A Selection of Recent Tort/ PI Supreme Court Cases

Spokane County Bar Association CLE: *How To Succeed As A Plaintiff's Attorney*

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by

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Recent Decisions

- ***L.M. v. Hamilton***, 193 Wn.2d 113, 436 P.3d 803 (2019).

  Issues: *Frye* standard; abuse of discretion standard; Dr. Allan Tencer

  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.

- ***Adamson v. Port of Bellingham***, 193 Wn.2d 178, 438 P.3d 522 (2019).

  Issues: Premises liability/landlord liability; possession and control of leased premises

  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, taken together, created sufficient control of the property such that the Port was liable as a premises owner. Notably, the Court quoted from Comments c and d of *Restatement (Third) of Torts* § 49 as clarifying that "'[a] person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land' and explains that control over certain areas may be shared and '[e]ven a possessor who cedes temporary control of property to another may be responsible as a possessor for conditions on the land that are not in the effective control of the other because of the temporal and practical limits of the other's possession.'" *Adamson*, 193 Wn.2d at 187.

- ***Beltran-Serrano v. City of Tacoma***, 193 Wn.2d 537, 442 P.3d 608 (2019).

  Issues: Government liability; public duty doctrine; overlapping claims based on intentional and negligent conduct

  Beltran-Serrano raises issues related to the tort duties owed by police officers with respect to the use of deadly force. Tacoma Police Officer Michel Volk stopped to question Cesar Beltran-Serrano. Beltran-Serrano was posing no threat and committing no crime, but Volk approached him nonetheless, 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. Volk nonetheless approached Beltran-Serrano without waiting for backup, and began questioning him. He became flustered and backed away, and 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 to 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 of negligence may lie for the unreasonable use of deadly force arising out of an officer's pre-shooting conduct, notwithstanding the fact that the ultimate 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.

- ***Vargas v. Inland Washington LLC*, *et al.***, 194 Wn.2d 720, 452 P.3d 1205 (2019).

  Issues: Liability of a general contractor for injuries on multi-employer jobsite; effect of *Afoa v. Port of Seattle* on liability of general contractors

  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 under 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.

- ***Ehrhart v. King County***, 195 Wn.2d 388, 460 P.3d 612 (2020).

  Issues: Government liability; tort duties of public health departments for outbreaks of infectious diseases; public duty doctrine

  Ehrhart raises issues related to the tort duties owed by Public Health Departments arising out of outbreaks of "notifiable conditions" under WAC 246-101-505, and whether the public duty doctrine offers protection from liability in this context. Hantavirus is a rare and often fatal disease that presents similar to the flu and is contracted by exposure to deer mouse droppings. An incident of the Hantavirus occurred in King County near Issaquah in November 2016, and in accordance

with WAC 246-101-105, which requires that Hantavirus cases be reported to local health departments within 24 hours, the incident was reported to the King County Department of Health. WAC 246-101-505 requires local health departments to "review and determine appropriate action" for each reported case of a notifiable condition, which may include issuance of public health advisories. In December 2016, the King County Health Department reviewed the case but did not issue an advisory to local providers. In February 2017, Brian Ehrhart, who lived near Issaquah, was seen in a hospital emergency room with flu-like symptoms, and was discharged home with instructions to return if his symptoms worsened. The next day Ehrhart was rushed to a hospital emergency room and died shortly thereafter from Hantavirus. Ehrhart's estate sued the County for negligence in failing to reasonably discharge its duty to take appropriate action under WAC 246-101-505. The County responded that the claim was barred by the public duty doctrine, as any duty it owed was owed to the public as a whole and not to any individual plaintiff or class of persons. Ehrhart responded that the case fell within two exceptions to the doctrine – the "failure to enforce" exception and the "rescue doctrine" exception. In a unanimous opinion, the Supreme Court held that the county health department's responsibility to issue health advisories under the WAC provision did not create a tort duty owed to the decedent individually, no exception to the public duty doctrine applied, and the county was entitled to summary judgment dismissal under the public duty doctrine.

- ***W.H. v. Olympia Sch. Dist.***, 195 Wn.2d 779, 465 P.3d 322 (2020).

  Issues: Discrimination in public accommodations under the Washington Law Against Discrimination (WLAD); WLAD standard of liability of schools for sexual assault inflicted on students by school employees

A school district employee sexually abused the minor plaintiffs, who were students of the school. Plaintiffs sued the district in federal district court, asserting a number of causes of action, including a claim under the Washington Law Against Discrimination (WLAD), RCW 49.60.215, alleging the minor plaintiffs' treatment constituted sex discrimination in a place of public accommodation. The federal district court certified questions to the Washington Supreme Court to clarify the application of RCW 49.60.215 in this context. The Supreme Court held: 1) under RCW 49.60.215 as interpreted in *Floeting v. Group Health Cooperative*, 192 Wn.2d 848, 434 P.3d 39 (2019), public accommodations, including school districts, are subject to strict liability for discrimination perpetrated by their employees; 2) "discrimination" for the purposes of a WLAD public accommodations claim encompasses intentional sexual misconduct.

