WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Amicus Program Updates
Clark County CLE/Roundtable
February 23, 2021

By

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Seeking Amicus Involvement

Applicants who are interested in seeking amicus involvement may submit requests on the WSAJ website (www.washingtonjustice.org). There, applicants will find the Procedure for Requesting Appearance of WSAJ Foundation as Amicus Curiae, as well as the Amicus Guidelines, which detail the criteria used by the Committee to evaluate requests. Applicants are generally encouraged to submit their requests as soon as is practicable, to allow the Committee sufficient time to review the case. Only in exceptional circumstances does the Foundation appear in cases pending before a state or federal Court of Appeals, or on a petition for review to the Washington Supreme Court. The vast majority of our submissions are amicus briefs submitted in cases pending on the merits before the Washington Supreme Court.

Recent Decisions

- ***Ehrhart v. King County***, 195 Wn.2d 388, 460 P.3d 612 (2020). *Ehrhart* raises issues related to the tort duties owed by Public Health Departments arising out of outbreaks of "notifiable conditions" under WAC 246-101-505, and whether the public duty doctrine offers protection from liability in this context. Hantavirus is a rare and often fatal disease that presents similar to the flu and is contracted by exposure to deer mouse droppings. An incident of the Hantavirus occurred in King County near Issaquah in November 2016, and in accordance with WAC 246-101-105, which requires that Hantavirus cases be reported to local health departments within 24 hours, the incident was reported to the King County Department of Health. WAC 246-101-505 requires local health departments to "review and determine appropriate action" for each reported case of a notifiable

condition, which may include issuance of public health advisories. In December 2016, the King County Health Department reviewed the case but did not issue an advisory to local providers. In February 2017, Brian Ehrhart, who lived near Issaquah, was seen in a hospital emergency room with flu-like symptoms, and was discharged home with instructions to return if his symptoms worsened. The next day Ehrhart was rushed to a hospital emergency room and died shortly thereafter from hantavirus. Ehrhart's estate sued the County for negligence in failing to reasonably discharge its duty to take appropriate action under WAC 246-101-505. The County responded that the claim was barred by the public duty doctrine, as any duty it owed was owed to the public as a whole and not to any individual plaintiff or class of persons. Ehrhart responded that the case fell within two exceptions to the doctrine – the "failure to enforce" exception and the "rescue doctrine" exception. In a unanimous opinion, the Supreme Court held that the county health department's responsibility to issue health advisories under the WAC provision did not create a tort duty owed to the decedent individually, no exception to the public duty doctrine applied, and the county was entitled to summary judgment dismissal under the public duty doctrine. WSAJ Foundation filed an amicus brief urging the Washington Supreme Court to abandon the public duty doctrine. *See* WSAJ Fdn. Am. Br. # A-431. **Plaintiff Attorneys – Adam Rosenberg, Jessica M. Cox, Daniel A. Brown.**

• ***Rocha, et al. v. King County***, 195 Wn.2d 412, 460 P.3d 624 (2020). Plaintiffs were summoned for jury duty in King County. Plaintiffs filed suit alleging the minimal amount paid to jurors for jury service ($10 per day plus mileage) had the effect of excluding people of low and moderate economic status from jury service at a disproportionate rate in violation of the requirement in RCW 2.36.080(3) that "[a] citizen shall not be excluded from jury service… on

account of economic status" (brackets added). The plaintiffs also sought a declaratory judgment that jurors are "employees" within the meaning of the Minimum Wage Act (MWA), ch. 49.46 RCW, and an injunction requiring King County to pay jurors for their time if they are not already compensated by an employer. The Supreme Court held that 1) jurors are not employees entitled to minimum wage for purposes of the MWA because no employer-employee relationship exists under the statutory language of ch. 49.46 RCW or otherwise; and 2) RCW 2.36.080(3) does not imply a cause of action for economic status discrimination and does not create an implied cause of action to allow jurors to sue for increased reimbursement rates. WSAJ Foundation filed an amicus brief arguing that the Court may compel payment to jurors for jury service pursuant to its inherent judicial authority to control and administer court functions and ensure the efficient and competent administration of justice, and to protect the right to a jury trial. *See* WSAJ Fdn. Am. Br. # A-432. **Plaintiff Attorneys – Jeffrey L. Needle; Toby J. Marshall.**

