WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

VOLUME XXXVII, NO. 1 *WINTER 2013*

Published and Distributed by: REED McCLURE
ISSN 1064-1378
Financial Center, 1215 Fourth, Suite 1700
Seattle, Washington 98161-1087
206/292-4900

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A STRIKE OF LIGHTNING

FACTS:

On November 21, 2006, lightning hit a tree in A's backyard causing damage. He had an insurance policy with the Good Neighbor folks at State Farm. Exactly what the written contract of insurance provided is not known because nobody put the policy in as evidence. It probably provided that State Farm was to pay for damage to the home that resulted from a lightning strike.

State Farm assigned Dan to adjust the claim. He met with A who told him the house suffered structural damage. So Dan hired Kyle, a structural engineer, to inspect. He found no lightning-related damage to the chimney. A did not like the report. He also did not like Dan. So State Farm sent adjuster #2: Jackie.

Jackie talked with A and asked Kyle to try again. A did not want Kyle back. Jackie hired a different engineer: Mark. Mark inspected the house again. Mark found evidence of some damage to the house but no evidence of damage to the chimney. State Farm authorized a contractor to repair the identified damaged, and paid $28,006.19 for the repair.

A told State Farm he was very upset with the engineers and the contractor who had failed to find lightning-related damage to the chimney. A hired an appraiser. State Farm hired an appraiser. A's expert said 60-70% of the damage was general wear and tear, but he was unable to say that the balance was due to the lightning.

A's appraiser told State Farm it should hire Paul, an expert on lightning damage. Jackie agreed to hire and pay Paul.

Paul performed his inspection and generated a report which largely agreed with the prior engineering reports in that much of the damage claimed by A was not lightning related. A complained that Paul's inspection and testing were inadequate. He said he was having more tests done and State Farm should pay for them. Jackie responded that State Farm had conducted a reasonable investigation and that further investigation was not warranted.

A sued State Farm for breach of contract and bad faith. State Farm moved for summary judgment pointing out that A had failed to provide any evidence of

additional lightning-caused damage. State Farm also pointed out that it had acceded to all of A's requests for additional inspections and new engineer reports.

The judge dismissed the case; A appealed and the Court of Appeals affirmed because reasonable minds could not differ as to the reasonableness of State Farm's investigation.

HOLDINGS:

1. The court will not review A's WAC 284-30-370 "prompt" review claim because the argument was not raised in the trial court. RAP 9.12.

2. To establish bad faith, an insured is required to show that the insurer's actions were unreasonable, frivolous, or unfounded.

3. An insurer does not act in bad faith where it acts honestly, bases its decision on adequate information, and does not overemphasize its own interest.

4. The determinative question is the reasonableness of the insurer's actions in light of all the facts and circumstances of the case.

5. Where reasonable minds could not differ as to the reasonableness of the insurer's actions, summary judgment is appropriate.

6. Viewed in light of all of the facts and circumstances of this case, reasonable minds could not differ as to the reasonableness of State Farm's investigation.

7. The court will not review A's breach of contract claim because A failed to put a complete copy of the policy into the record.

COMMENT:

An instructive case for both insureds and insurers.

Allen v. State Farm Fire & Casualty Co., 2012 Wash. App. LEXIS 2387 (Wash. App. Oct. 8, 2012).

TO TELL THE WHOLE TRUTH

FACTS:

Things were not going well for Larry. First, on October 30, 2007, he was rear-ended by Burzotta while stopped in traffic. Three months later, he filed for Chapter 7 bankruptcy. In his Petition, Larry did not list his personal injury claim against Burzotta. In May 2008, Larry's bankruptcy was discharged.

On October 20, 2010, Larry sued Burzotta. Seven months later, the defendant moved to dismiss citing the rule of "judicial estoppel." Larry ran back to the federal court to reopen his bankruptcy case and amend his schedule to disclose his personal injury claim. The superior court granted Burzotta's motion for summary judgment.

Larry appealed. The Court of Appeals affirmed the dismissal, pointing out that a debtor who fails to disclose a potential personal injury claim is judicially estopped from later bringing the claim.

HOLDINGS:

1. The leading case in Washington regarding application of judicial estoppel in the context of bankruptcy proceedings is *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535 (2007).

