WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Amicus Program

Recent Decisions &
Recent Amicus Briefs Filed

by

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2018-19 Decisions in Which the Foundation Filed Amicus Briefs

- ***Murray v. Dep't of Labor & Indus.***, 192 Wn.2d 488, 430 P.3d 645 (2018). *Murray* is a workers' compensation case which concerns whether medical coverage determinations made by the Health Technology Clinical Committee (HTCC) are preclusive and foreclose an individual review by an injured worker seeking "proper and necessary" medical benefits under Washington's Industrial Insurance Act. In 2013, the Department denied Murray's request for authorization for femoral acetabular impingement (FAI) surgery, because in 2011 the HTCC had determined that FAI surgery was unproven and therefore not a covered benefit. The court of appeals affirmed, holding that under RCW 70.14.120(3), an HTCC determination that a particular surgical procedure is not a covered treatment "is a determination that the particular health technology is not medically necessary or proper in *any* case." In a unanimous opinion, the Supreme Court reversed, holding: 1) RCW 70.14.120 is ambiguous, and the legislative history demonstrates an intent to protect workers' appellate rights; 2) the Department of Labor & Industries, not the HTCC, is responsible for injured workers' medical treatment coverage decisions; 3) Department medical coverage decisions remain subject to review, and an individual worker is entitled to rebut an HTCC determination that a particular treatment is not proper and necessary in the worker's case. WSAJ Foundation filed an amicus brief, arguing: 1) under a proper interpretation of RCW 70.14.120, an HTCC determination that a particular surgical procedure is not a covered benefit precludes an injured worker's individual determination as to whether that surgical procedure is proper and necessary treatment, *unless* the worker had a right to appeal a decision of the Department at the time the HTCC act was enacted; 2) since existing law at the time the HTCC act was enacted gave an injured worker the right to appeal a Department decision excluding coverage, an injured worker

is not precluded from an individual determination regarding whether a medical procedure is proper and necessary treatment; 3) if the Court determines that RCW 70.14.120 is ambiguous, legislative history supports an injured worker's right to an individual determination as to whether a particular medical treatment constitutes "proper and necessary" medical services under the Industrial Insurance Act. *See* WSAJ Fdn. Am. Br. # A-414. **Plaintiff Attorneys — Patrick Palace and Jordan Couch; Philip Buri.**

• ***L.M. v. Hamilton***, 193 Wn.2d 113, 436 P.3d 803 (2019). Allan Tencer, PhD, a biomechanical engineer, along with other defense medical experts, testified in a jury trial regarding the forces applied on a newborn by the natural forces of maternal labor (NFOL), and the forces applied by a health care provider assisting in delivery, and gave the opinion that NFOL alone could cause a brachial plexus injury. The Supreme Court held that admission of the expert testimony was not an abuse of the trial court's discretion. The Court held that "*Frye* does not require every deduction drawn from generally accepted theories to be generally accepted," 193 Wn.2d at 129, and found that the defense experts based their conclusion that NFOL caused L.M.'s injury on generally accepted science. The Court upheld the trial court's allowance of Tencer's testimony largely on the basis of the abuse of discretion standard of review. J. Gonzalez wrote a 3-Justice concurrence, stating that Tencer should not have been allowed to testify because he is not qualified to testify about childbirth injuries, and Tencer put forth an improperly speculative opinion. However, the concurring Justices opined that Tencer's testimony was harmless, because other qualified medical witnesses testified similarly. WSAJ Foundation filed an amicus brief arguing 1) Tencer is not qualified to give an opinion on causation in a medical malpractice case regarding a brachial plexus birth injury, and 2) Tencer made no attempt to ground his opinion on facts in the

record, which rendered his opinion too general and overly speculative to be helpful to the jury. *See* WSAJ Fdn. Am. Br. # A-420. **Plaintiff Attorneys – Ron Perey, Simeon Osborn, Susan Machler, Carla Tachau Lawrence.**

