WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY PAMELA A. OKANO

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WELCOME BACK ANNOUNCEMENT 1

A RESULTING LOSS CLAUSE ENDS IN A RESULT THE INSURER DIDN'T ANTICIPATE 1
Gardens Condominium v. Farmers Insurance Exchange, 2 Wn.3d 832, 544 P.3d 499 (2024), aff'g 24 Wn. App. 2d 950, 521 P.3d 957 (2022).

WASHINGTON SUPREME COURT UPHOLDS PIP PAYMENTS UP TO THE 80TH PERCENTILE 3
Schiff v. Liberty Mutual Fire Insurance Co., 2 Wn.3d 762, 542 P.3d 1002, *as amended* (2024).

TO BE LIABLE OR NOT TO BE LIABLE 5
Barlow v. State, 2 Wn.3d 583, 540 P.3d 783 (2024).

EMOTIONAL DISTRESS DAMAGES IN BAD FAITH CLAIMS DON'T REQUIRE PROOF OF OBJECTIVE SYMPTOMATOLOGY 7
P.E.L. v. Premera Blue Cross, 2 Wn.3d 460, 540 P.3d 105 (2023).

IT'S NOT ALWAYS TOO LATE 8
Bennett v. United States, 2 Wn.3d 430, 539 P.3d 361 (2023).

YES, VIRGINIA, A LANDOWNER CAN AVOID PREMISES LIABILITY BY REASONABLE DELEGATION TO AN INDEPENDENT CONTRACTOR 10
Eylander v. Prologis, 2 Wn.3d 401, 539 P.3d 376 (2023).

HOW NOT TO HANDLE A CLAIM 12
Rybacki v. Progressive Cas. Ins. Co., No. 84676-1-I (Dec. 11, 2023).

TROUBLING SLIP AND FALL CASE IS SETTLED BEFORE ORAL ARGUMENT IN THE WASHINGTON SUPREME COURT 15
Moore v. Fred Meyer Stores, Inc., 26 Wn. App. 2d 769, 532 P.3d 165 (2023).

E-MAIL NOTIFICATION 16

REED MCCLURE ATTORNEYS 17

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INDEX

Bad faith 7-8, 12-14
- Reserves as evidence of 12-14
Breach of contract 14
Burden of proof for emotional distress damages 7-8
Business operator 6-7
Consumer Protection Act 3-5, 14
Duty of a college to use reasonable care to protect students
from another student's off-campus actions 5-7
Duty of care 5-7, 14
- Delegation of 10-12
Emotional distress damages 7-8
Exclusion
- Faulty or defective construction 1-3
Failure to investigate 12-14
Failure to provide reasonable explanation for offer of settlement 14
Faulty or defective construction exclusion 1-3
Foreseeability 5-7, 15-16
IFCA 14
Independent contractor 10-12
Insurance policy construction 1-3
Invitee 10-12
Landowner 6-7, 10-12
Medical expenses
- Reasonable and necessary 3-5
Medical malpractice 8-10
Negligence 5-7, 10-12, 14
Notice of condition that caused an accident 15-16
PIP 3-5
RCW 4.16.350(3) 8-10
RCW 48.01.030 14
RCW 48.22.095(1)(a) 4
Reserves as evidence of bad faith 12-14
Resulting loss clause 1-3
Slip 'n' fall 15-16
Special relationship 5-7
Statute of Repose 8-10
UIM
- Coverage 12-14
- Evidence of damages 12-14
WAC 284-30-330(3)-(4) 4
WAC 284-30-330(7) 13
WAC 284-30-330(13) 14
WAC 284-30-395(1) 4

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REED MCCLURE IS PROUD TO CARRY ON THE TRADITION OF THE WASHINGTON INSURANCE LAW LETTER FOUNDED BY WILLIAM R. HICKMAN AND EDITED BY HIM FOR FORTY YEARS.

THE LAW LETTER PROVIDES A SURVEY OF AND INSIGHTS INTO SIGNIFICANT CURRENT INSURANCE AND TORT LAW DECISIONS. IT HAS HAD A LONG AND DEDICATED READERSHIP OF LEGAL AND INSURANCE INDUSTRY PROFESSIONALS.