2. The three core factors to guide a trial court's application of judicial estoppel are (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

3. It is inconsistent to fail to disclose a potential lawsuit in a bankruptcy proceeding, and then attempt to pursue the suit after discharge.

4. Generally, "intent to mislead is not an element of judicial estoppel."

5. The courts have made clear that the failure to schedule claims about which the debtor had knowledge is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated.

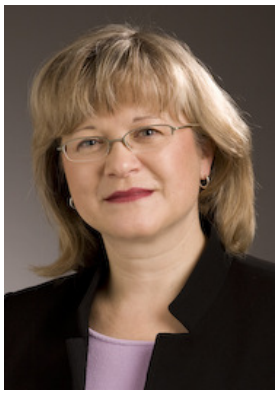
COMMENT:

Refreshing to see the court maintain an almost impenetrable barrier so that litigants are unable to play fast and loose with the courts.

My favorite Washington case remains *Garrett v. Morgen*, 127 Wn. App. 375, 112 P.3d 531 (2005) which was reviewed back in the Chilly Spring 2005 issue of the Law Letter. Other judicial estoppel cases be found in the Hot Summer 2007, Really Wet Fall 2007, Olympic Summer 2008, and the Dreadful Winter 2009 issues of the Law Letter.

Larsen v. Burzotta, 2012 Wash. App. LEXIS 1846 (Wash. App. Aug. 6, 2012).

MARILEE C. ERICKSON



2012 Thomson Reuters Super Lawyers list

PRACTICE

Marilee C. Erickson is a shareholder in the Reed McClure law firm. For over 23 years, Marilee has been representing parties in trial and appellate courts. She focuses her practice on defense of tort claims and insurance disputes, including bad faith claims. She also defends employment disputes and premises, product, and professional liability claims.

She devotes a substantial portion of her practice to appellate matters. Marilee is a charter member of the Washington Appellate Lawyers Association ("WALA"). She frequently appears in Washington appellate courts. Prior to joining Reed McClure, Marilee served as law clerk at the Washington Court of Appeals, Division II. She is a contributing author of the Third Edition of the *Washington Appellate Practice Deskbook*.

EDUCATION

Seattle University, School of Law, 1986, J.D., Honors: cum laude

North Park College, 1982, B.A., Honors: cum laude

BACKGROUND

Marilee was born and raised in Mount Vernon, Washington. She is admitted to practice in the State of Washington, the United States District Court for the Western District of Washington, and United States Court of Appeals for the Ninth Circuit.

In addition to her WALA membership, Marilee has served on various bar committees and often speaks at CLEs. Marilee was on the King County Bar Foundation and served as President in 1999 to 2000. She is a member of the King County Bar Association, Appellate Section, the Washington Defense Trial Lawyers, and Northwest Insurance Coverage Association.

REPRESENTATIVE CASES

Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007) A default order and judgment were vacated because plaintiff failed to disclose the fact a lawsuit had been filed when the defendant's liability insurer specifically inquired about the status of the case.

Del Rosario v. Del Rosario, 152 Wn.2d 375, 97 P.3d 11 (2004) Challenge to a personal injury release involving a non-English speaker. The Supreme Court reversed the trial court's application of the Finch "fairly and knowingly made" test for challenging a release. The Supreme Court held the Finch test only applied to latent injury claims. A party can only successfully challenge a release by establishing misrepresentation, overreaching, or undue influence.

Aranda v. Haywood, 143 Wn.2d 321, 19 P.3d 406 (2001) Plaintiff who waited until after trial was estopped from challenging adequacy of proof of service of the request for trial de novo of a mandatory arbitration award.

Ashley v. Hall, 138 Wn.2d 151, 978 P.2d 1055 (1999) Admission of lay opinion that did not meet requirements of ER 701 was harmless error where opponent did not timely object or move to strike.

Mathioudakis v. Fleming, 140 Wn. App. 247, 161 P.3d 451 (2007) Court refused to apply Fisher-Finney rule — that a damages award is binding on the UM/UIM carrier — to the tortfeasor.

Tribble v. Allstate Property and Cas. Ins. Co., 134 Wn. App. 163, 139 P.3d 373 (2006) Judgment against UIM/UM carrier in a trial for contract benefits is limited to the amount of the UIM/UM policy limits.

