

63784-3

63784-3

No: 637843

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON, SEATTLE

DALLAS SWANK and JEANNE A. PASCAL SWANK,

Plaintiffs/Appellants

vs.

JIM DUFFY

Defendant/Respondent

APPELLANTS' REPLY BRIEF

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
1510 14th Avenue
Seattle, WA 98122
Tel: (206) 322-5200

2010 MAR 18 AM 10:20

FILED
STATE COURT
CLERK

ORIGINAL

TABLE OF CONTENTS

Page

1. SNOHOMISH COUNTY HAS MADE CERTAIN FACT ASSERTIONS AS FOUNDATION FOR ITS ARGUMENTS WHICH NEED TO BE CORRECTED. 1

2. ALL ISSUES APPEALED BY SWANK WERE PROPERLY BROUGHT BEFORE THE TRIAL COURT.4

3. THE ADMISSION OF FINDINGS OF THE SNOHOMISH COUNTY ACCIDENT REVIEW BOARD WAS PROPER.7

4. THE PASSAGE OF TIME IS EXAGGERATED BY SNOHOMISH COUNTY AND HAS CAUSED SNOHOMISH COUNTY NO PREJUDICE.....8

5. SNOHOMISH COUNTY ASKS THE COURT TO MAKE CERTAIN ASSUMPTIONS BASED ON CLARK V. PACIFICORP, 118 WN.2D 167, 190, 822 P.2D 162 (1991) WHICH ARE UNFOUNDED.....12

6. SNOHOMISH COUNTY ARGUES THAT BECAUSE ALL CLAIMS AGAINST ALL PARTIES WERE NOT SETTLED PRIOR TO JULY 1, 1993 THAT THE AMENDMENTS TO RCW 51.24.060 APPLY EVEN THOUGH THE CHOUINARD EQUIPMENT SETTLEMENT TOOK PLACE BEFORE THAT DATE. THIS CONSTRUCTION IS ERRONEOUS.17

7. ALLOCATION OF RELATIVE FAULT BY THE DUFFY JURY WOULD NOT HAVE ELIMINATED THE NEED FOR A HEARING TO ALLOCATE FAULT INVOLVING SNOHOMISH COUNTY. THE TRIAL COURT SHOULD NOT HAVE USED THE FAILURE TO SUBMIT THAT ISSUE TO THE DUFFY JURY AS A BASIS FOR ESTOPPEL.....23

CONCLUSION25

TABLE OF AUTHORITIES

Cases

<u>Clark v. Pacificorp</u> , 118 Wn.2d 167, 822 P.2d 161 (1991).....	passim
<u>Fray v. Spokane County</u> , 134 Wn.2d 937, 952 P.2d 601 (1998).....	3
<u>Hamilton v. Labor & Industries</u> , 111 Wn.2d 569, 571, 761 P.2d 618 (1988).....	21
<u>Marriage of Williams</u> , 115 Wn.2d 202, 208, 796 P.2d 421 (1990).....	21
<u>Olmstead v. United States</u> , 277 U.S. 438, 483-84 (1928).....	24
<u>Pattern v. Dennis</u> , 134 F.2d 137 (1943).....	19
<u>State ex rel. Robinson v. Superior Court for King County</u> , 182 Wash. 277, 46 P.2d 1046 (1935).....	19
<u>Thorgaard Plumbing & Hearing Co. v. King County</u> , 71 Wn.2d 126, 426 P.2d 828 (1967)	19

Rules/Statutes

CR 59(c)(7)	4,5
ER 801(d)(2)(iii)	8
RCW 51.24.060	passim

Other Authorities

Pomeroy's Equity Jurisprudence (3d Ed.) Vol. I, §398	23
Story's Equity Jurisprudence (14 th Ed.) Vo. I, §99	23

1. Snohomish County has made certain fact assertions as foundation for its arguments which need to be corrected.

Snohomish County states The Honorable John M. Meyer assessed Snohomish County's fault at zero percent. This is an untrue statement.