A RESULTING LOSS CLAUSE ENDS IN A RESULT THE INSURER DIDN'T ANTICIPATE

FACTS:

The insured condominium's roof was defectively designed, leading to inadequate ventilation. An engineer redesigned the roof by adding 2'x2' "sleepers" above the roof's structural joists. These repairs were completed in 2004.

In 2019 the insured condominium discovered the earlier repairs were insufficient to vent moisture. The moisture damaged components of the roof.

The insured's policy covered all direct physical loss or damage to the building not specifically excluded. An exclusion provided:

> We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event directly or solely results in loss or damage or initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence. … .
>
> b. Faulty, inadequate or defective:...
>
> (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;...
>
> But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage. [24 Wn. App 950, 953.]

The insurer determined that the cause of the damage was defective construction and denied coverage. The insured contended that the resulting loss clause preserved coverage for humidity and condensation, which it claimed were not excluded.

Both sides moved for summary judgment. For purposes of the motion, it was stipulated that the damage had been caused by "by condensation and/or excess humidity resulting from inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs, and/or redesign."

The trial court granted summary judgment for the insurer on the ground that faulty construction had begun a sequence of events that resulted in the damage and that the resulting loss clause did not resurrect coverage.

A unanimous Division I panel reversed, holding that because the policy excluded defective construction that resulted in damage caused by excess humidity or condensation, there would be coverage if excess humidity or condensation were covered under the resulting loss clause.

The Washington Supreme Court granted review.

In a unanimous opinion, the Washington Supreme Court affirmed the Court of Appeals.

HOLDING:

1. Under the resulting loss clause, if faulty workmanship causes a covered peril to occur and that covered peril results in loss or damage, the loss or damage is covered.

2. The Court of Appeals opinion was consistent with *Vision One, LLC v. Philadelphia Indemnity Insurance Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012).

3. Condensation and humidity caused the damage. If condensation and humidity are covered, the resulting damage is covered.

4. Resulting loss clauses preserve coverage for loss that ensues after an excluded event if it would otherwise be covered by the policy, although the excluded event itself is never covered.

5. The Court rejected the insurer's argument that the resulting loss clause was inapplicable because condensation was the natural and unavoidable consequence of an excluded peril, faulty workmanship. The policy says that

it covers loss or damage caused by a covered cause of loss resulting from faulty workmanship. It does not state that the covered cause of loss must be independent from faulty workmanship. The Court will not add language to the policy.

6. Because exclusions are strictly construed against the insurer, a resulting loss exception must have effect to preserve coverage for loss resulting from covered perils regardless of whether the peril is the natural consequence of an excluded peril.

7. The Court also rejected the insurer's argument that its holding would mean that there could never be an excluded sequence of events. Insurers may draft policies to contain "sequence of events" causation language and are not required to add resulting loss clauses to exclusions.

COMMENT:

The Court gave insurers a way to avoid this problem in the future, but any such language must be clear and unambiguous.

Gardens Condominium v. Farmers Insurance Exchange, 2 Wn.3d 832, 544 P.3d 499 (2024), *aff'g* 24 Wn. App. 2d 950, 521 P.3d 957 (2022).

WASHINGTON SUPREME COURT UPHOLDS PIP PAYMENTS UP TO THE 80TH PERCENTILE

FACTS:

Dr. Schiff was an MD who provided health care services covered by PIP. He sued Liberty on the ground that the insurer's use of a software program that limited PIP payments to the 80th percentile was an unfair or deceptive practice under the Consumer Protection Act. Under the software program, bills as charged were ranked from highest to lowest. The 80th percentile limitation meant 80% of the bills on the low end would be paid in full. The remaining 20%, assuming that they were all higher than the 80th percentile, would be reduced to the 80th percentile level. Liberty did not evaluate the bills on an individualized basis.