Williams-Moore v. Estate of Shaw, 122 Wn. App. 871, 96 P.3d 433 (2003) Successfully challenged a plaintiff's attempt to serve herself as personal representative of deceased defendant's estate where plaintiff failed to post bond and take oath of personal representative.

Pfaff v. State Farm Mutual Auto Ins. Co., 103 Wn. App. 829, 14 P.3d 837 (2000) The court must consider the evidence and reasonable inferences in the light most favorable to the party seeking to vacate a default judgment when deciding whether the movant has presented "substantial evidence" of a "prima facie" defense.

HONORS AND AWARDS

Washington Super Lawyer: 2010, 2011, 2012

THE CASE OF THE DISAPPEARING DIGIT

FACTS:

Joe was in Chris's store to cut some insulation for a client. The table saw he was using did not have a safety guard on it. In fact, it had not had a guard for 25 years. Joe had used the saw without the guard for 14 years and on at least 5,000 occasions.

On the day in question, Joe held and pushed the insulation through the saw. The blade grabbed the insulation and pulled Joe's thumb into the blade. Joe lost the end of his thumb.

Joe sued Chris, alleging that Chris was negligent in maintaining the saw. The trial court dismissed based on the implied primary assumption of risk doctrine. The Court of Appeals agreed, pointing out that Joe knew there was no guard, knew that using the saw without a guard was a bad idea, but he went ahead and did it anyway.

HOLDINGS:

1. The defendant, as a moving party, bears the initial burden of showing the absence of a genuine issue of material fact. If met, the burden shifts to the plaintiff to make a showing sufficient to establish the existence of an element essential to that party's case. If the claimant fails to meet that burden, the trial court should grant the motion.

2. The doctrine of assumption of risk has four facets: (1) express assumption of risk, (2) implied primary assumption of risk, (3) implied reasonable assumption of risk, and (4) implied unreasonable assumption of risk.

3. Implied primary assumption of risk occurs where the plaintiff impliedly has consented to relieve the defendant of an objection or duty to act. The elements are that "the plaintiff (1) had full subjective understanding; (2) of the presence and nature of the specific risk; and (3) voluntarily chose to encounter the risk.

4. Stated differently, the plaintiff "'must have knowledge of the risk, appreciate and understand its nature, and voluntarily choose to incur it.'"

5. Joe understood and appreciated the nature of the risk and voluntarily chose to incur it.

COMMENT:

Just a dandy little opinion which demonstrates that just saying "I'm hurt and it's your fault" will not get you to the jury most of the time.

The one problem with the opinion is that the court did not publish it. However, there are some published opinions which will get you to the same result: *Erie v. White*, 92 Wn. App. 297 (1998); *Shorter v. Drury*, 103 Wn.2d 645 (1985).

The case does remind me that down in the mill town I grew up in you could always determine the experience level of a carpenter by the number of digits remaining.

Schoenmakers v. Bagdon, 2012 Wash. App. LEXIS 2813 (Wash. App. Dec. 6, 2012).

JUMP THE CURB - ABSURD

FACTS:

Marilyn and a friend were out bike riding. They were riding in the bike lane. The bike lane ended. They rode on the road. Her friend left the road and "jumped" onto the sidewalk.

Marilyn decided to do the same thing. (She probably could have kept going straight.) When Marilyn approached the curb she jumped. She did not "jump" high enough. She did not clear the curb. She fell. She was hurt.

Marilyn sued the State of Washington, alleging that her failure to successfully "jump" the curb was the State's fault. The State moved for summary judgment. Marilyn asked for more time for discovery. The court agreed and permitted additional briefing.

Marilyn did not submit additional discovery. Marilyn did not submit additional briefing. Marilyn did not show up for the hearing.

The superior court judge agreed there was no causation, and pointed out that the proximate cause of Marilyn's injuries was Marilyn's "choice" to jump the curb. The court dismissed the case. Marilyn appealed. And . . . and . . .

(wait for it) . . . Division 2 reversed and remanded! Two judges said there must be a material issue of fact hiding in there somewhere.

HOLDINGS:

1. A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel.

2. A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence.

3. Marilyn's evidence did not show that the gap failed to meet design standards nor did she present expert testimony that such gap created a hazardous condition for bicycles.

