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Practice and Procecdure—Rule 16—Grounds for Granting New Trial

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sounds in tort, and therefore the contract defense is inapplicable. A finding of bad faith may follow from a neglect or refusal to fulfill some contract obligation, *Bundy v. Commercial Credit Co.,* 202 N.C. 604, 163 S.E. 676 (1932), and an action based thereon sounds in tort, *Johnson v. Hardware Mutual Casulty Co.,* 108 Vt. 269, 187 A. 788 (1936). The court does not state what contract obligation was unfulfilled. There is no contractual obligation of the insurer to settle or compromise suits against the insured. The court must have been referring to the implied obligation of the insurer to use good faith because of a fiduciary relationship arising from the insured's having surrendered all right to defend suits or effect compromises. *American Fidelity and Casualty Co. v. All American Bus Lines,* 179 F.2d 7 (C.A. 10th 1949).

It is unfortunate that the trial court never determined whether the loss was within the policy coverage. Similar litigation might be avoided by several courses of action. (1) Force the insurer to elect to defend unconditionally or surrender the defense to the insured. Then if the damage suit reveals loss within the policy coverage, the insured may recover from the insurer in a separate suit if necessary, although payment by the insurer would be almost certain in view of the evidence indicating that the loss was within the policy coverage; (2) Allow counsel of the insurer and the insured to participate in the defense, thus giving protection to the interests of both. This is the method suggested by the *Fidelity* and *Compton cases, supra;* (3) Either of the foregoing solutions could be carried out by a provision in our Insurance Code directing the course of action to be pursued when similar "conflicts of interest" arise.

MYRON J. CARLSON

Practice and Procedure—Rule 16—Grounds for Granting New Trial. *P* sued *D* for malpractice. After a verdict for *P,* the trial court granted *D's* motion for new trial, citing Rule 16, sub. 9 of the General Rules of the Superior Court, 34A Wn.2d 117, i.e., "substantial justice has not been done." The court listed in the order granting the new trial the following reasons: insufficient evidence of negligence, prejudice of a juror, statements of *P's* counsel tending to prejudice the jury against *D,* speed of the verdict, consideration of the entire record and proceedings, and appearance and demeanor of witnesses. P appealed. *Held*: reversed and judgment for *P* according to the verdict. Rule 16 requires that in all cases where a trial court grants a motion for new trial it shall in the order of granting the motion give definite reasons of law and facts for so doing. The reasons based on the record are insufficient to warrant a new trial and the reasons based upon the trial court's consideration of the proceedings and demeanor of witnesses do not show in what way *D* was prejudiced thereby. *Mulka v. Keyes,* 41 Wn. 2d 427, 249 P.2d 972 (1952).

The Supreme Court for many years has been committed to the proposition that the trial court may in its discretion, grant a new trial on the ground that substantial justice has not been done. See Green, *Procedural Progress in Washington,* 26 WASH L. REV. 87, 109 (1951). The requirement that the trial court list reasons for such a conclusion was added to the Rules in 1951, as a result of a discussion in *Coppo v. Van Weeringen,* 36 Wn.2d 120, 217 P.2d 294 (1950). In the *Coppo* case, Justice Hill indicated that the Supreme Court would be able to perform the appellate function more effectively if the trial court were required to state reasons of law and fact for the granting of the new trial order.

Washington, in allowing an appeal from an order granting a new trial is in a minority position. Most jurisdictions deny such appeal upon the ground of lack of finality

or trial court discretion, and such was the rule at common law. See *Hayes v. Sears, Roebuck & Co.*, 34 Wn. 2d 666, 673, 209 P.2d 468, 472 (1949).

The instant case indicates that the trial court's assertion that the order is based upon matters outside the record is not a sufficient reason under Rule 16, and even a reference to the demeanor of witnesses, though admittedly not a consideration based on the record is, in itself, too general.

That the result of the instant case is proper cannot be questioned, since as the opinion points out, no particular significance was attached to the demeanor of any witness at the time the testimony was taken, and so the reasons in the trial court decision which were not a part of the record seemed to come as an afterthought. However, a requirement that the trial judge specify with particularity the prejudicial effect of such factors that are outside the record would seem to be an unreasonable encroachment upon the sound discretion of the trial court.

RAYMOND H. SIDERIUS

Domestic Relations—Natural Guardianship in Grandparents. The superior court of Washington for King County deprived the parents of *X*, a minor, of any and all parental rights in or to the child and directed that he be a ward of the court. *Y*, the maternal grandmother, petitioned for custody of the child. After complete and extended inquiry into *Y's* ability to care for the child the superior court (called the juvenile court in this type of proceeding), denied the request for custody due primarily to *Y's* tubercular condition. *Held* Reversed and remanded. When the parents were permanently deprived of custody the grandmother became the natural guardian and was entitled to custody if she were found to be a proper person. The majority opinion expressly states that the record presented supports the finding that the grandmother was unfit. The case, however, is remanded for further proceedings because *Y's* claim that the court below did not regard her as having a "preference right" to the child by virtue of her natural guardianship and also due to her assertion that she would be able to submit evidence of an improved physical condition. Four judges dissented. *State* ex rel. *Michelson v. Superior Court*, 41 Wn.2d 718, 251 P.2d 603 (1952).

This case introduces into Washington the concept of natural guardianship passing from the parents, upon death or permanent deprivation of their parental rights, to the grandparents. The court declares that this is its first occasion to pass upon the legal status of a blood relative of a child whose parents have either died or been permanently deprived of custody. It is true that this is the first case in Washington wherein the court has had to deal directly with this contention. There are cases, which the court in the instant case distinguished, in which language used suggested that grandparents have no legal right to custody of any child prior to an award of custody to them by the court. See *Morin v. Morin*, 66 Wash. 312, 119 pac. 745 (1911) and In re *Stuart*, 138 Wash.59, 244 Pac. 116 (1926).

The code provisions governing dependent and delinquent children and juvenile courts would appear to be an obstacle to the result reached here. RCW 13.04 [RRS §1987] governs juvenile courts and the awarding of custody of a "dependent child" as defined (in the subsections pertinent here) by RCW 13.04.010 (5), (6), and (8) [RRS §1987-1]. The code makes no mention of any rights residing in anyone to the custody of a dependent child and seems to indicate that the juvenile court has discretion to award custody of a dependent child to the person or institution it considers to be most desireable for the welfare of the child. The Supreme Court agrees that the child in