

NOTES

The Insurability of Punitive Damages in Washington: Should Insureds Who Engage in Intentional Misconduct Reap the Benefit of Their “Bargains?”

*Stephanie L. Grassia**

INTRODUCTION

Did the Washington Supreme Court make the right decision when it recently held that intentional wrongdoers, who are assessed a penalty of punitive damages, may shirk their responsibility by passing the cost of those damages on to the insurance-buying public via its insurers? This issue was of such significance that *amicus curiae* briefs were submitted by several large insurance companies and Washington corporations, including American International Companies (AIG), American Insurers, State Farm, Lloyd’s of London, Costco Wholesale Corporation, Puget Sound Energy, Weyerhaeuser, as well as the Washington State Trial Lawyers Association Foundation. After examining the moral and pragmatic ramifications of this decision, one must conclude that the court erred.

Consider the following scenario: a Washington company, Fluke, desires to put its California competitor, Talon, out of business. Fluke devises a plan to sue Talon for patent infringement. Unfortunately for Fluke, the case goes to trial, and the jury finds that Fluke had no basis for bringing the suit and that Fluke’s ulterior motive was to remove its competitor from the marketplace.

* J.D. Candidate 2003, Seattle University School of Law; Chartered Property Casualty Underwriter (CPCU). I wish to extend my deepest gratitude to the following individuals: Larry V. Wagner for inadvertently providing me with the topic for this Note; and my husband, Steve Grassia, for providing valuable insight, constructive criticism, and support during the writing of this Note.

Taking great exception to being wrongfully sued, Talon retaliates by initiating a lawsuit against Fluke in California State court, alleging that Fluke maliciously prosecuted the patent infringement claim in an attempt to force Talon out of business. Fluke tenders the claim to its liability insurer, which notifies Fluke that California law does not allow insurance coverage for punitive damages. Fearing a lack of coverage, Fluke initiates a declaratory action against its insurance company in Washington.

In the meantime, a California jury finds in favor of Talon and awards two million dollars in compensatory damages and four million dollars in punitive damages. Both Fluke and Talon then move for summary judgment in the declaratory action.

Applying Washington law, the Superior Court construes the insurance policy's insuring clause as providing coverage for compensatory damages *but not for punitive damages*. Fluke appeals, and the Washington Court of Appeals agrees with the Superior Court that Washington law applies to this action, upholding the ruling on compensatory damages. However, and more importantly, the appellate court disagrees with the trial court on the issue of punitive damages, finding that it is not against public policy to insure punitive damages in Washington.

Of course, this narrative is too fact-specific to be a hypothetical. Indeed, the precise scenario described above actually unfolded in Washington recently in *Fluke Corp. v. Hartford Accident & Indemnity Company*.¹ Hartford filed a petition for review with the Washington Supreme Court, which was granted.² The Washington Supreme Court heard oral arguments on September 11, 2001, and on November 21, 2001, it affirmed the Court of Appeals on all issues.³ As a result, punitive damages are now considered to be insurable in Washington State.

This Note examines the issue of the insurability of punitive damages, concluding that insurance coverage should not be allowed for punitive damages arising from intentional misconduct because such coverage contravenes public policy in the state of Washington. Part I defines and provides background for punitive damages and malicious prosecution. Part II outlines and synthesizes the treatment of the insurability of punitive damages in various states. The facts of the *Fluke* case, including the Court of Appeals's rationale that insurance cover-

1. 102 Wash. App. 237, 7 P.3d 825 (2000).

2. *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001).

3. *Fluke Corp. v. Hartford Accident & Indem. Co.*, 145 Wash. 2d 137, 34 P.3d 809 (2001).

age for punitive damages is not against public policy in Washington, are detailed in Part III. The next section reveals the Court of Appeals's faulty reasoning, illuminating several reasons why Washington should prohibit insurance coverage for punitive damages arising out of intentional misconduct. Part V summarizes the Washington Supreme Court's decision affirming the appellate court on the issue of whether insuring punitive damages is against public policy in Washington. This Note concludes in Part VI that punitive damages assessed for intentional misconduct should not be insurable in Washington as a matter of public policy and that the Washington Supreme Court should have reversed the appellate court on this issue.

I. HISTORY AND BACKGROUND OF PUNITIVE DAMAGES AND MALICIOUS PROSECUTION

A. *Punitive Damages*

When suing in tort, plaintiffs may be awarded punitive damages in addition to and apart from compensatory damages.⁴ Punitive damages (also called exemplary damages, punitory damages, or vindictive damages⁵) are awarded not to compensate the plaintiff but to punish and deter defendants (and potentially others) from such conduct in the future.⁶ "Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'"⁷

Punitive damages have existed in America since the late 1700s and have "received widespread and substantial acceptance."⁸ To illustrate this longstanding principle one need look no further than *Day v. Woodworth*,⁹ in which the United States Supreme Court stated the following:

[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

4. 1 DONALD S. MALECKI ET AL., *COMMERCIAL LIABILITY RISK MANAGEMENT AND INSURANCE* 44 (2d ed. 1986).

5. BLACK'S LAW DICTIONARY 396 (7th ed. 1999).

6. *Sintra, Inc. v. City of Seattle*, 131 Wash. 2d 640, 662, 935 P.2d 555, 566-67 (1997).

7. *Int'l Bd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

8. Jill McKee Pohlman, Comment, *Punitive Damages in the American Civil Justice System: Jackpot or Justice?*, 1996 UTAH L. REV. 613, 619 (1996).

9. 54 U.S. 363, 371 (1851).

We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.¹⁰

Washington is one of only five states that disallows juries from awarding punitive damages in the first place because they are contrary to public policy.¹¹ It is important to note, however, that punitive damages may be awarded in Washington when assessed under the law of another state, under federal law,¹² or where expressly authorized by statute.¹³ For example, punitive damages are expressly authorized under California law where Talon sued Fluke for malicious prosecution.¹⁴ Importantly, *Fluke* is the first case in which the *insurability* of punitive damages has been addressed in Washington.¹⁵ Prior to *Fluke*, Washington was one of seven states that was undecided on the issue.¹⁶

B. Malicious Prosecution

Fluke was sued for malicious prosecution in the instant case.¹⁷ Malicious prosecution at common law involved the institution of a criminal or civil proceeding for an improper purpose and without probable cause.¹⁸ Once a wrongful prosecution has ended in the defendant's favor, he or she may sue for tort damages.¹⁹ To establish a cause of action for malicious prosecution in California, a plaintiff must demonstrate that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice.²⁰ Although malicious prosecution originated as

10. *Id.*

11. McKee Pohlman, *supra* note 8, at 620. The other states are Louisiana (*Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988)); Massachusetts (*Pine v. Rust*, 535 N.E.2d 1247, 1249 (Mass. 1989)); Nebraska (*Braesch v. Union Ins. Co.*, 464 N.W.2d 769, 777 (Neb. 1991)); and New Hampshire (N.H. REV. STAT. ANN. § 507.16 (2002)). For Washington, see, e.g., *Dailey v. N. Coast Life Ins. Co.*, 129 Wash. 2d 572, 574, 919 P.2d 589, 590 (1996).

