WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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POLLUTION EXCLUSION EXCLUDES

FACTS:

Delores lived in a building owned by Quadrant. Pacific did repair work on the building using a liquid waterproofing sealant. The sealant gave off fumes as it dried. The fumes entered Delores's apartment. Delores suffered personal injury. Delores sued Quadrant.

Quadrant had a CGL policy with American States. The policy had a pollution exclusion which excluded coverage for bodily injury arising out of the discharge, dispersal, release, or escape of pollutants. The term "pollutants" was defined to mean any solid, liquid, gaseous, or thermal irritant including smoke, vapor, fumes, or chemicals. The company denied coverage.

PROCEDURE:

Quadrant sued American States. The trial court granted American States summary judgment, ruling that the pollution exclusion meant what it said. The Court of Appeals held that there was no coverage because the injury and cause of action were the result of a pollutant acting as a pollutant.

COURT OF APPEALS HOLDINGS:

(1) Interpretation of an insurance policy is a question of law.

(2) Summary judgment is appropriate if the contract has only one reasonable meaning when viewed in light of the parties' objective manifestations.

(3) Insurance policies are to be construed as a whole, with force and effect given to each clause.

(4) Overall, a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.

COMMENT:

The opinion did an excellent job of distinguishing between *Kent Farms, Inc. v. Zurich Ins. Co.,* 140 Wn.2d 396, 998 P.2d 292 (2000) (exclusion not applicable) and *Cook v. Evanson*, 83 Wn. App. 149, 920 P.2d 1223 (1996), *rev. denied,* 131 Wn.2d 1016 (1997) (exclusion applied to fumes).

However, that was not the end of the line. Quadrant petitioned the Washington Supreme Court to review the case, and the court agreed. The case was argued in September 2004 and seven months

later, the court issued a 5-4 opinion affirming the Court of Appeals. Inasmuch as insurance companies have lost 90% of their cases in the Supreme Court in recent years, it is difficult to quantify the significance of this ruling. One national coverage writer characterized it as "astonishing."

And we must also note that American States was represented by Reed McClure attorney Mary R. DeYoung.

SUPREME COURT HOLDINGS:

(1) Courts construe insurance policies as contracts and consider the policy as a whole, giving it a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.

(2) If insurance policy language is clear and unambiguous, courts must enforce it as written, and may not modify it or create ambiguity where none exists.

(3) A clause in an insurance policy is ambiguous only when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.

(4) The expectations of the insured cannot override the plain language of the contract.

(5) While insurance policy exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results.

(6) Where an insurance policy exclusion unambiguously applies to the facts of the case at hand, the plain language must be applied without reference to extrinsic evidence regarding the intent of the parties.

(7) Absolute pollution exclusion excluded coverage for injuries suffered by tenant when fumes from a waterproofing material used in complex entered tenant's unit.

Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 110 P.3d 733 (2005), *aff'g* 118 Wn. App. 525, 76 P.3d 773 (2003).

MARILEE C. ERICKSON

PRACTICE

Marilee C. Erickson is a shareholder in the Reed McClure law firm. For the past sixteen years, she has been representing parties in trial and appellate courts. She focuses her practice on matters involving commercial and insurance disputes and defense of tort claims.

Marilee is a charter member of the Washington Appellate Lawyers Association ("WALA"). She devotes a substantial portion of her practice to appellate matters. 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

University of Puget Sound School of Law (now known as Seattle University School of Law), J.D., *cum laude*, 1986
North Park College, B.A., *cum laude*, 1982

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 is a member of the following professional organizations:

King County Bar Foundation, President (1999-2000)
King County Bar Association
Washington Defense Trial Lawyers

LET THE PUNISHMENT FIT THE CRIME

FACTS:

In the fall of 1997, Richard sustained a workplace injury. In 1998, he asserted a claim for his injuries. Then in May 2000, he filed for bankruptcy. He did not list his personal injury claim on the bankruptcy schedule.

The bankruptcy proceeded. The trustee determined that there were no assets. Richard was discharged.

