WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

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WASHINGTON SUPREME COURT APPLIES CPA'S SAFE HARBOR RULE TO WALGREENS FOR SELLING COUGH SYRUP NOT LABELED 'NONDROWSY'

FACTS:

Walgreens sells company-branded over-the-counter cough medicines containing dextromethorphan hydrobromide. Some of these cough medicines were sold with a prominent "nondrowsy" label on the front of the packaging.

Over-the-counter medications are regulated by the US Food & Drug Administration, which has the authority to determine which medications are safe, effective, and not misbranded. The FDA concluded that any cough medicine containing dextromethorphan hydrobromide did not cause sufficient drowsiness to warrant requiring a drowsiness warning. Nevertheless, the FDA did not enact a rule that permitted such cough medications to be labeled as "nondrowsy."

Plaintiff purchased one of Walgreen's cough medicines. She claimed it made her unexpectedly drowsy. She filed a class action lawsuit against Walgreens in federal court, bringing several claims including a Washington Consumer Protection Act claim, RCW ch. 19.86. The federal district court certified the issue of whether under RCW 19.86.170, the FDA's decision falls within the CPA's safe harbor rule that the CPA does not apply to "actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States."

HOLDING:

1. An action must be specifically and actively permitted by an agency to fall within the CPA's safe harbor rule.

2. The pertinent statutory language is that the CPA does not apply to "actions permitted by any other regulatory body or officer acting under the statutory authority of …the United States." The statute does not define "permitting."

3. Undefined statutory terms are given their common dictionary meanings unless there is strong evidence that the legislature intended something else. "Permit" is defined in the dictionary to mean:

1 : to consent to expressly or formally

permit access to records

2 : to give leave : AUTHORIZE

3 : to make possible.

MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriamwebster.com/dictionary/permitted (last visited Mar. 12, 2025).

Plaintiff's position is consistent with the first two definitions; Walgreen's position is consistent with the third.

4. Washington law has long been that an agency must take overt affirmative actions to permit the actions or transactions at issue to fall within the CPA's safe harbor clause.

5. The court declined to address Walgreen's argument that the CPA was preempted by federal law.

COMMENT:

Another commonsense approach to the safe harbor rule.

Hall v. Walgreens Boots Alliance, Inc., 4 Wn.3d 447, 565 P.3d 564 (2025).

WASHINGTON SUPREME COURT HOLDS THAT THE REASONABLE FORESEEABILITY EXCEPTION APPLIES TO FALLING OBJECTS

FACTS:

Ms. Galassi was shopping at a Lowe's hardware store for fencing. She found what she was looking for at the rear of the store, where rolls of wire fencing were displayed on a horizontal shelf fitted with a stop bar, so that the rolls would not roll off.

The 2'x25' roll she wanted was on the second highest shelf, 6 feet off the floor and slightly above her eye level. It had not been properly put back on the shelf and was partially hanging off the shelf. She tried to remove the roll, but it immediately popped out and fell directly onto her foot, resulting in long-term physical and mental injuries. The accident happened about 5 hours after the store first opened.

Ms. Galassi sued Lowe's. Lowe's moved for summary judgment on the ground that it did not have actual or constructive notice of the allegedly

unsafe condition. There was no dispute that Lowe's did not have the requisite notice.

That said, evidence was presented that Lowe's ran a retail operation where customers were expected to serve themselves. There was also evidence that Lowe's employees were trained to do a daily walk, at the beginning of the business day, through the store to see if there were any dangerous conditions. Whenever an employee saw a dangerous condition, he or she was to correct the problem immediately.

The trial court granted Lowe's motion. Division II of the Court of Appeals reversed, finding genuine issues of material fact. The Washington Supreme Court affirmed the Court of Appeals.

HOLDING:

1. Ms. Galassi had the burden of showing that Lowe's alleged negligence was the "cause in fact" of her injuries.

2. Typically, "cause in fact" can be shown by proving that the defendant had actual or constructive notice of the defect. There is, however, a "reasonable foreseeability" exception to this rule.