12. *Kammerer v. W. Gear Corp.*, 96 Wash. 2d 416, 422-23, 635 P.2d 708, 711-12 (1981).

13. *Winchester v. Stein*, 135 Wash. 2d 835, 858, 959 P.2d 1077, 1088 (1998).

14. CAL. CIV. CODE § 3294(a) (West 2002). "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

15. See Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 BUS. LAW. 283, 299 (1999) (emphasis added).

16. See *id.* at 23.

17. *Fluke*, 102 Wash. App. at 241, 7 P.3d at 827.

18. BLACK'S LAW DICTIONARY 970 (7th ed. 1999).

19. *Id.*

20. *Brennan v. Tremco Inc.*, 20 P.3d 1086, 1088 (Cal. 2001).

a remedy for individuals subjected to maliciously instituted *criminal* charges, the tort has been extended in most common law jurisdictions to afford a remedy for the malicious prosecution of *civil* actions as well.²¹

Absent a specific exclusion, most commercial general liability policies provide coverage for malicious prosecution under the "Personal Injury" portion of said policies.²² Additionally, most commercial general liability policies are construed to provide coverage for punitive damages.²³ Nevertheless, it is well settled that agreements or contracts against public policy are illegal and void.²⁴ "[F]reedom of contract is subject to the limitation that the agreement must not be against public policy."²⁵ From these facts, the debate ensues: even though an insurance policy might be construed to provide coverage for punitive damages arising from malicious prosecution or other intentional torts, should public policy concerns override the insurance policy and preclude coverage?

The Washington Supreme Court has now weighed in on this issue; however, a tension remains. This tension arises from the conflict between parties' freedom of contract on one hand versus a public policy judgment on the other hand that parties should not be allowed to insure against intentional wrongdoing.

II. TREATMENT OF THE INSURABILITY OF PUNITIVE DAMAGES IN OTHER STATES

An analysis of other states' treatment of the insurability of punitive damages helps put the issue in perspective. According to authoritative reports, twenty-seven states (including Washington) permit li-

21. *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 501 (Cal. 1989).

22. 1 MALECKI ET AL., *supra* note 4, at 296. Fluke's policy explicitly provided malicious prosecution coverage. *Fluke*, 102 Wash. App. at 241, 7 P.3d at 827 ("The policy defines 'personal injury' as 'injury, other than 'bodily injury,' arising out of one or more of the following offenses: . . . b. Malicious prosecution.'")

23. *See, e.g., Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964); *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522 (Ariz. 1972); *Concord Gen. Mut. Ins. Co. v. Hills*, 345 F. Supp. 1090 (D. Me. 1972); *Abbie Uriguen Olds. Buick, Inc. v. United States Fire Ins. Co.*, 511 P.2d 783 (Idaho 1973); *Norfolk & Western Ry. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92 (N.D. Ind. 1976); *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013 (Or. 1977); *State v. Glens Falls Ins. Co.*, 404 A.2d 101 (Vt. 1979); *Dayton Hudson Corp. v. Am. Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981); *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106 (Iowa 1983); *Providence Wash. Ins. Co. v. Valdez*, 684 P.2d 861 (Alaska 1984); *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985); *United Serv. Auto. Ass'n v. Webb*, 369 S.E.2d 196 (Va. 1988); *South Carolina State Budget & Control Bd. v. Prince*, 403 S.E.2d 643 (S.C. 1991).

24. *E.g.*, 17A AM. JUR. 2D *Contracts* § 257 (1991).

25. *Id.*

ability insurance coverage for punitive damages as a matter of public policy, eighteen states disallow such coverage, and six states are undecided.²⁶ However, of the twenty-seven states that permit coverage for punitive damages, nearly thirty percent of them make an exception for punitive damages assessed for intentional misconduct.²⁷

Additionally, more than half of the eighteen states that prohibit coverage for punitive damages make an exception for punitive damages assessed as a result of vicarious liability.²⁸ The Appendix of this Note provides a synopsis of the various states' positions as compiled from the secondary sources noted above. From these statistics, it is clear that while a majority of the states permit coverage for punitive damages, an overwhelming number of them have recognized that coverage is not appropriate where the insured has engaged in intentional wrongdoing. Moreover, states forbidding punitive damages insurance coverage have noted that punitive and deterrent goals of punitive damages are not served when damages are assessed for the conduct of another under vicarious liability, such as under the doctrine of *respondent superior*.²⁹

Based on the various states' treatment as a whole, a debate about the merits of punitive damages coverage would be incomplete without distinguishing between intentional and unintentional conduct. These contentions are discussed in Part IV.

III. THE FACTS OF THE *FLUKE* CASE AND THE WASHINGTON COURT OF APPEALS'S HOLDINGS

When the Washington Supreme Court rendered its opinion in November of 2001, it dedicated only one short paragraph to the issue of whether "Washington public policy forbids shielding the insured from the burden of punitive damages."³⁰ Because the Court shed little light on its reasoning for concluding that punitive damages are insurable in Washington, it is more informative to examine the Court of Appeals's opinion.

26. See *Masters*, *supra* note 15, at 283; Michael A. Rosenhouse, Annotation, *Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R.4th 11 (1982).

27. See *Masters*, *supra* note 15, at 283; Rosenhouse, *supra* note 26, at 11.

28. See *Masters*, *supra* note 15, at 283; Rosenhouse, *supra* note 26, at 11.

29. *Commercial Union Ins. Co. v. Reichard*, 404 F.2d 868 (5th Cir. 1968) (permitting insurer to pay amount of judgment representing punitive damages on account of assault by insured employer's employee).

30. *Fluke*, 145 Wash. 2d at 148, 34 P.3d at 813.

