HOLT WOODS SCISCIANI

Licensed to practice in Washington and Oregon

October Newsletter

Dear Clients, Colleagues and Friends:

"We are what we repeatedly do. Excellence then is not an act but a habit."
-Aristotle

Excellence has been at the core of our firm since the doors opened almost exactly 19 years ago. The partners at Holt Woods & Scisciani LLP have a combined 60 years of experience in Washington and Oregon, which experience is used to help clients avoid claims, resolve claims and prevail on claims through litigation and arbitration. That experience (and that of our 13 Associate Attorneys and 14 staff members) also is reflected in our commitment to providing excellent customer service. For more information about our firm, our attorneys, our practice areas and our experience, please see our new website: **www.hwslawgroup.com**.

Holt Woods & Scisciani LLP regularly monitors changes in the law in the Pacific Northwest. Below are summaries of (and links to) three very recent decisions in Washington. The first is a much-anticipated ruling from the Washington Supreme Court about whether Washington law supports a claim for bad faith and violation of Consumer Protection Act against an employee claims adjuster (issue answered in the negative). The other two new cases emphasize the importance of getting the "little" things right in litigation. In one of those cases, the failure to sign the Summons that accompanied the Complaint (and the failure to correct that error within the applicable statute of limitations) was fatal to a plaintiff's claim. In the other, the submission of a "supplemental declaration" in opposition to a motion for summary judgment was deemed improper given that other, viable options were available in the form of a continuance of the hearing and/or a motion for reconsideration. We hope that you find these decisions to be insightful and indicative of the potential strict application of the Civil Rules.

At Holt Woods & Scisciani LLP, we have the experience necessary to navigate the law and the Civil Rules, to effectively and aggressively advance our clients' interests. That experience is reflected in the "Recent Happenings" section below. If you have questions about our firm or the law in the Pacific Northwest – or if you need help with a claim in the Pacific Northwest, please give us a call. We look forward to the

opportunity to work with you!

Points of Interest

Keodalah vs. Allstate
Boyer vs. Morimoto
Walker vs. Orkin

In a 5-4 Decision, Washington Supreme Court Holds that RCW 48.01.030 Does Not Provide A Basis for an Insured's Bad Faith and Consumer Protection Act Claims Against Claims Adjusters

Case: *Keodalah v. Allstate Ins. Co.* , No. 95867-0, 2019 Wash. LEXIS 591 (Oct. 3, 2019)

Issue: Does RCW 48.01.030 provide a basis for an insured's bad faith and Consumer Protection Act (CPA) claims against claims adjusters? **NO**

Facts: The plaintiff, an insured truck driver, was struck by a speeding motorcyclist while stopped at a stop sign. The motorcyclist, who died as a result of the accident, was uninsured. The plaintiff's insurer investigated the collision, ultimately concluding that the plaintiff was 70% at fault because plaintiff had run a stop sign and had been on his cell phone, both of which contradicted the reports of the Police Department and the accident reconstruction expert hired by the insurer. Plaintiff requested that the insurer pay UIM policy limits, which the insurer refused to pay. The plaintiff sued the insurer. At trial the jury found the motorcyclist was 100% at fault, awarding the plaintiff damages against the insurer for an amount just over the plaintiff's UIM policy limit.

The plaintiff then filed a separate lawsuit against the claims adjuster, alleging violations of the Washington Insurance Fair Conduct Act (IFCA), insurance bad faith, and CPA violations. The adjuster moved to dismiss the plaintiff's complaint under CR 12(b)(6) for failure to state a claim. The trial court granted the motion. On review, the Court of Appeals affirmed the dismissal of the IFCA claim, but reversed the dismissal on the bad faith and CPA claims, holding that RCW 48.01.030 imposed a duty of good faith to individual insurance adjusters, the breach of which could serve as a basis for bad faith and CPA claims. The Supreme Court of Washington granted the adjuster's petition for review, reversing the Court of Appeals holding on the bad faith and CPA claims.