• ***Adamson v. Port of Bellingham***, 193 Wn.2d 178, 438 P.3d 522 (2019). This case concerns what duties a landlord/lessor owes to an employee of its tenant. The Ninth Circuit certified questions to the Washington Supreme Court regarding what duties a premises owner owes to the injured employee of the premises lessee where: the lease transferred only priority, but not exclusive, use to the part of the property where the injury occurred; at the time of the injury the lessee exercised exclusive use of the part of the premises where the injury occurred; and the premises owner had responsibility for maintenance and repair of that part of the property where the injury occurred. The Supreme Court held that the priority use provision, the affirmative obligation to maintain and repair, and the Port's ability to lease the property to others together create sufficient control of the property such that the Port is liable as a premises owner. WSAJ Foundation filed an amicus brief citing *Restatement (Third) of Torts* § 49 Comments c and d (2019), and arguing: a landlord or a tenant is a possessor of premises who owes a duty of care to entrants on the premises if the landlord or tenant is in possession and control of the premises; a landlord who agrees under a lease to keep premises in repair and free of hazards, and retains sufficient control to perform repairs and keep the premises free of hazards, is in possession and control of that portion of the premises necessary to perform the agreed-upon repairs and maintain the premises free of hazards; under these circumstances, the landlord has an affirmative legal duty to act reasonably to keep the premises in good repair and free of hazards for use by a tenant and the tenant's invitees, and the landlord is liable in tort for negligent nonperformance of that duty

for injuries sustained by a tenant's employee. *See* WSAJ Fdn. Am. Br. # A-421. **Plaintiff Attorneys – James Jacobsen, Joseph Stacey; Philip A. Talmadge.**

• ***Barriga Figueroa v. Prieto Mariscal*,** 193 Wn.2d 404, 441 P.3d 818 (2019). In a case in which the same insurer provided liability coverage to the defendant and PIP coverage to the plaintiff, , in a 6-3 decision the Court held the work product privilege applies to statements in a PIP application filled out on behalf of the plaintiff and provided to the defendant's PIP insurer. The plaintiff-bicyclist was struck and injured by an automobile driven by the defendant. While the plaintiff was not a named insured, he was entitled to PIP coverage under the defendant's policy by statute.. The Court held that the PIP insurer owed the plaintiff the same quasi-fiduciary duties that it owed to its named insured, and the plaintiff was entitled to expect the PIP insurer to deal fairly with him and give equal consideration in all matters to his interests. The PIP insured signed the PIP application with his attorney's assistance, so the PIP application is considered a statement made in anticipation of litigation and should have been protected from disclosure under the work product rule. WSAJ Foundation filed an amicus brief, arguing: 1) where a PIP insured brings a personal injury action against the automobile driver, and the insurer commingles its files to provide material from the PIP file to the liability insured which is then used against the PIP insured at trial, the insurer commits bad faith as a matter of law; 2) under these circumstances, the Court should impose a rebuttable presumption of prejudice to the PIP insured, resulting in granting a new trial and exclusion of material from the PIP file; and 3) the PIP insured has causes of action for bad faith and CPA violations against the insurer. *See* WSAJ Fdn. Am. Br. #A-424. **Plaintiff Attorneys – Ned Stratton, Brian Anderson; George Ahrend**.