4. "[A]ssumption of risk" is a general rubric encompassing a cluster of different concepts. Four types of assumption of risk operate in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable assumption of risk.

5. Express and implied primary assumption of risk, arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding specific known risks. Express and implied primary assumption of risk may operate as a bar to recovery as to the risks assumed.

6. Implied reasonable and implied unreasonable assumption of risk apportion a degree of fault to the plaintiff and serve as damage-reducing factors.

COMMENT:

She came. She saw. She jumped. She fell. The State did not tell her to jump the curb. The State did not change the physical configuration in front of her. The State did nothing to cause the injury. She belongs on America's Funniest Home Videos, not in a courtroom.

The dissent, going to the heart of the matter, pointed out that Marilyn presented "no evidence that this was anything other than a simple misjudgment on her part."

Gunther v. State of Washington, 2012 Wash. App. LEXIS 1872 (Wash. App. Aug. 8, 2012).

A LADY NOT WELL SERVED

FACTS:

In 1995, Teresa slipped and fell in a Tacoma grocery store. She hired lawyer Tim to sue the store. Unfortunately, Tim failed to file suit before the statute of limitations ran on the claim.

Teresa sued Tim. The jury found that Tim had committed malpractice. The trial court granted Tim's post-trial motion "for a new trial on the issues of Damages Only." Teresa appealed. But the Court of Appeals affirmed the "grant of a new trial on damages." (*Schmidt v. Coogan*, 145 Wn. App. 1030 (2008).)

The "damages only" trial came on in August 2010. After Teresa put on her evidence, Tim filed a CR 50 motion for judgment as a matter of law, claiming that Teresa had failed to prove that any verdict against the grocery store would have been collectible. The trial court denied the motion, finding that Tim should have raised the issue of collectibility at the first trial, not at the damages-only trial.

After the jury returned a verdict for $83,000.00, Tim filed a motion under CR 50 and/or CR 59 seeking judgment as a matter of law, claiming that Teresa had failed to prove collectibility.

The trial court denied the motion. Tim appealed. The Court of Appeals reversed and ordered Teresa's lawsuit dismissed because she never proved collectibility.

HOLDINGS:

1. Teresa never proved collectibility, an essential component of damages in a legal malpractice claim.

2. Courts consider collectibility of the underlying judgment to prevent the plaintiff from receiving a windfall because it would be inequitable for the plaintiff to be able to obtain a greater judgment against the attorney than the judgment that the plaintiff could have collected from the third party.

3. Collectibility was at issue because collectibility is a component of damages in a legal malpractice action.

COMMENT:

Holy Cow! A bit of a surprise notwithstanding the existence of case law discussing the necessity of proving collectibility. (*See Matson v. Weidenkopf*, 101 Wn. App. 472 (2000).)

Looks like Teresa will now have to sue lawyer #2. Please note we are now 17 years since the accident. What is the saying about justice delayed?

Schmidt v. Coogan, ___ Wn. App. ___, 287 P.3d 681 (2012).

REPHRASING THE REPOSE

A statute of repose is often misunderstood. After all, what has "repose" got to do with anything? And when we note that it is a statute which limits one's ability to bring suit, we can see why it is often confused with a statute of limitations. However, a statute of repose can do something quite extraordinary. It can bar a tort suit before the accident happens.

We start in August 2009 when a Cessna 560 was damaged when its nose landing gear collapsed during landing. The nose gear was manufactured in April 1990 and had been installed on a Cessna 550 on October 24, 1990. That Cessna 550 was delivered to its first purchaser on October 30, 1990. That was more than 18 years before the accident.

Some time after delivery, the gear was removed from that Cessna 550 and was overhauled. On April 2, 2007, the gear was installed on the Cessna 560 that suffered the accident. That plane (the Cessna 560) had been delivered to its first purchaser on December 30, 1991. That is less than 18 years before the accident.

By now you have figured out that 18 is an important number. It is found in a federal statute known to its friends as GARA. Congress enacted GARA to alleviate the problem of excessive liability costs for general aviation aircraft manufacturers. Congress made plain that the 18-year statute of repose was designed to protect manufacturers of aircraft and of component parts. It was to keep jobs in the USA.

