



WASHINGTON STATE ASSOCIATION
for

J U S T I C E

formerly WASHINGTON STATE TRIAL LAWYERS ASSOCIATION

FOUNDATION

2011 Decisions – Amicus Case Summaries

Rahman vs. State of Washington, 170 Wn.2d 810 (2011), holds that the state is vicariously liable for injuries to an unauthorized passenger in a state-owned vehicle, even though the employee-driver was violating a work rule against giving rides to unauthorized passengers. WSAJ Foundation filed an amicus curiae brief and participated in oral argument. *Plaintiff Attorneys – WSAJ members Karen Kay, of the Law Office of Harold Carr, PS, and Candiss Anne Watson, of the Law Office of Anne Watson PLLC.*

Beggs vs. Department of Social & Health Servs., 171 Wn.2d 69 (2011), holds that there is an implied cause of action against mandatory reporters under RCW 26.44.030 for failure to report suspected child abuse, and that when the mandatory reporters are health care providers, this cause of action is not subject to the requirements of Ch. 7.70 RCW because reporting suspected child abuse is not “health care.” WSAJ Foundation filed an amicus curiae brief and participated in oral argument. *Plaintiff Attorneys – WSAJ members Allen M. Ressler, Timothy Rolland Tesh, and Cynthia Novotny, of Ressler & Tesh PLLC.*

Schnall vs. AT & T Wireless Services, Inc., 171 Wn.2d 260 (2011), withdrew a prior decision in the case upon reconsideration. Although the Court determined that the trial court did not abuse its discretion in declining to certify a nationwide class action against AT&T for contract and Consumer Protection Act claims arising out of its cell phone billing practices, the Court stated that a statewide class would appear to meet the requirements for certification. With respect to the CPA claims in particular, the Court stated that there are “credible reasons” to believe that the CPA should nonetheless have extraterritorial effect. The Court also quoted its earlier decision in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59 (2007), for the proposition that the Court has firmly rejected the principle that reliance is necessary to prove causation under the CPA. In both respects, the decision clarifies questions about CPA claims raised after the original *Schnall* opinion. WSAJ Foundation filed an amicus curiae memorandum in support of reconsideration. *Plaintiff Attorneys – WSAJ members Daniel F. Johnson and David E. Breskin, of Breskin Johnson & Townsend PLLC, and William W. Houck.*

Michaels vs. CH2M Hill, Inc., 171 Wn.2d 587 (2011), holds that the design professional immunity statute, RCW 51.24.035, does not apply to liability for injuries sustained in an area where no construction was taking place, and also confirmed that such immunity does not apply to the negligent preparation of design plans. WSAJ Foundation filed an amicus curiae brief. *Plaintiff Attorneys – WSAJ members Daniel E. Huntington, of Richter-Wimberley PS, Gary N.*

Bloom, of Harbaugh & Bloom PS, John R. Layman, of Layman, Layman & Robinson PLP, and George M. Ahrend, of the Ahrend Law Firm PLLC. (Note: Mr. Bloom and Mr. Ahrend were recused from participating on behalf of the Foundation.)

Unruh vs. Cacchiotti, 172 Wn.2d 98 (2011), holds that amendments to medical malpractice limitations statutes, which eliminated tolling of the limitations period during a patient's minority, RCW 4.16.190, and which imposed an eight-year repose period, RCW 4.16.350(3), do not apply retroactively. The Court also held that service of a request for mediation under RCW 7.70.110 may be served on a defendant health care provider's insurance representative rather than on the defendant personally, and that the tolling effects of a request for mediation under RCW 7.70.110 and presuit notice of claim under RCW 7.70.100 are cumulative. The Court declined to reach constitutional issues raised by the amendments. WSAJ Foundation filed an amicus curiae brief. *Plaintiff Attorneys – WSAJ members Paul W. Whelan, Garth L. Jones, and Ray W. Kahler, of Stritmatter Kessler Whelan Coluccio.*

Dowler vs. Clover Park School Dist., 172 Wn.2d 471 (2011), holds that special-education students and their parents and guardians are not required to exhaust administrative remedies under the federal Individuals with Disabilities in Education Act, 20 U.S.C. § 1415(*l*), or under Washington state law before filing a civil action in state court for disability discrimination in violation of the Washington Law Against Discrimination, Ch. 49.60 RCW, or for other tort claims, including negligence and outrage. WSAJ Foundation filed an amicus curiae brief. *Plaintiff Attorneys – Philip A. Talmadge and Emmelyn Hart, of Talmadge/Fitzpatrick, and WSAJ member Thaddeus P. Martin.*

Cudney v. ALSCO, Inc., --- Wn.2d ---, 259 P.3d 244 (2011), *reconsideration pending*, holds that Washington's public policy of promoting workplace safety is adequately protected under the Washington Industrial Safety and Health Act, Ch. 49.17 RCW, and that the state's public policy against drunk driving is adequately protected by laws against driving while intoxicated, RCW 9.91.020 & 46.61.504, so that an employee who was allegedly fired for reporting to his employer that a supervisor drove a company vehicle while intoxicated did not satisfy the "jeopardy" element of a claim for wrongful discharge in violation of public policy. WSAJ Foundation filed an amicus curiae brief, participated in oral argument, and filed an amicus curiae memorandum on reconsideration, which is still pending. *Plaintiff Attorneys – Keller W. Allen and Mary Palmer, of the Law Firm of Keller W. Allen PC.*