Dr. Schiff moved for partial summary judgment on liability. The trial court denied the motion. The Court of Appeals granted discretionary review and reversed, holding that *Folweiler Chiropractic, PS v. American Family Insurance Co.*, 5 Wn. App. 2d 829, 429 P.3d 813 (2018), required Liberty to

analyze PIP bills on an individualized basis to determine whether they were reasonable. The Washington Supreme Court granted review.

HOLDING:

In a 7-2 decision, the Washington Supreme Court reversed the Court of Appeals,

1. RCW19.86.020 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

2. To prevail under a private CPA action, a plaintiff must show (1) an unfair or deceptive act or practice (2) in trade or commerce, (3) which affects the public interest, (4) an injury to plaintiff's business or property, and (5) a causal link between the unfair or deceptive act or practice and the injury.

3. A CPA claim may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.

4. RCW 48.22.095(1)(a) states that insurers offering auto insurance policies must offer minimum personal injury protection of at least $10,000 for medical and hospital benefits. RCW 48.22.005(7) states that "'[m]edical and hospital benefits' means payments for all reasonable and necessary expenses.'"

5. The standards for prompt, fair, and equitable settlements provide that an insurer must determine whether medical and hospital services are (1) not reasonable, (2) not necessary, (3) not related to the accident, or (4) not incurred within three years of an accident, and insurers must provide notification of such determinations. WAC 284-30-395(1).

6. Liberty's review process can be characterized as a way to determine "reasonableness" through comparison to other charges for the same treatment in the same geographic area.

7. The relevant subsections of the WAC, 284-30-330(3) and (4), require insurers to adopt reasonable standards and a reasonable investigation into claims. Comparing charges for the same treatment in the same geographic area is relevant to the determination of reasonableness.

8. Courts in other jurisdictions have upheld the 80th percentile practice or variations thereof.

Justice Stephens, joined by Justice Gonzalez, dissented. While they agreed that the software program was relevant in deciding whether a given charge was reasonable, they did not think that it should be the sole evidence used in making that determination.

COMMENT:

Wow! Schiff filed a motion to reconsider based on his claim that the majority had misunderstood the parameters of the software program. Under court rules, the insurer could not file a response unless the Court requested one. Typically, the Court does not request a response. This time, however, a request was ordered. Nevertheless, the Court then denied the reconsideration motion.

Schiff v. Liberty Mutual Fire Insurance Co., 2 Wn.3d 762, 542 P.3d 1002, *as amended* (2024).

TO BE LIABLE OR NOT TO BE LIABLE

FACTS:

Madeleine was a freshman at Washington State University in Pullman. Shortly after she arrived on campus, she went to an off-campus party at Thomas's apartment. Thomas was a fellow student. Unfortunately for Madeleine, Thomas raped her at the party.

Thomas had originally been at WSU's Vancouver campus. During his time there, two female students had made complaints against him: one for making sexually suggestive comments via electronic communication, and one for unwanted touching. During WSU's investigation into the complaints, Thomas requested a transfer to the Pullman campus, which was granted. WSU ultimately found that Thomas had violated student conduct rules. It suspended him for 9 days and required him to write a paper on the meaning of "consent."

Madeleine sued WSU for Thomas's raping her, claiming that WSU had a special relationship with its students and furthermore, had knowledge of Thomas's prior transgressions. The case was removed to federal court.

WSU moved for summary judgment on the ground that the rape had occurred off-campus, so that it had no control or duty. The district court granted summary judgment. Madeleine appealed. The Court of Appeals for

the Ninth Circuit certified two questions to the Washington Supreme Court: (1) "Does Washington law recognize a special relationship between a university and its students giving rise to a duty to use reasonable care to protect students from foreseeable injury at the hands of other students?" and (2) "If the answer to question 1 is yes, what is the measure and scope of that duty?"

HOLDING:

1. Whether a duty exists is a question of law.

2. If there is a special relationship between the actor and the perpetrator or between the actor and the victim, the actor can have a duty to protect against the actions of third parties.

3. For example, under RESTATEMENT (SECOND) OF TORTS § 344, a possessor of land open to the public for the possessor's business purposes is subject to liability to members of the public for the conduct of third persons when the possessor of land fails to exercise reasonable care to (a) discover that such conduct is occurring or is likely to occur or (b) give a warning adequate to enable visitors to avoid the harm or otherwise to protect them against it.

