WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

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VOLUME XL, NO. 2 *SPRING 2016*

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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2016 WASHINGTON SUPER LAWYERS AND RISING STAR

Reed McClure is proud to announce that Bill Hickman, Jack Rankin, Pam Okano, and Marilee Erickson were again named to Thomson Reuters' 2016 Washington Super Lawyers list and that Jason Vacha was named to Thomson Reuters' 2016 Rising Stars list.

HOW MUCH IS THAT DOGGIE IN THE WINDOW?

FACTS:

The Monyaks owned two dogs: an 8-year-old mixed breed dachshund named Lola and a 13-year-old arthritic lab named Callie. The family was taking a vacation to France. And so they checked Lola and Callie into the local doggie kennel, with instructions that Callie was to be given an anti-inflammatory drug "Rimadyl."

When the Monyaks came to pick up the dogs, they found Lola was not in good shape: no appetite, trembling, and acute renal failure (probably caused by giving Callie's medicine to Lola). Nine months later, after many visits to the vet, and multiple dialysis treatments, Lola died. By then, the money spent on Lola was $67,000.

The Monyaks sued the kennel seeking to recover the $67,000 plus they wanted a jury to fix the amount of noneconomic damages they had sustained arising from the loss of Lola.

The kennel was of the view that Lola was property and the Monyaks were entitled to recover only her fair market value. (Since Lola was a free rescue mutt, her fair market value was zero.)

The trial court judge held the Monyaks would be permitted to present evidence of the actual value of the dog to them. The Court of Appeals held that where the actual market value of the animal is nonexistent or nominal, the current measure of damages would be the actual value of the dog to its owners, but held that evidence of noneconomic factors would not be admissible.

And then the case went to the Georgia Supreme Court, which said that the correct measure of damages for the loss of Lola was her fair market value at the time of the loss plus any expenses (including medical) incurred in treating the animal, but there could be no recovery for the animal's sentimental value to its owner.

COMMENT:

They spent $67,000 for treating a dog they got for free from the dog pound!! Why am I surprised or appalled? Americans spend $60 billion a year on their animals. Not only do we have the $67,000 being spent, but we have the expense of processing this legal question. It was taxpayer money which went

to supply a trial court judge, and a flock of appellate judges. Ten entities filed amicus briefs. And the case is not done yet.

The opinion, while based on the common law of Georgia, contains an extensive review of several points of view. However, its summary comes down on the side of common sense:

> ("[D]amages for the intrinsic value of the dog are not recoverable."). Instead, we agree with those courts which have held that the unique human-animal bond, while cherished, is beyond legal measure. ("[T]he sentimental bond between a human and his or her pet companion can neither be quantified in monetary terms or compensated for under our current law.")

Barking Hound Village, LLC v. Monyak, ___ Ga. ___, ___ S.E.2d ___ (2016 WL 3144352).

ANOTHER DOG BITE CASE

FACTS:

This is a story about a dog named "Scrappy." He was an 8-year-old male pit bull mix. Prior to the bite in question, "Scrappy" had a history of questionable behavior. In 2004, he attacked and injured a Dachshund owned by a neighbor. In 2007, the Sheriff had to come out because "Scrappy" aggressively chased a 7-year-old boy visiting a neighbor. In 2008, "Scrappy" lunged out of an open van window and bit the arm of a lady walking by.

"Scrappy" was owned by Cook, who was Mero's friend.

On the day in question, Cook drove Mero's truck to the Mero property. Cook and Mero left the property, leaving Scrappy inside the cab of Mero's truck with the window partially down. A bit later, Oliver arrived at the Mero property. As Oliver walked past the passenger side of the truck, Scrappy lunged out the window and bit Oliver, ripping off a significant piece of his nose.

Oliver sued Cook (the dog owner), the county, Mero, and several others. The trial court dismissed on summary judgment the claims against the county and against Mero. On appeal, the Court of Appeals affirmed the dismissal of the county but reinstated Oliver's premises liability claim.