Holding & Analysis : The Court held that RCW 48.01.030 did not create a private right of action. The Supreme Court relied on the *Bennett v. Hardy* three-pronged test to come to their conclusion. The *Bennett* factors for whether a statute includes an implied cause of action are "(1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation."

Analyzing whether RCW 48.01.030 meets the first factor of the Bennett test – whether the plaintiff is within the class protected by the statute – the Court explained that RCW 48.01.030 addresses the public at large, rather than any identifiable class of persons. This was evidenced by the legislature stating that its purpose is to protect the "integrity of insurance" and the "public interest." Therefore, the first factor of the Bennett test was not met.

Addressing the second Bennett factor of whether the legislature intended to create a statutory cause of action, the Court found that the legislature did not intend for RCW 48.01.030 to create a private cause of action. The Court noted that the legislature provided several specific enforcement mechanisms within the insurance code, which suggests that the "omission of a provision for a

private cause of action under RCW 48.01.030 was intentional." Thus, the statute failed to meet the second Bennett factor as well.

Analyzing the third Bennett factor of whether implying a remedy furthers the purpose of the legislation, the Court concluded that it did not. While acknowledging that implying a cause of action could be seen as furthering the "general policy goal of 'preserving inviolate the integrity of insurance'" of RCW 48.01.030, the cause of action could also be used by insurers against those they insure. Such a cause of action would "subject[] every person and entity listed in RCW 48.01.030 to liability" and would be inconsistent with the legislature's creation of specific enforcement mechanisms, as stated above. Thus, Court held that RCW 48.01.030 does not provide for a private cause of action.

Next, the Court addressed whether the plaintiff's CPA claim should have been dismissed. CPA claims have five elements, all of which must be established for a CPA claim to succeed: "(1) an unfair or deceptive act or practice that (2) affects trade or commerce and (3) impacts the public interest, and (4) the plaintiff sustained damage to business or property that was (5) caused by the unfair or deceptive act or practice." A plaintiff can establish the first two elements where the plaintiff proves the defendant violated a statute declaring that said "violation is a per se unfair trade practice." The third element may be established based on a showing that the defendant violated a statute containing a specific legislative declaration of public interest.

The plaintiff alleged that the claims adjuster violated WAC 284-30-330(2), (4), (6), (7), (8), and (13). The Court determined that, while violations of those statutes would be per se unfair trade practices, only insurers may violate those provisions, not claims adjusters. The plaintiff also claimed that the adjuster's violation of RCW 48.01.030 satisfied the requirements for a CPA claim. The Court disagreed – again emphasizing that the statute applied only to insurers who breached their duty of good faith. Thus, the plaintiff failed to state a claim against the adjuster; however, the Court explicitly stated that the plaintiff could have sued the insurer. The Supreme Court reversed the Court of Appeals and reinstated the trial court's dismissal of all the plaintiff's claims.

If you would like to view a copy of the *Keodalah v. Allstate* case, it is available here in PDF format.

Washington Court Upholds Decision Not to Consider Supplemental Declaration Filed After Memorandum Decision on Summary Judgment

Case: *Boyer v. Morimoto*, No. 36166-7-III, 2019 Wash. App. LEXIS 2363 (Ct App Sep. 10, 2019)

Issue: Does Washington procedural law require trial courts to consider supplemental declarations filed after the court issues a memorandum decision granting a party summary judgment, but before the court enters a formal order on summary judgment? **NO**

Facts: A patient underwent surgery to deal with excess skin left as a result of significant weight loss. Due to complications following surgery, the patient became extremely ill and had to have several toes amputated. The patient subsequently sued the doctor and the clinic where the surgery took place. The doctor filed a motion for summary judgment, asserting that the patient could not present admissible testimony from a qualified expert to establish the necessary standard of care. In response to the motion, the patient submitted a declaration from an expert witness providing testimony on what the applicable standard of care was, that the "standard is not unique to the State of Washington and applies on a nationwide basis[,]" and that the doctor's conduct fell below that standard of care.