• ***State of Washington v. Arlene's Flowers, et al.***, 193 Wn.2d 469, 441 P.3d 1203 (2019). Following Washington's recognition of same-sex marriage, Robert Ingersoll and Curt Freed planned to marry and sought wedding floral services from Arlene's Flowers. Arlene's owner, Barronelle Stutzman, declined to provide the requested services on religious grounds. The State of Washington and Plaintiffs Ingersoll & Freed sued Arlene's and Stutzman under the WLAD and the CPA, arguing that Arlene's refusal to provide services violated RCW 49.60.215, which prohibits public accommodations from discriminating on the basis of sexual orientation. Arlene's responded that her conduct did not violate the statute, and additionally asserted constitutional defenses. The trial court granted the State & Ingersoll/Freed's motion for summary judgment. The Washington Supreme Court granted direct review and affirmed. Arlene's filed a Petition for Certiorari seeking review by the U.S. Supreme Court. While Arlene's Petition was pending, the U.S. Supreme Court issued an opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018), a case that raised similar issues. The U.S. Supreme Court then granted Arlene's Petition, vacated the judgment and remanded the case to the Washington Supreme Court "for further consideration in light of *Masterpiece Cakeshop*." 138 S.Ct. 2871. Upon the return of *Arlene's Flowers* to the Washington Supreme Court (*Arlene's II)*, the Washington Supreme Court again affirmed the trial court's order granting summary judgment, concluding that nothing in *Masterpiece Cakeshop* provided a basis for altering its opinion in *Arlene's I.* WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. A-425. On September 12, 2019, Arlene's Flowers and Baronnelle again petitioned for certiorari to the U.S. Supreme Court. **Plaintiff Attorneys for Ingersoll/Freed – Emily Chiang, Lisa Nowlin, Elizabeth Gill.**

• ***Beltran-Serrano v. City of Tacoma***, 193 Wn.2d 537, 442 P.3d 608 (2019). *Beltran-Serrano* raises issues related to the tort duties owed by police officers with respect to the use of deadly force. Tacoma Police Officer Michele Volk stopped to question Cesar Beltran-Serrano. Beltran-Serrano was posing no threat and committing no crime, but Volk approached him apparently to advise him of applicable panhandling laws. When it was evident he spoke only Spanish, she called for a Spanish-speaking officer, who was five minutes from their location. She approached him without waiting and began questioning him. He became flustered and backed away, and Officer Volk tased him. When he tried to run, she shot him four times. Beltran-Serrano sued the City of Tacoma, Volk's employer, alleging negligence and assault and battery. In its motion for summary judgment, relying in part on the Public Duty Doctrine, the City maintained there is no cause of action under Washington law for negligence with respect the use of deadly force, and that Beltran-Serrano's claims were limited to assault and battery. The trial court agreed and dismissed the negligence claims. The Washington Supreme Court accepted direct review. In a 5-4 decision, the Washington Supreme Court held that a claim for negligence may lie for the unreasonable use of deadly force, notwithstanding the fact that the discharge of the weapon was intentional. With respect to the Public Duty Doctrine, the Court reaffirmed the rule endorsed by a majority of justices in *Munich v. Skagit Emergency Communication Center,* 175 Wn.2d 871, 286 P.3d 328 (2012) (Chambers, J., concurring opinion joined by four justices), that the Doctrine does not apply to claims asserted under the common law. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. # A-419. **Plaintiff Attorneys — John R. Connelly, Jr., Micah R. LeBank and Meaghan M. Driscoll; Philip A. Talmadge.**

• ***Daniels v. State Farm Mut. Auto. Ins. Co.,*** 193 Wn.2d 563, 444 P.3d 582 (2019). This case concerns whether a first-party insurer, upon obtaining a partial recovery in a subrogation action, violates the "made whole" doctrine or breaches a contractual subrogation clause by taking a partial subrogation recovery without first reimbursing the insured for the full amount of her deductible. The Supreme Court held that whether an insurer's claim for repayment arises from a reimbursement claim against its insured, an offset of policy proceeds, or through a direct subrogation action makes no difference, and its insured must be made whole for her entire loss before the insurer recovers its own payments. WSAJ Foundation filed an amicus brief arguing: 1) the "made whole" doctrine governs an insurer's right to recover amounts paid its insured, whether the insurer seeks to enforce that right through a reimbursement claim against the insured or a subrogation action against the tortfeasor; 2) an insured is made whole when she is fully compensated, *i.e*., she has made a complete recovery of the actual losses suffered as a result of an automobile accident, which include the amount of her policy deductible; 3) balancing the equities between an insured who has not been fully compensated for her loss against an insurer who has not been fully compensated for its loss, but has been paid premiums by its insured to accept the risk of losses, should result in the insured receiving the first dollar recovery from the tortfeasor. *See* WSAJ Fdn. Am. Br. #A-426. **Plaintiff Attorneys – Matthew Ide, David Hallowell**.