COMMENT:

Surprisingly, the case presents a host of complex legal issues which the court works her way through in a published opinion. Among the issues reviewed: the public duty doctrine, the failure to enforce exception to the public duty doctrine, whether departmental policies have the force of law, and the evolution of the common law as related to premises liability in dog bite cases.

Oliver v. Cook, ___ Wn App. ___, ___ P.3d ___ (2016).

HOW MANY ACCIDENTS?

FACTS:

Suzanna was drunk. Suzanna was driving. Suzanna was driving drunk southbound.

She crossed the centerline into the northbound lane and hit George. She then swerved into the left turn lane and rear-ended Terry who was stopped at a red light. The impact slammed Terry's car into the rear end of Matt's car, which rotated and hit the front driver's side of Jason's car.

Suzanna continued going south in the northbound lane. She ran a red light and collided head-on with Lynsey's car. The impact caused Suzanna's car to rotate and hit Lynsey's car again. Amber, who was driving behind Lynsey, then rear-ended Lynsey.

All of this took 4-5 seconds over 160 feet.

Out of the carnage, a question of liability insurance arose. The car Suzanna was driving was insured by State Farm. The policy provided coverage in the amount of $100,000 per accident. State Farm took the position that the several collisions constituted one accident.

State Farm filed for a declaratory judgment, but the trial court denied the request for a ruling that the collisions constituted one accident. However, the court also declined to rule that there was more than one accident.

On appeal, the court ruled there were no issues of material fact that the collision constituted one accident as a matter of law.

HOLDINGS:

1. All injuries or damage within the scope of a single "proximate, uninterrupted, and continuing cause" must be treated as arising from a single accident.

2. Suzanna's negligence in losing control of her car was the sole, uninterrupted proximate cause of all the collisions at issue.

COMMENT:

Too bad this bizarre set of facts was not published. The controlling authority is *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465 (1956) and *Pemco Mut. Ins. Co. v. Utterback*, 91 Wn. App. 764 (1998).

State Farm Mutual Auto Ins. Co. v. Glover-Shaw, 2016 WL 687180 (Wash. App. Feb. 16, 2016).

HIT IT AGAIN, SAM

FACTS:

The "Variable Frequency Drive" at the mill was not working. So the boss called the service company which sent out Lee, a technician, to repair the VFD. The boss had Fletcher (a loader operator) escort Lee to the VFD.

They examined the VFD; turned it on and off; took it apart; put it back together. It would not start. The tech confirmed that the cooling fan was not working.

It occurred to Fletcher (the loader operator) that he might fix the non-functioning fan by hitting it. To do so, he picked up a screwdriver from the tool box and announced that he was going to "tap" the fan. As he attempted to tap the fan, he inadvertently came in contact with an energized part of the VFD. This caused an "electrical arc blast" and created what Lee described as the "loudest sound" he had ever heard.

Because of the arc blast, Lee's hearing was permanently damaged. Ultimately, he was rendered unemployable.

Lee sued Fletcher and Willis, claiming that Fletcher was negligent when he shoved the screwdriver into the VFD. Prior to trial, the judge ruled that Fletcher was negligent. The jury allocated 90% of the fault to Fletcher, and 10% to Lee.

On appeal, the court affirmed.

HOLDINGS:

1. To establish the elements of an action for negligence, the plaintiff must show (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury.

2. Whether a legal duty exists is a question of law, but whether a party has breached a duty is a question of fact.

3. A person whose conduct involves an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the risk from taking effect.

4. Negligence is generally a question of fact for the jury, and should be decided as a matter of law only in the clearest of cases and when reasonable minds could not have differed in their interpretation of the facts.

COMMENT:

The opinion contains an excellent review of "foreseeability", a complex and flexible legal concept.

Lee v. Willis Enterprises, Inc., ___ Wn. App. ___, ___ P.3d ___ (2016).

FOOTBALL CONCUSSION

FACTS:

In 2009, Washington became the first state to enact a statute dealing with concussion injuries in youth football. The purpose of the law, known as the Zachery Lystedt Law, was to reduce the risk of injury or death to youth athletes who sustain concussions. In September 2009, Drew, a football player for Valley Christian School, sustained a head injury during a game. He was diagnosed as having sustained a concussion. He was seen by a couple of doctors and was cleared to play the next game.