The Honorable John M. Meyer made no allocation of fault whatsoever. Further, when Snohomish County included a finding of zero percent fault allocated to Snohomish County in its proposed findings and conclusions, Judge Meyer crossed the finding out before signing Snohomish County's proposed findings of fact and conclusions of law. CP 308-313. Snohomish County has not cross appealed with respect to the cross out.

There was no finding of zero percent fault allocated to Snohomish County. Snohomish County arguments based on that assertion are unfounded.

Snohomish County also states there is no proof in the record of the fact that Chouinard Equipment was in bankruptcy. There is such proof in the record and that proof should be known to Snohomish County.

Snohomish County Prosecuting Attorneys were the ones who originally informed the Superior Court of the Chouinard Equipment bankruptcy. December 20, 1989 the Snohomish County Prosecuting

Attorney's office sent a letter to the Clerk of the Snohomish County Superior Court informing the Clerk of the Chouinard bankruptcy and asking that the trial date be stricken. CP 1407.

The automatic stay in bankruptcy began April 17, 1989. CP 1407-1409. It was not lifted until June 25, 1991. CP 1405-1406.

Further, Snohomish County Prosecuting Attorneys specifically referenced the Chouinard bankruptcy in their trial brief filed in 2000. The same trial brief also references the stay. CP 208.

Snohomish County in a footnote states the companion action brought by Dallas Swank against Snohomish County in 1992 was beyond the statute of limitations. There has been no such finding, and the case was not brought beyond the statute of limitations. Snohomish County ignores the fact that Chouinard's automatic stay in bankruptcy tolled all causes of action.

Snohomish County attempts to avoid Fray v. Spokane County, 134 Wn.2d 937, 952 P.2d 601 (1998) by arguing there is no proof that Swank was under LEOFF II in the record. The record does contain such proof.

The Court of Appeals in its decision in this case entered April 15, 1996 stated: "Swank is a member of LEOFF Plan II." CP 960. The record also contains the following sworn statement by Dallas Swank: "I

am a sergeant in the Snohomish County Sheriff's Department." CP 988.

There are numerous other references in the record to these facts as well.

Frankly, Snohomish County's attempt to avoid the Fray decision by claiming no proof of LEOFF II status in the record is not only inaccurate but strange. It is not contested that Dallas Swank was a Snohomish County Sheriff's Deputy. As such, either LEOFF I or LEOFF II would apply to him. If LEOFF II did not apply, then he would be under LEOFF I, which unquestionably permits suits by deputies against their employers. CP 974.

Snohomish County also claims there is no proof the Snohomish County Accident Review Board proceedings were under oath. Again the claim is inaccurate, and again the proof of this is established by prior submissions of Snohomish County Prosecuting Attorneys in this case.

The declaration submitted by a Snohomish County Prosecuting Attorney in support of summary judgment in this case states: "The Snohomish County Sheriff's Office conducted a hearing on August 26, 1987, regarding the accident suffered by plaintiff Dallas Swank which is the basis of this lawsuit. Testimony was taken under oath and later transcribed. Attached hereto are true and accurate copies of pages 46, 47 and 50 of that transcript." CP 1108.

Apparently, Snohomish County takes the position that the Accident Review Board proceedings are under oath with selected portions admissible for purposes of its own summary judgment motions but does not concede the same for Dallas Swank.

Snohomish County also argues that collateral estoppel ought to apply based on the unappealed dismissal of Swank's Mandamus action. Snohomish County fails to inform this court that the dismissal was without prejudice. In fact Snohomish County had submitted an order that included the following language: "DISMISSED WITH PREJUDICE." The Honorable John M. Meyer specifically crossed out "With prejudice." CP 569.

2. All issues appealed by Swank were properly brought before the trial court.

Snohomish County alleges Swank appeals matters brought up for the first time on appeal. This is not the case. The issues being appealed were all raised with the trial court. CP 278-305.

