TORT LAW UPDATE

DAVID A. WILNER, ESQUIRE
COZEN AND O'CONNOR
1201 Third Avenue
Seattle, Washington 98101
(206) 340-1000
dwilner@cozen.com

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Columbia, SC
Dallas, TX
Los Angeles, CA
New York, NY
Newark, NJ
Philadelphia, PA
San Diego, CA
Seattle, WA
W. Conshohocken, PA
Westmont, NJ

COZEN and O'CONNOR
Attorneys at Law

I.
PRODUCT LIABILITY – FAILURE TO WARN

The Supreme Court recently addressed the issue of causation as a necessary component of a failure to warn claim under Washington's Product Liability Act, RCW 7.72 et seq. The case of Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 971 P.2d 500 (1999), involved claims against the manufacturer of a window system. Twenty-month-old Daniel Soproni apparently had a habit of opening and closing his parents' second floor bedroom window. Despite his mother's repeated reprimands, Daniel ultimately opened the window and fell onto a concrete patio below, suffering extensive head injuries.

Daniel's parents and a personal representative filed suit against a number of parties, including the window manufacturer, Alpine, alleging in part that Alpine failed to provide warnings to its customers regarding the window's operation and the possibility that Alpine windows could be opened by children. The trial court granted summary judgment to the defendants on all claims, and the Court of Appeals affirmed. The Washington Supreme Court upheld the dismissal of the failure to warn claims, noting:

> The record established that the lack of warnings did not contribute to the accident in any way. It shows, rather, that Daniel's mother was aware that the child easily opened the window just prior to the incident that caused the injury and that she was aware that this presented a danger.

137 Wn.2d at 326. Accordingly, the court implied that additional warnings, even if provided by Alpine, would have had little or no effect on Daniel's parents. Even assuming the existence of a danger of which Alpine failed to warn, such a failure was not the proximate cause of Daniel's injuries. Daniel's parents were aware of the danger and failed to safeguard the room.

Though certainly not setting forth any particularly novel or new concepts, this case does address the one component of failure to warn claims that receives insufficient attention from many product liability plaintiffs. It is important to bear in mind that, regardless of whether the defendant failed to warn of a material defect, the plaintiff must establish the warning would have been heeded.

Of additional note are several lines of dicta by the court addressing the plaintiffs' design defect claims. In upholding the dismissal of these claims, the Court of

Appeals heavily emphasized Alpine's compliance with a number of uniform and local codes (e.g., Uniform Building Code, National Fire Protection Association Codes and Regulations, etc.). The Supreme Court, however, reiterated established case law that evidence of code conformity is not dispositive in product defect claims. Rather, the key issue is whether the product is dangerous beyond the expectations of the ordinary consumer. While compliance with applicable codes may in some instances satisfy consumer expectations, such compliance is merely evidence to be considered by the trier of fact, and not dispositive on the issue.

II.
WRONGFUL DISCHARGE – PUBLIC POLICY

The Court of Appeals recently addressed the public policy exception to the general doctrine of at-will employment in the case of Lins v. Children's Discovery Centers, 95 Wn. App. 486, 976 P.2d 168 (1999). Plaintiff Diane Lins sued her employer, Children's Discovery Centers of America (CDC), for wrongful discharge. In March of 1995, Lins and five other CDC employees were involved in an automobile accident that occurred during and within the scope of their employment with CDC. Lins and the other five employees filed worker's compensation claims with the Department of Labor and Industries. Apparently fearing litigation over the accident, a CDC supervisor instructed Lins to terminate the five CDC employees. Lins testified she was aware that terminating the five employees would be retaliatory in nature and unlawful, and therefore refused to do so. Shortly thereafter, she received her first (and only) poor performance review, was placed on probation, and ultimately fired for "neglect of duty/poor performance."

Lins predictably brought suit against CDC, alleging her termination was a violation of public policy and, as such, an exception to the general rule in Washington that all private employment is "at-will." CDC conceded that if Lins had been terminated for filing *her own* L&I claim, such a firing would have been retaliatory and actionable. However, CDC argued, Lins was terminated for failing to follow instructions and failing to terminate her fellow employees as ordered. Surprisingly, the trial court agreed and dismissed the case.

The Court of Appeals, overturning the dismissal, noted it is unlawful for an employer to discharge an employee due to the employee's refusal to perform an illegal

act.[1] Further, the court observed that allowing employers to effectively use employees as the arm by which their unlawful activities are carried out violates public policy.