- ***W.H. v. Olympia Sch. Dist.***, 195 Wn.2d 779, 465 P.3d 322 (2020) (on certification from the federal district court for the Western District of Washington). A school district employee sexually abused the minor plaintiffs. Plaintiffs sued the district in federal district court, asserting a number of causes of action, including a claim under the Washington Law Against Discrimination (WLAD), RCW 49.60.215, alleging the minor plaintiffs' treatment constituted sex discrimination in a place of public accommodation. The federal district court certified questions to the Washington Supreme Court to clarify the application of RCW 49.60.215 in this context. The Supreme Court held: 1) under RCW 49.60.215 as interpreted in *Floeting v. Group Health Cooperative*, 192 Wn.2d 848, 434 P.3d 39 (2019), public accommodations, including school districts, are subject to strict liability for discrimination perpetrated by their employees; 2)

"discrimination" for the purposes of a WLAD public accommodations claim encompasses intentional sexual misconduct. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. # A-436. **Plaintiff Attorneys: Darrell L. Cochran, Kevin M. Hastings, Christopher E. Love.**

- ***Burnett v. Pagliacci Pizza, Inc.,*** 196 Wn.2d 38, 470 P.3d 486 (2020). This case asks the Court to determine whether and under what circumstances an employer may use provisions contained in employee handbooks to impose binding contractual obligations, like arbitration agreements, upon their employees. Burnett began working for Pagliacci Pizza as a delivery driver in October of 2015. At his employee orientation, Burnett was directed to sign several forms before he could begin working, including an "Employee Relationship Agreement" (ERA). Burnett signed the ERA. The ERA referenced the company's employee handbook, the "Little Book of Answers." Pagliacci told him to take the Little Book home and read it on his own time. On page 18 of the unsigned 23-page handbook was a mandatory arbitration policy. Two years later, when he was terminated and brought suit against Pagliacci for wage and hour violations on behalf of himself and a putative class, Pagliacci moved to compel arbitration. Burnett opposed arbitration, arguing that no agreement to arbitrate was formed, and that even if there had been, the arbitration policy was substantively and procedurally unconscionable. In a unanimous opinion, the Washington Supreme Court held: 1) because the employee did not have notice of the arbitration provision when he signed the employment agreement, he never assented to the arbitration provision and accordingly there was no enforceable agreement to arbitrate; 2) even assuming a valid agreement was formed, the arbitration agreement was procedurally unconscionable because the arbitration clause was hidden in the pages of the employee handbook and the employee had no reasonable

opportunity to understand the arbitration agreement before he signed the ERA; 3) even assuming a valid agreement was formed, the arbitration agreement was substantively unconscionable because limitations in the arbitration procedures unfairly favored the employer and were overly harsh. WSAJ Foundation filed an amicus brief on the merits. WSAJ Fdn. Am. Br. # A-434. **Plaintiff attorneys: Toby J. Marshall, Erika L. Nusser, Blythe H. Chandler**.

