WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Amicus Program
Year in Review
October 2019-October 2020

By

Valerie McOmie and Dan Huntington,

Table of Contents

2019-20 Decisions in Which the Foundation Filed Amicus Briefs

• ***Strauss v. Premera Blue Cross***, 194 Wn.2d 296, 449 P.3d 640 (2019). This case concerns coverage under a medical insurance policy. Strauss sued Premera because of a denial of coverage for proton beam therapy (PBT) radiation treatment for prostate cancer. Strauss' policy with Premera included coverage for "medically necessary" treatment, and the definition of "medically necessary" included treatment "not more costly than an alternative service… at least as likely to produce equivalent therapeutic or diagnostic results." Premera denied Strauss' request for PBT on the basis that clinical outcomes with PBT have not been shown to be superior to intensity-modulated radiation therapy (IMRT), yet PBT is more costly. The trial court granted summary judgment for Premera, which was affirmed by the court of appeals. The court reasoned: "Because the record establishes there are peer-reviewed medical studies that show the side effects of PBT may be superior to IMRT and other peer-reviewed medical studies that show the side effects of IMRT may be superior to PBT, reasonable minds could only conclude that absent clinical evidence directly comparing PBT and IMRT, the treatments are equivalent and Strauss cannot show PBT was medically necessary." *Strauss*, 1 Wn. App. 2d 661, 683-84. 408 P.3d 699 (2017). In a 5-4 decision, the Supreme Court reversed, holding that clinical evidence directly comparing PBT to IMRT was not required in order to create a fact issue as to whether PBT had a superior side effect profile and thus was medically necessary within the meaning of the insurance contract. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. # A-418. **Plaintiff Attorneys – Patrick Trudell; Howard Goodfriend, Victoria Ainsworth.**

• ***Keodalah v. Allstate Ins. Co***., 194 Wn.2d 339, 449 P.3d 1040 (2019). In a 5-4 decision, the Supreme Court held that an adjuster/employee of an insurance company cannot be held liable

for bad faith or a CPA violation based on a violation of the statutory duty of good faith under RCW 48.01.030. The 4-Justice dissent noted that the majority did not address the arguments raised by the plaintiffs and WSAJF Foundation regarding the common law duty to act in good faith, and stated that the Court should have found that there was a breach of the common law duty to act in good faith and a CPA violation. WSAJ Foundation filed an amicus brief arguing: 1) under the common law, an agent is liable for acts undertaken within the scope of the agency relationship if the agent owes an independent duty to the plaintiff; 2) public policy and precedent reflected in the Insurance Code's statutory and regulatory provisions, as well as the Supreme Court's bad faith jurisprudence, warrant the recognition of a common law duty of good faith owed by adjusters to insureds; and 3) relevant CPA and Insurance Code provisions, as well as the Supreme Court's jurisprudence clarifying their application, support a CPA claim predicated on breach of the duty of good faith by an adjuster engaged in the business of insurance. *See* WSAJ Fdn. Am. Br. # A-423. **Plaintiff Attorneys – Vonda M. Sargent, Carol Farr; Scott David Smith, C. Steven Fury.**

• ***Weaver v. City of Everett and Dep't of Labor & Indus***., 194 Wn.2d 464, 450 P.3d 177 (2019). This case asked the Court to examine whether the common law doctrines of res judicata and collateral estoppel should operate to bar a worker from initiating a claim for worker's compensation benefits based on a prior proceeding. Weaver missed five weeks of work following surgical removal of a cancerous (malignant melanoma) mole. He filed an application for worker's compensation benefits, seeking less than $10,000 in wage loss, claiming his melanoma was caused by sun exposure in his work as a firefighter. DLI denied the application and Weaver appealed to the Board. The Industrial Appeals Judge weighed the testimony of the employer's expert dermatologist and oncologist who testified that Weaver's melanoma likely did not arise out of his