III.
WRONGFUL DISCHARGE – EMPLOYMENT MANUAL

The Court of Appeals addressed another exception to the at-will doctrine, relating to employee manuals, in the case of Dolittle v. Small Tribes, Inc., 94 Wn. App. 126, 971 P.2d 545 (1999). Maeve Dolittle was hired as the comptroller for defendant Small Tribes of Western Washington ("STOWW"). Dolittle was provided with a copy of STOWW's employment and policy manual, which provided for termination for cause, that is, only in the event of misconduct or poor performance, and noted that employees were assured of "reasonable job security" so long as their conduct and work were acceptable and funding for the group continued. The manual also provided for specific items of discipline and other penalties for varying levels of employee misconduct. These items were addressed in the "Guide to Disciplinary Action," which was contained within the employment manual provided by STOWW to plaintiff Dolittle.

Additionally, the manual noted that STOWW's employment policies and procedures could only be revised upon completion of a specific protocol. In particular, the policy manual set forth:

> When the need for a new or revised policy or procedure is indicated, it will be referred to the personnel committee. If it is decided by the personnel committee that such a policy or revision is desirable, the committee will outline or suggest the principal points that should be covered. The staff will assist the committee in preparing a preliminary draft of the policy and distribute it to members of the board for their consideration.
>
> The board will review the draft and provide the appropriate direction for preparation to all tribes and all board members in ample time to provide adequate study before being voted on by the board. All member tribes

[1] The court also reiterated established case law holding it unlawful for an employer to discharge an employee when the employee chooses to perform a public duty or obligation (i.e., jury duty), exercises a legal right or privilege (i.e., filing a worker's compensation claim), files a discrimination complaint, or acts in the capacity of a whistle blower. 195 Wash. App. at 491.

> and all staff members, to include all new employees, will be provided with an up-to-date copy of the personnel policies manual and all changes thereto.

Shortly after Dolittle was hired, STOWW issued a general memorandum revoking the "Guide to Disciplinary Action," as well as the for-cause language referenced above. The revocation by STOWW of these terms was made without regard to the protocol referenced above. Dolittle was terminated shortly thereafter, and filed suit alleging breach of the employment contract.

The Court of Appeals noted that STOWW was entirely within its rights to disclaim its previous representations and assurances in the policy manual, and confirmed that companies can, in fact, revise a for-cause employment relationship to at-will employment, provided proper notice is provided to the subject employee. However, the court noted STOWW failed to follow its own established protocol for changing the terms of its employment manual. This protocol, the court opined, provided additional security to employees that significant issues affecting their employment would be addressed in a certain manner, and decisions would not be made in an arbitrary fashion. The court reversed the dismissal, holding STOWW's failure to follow its own established protocol for changing the terms of its manual violated STOWW's employment agreement with Dolittle.

This case points out some of the hidden (and not-so-hidden) pitfalls associated with employee manuals and handbooks. These materials and the clauses therein can present dangers to employers if not carefully drafted and, later, carefully followed.

IV.
CONSTRUCTION DEFECT – THE DISCOVERY RULE

The Court of Appeals case of North Coast v. Factoria Partnership, 94 Wn. App. 855, 974 P.2d 1257 (1999) is a construction defect case in which the plaintiff faced rather significant statute of limitations problems. Plaintiff Factoria filed suit against defendant North Coast for defects discovered in a commercial office building in which construction was completed in February of 1990. Litigation was not commenced until April of 1997, over seven years past the date of substantial completion and fourteen months after the expiration of the six year statute of limitations for contract-based actions. As such, the Superior Court trial judge dismissed the case. The plaintiff appealed, arguing that Washington's "discovery rule" - which tolls the statute of limitations until the defect or problem is discovered—should apply to claims involving the late discovery of latent defects.

The Court of Appeals noted that, generally speaking, the statute of limitations in contract-based actions begins to run when the contract is breached. Further, the discovery rule, which delays the commencement of the statutory period until the defect is discovered (or should have been discovered), has historically not been applied to contract-based claims. The court declined to extend the discovery rule to contract actions, also noting that, in any event, the alleged injury was not "inherently undetectable," or particularly latent.

This case presented the Court of Appeals with the opportunity to join the few jurisdictions that differentiate, for statute of limitations purposes, between latent and patent defects. Unfortunately for those of us working in the field of subrogation, the court chose not to do so.

