

FILED  
COURT OF APPEALS

10 JUN 17 PM 3:40

STATE CLERK

BY C. [Signature]  
CLERK

No. 39993-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

DON HAWKINS and GERI HAWKINS,  
Appellants,

vs.

DOBLER MANAGEMENT COMPANY, INC., d/b/a "University  
Commons" apartment complex,  
Respondents.

---

BRIEF OF APPELLANTS DON AND GERI HAWKINS

---

PFAU COCHRAN VERTETIS  
KOSNOFF PLLC  
Darrell L. Cochran, WSBA No. 22851  
Jason P. Amala, WSBA No. 37054  
Attorneys for Appellants  
911 Pacific Ave., Suite 200  
Tacoma, WA 98402  
(253) 777-0799 phone  
(253) 627-0654 facsimile

**ORIGINAL**

**TABLE OF CONTENTS**

|      |                                |    |
|------|--------------------------------|----|
| I.   | INTRODUCTION .....             | 1  |
| II.  | ASSIGNMENTS OF ERROR.....      | 1  |
| III. | STATEMENT OF THE CASE.....     | 2  |
|      | A.    Background Facts.....    | 2  |
|      | B.    Procedural History ..... | 5  |
| IV.  | ARGUMENT .....                 | 6  |
| IV.  | CONCLUSION.....                | 14 |

**TABLE OF AUTHORITIES**

**CASES**

|  |        |
|--|--------|
| <i>Carle v. Earth Stove, Inc.</i> , 35 Wn. App. 904, 670 P.2d 1086 (1983) .....      | 8      |
| <i>Foisy v. Wyman</i> , 83 Wn.2d 22, 515 P.2d 160 (1973) .....                       | 11     |
| <i>Goodwin v. Bacon</i> , 127 Wn.2d 50, 896 P.2d 673 (1995) .....                    | 8      |
| <i>Jaeger v. Cleaver Const., Inc.</i> , 148 Wn. App. 698, 201 P.3d 1028 (2009) ..... | 8      |
| <i>Kappelman v. Lutz</i> , 141 Wn. App. 580, 170 P.3d 1189 (2007) .....              | 8      |
| <i>Kubista v. Romaine</i> , 87 Wn.2d 62, 549 P.2d 491 (1976) .....                   | 10, 11 |
| <i>State v. Edwards</i> , 131 Wn. App. 611, 128 P.3d 631 (2006) .....                | 7      |
| <i>State v. Jones</i> , 71 Wn. App. 798, 824, 863 P.2d 85 (1993) .....               | 12     |
| <i>Todd v. Harr, Inc.</i> , 69 Wn.2d 166, 417 P.2d 945 (1966) .....                  | 8, 10  |
| <i>Tucker v. Hayford</i> , 118 Wn. App. 246, 75 P.3d 980 (2003) .....                | 11     |

**RULES**

|              |                            |
|--------------|----------------------------|
| ER 403 ..... | 2, 7, 12, 13               |
| ER 411 ..... | 1, 4, 7, 8, 10, 11, 12, 13 |

**OTHER AUTHORITIES**

|   |   |
|---|---|
| Tegland, Washington Practice, Courtroom Handbook on Washington Evidence (2007-08 ed.) ..... | 8 |
|---|---|

## **I. INTRODUCTION**

This appeal arises from a Superior Court's decision to reverse two trial decisions made by a District Court. The District Court (1) excluded evidence of a defendant's liability insurance, and (2) awarded appellants Don and Geri Hawkins ("the Hawkins") their attorneys' fees and costs.

On appeal, the Superior Court reversed those decisions. It concluded that a defendant can use evidence a co-defendant's liability insurance to prove it acted reasonably and that the co-defendant acted unreasonably. Based on that conclusion, the Superior Court remanded the case for a new trial and vacated the award of attorneys' fees and costs pending the outcome of the new trial.

The Hawkins sought discretionary review, it was granted, and this appeal followed. The Hawkins respectfully request the Court affirm the District Court's decision to exclude evidence of a defendant's liability insurance, and reinstate its award of their attorneys' fees and costs.