employment, against the testimony of Weaver's expert, who had no training in oncology or dermatology. The Board issued a final order denying the application for benefits. Weaver filed a *pro se* petition for review to the superior court, but eventually stipulated to an order of dismissal in light of the limited funds at issue and the expense of proceeding further. Shortly thereafter, Weaver was diagnosed with a brain tumor, and it was determined that tumor had metastasized from the earlier diagnosed malignant melanoma. Weaver filed a second application for benefits, this time seeking permanent total disability benefits. Both the Department and the Board concluded that the initial denial in the prior proceeding was binding in the subsequent action. Weaver appealed to the superior court, which affirmed the Board's order. The Court of Appeals reversed. The Washington Supreme Court affirmed the Court of Appeals, holding 1) res judicata, or claim preclusion, was inapplicable because that doctrine requires identity of subject matter, which was absent here, and 2) collateral estoppel, or issue preclusion, would be inappropriate because its application in Mr. Weaver's particular case would work an injustice. WSAJ Foundation filed an amicus brief arguing: 1) claim preclusion (res judicata) should generally not bar a subsequent claim based on an earlier IIA Board order denying an application for benefits, because the initial determination of whether a worker's claim concerns an injury or disease that arises naturally and proximately out of an occupational exposure constitutes an "issue" rather than a "claim" under common law res judicata/collateral estoppel principles; 2) whether issue preclusion (collateral estoppel) should bar a subsequent claim for benefits requires an examination of whether the doctrine will work an injustice. *See* WSAJ Fdn. Br. #A-427. **Plaintiff Attorney – T. Jeffrey Keane.**

• ***Vargas v. Inland Washington LLC, et al.***, 194 Wn.2d 720, 452 P.3d 1205 (2019). This case concerns a general contractor's duty to ensure the safety of all workers on a multi-employer jobsite, and whether that duty was altered by *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018) (*Afoa II*). The trial court entered a summary judgment order stating the general contractor was not vicariously liable for subcontractors' WISHA violations or other common law duties owed by the subcontractors. The Court of Appeals initially granted discretionary review, but then dismissed review as improvidently granted after the Washington Supreme Court issued the *Afoa II* decision. The Supreme Court reversed and remanded for further proceedings, finding genuine issues of material fact precluded summary judgment. The Court held that the general contractor may be directly liable for a failure to comply with its common law duty to provide a safe place to work in all areas under its supervision, regardless of whether the general contractor is present, regardless of whether an expert other than the general contractor happens to be in charge of a specific job in the area, and regardless of whether multiple subcontractors happen to be working in the area at the same time. The Court held the general contractor can also be directly liable for a failure to comply with its statutory duty to comply with WISHA, and this duty was not altered by *Afoa II*. The Court held that a general contractor may not delegate its statutory duty to comply with WISHA, and if it delegates anyway it will be vicariously liable for the negligence of the entity subject to its delegation. Finally, the Court held that a general contractor will be vicariously liable for the negligence of any entity over which it exercises control, and the test of control is not the actual interference with the work of the entity, but the right to exercise control. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. # A-429. **Plaintiff Attorneys – Raymond Bishop, Derek Moore.**

• ***Peoples v. USAA*, *et al*.; *Stedman v. Progressive Direct Ins. Co*.**, 194 Wn.2d 771, 452 P.3d 1218 (2019) (on certification from the federal district court from the Western District of Washington). These consolidated cases concern whether an insured's claim under the Consumer Protection Act against a PIP insurer for wrongfully denied payment of medical expenses is a claim for "personal injury" damages and therefore does not constitute an injury to "business or property" as required in RCW 19.86.090. The Supreme Court held that the wrongful denial of PIP benefits is an injury to "business or property" under RCW 19.86.090, and insureds wrongfully denied benefits may recover actual damages, including out-of-pocket medical expenses that should have been covered, and can seek injunctive relief to compel the payment of benefits to medical providers. The Court held that while personal injuries are not cognizable under the CPA, the deprivation of contracted-for insurance benefits is an injury to "business or property" regardless of the type of benefits secured by the policy. Further, when a CPA claim is predicated on an insurer's mishandling of a PIP claim, investigation costs and the time an insured takes away from business in order to respond to unfair practices are cognizable claims for damages under the CPA. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Foundation Amicus Brief # A-430. **Plaintiff Attorneys – Randall Johnson, Daniel Whitmore, Duncan Turner, Daniel Rogers; David Breskin, Brandon Donckers, Young-Ji Ham.**