While admitting that the statute was "ambiguous" the court examined the legislative history to support its conclusion that the applicable trigger date

began on the date of delivery of the aircraft to its first purchaser, i.e., October 1990, more than 18 years before the accident.

In other words, the statute of repose cut off the claim on October 30, 2008. But the accident did not occur until August 2009. The claim was barred before the accident occurred! Neat result.

Here in Washington, our courts tend to try to limit the drastic impact of a statute of repose. We have three that are frequently encountered in tort litigation. RCW 4.16.300-320 establishes a 6-year statute of repose for construction claims. RCW 7.72.060 establishes a 12-year statute of repose for products liability claims.

The 8-year statute of repose enacted by the legislature for medical malpractice claims (RCW 4.16.350) has had a rough go of it. Twenty-two years after it was enacted, the Washington Supreme Court held it was unconstitutional because it violated the privileges and immunities claims of the state constitution. *DeYoung v. Providence Medical Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998). The vote was 5-4 with Chief Justice Alexander dissenting and pointing out that "this court cannot . . . legislate."

Oddly, this was not the final word on the subject. The Legislature came back in 2006 and said to the court, when we said it was an 8-year statute of repose, we meant it. (Section 302, chapter 8, Law of 2006; RCW 4.16.350). What we enacted was legitimate, rational, and reasonable. So back off.

United States Aviation Underwriters, Inc. v. Nabtesco Corp., 697 F.3d 1092 (9th Cir. 2012).

SPELL IT OUT

Bryan Garner puts on an excellent seminar around the country in which he attempts to teach lawyers and judges how to write effectively using the English language. We are reminded of Professor Higgins in *My Fair Lady*:

> There even are places where English completely disappears. In America, they haven't used it for years!

In a recent mailing, Garner identified some common misspellings:

"Here are five legal terms that lawyers and judge often misspell:

- *Ad hominem* (not **ad hominum*): an argument directed not to the merits of an opponent's argument but to the opponent's personality or character.

- *De minimis* (not **de minimus*): a shortened form of the Latin maxim *de minimis non curat lex* (=the law does not concern itself with trifles).

- *Judgment* (not **judgement*): the final decisive act of a court in defining the rights of the parties. Although *judgement* is prevalent in British nonlegal texts, *judgment* is the preferred form in American English and British legal texts.

Fortunately, I have no less than three eagle-eyed individuals who keep me from such errors.

HOW TO WIN FRIENDS AND INFLUENCE JUDGES

This fellow would have benefitted from Garner's class.

Kevin was a bankruptcy lawyer in Florida. He got into a #@!!% match with a bankruptcy judge who did not like his "tone". In response to an order to show cause, Kevin wrote:

> In your fourth published example of "Ready-Fire-Aim" against this attorney, it is obvious that you have not reviewed the record in this case which does not support the purported findings of fact. . . . Your conduct in this case [h]as been without citation to any authority for the propositions that: your jurisdiction is never ending and without geographic bounds; your unconditional releases are meaningless; and pronouncements of the United States Supreme Court are mere suggestions.
>
> * * *
>
> It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings.

And having dug a hole, Kevin grabbed a shovel and kept going:

> In a supplemental response, [Kevin] stated that he 'delivered a nice bottle of wine to the Court's chambers, with a hand-written note, which read as follows, "Dear Judge Olson, a Donnybrook ends when someone buys the first drink. May we resolve our issues privately?"'

Unfortunately, the ex parte peace offering did not generate the expected response. Compare:

> Portia:
> The quality of mercy is not strain'd,
> It droppeth as the gentle rain from heaven
> Upon the place beneath. It is twice blest:
> It blesseth him that gives and him that takes

The Merchant of Venice, act 4, scene 1, lines 180-187

Instead, the judge hit Kevin with a 60-day suspension. The district court affirmed the bankruptcy judge. Kevin appealed to the 11th Circuit. He contended that it violated his First Amendment right to free speech and his Fifth Amendment right to due process.

The 11th Circuit was not moved, and upheld the suspension.

COMMENT:

A public servant should have a relatively thick skin. A public servant with lifetime tenure should have a damn thick skin. As Harry Truman said: "If you can't stand the heat, get out of the kitchen."

