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June Newsletter

Dear friends, colleagues and clients, We are pleased to bring you the June 2020 Newsletter from Holt Woods & Scisciani LLP

Points of Interest

Sandra Ehrhart v. King County et al
Frantom v. State No. 52007-9-II
Lock v. American Family Ins. Co. No. 79255-6-I
Shimmick Construction Co., Inc. v. Wa State Dept. of L&I No. 79619-4-I

***Sandra Ehrhart v. King County et al.*, No. 96464-5 (Wash. Sup. Ct. April 2, 2020)**

Issue: Whether the regulations governing King County's responsibility to issue health advisories created a duty owed to individuals as opposed to a nonactionable duty owed to the public as a whole? **NO.**

Facts: This case arose out of the death of Brain Ehrhart, who died from contracting hantavirus in early 2017. Hantavirus is a rare and serious infection presenting with flu-like symptoms but can quickly progress to life-threatening respiratory complications. After a woman living near Issaquah contracted hantavirus in November 2016, she was ultimately admitted as a patient to Overlake Medical Center where she spent several days in a coma but survived. Overlake Medical Center notified King County in December 2016. King County promptly conducted an investigation but concluded that the patient had likely contracted hantavirus on her own property. In February 2017, Mr. Ehrhart was rushed to the emergency room and died shortly thereafter due to organ failure.

His widow sued King County's public health department, Swedish Medical Center and an emergency room physician for negligence. Ehrhart argued that WAC 246-101-505, which requires King County to "[r]eview and determine appropriate action" whenever it receives reports of certain serious conditions, created a duty that King County breached by failing to issue a health advisory after it learned of the November 2016 case. King County asserted the public duty doctrine as an

affirmative defense, arguing it was not liable for Mr. Ehrhart's death because it did not owe him a duty as an individual. Ehrhart moved for partial summary judgment asking the court to dismiss this defense. The trial court ruled that it was a question of fact whether the actions taken by King County were appropriate. King County appealed.

Holding: The Washington Supreme Court concluded that the public duty doctrine barred liability arising from King County's response and that the "failure to enforce" exception to the public duty doctrine did not apply. WAC 246-101-505 is intended to protect the public as a whole and does not identify any particular group or category of individuals to whom governments owe a special obligation. While WAC 246-101-505 sets forth the responsibility for King County to "[r]eview and determine appropriate action," such responsibilities are distinct from a requirement to enforce that WAC against third-parties. Thus, King County only owed a duty to the public as a whole.

Discussion: This case offered the Washington Supreme Court a much-needed opportunity to provide clarity on the distinction between the public duty doctrine and the discretionary immunity doctrine. The Court confirmed that the public duty doctrine is rooted in tort principles and serves to bar private negligence claims when a government breaches duties owed to the public as a whole. In order to maintain a negligence claim, a plaintiff must prove that it was owed an individual duty, not merely a general obligation to the public. Conversely, the discretional immunity doctrine is rooted in separation of powers principles to protect state actors' ability to take discretionary action that does not result in such action being characterized as tortious. Accordingly, when litigating the failure to enforce an exception to the public duty doctrine, this case confirms that the discretionary immunity doctrine does not apply.

Briefing by Kristen Barnhart, an Associate Attorney in Holt Woods & Scisciani LLP's Seattle Office. Kristen is licensed to practice in Washington.

Frantom v. State No. 52007-9-II (April 2, 2020)

Issue: (1) Does ER 611(c) allow leading question on direct examination of an adverse party? **YES**. (2) Is a separate motion to declare the adverse party as hostile required? **NO**. (3) Does ER 611(c) always permit the use of leading questions on cross-examination? **NO.**

Facts: At trial, Frantom called a defendant as a witness in his case-in-chief. Early in the direct examination of the witness, the defense objected to a leading question posed. The trial court sustained the objection, explaining that a party can never use leading questions in direct examination. Frantom argued that the witness was an adverse party and therefore leading questions were allowed pursuant to ER 611(c). The trial court then suggested that leading questions may sometimes be allowed on direct examination if a motion is made to treat the witness as hostile. Frantom made the motion, but it was denied. The trial court disagreed noting that Frantom failed to bring a motion to treat the witness as an adverse witness and leading questions were categorically disallowed on direct examination. Frantom did not otherwise make an offer of proof to articulate that there was testimony he would have elicited with leading questions.