- ***Gerlach v. The Cove Apartments, LLC, et al.***, 196 Wn.2d 111, 471 P.3d 181 (2020).

  Issues: Tort liability of landlords for injuries to tenants' guests under the implied warranty of habitability; tort liability of landlords for injuries to tenants' guests under the Residential Landlord Tenant Act; inadmissibility of BAC measurement to prove extent of intoxication; inadmissibility of expert testimony comparing medical expenses to Medicare reimbursement rates to contest reasonableness

  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; 3) the RLTA does not support an implied cause of action for personal injury by the guest of a tenant; and 4) the trial court did not abuse its discretion in excluding expert testimony comparing Medicare reimbursement rates to contest the reasonableness of the plaintiff's medical expenses.

- ***Young v Toyota Motor Sales, Inc.***, 196 Wn.2d 111, 472 P.3d 990 (2020).

  Issues: Consumer Protection Act

  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 appellate 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 disagreed with the Court of Appeals and 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.

- ***Hermanson v. MultiCare Health System, Inc.***, 196 Wn.2d 578, 475 P.3d 484 (2020).

  Issues: Corporate attorney-client privilege & physician-patient privilege; application of the rule from *Youngs v. Peacehealth*, 179 Wn.2d 645 (2014) in the context of independent contractors

Hermanson was involved in an automobile accident and treated for his injuries at a MultiCare hospital by MultiCare-employed health care workers and by an ER physician employed by an independent contractor. Hermanson alleged that his healthcare providers gave the results of his blood-alcohol screen to police officers without Hermanson's consent. Hermanson filed suit against MultiCare and unnamed employees, alleging causes of action for negligence, defamation, false imprisonment and violation of the physician-patient privilege under RCW 5.60.060(4). Even

though the ER physician and his employer were not named as defendants, MultiCare, the ER physician and the ER physician's employer retained a single law firm to represent all of those entities under a "joint representation" agreement. Defense counsel sought a protective order confirming its right to have ex parte privileged communications with its clients, including the ER physician and the MultiCare employees who had direct knowledge concerning the incidents in Hermanson's complaint. Both plaintiff and defendants sought discretionary review of the trial court's order allowing some, but not all, of the requested ex parte communications. In a 2-1 decision, the Court of Appeals held: 1) MultiCare's counsel was prohibited from ex parte privileged communication with the ER physician, because he was not a MultiCare employee; 2) ex parte privileged communication was allowed with MultiCare's employed nurses and social worker who treated Hermanson and had knowledge of the incidents in his complaint. Both plaintiff and defendants petitioned for review. In a 6-3 decision, the Supreme Court majority held: 1) MultiCare may have ex parte privileged communications with its independent contractor's employee (the ER physician) limited to the facts of the alleged negligent event; 2) MultiCare may have ex parte privileged communications with its employed nurses and social worker limited to the facts of the alleged negligent event. The majority reasoned that where the facts indicate that the corporation exercised sufficient control over the independent contractor to establish agency, the corporate attorney client privilege extends to the independent contractor. On the facts here, the Court concluded that the nonparty ER physician, who was an independent contractor of MultiCare, still maintained a principal-agent relationship with MultiCare and served as the "functional equivalent" of a MultiCare employee such that the corporate attorney-client privilege applied. The dissent agreed that defense counsel should be entitled to ex parte privileged communication with the nurses and social worker employed by MultiCare, but argued that the corporate attorney-client

privilege should not be extended to apply to an independent contractor, i.e., the ER physician, and such an extension significantly harms policy concerns which support the physician-patient privilege.

- ***Mancini v. City of Tacoma***, __ Wn.2d __, 479 P.3d 656 (2021).

  Issues: Government liability; tort duties of law enforcement; negligent investigation; negligent execution of a search warrant

  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. In an 8-1 opinion, the Supreme Court reversed the Court of Appeals and reinstated the jury's verdict. The Court held that the defendants were not entitled to discretionary governmental immunity, because that immunity is only available for high-level policymaking decisions of a governmental entity and is not applicable to everyday operational level acts, such as executing a search warrant.

The Court also held that the public duty doctrine did not bar Mancini's claim, because this was not a case where the City's duty ran solely to the public at large, but rather involved a case of affirmative misfeasance directed by the police to a particular individual and the police had a duty to exercise reasonable care to refrain from causing foreseeable harm in their interactions with Mancini. The Court held that the jury's finding of negligence was appropriate because police officers have an actionable tort duty to exercise reasonable care in executing search warrants and detaining residents during the execution of a warrant. The Court did not reach the issue of whether Mancini could or could not recover for negligent police investigation. However, the majority opinion indicated that its previous statements acknowledging the "no duty" rule in negligent investigation claims have no precedential value. *See Mancini*, 479 P.3d at 664 n.7 ("we have never addressed an actual negligent investigation claim outside the child abuse context"). Additionally, the sole dissenting Justice stated that she would recognize a cause of action for negligent police investigation. *See Mancini*, *supra* at 669 (Madsen, J., dissenting).

- ***Meyers v. Ferndale Sch. Dist.,*** __Wn.2d __, 481 P.3d 1084 (2021).