Soon after the game began, several people saw Drew's quality of play get worse and worse. He was sluggish, out of position, and appeared dazed.

The coach yelled at Drew from the sidelines. On one occasion, he grabbed Drew by the face mask and violently began to jerk it up and down while he screamed at him.

At the end of the second quarter, an opposing player hit Drew; he shuffled off the field and collapsed. Two days later he died.

The parents filed a wrongful death suit against the school, the coach, and several others. On summary judgment, the trial court dismissed the claims against all defendants. On appeal, the court wrote a 29-page opinion, which carefully reviewed how the 2009 statute interfaced with the common law. It upheld the dismissal of the coach but reversed the dismissal of the school.

HOLDINGS:

1. The new law does not create an implied cause of action, but the violation of the new law by one on whom the law imposes a duty may be evidence of negligence.

2. Genuine issues of material fact preclude summary dismissal of the school even though Dr. Burns cleared Drew to return to play, when the coach permitted Drew to continue playing even after Drew showed observable signs of continued concussive injury.

3. The nonprofit volunteer immunity statute, RCW 4.24.670, insulates the coach from personal liability for simple negligence.

4. The three core tenets of the Zackery Lystedt Law are: (1) to establish a set of concussion management guidelines to educate coaches, parents, and youth athletes about the risks associated with concussions, (2) to remove youth athletes from competition if they exhibit any sign or symptom of a concussion, and (3) to require youth athletes to be cleared by a licensed health care provider before returning to play.

5. Each youth athlete and the athlete's parent or guardian must sign and return a concussion and head injury information sheet circulated by the school district before the youth athlete is allowed to participate in any sporting practice or competition.

6. If a youth athlete is suspected of sustaining a concussion or head injury in a practice or game, the youth athlete must be immediately removed from play at that time.

7. A youth athlete who has been removed from play may not return until he receives written clearance from a properly trained licensed health care provider.

COMMENT:

We can't give this opinion and the statute much more than a superficial overview. We will note that the opinion will be an excellent, albeit complex, guide for any litigation arising out of a football related concussion.

We should note the opinion's reference to and application of the "nonprofit volunteer immunity" statute, RCW 4.24.670. It provides immunity to a volunteer of a nonprofit organization for harm not caused by gross negligence, reckless misconduct, or flagrant indifference to the safety of others.

Swank v. Valley Christian School, ___ Wn. App. ___, ___ P.3d ___ (2016).

THE ROOT OF THE PROBLEM

FACTS:

Jennifer had two trees growing on her property. A large portion of the roots from the trees encroached onto the property of her neighbor. The neighbor removed the encroaching roots. Jennifer sued the neighbor for damage to the trees and for nuisance.

The trial court found as a matter of law that the neighbor was entitled to remove the encroaching roots and that in so doing, he did not owe Jennifer a duty of due care to prevent damage to the trees.

The trial court dismissed the case. The Court of Appeals agreed.

HOLDINGS:

1. In Washington, an adjoining landowner can engage in self-help and trim the branches and roots of a neighbor's tree that encroaches onto his or her property.

2. The adjoining owner's remedy is to clip or top off the branches or cut the roots at the property line.

3. A nuisance is an unreasonable interference with another's use and enjoyment of property.

4. In a nuisance case, the fundamental inquiry concerns whether the use of certain land can be considered reasonable in relation to all of the facts and circumstances.

COMMENT:

A review of the opinion indicates that Jennifer put forth every possible argument.

Mustoe v. Ma, 193 Wn. App. 161, ___ P.3d ___ (2016).

POTHOLE IMMUNITY

FACTS:

John fell into a pothole on an asphalt path in Teo Park. The park was owned by the Port. John sued the Port. The Port claimed it was entitled to immunity under the recreation use statute (RCW 4.24.210).

The trial court agreed there was immunity, and the Court of Appeals affirmed.

HOLDINGS:

1. Landowners who allow the public to use their land for recreational purposes without charging a fee are immune from suit for unintentional injuries that occur on the land.