• ***Taylor v. Burlington Northern Railroad Holdings, Inc***., 193 Wn.2d 611, 444 P.3d 606 (2019) (S.Ct. # 96335-5; on certification from the Ninth Circuit Court of Appeals). The Ninth Circuit certified a question to the Washington Supreme Court asking under what circumstances, if any, obesity qualifies as an "impairment" under the Washington Law Against Discrimination (WLAD). The WLAD makes it an unfair practice for an employer to refuse to hire an applicant

because of "the presence of any sensory, mental, or physical disability" unless the disability prevents "the proper performance of the particular worker involved." RCW 49.60.180. A "disability" is the presence of a sensory, mental or physical impairment that (1) is medically cognizable or diagnosable, (2) exists as a record or history or (3) is perceived to exist whether or not it exists in fact. RCW 49.60.040. An "impairment" includes "any physiological disorder, or condition…affecting one or more of [an enumerated list of] body systems…" RCW 49.68.040(7)(c). In an 8-1 opinion, the Washington Supreme Court held that obesity always qualifies as an impairment, because it is recognized by the medical community as a "physiological disorder, or condition" affecting several body systems enumerated in the statute. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. # A-422. **Plaintiff Attorneys – Jay R. Stephens; Kenneth W. Masters, Shelby R. Frost Lemmel.**

• ***Karstetter v. King County Corrections Guild***, 193 Wn.2d 672, 444 P.3d 1185 (2019). *Karstetter* is an employment case that raises issues related to the tort of wrongful discharge in violation of public policy, as well as the interplay between the wrongful discharge tort and the Rules of Professional Conduct governing in-house attorneys. Jared Karstetter was in-house counsel for King County Corrections Guild, a labor organization that represented corrections officers. Karstetter was contacted by the King County Ombudsman's Office, which was seeking Guild financial records in relation to an investigation of the Guild's president, who was suspected of receiving improper parking reimbursements. Karstetter provided the requested documentation and was subsequently terminated. He sued the Guild for wrongful discharge in violation of public policy and breach of contract. The Guild argued that because clients have the right to terminate their attorneys at any time and for any reason, and RPC 1.16(a)(3) directs that an attorney shall not

represent a client if he or she is discharged, in-house counsel should be prohibited from enforcing "for cause" provisions in employment contracts or asserting claims for wrongful discharge in violation of public policy. On review, the Washington Supreme Court held that such claims may lie as long as they may be brought "without violence to the integrity of the attorney-client relationship." *Karstetter,* 444 P.3d at 1187. WSAJ Foundation appeared as amicus curiae on the wrongful discharge issue only, addressing whether the so-called "Perritt test" applies to wrongful discharge claims, and whether whistleblower status under that tort requires proof that the employee's public policy-linked conduct was undertaken for the purpose of furthering the public good. *See* WSAJ Fdn. Am. Br. # A-417. **Plaintiff Attorney — Judith Lonnquist.**