In re Gleason, 2012 U.S. App. LEXIS 21248 (11th Cir. 2012).

MORE WISDOM FROM ALEXANDER

Several readers of the last Law Letter noted the profound wisdom of former Chief Justice Gerry Alexander when he ruled that $17,000 was more than $16,000 (17,000 > 16,000). Now why should such a seemingly self-evident proposition be deemed noteworthy when it is embraced by a member of the

judiciary? To answer that, we must first track down where these black-robed folks come from.

First of all, we must remember that judges/justices did not spring forth fully formed as from the head of Zeus. No. Before they became judges, they were lawyers. And before they were lawyers, they went to law school. And before they went to law school, they went to undergraduate school. And in undergraduate school, they majored in things like history, political science, government, business, English, philosophy, 19th Century French poetry, and so on. What they were not taking was much in the way of mathematics, physics, chemistry, engineering, or the scientific method.

As a consequence, we have a situation, as we pointed out last issue, where four justices of the Washington Supreme Court wanted to rule that 16,000 > 17,000.

And this time we have another example of Justice Alexander's grasp of the commonsense solution. This case was masquerading as a free exercise of religion First Amendment case. The four-person "lead" and the three-person dissent/concurrence went at each other like a sack full of scalded cats. But, Justice Alexander nailed it with a legal concept all of us learned in our first semester of law school: Exhaustion of administrative remedies:

> The lead opinion and concurrence/dissent each agree that because Angela Erdman submitted her claims involving matters of discipline, faith, and ecclesiastical law to the Presbytery of Olympia and did not appeal the decision of that body, we must accept that decision as final and binding. That conclusion, in my judgment, resolves the case, and we should not, as the lead opinion and concurrence/dissent do, speculate about what this court should do in factually dissimilar cases that may come before the court in the future.

Perhaps it is time for us to do a more expansive search for more Alexander gems.

Erdman v. Chapel Hill Presbyterian Church, 175 Wn.2d 659, 286 P.3d 357 (2012).

DANIELLE M. EVANS

PRACTICE

Ms. Evans practices in the areas of insurance defense, construction defect, legal malpractice defense, employment law, general civil litigation, and appellate work.

EDUCATION

Rutgers University School of Law – Newark, J.D., Newark, New Jersey, 2007 Honors: Business Editor, Women's Rights Law Reporter

Alfred University, B.A. in Art and Culture, Alfred, New York, 2002 Honors: cum laude

BACKGROUND

Ms. Evans was born and raised in Portland, Oregon. Prior to joining Reed McClure, Ms. Evans served as a judicial law clerk to the Hon. Jaime D. Happas, a designated mass tort judge in the Superior Court of New Jersey. Many of the mass torts before the court were complex products liability cases arising from injuries allegedly caused by pharmaceutical products. Often the mass torts had parallel litigation before the Federal multi-district litigation and other state courts. A representative opinion is Bailey v. Wyeth, Inc., 2008 WL 5196846 (N.J. Super. Law Div. July 11, 2008).

In addition to her experience with complex civil litigation, Ms. Evans has experience with dispute resolution. During law school Ms. Evans served as a mediator for the Special Civil Division of Superior Court in Essex County, New Jersey. She also interned at the dispute resolution division of the Financial Industry Regulatory Authority.

She is admitted to practice in the State of Washington, and the United States District Court, Eastern and Western Districts of Washington.

MORE THAN ONE TURKEY THIS THANKSGIVING

Traditionally, the Washington Supreme Court has used the dead time of the day before Thanksgiving to get rid of the cases it would just as soon not have the public be too aware of. The media and the public are more concerned with turkeys, rain, and traffic and don't notice what a majority of the Court is up to: e.g., ordering a new trial (8 years after the first trial) in a child rape case where the trial court event was not objected to, and no prejudice has been shown.

These 4 cases generated 14 opinions. From the standpoint of appellate law and procedure, the majority has turned the universe upside down. Note the quaint view of Justice Charlie Wiggins who believes that error must be objected to in the trial court and failing that, the error must be shown to be prejudicial on appeal.

Would it be too unkind to observe that not all the turkeys were on the table this Thanksgiving???