A. Facts and Procedural History

In 1988, Fluke Corporation, a manufacturer of electrical equipment based in Everett, Washington, brought a patent infringement suit against a California competitor, Talon Instruments, and Talon's president, Robert Corby.³¹ Fluke lost.³² Judgment was entered in December 1992 on the jury's verdict of non-infringement.³³

Talon and Corby sued Fluke in California state court in November of 1993, alleging that Fluke maliciously prosecuted the patent infringement claim in an attempt to force them out of business.³⁴ Fluke tendered the claim to its commercial general liability and umbrella insurer, Hartford.³⁵

Hartford agreed to defend Fluke in the lawsuit but notified Fluke that California law does not allow insurance coverage for intentional acts, including malicious prosecution, or for punitive damages.³⁶ In response to this news, Fluke instituted suit against Hartford in a Washington court in July 1996, seeking a declaration of coverage.³⁷ The parties agreed to stay the litigation in Washington until the entry of a final judgment in the California malicious prosecution case.³⁸

The California jury found in favor of Talon and Corby in the spring of 1997.³⁹ The jury's verdict awarded two million dollars in compensatory damages and four million in punitive damages.⁴⁰ Both Fluke and Hartford then moved for summary judgment in the declaratory action.⁴¹

31. *Fluke*, 102 Wash. App. at 241, 7 P.3d at 827.

32. *Id.* at 241, 7 P.3d at 827.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 241, 7 P.3d at 828.

40. *Id.* at 241-42, 7 P.3d at 828. On the issue of punitive damages, the jury was instructed as follows:

If you find the plaintiff suffered actual injury, harm or loss caused by malicious prosecution, you must decide in addition whether by *clear and convincing evidence* you find that there was *malice* in the conduct on which you base your finding of liability. Malice means conduct which is *intended by the defendant to cause injury to the plaintiff or despicable conduct* which is carried on by the defendant with a willful and conscious disregard for the rights [sic] of others. Despicable conduct is conduct so *vile, base, contemptible, miserable, wretched or loathsome* that it would be looked down upon and depicted by ordinary, decent people.

Brief of Amici Curiae Am. Int'l Companies at 3, *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001) (No. 70519-4) (emphasis added).

41. *Fluke*, 102 Wash. App. at 242, 7 P.3d at 828.

Choosing to apply Washington law, the Snohomish County Superior Court found no bar to Fluke's entitlement to coverage for the award of compensatory damages.⁴² As to punitive damages, however, the court construed the policy's insuring clause as providing no coverage.⁴³ The court awarded Fluke its fees and costs under the rule of *Olympic Steamship*.⁴⁴ Fluke appealed the ruling denying coverage for punitive damages, and Hartford appealed the ruling granting coverage for compensatory damages. The case went before the Court of Appeals of Washington, Division 1.⁴⁵ The Court of Appeals held that (1) Hartford unequivocally agreed in the insurance contract to cover both compensatory and punitive damages;⁴⁶ and (2) coverage for compensatory or punitive damages arising from malicious prosecution are not against public policy in Washington.⁴⁷

B. The Court of Appeals's Holdings

The Court of Appeals held that (1) Hartford agreed to cover both compensatory and punitive damages in Fluke's insurance policies; (2) there is no statutory prohibition of insuring punitive damages in Washington, and absent a statute, Washington courts are reluctant to invoke public policy as a reason to limit or avoid express contract terms; (3) Washington does not have a policy of imposing punitive damages to punish and deter wrongdoing; Washington's only express policy is that they are disfavored; and (4) Hartford collected a premium for the coverage, and therefore the insured had a legitimate and enforceable expectation of receiving the coverage promised.

While the Court of Appeals did not devote a large portion of its opinion to the issue of whether punitive damages should be insurable in Washington, its analysis was more thorough than that of the Washington Supreme Court. First, the Court of Appeals examined Fluke's policies and concluded that they provided coverage for both compensatory and punitive damages.⁴⁸ Under Coverage B of the primary

42. *Id.* at 242, 7 P.3d at 828.

43. *Id.*

44. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wash. 2d 37, 53, 811 P.2d 673 (1991) (holding that an insured is entitled to recover its attorney fees when it is compelled to assume the burden of legal action to obtain the benefit of its insurance policy).

45. *Fluke*, 102 Wash. App. at 242, 7 P.3d at 828.

46. *Id.* at 244-45, 7 P.3d at 829.

47. *Id.* at 248, 7 P.3d at 831. In addition, the court considered these other issues, which are beyond the scope of this article: (1) whether the Hartford policy provided punitive damages coverage (yes); (2) whether indemnification for malicious prosecution is against public policy in Washington (no); (3) choice of law between Washington and California (Washington); and (4) whether Fluke was entitled to attorney fees under *Olympic Steamship* (yes).

48. *Id.* at 242-45, 7 P.3d at 828-29.

commercial general liability policy, "Personal and Advertising Injury Liability," Hartford agreed to pay "those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies."⁴⁹ The policy defined "personal injury" as "injury, other than 'bodily injury,' arising out of one or more of the following offenses: . . . b. Malicious prosecution."⁵⁰ The primary policy granted a limit of one million dollars for each occurrence.⁵¹ The umbrella policy granted similar coverage with a limit of nine million dollars.⁵² The policies contained thirty-four subsections of exclusions, including an exclusion for the "violation of a penal statute."⁵³ There was no exclusion for punitive damages.⁵⁴

Next, the appellate court dissected (and ultimately rejected) the Snohomish County Superior Court's analysis of the policy language. The Superior Court had found that the language of the policies, covering damages that the insured becomes legally obligated to pay "because of" personal injury, did not cover punitive damages.⁵⁵ The Superior Court reasoned that punitive damages were awarded not to compensate but rather to deter and punish, without regard to the extent to which the wronged party was damaged, and therefore they are not damages flowing from ("because of") the tort of malicious prosecution.⁵⁶ Hence, they were not included under coverage for damages the insured must pay "because of" the injury arising out of the insured's misconduct.⁵⁷

After reviewing case law from other jurisdictions, the Court of Appeals disagreed with the Superior court, finding the court's rationale to be the minority rule.⁵⁸ The Court of Appeals then provided a clear statement of the majority rule regarding insurability of punitive damages: "Most courts do not focus on the meaning of 'because of'; they look instead to the phrase 'all sums that the insured becomes legally obligated to pay as damages' and interpret it as providing coverage for punitive damages."⁵⁹ Courts embracing this majority rule have emphasized the absence of a specific exclusion for punitive damages,

49. *Id.* at 242, 7 P.3d at 828.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 242-43, 7 P.3d at 828.