3. Under the reasonable foreseeability exception, plaintiff may show the requisite notice by proof that the nature of the proprietor's business and its method of operation are such that the existence of unsafe conditions on the premises are reasonably foreseeable.

Factors in the nature of the proprietor's business and its method of operation could include (but are not limited to) such things as:

> the physical features and layout of the store, including the location where the injury occurred; the types of merchandise offered for sale; where and how different types of merchandise are displayed; the extent to which customers are required or encouraged to interact with the merchandise before purchase; typical customer patterns and behaviors; where store employees are generally situated; whether there is signage providing instructions or warnings to customers; any history of prior injuries; the store's safety, inspection, or maintenance policies; and even the store's geographical location and relevant local weather patterns.

4. Merely because the proprietor operates a self-service operation is insufficient. Such an operation is insufficient. But here, the fencing had been improperly stored on a high shelf, and it was reasonably foreseeable

that a previous customer might have improperly put the fencing back on the shelf.

5. On the other hand, there was evidence that no similar accident had occurred previously. Thus, a genuine issue of material fact exists as to the cause in fact. Moreover, Ms. Galassi still has the burden to also show that Lowe's was negligent.

COMMENT:

The court applies the reasonable foreseeability exception to falling objects.

Galassi v. Lowe's Home Centers, LLC, 4 Wn.3d 425, 565 P.3d 116 (2025).

DIVISION I APPLIES MAJORITY RULE IN COVID PROPERTY DAMAGE CASES

FACTS:

The Tulalip Tribes sued their first-party insurance companies for coverage after Covid-19 required business closures that resulted in significant monetary losses. The Tribes' policies purported to cover "all risk of direct physical loss or damage occurring during the period of this Policy."

The insurers filed a CR 12(b)(6) motion to dismiss for failure to state a claim on the ground that there was no "direct physical loss or damage."

HOLDING:

1. In *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Co.*, 200 Wn.2d 208, 515 P.3d 525 (2022), the Washington Supreme Court held that "physical loss or damage" requires "some external physical force that causes direct physical change to the properties." Here, the loss was all monetary.

2. The court rejected the Tribes' argument that the Covid-19 virus rendered their properties unsafe, thereby causing physical loss. The property remained in possession of the Tribes, could have been used, and the Tribes were not prohibited from entering the property. Indeed, the Tribes resumed operations at the property during Covid-19 despite the fact that the risk of Covid-19 remained. The loss of desired use of the property absent physical change is insufficient.

3. The court also rejected the Tribes' argument that Covid-19 contaminated the air within their property. The virus dissipates on its own after 9 days and could disappear even faster with proper cleaning methods.

In any event, the Covid-19 virus is harmful to humans, but the coverage applies only to property.

COMMENT:

Division I and the *Hill & Stout* court were simply applying what has become the overwhelming majority rule.

Tulalip Tribes v. Lexington Insurance Co., 34 Wn. App. 2d 108, 566 P.3d 149 (2025).

UW HELD LIABLE FOR $1.4 MILLION BECAUSE IT WAS ABLE TO ARGUE ITS CASE EVEN ABSENT ITS REQUESTED JURY INSTRUCTION

FACTS:

Roger was riding his bike on the University of Washington campus when he hit a speed bump and crashed, suffering traumatic brain injury. Because previous bicyclists had also crashed on that speed bump, UW had painted it white and painted the word "BUMP" in 2-ft tall capital letters 30 feet before the bump in both directions. A jury awarded $4 million in damages, but found Roger 65% at fault and UW 35% at fault.

Many years before the accident, Roger had been diagnosed with Alzheimer's. He passed away two years after the accident after entering the hospital for an obstructed bowel.

UW proposed a jury instruction that would have read, " The duty of care is either to eliminate the hazardous condition or to adequately warn the traveling public of its presence." The trial court rejected the instruction as unnecessary and, in fact, in closing argument, UW claimed that it had warned the traveling public of the speed bump.

HOLDING:

1. Whether to give a proposed jury instruction falls within the discretion of the trial court.

2. Jury instructions are adequate when supported by the evidence, when they allow the parties to argue their positions, and when they properly inform the trier of fact of the applicable law.