The cases were *In re Morris* (4 opinions); *State v. Paumier* (3 opinions); *State v. Sublett* (4 opinions); *State v. Wise* (3 opinions).

WORDS TO REMEMBER

Most of us view the content of legal opinions as being as dry as dust. But hidden away in the endless volumes of legal reports we may find a few gems. The folks at Westlaw send these along:

> Bankruptcy trustee may sing all he wants, but it is court that must call tune.

In re Thinking Machines Corp., 67 F.3d 1021 (1st Cir. 1995).

> Absent corruption or bad faith, no independent tort exists for sports referee malpractice.

Bain v. Gillispie, 357 N.W.2d 47 (Iowa Ct. App. 1984).

QUICKLY, QUICKLY, QUICKLY

In the Fall 2012 issue, we reported on the *Niccum* case (*Niccum v. Enquist*, 175 Wn.2d 441 (2012)), an "offer of compromise" case where, by a vote of 5 to 4, the court ruled that $16,650 is $700 less than $17,350. This stunning grasp of commonsense caught at least one Court of Appeals by surprise such that it had to withdraw a published opinion and substitute a new published opinion.

The case is *Stedman v. Cooper*, 2012 Wash. App. LEXIS 2671. In its August 13, 2012 opinion, the court held that defendant Cooper had not improved her position in a trial de novo. The arbitrator had set damages at $23,300. Cooper filed for trial de novo. The plaintiff offered to settle for $23,299.99, i.e., a penny less than the arbitration award. The offer was rejected and the case went to trial. The jury awarded $22,000.00. The trial court entered judgment for the plaintiff for $22,000 plus costs, i.e., $23,469.83. The court then determined that Cooper had not improved her position over the $23,299.99 offered by the plaintiff.

In the November 19, 2012 opinion, the Court of Appeals noted that *Niccum* had established that the arbitrator's award and the jury award are the only relevant figures to be used in determining who improved whose position. (RCW 7.06.050)

Consequently, inasmuch as $22,000 is less than $23,300, the defendant did improve her position, and plaintiff was not entitled to an award of attorneys fees.

And Now for Something Completely Different: The Court of Appeals affirmed the trial court's exclusion of the testimony of an expert witness, Dr. Allan Tencer, a UW professor of M.E. He was going to testify that the plaintiff could not have been injured in the accident because the force of the impact was too small. The court said that such information might mislead the jury. We certainly would not want the jury to think the plaintiff was pumping up her injuries.

I am pleased to note that this case was handled by Reed McClure appellate attorney Marilee C. Erickson.

Stedman v. Cooper, 2012 Wash. App. 2671 (Wash. App. Nov. 19, 2012).

Bird v. Best Plumbing. The question: Does an insurance company have the right to have a jury determine the reasonableness of a bad faith settlement? The Law: Article I, §21 of the Washington State Constitution provides, "the right of trial by jury shall remain inviolate."

"Inviolate." That is a very strong word.

Unfortunately, the significance of the word was lost on the 6 person majority (two of them WSTLA attorneys who should know better). However, the third WSTLA lawyer on the Supreme Court (Justice Charlie Wiggins) did recall the importance of trial by jury:

> The right to jury trial cannot be truncated by such a procedural pretext. The jury trial is the rootstock of our liberties, a fundamental right for which the peers of England stood firm at Runnymede against King John, without which the original states refused to ratify the constitution until the bill of rights was added, and which article I section 21 requires must remain "inviolate."

And then he pointed out the inherent conflict in the majority's analysis:

> The majority's reasoning is also contrary to *Sofie*, in which we distinguished the unconstitutional cap on noneconomic damages from the mandatory arbitration procedure, which requires that damage in smaller cases must be determined initially by an arbitrator. We noted that "the availability of a jury trial de novo to redetermine the arbitrator's conclusion preserved the right protected by article 1, section 21." *Sofie*, 112 Wn.2d at 652. If the majority's interpretation were correct, the constitution would not require a trial de novo by jury; the arbitrator's conclusion would authoritatively determine the damages.

All in all, an extremely disconcerting opinion.

Bird v. Best Plumbing Group, LLC, 175 Wn.2d 756, 287 P.3d 551 (2012).

WILLIAM R. HICKMAN

William R. Hickman is "Of Counsel" with the firm. After 44 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.

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