• ***Group Health Cooperative v. Coon***, 193 Wn.2d 841, 447 P.3d 139 (2019). This case concerns the application of the *Thiringer* "made whole" doctrine to a reimbursement claim for benefits paid under a medical insurance policy. Following knee surgery, Coon developed an infection that resulted in an above-the-knee amputation. Coon's medical insurer, Group Health (GHO), paid $372,000 in medical expenses. The policy provided that GHO had subrogation and reimbursement rights and required that the insured do nothing to prejudice GHO's subrogation and reimbursement rights. It further provided that if the insured failed "to cooperate fully with GHO in recovery of GHO's Medical Expenses, the [insured] shall be responsible for directly reimbursing GHO for 100% of GHO's Medical Expenses." Coon's attorney advised GHO that he was pursuing a claim against the clinic. However, Coon's attorney was unable to obtain an expert who could support a theory of causation, and the best theory he had been able to develop was a "*res ipsa loquitor*" argument. Coon's attorney estimated future care costs of $2 million and future economic loss of $7 million, but settled for $2 million, which was less than the clinic's insurance

policy limits. GHO was notified of the settlement three days after it occurred. GHO filed a declaratory judgment action requesting a determination of its subrogation rights and judgment for the $372,000 it paid for Coon's medical expenses. The trial court granted summary judgment to GHO. On review, the Washington Supreme Court held the Thiringer rule applies to medical insurance policies, requiring that insureds to health insurance policies be made whole before an insurer can seek reimbursement or subrogation. The Court further held that settlement for less than policy limits constitutes some evidence that the insured has been fully compensated, but does not create a presumption of full compensation. Finally, the Court reaffirmed prior precedent holding that insurers are entitled to relief for insureds' breach of insurance contract provisions only if, and to the extent that, the insurer has been prejudiced by the breach. WSAJ Foundation filed an amicus brief on the merits. *See* WSAJ Fdn. Am. Br. # A-428. **Plaintiff Attorneys – Gene Moen; Ian Birk.**

• ***Strauss v. Premera Blue Cross***, __ Wn.2d __, 449 P.3d 640 (2019). This case concerns the sufficiency of expert testimony to create a genuine issue of material fact as to whether a particular medical treatment is "medically necessary" under the terms of a medical insurance policy. John 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. On summary judgment, Strauss and Premera presented conflicting medical

expert affidavits concerning whether IMRT caused more significant side effects than PBT. The Court of Appeals affirmed summary judgment dismissal of the insured's claim, reasoning that "absent clinical evidence directly comparing PBT and IMRT… Strauss cannot show PBT was medically necessary." In a 5-4 decision, the Supreme Court reversed, holding that the Court of Appeals inappropriately weighed conflicting evidence, and whether the PBT treatment was "medically necessary" so as to come within coverage of the medical insurance policy must be determined by the trier of fact. WSAJF filed an amicus brief, arguing 1) conflicting medical expert opinions regarding causation create a genuine issue of material fact that precludes summary judgment and requires resolution by the trier of fact; and 2) proximate cause medical expert testimony does not require supporting statistical studies for admissibility. *See* WSAJ Fdn. Am. Br. # A-418. **Plaintiff Attorneys – Patrick Trudell; Howard Goodfriend, Victoria Ainsworth.**

• ***Keodalah v. Allstate Ins. Co***., __ Wn.2d __, 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 statutory violation of the duty of good faith in RCW 48.01.030. The 4-Justice dissent noted that the majority wholly failed to address the arguments raised by the plaintiffs and WSAJ 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***., __ Wn.2d __, 2019 WL 5251493 (Oct. 17, 2019). This case asked the Court to examine the circumstances under which 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. In a unanimous opinion, the Court held that neither doctrine barred the worker's subsequent claim under the facts of this case. Mr. 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 rheumatologist 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. The Department denied his application on the basis that the denial in the prior proceeding

was binding. Weaver appealed, and the Board held that the earlier determination that his cancerous mole did not arise out of his employment was binding in the subsequent action because the brain tumor arose out of the same malignancy. Weaver appealed to the superior court, which affirmed the Board's order, ruling that res judicata and/or collateral estoppel barred his claim. The Court of Appeals reversed. The Supreme Court agreed with the Court of Appeals, holding that res judicata, or claim preclusion, was inapplicable because that doctrine requires identity of subject matter, which was absent here. It further held that 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 in the Supreme Court, 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. Am. Br. # A-427. **Plaintiff Attorney – T. Jeffrey Keane.**