4. A university, as a business operator and possessor of land, is potentially liable to members of the public including students who are on campus for school-related activities.

5. The 5-person majority declined to apply the broader rule applicable to K-12 students because schools in a K-12 situation have closed campuses and almost complete control over their students. Students' attendance is not voluntary, and teachers undertake being a mandatory substitute for the parent. That is not true in a university setting.

6. Foreseeability alone does not create a duty.

7. The fact that the victim may be blameless does not alone create a duty.

8. That a university's code of conduct may seek to regulate off-campus behavior is also insufficient to create a duty since the code does not seek to regulate behavior in a preventative way.

9. A type of special relationship exists, but that relationship is defined and anchored in RESTATEMENT (SECOND) OF TORTS § 344, and exists where a student is on campus, similar to a business invitee.

10. The measure and scope of the duty is based on a student's enrollment and presence on campus or participation in university-controlled activities.

Four justices dissented. They would have held that a university has a special relationship with its students such that the university has a duty to use reasonable care to protect students from foreseeable harm associated with alcohol and other substance-use-related emergencies, and that such a duty arises when the university has actual knowledge of conditions that would lead a reasonable person to conclude that a student is in danger of serious physical harm. They would have also held that the contours of the duty are shaped by the nature of the relationship and the foreseeability of the danger, and that the duty is not confined to the campus borders if the harm is reasonably foreseeable.

COMMENT:

Fraternities—where hazing can occur—can be located off-campus. But if an off-campus fraternity is recognized by the college or university, it may well be subject to school rules as if it were physically located on campus. A reasonably good argument could then be made that Barlow's on-campus ruling applies.

Barlow v. State, 2 Wn.3d 583, 540 P.3d 783 (2024).

EMOTIONAL DISTRESS DAMAGES IN BAD FAITH CLAIMS DON'T REQUIRE PROOF OF OBJECTIVE SYMPTOMATOLOGY

The Washington Supreme Court, in a unanimous opinion, has held that in insurance bad faith cases, an insured does not have to prove objective symptomatology to recover emotional distress damages. In other words, an insured does not have to support a claim of emotional distress by medical evidence and diagnosis. Although the tort of negligent infliction of emotional distress does require such proof, and although the tort of bad faith sounds in negligence, the Court ruled that negligence principles don't apply to emotional distress damages arising out of an insurance company's bad faith because:

> Unlike ordinary negligent actors, insurers have chosen to enter a highly regulated field "affected by the public interest, requiring that all persons be actuated by good faith, abstain from

deception, and practice honesty and equity in all insurance matters." RCW 48.01.030. Moreover, in a first-party insurance bad faith action like this one, the plaintiff and the defendant necessarily have a preexisting relationship.

COMMENT:

The Court noted that the same rule applies to medical malpractice cases.

P.E.L. v. Premera Blue Cross, 2 Wn.3d 460, 540 P.3d 105 (2023).

IT'S NOT ALWAYS TOO LATE

FACTS:

Bette was married to a member of the U.S. Navy. In 2009 she had sinus surgery at a naval hospital. A week later, she had significant nose bleeds and returned to the hospital. When the on-call doctor pushed nasal packing up her nose, Bette heard cracking and experienced severe pain; then she passed out. She was rushed to the operating room to control the bleeding.

After discharge, Bette began having migraines, light sensitivity, malaise, memory loss, and other neurocognitive impairments. Specialists could not determine the cause. It was not until 2017 that she was diagnosed with traumatic brain injury caused by the insertion of the nasal packing more than 8 years before.

Under federal law, Bette timely filed a malpractice suit against the United States. The US moved to dismiss on the ground that Washington State's 8-year medical malpractice statute of repose, RCW 4.16.350(3), barred the action. The federal district court certified two questions to the Washington Supreme Court: whether the statute of repose violated the state constitution's (1) privileges and immunities clause or (2) administration of justice clause.