• ***Gerlach v. The Cove Apartments, LLC, et al.***, 196 Wn.2d 111, 471 P.3d 181 (2020). Gerlach was injured when she fell from a balcony that was a portion of premises leased to her friend. Gerlach filed suit against the landlord alleging common law negligence and violations of the Residential Landlord Tenant Act (RLTA), ch. 59.18 RCW. The defendants alleged as an affirmative defense that Gerlach was intoxicated and that pursuant to RCW 5.40.060(1) she was not entitled to recovery. The trial court instructed the jury that Gerlach admitted to intoxication, but excluded the BAC measurement (.238) on the basis that it would be unfairly prejudicial under ER 403. The jury returned a verdict finding the landlord was negligent, its negligence was a proximate cause of Gerlach's injuries, and that Gerlach was comparatively negligent and 7% at fault. The landlord appealed and the Court of Appeals reversed, holding that the trial court erred in excluding the evidence concerning Gerlach's BAC measurement and in instructing the jury that the landlord owed a duty to Gerlach based on the RLTA. In a 6-3 opinion, the Supreme Court reversed and reinstated the jury verdict, holding: 1) the trial court did not abuse its discretion in excluding evidence of the plaintiff's blood alcohol measurement and related defense expert testimony on the basis that it would be overly prejudicial; 2) Washington law would adopt in part *Restatement (Second) of Property, Landlord & Tenant* §17.6 (1977), such that tenants and their guests have a cause of action for personal injuries caused by a landlord's violation of the common

law warranty of habitability; and 3) the RLTA does not support an implied cause of action for personal injury by the guest of a tenant. WSAJ Foundation filed an amicus brief on the merits arguing: 1) the judicial adoption of the implied warranty of habitability and the enactment of the RLTA provide landlords with the requisite access and control over the leased premises necessary to recognize tort liability; 2) a rule recognizing common law liability of landlords for personal injuries should apply both to tenants and their guests; 3) residential tenants and their guests should be permitted to bring claims for personal injuries under *Restatement (Second) of Property* § 17.6 (1977) based upon a landlord's breach of the common law, breach of the statutory implied warranty of habitability and violation of the duties enumerated in the RLTA. WSAJ Fdn. Am. Br. # A-435. **Plaintiff Attorneys: Ben F. Barcus; Simon H. Forgette; Howard M. Goodfriend.**

• ***Young v Toyota Motor Sales, Inc.***, 196 Wn.2d 111, 472 P.3d 990 (2020). Toyota's advertising and vehicle sticker incorrectly represented that a part was included in a vehicle that Young purchased (a thermometer). Young filed suit alleging fraud, negligent misrepresentation, and direct and per se violations of the CPA. The fraud claim was dismissed on summary judgment, and in a bench trial the court ruled against Young on both the negligent misrepresentation and CPA claims. With respect to the CPA, the trial court held, *inter alia,* that Toyota's alleged misrepresentation did not have the capacity to deceive a substantial portion of the public. It further found as a matter of fact that Young's chosen theory of causation, reliance on the misrepresentation, was not established. The Court of Appeals affirmed. The court held that Young failed to meet 2 of the 5 required elements of the CPA claim as established in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co*., 105 Wn.2d 778, 719 P.2d 531 (1986): an unfair or deceptive act or practice, and causation. The court held that Young failed to show a deceptive act

or practice because he failed to prove that Toyota's error was of "material importance." The court held that Young failed to prove causation because he did not take any action in reliance on Toyota's misrepresentation. The Supreme Court ruled that where an affirmative misrepresentation is alleged, neither materiality nor reliance is necessary to establish a CPA claim. However, the Court affirmed the trial court, because the plaintiff *chose* to assert reliance as his theory of causation, and the trial court found as a matter of fact that causation was not established. WSAJ Foundation filed an amicus brief arguing: 1) if a plaintiff who has been injured by a defendant's deceptive act is able to prove that the defendant's deception also had the capacity to deceive a substantial portion of the public, and that this deception actually injured, or has the capacity to injure the public, such conduct necessarily constitutes a matter of material importance within the meaning of the CPA; 2) under the CPA, proximate cause may be shown by proof that but for the defendant's deceptive conduct, the plaintiff would not have suffered injury, and the plaintiff does not have to prove reliance. WSAJ Fdn. Am. Br. # A-439. **Plaintiff Attorneys: Brian G. Cameron, Kirk D. Miller.**