Eleven days later, Richard filed a personal injury lawsuit in state court. The defendant in the personal injury lawsuit moved for dismissal, arguing that judicial estoppel barred the personal injury claim. The superior court judge granted the motion and dismissed. Richard appealed. The Court of Appeals affirmed, pointing out that judicial estoppel was established when Richard failed to list his personal injury claim on the bankruptcy schedules and that failure was accepted and relied upon by the bankruptcy court.

HOLDINGS:

(1) Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

(2) The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resorting to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and waste of time.

(3) The failure to list the claim in the bankruptcy schedules fulfills the first criterion of judicial estoppel. The Bankruptcy Code and court rules "impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims."

(4) The failure to disclose the claim by failing to list it in the schedules was an inconsistent position from the one now taken.

(5) Judicial estoppel applies only if a litigant's prior inconsistent position benefited the litigant or was accepted by the court. Both are not required.

(6) The case was closed as a "no asset" case. The bankruptcy court accepted Richard's position that the liquidation of nonexempt property would not create a dividend for unsecured creditors.

COMMENT:

In *The Mikado* (Song #17; Act 2), those commentators on 19th century morality, Gilbert & Sullivan, introduced the novel concept that the punishment should fit the crime. Here, we had Richard swearing under oath in the bankruptcy proceeding that he had no personal injury claim. And after he is found out, presto!, he has no personal injury claim. There could not be a better example.

Richard's last gasp argument was to blame his bankruptcy attorney. The court called this "disingenuous."

Further explanation of judicial estoppel can be found in *Hamilton v. State Farm,* 270 F.3d 778 (9th Cir. 2001), and the many cases which have followed it.

Cunningham v. Reliable Concrete Pumping Inc., 126 Wn. App. 222, 108 P.3d 147 (2005).

JUDICIAL ESTOPPEL - PART II

FACTS:

Shortly after Division I published the *Cunningham* opinion, Division II issued a similar ruling.

In May 1997, the Davises filed for Chapter 7 bankruptcy. The next month, they sued Dr. Morgan for $5 million for malpractice. They did not list the Dr. Morgan claim on their bankruptcy forms. In fact, Ms. Davis denied under oath any knowledge of her claim against Dr. Morgan. At the time the denial was made, she knew it was false. It was an intentional failure to disclose.

The bankruptcy court accepted the representation, closed the case as "no asset," and discharged the Davises.

In April 2001, Dr. Morgan moved for dismissal based on judicial estoppel. The Davises ran back to the bankruptcy court to reopen their proceeding and to list Dr. Morgan, and to get a new trustee appointed.

The trial court held a fact-finding hearing. After that, he entered findings that Davis had falsely denied the claim against Dr. Morgan, and had intentionally failed to disclose it. He concluded that judicial estoppel barred the claim.

The Court of Appeals said that the judge exercised his broad discretion and properly applied judicial estoppel.

HOLDINGS:

(1) "Judicial estoppel" arises in equity and serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court.

(2) A court may invoke judicial estoppel either to prevent a party from gaining an advantage by taking inconsistent positions or to maintain the dignity of judicial proceedings.

(3) The Bankruptcy Code and court rules impose on the debtor an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.

(4) Because judicial estoppel seeks to protect courts and not parties, the doctrine may be applied even if the inconsistent actions involve different parties or, in the absence of reliance, damage or final judgment in the first action.

COMMENT:

The court found legal support for its ruling in both Division I's *Cunningham* case and the 9th Circuit's *Hamilton* case. The court agreed with several other courts which have held that the exclusive jurisdiction to decide whether judicial estoppel applies rests with the court where the undisclosed claim is pending, not with the bankruptcy court. Moreover, the specificity of the findings of fact as to the intentional failure to disclose, and the denial under oath made any other result unthinkable.

We were pleased to represent Dr. Morgan on appeal.

Garrett v. Morgan, ___ Wn. App. ___, 112 P.3d 531 (2005).