54. *Id.* at 243, 7 P.3d at 828.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

noting the absence of any other distinction in the policy between compensatory and punitive damages.⁶⁰ Citing to the Oregon Supreme Court, the Court of Appeals said that “a person insured by such a policy would suppose that the term ‘damages’ would include all damage which became, by judgment, a ‘sum’ that the insured became legally obligated to pay – including punitive damages.”⁶¹ In short, the Court of Appeals found the majority rule to be in accord with the interpretive rules followed by Washington courts in construing insurance policies.⁶² Thus, if Hartford wished to exclude punitive damages, it could have inserted the word “compensatory” or added a specific punitive damages exclusion.⁶³ “We will not add language to the policy that the insurer did not include.”⁶⁴

Second, the court pointed out that Washington’s statutes do not make punitive damages uninsurable; absent a statute, Washington courts are reluctant to invoke public policy as a reason to limit or avoid express contractual terms.⁶⁵ One explanation for the reluctance is that among the branches of government, the judiciary is the least capable of receiving public input and resolving broad policy questions.⁶⁶ Therefore, Washington courts have relied on policy to strike down insurance provisions only when that policy “pervades our entire scheme of insurance legislation.”⁶⁷ A second reason that the courts are unresponsive to arguments made by insurance companies that coverage is void as against public policy is because the insurers draft the policy language and cannot argue that their own drafting is unfair.⁶⁸

Third, the court noted that Washington does not have a policy of imposing punitive damages to punish and deter wrongdoing; rather, Washington’s only express policy is that they are disfavored.⁶⁹ “Our courts view [punitive damages] as ‘a penalty generally reserved for criminal sanctions,’ inappropriate in civil cases because they give the

60. *Id.* at 243, 7 P.3d at 829.

61. *Id.* at 244, 7 P.3d at 829 (citing *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1015 (Or. 1977)).

62. “Insurance contracts should be interpreted in the way that an average insured would read them.” *Id.* (citing *Bowers v. Farmers Ins. Exch.*, 99 Wash. App. 41, 45, 991 P.2d 734, 737 (2000)).

63. *Id.*

64. *Id.* (quoting *Am. Nat’l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wash. 2d 413, 430, 951 P.2d 250, 257 (1998)).

65. *Id.* at 246, 7 P.3d at 830 (citing *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash. 2d 477, 481, 687 P.2d 1139, 1142 (1984)).

66. *Id.* (citing *Burkhart v. Harrod*, 110 Wash. 2d 381, 385, 755 P.2d 759, 761 (1988)).

67. *Id.* (quoting *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wash. 2d 203, 208, 643 P.2d 441, 444 (1982)).

68. *Id.* (quoting *Am. Nat’l Fire Ins. Co.*, 134 Wash. 2d at 430, 951 P.2d at 257).

69. *Id.* at 248, 7 P.3d at 831.

plaintiff a windfall beyond full compensation."⁷⁰ The court refused to assume that being covered for punitive damages encourages insureds to commit egregious wrongs.⁷¹ The decision on the question of whether punitive damages should be insurable is best left to the Washington Legislature.⁷²

Finally, the court stated that Fluke's policy promised coverage for those sums Fluke became obligated to pay either as compensatory or punitive damages arising from malicious prosecution.⁷³ "Hartford collected a premium for that coverage."⁷⁴ "An insured who has paid a premium ordinarily has a legitimate and enforceable expectation of receiving the coverage promised."⁷⁵ Therefore, the insured could expect coverage for punitive damages arising out of malicious prosecution.

In its decision, the Washington Court of Appeals failed to address many valid arguments opposing insurance coverage for punitive damages. It concluded that Fluke's policy explicitly covered punitive damages; that there is no public policy against insuring punitive damages in Washington; that Washington's only express public policy regarding punitive damages is that they are disfavored; and that Fluke paid for punitive damages coverage and therefore had a legitimate expectation of coverage. From these arguments, the Court of Appeals concluded that insurance for punitive damages necessarily does not offend Washington public policy. The next section analyzes the Court of Appeals's rationale and reveals flaws in its logic.

IV. ANALYSIS OF THE COURT OF APPEALS'S DEFECTIVE REASONING

The Court of Appeals erred in deciding that insurance for punitive damages is not against public policy in Washington. This holding is incorrect for the following reasons: (1) although there is no Washington statute prohibiting insurance coverage of punitive damages in Washington, there is no statute permitting it, either, and public policy ultimately disfavors such coverage; (2) while punitive damages are generally disfavored in Washington, public policy does not necessarily favor insurance coverage for such damages; (3) allowing policyholders to insure their intentional wrongdoing encourages bad

70. *Id.* (quoting *Dailey v. N. Coast Life Ins. Co.*, 129 Wash. 2d 572, 574, 919 P.2d 589, 590 (1996)).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (citing *Thiringer v. Am. Motors Ins. Co.*, 91 Wash. 2d 215, 220, 588 P.2d 191, 194 (1978)).

behavior; (4) there is no evidence that Fluke and Hartford expressly contemplated whether punitive damages were covered by the insurance contracts; (5) allowing punitive damages to be insured thwarts the dual purpose of punitive damages—punishment and deterrence; (6) insuring punitive damages allows wrongdoers to unfairly pass their costs onto the premium-paying public; and (7) the court should have distinguished between allowing coverage for punitive damages arising out of unintentional conduct versus intentional conduct. Each of these contentions will be successively examined below.

A. The Lack of a Washington Statute Prohibiting Punitive Damages Coverage Is Not Dispositive

The court emphasized that Washington statutes do not prohibit the insuring of punitive damages, and absent such a statute, Washington courts are reluctant to invoke public policy to invalidate express contract terms.⁷⁶ Nevertheless, it is inconsequential that the Washington Legislature has failed to enact a statute prohibiting the insurability of punitive damages because Washington law generally does not permit punitive damages in the first place.⁷⁷ Accordingly, it would be illogical for the Legislature to prohibit the insuring of punitive damages when Washington courts, applying Washington law, are not allowed to assess them in the first place.