2018-19 Amicus Briefs Filed; Awaiting Decision

- ***Vargas v. Inland Washington LLC*, *et al.***, 5 Wn. App. 2d 1014 (2018) (Supreme Ct. # 96527-7). 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 in light of the *Afoa II* decision. WSAJ Foundation filed an amicus brief on review arguing: 1) in *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990), the Court imposed a duty as a matter of law on general contractors on a multi-employer jobsite to ensure compliance with safety regulations and the provision of a safe place to work for all workers on the worksite; 2) this duty necessarily includes placing vicarious liability on a general contractor for a subcontractor's failure to provide a safe workplace and to comply with safety regulations; and 3) nothing in *Afoa II* alters these general contractor duties. *See* WSAJ Fdn. Am. Br. # A-429. **Plaintiff Attorneys – Raymond Bishop, Derek Moore.**

- ***Peoples v. USAA*, *et al.*; *Stedman v. Progressive Direct Ins. Co***. (on certification from the federal district court from the Western District of Washington) (Supreme Ct. # 96931-1). 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 does not constitute an injury to "business or property" as required in RCW 19.86.090. The Foundation filed an amicus brief on review arguing: 1) the plain language of Ch. 19.86 RCW, Title 48 RCW and Ch. 284-30 WAC evidence legislative intent that all insurance transactions create a legally protected interest in an insured's property and are subject to the enforcement provisions of the CPA; 2) if the statutory schemes are considered ambiguous, the Court should hold that all insurance transactions, including those involving PIP coverage, are subject to the enforcement provisions of the CPA because this construction better effectuates the purposes of the CPA and the Insurance Code. *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*** (on direct review from Pierce County Superior Court order granting Ehrhart's partial motion for summary judgment) (S.Ct. # 96464-5). *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 should offer protection from liability in this or any other context. Brian Ehrhart, a resident of King County, died as a result of the hantavirus, 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 approximately two months prior to Ehrhart's death, 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. For over a month following the first reported hantavirus incident, the King County Health Department did not issue an advisory to local providers, and instead advised the infected party to seek an exterminator. However, when the County learned that the Seattle Times planned to publish an article regarding the outbreak, it issued an advisory. 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. The trial court "conditionally" granted Ehrhart's motion for summary judgment regarding the failure to enforce exception, finding it applicable here subject to further fact finding at trial. The County moved for direct discretionary review to the Washington Supreme Court, which the Court granted. WSAJ Foundation appeared as amicus curiae, 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.**

- ***Bednarczyk, et al. v. King County***, 7 Wn. App. 2d 647, 435 P.3d 325, *review granted*, 193 Wn.2d 1017 (2019). Plaintiffs were summoned for jury duty in King County. Plaintiffs filed suit alleging the minimal amount paid 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 trial court granted King County's motion for summary judgment and dismissed the plaintiffs' claims. In a 2-1 decision, the Court of Appeals affirmed. The majority held the Legislature's intent as expressed in RCW 2.36.080 is to ensure that jurors have the *opportunity* to be considered for jury service, which is accomplished by including jurors of low and moderate economic status in the master jury list and summoning them for jury duty. *See* 7 Wn. App. 2d at 652-56. The Court held that the legislative intent expressed in the statute is to protect the *opportunity* to serve as a juror, "not guarantee the right to actually serve

on a jury when summoned." *Id*. at 654. The Court held that jurors are not employees under the MWA, because jury service is performed as a civic duty, and because jury service is a duty, jurors are not entitled to compensation. *See id.* at 658. WSAJ Foundation filed an amicus brief in the Supreme Court 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 its judicial authority to protect the right to a jury trial. **Plaintiff Attorneys – Jeffrey L. Needle, Toby J. Marshall.**