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Summer Newsletter

Dear friends, colleagues and clients, We are pleased to bring you the Summer 2021 Newsletter from Holt Woods & Scisciani LLP

Points of Interest

Hermanson v. MultiCare Health System, Inc.
Roger Leishman v. Ogden Murphy Wallace, PLLC and Patrick Pearce
Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc.

Washington Supreme Court Clarifies the Scope of Corporate Attorney-Client Privilege of Independent Contractors in *Hermanson v. MultiCare Health System, Inc.,* 196 Wn.2d 587 (2020)

This case arose when Doug Hermanson struck a vehicle and crashed into a utility pole. Hermanson was transported to Tacoma General Hospital ("TGH"), which is owned by MultiCare Health ("MCH"). Hermanson was treated by several MCH employees, including two nurses and a social worker. The physician who treated Hermanson, Dr. Patterson, was an independent contractor of MCH pursuant to an agreement between MCH and Trauma Trust, his employer. Dr. Patterson had his own office at TGH and was expected to abide by MCH's policies and procedures.

During Hermanson's treatment, a blood test showed a high blood alcohol level. As a result, someone at TGH reported this information to the police, and the police charged Hermanson with negligent driving and hit and run. Based on this disclosure, Hermanson sued MCH and multiple unidentified parties. MCH retained counsel to jointly represent MCH, Dr. Patterson, and Trauma Trust, reasoning that while Dr. Patterson and Trauma Trust were not identified parties, Hermanson's initial demand letter implicated both parties.

Hermanson objected to this joint representation and argued that MCH's ex parte communications with Dr. Patterson violated Hermanson's physician-patient privilege. MCH subsequently filed a motion for a protective order to have ex parte communications with Dr. Patterson. In the same motion, MCH sought to protect its ex parte communications with the two nurses and the social

worker. In response, the trial court denied MCH's motion as to Dr. Patterson and the social worker, reasoning that Dr. Patterson was not a MCH employee and thus did not fall under the corporate attorney-client privilege, and the social worker does not fall under any type of medical privilege. However, the trial court held that the nurses qualified under the corporate attorney-client privilege because they were MCH employees.

MCH then filed a motion for discretionary review with the Court of Appeals. The Court of Appeals affirmed the trial court's ruling as to Dr. Patterson and the two nurses but reversed the ruling as to the social worker because the social worker was a MCH employee. Both parties filed petitions for review, which were granted.

The Washington Supreme Court reversed both rulings and held that a nonparty physician who is an independent contractor maintains a principal-agent relationship and is the "functional equivalent" of an employee such that *Youngs* applies (i.e., hospital may have ex parte communications with plaintiff's nonparty treating physician, a hospital's *employee*, if communications limited to facts regarding negligent event). Furthermore, the Court explained that because nurse-patient and social worker-client privilege have identical purpose to physician-patient privilege, a hospital may have ex parte communications with non-physician employees, under *Youngs* limitations.

Discussion: Over thirty years ago, the Washington State Supreme Court held that to protect the patient-physician relationship, defense counsel cannot have ex parte communications with a personal injury plaintiff's non-party treating physician. This case, *Loudon v. Myhre,* limited defense counsel's communications with non-party treating physicians to depositions or with the consent of plaintiff's counsel. Approximately twenty-five years later, in *Youngs v. PeaceHealth,* the Court ruled that *Loudon* does not apply to non-party treating physicians employed by a defendant hospital who have direct knowledge of the events leading to a claim. The holding in *Hermanson* ensures *Loudon* rule is not fully eroded by recognizing a patent's physician-patient privilege must be well protected while acknowledging corporations must effectively ascertain facts of incidents involving employees, and now, independent contractors who are the "functional equivalent" of an employee.

Briefing by Christopher A. Luhrs, an Associate Attorney at Holt Woods & Scisciani LLP.

Washington Supreme Court clarifies which parties are protect from SLAPP lawsuits in *Roger Leishman v. Ogden Murphy Wallace, PLLC and Patrick Pearce, 196 Wn.2d 898 (2021)*

Roger Leishman, an openly gay man, was hired by the Washington Attorney General's Office ("AGO"). Early into this employment, Leishman developed symptoms associated with a medical diagnosis of PTSD and anxiety. Leishman advised his employer of this diagnosis and its symptoms. In January 2016, Leishman discovered he did not receive a raise due to complaints from his supervisor regarding his conduct at work.

In March 2016, he informally complained that his supervisor made homophobic statements towards him. A meeting was held where Leishman's supervisor denied any allegations of wrongdoing and Leishman admitted that he became angry during this meeting. After the meeting, Leishman formally submitted his complaint, and his supervisor submitted a complaint regarding Leishman's conduct during the meeting. Leishman was terminated as a result.

Ogden Murphy Wallace PLLC ("OMW") was hired to conduct investigations into both complaints. OMW did not inform Leishman that the investigation covered both complaints, and Leishman thought the investigation was solely for the discrimination complaint. OMW found that Leishman violated work policy and there was insufficient evidence to establish a discrimination violation. Leishman brought suit against the AGO and the parties subsequently settled.