Although it is appropriate to look toward the Legislature for a pronouncement of public policy, it is imperative to remember that this branch of government is not the only source from which such policy can be discerned. For example, the Washington Supreme Court has recognized at least three sources of public policy: statutes, judicial decisions, and public morals.⁷⁸ Although courts have been hesitant to use public policy to invalidate insurance contract provisions,⁷⁹ when the Legislature has not enacted a statute, Washington courts refer to

76. *Id.* at 246, 7 P.3d at 830.

77. Memorandum in Support of Petition for Review of Amici Curiae Alliance of Am. Insurers & State Farm Mut. Auto. Ins. Co. at 4-5, *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001) (No. 70519-4).

78. Memorandum in Support of Petition for Review of Amicus Curiae American International Companies at 4, *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001) (No. 70519-4) (stating "In general, a contract which is not prohibited by statute, condemned by judicial decision, or contrary to the public morals, contravenes no principle of public policy.") (quoting *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash. 2d 477, 481, 687 P.2d 1139, 1142 (1984)). See also *Cary v. Allstate Ins. Co.*, 130 Wash. 2d 335, 346-47, 922 P.2d 1335, 1341 (1996); *Am. Home Assurance Co. v. Cohen*, 124 Wash. 2d 865, 873-74, 881 P.2d 1001, 1006 (1994); *Schab v. State Farm Mut. Auto. Ins. Co.*, 41 Wash. App. 418, 422-23, 704 P.2d 621, 624 (1985)).

79. *Emerson*, 102 Wash. 2d at 483, 687 P.2d at 1139.

their own pronouncements of law and policy, or to the “public morals.”⁸⁰ As to sources of public policy, the Washington Supreme Court has said:

The term “public policy,” . . . embraces all acts or contracts which tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.⁸¹

The Washington Supreme Court and the Court of Appeals have found that public policy prohibits insurance coverage for intentional misconduct: “It is against public policy to insure against liability arising from the intentional infliction of injury on the person of another.”⁸² Indeed, the court has utilized public policy to prohibit the assessment of punitive damages in this state.⁸³ Therefore, if the courts hold that it is against public policy to insure against intentional injury and to assess punitive damages, it follows *a fortiori* that it is against public policy to insure against punitive damages flowing from intentional misconduct.

Dissenters would argue that the doctrine of “freedom of contract”⁸⁴ should govern in situations like this one. Assuming *arguendo* that Fluke and Hartford expressly bargained for punitive damages coverage, then Fluke should receive coverage. However, it is well established that the “freedom of contract” doctrine is tempered with the caveat that contracting parties may *not* enter into contracts if the sub-

80. Brief of Amicus Curiae American International Companies at 5, *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026 (2001) (No. 70519-4).

81. *Emerson*, 102 Wash. 2d at 483, 687 P.2d at 1139 (quoting *LaPoint v. Richards*, 66 Wash. 2d 585, 594–95, 403 P.2d 889, 895 (1965)).

82. *Cohen*, 124 Wash. 2d at 871, 881 P.2d at 1005. See also *Grange Ins. Co. v. Brosseau*, 113 Wash. 2d 91, 98, 776 P.2d 123, 126 (1989) (stating that “public policy or law actually prohibits the purchase of insurance covering [wrongful acts (intentional torts)]”); *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wash. 2d 99, 106, 751 P.2d 282, 285 (1988); *Federated Am. Ins. Co. v. Strong*, 102 Wash. 2d 665, 674–75, 689 P.2d 68, 74 (1984); *Unigard Mut. Ins. Co. v. Spokane Sch. Dist. No. 81*, 20 Wash. App. 261, 265, 579 P.2d 1015, 1019 (1978) (stating that “public policy prevents an insured from benefiting from his wrongful acts”).

83. *Dailey v. N. Coast Life Ins. Co.*, 129 Wash. 2d 572, 574, 919 P.2d 589, 590 (1996).

84. “Every person has the inherent and inalienable right to freely deal or refuse to deal with his fellow men, and the right to make and enforce contracts is one of the most valuable and sacred rights of individuals and corporations. Competent persons ordinarily have the utmost liberty of contracting, and their agreements voluntarily and fairly made will be held valid and enforced in the courts. Parties may incorporate in their agreements any provisions that are *not illegal or violative of public policy.*” 17A AM. JUR. 2D *Contracts* § 238 (1991) (emphasis added).

ject matter is against public policy.⁸⁵ Applying the facts of this case to the *Emerson*⁸⁶ quote above, allowing Fluke to reap the benefit of its alleged “bargain” injures the public morals and the public confidence in the purity of the administration of the law and violates Washington public policy. During a time when the Enron, Arthur Anderson, and WorldCom fiascos loom large, many citizens likely believe that persons or entities can buy their way out of any kind of wrongdoing. As a result, citizens’ confidence in our justice system has diminished. The *Fluke* court incorrectly disregarded the negative effect punitive damages coverage could have on public morals and confidence.

B. The Prohibition of Punitive Damages in Washington Does Not Necessarily Imply that Public Policy Must Favor the Insurability of Punitive Damages

As noted previously, Washington law disfavors punitive damages awards *because they are against public policy*.⁸⁷ Yet, the *Fluke* court inexplicably concluded that Washington public policy must favor insurance coverage for punitive damages.⁸⁸ It would make better sense to hold that if the state does not allow punitive damages because they create a windfall for the plaintiff, then the state should not allow wrongdoers to obtain insurance coverage that would guarantee a plaintiff a source of funds for the windfall. The *Fluke* court did the opposite. The decision essentially allows policyholders to purchase insurance protecting them from the very punitive damages that the courts in this state have found to be against public policy. Because punitive damages are against public policy in Washington, the court should have decided that insuring them is also against public policy.

C. Allowing Policyholders to Insure Their Intentional Wrongdoing Encourages Bad Behavior

In one brief sentence, the *Fluke* court assumed that punitive damages coverage would not encourage insureds to commit egregious wrongs.⁸⁹ However, one might argue that allowing policyholders to insure against punishment for their intentional wrongdoing will have the negative effect of encouraging misconduct because wrongdoers will

85. *E.g., id.* (“An agreement or contract made in violation of established public policy is not binding and will not be enforced. Thus, freedom of contract is subject to the limitation that the agreement must not be against public policy.”).

86. *Emerson*, 102 Wash. 2d at 483, 687 P.2d at 1143.

87. *Dailey*, 129 Wash. 2d at 574, 919 P.2d at 590.

88. *Fluke*, 102 Wash. App. at 248, 7 P.3d at 831.

