington Bar in 2009.

Becky's professional memberships include Washington State Bar Association, King County Bar Association, American Bar Association's Government Contracting Section and Fashion Group International. She co-authored an article published in The Procurement Lawyer entitled, "Fraud Counterclaims in the Court of Federal Claims: Not so Fast, My Friend."

BAR ADMISSIONS

Washington State

United States District Court, Western District of Washington

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, and 2011.

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REED MCCLURE ATTORNEYS

EARLE Q. Bravo ..... ebravo@rmlaw.com 206/386-7165
MICHAEL N. Budelsky ..... **mbudelsky@rmlaw.com 206/386-7008**
REBECCA D. Clawson ..... bclawson@rmlaw.com 206/386-7006
MARILEE C. Erickson ..... merickson@rmlaw.com 206/386-7047
DANIELLE M. Evans ..... devans@rmlaw.com 206/386-7185
WILLIAM R. Hickman..... whickman@rmlaw.com 206/386-7011
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