## **II. ASSIGNMENTS OF ERROR**

(1) The Superior Court erred in concluding that a defendant can use evidence of a co-defendant's liability insurance to prove it acted reasonably and the co-defendant acted unreasonably because (a) under ER 411, evidence of liability insurance is not admissible to show a party acted

reasonably or another party acted unreasonably, and (b) any minor probative value was substantially outweighed by its prejudicial effect under ER 403.

(2) The Superior Court erred in vacating the award of attorneys' fees and costs to the Hawkins pending a new trial because the remand for a new trial was based solely on its erroneous decision that evidence of a defendant's liability insurance was admissible.

### **III. STATEMENT OF THE CASE**

#### **A. Background Facts**

Appellants Don and Geri Hawkins ("the Hawkins") began renting a duplex from respondent Dobler Management Company, Inc. ("Dobler") on September 6, 2001.<sup>1</sup>

The rental contract stated that the Hawkins were not allowed to repair their duplex because all repairs would be done by Dobler.<sup>2</sup> The contract also provides that "[r]enter(s) agrees to pay all costs, expenses and attorney's fee, as allowed by law, expended or incurred by the property owner and/or his/her agent by any reason of any default or breach by Renter(s) of any terms of this agreement."<sup>3</sup> In 2005, Dobler increased

---

<sup>1</sup> CP 40, 77.

<sup>2</sup> CP 40, 77 at ¶¶ 13 and 16.

<sup>3</sup> CP 61, 77 at ¶ 18.

the Hawkins' rent and reiterated its contractual duty to make all repairs to their duplex.<sup>4</sup>

At a District Court trial, the Hawkins testified that (1) on April 4, 2006, a car crashed into their duplex and created an eight-foot hole in their bedroom wall, from floor to ceiling, (2) Dobler failed to start making meaningful repairs to the hole until at least July 10, 2006, and (3) the repairs were not finished until at least July 21, 2006.<sup>5</sup>

More specifically, on April 5, 2006, Dobler covered-up the eight-foot hole with a couple pieces of plywood.<sup>6</sup> However, the plywood did not cover the entire hole; instead, there was a void "in the bottom of the wall, and the plywood did not cover the void so there was a void in the wall approximately two to three inches that was open to the daylight or whatever."<sup>7</sup>

Mr. Hawkins informed Dobler's landlord about this void, and repeatedly offered to fix the hole himself, but he and Mrs. Hawkins were consistently told by Dobler not to fix the hole and that Dobler would make the repairs.<sup>8</sup> The Hawkins relied upon those representations.<sup>9</sup>

---

<sup>4</sup> CP 40, 61, 79.

<sup>5</sup> CP 40, 61.

<sup>6</sup> CP 40, 61.

<sup>7</sup> CP 40-41, 61.

<sup>8</sup> CP 41, 62.

<sup>9</sup> CP 41, 62.

Ten weeks after the accident, on June 10, 2006, Mrs. Hawkins sent Dobler an email and asked Dobler to live up to its promises and fix the hole, or else the Hawkins would have to contact an attorney.<sup>10</sup> On June 15, 2006, the Hawkins hired an attorney and sent a formal letter to Dobler, asking it to fix the hole.<sup>11</sup> Dobler did not respond.<sup>12</sup> After a second letter, Dobler responded that it was not responsible.<sup>13</sup> Finally, on July 10, 2006, Dobler sent out a maintenance crew to begin repairing the hole, repairs that took approximately a week.<sup>14</sup>

At trial, Dobler sought to admit evidence of the driver's liability insurance in order to argue that Dobler's three-month delay was reasonable because it was waiting for the driver's insurance company to authorize repairs.<sup>15</sup> The trial court excluded that evidence under ER 411, but allowed Dobler to present testimony that it was having a hard time finding contractors because of the housing boom.<sup>16</sup>

---

<sup>10</sup> CP 43.

<sup>11</sup> CP 43.

<sup>12</sup> CP 43.

<sup>13</sup> CP 43-44.

<sup>14</sup> CP 44.

<sup>15</sup> CP 23-24; CP 30-32 (arguing that evidence of the driver's insurer is "relevant to the reasonableness of the delay" and that the evidence "was certainly relevant to whether or not all or a portion of the time between April 4th and July 19th was caused by delays created by Defendant Diels through their insurance carrier").