In a 7-2 decision, the Washington Supreme Court held that the statute of repose violated the state privileges and immunities clause. Because it was unnecessary to decide the second question, the Court declined to reach it.

HOLDING:

1. As a statute of repose, RCW 4.16.350(3) bars actions that commence more than 8 years after the act or omission that caused the injury or condition.

2. The state privileges and immunities clause has a two-part test: (a) does the challenged statute grant a privilege or immunity; and if so, (b) is there a reasonable ground in fact for granting that privilege or immunity.

3. Whether there is a "privilege" or "immunity" depends on whether the challenged statute implicates a fundamental right of state citizenship.

4. The right to pursue a common law cause of action is such a fundamental right.

5. A reasonable ground for granting a privilege or immunity requires a nexus between the legislature's stated purpose and the challenged statute. Hypothesized facts are insufficient.

6. The Legislature expressly stated that the purpose behind the statute of repose was to "tend to reduce" the cost of medical malpractice insurance, to provide protection against stale claims, and to balance the interests between injured plaintiffs and the health care industry, particularly since the legislature compromised on the 8-year period and other states' legislatures had enacted 8-year statutes of repose.

7. There is no reasonable basis to conclude that the statute of repose reduced the cost of medical malpractice insurance. Indeed, the Legislature itself declared that ""to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance." This does not say that the statute of repose will in fact reduce the cost.

8. The legislature's stale claim rationale also fails. The exceptions to the statute of repose allow tolling of the 8-year repose period upon proof of fraud, intentional concealment, or the presence of certain foreign bodies. The statute provides that in such case, plaintiff has one year after the date of discovery of the fraud, concealment, or foreign body to bring suit. Moreover, the Court had previously held, under a different statute, that barring tolling of the statute of repose during the minority of a plaintiff was unconstitutional. Therefore, the fear of stale claims does not reasonably support the statute of repose.

9. Mere legislative compromise and the similar enactments in other states are insufficient to show the required reasonable basis.

Justices Madsen and Johnson concurred that the statute of repose implicated an immunity within the privileges and immunities clause. Nevertheless, accusing the majority of "courtroom fact-finding," these two justices would have held that the Legislature had a reasonable basis for enacting the statute.

COMMENT:

The Court had already invalidated a prior medical malpractice statute of repose. RCW 4.16.350(3) was the Legislature's attempt to cure the prior statute's deficiencies. The decision also makes one wonder about the fate of other statutes of repose.

Bennett v. United States, 2 Wn.3d 430, 539 P.3d 361 (2023).

YES, VIRGINIA, A LANDOWNER CAN AVOID PREMISES LIABILITY BY REASONABLE DELEGATION TO AN INDEPENDENT CONTRACTOR

FACTS:

Prologis needed some maintenance and repair work on the roof of its warehouse. It contracted with an independent contractor—a roofing company. The roofing company purported to have the expertise to do the work, including compliance with relevant safety laws.

The parties entered into a contract that required the roofing company to comply with all laws and be solely responsible for the health and safety of anyone working on the job. In addition, the contract required the roofing company to create a site-specific roof safety plan. The company did so and shared the plan with its employees.

An employee of the roofing company died on the job when he tripped over a skylight and fell 30 feet to a concrete floor. His personal representative sued Prologis. The trial court granted Prologis summary judgment on the ground that the roofing company controlled the work and that Prologis was entitled to rely on its expertise as to the need for safety equipment.

On appeal, Prologis conceded it owed a landowner's duty to plaintiff's decedent to remediate risks from known or obvious dangers. Plaintiff conceded that Prologis had no statutory duty to the decedent. The sole issue was whether Prologis might have common law liability as the possessor of

land. The Court of Appeals and the Supreme Court affirmed the summary judgment in favor of Prologis.

HOLDING:

1. As the employee of an independent contractor, decedent was an invitee.

2. A landowner owes an invitee a reasonable duty of care to make the land safe for entry.

3. A landowner is not generally liable to invitees for physical harm caused by a condition in the land that was known or obvious to the invitees unless the landowner should anticipate such harm despite the knowledge or obviousness.

4. Here Prologis owed a duty of reasonable care to protect against the danger pose by the skylight despite the fact that the skylight was obvious.