2. The purpose of recreational use immunity is to encourage landowners and those in lawful possession of land to make it available to the public for recreational purposes by limiting their liability.

3. To be entitled to immunity under the recreational use statute, the landowner must prove that the land in question is (1) open to members of the public, (2) for recreational purposes, and (3) for which "no fee of any kind [is] charged."

4. To maintain recreational use immunity and charge a fee, "[a] landowner must only show that it charges no fee for using the land or water area where the injury occurred."

COMMENT:

Fortunately, the Court of Appeals granted a motion to publish in part so the court's clear, succinct decision of recreational land use immunity can be cited.

Hively v. Port of Skamania County, 193 Wn. App. 11, ___ P.3d ___ (2016).

CONTAMINATED TAT

FACTS:

Anne got a tattoo. It did not go well. The ink was contaminated with bacteria. She suffered a serious reaction to the ink. The doctor was able to get the infection under control, but the infection aggravated an underlying chronic kidney disease. Her kidneys failed. She went on dialysis.

Anne brought a negligence suit against the tattoo artist and the tattoo parlor, asserting that they had a duty to use sterile ink. The trial court granted the artist's motion for dismissal, finding that Anne failed to establish the essential elements of negligence.

Anne appealed. But the Court of Appeals affirmed because neither the regulations governing the tattoo industry nor the common law impose a duty to use sterile ink.

HOLDINGS:

1. There is no regulation that, by its plain language, creates a duty to use sterile ink.

2. The plain language of the regulation is not ambiguous. The legislative intent is clear. There is not a regulatory requirement to use sterile ink.

COMMENT:

A most mysterious result. Anne was treated with contaminated ink which led to the loss of her kidney function. But because the secretary of health did not spell out an express prohibition on the use of contaminated ink, she has no claim. Seems that utilization of a contaminated product would violate some duty of care.

Equally mysterious is that while Anne had a product liability claim, she conceded dismissal of that claim.

Chester v. Deep Roots Alderwood, LLC, 193 Wn. App. 147, ___ P.3d ___ (2016).

CUMIS/TANK

Over the past 50 years, clearly the "game changer" opinion was the 1984 *Cumis* case from California. It introduced the concept of "*Cumis* counsel." It allowed a liability carrier to provide a defense to its insured while reserving its right to deny coverage. On the downside, the company had to pay for the defense, and had to provide independent counsel.

Over the following years, many courts adopted variations of the *Cumis* rule. In Washington, the Supreme Court adopted a scaled back rule in the *Tank* case. It was so scaled back that some of us believed the court had "implicitly rejected the *Cumis* rule." *Arden v. Forsberg*, slip op. at 14.

Then in 1997, the California Supreme Court had occasion to review *Cumis*. In a case called *Buss*, the court decided that if after the litigation was over it was apparent that there was no coverage, then the insured should reimburse the company for the cost of providing the defense. This seemed like a fair and equitable solution. But it has not been received with open arms.

Most recently, the question was before the Alaska Supreme Court having been sent via certified question from the U.S. Court of Appeals for the Ninth Circuit. What made this case one to watch was that the reimbursement provision did not arise out of a reservation of rights letter. This time, it was

hard-wired right into the insurance contract. The policy had an express provision providing that the insured would reimburse the insurance company for fees and costs the insurance company incurred "in defending non-covered claims". Hard to imagine how it could be much clearer. But the court said Alaska law prohibits enforcement of a policy provision entitling an insurer to reimbursement of fees and costs incurred while defending under a reservation of rights.

Well, to be perfectly frank, we were not expecting a different result.

Our courts are fond of saying that they do not rewrite the parties' contract. But it sure looks like they rewrote this contract by chopping out the reimbursement provision.

We must not overlook *Hartford Casualty Ins. Co. v. J.R. Marketing, LLC*, 61 Cal. 4th 988, 353 P.3d 319 (2015), where, last year, the California Supreme Court held that Hartford could bring a direct action against the *Cumis* counsel for alleged excessive and unreasonable fees. The defense fees there were in the neighborhood of $13.5 million.