<sup>16</sup> CP 62, 74 at ¶ 6; CP 23-24; CP 103-04 (acknowledging that Dobler was allowed to present testimony regarding its efforts to find contractors and make repairs); CP 106 (same).

One of Dobler's top managers conceded on cross-examination that Dobler had \$88,000 in reserves at the time of the accident to make repairs, but Dobler wanted to save its money and wait for the insurer.<sup>17</sup>

**B. Procedural History**

The jury found that Dobler breached its contract with the Hawkins.<sup>18</sup> The jury awarded the Hawkins all of their rent between the day of the accident and when the hole was finally fixed, holding the driver liable for one week's worth of rent and Dobler liable for the remainder.<sup>19</sup>

The District Court subsequently awarded the Hawkins their reasonable attorneys' fees and costs related to their claim for breach of contract.<sup>20</sup> Even after the Hawkins reduced their attorneys' fees and costs to reflect only those related to their claim for breach of contract, the District Court further reduced their fees and costs by more than \$11,000.<sup>21</sup>

On October 16, 2009, a Superior Court reversed the District Court's decision to exclude evidence of insurance and remanded the case for a new trial.<sup>22</sup> Given the remand, the Superior Court also vacated the trial court's award of attorneys' fees and costs to the Hawkins.<sup>23</sup>

---

<sup>17</sup> CP 74 at ¶ 7; *see also* CP 107-08 (conceding that Dobler had \$88,000 to make the repairs, but chose instead to wait on the insurer's money).

<sup>18</sup> CP 81-82.

<sup>19</sup> CP 81-82, 84.

<sup>20</sup> CP 86-88.

<sup>21</sup> CP 87-88.

<sup>22</sup> CP 122-23.

<sup>23</sup> CP 124-25.

During oral argument, Dobler made clear that the only reason it sought to admit evidence of the liability insurance was because “[i]t goes to the question of reasonableness. ... We’re trying to say that it was because of the [driver] ... that those delays occurred ...”<sup>24</sup>

Dobler also revealed that it subsequently sued the driver and recovered the damages that Dobler incurred because of the delay caused by the driver’s insurance.<sup>25</sup>

Over the Hawkins’ argument that evidence of liability insurance cannot be admitted to prove reasonableness, particularly where no duty or privity exists between the Hawkins and the driver’s insurer, the Superior Court held that the trial court should have allowed evidence of insurance “for the very limited purpose of trying to explain their delays ... that that (sic) is their defense, that we delayed, not because we chose to do it, but we were trying to work with this other third party; so I think to that very limited extent, they should have been able to bring forth those discussions as part of their defense. Otherwise, you’re gutting their defense.”<sup>26</sup>

#### IV. ARGUMENT

The Court should reverse the Superior Court’s erroneous conclusion that a defendant can use evidence of a co-defendant’s liability

---

<sup>24</sup> Verbatim Transcript of Proceedings, dated October 16, 2009 (“RP”), at 8.

<sup>25</sup> RP at 13.

<sup>26</sup> RP at 15-16.

insurance to prove it acted reasonably and the co-defendant acted unreasonably because (1) ER 411 and every reported case in Washington holds that a defendant cannot use evidence of insurance to argue its conduct was reasonable or to argue that another party acted unreasonably; and, (2) even if evidence of liability insurance could be used to prove reasonable conduct, the District Court properly exercised its discretion and ruled that the evidence was too prejudicial under ER 403, particularly where Dobler had \$88,000 available to make the repairs.

Moreover, the Court should reverse the Superior Court's decision to vacate the award of attorneys' fees and costs to the Hawkins pending a new trial because the only basis for the new trial was its erroneous decision that the District Court should have admitted evidence of a defendant's liability insurance.

Questions of law raised by an erroneous evidentiary decision are reviewed under a de novo standard. *State v. Edwards*, 131 Wn. App. 611, 128 P.3d 631 (2006).