After oral argument on the motion for summary judgment, the trial court requested that the patient file a curriculum vitae (CV) for her expert on the standard of care, which the patient subsequently did. The trial court issued a memorandum decision granting the motion for summary judgment, stating that the CV "failed to present an adequate foundation" for the expert's opinion of the applicable standard in Washington. Therefore, the expert's opinion was inadmissible, and the patient had failed to provide testimony establishing any standard of care.

Before the order was entered, the patient filed a supplemental declaration from her expert which

cured the foundation issues with the previous opinion. The declaration was not accompanied by a motion for reconsideration, or a motion for late filing of the declaration. The court entered an order granting the doctor's motion for summary judgment without mention of the supplemental declaration. The Court of Appeals affirmed the trial court's decision.

Holding & Analysis: The Court held that Washington law did not require trial courts to consider supplemental declarations that had been filed late. In rendering their decision, the Court emphasized that, despite the trial court recommending twice that the patient should file a motion for reconsideration, she never did, nor did she file a motion for continuance of the summary judgment hearing. The Court's opinion makes it clear: if a party files an affidavit or declaration late, it must be accompanied by an additional motion for reconsideration or for continuance.

If you would like to view a copy of the *Boyer v. Morimoto* case, it is available here in PDF format.

Washington Court Orders Dismissal After Plaintiff's Attorney Fails to Sign Summons

Case: *Walker v. Orkin*, No. 77954-1-I, 2019 Wash. App. LEXIS 2392 (Ct App Sep. 16, 2019)

Issue: Will failure to sign a copy of a complaint and summons served on the defendant in a case be grounds for dismissal in Washington? **YES**

Facts: The plaintiff filed suit for personal injury occurring after the defendant's employee was involved in a car accident with the plaintiff. The plaintiff filed his complaint with the court, then served the defendant with summons and the complaint; however, the summons was not signed, and the complaint was not dated or signed. The defendant answered the complaint, raising the affirmative defense of insufficient service of process. The plaintiff did not correct the defect in his process by serving Defendant with signed and dated copies of the summons and complaint before the expiration of the statute of limitations. After the statute expired, Defendant filed a CR 12(b) motion to dismiss for insufficient service of process, which the trial court denied. The Court of Appeals of Washington reversed and remanded to the trial court, ordering that the motion to dismiss be granted.

Holding & Analysis: The Court of Appeals held that failing to sign the summons and complaint was grounds for dismissal when the plaintiff failed to correct those defects within the statute of limitations. In their opinion, the Court emphasized the importance placed on the procedural rules, specifically proper service of process, and held that the procedural rules must be interpreted under their plain meaning. CR 4(a)(1) unambiguously states that the summons and complaint served upon a defendant must be signed by either the plaintiff or her attorney, and several other rules regarding service of process make it clear that the summons must be signed. The Court opined that minor errors and technicalities should not give rise to dismissal of a suit; however, the rules of civil procedure allow a plaintiff to cure any technical errors by amending their documents under CR 4(h). The plaintiff's attorneys failed to take curative measures under 4(h), and therefore, dismissal was warranted.

If you would like to view a copy of the *Walker v. Orkin* case, it is available here in PDF format.

Contributing Attorney: Nicolas Ball

Nicolas Ball is an Associate in the Portland office of Holt Woods & Scisciani LLP. Mr. Ball focuses his practice on civil litigation, including the defense of businesses and individuals against construction defects and personal injury lawsuits.