• ***Hermanson v. MultiCare Health System, Inc.***, 196 Wn.2d 578, 475 P.3d 484 (2020). Hermanson was involved in an automobile accident and treated for his injuries at a MultiCare hospital by MultiCare-employed health care workers and by an ER physician employed by an independent contractor. Hermanson alleged that his healthcare providers gave the results of his blood-alcohol screen to police officers without Hermanson's consent. Hermanson filed suit against MultiCare and unnamed employees, alleging causes of action for negligence, defamation, false imprisonment and violation of the physician-patient privilege under RCW 5.60.060(4). Even though the ER physician and his employer were not named as defendants, MultiCare, the ER physician and the ER physician's employer retained a single law firm to represent all of those

entities under a "joint representation" agreement. Defense counsel sought a protective order confirming its right to have ex parte privileged communications with its clients, including the ER physician and the MultiCare employees who had direct knowledge concerning the incidents in Hermanson's complaint. Both plaintiff and defendants sought discretionary review of the trial court's order allowing some, but not all, of the requested ex parte communications. In a 2-1 decision, the Court of Appeals held: 1) MultiCare's counsel was prohibited from ex parte privileged communication with the ER physician, because he was not a MultiCare employee; 2) ex parte privileged communication was allowed with MultiCare's employed nurses and social worker who treated Hermanson and had knowledge of the incidents in his complaint. Both plaintiff and defendants petitioned for review. In a 6-3 decision, the Supreme Court majority held: 1) MultiCare may have ex parte privileged communications with its independent contractor's employee (the ER physician) limited to the facts of the alleged negligent event; 2) MultiCare may have ex parte privileged communications with its employed nurses and social worker limited to the facts of the alleged negligent event. The majority held that the nonparty ER physician, who was an independent contractor of MultiCare, still maintained a principal-agent relationship with MultiCare and served as the "functional equivalent" of a MultiCare employee such that the corporate attorney-client privilege applied. The dissent agreed that defense counsel should be entitled to ex parte privileged communication with the nurses and social worker employed by MultiCare, but argued that the corporate attorney-client privilege should not be extended to apply to an independent contractor, i.e., the ER physician, and such an extension significantly harms policy concerns which support the physician-patient privilege. WSAJ Foundation filed an amicus brief on review arguing: 1) the corporate attorney-client privilege is limited to corporate employees and does not extend to independent contractors; 2) if the Court concludes the corporate attorney-

client privilege extends to independent contractors, the entity asserting the privilege should have the burden of proving agency, which in Washington requires proof of the principal's retention of the right to control the manner of the agent's work; 3) prohibiting ex parte privileged contact in this context will not prevent corporate defendants and their attorneys' preparation of a defense, as they can access necessary information through traditional discovery. WSAJ Fdn. Am. Br. # A-440. **Plaintiff Attorney: Dan'l W. Bridges.**

• ***McLaughlin v. Travelers Commercial Ins. Co.***, 196 Wn.2d 631, 476 P.3d 1032 (2020). McLaughlin was a named insured on a California automobile insurance policy issued by Travelers. The policy included "medical payments coverage," which has wording similar to PIP coverage in Washington policies. McLaughlin moved from California to Washington and was injured while riding his bicycle when the occupant of an automobile opened the car door and struck McLaughlin. Travelers denied payment under the medical payments coverage on the basis that McLaughlin did not come under the policy definition of an "insured" because he was not occupying a motor vehicle and did not qualify as a pedestrian struck by a motor vehicle. McLaughlin filed suit and both parties moved for summary judgment. The parties advised the trial court that there was no need for a choice of law analysis because the policy would be interpreted the same under either Washington or California law. The trial court granted Travelers' motion and denied McLaughlin's motion. On appeal, McLaughlin argued that "pedestrian" as used in the policy should be defined in accordance with the definition of pedestrian set forth in Washington statutes regarding PIP coverage, and that under that statutory definition a bicyclist qualifies as a pedestrian. Travelers equated its medical payments coverage with PIP coverage and again stated there was no conflict between Washington and California law. The Court of Appeals affirmed, concluding that the plain and ordinary meaning