SOMETIMES NOTHING GOES RIGHT

FACTS:

In February 1993, the Huffs were involved in an Oregon auto accident. Ten days later they retained lawyer Pat. Two years later, the Oregon statute of limitations ran. No complaint had been filed. In June 1995, the Huffs hired lawyer Carl, and learned that the statute had run on their claim.

In May 2002, the Huffs, represented by lawyer Carl, sued lawyer Pat for having missed the two-year statute of limitations back in 1995. Lawyer Pat moved for dismissal, arguing that the Huffs and lawyer Carl had themselves missed the Washington three-year statute of limitations for legal malpractice.

The trial court dismissed because the Huffs waited nearly seven years after discovery. The Court of Appeals affirmed.

HOLDINGS:

(1) The statute of limitations for a legal malpractice action in Washington is three years.

(2) Generally, the statute of limitations accrues when the plaintiff has a right to seek relief in the courts.

(3) The discovery rule applies in legal malpractice actions, and the statute of limitations does not accrue "'until the client discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action.'"

(4) The statute of limitations begins to run when "the plaintiff knew or should have known all of the essential elements of the cause of action."

(5) The Huffs were not diligent in pursuing their rights. They knew the facts underlying their malpractice claim as early as June 24, 1995, nearly seven years before filing suit.

COMMENT:

There is a certain irony (or is it coincidence) that the claim against lawyer #1, for missing the statute, was barred because lawyer #2 also missed the statute. Wow, do we dare compute when the Huffs' claim against lawyer #2 for missing the statute arose? Could it be that it ran out in June 2001?

Whatever. We are pleased to note that lawyer #1 was represented by Jennifer L. Moore and Earl M. Sutherland of Reed McClure.

Huff v. Roach, 125 Wn. App. 724, 106 P.3d 268 (2005).

NOT AS FUNNY AS IT SEEMED AT THE TIME

FACTS:

Dr. Woo, an oral surgeon, decided to play a joke on his assistant, Tina. While she was under anesthesia for the repair of a chipped tooth, he placed false teeth shaped like boar tusks in her mouth. Then he took pictures of her. After she woke up, she was given the teeth and the picture.

Tina left. Tina got a lawyer. Tina sued Dr. Woo for a lot of things: assault; outrage; battery; invasion of privacy; medical negligence; and negligent infliction of emotional distress. His liability carrier refused to defend him. Dr. Woo settled with Tina. He sued his insurance company for coverage, bad faith, and Consumer Protection Act violations.

The trial court judge ruled that the company should have defended Dr. Woo. The jury returned a verdict in his favor. On appeal, Division I, finding that there never was a duty to defend, reversed the judgment and ordered the case dismissed.

HOLDINGS:

(1) An insurer's duty to defend an action brought against a policyholder arises when a complaint is filed alleging facts and circumstances arguably covered by the policy.

(2) Although the duty to defend is broad, an insurer has no duty to defend claims based on factual allegations that are clearly not covered by the policy.

(3) This complaint is not ambiguous. Tina accused Dr. Woo of devising a scheme to humiliate and denigrate her by obtaining a pair of flippers shaped like boar tusks, putting them in her mouth, taking pictures of her with the tusks in her mouth while she was anesthetized, and later referring to the tusks and pictures as a "trophy to take home."

(4) Although the complaint lists several alternative causes of action, including medical negligence and negligent infliction of emotional distress, the facts and circumstances supporting her claims are limited to this series of events.

(5) No reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient.

(6) As a matter of law when Dr. Woo placed the boar tusks in Tina's mouth and took pictures, he was not rendering professional services.

COMMENT:

Fascinating case. The opinion goes on to explain why there was no coverage under the employment practices coverage and the general liability coverage in addition to the professional liability coverage.

Woo v. Fireman's Fund Ins. Co., ___ Wn. App. ___, 114 P.3d 681 (2005).

EARL M. SUTHERLAND

PRACTICE

Mr. Sutherland represents clients in a wide variety of complex civil litigation matters, including errors and omissions claims against and involving lawyers, as well as other professionals, directors and officers, and securities act claims; insurance coverage disputes and "bad faith" litigation arising from a variety of insurance policies; construction defect and products liability matters. He has over two decades of trial court experience.

