WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Amicus Program
Year in Review
November 2017-November 2018

By

Valerie McOmie and Dan Huntington
for Foundation Board Dinner 11/8/18

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2017-18 Decisions in Which the Foundation Filed Amicus Briefs

• ***Bearden v. McGill***, 190 Wn.2d 444, 415 P.3d 100 (2018). In a 7-2 opinion (6 majority, 1 concurring, two dissenting), the Court reversed the Court of Appeals and held that under MAR 7.3, in calculating whether the party that requests trial de novo following mandatory arbitration "fails to improve" his or her position at the trial, the amount of statutory fees and costs awarded at arbitration and trial are included in the comparison. WSAJ Foundation submitted an amicus curiae brief and appeared at oral argument, arguing that under the "plain meaning" rule, the language used in MAR 7.3 requires a broad application that compares the final trial de novo judgment, including statutory fees and costs, with the final arbitration award, including statutory fees and costs. WSAJ Foundation further argued that if the Court finds MAR 7.3 ambiguous, legislative history supports including statutory fees and costs in determining whether a party improved its position. *See* WSAJ Fdn. Am. Br. # A-406. **Plaintiff Attorneys — Kathleen Garvin, Corrie J. Yackulic and Carla Lawrence.**

• ***Gilmore v. Jefferson County Public Transportation Benefit Area***, 190 Wn.2d 483, 415 P.3d 212 (2018). A unanimous Supreme Court reversed the Court of Appeals and held: 1) the trial court did not abuse its discretion in excluding the proposed testimony of Allan Tencer, PhD, on the basis that it was unreliable, misleading and confusing; 2) the trial court did not abuse its discretion in excluding evidence of the plaintiff's receipt of L & I benefits; and 3) the trial court did not abuse its discretion in denying defendant a new trial on the basis of plaintiff counsel's alleged inflammatory remarks in closing argument. In a concurring opinion, Justice Yu reiterated the "importance of carefully evaluating proposed expert testimony to determine its relevance and

admissibility in each individual case," and stated that to not have excluded Dr. Tencer's speculative conclusions "might well have been an abuse of discretion." WSAJ Foundation submitted an amicus curiae brief arguing that: a reviewing court may not reverse a trial court for an abuse of discretion unless the trial court applies the wrong legal standard or takes a position that no reasonable person would take; the trial court properly excluded the proposed testimony of Tencer under ER 403 because it was unreliable, prejudicial, confusing and misleading; the trial court properly excluded evidence of L & I benefits under RCW 51.24.100 and the strict exclusion rule, or, alternatively, evidence of benefits is properly excluded under ER 403 because it is prejudicial; and the trial court is in the best position to assess alleged misconduct during trial, and correctly exercised its discretion in ruling that no misconduct sufficient to justify a new trial occurred. *See* WSAJ Fdn. Am. Br. # A-407. **Plaintiff Attorneys — David S. Heller and Sunshine Bradshaw.**

• ***Chavez, et al. v. Our Lady of Lourdes Hospital, et al.***, 190 Wn.2d 507, 415 P.3d 224 (2018). In *Chavez*, a unanimous Supreme Court reversed the Court of Appeals and held that the trial court abused its discretion in denying class certification by finding that individual issues predominate over class issues and by failing to compare alternative methods of adjudication. The Court held that the plaintiff class met the predominance requirement and that a class action is superior to other methods of resolving the claims, and remanded to the trial court with instructions to certify the class. WSAJ Foundation submitted an amicus curiae brief arguing that Washington liberally interprets CR 23 to favor class certification, the trial court abused its discretion in refusing to certify a class without specifying facts to support its opinion that the

plaintiffs could not meet the predominance and superiority requirements of CR 23(b)(3), and the Court of Appeals erred by interpreting conflicting facts in favor of the defendant opposing class certification in order to show deference to the trial court's decision denying certification. *See* WSAJ Fdn. Am. Br. # A-408. **Plaintiff Attorneys — Jack B. Krona, Jr., James G. McGuinness and Aaron M. Streepy.**