89. *Id.* at 248, 7 P.3d at 831.

no longer be held directly accountable for their actions. After *Fluke*, if a Washington insured desires to commit an intentional wrong, carrying with it the potential of punitive damages, the insured can simply purchase insurance coverage covering it. Essentially, *Fluke* allows an insured to conduct a cost/benefit analysis to determine whether wrongdoing might be worthwhile.⁹⁰ If this balancing test shows that the benefits of insurance outweigh the costs of committing an intentional wrong, an insured is more likely to engage in that wrongdoing.⁹¹ Thus, the Washington courts should not encourage contemptible behavior by allowing policyholders to bankroll such transgressions.

D. Fluke and Hartford Did Not Necessarily Contemplate Whether Punitive Damages Were Covered

The Washington Court of Appeals assumed without question that "Hartford collected a premium for that [punitive damages] coverage."⁹² "Ordinarily, an insured who has paid a premium has a legitimate and enforceable expectation of receiving the coverage."⁹³ However, from the record, it is unclear whether *Fluke* or Hartford ever contemplated that punitive damages would be covered in Washington or whether Hartford charged an additional premium for the coverage.⁹⁴ In fact, even though the Court of Appeals said that the Hartford policy "promised coverage for those sums *Fluke* became obligated to pay either as compensatory or punitive damages arising from malicious prosecution,"⁹⁵ it was not clear at the outset that the policy plainly covered punitive damages. This fact is borne out by the court's devotion of a fair amount of its opinion to determining whether *Fluke's* insurance contract even covered punitive damages *in the first place*.⁹⁶

Because the court had to conduct an extensive analysis to determine whether punitive damages were covered by *Fluke's* policy, it is

90. See Gary S. Franklin, *Punitive Damages Insurance: Why Some Courts Take the Smart out of "Smart Money,"* 40 U. MIAMI L. REV. 979, 1018 (1986).

91. *Id.*

92. *Fluke*, 102 Wash. App. at 248, 7 P.3d at 831.

93. *Id.* at 248, 7 P.3d at 831.

94. Memorandum in Support of Petition for Review of Amicus Curiae Certain Underwriters at Lloyd's, London and Certain London Market Companies at 5, *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001) (No. 70519-4).

95. *Fluke*, 102 Wash. App. at 248, 7 P.3d at 381.

96. *Id.* at 242-45, 7 P.3d at 828-30. Under Coverage B of *Fluke's* primary commercial general liability policy, "Personal and Advertising Injury Liability," Hartford agreed to pay "those sums that the insured becomes legally obligated to pay as *damages* because of 'personal injury' or 'advertising injury' to which this insurance applies." *Id.* (emphasis added). The policy did not explicitly mention that it covered punitive damages.

untenable to conclude that Fluke and Hartford expressly agreed that punitive damages were covered by the policy. Coupling this fact with the uncertain status of the insurability of punitive damages in Washington before *Fluke* (at the time the policy in question was negotiated), the Court of Appeals's argument is even less convincing.

E. Punishment and Deterrence

By allowing Fluke to tender its punitive damages judgment to its insurer, the court ignored the main purposes of awarding punitive damages: punishment and deterrence.⁹⁷ California has adopted these reasons as the rationale behind its policy favoring punitive damages.⁹⁸ “[T]he purposes of punitive damages, in . . . California . . . , are to punish the defendant and to deter future misconduct by making an example of the defendant.”⁹⁹ Consequently, allowing an insured to commit an intentional act of harm toward another while simultaneously placing responsibility of payment on the insurer serves neither purpose. The insured escapes punishment because it is free from paying any of the judgment. Further, the insured will not be deterred from engaging in misconduct in the future because it is aware that any intentional misconduct will be bankrolled by its insurer.

Some might argue that a wrongdoer such as Fluke would suffer punishment in the form of a policy cancellation or higher premiums after a punitive damage loss. This argument is flawed. The threat of policy cancellations do not dissuade a policyholder from engaging in intentional wrongdoing, because if cancellation occurs, it takes place *after* the wrongdoing has occurred. Stated differently, the policyholder will still receive punitive damages coverage for that first act of wrongdoing. Furthermore, allowing insureds to pass punitive damages awards on to their insurers will not deter others from engaging in similar conduct. Indeed, seeing tortfeasors go unpunished will give others implied license to engage in similar misconduct. Potential wrongdoers would simply purchase an insurance policy covering punitive damages before engaging in the wrongful conduct. This scenario is analogous to a criminal purchasing a “get out of jail free” pass before committing a crime. Surely the Court of Appeals could have invoked public policy to override this sort of criminal “insurance” had it existed; certainly it should rule accordingly in civil suits involving intentional misconduct. The courts erred in not considering these factors.

97. *Sintra*, 131 Wash. 2d at 662, 935 P.2d at 566.

98. *PPG Indus., Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 656–59 (Cal. 1999).

99. CAL. CIV. CODE § 3294(a) (West 2002).

In this case, Fluke was rewarded for its successful forum shopping¹⁰⁰ in bringing the declaratory action against Hartford in Washington, where the insurability of punitive damages issue had not yet been decided.¹⁰¹ Had Fluke brought suit in California, the outcome would have been much different; the California court would have applied its statute prohibiting the insuring of punitive damages to find against Fluke. Hence, the Washington Supreme Court added insult to injury by allowing Fluke to “work the system” to circumvent California’s laws. In essence, Fluke was allowed to exploit the California judicial system to attempt to put a California company out of business, but when California law ceased to suit its needs, Fluke methodically rejected the California courts and successfully obtained a forum in Washington.

F. Allowing Intentional Wrongdoers to Insure Punitive Damages Imposes the Cost of Wrongdoing onto the Premium-Paying Public

The insurance mechanism involves collecting and pooling premiums from all eligible insureds so that those who suffer covered losses receive indemnity. As losses become more frequent and severe, insurance companies must increase everyone’s premiums in order to fulfill future loss-paying obligations. Additional costs will arise not only in the payment of higher judgments, but also in the areas of added administrative and legal expenses, extra reserving costs, loss of policyholder confidence, and the cost of related governmental inquiries.¹⁰² Bear in mind that the punitive damages portion of jury awards are often much higher than the compensatory damages award. Consequently, if insurance companies are required to pay punitive dam-

100. Supplemental Brief of Amicus Curiae Certain Underwriters at Lloyd’s, London and Certain London Market Companies at 7–9, *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001) (No. 70519-4). For example,

It is important to recognize that this coverage case presents itself in Washington for no other reason than Fluke beat Hartford to the courthouse. Fluke initiated this declaratory judgment action in Washington before the underlying California malicious prosecution trial started. Hartford commenced a declaratory judgment action in California while the Washington court was considering whether Talon Industries and Corby were necessary parties to the Washington action and whether it had jurisdiction over them. It was not until the Washington Superior Court ruled that it had jurisdiction over Talon Industries and Corby that the California court dismissed the declaratory judgment action.