5. However, Prologis reasonably delegated its duty to the independent contractor, decedent's employer.

6. A duty is nondelegable only in limited circumstances, such as when the landowner retains the right to control the independent contractor's work, or when required by statute, contract, franchise, charter, or the common law.

7. Plaintiff did not argue the retained control doctrine and in any event, there was no showing that Prologis exercised any control over the way the roofing company did its work. Plaintiff also conceded there was no statutory nondelegable duty.

8. Instead, plaintiff claims that a landowner's duty to an invitee is nondelegable. But none of the cases cited by plaintiff stand for this proposition.

9. The general rule is that a landowner is not liable for injuries caused by an independent contractor's conduct.

10. A landowner may delegate its duty to protect invitees from known or obvious conditions by reasonably delegating that duty to an independent contractor.

11. The delegation may be reasonable if (a) the delegation is explicit and requires the independent contractor to assume the duty of reasonable care

in making the land safe for entry, i.e., the delegation anticipates the harm from known or obvious conditions; (b) the landowner exercises reasonable care in selecting an independent contractor with proper experience and capacity to work in the presence of known or obvious dangers.

Justices Stephens and Madsen concurred for the purpose of emphasizing that the case involved only whether there was a breach of the landowner's duty, not whether there was a duty in the first place. Prologis met its duty by reasonably delegating it to a competent independent contractor.

COMMENT:

A commonsense opinion. Landowners must ensure that their contracts with independent contractors with the requisite experience and capacity are clear and unambiguous as to the delegation of the duty of care.

Eylander v. Prologis, 2 Wn.3d 401, 539 P.3d 376 (2023).

HOW NOT TO HANDLE A CLAIM

FACTS:

Lisa was injured by an underinsured motorist. She asked her insurer to open a UIM claim. The insurer did so, setting reserves at the underinsured motorist's $100,000 policy limit. Lisa's UIM limit was $250,000. The claim was assigned to a large loss adjustor.

In its initial claim evaluation, the insurer determined that Lisa's cervical neck injury had lasted nine months and her headaches 12 months. By the time of the insurer's second evaluation, the insured had submitted medical records indicating that she was still undergoing treatment more than a year after the accident. Nevertheless, the insurer made its first UIM offer of $5,000 plus attorney fees and waiver of PIP subrogation on the basis that her injuries had not lasted more than a year. Thereafter, the insurer increased its offer three times, up to $20,000.

Lisa sued the underinsured motorist and the UIM insurer. In the damages portion of the trial against former, there was medical evidence that Lisa had been treating for injuries related solely to the accident for at least three years. A jury found that Lisa's injuries arising out of the accident were worth $1.8 million.

In the bad faith portion of the trial, there was expert testimony that the insurer had a practice of limiting the time period in which to evaluate

nonsurgical and brain injuries to 1 year. Further, the expert testified that the insurer had an additional practice of not even considering future noneconomic damages and limiting all damages to a year after the accident. The expert summarized the deposition of the insurer's corporate representative as saying that the insurer felt that paying for permanent injuries would make the cost of premiums astronomical. He also noted that the insurer's settlement offers failed to explain its reasoning in such a way that would enable the insured to make an informed decision. And he questioned why the company had set its reserves at $100,000 and then offered only a maximum of $20,000.

The insurer moved for a directed verdict on the contractual and extracontractual claims against it. Although the trial court refused to take into account the damages phase of the trial, it nevertheless granted the motion and entered judgment against the underinsured motorist and the insurer for $1.8 million. Lisa appealed.

HOLDING:

In an unpublished decision, Division I of the Washington State Court of Appeals reversed the directed verdict and remanded for a new trial on the claims against the insurer. It also vacated the $1.8 million judgment, and remanded for entry of judgment solely against the underinsured motorist.

1. The trial court should have considered the damages portion of the trial in granting a directed verdict.

2. UIM insurance is excess coverage designed to fully compensate the claimant for damages he or she is legally entitled to recover from the tortfeasor.