Mr. Sutherland is admitted to practice in the state and federal courts of Washington and Alaska, and in the Court of Appeals for the Ninth Circuit.

EDUCATION AND BACKGROUND

Mr. Sutherland was born in Lake Forest, Illinois, but early in his life traveled extensively and lived for a time in Sao Paulo, Brazil. His family then settled in the Portland, Oregon area, where he attended Reed College. He was a student at the University of Warwick in Coventry, England, for a year before receiving his B.A. in History from Reed in 1978.

Mr. Sutherland received his J.D. from the University of Washington School of Law in 1981. Upon graduation, he moved to Anchorage where he practiced with the firm of Hughes, Thorsness, Gantz, Powell & Brundin, Alaska's largest law firm. Mr. Sutherland had been a partner there for over eight years when he accepted the position with Reed McClure that enabled Earl, his wife Nancy, and their three daughters to return to Seattle.

Mr. Sutherland is a member of the following professional organizations:

Defense Research Institute
Washington Defense Trial Lawyers
Washington State Bar Association
Alaska Bar Association
Past State Chairman, United States Supreme Court
Historical Society
IADC Trial Academy Graduate

PUBLICATIONS AND PRESENTATIONS

"One Client, One Defense: Revisiting CHI with the Alaska Rules of Professional Conduct," 11 *Alaska Law Review* 1 (1994)

Reed McClure seminars for client groups, including The Annual Insurance Law Seminar.

Presentations to Insurance industry associations, addressing issues of contractual liability, additional insureds, errors and omissions prevention and related topics.

Tort law digest editor for inclusion in Best's *Directory of Recommended Insurance Attorneys*.

In-house presentations for continuing education and training to various professional clients on risk management and prevention matters.

THAT ATV IS A CYCLE

FACTS:

Adina was riding as a passenger on a 4-wheel Yamaha Banshee ATV. Adina was thrown off and injured. There being no insurance on the ATV, Adina sought coverage under her UIM policy with State Farm.

The UIM policy provided that there was no coverage for injury occurring while Adina was operating or occupying a motorcycle or a motor driven cycle.

State Farm was of the view that there was no coverage. Adina sued. The trial court found for State Farm.

On appeal, the court concluded that the 4-wheel ATV was a "motor driven cycle," and that there was no UIM coverage.

HOLDINGS:

(1) In *State Farm v. Gates,* 83 Wn. App. 471 (1996), we held that a 3-wheel ATV is a motorcycle.

(2) We think that an average purchaser of insurance viewing the Banshee would readily believe, without doubt or ambiguity, that it is a "motor driven cycle."

(3) We hold that a 4-wheel ATV is a motor driven cycle.

COMMENT:

Short, clear opinion which contains a host of dictionary definitions of various cycles.
I am pleased to note that State Farm was represented by my partner Pam Okano.

Lake v. State Farm Mut. Auto. Ins. Co., ___ Wn. App. ___, 110 P.3d 806 (2005).

ANAMARIA GIL

PRACTICE

Ms. Gil has twelve years of litigation experience. Since coming to Reed McClure in 1996, Ms. Gil has focused her practice on personal injury defense litigation, including premises liability, product liability, and motor vehicle accidents. Ms. Gil devotes a significant part of her practice to representing and advising large retailers and property owners in tort-related lawsuits.

Ms. Gil has considerable experience defending claims involving significant and catastrophic injuries.

Ms. Gil also has background and experience defending UIM claims, and investigating suspicious loss claims for insurance companies.

Ms. Gil also serves as an arbitrator for the King County Superior Court.

EDUCATION

Northwestern University School of Law, J.D., 1992
University of Washington, Political Science Honors Program, B.A., 1989

BACKGROUND

Ms. Gil was born an American citizen abroad in Tegucigalpa, Honduras. In her early life, she traveled extensively through Latin America with her family, before settling in Seattle.

