HOLT WOODS SCISCIANI

Licensed to practice in Washington, Oregon and Alaska

March Newsletter

Dear friends, colleagues and clients,

We are pleased to bring you the March 2020 Newsletter from Holt Woods & Scisciani LLP

Points of Interest

W. Beach Condo. v. Commonwealth Ins. Co. of Am.
State v. Arnold
Curtin v. City of E. Wenatchee

W. Beach Condo. v. Commonwealth Ins. Co. of Am. , No. 79676-3-I (Wash. Ct. App. Div. I, Jan. 13, 2020)

Issue: The Insured's failure to file suit against its insurer within one year, as required by the policy's suit limitation, precluded the Insured's breach of contract claim. Did this also preclude the Insured's claims against its Insurer for IFCA and CPA violations? **NO.** The Insurer's coverage obligations existed independently of any suit limitation period.

Facts: The Insured, a condominium owner's association, submitted a claim to its property Insurer when an inspection revealed water damage behind the building envelope of each of the condominium's three buildings. The Insured submitted its claim on September 26, 2016—more than a year after it received the forensic report detailing the defects causing the damage, dated September 8, 2015. After conducting its investigation, the Insurer denied coverage, contending among other exclusions that the Insured did not submit its claim or file suit within one year after the occurrence giving rise to the claim, as required by the policy's one-year suit limitation clause. The provision stated:

No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Insured of the occurrence which gives rise to the claim…

The Insured then filed its complaint, alleging breach of contract, bad faith, and CPA and IFCA violations. The trial court dismissed the breach of contract claim for the Insured's failure to file within the one-year period and, on a later motion, dismissed the remaining claims because dismissal of the Insured's contract claim demonstrated that the Insurer's denial of coverage was reasonable as a matter of law.

Holding: The Court of Appeals concluded that the contractual one-year suit limitation precluded the breach of contract claim but did not preclude the CPA and IFCA claims. For a first-party claimant to recover under the CPA or IFCA, it must demonstrate that its insurer unreasonably denied a claim for coverage or payment of benefits. Here, the one-year suit limitation clause did *not* negate coverage or extinguish the Insurer's coverage obligations; it only barred the judicial remedy available to the Insured for breach of the obligations. It did not bar the judicial remedy available to the Insured for violations of the CPA or IFCA.

Discussion: Insurers issuing policies to Washington insureds may be held liable under the CPA and IFCA for unreasonably denying coverage despite the fact that the insured can no longer pursue a breach of contract claim. Insurers should understand that their legal obligation to provide coverage for a claim (and thus their exposure to CPA and IFCA violations) is not extinguished by the expiration of either a statute of limitation or suit limitation clause. As a result, insurers should take care to make coverage decisions independent of whether the insured could seek a remedy in court, including whether any suit limitation periods have expired. It should be noted that the suit limitation clause was not phrased as a coverage condition. As a result, this ruling does not address how the result may be different if the suit limitation clause was phrased as a coverage condition.

Briefing by Jimmy B. Meeks, Jr., an Associate Attorney in Holt Woods & Scisciani's Seattle Office. Jimmy is licensed to practice in Washington and Oregon.

State v. Arnold, No. A168230 (Or Ct App, November 26, 2019)

Issues: (1) Can service of summons still be considered effective under ORCP 7 if the underlying summons is technically defective? **YES**. (2) Must a party still obey an order if that party has a good faith reason to believe the order is invalid or erroneous? **YES**.

Facts: Police served defendant Tina Arnold with a restraining order naming "Tina Ball," who was married to F. Ball. Defendant accepted the restraining order and left the premises, but later returned, claiming that the order was not valid because it was not issued in her actual name. Defendant was found in contempt of the restraining order and moved for a judgment of acquittal.

Holding: Citing Oregon's long-standing law that personal service should not be allowed to devolve into "a degrading game of wiles and tricks, rather than a procedure for insuring that a defendant receive actual notice of the subject and pendency of an action," *Business & Prof. Adj. Co. v. Baker* , 62 Or App 237, 240–41 (1983), the Court held that adequacy of service is determined by examining the totality of the circumstances, even if formal service requirements have not been met. Service of the restraining order was sufficient because the facts showed that defendant had notice of the order and understood that it applied to her.

The Court also held that, regardless of sufficiency, a court order is not subject to collateral attack in a contempt proceeding. "Litigants are not entitled to sit in judgment on their own cases . . . Unless and until an invalid order is set aside, it must be obeyed." The only possible exception offered by the Court is if a litigant has no fair opportunity to challenge the order prior to violating it, which was not the case here. Even if the trial court had held that the order was fatally flawed, it was still a valid order at the time defendant violated it, and therefore defendant was still in contempt.

Discussion: *Arnold* supports the general principle that court orders (including summons) which fulfill their intended purpose are not subject to technical attacks by persons seeking to disregard the order. In cases where an aggrieved person has a good faith belief that an order is invalid, the remedy is to seek a court ruling invalidating or quashing the order and, until such time, the order must still be obeyed.

Briefing by Robert Parker, an Associate Attorney in Holt Woods & Scisciani's Portland Office. Robert is licensed to practice in Washington and Oregon.