Id.

101. *Fluke*, 102 Wash. App. at 246, 7 P.3d at 830.

102. Memorandum in Support of Petition for Review of Amicus Curiae Certain Underwriters at Lloyd’s, London and Certain London Market Companies at 4–5 (citing BLATT, HAMMESFAHR & NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 5.2 (1991)), *Fluke Corp. v. Hartford Accident & Indem. Co.*, 143 Wash. 2d 1026, 22 P.3d 802 (2001) (No. 70519-4).

ages awards, they will pass these costs on to the policy-buying public through higher premiums.¹⁰³ Thus, by forcing innocent policyholders to contribute more to the insurance pool through higher premiums, instead of punishing the wrongdoer, society punishes itself for the wrongdoer's egregious behavior.¹⁰⁴ The *Fluke* court failed to appreciate or consider the burden imposed on the premium-paying public if the public is forced to "subsidize" others' intentional misconduct.

One could argue that the insurance industry and innocent policyholders will not subsidize the increased premiums but rather that these costs will fall on the intentional tortfeasors who must pay increased premiums or suffer a lack of or reduction in future coverage. However, this argument fails to recognize that the intentional tortfeasor will still be permitted to reap the benefit of his or her coverage, allowing a sort of "freebie." In other words, Washington insureds will be entitled to one intentional tort against their insurance policy, with the possibility of suffering loss of coverage later. The problem is that the wrong has still occurred, and unfortunately, the pool must subsidize a financial loss that reduces policyholders' surplus. When policyholders' surplus is reduced, additional premiums must be collected from *all* policyholders to replenish the pool. In a case such as *Fluke's* where the punitive damages amount to four million dollars, it is unlikely that the insurer can or will recoup these funds from the one policyholder that perpetrated the loss. The funds must come from the entire policy-buying public in the form of higher premiums.

Furthermore, if the intentional wrongdoer loses its insurance coverage, *all* future premiums from innocent insureds must subsidize the shortfall because the insurance company will no longer collect a premium from the intentional wrongdoer. The real losers under this sort of regime are the insurance companies and their blameless policyholders. Washington courts should prohibit such a regime.

G. Distinguishing between Punitive Damages Awarded for Unintentional and Intentional Conduct

As noted earlier in Part II, a debate about the merits of punitive damages coverage would be incomplete without distinguishing between intentional and unintentional conduct. In *Fluke*, the Court of Appeals failed to make this distinction. Instead, the court broadly stated that punitive damages are insurable regardless of the nature of the underlying conduct that gave rise to the assessment of punitive

103. N.W. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440-42 (5th Cir. 1962).

104. *Id.*

damages.¹⁰⁵ However, several of the states that have addressed the insurability of punitive damages clearly distinguish between punitive damages awarded for unintentional conduct and those awarded for intentional misconduct.¹⁰⁶ A well-reasoned holding would have recognized that punitive damages assessed for intentional misconduct signify that the actor has acted with malice and that one who acts with malice should not be allowed to pass the costs of their misconduct on to the insurer and the policy-buying public in general. On the other hand, if a wrongdoer has acted with negligence or gross negligence, with no actual intent to do harm, the court could allow punitive damages arising out of such conduct to be insured, subject to contrary statements by the Legislature.

To illustrate the difference between intentional and unintentional conduct with regard to public policy, it is helpful to review three examples of negligence illustrated in an Oregon Supreme Court case that do not rise to the level of intentional misconduct yet could nevertheless expose a tortfeasor to punitive damages. First, a physician whose treatment of a patient is grossly negligent may be held liable for punitive damages.¹⁰⁷ Second, a creditor who has occasion to repossess personal property pledged as security for an unpaid debt may be subject to liability for punitive damages if a jury decides that the creditor acted improperly and in disregard of plaintiff's rights, even though the defendant exercised what he believed to be a legal right.¹⁰⁸ Third, the operator of a retail store who unwittingly sells goods in a package bearing representation that he *should know* to be false or *misleading*, or who blindly engages in a practice that he should know to be *unfair or deceptive*, contrary to the provisions of the Oregon Unlawful Trade Practices Act, may also be subject to an uninsurable liability for punitive damages.¹⁰⁹

Rejecting the defendant's argument that insuring punitive damages was against Oregon's public policy in all cases, the Oregon Supreme Court stated,

[E]ven though the risks involved in each of these examples were of such a nature as to be encountered in the operation of such business or professions, and the conduct involved did not involve '*intentionally inflicted injury*,' any contract with an insurance company to provide protection against the risk of punitive

105. See *Fluke*, 102 Wash. App. at 247-48, 7 P.3d at 830.

106. See generally *Masters*, *supra* note 15, at 283; *Rosenhouse*, *supra* note 26, at 11.

107. *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1018 (Or. 1977).

108. *Id.*

109. *Id.*

damages as the result of such conduct would become invalid as a matter of 'public policy,'¹¹⁰

In making the distinction between intentionally inflicted injury and injury that is the result of gross negligence or recklessness, the Oregon Supreme Court advanced sound public policy by ensuring that those who inadvertently commit harms resulting in punitive damages may insure against that harm.¹¹¹ However, Washington courts failed to appreciate the distinction set forth above by wrongly allowing these protections to be extended to policyholders who commit intentional harm.¹¹²

The Washington courts should have adopted the Oregon Supreme Court's view and limited the insurability of punitive damages to situations not caused by intentional misconduct. Such a decision would have evolved Washington's public policy of discouraging acts or contracts that injure the public health, the public morals, or the public confidence in the purity of the administration of the law,¹¹³ while protecting those who, without specific intent, cause injury to others.

As noted, a number of reasons describe why the Washington Court of Appeals erred in deciding that the insuring of punitive damages is not against Washington's public policy. Punitive damages coverage does not automatically exist merely because there are no statutes prohibiting it. Insurability of punitive damages is not implied by the prohibition of such damages. Insurance for intentional wrongdoing promotes bad behavior. There is no evidence that Fluke and Hartford specifically negotiated punitive damages coverage. Punishment and deterrence are negated by insurance for punitive damages. Insuring intentional wrongdoers allows them to pass their costs to the public. Finally, courts should distinguish between unintentional and intentional wrongdoing. Had the Court of Appeals considered these arguments, it may have come to a different conclusion in its holding on the insurability of punitive damages.