Ms. Gil is licensed to practice in Washington State and the U.S. District Court, Eastern and Western Districts of Washington.

In 1994, Ms. Gil served as a Special Deputy Prosecutor for the Office of the Prosecuting Attorney in King County, Washington.

MEMBERSHIPS

Washington State Bar Association

Washington Defense Trial Lawyers Association

HONORS AND AWARDS:

Selected, "Rising Star", Washington Law & Politics Magazine, 2001.

WIGA'S UIM SETOFF

FACTS:

Margaret was injured in an auto accident caused by Nirmal. Nirmal had $100,000 in insurance with United Pacific. Unfortunately, United Pacific went bankrupt. Fortunately, Margaret had $100,000 in UIM coverage with her own carrier. That was paid. But Margaret wanted more. She wanted WIGA to put up another $100,000 to replace the $100,000 which United Pacific was not paying.

The trial court and the Court of Appeals ruled that it was clear that WIGA was entitled to offset its payment obligation by the amount available under a claimant's UIM policy.

HOLDINGS:

(1) It is well established that WIGA is entitled to offset its obligation by the amount available under a claimant's UIM policy. The purpose of chapter 48.32 RCW is to avoid financial loss to claimants when insurers become insolvent.

(2) The statute is not intended to increase the insurance recovery available to claimants.

(3) Under the Act, WIGA steps into an insolvent insurer's shoes to the extent of its obligation on all covered claims.

(4) RCW 48.32.100, the nonduplication provision, provides, however, that a claimant who has a claim against his insurer which is also a covered claim under the Act must first exhaust his right under his own policy. Any amount collected by the claimant must be offset against WIGA's obligation.

COMMENT:

Some of the very early WIGA cases appeared to treat the WIGA fund as some kind of golden-egg-laying goose which was subject to judicial carving. In recent years, we have seen a recognition that WIGA is a creature of statute. It is not and was not created to act as an ordinary insurance company. It is a statutory entity that depends on the Act for its existence, and for the definition of its power and duties. It issues no policies, collects no premiums, makes no profits , and assumes no contractual obligation to its insureds.
We are pleased to point out that Reed McClure attorney Mary R. DeYoung represented WIGA.

Gallagher v. Sidhu, 126 Wn. App. 913, 109 P.3d 840 (2005).

PLAY IT STRAIGHT!

FACTS:

The Johnsons had a fire in their pump house. They said it destroyed an extensive tool and hobby collection. After paying the Johnsons about $16,000, Allstate concluded that there had been misrepresentation, concealment, and a failure to cooperate.

The Johnsons sued Allstate for breach of contract, bad faith, and negligence. The dispute was tried to a jury, which said that the Johnsons had intentionally misrepresented material facts in connection with the fire loss.

The trial court dismissed the Johnsons' claim and ordered the Johnsons to pay back the $16,000. The Johnsons appealed, but the Court of Appeals ruled the Johnsons had to pay Allstate, and Allstate did not have to return the premiums.

HOLDINGS:

(1) Homeowners' insurer was not required to return premiums paid by insureds after policy was voided by concealment and misrepresentation during loss reporting period in connection with claim; the contract was valid when entered.

(2) Insured's misrepresentations and concealment in connection with claim for personal property destroyed by fire voided entire homeowners' insurance policy and entitled the insurer to recover payments made for loss to structure.

COMMENT:

A clear reminder that, in Washington, a policyholder is held to a high standard of honesty in the adjustment of a fire loss. A fire loss is not a lottery ticket.

Of interest to counsel was the court's criticism of trial counsel for submitting a copy of an unpublished Court of Appeals opinion to the trial court judge. It pointed out that unpublished opinions are not part of the common law of Washington and should not be cited.

Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 108 P.3d 1273 (2005).

WE HAVE BEEN REMISS

We have been remiss in failing to bring to your attention some outstanding new lawyers who have joined us here at Reed McClure.