• ***Durant v. State Farm Mut. Auto. Ins. Co.*,** 191 Wn.2d 1, 419 P.3d 400 (2018). *Durant* concerns whether a PIP insurer can restrict payment of medical expenses to expenses for services "essential in achieving maximum medical improvement." A unanimous Supreme Court said "no." Brett Durant's PIP policy with State Farm provided the insurer would pay for reasonable medical expenses incurred for necessary health care services "essential in achieving maximum medical improvement for the bodily injury sustained in the accident." State Farm denied payment for some expenses on the basis that Durant had reached "maximum medical improvement." The Supreme Court held that was an impermissible limitation of payment of PIP benefits. RCW 48.22.085 requires automobile insurers to offer PIP coverage; WAC 284-30-395(1) provides the ***only*** grounds for denial of PIP medical benefits are if the medical services (a) are not reasonable, (b) are not necessary, (c) are not related to the accident, or (d) are not incurred within three years of the accident. The Court held that State Farm's "maximum medical improvement" provision was inconsistent with the statutorily mandated coverage for PIP policies, and violated Washington's strong public policy in favor of full compensation for automobile accident victims. WSAJ Foundation submitted an amicus brief arguing that State Farm's policy limitation is inconsistent with the express language of the WAC provision, and

inconsistent with the declared public policy in Washington's PIP statutes and regulations. *See* WSAJ Fdn. Am. Br. # A-411. **Plaintiff Attorneys – Tyler K. Firkins, David Nauheim.**

• ***Afoa v. Port of Seattle***, 191 Wn.2d 110, 421 P.3d 903 (2018). *Afoa* raises several legal issues, including the relationship between fault allocation under RCW 4.22.070 and the doctrine of nondelegable duties, a defendant's assertion of nonparty fault under CR 12(i), and the concept of privity under the equitable doctrines of res judicata and collateral estoppel. Brandon Afoa worked as an employee of EAGLE, a company licensed to provide ground services at Sea-Tac Airport. Sea-Tac is owned and operated by the Port of Seattle. Afoa was severely injured when the ground services vehicle he was operating collided with broken equipment left on the tarmac, and Afoa sued the Port under the common law and the Washington Industrial Health and Safety Act of 1973 (WISHA), Ch. 49.17 RCW, for breach of its nondelegable duty to provide a safe workplace. The Port asserted nonparty fault, but did not initially name the at-fault nonparties. In a separate federal action by Afoa against several airlines that operated in that area of Sea-Tac and had executed licensing agreements with EAGLE, the federal district court granted the airlines' motion for summary judgment, holding there was insufficient evidence that the airlines retained control over the workplace. Thereafter, in the state action against the Port, the trial court permitted the Port to name the airlines as at-fault nonparties. At trial, the jury found Afoa suffered $40 million in damages, and allocated 25% fault to the Port, .2% to Afoa, and the remaining 74.8% equally divided among the airlines. The trial court entered judgment for Afoa against the Port solely for its $10 million portion allocated by the jury. The Court of Appeals reversed, holding that the Port's retention of the right to control workplace safety at Sea-Tac

imposed vicarious liability on the Port, that principles of vicarious liability are preserved in RCW 4.22.070(1)(a), and that the Port was jointly and severally liable for the negligence of the airlines. The Washington Supreme Court reversed the Court of Appeals, holding in a 5-4 opinion that the Port, as the jobsite owner that retained the right of control over workplace safety, had a nondelegable duty to maintain workplace safety under the common law and WISHA. However, the Court held that the Port was severally, and not jointly, liable, because the airlines were concurrent tortfeasors, and there was no factual showing that the Port retained the right to control the work of the airlines and that the airlines were acting as the Port's agents, as required to create vicarious liability under RCW 4.22.070(1)(a). The Court also held that under CR 12(i), the trial court properly permitted the Port to amend its answer to add the airlines as at-fault nonparties, notwithstanding significant delay, because Afoa could not demonstrate unfair surprise. Finally, the majority held that the equitable doctrines of res judicata and collateral estoppel did not bind the Port to the federal court's dismissal of the airlines, despite the fact that the Port and the airlines were represented by the same counsel and insured by the same insurer. The Court held that these facts alone do not establish privity, as privity requires a showing of control over the strategy of the litigation. In dissent, joined by three justices, Justice Stevens urged that the doctrine of nondelegable duties constitutes a form of vicarious liability, that principles of vicarious liability are preserved in RCW 4.22.070, and the Legislature did not evidence its intent to abrogate the nondelegable duty doctrine. WSAJ Foundation appeared as amicus curiae, arguing 1) a jobsite owner that retains the right to control safety in the workplace has a nondelegable duty to maintain workplace safety and may not delegate liability by allocating fault under RCW 4.22.070, and 2) nonparty fault is an affirmative defense a defendant must timely

plead, and the trial court erred in failing to determine whether the Port's late motion to amend constituted waiver. *See* WSAJ Fdn. Am. Br. # A-409. After the Court issued its decision, Afoa filed a Motion for Reconsideration on all issues, and the Foundation submitted an Amicus Curiae Memorandum on Reconsideration, addressing only the CR 12(i) issue. On October 11, 2018, the Court denied the Motion for Reconsideration. **Plaintiff Attorneys — Derek Moore, Raymond Bishop and Michael Schein.**