• ***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 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 occasioned 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.***, __ Wn.2d __, 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.***, 2020 WL 6603473 (November 12, 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). Hermanson did not allege medical malpractice. 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. In a 6-3 decision, the Supreme Court reversed the Court of Appeals' holding prohibiting the hospital's attorneys from ex parte privileged communication with the ER physician, and affirmed the holding allowing ex parte privileged communication with the nurses and social worker employed by the hospital. The Court concluded that the hospital's corporate attorney-client privilege extended to a plaintiff's treating physician who is an independent contractor of the hospital, so long as there is a principal-agent relationship between the physician and the hospital. The Court relied upon federal caselaw authorities for the proposition that, under the facts in *Hermanson*, the ER physician employed by an independent contractor was the "functional equivalent" of a hospital employee. 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.**

2020 Amicus Briefs Filed; Awaiting Decision

• ***Mancini v. City of Tacoma***, *noted at* 8 Wn. App. 2d 1066, 2019 WL 2092698, *review granted*, 194 Wn.2d 1009 (2019). This case concerns whether a person injured as the result of a negligent police investigation may bring a claim under Washington common law. 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 memoranda to the Washington Supreme Court, urging the Court to examine whether negligent investigation claims should be recognized in this context. The Court granted review. 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.**

• ***McLaughlin v. Travelers Commercial Ins. Co.***, 9 Wn. App. 2d 675, 446 P.3d 654 (2019), *review granted*, 194 Wn.2d 1016 (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. In March, 2017, McLaughlin moved from California to Washington, and in July, 2017, he 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 its opinion, the Court of Appeals described the coverage as "PIP" coverage, applied Washington law concerning insurance policy and statutory interpretation, interpreted Washington insurance code and vehicle code statutes, and reviewed Washington case law in its analysis. WSAJ Foundation filed an amicus brief on review, arguing: 1) having advised both the trial court and Court of Appeals that it wished to apply 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.

- ***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 a defendant with a special relationship duty to protect a plaintiff from the risk of reasonably foreseeable injury may not obtain a dismissal on the basis of a lack of legal causation. 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.**

Amicus Brief Filed; Case Settled and Withdrawn Prior to Decision

• ***Lyon v. Okanogan County Electric Cooperative, Inc., et al.,*** (Supreme Ct. # 97826-3) (on direct review from superior court). Lyon was a professional firefighter seriously injured in the course of responding to a fire allegedly caused by the negligence of the defendants. The trial court dismissed Lyon's claims on summary judgment finding that all of the claims were barred under the professional rescuers doctrine. WSAJ Foundation filed an amicus brief on the merits arguing:

the professional rescue doctrine was adopted as a complete bar to a rescuer's cause of action against a party that caused the danger that required a rescue, based upon the assumption of risk doctrine; in the decades since the adoption of the professional rescue doctrine, Washington jurisprudence regarding assumption of the risk has been further developed and refined, and continued recognition of the professional rescue doctrine as a complete bar to a rescuer's cause of action is inconsistent with the further development of assumption of risk law in Washington; the principles and public policies underlying the statutory schemes governing compensation for professional rescuers, including firefighters, supports a recognition of third-party actions; the professional rescue doctrine should be reexamined and abolished by the Court. *See* WSAJ Fdn. Am. Br. # A-433. **Plaintiff Attorneys: Steven L. Bulzomi; Kenneth W. Masters, Shelby R. Frost Lemmel.**

Amicus Curiae Memoranda Filed

- ***Mancini v. City of Tacoma***, 8 Wn. App. 2d 1066, *review granted*, 194 Wn.2d 1009 (2019). WSAJ Foundation filed an amicus curiae memorandum in support of Plaintiff's petition for review arguing that the existence and scope of a common law negligent investigation claim is an issue of substantial public interest warranting review. **Plaintiff Attorneys: Lori S. Haskell; Gary Manca.**
- ***Boyer v. Morimoto***, 10 Wn. App. 2d 506, *review denied*, 194 Wn.2d 1009 (2019). WSAJ Foundation filed an amicus curiae memorandum in support of Plaintiff's petition for review arguing that the requirement that a medical expert establish a basis of knowledge of the specific standard of care in Washington conflicts with RCW 7.70.040 and *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983). **Plaintiff Attorneys: Anthony D. Shapiro; Gary Manca**.