Greg Silvey joined the firm as a principal in September of 2004. He came to us from Alaska where he was a shareholder in the Anchorage firm of Guess & Ruud. Mr. Silvey is in his twentieth year of practice, which has covered a wide variety of issues, including insurance coverage, coverage litigation, bad faith litigation, commercial disputes, product liability and professional negligence. He is admitted to practice in the state and federal courts of Washington and Alaska.

We welcomed four new associates as well:

Kelly Hebert in October 2004 — Her practice focuses primarily on insurance defense litigation, including personal injury and health care matters. She is a graduate of the UW and the Seattle University Law School.

Terry Price in January 2005 — Mr. Price practices litigation concerning insurance defense matters. He was a law clerk at the Court of Appeals, Division Two. He is a part-time lecturer at the UW Law School.

Miry Kim in June 2005 — Ms. Kim practices in the areas of insurance defense and general litigation. She is a graduate of Reed College and the UW Law School. Before joining the firm she was a Deputy Prosecuting Attorney in Pierce County.

Kara Craig in June 2005 — Her practice is focused on medical malpractice defense litigation. She is a graduate of the University of Illinois undergraduate and law school. Prior to joining the firm she was involved in appellate and professional liability disputes in Illinois.

MITIGATING THE DAMAGE

FACTS:

Fox and Evans were involved in an auto accident. Fox sued. Evans admitted liability but contested damages, saying that Fox had failed to mitigate her damages.

At trial, Evans introduced expert testimony that Fox would not accept a diagnosis of depression and that if she treated her depression, her condition would improve. There was also evidence that Fox had stopped taking medication which had improved her condition.

The court instructed the jury about mitigation. The jury found that Fox's failure to mitigate was the cause of 22% of her damages.

Fox appealed, but the Court of Appeals said the mitigation instruction was supported by substantial evidence, and affirmed the reduced judgment.

HOLDINGS:

(1) An injured person may not recover damages proximately caused by that person's unreasonable failure to mitigate.

(2) A person who is liable for an injury to another is not liable for any damages arising after the original injury that are caused by the failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damages.

(3) A defendant requesting a failure to mitigate instruction must show that there were alternative treatment options available to the plaintiff and that the plaintiff acted unreasonably in deciding on treatment.

(4) This rule recognizes that an injured party has some duty to lessen his or her damages.

(5) Because the defendant caused the injury, however, it is the defendant's burden to show that the plaintiff acted unreasonably.

COMMENT:

It is a rare case where the defense not only alleges failure to mitigate, but goes ahead and convinces the jury that there was an unreasonable failure to mitigate.

Fox v. Evans, ___ Wn. App. ___, 111 P.3d 267 (2005).

THE ACCIDENT IS NOT NEGLIGENCE

FACTS:

Thirteen-year-old Danae got off the school bus. The bus had stopped 20-100 feet past the usual stop. That point was closer to Danae's house than normal and was on the same side of the street as her house.

The bus drove away a short distance to a stop sign. Danae walked down the road toward her house, and then started walking across the street behind the bus to her mail box located across the street from her house. As Danae came out from behind the bus, she was hit by Connie.

Danae sued Connie, the school bus driver, and the school district for her injuries. The trial court dismissed all three defendants on summary judgment. The Court of Appeals affirmed, pointing out that "legal causation" was absent from the plaintiff's case.

HOLDINGS:

(1) Speeding cannot be said to have proximately caused a collision if the speeding car was where it was entitled to be and the driver would not have had sufficient time to avoid the collision even if driving at the lawful speed.

(2) Washington courts have consistently refused to impose liability on drivers who hit children who darted onto the roadway from behind obstructions.

(3) The only proof Danae offers as to the danger of the drop off point is evidence of the accident itself. Proof that an accident occurred is not by itself proof of negligence.

(4) Danae did not need to cross the street to get to her home. The bus driver was unaware of Danae's intention to cross the street to check the mailbox and thus cannot be held liable for her failure to make sure Danae crossed the street safely after she had dropped Danae off and pulled away.

COMMENT:

Our summary does not do justice to the legal analysis set out by the court. Through abundant description and quotation, the court sets out for the reader exactly why this plaintiff's claim could not withstand summary judgment.