• ***Martin v. Gonzaga***, __ Wn.2d __, 425 P.3d 837 (2018). This employment case provided the Washington Supreme Court with the opportunity to address the elements of proof required to state a claim for wrongful discharge in violation of public policy that is predicated on whistleblower activities. Plaintiff David Martin was terminated by Gonzaga, allegedly for insubordination, after he attempted to voice a variety of concerns to Gonzaga's Athletic Director and University President about safety and other necessary improvements in Gonzaga's athletic facilities. Martin sued Gonzaga for wrongful discharge in violation of public policy, alleging he had been terminated in substantial part because he voiced concerns about safety issues on campus, that his complaints constitute a form of whistleblowing, and that termination on the basis of whistleblowing is against public policy. The trial court granted Gonzaga's motion for summary judgment. In a split opinion, the Court of Appeals, Division III, affirmed the trial court's ruling. The Supreme Court held that Martin failed to state a cognizable wrongful discharge claim against Gonzaga, primarily because he had not created a genuine issue of material fact that Gonzaga's decision to discharge Martin was motivated by his public policy related conduct. However, the Court articulated several key points of law that the Foundation

urged in its amicus brief: 1) The Perritt test does not apply to wrongful discharge claims that are predicated on whistleblower activity, and that instead the traditional formulation of the tort articulated in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984), and refined by *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), govern the elements of the claim; 2) the employer has the burden of proof regarding the "overriding justification" prong of the Perritt test; and 3) the so-called "after acquired evidence doctrine," which has been used by some courts of appeals as a damage reducing factor in employment cases, does not apply to the overriding justification prong of the Perritt test. WSAJ Foundation appeared as amicus curiae, arguing that the "Perritt test" in general, and its "overriding justification" prong in particular, do not apply to a claim for wrongful discharge predicated on whistleblowing. Moreover, even were the Perritt test applicable, its overriding justification prong should be an affirmative defense that a defendant is permitted to assert only when it concedes causation but offers a competing interest that overrides the public policy protected by the employee's conduct. *See* WSAJ Fdn. Am. Br. A-416. **Plaintiff Attorney — Julie Watts.**

- ***HBH v. State,*** — Wn.2d —, — P.3d — (Nov. 1, 2018; S.Ct. # 94529-2). In *HBH v. State,* the Court held in a 5-4 opinion that under *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) and its progeny, as well as *Restatement (Second) of Torts* § 315(b) (1965) and its related Restatement provisions, §§ 314A & 320, the Department of Social and Health Services (DSHS) has a common law duty to protect the foster children in its charge. In HBH, Plaintiffs were foster children placed by DSHS in an abusive foster home, where they were later adopted. Plaintiffs

brought suit against DSHS for failing to protect them during the foster period, including taking reasonable steps to investigate the foster family and providing ongoing monitoring to ensure their safety. The trial court granted DSHS's motion for summary judgment, concluding DSHS had no common law duty to protect in this context. The Court of Appeals reversed, holding that DSHS has a special relationship with the foster children in its charge, giving rise to a common law duty of protection, and that this duty is separate and distinct from the statutory duty under RCW 26.44.050 (the statutory claim is limited to claims of negligence based on the failure to investigate actual reports of child abuse).[1] The Supreme Court affirmed, holding 1) under the statutory waiver of sovereign immunity, RCW 4.92.090, the State is liable to the same extent *as if* it were a private entity, and there need not be a counterpart to the public entity in the private sector to give rise to government liability, and 2) the essential feature of the special relationship duty to protect is the entrustment of care for a vulnerable person, and there is no legal basis for limiting the duty to custodial relationships. WSAJ Foundation appeared as amicus curiae, arguing 1) the State does not enjoy sovereign immunity in this context, and 2) the essential nature of the special protective relationship under Restatement (Second) of Torts § 315(b) is the entrustment of responsibility for the protection of a vulnerable person, and physical custody should not be required. *See* WSAJ Fdn. Am. Br. # 410. **Plaintiff Attorneys — Julie Kays & Lincoln Beauregard; Phil Talmadge.**