During the defense's cross examination of the witness during plaintiff's case-in-chief, Frantom objected twice to leading questions. The trial court overruled the objections noting that leading questions were permitted because it was cross-examination, even though the questions were not actually leading. Frantom appealed and argued that the trial court erred when it made certain evidentiary rulings that he contended violated ER 611(c).

Holding: The trial court erred when it ruled that Frantom could not leading question on direct examination of an adverse party. Furthermore, no motion is required to ask leading questions of an adverse witness during direct examination. Nonetheless, the Court of Appeals found that this error was harmless because Frantom failed to articular actual harm since Frantom was able to call the witness later in the trial when he was called as a defense witness.

Additionally, the Court of Appeals ruled that ER 611(c) indicates that counsel cannot use leading questions to examine a party that counsel represents unless the trial court finds there is a specific reasons to permit leading questions. Nevertheless, Plaintiff failed to preserve this issue because the questions objected to during the witness's cross-examination were not leading.

Discussion: ER 611(c) provides that if a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be leading. ER 611(c) does not require that party seeking to ask leading questions of an adverse party move to declare the witness hostile. In analyzing ER 611(c) regarding leading questions during "friendly cross-examination," the court noted that ER 611(c) states "ordinarily leading questions should be permitted on cross-examination." This was interpreted to mean that trial courts are not *always* required to permit leading questions on cross-examination. The Court concluded that read in context, ER 611(c) plainly contemplates that leading questions will typically be used with hostile of adverse witnesses.

Briefing by Charissa Williams, an Associate Attorney in Holt Woods & Scisciani LLP's Seattle Office. Charissa is licensed to practice in Washington and Oregon.

Lock v. American Family Ins. Co. No. 79255-6-I (April 6, 2020)

Issues: (1) Whether the trial court erred in excluding evidence of the UIM carrier's litigation conduct after the named insured filed of a UIM? **NO.** (2) Whether the trial court erred in finding that the insured failed to prove evidence of damages to business or property which rendered her Consumer Protection Act (CPA) claim unsupportable as a matter of law? **NO.**

Facts: Stephanie Lock sued American Family Insurance Company seeking coverage under her UIM policy after she was injured in a collision with an uninsured driver in 2013. All of Lock's medical bills were paid by American Family out of PIP benefits under the policy. American Family valued the remainder of Lock's claim at $8,500 and made two settlement offers. Lock did not accept and later filed suit in King County Superior Court. Her lawsuit included extra-contractual claims for insurance bad faith, violations of the CPA and violation of the Insurance Fair Conduct Act (IFCA). At some point during the litigation, despite American Family being aware that Lock was represented by counsel, a representative of American Family sent a check directly to Lock and claimed it was for a complete release of all claims.

American Family brought a pre-trial motion to exclude evidence of American Family's direct contact with Lock as well as the litigation tactics of American Family's counsel after the UIM lawsuit had been filed. The trial court granted both motions. Following a verdict in Lock's favor, the trial court granted a judgment notwithstanding the verdict (JNOV) on Lock's extra-contractual claims. The trial court concluded that Lock failed to prove damages proximately caused by American Family's bad faith and failed to demonstrate injury to business or property in support of her CPA claim. Lock appealed and argued that the trial court abused its discretion in excluding the post-litigation conduct of American Family's counsel and American Family's direct communications with Lock.

Holding: The Court of Appeals affirmed the trial court's order excluding post-litigation conduct of trial counsel and the dismissal of Lock's CPA claim. The Court of Appeals held that Lock's failure to prove evidence of damages to business or property rendered her CPA claim unsupportable as a matter of law. The inconvenience and expense involved in prosecuting a CPA claim does not support a claim for injury to business or property. Likewise, personal injuries are not compensable and do not satisfy the injury requirement. Thus, damages for emotional distress were not recoverable under the CPA. The Court of Appeals, however, reversed the trial court's JNOV dismissing Lock's insurance bad faith claims and the order excluding evidence of American Family's direct contact with Lock during litigation finding that Lock may have suffered damages related to her insurance bad faith claim.

Discussion: Much of this dispute focused on the post-litigation conduct of American Family's trial counsel which was excluded from trial. The Court of Appeals concluded that a UIM insurer "stands in the shoes" of the tortfeasor, may defend as the tortfeasor would defend and is entitled to counsel's advice in strategizing the same defenses that the tortfeasor could have asserted. Thus, a natural consequence of UIM litigation is that the nature of the relationship between an insurer and its insured becomes adversarial and the parties are then bound by normal rules of procedure and ethics. Post litigation conduct of an insurer's trial counsel is not the basis for liability for insurance bad faith – the remedy for bad litigation conduct is properly sought through motions to strike, compel discovery, secure protective orders, or impose sanctions – as both the state and federal court judges did here.