3. Here UW was able to argue its position to the jury. The jury instructions as given were not misleading or incorrect.

Stocker v. University of Washington, 33 Wn. App. 2d 352, 561 P.3d 751 (2024).

AMAZON NOT LIABLE TO FAMILIES OF PERSONS WHO BOUGHT SODIUM NITRATE TO COMMIT SUICIDE

The families of 4 persons who bought sodium nitrate online from Amazon in order to commit suicide sued Amazon for products liability, common law negligence, negligent infliction of emotional distress, and violations of the Consumer Protection Act. The trial court denied Amazon's CR 12(b)(6) motion to dismiss. Division I of the Court of Appeals granted discretionary review.

HOLDING:

1. Washington law does not impose a duty upon sellers to prevent the intentional misuse of a product, and suicide—under these facts—breaks the chain of causation. Therefore, Amazon's CR 12(b)(6) motion should have been granted.

2. An appeal from the denial of a CR 12(b) motion to dismiss for failure to state a claim is reviewed de novo. Dismissal is appropriate when the court can say that beyond a reasonable doubt, there are no facts that would justify recovery.

3. The Washington Products Liability Act, RCW ch. 7.72, provides the exclusive remedy for products liability claims. Common law claims of negligence are expressly preempted by the WPLA.

4. Under the WPLA, a product seller is subject to liability if plaintiff's harm was proximately caused by one of the following:

> (a) The negligence of such product seller; or (b) Breach of an express warranty made by such product seller;... or (c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

RCW 7.72.040(1).

Plaintiffs here rely on subsections (a) and (c), claiming that Amazon concealed from vendors that the product was being sold to children and vulnerable adults, that Amazon concealed that minors could have Amazon accounts, and that Amazon had misrepresented that it was advisable and recommended that people who purchase sodium nitrite should also purchase anti-vomit medication, a suicide manual with instructions on death

via sodium nitrite, and a personal scale. But the WPLA requires that the seller make intentional misrepresentations about the product itself. Plaintiffs' allegations are insufficient to impose liability under RCW 7.72.040(1)(c).

Furthermore, there is no proximate cause as a matter of law under these circumstances.

5. Here, there was no face-to-face transaction between Amazon and the purchasers that might have alerted the former that the purchasers might have been incompetent. Furthermore, even if there had been, mentally ill persons may be able to hide their symptoms and intentions from even their loved ones.

6. Although Amazon did have a duty to exercise reasonable care to avoid the foreseeable consequences of its sales, there is no duty to protect a person from self-inflicted harm by way of suicide. There is no duty to prevent someone from intentionally taking his own life absent a special relationship, which does not exist here, or the decision to commit suicide was proximately caused by the defendant's negligence such that the suicide was not truly a voluntary act.

7. Under the Washington Consumer Protection Act, RCW ch. 19.86, plaintiff must show injury to his business or property. Causing one's own death is a personal injury, not an injury to business or property.

COMMENT:

The court takes a commonsense approach.

Scott v. Amazon.com, Inc., 33 Wn. App. 2d 44, 559 P.3d 528 (2024), *rev. granted*, 4 Wn.3d 1015 (2025).

AHHHA

FACTS:

Hawkins was rearended by Driver #1. Moments later, Driver #2 rearended Driver #1, resulting in a second collision with Hawkins. Driver #2 worked for Sears, which was insured under a policy issued by Ace American Insurance Co.

Almost a year later, Hawkins' attorney sent Sedgwick—which managed claims for Ace on Sears' behalf—a notice of representation. An adjuster subsequently contacted Driver #2, who provided a statement and photos of the accident. Another adjuster wrote Hawkins' attorney to acknowledge his

representation and request additional information. Shortly thereafter, Hawkins' attorney made a settlement demand and a few months later, sent Sedgwick information about her earnings. Ace never appointed defense counsel for Driver #2.

Approximately 2 years after the accident, Hawkins filed a complaint against Sears and Driver #2, among others. Driver #2 was served with the complaint and notified Sears. Shortly thereafter, Sears filed for bankruptcy, which resulted in a stay of the claim against it and Driver #2. Driver #2 had provided copies of the summons and complaint to Sears by e-mail, but the Sears claim manager neglected to see the e-mail for a month.