Recent Happenings

Congratulations to **Dennis Woods** and **Kelsey Shewbert** for obtaining a defense verdict at a recent Alaska trial. Dennis and Kelsey were defending a national retailer against a claim by the plaintiff for personal injury and wage loss. Plaintiff alleged that palletized merchandise was improperly placed in the store during business hours as part of the freight process. Plaintiff alleged that the palletized merchandise also was too low and hidden behind an endcap – thus creating a tripping hazard. Plaintiff asked the jury for over $1,000,000. After deliberating, the jury returned a defense verdict and our client is entitled to an award of fees and costs in light of beating an offer of judgment that was filed early in the case.

Congratulations to **Dennis Woods** and **Jimmy Meeks**, who recently scored a couple of big wins in cases which arose out of a gas explosion in a Seattle business district.

The first win involved the $16,000,000+ contractual indemnity claim by the gas utility company, alleging defects in our client's work led to the explosion. We secured dismissal of the plaintiff's entire case on summary judgment under Washington's construction statute of repose. The court agreed with our argument that, if one or more discrete tasks of a construction project remain incomplete, the project is nonetheless considered "substantially complete" under the statute of repose if the project is ultimately used for its intended purpose – even when the scope of the project encompasses an entire city block. The decision is currently on appeal.

The second win came from Division I of the Washington Court of Appeals. The case involved the personal injury claims of the firefighters who responded to the gas explosion. The Court of Appeals unanimously affirmed the lower court's dismissal of the firefighters' complaint under the professional rescuer doctrine. The court ruled that an explosion is a danger inherent to responding to gas leaks, even when firefighters may not be fully aware of the circumstances surrounding the leak. Furthermore, the court ruled that Washington does NOT recognize an exception to the professional rescuer doctrine for willful, wanton, or reckless acts causing the need for first responders at the scene.

Congratulations to **Dennis Woods** and **Joshua Campbell** for their work defending a local client from claims of alleged violations of the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA) in U.S. District Court. Dennis and Josh were quickly able to have the FDCPA claim dismissed on summary judgment – arguing that the statute of limitations had expired. Meanwhile, they filed a third-party complaint against the company who assigned the debt to our client. Dennis and Josh filed a motion for summary judgment based on the theory that the FCRA claim's statute of limitations had also expired. At the same time, they directed the responsible third-party to negotiate a global settlement with plaintiff in exchange for dismissing the third-party complaint. In the end, plaintiff agreed to settle instead of facing the outcome of the motion for summary judgment. The responsible third-party contributed 100% to the settlement. In sum, the claims against the client were dismissed either by motion or settlement, and the client did not have to pay a dime.

Congratulations to **Dennis Woods** and **Kelsey Shewbert** for vacating a judgment that was over seven months old and overturning an order of default. In this case, a default judgment was entered against our client for failure to answer a writ of garnishment without giving proper notice to our client prior to the hearing. We successfully argued that the lack of notice violated our clients due process rights and the Court agreed and vacated the judgment and overturned the order of default.

Congratulations to **Dirk Holt**, who has been appointed as a trustee to the Board of Washington Defense Trial Lawyers (WDTL). Aside from the Washington State Bar Association, WDTL is the primary defense bar organization serving defense attorneys statewide. This is Dirk's second stint as a trustee. He previously served from 2008 to 2013.

Our Partners

Jonathan Dirk Holt

Dennis G. Woods

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Construction Law Newsletter

Holt Woods & Scisciani LLP has an email newsletter similar to this one that is focused on construction law issues and cases. If you would like to be added to the Construction Law email alert mailing list, please let us know by sending an email to **newsletters@hwslawgroup.com** with a subject of "Construction Defect Email Alert Addition."

Employment and Risk Management Newsletter

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Liability Newsletter

Holt Woods & Scisciani LLP has an email newsletter focused on liability issues and cases. If you would like to be added to our Liability email alert mailing list, please let us know by sending an email to **newsletters@hwslawgroup.com** with a subject of "Liability Email Alert Addition."

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Holt Woods & Scisciani LLP is a civil litigation firm, practicing in the areas of tort and commercial litigation, construction litigation, insurance defense, product liability, employment law 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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