Briefing by Audrey Chambers, an Associate Attorney in Holt Woods & Scisciani LLP's Seattle Office. Audrey is licensed to practice in Washington.

Shimmick Construction Co., Inc. v. Wa State Dept. of L&I No. 79619-4-I (March 23, 2020)

Issues: (1) Whether tow trucks are considered cranes for purposes of the Department of Labor & Industries' (L&I) regulations when they are used to hoist, lower, or horizontally move a suspended load. **YES**. (2) Whether L&I's regulations prohibit crane operation in the entire area below an energized power line, not just crane operation within a certain distance from a line, when the crane is capable of reaching the power line. **YES**.

Facts: Shimmick Construction Company ("Shimmick") installed an underground electrical panel vault as part of a large construction project. Directly above the area where Shimmick was working, about forty feet above street level, were three high-voltage power lines. The power lines were live and energized when Shimmick was installing the underground panel vault.

Shimmick was told that using a typical vertical crane for installing the panel vault would not be feasible given the energized power lines overhead. Instead, Shimmick decided to outfit two tow trucks with special equipment to lower the sections of the panel vault into the excavation pit. The special equipment included an extendible boom that, when fully extended and in the vertical position, could reach over forty feet above the ground. Shimmick employed dedicated spotters and other safety policies to ensure that the booms did not contact the power lines. On the day of the lifting, each tow truck was almost directly below the power lines. Neither operator of the tow truck were certified to operate a crane. The lifts did not encounter any issues and the panel sections were lowered successfully into place.

The next day, L&I received an anonymous photograph of the two tow trucks hoisting a panel section near the power lines. L&I determined that the tow trucks were subject to L&I's crane regulations and were dangerously close to the power lines, exposing the workers to the risk of electrocution. L&I issued a monetary penalty to Shimmick for $4,800. Shimmick appealed the Department's decision several times, eventually bringing the appeal to the Washington State Appellate Court.

Holding: Citing the language of applicable statutes and L&I regulations, the Court found that (1) tow trucks, when used to hoist, lower, or horizontally move a suspended load, are considered cranes, and (2) crane operation in the entire area below an energized power line is prohibited if the crane is capable of reaching the power line.

Discussion: The legislature broadly defined a "crane" to mean any "power-operated equipment used in construction that can hoist, lower, and horizontally move a suspended load." RCW 49.17.400(5). This provision of such equipment included, but not limited to, "service/mechanic trucks with a hoisting device," "boom truck cranes," and "multipurpose machines when configured to hoist and lower by means of a winch or hook and horizontally move a suspended load." L&I adopted this definition to determine which equipment is subject to its crane regulations. Here, the tow trucks were being used to hoist, lower and horizontally move the panel sections into the excavation pit and were therefore functioning as cranes. The Court stated that substantial evidence supports L&I's finding that the tow trucks served as cranes and affirmed the finding.

The Court also determined that the safety regulations for operating cranes prohibit crane activities *anywhere* below a power line when a crane's design allows it to reach within the minimum clearance distance. The violation existed as soon as Shimmick began using the cranes underneath the power lines; it did not matter if the cranes came within a certain distance of the power lines. Furthermore, it was not relevant that Shimmick enacted safety measures like spotters to decrease the likelihood of harm. A lessened likelihood of harm does not negate the fact that Shimmick exposed its employees to a violative condition.

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Recent Happenings

The CLM Seattle Chapter recently hosted a meeting of its members via video conference, to discuss how the members' various industries are managing the disruptions associated with COVID-19. The event was one of the first such video conferences held among local chapters. The participants shared information with one another about such things as remaining productive, positive and connected with colleagues and clients during the pandemic. There even was discussion about improving ergonomics and focus in the work-from-home environment. For more information about the CLM and upcoming events, please contact **Tony Scisciani** (President of the CLM Seattle Chapter).

Congratulations to **Tony Scisciani** and **Kristen Barnhart** for a successful motion for summary judgment in Whatcom County Superior Court. The plaintiff in that case sought recovery of damages for which we argued plaintiff already recovered in a prior lawsuit (to which our clients were not parties). Applying the doctrine of collateral estoppel and the bar against double recovery, the trial court dismissed the claims. The briefing and oral argument were presented to the court remotely, of course, given COVID-19 restrictions; so, congratulations to Tony and Kristen for successfully navigating those challenges.

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About Holt Woods & Scisciani LLP

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