By this time, the 20 days in which Driver #2 could have answered the complaint had gone by. Hawkins filed a motion for default, which the trial court granted. Subsequently, the trial court entered a default judgment against Driver #2 for almost $400,000.

At that point, Hawkins hired coverage counsel. Because the stay against Driver #2 had not yet been lifted at the time of the default judgment, Hawkins reached a new settlement with Driver #2 for $1.5 million, claiming that at the time of the default judgment, she had been unaware of the effects of an alleged traumatic brain injury she had suffered as a result of the accident. There was no expert testimony. Hawkins also filed a motion for a determination of reasonableness of the settlement.

At this point, Ace finally appointed defense counsel for Driver #2. A day later, a signed order finding the settlement reasonable was granted and thereafter, Driver #2 confessed judgment for $1.5 million. Pursuant to a covenant not to execute and an assignment of Driver #2's rights against Ace, Hawkins sued ACE.

HOLDING:

Division I of the Washington Court of Appeals held:

1. Because Ace had no notice of the reasonableness hearing, it was not bound by the $1.5 million settlement agreement.

2. When an insurer has an opportunity to be involved in a settlement against its insured, and that settlement is found to be reasonable, the amount of the settlement is the presumptive damages award for purposes of coverage.

3. But an insurer is bound by the settlement only to the extent that the settlement is reasonable and was made without fraud or collusion.

4. A covenant not to execute raises the specter of fraud and/or collusion.

5. But the insurer must be given notice of the proposed covenant settlement and an opportunity to be heard on its reasonableness.

6. If, after the insurer is given the opportunity to be heard in a reasonableness hearing, the settlement is determined to be reasonable and without fraud or collusion, the insurer will be bound.

7. Ace is, as a matter of law, liable for breach of the insurance contract, bad faith, and IFCA violations as a matter of law. An insurer has a duty to defend when the allegations of the complaint, construed liberally, could impose liability on the insured.

8. Ace never appointed defense counsel for Driver #2 for approximately 2.5 years after Driver #2 had been served. By this time, default judgment had been entered.

9. An insurer fails to act in good faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded. Here, Ace provided no explanation for its failure to appoint defense counsel for Driver #2.

10. The duty to defend is a valuable service paid for by the insured. When the insurer unreasonably fails to provide a defense, the insurer has unreasonable denied benefits under the policy to the insured and is thus liable under IFCA.

COMMENT:

No surprise here.

Hawkins v. Ace American Insurance Co., 32 Wn. App. 2d 900, 558 P.3d 157 (2024), *rev. denied*, May 6, 2025.

FEDERAL WAY POLICE OWED ONLY A DUTY TO THE PUBLIC, NOT TO INJURED BYSTANDER

FACTS:

The Zorchenkos and Danica Ostrom were involved in a minor traffic accident. Both drivers pulled over to the side of the road. No one was injured, and the damage to the vehicles was minor. Mrs. Zorchenko decided to call the police for assistance, so she called 911.

Police Officer Giger arrived. She parked her vehicle behind the other two, with the front close to the white line that marked the outer boundary of the roadway, but the rear of the car was several feet onto the shoulder. She activated 3 sets of flashing lights to warn other drivers. After obtaining information about the collision from both drivers, she returned to her vehicle to make the collision report.

Shortly thereafter, a van driven by Derrick Bowers sideswiped the police officer's vehicle, which struck the Zochenkos' vehicle, pushing it onto the grassy hill on which Mr. Zorchenko was standing. He was pinned under the van. Mr. Zorchenko sued the City, as well as Bowers and Ostrom.

The City moved for summary judgment on Mr. Zorchenko's claims against it. Based on the public duty doctrine, the trial court granted the motion and certified the order for immediate appeal.

HOLDING:

1. The trial court properly granted summary judgment to the City.

2. Pursuant to RCW 4.96.010(1), local governments are liable for tortious conduct while performing or performing in good faith their official duties to the same extent as if they were a private person or entity.