of "pedestrian" does not include a bicyclist, and that the plain and ordinary meaning of a term in an insurance policy should not be displaced by a definition of the same term in an insurance statute. In a 6-3 opinion, the Supreme Court reversed the Court of Appeals. The majority held that the definition of "pedestrian" in RCW 48.22.005(11) applied broadly to casualty insurance in Washington, and under that definition "pedestrian" includes bicyclists and applies to the policy in this case. Further, even if that statutory definition did not directly apply, the term "pedestrian" in the policy was ambiguous and would be interpreted in favor of the insured to provide coverage. WSAJ Foundation filed an amicus brief arguing: 1) having advised both the trial court and Court of Appeals that it submitted to the application of Washington law, Travelers is bound to an interpretation of its coverage as if it were PIP coverage under Washington law; 2) under Washington law, a named insured who suffers injury in an automobile accident is entitled to recover PIP coverage; 3) Washington statutes are read into contracts of insurance, and to the extent insurance policy provisions conflict they are supplanted by Washington statutory law; and 4) McLaughlin is entitled to benefits pursuant to Washington statutes governing PIP coverage. WSAJ Fdn. Am. Br. # A-438. **Plaintiff Attorneys: Robert Levin; Philip A. Talmadge, Aaron P. Orheim.**

• ***Mancini v. City of Tacoma***, 2021 WL 279715, ___ P.3d ___ (January 28, 2021). Based upon a tip from a confidential informant, the Tacoma Police Department conducted an investigation, obtained a search warrant and sent a team of police officers into Mancini's apartment while she was sleeping. Mancini was pushed to the ground, handcuffed and forced to wait outside of her apartment in her nightgown during the search. Mancini was a 60-year-old nurse employed by Group Health; the police had relied on the unsubstantiated tip from the informant and raided

the wrong apartment. Mancini filed suit, asserting several claims, including negligence. The trial court initially granted summary judgment to the City on the basis of the public duty doctrine. The Court of Appeals reversed and remanded for trial, holding that the public duty doctrine does not apply to common law claims. *See Mancini v. City of Tacoma, noted at* 188 Wn. App. 1006, 2015 WL 3562229 (2015) (*Mancini I).* At trial, the jury returned a verdict for Mancini on the negligence claim. The Court of Appeals reversed, holding that as argued, Mancini's claim constituted a "negligent investigation" claim, which is not recognized under Washington law. WSAJ Foundation filed an amicus curiae memorandum in support of Mancini's Petition for Review in the Washington Supreme Court, urging the Court to examine whether negligent investigation claims should be recognized in this context. The Court granted review. In an 8-1 opinion, the Supreme Court reversed the Court of Appeals and reinstated the jury's verdict. The Court held that the defendants were not entitled to discretionary governmental immunity, because that immunity is only available for high-level policymaking decisions of a governmental entity and is not applicable to everyday operational level acts, such as executing a search warrant. The Court also held that the public duty doctrine did not bar Mancini's claim, because this was not a case where the City's duty ran solely to the public at large, but rather involved a case of affirmative misfeasance directed by the police to a particular individual and the police had a duty to exercise reasonable care to refrain from causing foreseeable harm in their interactions with Mancini. The Court held that the jury's finding of negligence was appropriate because police officers have an actionable tort duty to exercise reasonable care in executing search warrants and detaining residents during the execution of a warrant. The Court did not reach the issue of whether Mancini could or could not recover for negligent police investigation. However, the Court cast doubt on the notion that its previous statements suggesting no such tort exists have precedential value. The