110. *Id.* at 1018-19 (emphasis added).

111. *Id.* at 1021 (holding that insurance protection should be available to a professional person or wage earner or to a housewife or retired person, who might well be ruined financially by a judgment for punitive damages as the result of conduct of no more flagrancy than an act of 'gross negligence,' a momentary 'reckless' act, or conduct 'contrary to societal interests.').

112. *Fluke Corp. v. Hartford Accident & Indemnity Co.*, 102 Wash. App. 237, 7 P.3d 825 (2000).

113. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash. 2d 477, 483, 687 P.2d 1139, 1143 (1984).

V. THE WASHINGTON SUPREME COURT'S HOLDING

On November 21, 2001, the Washington Supreme Court affirmed the Court of Appeals on all issues.¹¹⁴ In its opinion, the court devoted a mere paragraph to the topic of whether insuring punitive damages was against public policy in Washington.¹¹⁵ Finding that "this state has articulated no such public policy [against insuring punitive damages], either by statute or judicial decision[.]"¹¹⁶ the court simply "[d]ecline[d] to conclude that insuring oneself against a disfavored penalty runs counter to public policy."¹¹⁷ Therefore, as it currently stands, punitive damages are insurable in Washington whether they arise from intentional misconduct or not.

The problem with the Washington Supreme Court's opinion is that its brevity causes one to question whether the court adequately considered the insurability of punitive damages issue. Instead of providing a detailed explanation of why it arrived at this conclusion, the court seemingly based its whole decision on the fact that neither the Washington Legislature nor the Washington courts have articulated any public policy theories against insuring punitive damages.¹¹⁸ Or, perhaps the Washington Supreme Court implicitly accepted the Court of Appeals's rationale, declining to take time to synopsise the actual reasons for its decision.

Either way, the court's apparent disregard for the importance of the issue is disappointing. The court, unfortunately, did not consider whether there should be a difference between insuring punitive damages assessed for intentional misconduct as opposed to insuring punitive damages assessed for unintentional conduct (e.g., gross negligence and recklessness). Interestingly, the court implied in dictum that a court *could* make a public policy decision when it said, "this state has articulated no such public policy . . . by . . . *judicial decision*."¹¹⁹ Being the highest court in this state, it could have taken the position that intentional wrongdoers should not benefit from their misconduct, and it could (and should) have reversed the Court of Appeals to the extent that insuring punitive damages was permitted without limitation.

114. *Fluke Corp. v. Hartford Accident & Indem. Co.*, 145 Wash. 2d 137, 141, 34 P.3d 809, 811 (2001).

115. *Id.* at 148, 34 P.3d at 814.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (emphasis added).

VI. CONCLUSION

Based on the foregoing arguments, the Washington Court of Appeals, and ultimately the Washington Supreme Court, incorrectly held that there is no public policy objection to insuring punitive damages in Washington. First, the lack of a statute or judicial decision prohibiting the insurance of punitive damages does not imply that Washington therefore allows coverage for punitive damages without considering public policy. Second, while Washington courts disfavor the awarding of punitive damages in most instances, it does not follow that public policy therefore favors insurance for punitive damages. Third, allowing insureds to insure their own misconduct may implicitly give them permission to commit such misconduct. Fourth, it is doubtful that Fluke and Hartford expressly agreed that punitive damages would be covered by Fluke's policies or that Hartford charged a premium for it.

Fifth, punitive damages are awarded for two reasons: punishment and deterrence. Allowing insureds to protect themselves against paying punitive damages awards frustrates states' desires to both punish insureds that have committed serious wrongs and deter others from committing the same wrongs. Sixth, allowing policyholders to pass the cost of their wrongdoing on to insurance companies and their insureds serves no purpose other than to punish the public for the misconduct of others. Finally, both courts failed to distinguish between insuring against unintentional versus intentional wrongdoing.

In closing, if the Washington Supreme Court strongly felt that punitive damages should be covered to some extent, it should have adopted approaches similar to many other states surveyed in this Note and made a distinction between *unintentional* conduct and *intentional misconduct*. The Washington Supreme Court therefore should have reversed the Court of Appeals and prohibited insuring punitive damages altogether, or alternatively, it should have permitted insuring punitive damages only to the extent that they arise out of unintentional conduct. The Washington Legislature should accordingly pick up the baton dropped by the Washington Supreme Court and enact legislation that exempts punitive damages for intentional misconduct from insurability.

Appendix

STATE SURVEY OF THE INSURABILITY OF PUNITIVE DAMAGES AS A
MATTER OF PUBLIC POLICY*Compiled from the articles cited supra, note 26.*

State	Insurable	Intentional Misconduct Exception	Uninsurable	Vicarious Liability Exception	Undecided
Alabama	X				
Alaska	X				
Arizona	X				
Arkansas	X	X			
California			X	X	
Colorado			X		
Connecticut			X		
Delaware	X				
District of Columbia					X
Florida			X	X	
Georgia	X				
Hawaii	X				
Idaho	X				
Illinois			X	X	
Indiana			X	X	
Iowa	X				
Kansas			X	X	
Kentucky	X	X			
Louisiana			X	X*	
Maine					X
Maryland	X				
Massachusetts					X
Michigan	X				
Minnesota			X		
Mississippi	X				
Missouri			X	X	
Montana	X**				

* If unintentional.

Nebraska					X
Nevada			X		
New Hampshire	X ^{***}				
New Jersey			X		
New Mexico	X				
New York			X		
North Carolina	X	X			
North Dakota					X
Ohio			X		
Oklahoma			X	X*	
Oregon	X	X			
Pennsylvania			X	X	
Rhode Island			X		
South Carolina	X				
South Dakota					X
Tennessee	X	X**			
Texas	X	X			
Utah			X		
Vermont	X				
Virginia	X	X			
Washington	X				
West Virginia	X	X			
Wisconsin	X				
Wyoming	X				
TOTALS	27	8	18	10	6

** If coverage is expressly provided in policy.

*** If assessed against municipalities pursuant to federal statute.

* When based on ordinary negligence.

** Only insurable if assessed for negligence.