• ***Rublee v. Pfizer, Inc.***, __ Wn.2d __, __ P.3d __ (Nov. 1, 2018; S.Ct. # 94732-5). In a 5-4 opinion, the Washington Supreme Court held 1) the *Restatement (Second) of Torts* § 400

[1] RCW 74.13.031(6) now requires DSHS to conduct "private and individual face to face visits."

"apparent manufacturer" doctrine applies in Washington for common law product liability claims predating the 1981 product liability act; 2) in order to determine whether a nonmanufacturing entity is an "apparent manufacturer," the Court applies an objective reliance test from the perspective of an ordinary, reasonable consumer; 3) the apparent manufacturer doctrine is not limited to sellers and others in the "chain of distribution." Following Vernon Rublee's death from mesothelioma, his estate filed a wrongful death claim against Pfizer. Rublee had worked at a naval shipyard around equipment coated with insulation cement containing asbestos, which had been manufactured by Quigley Co. Pfizer acquired Quigley as a wholly owned subsidiary. When Quigley declared bankruptcy, the estate filed a claim alleging that Pfizer was an "apparent manufacturer" under *Restatement (Second)* § 400. Section 400 provides that "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." The Court of Appeals affirmed the summary judgment dismissal of Rublee's claim, finding that while the evidence showed that Pfizer and Quigley had a corporate relationship, no evidence provided a reasonable inference that Pfizer manufactured the asbestos products. The Supreme Court found that genuine issues of material fact exist as to whether a reasonable consumer could believe that Pfizer was a manufacturer of the asbestos products that caused Rublee's death, and reversed the Court of Appeals. WSAJ Foundation filed an amicus brief arguing that the Supreme Court should adopt *Restatement* § 400, that § 400 should not be construed to require proof of reliance, that if the Court requires proof of reliance the objective reliance test from the viewpoint of the end user of the product should be adopted, and that § 400 apparent manufacturer liability is not limited to sellers and others in the chain of distribution. *See*

WSAJ Fdn. Am. Br. # A-413. **Plaintiff Attorneys — Matthew Bergman and Leonard Feldman.**

• ***Hendrickson v. Moses Lake School District***, — Wn.2d —, — P.3d — (Nov. 1, 2018; S.Ct. # 94898-4). In a unanimous opinion, the Washington Supreme Court held 1) the special relationship duty to protect owed by a school to its students is a duty of ordinary care, and an instruction describing the duty of ordinary care is generally sufficient to instruct the jury on the applicable law, and 2) the special relationship duty to protect is generally compatible with a contributory negligence instruction, and a defendant is thus permitted to assert a contributory negligence defense in this context unless the facts fall within a recognized exception to this general rule. Heidi Hendrickson, a 15-year-old high school student, injured her thumb while operating a table saw in her shop class. Hendrickson brought suit against the school, asserting negligence in the maintenance of its equipment, in providing reasonable instruction, and in providing adequate supervision. Before trial, Hendrickson requested a jury instruction explaining the nature of the enhanced duty to protect under the special relationship doctrine, which the court rejected. Moses Lake requested an instruction on contributory negligence, which the trial court gave, over Hendrickson's objection. The jury found that Moses Lake was negligent but that its negligence did not cause Hendrickson's injury. The Court of Appeals, Division III, reversed the trial court's ruling as to the special relationship instruction, but affirmed its decision to allow the contributory negligence instruction. On review to the Washington Supreme Court, WSAJ Foundation appeared as amicus curiae, arguing 1) where a plaintiff asserts breach of the enhanced duty to protect under the special relationship doctrine, the jury should be instructed as

to the unique nature of that duty, which includes anticipating dangers and taking reasonable precautions to prevent harm; and 2) the duty to protect, which includes a duty to protect the plaintiff from his or her own negligence, is generally incompatible with a contributory negligence defense. *See* WSAJ Fdn. Am. Br. # A-415. **Plaintiff Attorneys — Matthew Albrecht, David DeWolf and George Ahrend.**