**First**, the Superior Court erred because it is black letter law that evidence of insurance is not admissible to excuse a defendant's negligence: "Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully." ER 411; *Kappelman v. Lutz*, 141

Wn. App. 580, 590, 170 P.3d 1189 (2007) (“the fact that a defendant in a personal injury case carries liability insurance is not material to the questions of negligence and damages”); *Goodwin v. Bacon*, 127 Wn.2d 50, 54-55, 896 P.2d 673 (1995) (trial court properly excluded evidence of a defendant’s liability insurance); *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 906, 670 P.2d 1086 (1983) (“long standing rule that reference to insurance coverage during a trial of the type involved here is impermissible”); *Todd v. Harr, Inc.*, 69 Wn.2d 166, 168-69, 417 P.2d 945 (1966) (“[n]o review of the pertinent cases is necessary to substantiate the proposition that the fact that a personal injury defendant carries liability insurance is entirely immaterial”); cf. *Jaeger v. Cleaver Const., Inc.*, 148 Wn. App. 698, 719, 201 P.3d 1028 (2009) (ER 411 excludes evidence of liability insurance but not evidence of other insurance).

As Tegland notes in the Courtroom Handbook on Washington Evidence, “[i]nsurance coverage is irrelevant to a party’s legal liability ...” Tegland, Washington Practice, Courtroom Handbook on Washington Evidence (2007-08 ed.), at 256, cmt. 1.

The District Court’s exclusion of the driver’s liability insurance was in-line with each of these cases, ER 411, and Tegland: evidence of liability insurance cannot be used “... upon the issue of whether the person acted negligently or otherwise wrongfully.” ER 411.

This is no different than Dobler's desire to use proof of the driver's insurance to argue that its gross delay was reasonable (i.e., to prove that Dobler was not negligent or otherwise wrongful) or to argue that the jury should have apportioned more damages to the driver (i.e., to prove that the driver was negligent or otherwise wrongful).

This impermissible use is exactly what Dobler intended to do at trial, and what it intends to do at the new trial. As its counsel stated during oral argument, "[i]t goes to the question of reasonableness. ... We're trying to say that it was because of the [driver] ... that those delays occurred ..."

But that argument is not allowed when the jury trial involves the negligence of Dobler and the negligence of the driver because Dobler owed the Hawkins a duty to keep their apartment in a habitable condition and to repair a defective condition in a reasonable time. It cannot argue that its duty was somehow lessened by the existence of insurance for its co-defendant, particularly where no duty or privity existed between the insurance company and the Hawkins.

This point is well-illustrated by exactly what happened here. Dobler was held liable because the jury felt it was unreasonable for Dobler to take three months to fix an eight-foot hole in the Hawkins' bedroom wall. In turn, Dobler sued the driver's insurer for contribution for those damages that were caused by the insurer's delay in approving the repairs.

That is how it is supposed to work – insurance has no role in the underlying trial to determine whether Dobler breached its duty to repair the Hawkins’ bedroom wall in a reasonable time. While it may be admissible in the subsequent contribution claim by Dobler against the driver, it is not admissible in the underlying claim where the jury must decide whether Dobler and the driver acted reasonably and must apportion fault according to their respective negligence.

As the Washington Supreme Court noted in *Todd v. Harr, Inc.*: “No review of the pertinent cases is necessary to substantiate the proposition that the fact that a personal injury defendant carries liability insurance is entirely immaterial.” 69 Wn.2d at 168-69.

**Second**, the only Washington case where evidence of liability insurance has been admitted, *Kubista v. Romaine*, 87 Wn.2d 62, 549 P.2d 491 (1976), involves facts that are the opposite of the facts presented here.

In *Kubista*, a plaintiff was allowed to use evidence of insurance for one of the “other purposes” allowed by ER 411: the plaintiff decided to return to school, rather than continue working, based on the insurer’s promise to “take care of him,” and the defendant argued during closing argument that “I don’t believe that the defendant is responsible for that decision.” *Id.* at 64-65. The “other purpose” for which evidence of insurance was allowed, pursuant to ER 411, was “to show defendant was

estopped to assert the defense that plaintiff's failure to seek employment violated his duty to mitigate damages." *Id.* at 67.

Unlike *Kubista*, Dobler had a duty to fix the hole in the Hawkins' bedroom wall in a reasonable time, regardless of the presence of insurance, and it failed to do so. As the trial court correctly concluded, Dobler cannot use the existence of a third party's insurance to suggest that its conduct was reasonable or to apportion more fault to the insured, especially where Dobler constantly promised the Hawkins that the hole was going to be fixed.