majority noted the multiple Court of Appeals decisions that have denied recovery for negligent investigation and stated "we have never addressed an actual negligent investigation claim outside the child abuse context." *Mancini*, 2021 WL 279715 at * 5 n.7. Further, the sole dissenting Justice stated that she would recognize a cause of action for negligent police investigation. *See Mancini*, *supra* at * 11 (Madsen, J., dissenting). WSAJ Foundation filed an amicus brief, arguing: 1) the Supreme Court has never squarely examined Court of Appeals' decisions barring common law negligent investigation claims; 2) a rule that there is no duty to exercise reasonable care when conducting an investigation is not reconcilable with the Court's precedent, is not consistent with public policy, undermines justice and defies logic and common sense; 3) whether there is a duty to exercise reasonable care when conducting an investigation should not be altered by case law governing probable cause or constitutional requisites for obtaining search warrants. WSAJ Fdn. Am. Br. # A-437. **Plaintiff Attorneys: Lori S. Haskell; Gary Manca.**

Pending Cases

- ***Meyers v. Ferndale Sch. Dist.,*** 12 Wn. App. 2d 254, 457 P.3d 483, *review granted*, 195 Wn.2d 1023 (2020). Plaintiff's decedent was a high school student in the defendant school district. He was killed while out on an off-campus walk with his P.E. teacher and class when an automobile driver fell asleep, crossed the road, drove up on the sidewalk and struck him. Plaintiff brought a negligence action against the driver and the school district, alleging that the district had a duty to protect its students based on the special relationship between a school and its students. The trial court dismissed the claim against the school district, apparently concluding that the District owed no duty to Plaintiff because the manner in which the accident occurred was unforeseeable as a

matter of law. The Court of Appeals reversed, holding that the trial court misapprehended the relevant foreseeability issue, and that the issue was instead whether the harm suffered fell within the general field of danger that should have been anticipated. To this question, the appellate court held there was a question of fact. On review to the Supreme Court, the district shifted its argument from duty to causation, and argued that both factual and legal causation were absent here. Regarding legal causation, the District urged the Court to hold that as a matter of policy, any alleged negligence by the school was too remote from the Plaintiff's injury to warrant the imposition of liability. WSAJ Foundation filed an amicus brief on review, arguing that where the Court has determined that a defendant has a duty to protect based on a special relationship, and there are questions of fact related to breach, foreseeability and factual cause, legal cause should not operate to defeat liability. WSAJ Fdn. Am. Br. # A-441. **Plaintiff Attorneys: John R. Connelly, Jr., Marta L. O'Brien, Jackson Pahlke; Philip A. Talmadge.**

• ***Coogan v. Borg-Warner Morse TEC Inc.***, *noted at* 12 Wn. App. 2d 1021, 2020 WL 824192, *review granted*, 195 Wn.2d 1024 (2020). Coogan died approximately seven months after being diagnosed with mesothelioma, and his spouse and estate sued multiple entities alleging that Coogan's death resulted from exposure to asbestos from their products. Following a three-month trial, a jury entered a $81.5 million verdict, including $30 million to Coogan's estate for his pain and suffering and $51.5 million to his wife and daughters. The Court of Appeals affirmed the liability verdict but reversed the $30 million verdict to the estate for Coogan's pain and suffering on the basis that it shocked the court's conscience, and reversed the awards to Coogan's wife and daughters on the basis that the trial court erred in excluding the testimony of the defendants' medical expert. WSAJ Foundation filed an amicus brief arguing that an appellate court should not

reverse an award of damages in a jury verdict after the trial court denied a motion for a new trial or remittitur solely on the basis that the amount of the damage award shocks the conscience of the appellate court. WSAJ Fdn. Am. Br. # A-442. **Plaintiff Attorneys: William J. Rutzick; Brian D. Weinstein, Alexandra B. Caggiano; Jessica M. Dean, Lisa W. Shirley, Benjamin H. Adams.**