Anderson vs. Akzo Nobel Coatings Inc., --- Wn.2d ---, 260 P.3d 857 (2011), holds that, under the *Frye* test for the admissibility of expert testimony as applied in Washington, expert testimony is admissible if the expert's theory and methodology are generally accepted, even if the expert's conclusions are not generally accepted. WSAJ Foundation filed an amicus curiae brief and participated in oral argument. *Plaintiff Attorneys – WSAJ members Lincoln C. Beauregard and John R. Connolly, Jr., of the Connolly Law Offices.*

Mohr vs. Grantham, --- Wn.2d ---, 262 P.3d 490 (2011), holds that a claim for "loss of a chance," first recognized by a plurality in *Herskovits v. Group Health Coop.*, 99 Wn.2d 609 (1983), applies in the medical malpractice context to injuries short of death, i.e., lost chance of a better outcome, and is not limited to cases involving a lost chance of survival. The Court further

stated that the loss of a chance is itself a form of compensable injury. WSAJ Foundation filed an amicus curiae brief and participated in oral argument. *Plaintiff Attorney – Cheryl R.G. Adamson.*

2011 Amicus Briefs filed. Decisions Pending

A-326 Townsend vs The Quadrant Corporation (S.C. #84422-4), involves (1) the extent to which minor children of signatories to a residential real estate purchase and sale agreement are bound by an arbitration clause in the agreement in pursuing personal injury claims against the builder and seller of the residence? and (2) whether procedural unconscionability alone is sufficient to avoid enforcement of an arbitration clause? WSAJ Foundation filed an amicus curiae brief. *Plaintiff Attorneys – Lory Ray Lybeck, Katherine Lynn Felton, Brian Clifford Armstrong, and Benjamin R. Justus, of Lybeck Murphy LLP.*

A-327 Matsuyuk v. State Farm Fire & Cas. Co. (S.C. #84686-3), and **Weisman v Safeco Ins. Co.** (S.C. #85012-7), involve whether the equitable sharing rule developed in *Mahler v. Szucs*, 135 Wn.2d 398 (1998), and subsequent cases applies when the plaintiff-insured receives PIP coverage from the tortfeasers' liability insured, and settles with the tortfeasor. WSAJ Foundation filed an amicus curiae brief on the merits. *Plaintiff Attorneys – WSAJ members David R. Hallowell, Matthew J. Ide, and Craig F. Schauerermann.*

A-328 Cedell vs. Farmers Insurance Company of Washington (S.C. #85366-5), involves (1) whether Washington's "civil fraud" exception to the attorney-client privilege and work product rule apply in the first-party insurance bad faith context, even if the bad faith conduct in question does not rise to the level of actual fraud? and (2) whether the attorney-client privilege and work product protection apply to materials generated prior to the denial of coverage or the cessation of attempts to resolve the claim? WSAJ Foundation filed an amicus curiae memorandum in support of review and an amicus curiae brief on the merits, and also participated in oral argument. *Plaintiff Attorney – Stephen L. Olson, of Olson Zabriskie Campbell.*

A-329 Gendler vs. Batiste (S.C. #85408-4), involves whether Washington State Patrol vehicle accident records by location are subject to disclosure under the Public Records Act, Ch. 42.56 RCW, or whether they are privileged under federal law, 23 U.S.C. § 409, because they are stored in an integrated database maintained by the Washington State Department of Transportation. WSAJ Foundation filed an amicus curiae brief on the merits. *Plaintiff Attorneys – WSAJ members Keith L. Kessler, of Stritmatter Kessler Whelan Coluccio, and Kenneth Masters, Masters Law Group PLLC.*

A-330 Macias vs. Saberhagen Holdings, Inc. (S.C. #85535-8), involves the nature and extent of a manufacturer's duty to warn, under Washington common law negligence and strict products liability and the Washington Product Liability Act, Ch. 7.72 RCW, about dangers associated with servicing reusable respirators contaminated with asbestos. WSAJ Foundation filed an amicus curiae brief on the merits. *Plaintiff Attorneys – WSAJ members Matthew P. Bergman and Brian F. Ladenburg, of Bergman, Draper & Frockt, and John W. Phillips and Matthew Geyman, of Phillips Law Group, PLLC.*

A-331 The Estate of Ashlie Bunch ex rel. Kozel vs. McGraw Residential Ctr. (S.C. #85679-6), involves questions regarding the proper procedure for joinder of a parent in an action for the death of a minor child under RCW 4.24.010, and the proper interpretation and application of the statutory requirement that the parent “has regularly contributed to the support of his or her minor child” in order to be eligible to pursue such a claim. WSAJ Foundation filed an amicus curiae brief on the merits and participated in oral argument. *Plaintiff Attorneys – WSAJ member Jeffrey Herman, of the Herman Law Firm LLC, and Elena L. Garella.*

A-332 Camicia vs. Howard S Wright Constr. Co. (S.C. #85583-8), involves the question of whether the immunity provided by the recreational use statute, RCW 4.24.210 applies to land that is part of Washington’s public transportation system. WSAJ Foundation filed an amicus curiae brief on the merits. *Plaintiff Attorneys – WSAJ members John Budlong and Faye J. Wong, of the Law Offices of John Budlong.*