V.
CONSTRUCTION DEFECT – CONSUMER PROTECTION ACT

The Washington Court of Appeals dealt with yet another construction defect claim in the case of Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 989 P.2d 486 (1998). The Griffith class action claims against defendant Centex involved peeling paint and siding problems to over 150 homes built and sold by Centex. The plaintiffs alleged breaches of warranty, negligent misrepresentation, and certain violations of Washington's Consumer Protection Act ("CPA"), RCW 19.86 et seq. The real estate contract provided to each purchaser by Centex provided for a one-year limited warranty period. The contract also purported to waive all claims against Centex other than for those items specifically referenced within the one-year limited warranty. Paint and siding problems were discovered approximately three years after purchase.

Holding the warranty limitation and disclaimer valid and enforceable, the trial court dismissed the warranty claims and the Court of Appeals affirmed.

The Court of Appeals also affirmed the trial court's dismissal of the negligent misrepresentation claims, pointing to Washington's adoption of the economic loss rule. The rule operates to preclude tort-based remedies in cases involving building defects in which a contract (such as a real estate purchase and sale agreement) allocates liability. Citing to a number of previous Supreme Court decisions establishing the rule and scope of the economic loss doctrine, the Court of Appeals held the economic loss rule bars claims of negligent misrepresentation by home buyers, even against builders also serving as vendors.

This case emphasizes Washington courts' strong preference of allowing the terms of purchase and sale contracts to govern sellers' responsibilities to buyers. A

one-year warranty period seems almost laughably short, yet the court let the provision stand. Similarly, the court refused to allow the plaintiffs to circumvent the short warranty period by alleging misrepresentation in the sale, reiterating that claims involving defects in a building should be governed by the terms of the contract of sale, and sound in contract, not tort.

Significantly, however, the court overturned the trial court's dismissal of the plaintiffs' Consumer Protection Act claims. Although plaintiffs' allegations regarding its CPA claims were substantially similar to those alleged in the misrepresentation claims, the court pointed out that the CPA provides an entirely separate source of duty to disclose material facts, and that the CPA has previously been applied in actions involving property purchase disputes. As such, a CPA claimant does not face the procedural problems associated with the economic loss doctrine. Holding that a genuine issue of material fact did exist with respect to whether the defendant violated its duties to disclose, the court remanded the CPA portion of plaintiffs' claim and overturned the trial court's dismissal.

VI.
RIGHT OF WAY—CROSSWALK

The long-standing question as to the responsibilities of bicyclists in crosswalks as relating to motor vehicle traffic was settled, at least partially, in the case of Pudmaroff v. Allen, 138 Wn.2d 55, 977 P.2d 574 (1999). In Pudmaroff, the plaintiff was struck by a car while riding his bicycle across a marked crosswalk. The defendant driver appealed the jury verdict against him, claiming that bicyclists are held to the same laws and responsibilities as motor vehicle operators, and that motorists need only stop for pedestrians in crosswalks.

Washington traffic laws provide: "[T]he operator of an approaching vehicle shall stop and remain stopped to allow a *pedestrian* to cross the roadway within an unmarked or marked crosswalk." RCW 46.61.235(1) (emphasis added). The term "pedestrian" is defined as:

> [A]ny person who is afoot or who is using a wheelchair or a means of conveyance propelled by human power *other than a bicycle*.

RCW 46.04.400 (emphasis added). The defendant therefore argued that the plaintiff was not, in fact, a pedestrian, and therefore not entitled to the protections of a pedestrian.

The court did concur with the defendant insofar as "when bicycles are operated on roadways, they are subject to the rules of the road." 138 Wn.2d at 63. The line is apparently not so clear, however, when the bicycle enters a crosswalk. The court cited to an earlier opinion by the Court of Appeals holding that RCW 46.61.755, which requires bicycles operated on roadways to follow the rules of the road, does *not* apply to bicycles utilizing crosswalks. Crawford v. Miller, 18 Wn. App. 151, 566 P.2d 1264 (1977). Upholding the jury verdict against the defendant, the court opined that the defendant's position, if accepted, would place "every child in Washington riding a bicycle and using a crosswalk at risk" and would be contrary to the overall purpose of the State's traffic laws.

As an aside, the court did leave open the possibility that a bicyclist using a crosswalk could be partially or wholly responsible for his or her injuries if he or she fails to use reasonable care. The simple fact that the accident occurred within a crosswalk is not dispositive on the issue of responsibility or fault.

PHILA1\1310829\1 099991.000