- ***Johnson v. State of Washington, Department of Liquor Control Board***, *noted at* 10 Wn. App. 2d 1011, 2019 WL 4187744, *review granted*, 196 Wn.2d 1024 (Table) (December 2, 2020). Johnson brought a cause of action against the State alleging that she suffered damages from injuries that occurred as the result of a slip and fall when she entered a State-owned retail store as a customer. Following a jury verdict in favor of the plaintiff, the Court of Appeals held that the trial court erred in denying the State's motion for a directed verdict on the basis that Johnson failed to present evidence that the store employees had actual or constructive notice of a dangerous condition, which precludes recovery. WSAJ Foundation filed an amicus brief in the Supreme Court arguing: 1) that the traditional rule that required actual or constructive notice for a business owner to be liable to customers for a temporary unsafe condition has been replaced by Washington's adoption of *Restatement (Second) of Torts* § 343 and its standard that requires a possessor of premises to exercise reasonable care to protect invitees from unsafe conditions of which the possessor knows or would discover through the exercise of reasonable care; 2) this standard obliges the possessor to inspect for unsafe conditions followed by reasonably necessary repair, safeguards or warning; 3) where a plaintiff/invitee can show the possessor of premises knows of or in the exercise of reasonable care would discover an unsafe condition, the plaintiff need not also prove actual or constructive notice of the specific condition.

Plaintiff Attorneys: Joseph M. Mano, Jr.; George M. Ahrend, David C. Whisenand.

- ***Turner v. Washington State Department of Social and Health Servs., Lewis Mason Thurston Area Agency on Aging***, Supreme Court No. 99243-6. *Turner* raises issues related to the duties owed by the Department of Social and Health Services (DSHS) and Area Agencies on Aging (AAAs) to disabled persons who suffer injury or death while under their care and supervision. Kent Turner suffered from multiple sclerosis and was confined to a wheelchair and unable to perform routine tasks including bathing, toileting and wheelchair transfers. When his wife, who was his primary caretaker, was diagnosed with cancer and had to undergo extensive treatment, Turner applied for assistance through DSHS. A DSHS caseworker conducted an evaluation to determine Turner's medical need and financial eligibility for services and concluded that he needed extensive assistance in many areas, including bathing, toileting and dressing, and required 24 hour care. Turner was placed in a residential skilled nursing facility. Turner was soon visited by a different DSHS caseworker, whose job was to relocate patients from nursing facilities to a lesser level of care that could meet the patient's needs, in order to save expenses. Turner reiterated his intent to remain in a skilled nursing facility until he could return home to his wife. The caseworker conducted additional evaluations, and although she did not alter any of the findings regarding Turner's limited functional ability, she did change the recommended level of care to "in-home." Turner agreed to move to a private apartment, where he lived alone and was provided two, two-hour blocks of in-home care each day. After Turner moved to the apartment, DSHS contracted with Lewis Mason Thurston Area Agency on Aging (LMT) to take over case management services. Despite multiple reports and incidents demonstrating Turner's inability to care for himself safely and adequately while living in his apartment, neither DSHS nor LMT took any

action. Less than two months after he had moved into the apartment, Turner died alone in a fire of unknown origin. Turner's estate filed a wrongful death action against DSHS and LMT, which was dismissed on summary judgment on the basis that there was no actionable duty owed to protect Turner. WSAJ Foundation filed an amicus brief in the Supreme Court arguing that DSHS and/or LMT owed Turner at least three common law duties: 1) entrustment for a vulnerable person gives rise to a common law duty to protect within the scope of the relationship, and defendants were entrusted with Turner's care and were required to take reasonable precautions to prevent foreseeable harm; 2) all persons have a duty to ensure their affirmative acts do not create an unreasonable risk of harm to others, and DSHS's recruitment of Turner to move to an apartment constituted an affirmative act creating an unreasonable risk of harm; 3) by contracting to render services to Turner in its contract with DSHS, and negligently performing those services such that it increased Turner's risk of harm, LMT is liable for harm arising from the increased risk. **Plaintiff Attorneys: Brad J. Moore, Brian F. Ladenburg, A. Melanie Nguyen; Philip Talmadge, Gary Manca.**