The existence of insurance is irrelevant to Dobler's common law, statutory, and contractual duty to the Hawkins to keep their rental in a habitable condition and to make timely repairs. *Tucker v. Hayford*, 118 Wn. App. 246, 256-58, 75 P.3d 980 (2003) (a landlord owes a tenant an implied duty of habitability duty, in addition to duties that may be created by statute or contract); *Foisy v. Wyman*, 83 Wn.2d 22, 27, 515 P.2d 160 (1973) ("[a]ny realistic analysis of the lessor-lessee or landlord-tenant situation leads to the conclusion that the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling").

**Third**, even if the evidence somehow qualified as an exception to ER 411, which it does not, the District Court properly excluded this evidence because its probative value was substantially outweighed by its prejudicial value – the jury would have believed that Dobler's negligence

was excused by its reliance on the insurer, which is not the law. ER 403; *see also State v. Jones*, 71 Wn. App. 798, 824, 863 P.2d 85 (1993) (appellate court justified exclusion of evidence under ER 403, even though trial court had not mentioned the rule).

The existence of insurance does not relieve Dobler of its duties to the Hawkins, and no duty or privity exists between the insurer and Hawkins. This is particularly true where Dobler conceded at trial that it had \$88,000 in reserves that it could have used to repair the hole in the Hawkins' wall. Instead of using a small portion of that \$88,000, and then seeking reimbursement from the insurance company, Dobler chose to ignore its common law, statutory, and contractual duties to the Hawkins.

**Finally**, public policy weighs against the Superior Court's erroneously expansive view of ER 411.

For example, as in this case, there will rarely be privity between the insurer and the injured party. This means the injured party has no recourse if the jury holds the defendant less liable because of another defendant's liability insurance, but its insurer later denies coverage.

Similarly, the injection of liability insurance into a jury trial to prove reasonable or unreasonable conduct opens up a Pandora's Box of irrelevant side issues, such as the effect a verdict would have on the juror's own premiums.

Expanding the exceptions to ER 411 as envisioned by the Superior Court would slowly allow those exceptions to swallow the rule in complex litigation. For example, any time a company is required to use insurance coverage to repair a dangerous condition, a future co-defendant could inject evidence of the company's insurance into the trial by arguing that the company could have done more to make the condition safe, but it failed to do so because of its "cheap" insurance company. In other words, the company's conduct was "more unreasonable" because the company's insurer failed to do more to fix the dangerous condition.

The trial court properly excluded evidence of the driver's liability insurance. The Superior Court's decision to reverse the District Court conflicts with the plain terms of ER 411, every Washington case on the subject, the trial court's discretion under ER 403, and the public policy behind ER 411.

#### IV. CONCLUSION

For the reasons presented above, the Hawkins respectfully request the Court reverse the Superior Court's erroneous decision to remand this case for a new trial and its decision to vacate the District Court's award of attorneys' fees and costs pending the outcome of that new trial.

Dated this 17th day of June 2010.

Respectfully submitted,

PFAU COCHRAN VERTETIS KOSNOFF  
PLLC

By



Darrell L. Cochran, WSBA No. 22851  
darrell@pcvklaw.com  
Jason P. Amala, WSBA No. 37054  
jason@pcvklaw.com  
Attorneys for Appellants  
911 Pacific Ave., Suite 200  
Tacoma, WA 98402  
(253)777-0799 phone  
(253)627-0654 facsimile

**CERTIFICATE OF SERVICE**

I, Michele Owen, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Pfau Cochran Vertetis Kosnoff PLLC, 911 Pacific Ave., Suite 200, Tacoma, Washington, 98402, attorneys for Appellants Don and Geri Hawkins.

C. On June 17, 2010, I caused a copy of Brief of Appellants Don and Geri Hawkins to be served upon the following via  Faxed  Mailed  Hand-Delivered  Legal Messenger.

Clerk of the Court  
COURT OF APPEALS – DIV. II  
950 Broadway, Ste. 300  
Tacoma, WA

Everett Holum, P.S.  
Attorney at Law  
633 N. Mildred Street, Suite G  
Tacoma, WA 98406

Dated this 17th day of June 2010.

  
Michele Owen

ND: 4852-7484-8262, v. 1