3. Thus, local governments are liable for damages for their torts only if the damages arise from official conduct that is "analogous" to conduct that would potentially subject a private person or entity to liability.

4. The requirement of analogous conduct reduces liability because local governments have several duties mandated by statute or ordinance that private parties do not have.

5. Public officials carrying out duties have a duty to the general public, but no actionable duty in tort to particular individuals. This is the public duty doctrine.

6. Thus, to show liability on the part of a public employee, a plaintiff must show that the duty breached was owed to an individual, not just to the public in general.

7. Here, the Zorchenkos did not contact the police for any reason for medical aid or for any reason related to their safety. They merely wanted assistance in obtaining a police report as well as legal advice about moving the vehicles. There was no prolonged interaction between Mrs. Zorchenko

and the 911 dispatcher. The police officer had a statutory duty to investigate collisions and make a collision report. In other words, Officer Giger's duties were statutorily imposed and the duty she owed was to the public in general.

COMMENT:

Again, not a surprising result.

Zorchenko v. City of Federal Way, 31 Wn. App. 2d 390, 549 P.3d 743, *rev. denied*, 3 Wn.3d 1026 (2024).

SANCTIONS OF $1 MILLON PLACED ON DEFENSE COUNSEL'S LAW FIRM

FACTS:

In December 2021, interrogatories were served on defendant, requesting information about potentially applicable insurance policies. The defense produced the declarations page of a $5 million policy issued by Ace American. The answers to interrogatories were signed by Attorney #1, but listed two attorneys.

The litigation continued for 3 more years, plaintiff basing his actions on the premise that there was only one $5 million policy. Plaintiff made a policy limits demand.

On the Friday before trial, the defense disclosed that there was also a $25 million Travelers excess policy applicable to the claim. A jury awarded plaintiff more than $11 million.

After trial, plaintiff requested sanctions for failing to supplement the interrogatory requesting information about insurance policies. Plaintiff did not request attorney fees, but asked that any sanctions be paid to a charity.

Attorney #3 answered the motion, stating under oath that the Travelers excess policy had not been disclosed to defendant's counsel until after the close of discovery and that it had been disclosed to plaintiff as soon as Travelers had sent a copy of the policy to defense counsel. There was no explanation for the delay in producing the excess policy.

The trial court imposed a $1 million sanction on defense counsel's law firm, directing that it be paid to the American Red Cross.

In the meantime, a defense attorney for another law firm filed a supplemental discovery response, stating that there was yet another $25 million policy issued by Everest National that was excess to the Travelers excess policy.

Defense counsel moved to reduce the amount of the sanction. This time the Attorney #1, who had signed the original answer to interrogatories filed a declaration attaching e-mails he had sent to Sedgwick Claims Management, which had handled the claim on behalf of Ace American. One of the e-mails revealed that Attorney #1 had asked Sedgwick for "the applicable policy", not all potentially applicable policies. Moreover, Attorney #1's declaration revealed that he had originally learned about the Travelers excess policy on August 1, 2024, after receiving an e-mail from Travelers that it had been placed on notice of the suit against its insured. There was no explanation why the insured had waited so long to put Travelers on notice. Attorney #1 averred that his failure to supplement his answer to interrogatories was "inadvertent error." There was no explanation why Attorney #1 waited until the Friday before trial to disclose the existence of the policy.

Nor was there any explanation why the Everest National policy was not disclosed until after trial.

The sanctions order and judgment are now on appeal to Division II of the Court of Appeals.

COMMENT:

Sanctions are a discretionary ruling. If the facts are as the trial court has stated, it may be quite difficult to get the sanctions order reversed.

Jok v. Safelite Fulfillment, Inc., Pierce County Superior Ct., No. 20-2-08257-6 (Mar. 14, 2025).

REED MCCLURE IS PLEASED TO ANNOUNCE THE ADDITION OF ATTORNEYS JASON SODERMAN AND JENNIFER SODERMAN WHO ARE JOINING US FROM MURRAY DUNHAM AND MURRAY. WE WELCOME THEM TO OUR REED MCCLURE TEAM!

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