Claar v. Auburn Sch. Dist., 126 Wn. App. 897, 110 P.3d 767 (2005).

AN UNREASONABLE SETTLEMENT

FACTS:

Mike was driving his wife's car. He made a sudden left turn in front of Dean. Dean died.

Mike had a $25,000 policy with Clarendon. They denied coverage because the wife's car was not listed on the policy.

Prior to the accident, Mike had filed a Chapter 13 bankruptcy. After the accident, he converted it to a Chapter 7 proceeding. After he was discharged, Dean's widow sued the insurance company and filed a declaratory action. The widow made a policy limits demand with a 60-day deadline. The company did not respond.

The insurance company moved for summary judgment on coverage. The trial court found that Mike was entitled to coverage as a matter of law. The company tendered the $25,000 limits. The widow rejected the tender and proceeded with her wrongful death case against Mike. The company was providing Mike a defense.

Mike and the widow agreed to settle. In exchange for a $5 million confession of judgment, the widow agreed not to hold Mike personally liable on the judgment.

The widow, as Mike's assignee, filed a bad faith against the insurance company alleging it had acted in bad faith in its initial denial of coverage, in failing to provide Mike counsel in the declaratory action, and in failing to make a timely response to the policy limits demand. That lawsuit was dismissed on summary judgment, and is pending on appeal.

Back in the wrongful death suit, the widow moved for a determination that the $5 million covenant judgment was reasonable. The trial court found that the $5 million settlement was inherently unreasonable because Mike's discharge in bankruptcy was a complete defense, *i.e.*, Mike had no exposure. The Court of Appeals said the trial court did not abuse his discretion.

HOLDINGS:

(1) In determining the reasonableness of a settlement agreement, the trial court weighs the factors identified in *Glover v. Tacoma General Hospital.*

(2) The *Glover* factors are also appropriate when determining the reasonableness of a settlement in context of a covenant judgment.

(3) The amount of a covenant judgment will become the presumptive measure of an insured's

harm in a bad faith action against the insurer only if the covenant judgment is reasonable under the *Glover/Chaussee* factors.

(4) In determining the reasonableness of a settlement, the trial court "must have discretion to weigh each case individually."

(5) A covenant judgment can be reasonable per se only in a case where an insurer breaches its duty to defend or otherwise wrongfully "exposes its insured to business failure and bankruptcy."

(6) As the trial court saw it, the fact that Mike had been granted a discharge in bankruptcy of his personal liability to Dean made it unreasonable for him to settle for any amount in excess of the available policy limits. By virtue of the bankruptcy discharge, Mike had a complete defense to personal liability.

COMMENTS:

Too often it appears that the trial court just rubber stamps the settlement as "reasonable." It is rather refreshing to note that this trial court judge did actually see that the "settlement" was nonsense.

It should not be overlooked but in the opinion the court stated that, "It bears repeating that [the insurance company] did defend [Mike]." I would interpret that as a message that the result might have been different if a defense had not been provided.

Werlinger v. Warner, 126 Wn. App. 342, 109 P.3d 22 (2005).

QUICKLY, QUICKLY, QUICKLY

Colorado has held that expert testimony on standard of care was not required in first-party bad faith. However, what was of much greater significance was that the Colorado Supreme Court placed Colorado among the overwhelming majority of jurisdictions that make the existence of coverage a prerequisite to bad faith liability. And who, dear reader, do you think is out in left field? You are right! It is Washington. It must be something in the water in Olympia which causes the court to fantasize that a bad faith edifice can be constructed without a coverage foundation.

American Family Mut. Ins. Co. v. Allen, ___ Colo. ___, 102 P.3d 333 (Colo. 2004).

The Washington courts continue to keep the *Birklid* exception to employer immunity a very narrow exception. In the first case, Division I held that a former Seahawk defensive lineman, who had his career ruined when he impaled his knee on a hook welded onto the rear of a blocking sled, had failed to create a fact issue as to whether the injuries were inflicted with deliberate intention of the employer. In the second case, the Supreme Court held (7-2) that while a severely disabled special education student had injured the staff 96 times during the school year, the injured teachers were unable to show that the school district had willfully disregarded actual knowledge that employee injury was certain to occur.