Curtin v. City of E. Wenatchee , Nos. 36209-4-III, 36210-8-III, 2020 Wash. App. LEXIS 264 (Ct. App. Feb. 6, 2020)

Issues: (1) Are pre-majority medical expenses (damages for medical expenses incurred prior to one's eighteenth birthday) only recoverable by a minor's parents, since the parents are financially responsible for the minor's care and maintenance? **NO**. (2) Does the tolling provision in Wash. Rev. Code § 4.16.190, which pauses the statute of limitations until a minor attains the age of competency to bring claims on his or her own behalf, permit a parent or guardian to "bootstrap" their own untimely claim to the minor's claim? **NO**.

Facts: Plaintiffs Jennifer Curtin and her parents sued Defendants City of East Wenatchee and Leo Agnes for personal injuries sustained by Jennifer while she was a minor, seeking compensation for pre-majority medical expenses. The suit was filed more than three years after Jennifer was injured, but within three years of her eighteenth birthday. The parties agreed that Jennifer's claim was timely because RCW 4.16.080(2) and RCW 4.16.190 had tolled her claim until she reached eighteen years of age. However, Defendants moved for summary judgment on the parents' claims, arguing that: (1) only the parents had standing to bring a claim for pre-majority medical expenses, and (2) their claims were time-barred by the three-year statute of limitations. The trial court agreed and granted summary judgment dismissal.

Holdings: Washington's Court of appeals reversed the trial court's ruling that Jennifer lacked standing to assert a claim for pre-majority medical expenses. The Court of Appeals held that a the injured minor may sue to recover any damages, including pre-majority medical expenses, after reaching the age of competence. However, in such a circumstance, a principle of de facto emancipation applies and the parents are not able to come to court and claim the same expenses. As a result, the Court of Appeals affirmed dismissal of Jennifer's parents' claim. The Court held that RCW 4.16.190 is not meant to permit a parent or guardian who has failed to take timely action to "bootstrap" their own otherwise untimely claim to the minor or disabled person's claim.

Discussion: In deciding whether a child could recover pre-majority medical expenses, the Court of Appeals relied on *McAllister v. Saginaw Timber Co.,* 171 Wash. 448, 451 (1933), which held that medical expenses are legal "necessaries" to which both parents and children hold equal rights and responsibilities. However, this shared right to pre-majority medical expenses does not allow for double recovery. Consequently, if a minor recovers certain expenses, a de facto emancipation will apply and the parents will not be able to come to court and claim the same expenses.

In determining that the parents claim was untimely, the Court of Appeals reasoned that the tolling provision of RCW 4.16.190 is "person" specific and only applies to those who meet the statute's criteria – individuals who are disabled or under the age of 18. As a result, it does not toll the claims of competent parents. The purpose of a statute of limitation is to "compel prompt litigation." *Stenberg*, 104 Wn.2d at 721. It is reasonable to require a competent adult to take prompt action once they become aware of the basis for a legal claim. Doing so ensures a dispute will be resolved while evidence is accessible and memories are fresh. It also frees potential defendants of fears about "litigation unlimited by time."

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

Contributing Attorney: Jimmy Meeks

Jimmy Meeks is an associate in the Seattle office of Holt Woods & Scisciani LLP. Jimmy focuses his practice on defending Washington and Oregon businesses and individuals in a variety of complex civil litigation, including claims of construction defect, premises liability, personal injury, and professional malpractice. He also has experience advising clients on insurance coverage and business matters. Prior to joining Holt Woods & Scisciani LLP, Jimmy worked at a firm which specializes in

the defense of corporations and their officers in complex litigation and white-collar prosecutions.

Contributing Attorney: Robert Parker

Robert Parker is an associate in the Portland office of Holt Woods & Scisciani LLP. Robert has a varied practice covering areas from complex civil litigation and insurance defense to First Amendment cases, internet law, trade practice, and intellectual property. Prior to joining Holt Woods & Scisciani LLP, Robert worked at the Federal Defender's Office for the District of Oregon and at a small Portland firm which specialized in small business law and First Amendment law.

Contributing Attorney: Marlene Otero

Marlene Otero is an associate in the Seattle office of Holt Woods & Scisciani LLP. Marlene focuses her practice defending Washington businesses and individuals in a variety of complex civil litigation, including claims of construction defect, premises liability, personal injury, and professional malpractice.

Recent Happenings

Congratulations to **Tony Scisciani** for being invited to speak at the CLM Annual Conference in Dallas, TX in March of 2020. Tony will be part of a panel of qualified claim and litigation professionals, leading a session entitled, "Step Right Up! The Circus of Indemnity Claims and the Interplay of Insurance, Indemnity and Limitation of Liability." The presentation and discussion will relate primarily to the subject of indemnity and will focus on allocation of risk through contracts and insurance in a variety of contexts.

See www.theclm.org for more information about the CLM and its Annual Conference.

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About Holt Woods & Scisciani LLP

Holt Woods & Scisciani LLP is a civil litigation firm, practicing in the areas of tort and commercial litigation, construction litigation, insurance defense, product liability, professional liability and appellate work. For more information about our firm, and our areas of practice, please refer to our website at **www.hwslawgroup.com** or feel free to contact any of our partners listed above.

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