Leishman then sued OMW alleging negligence, violations of the CPA, negligent misrepresentation, and discrimination. OMW filed a motion for judgment on the pleadings, arguing that OMW had immunity under RCW 4.24.510. The trial court granted OMW's motion, and Leishman appealed. The Court of Appeals reversed, holding that "government contractors, when communicating to a government agency under the scope of their contract, are not 'persons' entitled to protection under RCW 4.24.510." The Washington Supreme Court granted review and ruled that a government contractor is covered by the immunity provided in RCW 4.24.510 because the plain language of the term "person" unambiguously includes individuals and organizations, regardless of their contract

with the government.

Discussion: In the 1970s, growing litigation targeted nongovernmental individuals and groups for communicating their views to a government body/official on an issue of some public interest. These were known as SLAPP suits. Washington enacted its anti-SLAPP statute, RCW 4.24.510, in 1989. The anti-SLAPP statute provided immunity to a "person" who communicates a complaint or information to a government agency for claims based on the communication regarding any matter reasonably of concern to that agency.

It is of note that the contents of this lawsuit do not resemble a typical SLAPP suit. However, the plain language of the statute makes it clear communications are protected "regardless of content or motive." Additionally, the plain language of the statute makes it clear that the legislature intended "person" to include nongovernment organizations. In creating this statute, the legislature specifically insulated individuals and organizations from civil liability when they communicate information to the government.

Briefing by Joshua H. Tinajero, an Associate Attorney in Holt Woods & Scisciani's Seattle office. Joshua is licensed to practice in Alaska and Washington.

The Washington Court of Appeals Upholds Washington's Statute of Repose in *Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc.*

Congratulations to HWS Partner Brandon Smith and Senior Associate Jimmy Meeks, who recently scored a big win in Division I of the Washington Court of Appeals! This decision is not only a win for our client, but a success for construction companies and insurance carriers statewide. In this matter, the Court of Appeals properly refused to disrupt the decades of stability that the construction statute of repose has supplied to Washington's construction industry in favor of contractors—providing simplicity, predictability, and certainty for contractors and insurers calculating the windows of exposure associated with construction projects.

The matter of *Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc.* concerned PSE's $17 million contractual indemnity claim arising out of the 2016 Greenwood gas explosion. In 2004, PSE hired Pilchuk to redesign the gas distribution system on the 8400 block of Greenwood Ave in Seattle, WA. One of the gas lines to be decommissioned as a part of the project remained active, leading to the explosion twelve years later that destroyed a few commercial properties and significantly damaged many others. PSE claimed that Pilchuk had a contractual duty to indemnify PSE for its losses arising from the explosion, including immediate remediation costs, penalties incurred in the UTC's regulatory action, costs to perform the UTC's mandated remediation program, settlement payments for dozens of third-party property damage claims and attorneys' fees.

We successfully moved for summary judgment on all claims under Washington's construction statute of repose (RCW 4.26.300 *et seq*.), which bars all claims arising from construction of an improvement upon real property which do not accrue within six years of substantial completion of the construction. On appeal, PSE argued that the statute of repose did not apply because: (1) deactivation of the gas line in question was a separate "improvement" from the overall project for purposes of the statute; (2) a contractor who fails to perform work cannot be said to have substantially completed the improvement; (3) submission of records documenting construction fall outside of the construction activities within the scope of the statute; and (4) Washington courts should recognize an exception to the statute for claims of fraudulent conduct.

The Court of Appeals affirmed the dismissal of PSE's claims and confirmed our arguments in opposition to the appeal, holding that: (1) deactivation of the gas line in question was substantially complete regardless of whether it was separate improvement, because it was put to its intended "disuse;" (2) submission of records documenting construction is indeed a construction activity within the scope of the statute; and (3) the plain language of the statute barring "all claims…of any kind" includes claims of fraud. The decision preserves the statute's longstanding role protecting contractors from indefinitely long windows of liability.

The unpublished decision can be found here. The Washington State Supreme Court has denied review.

Contributing Attorneys

Brandon J. Smith

Brandon is a partner in the Seattle office of Holt Woods & Scisciani LLP. He focuses his practice on a variety of complex commercial litigation, including construction, products liability and professional malpractice. Prior to joining Holt Woods & Scisciani LLP, Brandon represented financial institutions in banking law disputes. He also has substantial experience in class action lawsuits.

Christopher A. Luhrs

Chris Luhrs is an associate in the Seattle office of Holt Woods & Scisciani LLP. His practice is focused on representing businesses and individuals in complex civil litigation, including insurance and tort defense, business disputes, product and premises liability, and personal injury. Chris represents clients in state and federal court, as well as in private arbitration and administrative proceedings. Prior to joining Holt Woods & Scisciani, Chris' practice involved commercial and real estate litigation and creditor's rights.

Joshua H. Tinajero

Joshua H. Tinajero is an associate in the Seattle office of Holt Woods & Scisciani LLP. Prior to joining Holt Woods & Scisciani LLP, Joshua spent a year working for a boutique law firm that mainly represented insurance companies in first party coverage disputes. Before that, Joshua was an Assistant District Attorney for the State of Alaska working in the Anchorage Office. As a state prosecutor, he handled a wide variety of felony matters and took 25 cases to jury trial.

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About Holt Woods & Scisciani LLP

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