3. The UIM insurer here owed its insured a duty beyond merely issuing payment to her.

4. WAC 284-30-330(7) establishes that an unfair or deceptive act can include "[c]ompelling a first party claimant to initiate or submit to litigation … to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered." A jury could consider a comparison of the reserve set by the insurer and the amount it offered to determine whether it acted in bad faith. A jury could also consider the insurer's practice of refusing to evaluate future noneconomic damages or the permanency of injury.

5. WAC 284-30-330(13) states that an unfair or deceptive act can also include "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." A jury could determine that the insurer here failed to provide such a reasonable explanation.

6. A negligence claim is based on the insurer's failure to exercise ordinary care. There was sufficient evidence that would allow a jury to find that the UIM insurer here did not exercise ordinary care, so it was error to grant the insurer a directed verdict on Lisa's negligence claim.

7. There was sufficient evidence to allow a jury to find that the UIM insurer had violated the Consumer Protection Act, RCW 19.86.

8. There was sufficient evidence to allow a jury to find that the UIM insurer had also violated IFCA, RCW 48.30.015, as there was sufficient evidence from which a jury could find that the insurer's lowball offers amounted to an unreasonable denial of Lisa's claim.

9. The fact that the UIM insurer paid its $250,000 in UIM benefits after the jury had determined damages does not mean that there was no breach of contract. RCW 48.01.030 imposes on insurers "a specific duty to act with reasonable promptness in investigation and communication with their insureds following notice of a claim and tender of defense." This duty is read into every insurance policy. Here, the insurer failed to properly assess Lisa's damages and thus breached its contract to pay what she was legally entitled to recover.

10. The damages portion of the trial was solely to assess the damages proximately caused by the accident. It was error to enter judgment on the damages the jury found against the insurer.

COMMENT:

The insurer is lucky that this is an unpublished opinion. Washington courts have long rejected the notion that having to raise premiums is a legitimate defense to not complying with the UIM statute. *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 2d 203, 643 P.2d 441 (1982).

Rybacki v. Progressive Cas. Ins. Co., No. 84676-1-I (Dec. 11, 2023).

TROUBLING SLIP AND FALL CASE IS SETTLED BEFORE ORAL ARGUMENT IN THE WASHINGTON SUPREME COURT

FACTS:

Rebecca slipped and fell in a puddle of water as she was walking down the coffee and cereal aisle of a Fred Meyer store. She would later testify that there were paper towels and a folded-up plastic "wet floor" sign on a store shelf nearby, although it was disputed whether Fred Meyer used signs of that type. The day, however, was a sunny one and there were no liquids or anything else that could generate liquid stored in that aisle.

Fred Meyer proposed a pattern jury instruction that said, among other things, that the owner of the premises had to have actual or constructive knowledge of the condition that caused the accident. Rebecca proposed an amendment to the instruction that would have required reasonable foreseeability of unsafe conditions rather than actual or constructive knowledge. The trial court gave the pattern jury instruction without amendment.

The jury entered a defense verdict. Rebecca appealed, claiming that *Johnson v. Washington State Liquor & Cannabis Board*, 197 Wn.2d 605, 486 P.3d 125 (2021), had eliminated the need for her to show actual or constructive knowledge and that she need show only reasonable foreseeability

HOLDING:

A unanimous Division II panel reversed and remanded for further proceedings. It held:

1. Reasonable foreseeability should be given equal consideration to the traditional actual or constructive notice requirement.

2. Therefore, reasonable foreseeability —the nature of the proprietor's business and its method of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable—should be included alongside, rather than in place of, the traditional notice requirements articulated in the pattern jury instruction.

3. The jury instructions, when taken as a whole, should make clear that entitlement to recover under a reasonable foreseeability theory requires a connection between the unsafe condition and the business's method of

operation—the unsafe condition may not be merely incidental to the business's method of operation.

COMMENT:

The Washington Supreme Court granted review with oral argument scheduled for February 22, 2024. The parties settled before the case could be argued.

Moore v. Fred Meyer Stores, Inc., 26 Wn. App. 2d 769, 532 P.3d 165 (2023).

E-MAIL NOTIFICATION

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