Watson v. Football Northwest Mgmt., 2005 WL 762614 (Wash. App. Apr. 4, 2005). *Vallandigham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 109 P.3d 805 (2005).

United States Supreme Court opinions are usually a bit too refined for this publication. However, the recent case of Richard Rousey caught our eye. Richard was in bankruptcy. He took the position that his IRA was safe from his creditors. The trustee ruled against him. Richard appealed. The bankruptcy judge ruled against him. Richard appealed. The Bankruptcy Appellant Panel ruled against him. Richard appealed. The 8th Circuit Court of Appeals ruled against him. Richard appealed. And finally, the U.S. Supreme Court ruled unanimously (9-0) in Richard's favor. Moral: Never, never, ever give up.

Richard's persistence brings to mind the soliloquy by the King of Swamp Castle in Scene 14 of *Monty Python and the Holy Grail:*

> Listen, lad. I built this kingdom up from nothing. When I started here, all there was was swamp. Other kings said I was daft to build a castle on a swamp, but I built it all the same, just to show 'em. It sank into the swamp. So, I built a second one. That sank into the swamp. So, I built a third one. That burned down, fell over, then sank into the swamp, but the fourth one . . . stayed up! And that's what you're gonna get, lad: the strongest castle in these islands.

Rousey v. Jacoway, 125 S. Ct. 1561, 161 L. Ed. 2d 563 (2005).

While it sometimes seems as if the rules relating to appeals are made of soft, malleable plastic, the one which appears carved in stone is that if you want to appeal, you have got to file a notice of appeal within 30 days. If you do not, you had better have a better excuse than, "The computer ate it." In a recent case out of Division III, we see the court first ruled that the clock started ticking when the superior court judge in a RALJ appeal signed and filed a copy of her oral opinion. It then noted that an extension would be inappropriate as there was no showing of extraordinary circumstances. It stated that the mistake of counsel was not extraordinary.

City of Spokane v. Landgren, _____ Wn. App. _____, 107 P.3d 114 (2005).

In an unpublished opinion, Division I reiterated the rule that a defendant informally appears in an action when he or his agent engages in activity that demonstrates an intent to defend. Here, the adjuster for the defendant's insurance company communicated with the plaintiff's attorney to discuss settlement before the complaint was filed. That was sufficient to constitute an informal appearance, and to require vacation of the default judgment. Published discussions of how settlement talk and request for records can constitute an informal appearance are found in *Batterman v. Red Lion Hotels,* 106 Wn. App. 54, 21 P.3d 1174 (2001), and *Skilcraft Fiberglass, Inc. v. Boeing Co.,* 72 Wn. App. 40, 863 P.2d 573 (1993).

Morin v. Burris, 2005 WL 827231 (Wn. App. Apr. 11, 2005).

The New York Court of Appeals has held that a fraudulently incorporated medical practice (*e.g.*, one not owned by a licensed physician) is not entitled to reimbursement under a no-fault policy.

State Farm Mut. Auto. Ins. Co. v. Mallela, 4 N.Y.3d 313, 827 N.E.2d 758 (2005).

The Appeal Group

Reed McClure's Appeal Group had its beginning May 14, 1968. That was the day Bill Hickman started working on his first appeal. Thirty seven years and 500 appeal proceedings later the Appeal Group is pleased to note that so far in 2005 it has received 20 appellate opinions, and won 75% of those. Of equal significance is that while the vast majority of appellate opinions in Washington are "unpublished", almost 50% of the Reed McClure opinions were "published" meaning they represented a contribution to the common law of the state of Washington.

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com/newsltr.htm ... and Pam Okano's Coverage Column is available at www.wdtl.org/ (see Coverage Uncovered).

For up to date reports on Reed McClure attorneys please visit our website at www.rmlaw.com

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