Attorneys Liability Protection Society, Inc. v. Ingaldson Fitzgerald, P.C., 370 P.3d 1101 (Alaska 2016).

MORE *CUMIS* AND MORE *TANK*

And while on the subject of *Cumis* and *Tank*, we must draw your attention to a recent case from Division II: *Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 731, ___ P.3d ___ (2016). Here in a 27-page opinion, the court reviewed and analyzed many, many of the questions that arise when a liability carrier hires *Tank* counsel to defend the insured under a reservation of rights agreement.

Some of the outstanding points of the opinion:

1. We hold as a matter of law that Forsberg's representation of the Ardens while it also represented Hartford did not create a conflict of interest and that Forsberg had no obligation to notify the Ardens that they represented Hartford in other cases.

2. We also hold that there is no evidence that Forsberg breached its duty of disclosure regarding the potential conflicts of interest between Hartford and the Ardens.

3. As a matter of law, Forsberg had no duty to the Ardens to persuade Hartford to accept the claimants' initial settlement offer.

4. There is no evidence that Forsberg breached a fiduciary duty regarding the Ardens' interest in a swift resolution of the lawsuit.

5. A question of fact exists as to whether Forsberg breached its duty to consult with the Ardens before rejecting settlement demands, but there is no evidence that any breach injured the Ardens.

6. We hold that there is no evidence that Forsberg was negligent regarding its judgment decision to extend the start of settlement negotiations.

Back after *Tank* came out in 1986, we counseled defense attorneys who were retained by an insurance company to provide a reservation of rights defense to read the *Tank* opinion very carefully. And then go back and read it again even more carefully. The simple fact was that the rules had been significantly changed, and if defense counsel did not follow the new rules, he or she would get hammered.

Now we will modify that advice: In addition to reading *Tank*, read *Arden v. Forsberg Umlauf* even more carefully.

And, finally, let us bring to your attention the fact that this very important legal opinion had its start when Mr. Arden shot and killed his neighbor's puppy.

Arden v. Forsberg & Umlauf, P.S., 193 Wn. App. 731, ___ P.3d ___ (2016).

FOLLOW-UP

Back in the Short Winter 2015 issue of the Law Letter, we reviewed the *Lui* case as follows:

NO VACANCY COVERAGE

FACTS:

Kut and May owned a business building. The tenant was kicked out in early December for failure to pay the rent.

When winter came, the building was vacant. A water pipe froze and burst causing substantial damage to the building. The owners gave notice of the damage to their insurance company. The company investigated and paid out

almost $300,000.00. The company investigated some more and found out the building was vacant. The policy excluded coverage for water damage when the building was vacant.

The insurance company told the insured that notwithstanding the lack of coverage, it would not seek reimbursement of the $300,000 already paid, but it would not pay anything more on the loss.

The owner sued the company for the remainder of the claim, i.e., $465,285.26. Both sides moved for summary judgment. The trial court ruled in favor of the owner. The Court of Appeals reversed and ruled in favor of the company because the plain language of the vacancy endorsement unambiguously limits coverage for water damage when the building is vacant.

HOLDINGS:

1. Insurance policies are construed as contracts. Washington courts follow the objective manifestation theory of contracts. The courts look for the parties' intent as objectively manifested rather than their unexpressed subjective intent.

2. An insurance policy is construed as a whole, with the policy being given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.

3. Insurance limitations must be clear and unequivocal. We will find a clause ambiguous only when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.

4. We construe ambiguity in favor of coverage. We cannot create ambiguity where none exists.

5. We will not find a contract provision ambiguous simply because it is complex or confusing.

COMMENT:

Nice clear summary of Washington law.

Lui v. Essex Ins. Co., 2015 WL 1542380 (Wash App. Apr. 6, 2015).

The insureds filed a petition for review which the Supreme Court granted. However, the court unanimously held that the policy unambiguously excluded coverage for water damage immediately upon vacancy.

Lui v. Essex Ins. Co., ___ Wn.2d ___, 2016 WL 3320769 (June 9, 2016).

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