2017-18 Amicus Briefs Filed; Awaiting Decision

• ***Murray v. Department of Labor and Industries***, 1 Wn. App. 2d 1, 403 P.3d 949 (2017), *review granted,* 190 Wn.2d 1001 (2018) (S.Ct. # 95251-5). *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, Title 51 RCW. Michael Murray injured his hip at work, and the Department allowed his claim. 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. Murray appealed, and the Board of Industrial Insurance Appeals and the superior court granted summary judgment for the Department on the basis that the HTCC's determination that FAI surgery was not a covered benefit precluded an individual review as to whether that surgery was "proper and necessary" medical treatment for Murray. 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." WSAJ

Foundation filed an amicus brief, arguing that 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. 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. *See* WSAJ Fdn. Am. Br. # A-414. **Plaintiff Attorney — Patrick Palace and Jordan Couch; Philip Buri.**

- ***Karstetter v. King County Corrections Guild***, 1 Wn. App. 2d 822, 407 P.3d 384 (2017), *review granted,* 190 Wn.2d 1018 (2018) (S.Ct. # 95531-0). *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 of 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 Foundation appeared as amicus curiae on the wrongful discharge issue only, addressing a limited aspect of the case: whether the 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.**

- ***Strauss v. Premera Blue Cross***, 1 Wn. App. 2d 661, 408 P.3d 699 (2017), *review granted*, 190 Wn.2d 1025 (2018). This case concerns coverage under 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. The trial court granted summary judgment for Premera, which was affirmed by the Court of Appeals on the basis that "[b]ecause 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 at 683-84 (brackets added). On review to the Supreme Court, 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.**

• ***Beltran-Serrano v. City of Tacoma*** (S.Ct. # 95062-8; on direct review from order of Pierce County Superior Court granting the City of Tacoma's motion for summary judgment). *Beltran-Serrano* raises issues related to accountability for tortious activity involving conduct undertaken by governmental entities in their governmental, as opposed to their proprietary, capacity. Tacoma Police Officer Michele Volk stopped to question Cesar Beltran-Serrano. He was posing no threat and committing no crime, but she 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 she tased him. The tasers caused him to panic. He tried to run, and she shot him four times. Beltran-Serrano sued the City of Tacoma, 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 in the use of deadly force, and that Beltran-Serrano's claims are limited to assault and battery. The trial court agreed, and dismissed the negligence claims. The Washington Supreme Court accepted direct review. WSAJ Foundation filed an amicus brief, arguing 1) the Public Duty Doctrine does not apply to claims brought under the common law; 2) negligence related to the unreasonable use of force may be brought under existing common law doctrines recognized in Washington, including the duty to prevent foreseeable harm resulting from one's own affirmative acts of misfeasance; 3) in addition to

vicarious liability for the negligence of its officer, the City may be directly liable for negligent training, and where such a claim is not redundant with a claim asserting vicarious liability, a claim for negligent training should not require proof that the employee was acting outside the scope of employment; and 4) for the deterrent purposes of tort law to be realized, it is critical that the law recognize a claim arising out the unreasonable use of force by police that permits consideration of pre-shooting conduct. *See* WSAJ Fdn. Am. Br. # 419. **Plaintiff Attorneys — John R. Connelly, Jr., Micah R. LeBank and Meaghan M. Driscoll; Philip A. Talmadge.**

- ***L.M. v. Hamilton***, 200 Wn. App. 535, 402 P.3d 870 (2017), *review granted*, 191 Wn.2d 1011 (2018). This case concerns whether Allan Tencer, PhD, a biomechanical engineer, is qualified to provide expert testimony regarding the cause of a brachial plexus injury L.M. suffered at or near the time of his birth. Tencer testified in a jury trial regarding the forces applied on a newborn by the natural forces of maternal labor, and the forces applied by a health care provider assisting in delivery, and gave an opinion that the natural forces of maternal labor alone could cause a brachial plexus injury. The Court of Appeals affirmed the admission of Tencer's testimony, holding that *Frye* was not implicated in the admission of testimony regarding the natural forces of labor, and the testimony was helpful to the jury under ER 702. On review to the Supreme Court, WSAJF 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 overly speculative and too general to be helpful to the jury. *See* WSAJ Fdn. Am. Br. #

A-420. **Plaintiff Attorneys – Ron Perey, Simeon Osborn, Susan Machler and Carla Tachau Lawrence.**