  Issues: School liability for student injuries; the relationship between duty and legal causation

  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. The appellate court clarified that the issue was not whether the particular accident was foreseeable, but instead whether the harm suffered fell within the general field of danger that should have been anticipated, and that there was a question of fact as to this issue. The court further held that the district's legal cause challenge, which asserted that as a matter of public policy the injury was too remote from the alleged negligence to warrant liability, was resolved by the presence of duty. On review to the Supreme Court, the Court agreed with the appellate court's reasoning regarding foreseeability. Regarding legal causation, the Supreme Court criticized the Court of Appeals' analysis because it "erroneously conflated the duty inquiry with the legal cause inquiry" and "seemingly concluded that the establishment of duty also satisfies legal causation." *Meyers*, 2021 WL 822221 at * 4. The Supreme Court conducted a legal cause analysis separate from duty, placing particular emphasis on the special relationship between schools and students, which gives rise to a duty to protect students from reasonably anticipated dangers. *See Meyers*, *supra* at * 6. Ultimately, the Supreme Court affirmed the Court of Appeals, holding that the school had a duty and that legal cause was met because the accident was not too remote to preclude liability.

Pending Cases

- ***Coogan v. Borg-Warner Morse TEC Inc.***, *noted at* 12 Wn. App. 2d 1021, 2020 WL 824192, *review granted*, 195 Wn.2d 1024 (2020).

  Issues: Appellate review of jury verdicts for excessiveness/inadequacy; "shocks the conscience" standard

  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. On review, the Supreme Court may consider a number of issues, including whether an appellate court is permitted to reverse an award of damages in a jury verdict solely on the basis that the amount of the damage award shocks the conscience of the appellate court, after the trial court denied a motion for a new trial or remittitur.

- ***Johnson v. State of Washington, Department of Liquor Control Board***, *noted at* 10 Wn. App. 2d 1011, 2019 WL 4187744, *review granted*, 196 Wn.2d 1024 (Table) (December 2, 2020).

  Issues: Premises liability; the role of actual or constructive notice in claims against business owners for temporary dangerous conditions resulting in injury to invitees

Johnson brought a cause of action against the State alleging that she suffered damages from injuries that occurred as the result of a slip and fall when she entered a State-owned retail store as a customer. Following a jury verdict in favor of the plaintiff, the Court of Appeals held that the trial court erred in denying the State's motion for a directed verdict on the basis that Johnson failed to present evidence that the store employees had actual or constructive notice of a dangerous condition, which precludes recovery. On review, the Supreme Court was asked to address whether the traditional rule that required actual or constructive notice for a business owner to be liable to customers for a temporary unsafe condition has been replaced by Washington's adoption of *Restatement (Second) of Torts* § 343 and its standard that requires a possessor of premises to exercise reasonable care to protect invitees from unsafe conditions of which the possessor knows or would discover through the exercise of reasonable care. If the notice requirement remains, the Court was asked to determine whether the circumstantial evidence presented at trial may be used to establish this requirement.

- ***Turner v. Washington State Department of Social and Health Servs., Lewis Mason Thurston Area Agency on Aging***, Supreme Court No. 99243-6.

  Issues: **Government liability; public duty doctrine; common law and statutory duties owed by DSHS and private case management providers to disabled and elderly patients in long term care**

  Turner raises issues related to the duties owed by the Department of Social and Health Services (DSHS) and Area Agencies on Aging (AAAs) to disabled persons who suffer injury or death while under their care and supervision. Kent Turner suffered from multiple sclerosis and was

confined to a wheelchair and unable to perform routine tasks including bathing, toileting and wheelchair transfers. When his wife, who was his primary caretaker, was diagnosed with cancer and had to undergo extensive treatment, Turner applied for assistance through DSHS. A DSHS caseworker conducted an evaluation to determine Turner's medical need and financial eligibility for services and concluded that he needed extensive assistance in many areas, including bathing, toileting and dressing, and required 24 hour care. Turner was placed in a residential skilled nursing facility. Turner was soon visited by a different DSHS caseworker, whose job was to relocate patients from nursing facilities to a lesser level of care that could meet the patient's needs, in order to save expenses. Turner reiterated his intent to remain in a skilled nursing facility until he could return home to his wife. The caseworker conducted additional evaluations, and although she did not alter any of the findings regarding Turner's limited functional ability, she did change the recommended level of care to "in-home." Turner agreed to move to a private apartment, where he lived alone and was provided two, two-hour blocks of in-home care each day. After Turner moved to the apartment, DSHS contracted with Lewis Mason Thurston Area Agency on Aging (LMT) to take over case management services. Despite multiple reports and incidents demonstrating Turner's inability to care for himself safely and adequately while living in his apartment, neither DSHS nor LMT took any action. Less than two months after he had moved into the apartment, Turner died alone in a fire of unknown origin. Turner's estate filed a wrongful death action against DSHS and LMT, which was dismissed on summary judgment on the basis that there was no actionable duty owed to protect Turner. On review, the Supreme Court was asked to determine the statutory and common law duties owed by DSHS and case management service providers to patients who are injured or killed while receiving long-term care services under their supervision.