Snohomish County treats matters brought up on reconsideration with the trial court as matters not brought up with the trial court. This argument is unfounded.

Swank based his reconsideration on CR 59 and 60. CP 278. CR 59(c)(7) provides, on motion of a party aggrieved, any decision or order

may be vacated and reconsideration granted on grounds that it is contrary to law.

The matters appealed here all fit the grounds for reconsideration permitted under CR 59(c)(7) and were appropriately brought before the trial court for reconsideration. The issues appealed are not brought up for the first time on appeal.

However, even assuming the matters brought up for reconsideration did not fit CR 59(c)(7), Snohomish County ignores the fact that the court specifically considered the issues raised and the declaration submitted with the reconsideration. The court had discretion to consider these materials, so the real issue being raised by Snohomish County is whether Judge Meyer abused his discretion by denying Snohomish County's motion to strike those materials. Snohomish County has filed no cross appeal with respect to this issue.

Snohomish County made a motion to strike the materials submitted by Dallas Swank in support of reconsideration. This motion was denied and the materials submitted were specifically included by the court in its reconsideration. CP 30-32. There is no allegation this was an abuse of discretion.

The arguments made by Swank in opposition to Snohomish County's motion to suppress are found at CP 37-43. They provide ample ground to support the court's exercise of discretion.

Among other things, Swank pointed out Snohomish County did not serve Swank with papers after Swank noted his presentation. Swank, accordingly, did not know whether the County was relying on paperwork it had submitted before the Court of Appeals ruling or whether it was submitting no paperwork at all and was merely going to argue against the suggested Swank allocation. This was sufficient grounds for allowing Swank to submit additional information to the Court.

Swank, also, pointed out the issues raised by Snohomish County had already been decided by the court. Swank had already persuaded the court that it could and should hold an allocation of fault hearing. The order had been granted and reconsideration denied on more than one occasion. Snohomish County's submission amounted to yet another reconsideration of the order to hold an allocation of fault clothed as its own presentation of findings and conclusions. Swank was entitled to rely on the court's order that an allocation of fault hearing would take place and not have to once again brief whether or not one should take place.

Swank had simply presented the court with papers to give the court a basis for allocating fault; he did not present the court with a

lengthy repetition of why the hearing that had already been ordered should take place. Snohomish County essentially highjacked Swank's hearing and turned it into something other than the mere hearing to allocate fault which Swank had scheduled.

Since the findings and conclusions entered did in fact revisit previously litigated issues and were not limited to allocating fault among the parties, Swank argued he should be allowed to submit evidence that went to those unrelated findings.

Based on these arguments the court denied Snohomish County's motion to exclude. This was not an abuse of discretion.

3. The admission of findings of the Snohomish County Accident Review Board was proper.

Snohomish County seeks exclusion of the findings of its own accident review board. Judge Meyer's admission of the findings of the Snohomish County Accident Review Board was proper.

Snohomish County essentially argues the findings of its own review board should not have been considered by Judge Meyer on grounds of hearsay. The argument is without merit.

The Snohomish County Accident Review Board was commissioned to investigate the Swank accident by the Snohomish

County Sheriff's office. CP 1108. The findings of the Board were admissible under several bases.

The Snohomish County Accident Review Board findings were admissible under ER 801(d)(2)(iii). ER 801(d)(2)(iii) provides admissions by a person authorized to make a statement concerning the subject are admissible.

The findings of the Accident Review Board were also admissible under RCW 5.44.040. RCW 5.44.040 provides for the admissibility of public records.

As stated above, the objection of Snohomish County to the admission of its own Accident Review Board seems disingenuous, since Snohomish County used the Accident Review Board transcript in support of its own motion for summary judgment. CP 1108.

The admission into evidence of the findings of the Snohomish County Accident Review Board by the trial court was not error.

4. The passage of time is exaggerated by Snohomish County and has caused Snohomish County no prejudice.

Snohomish County argues it is prejudiced by the passage of time. In fact it has been continuously and intimately involved with this case since its inception. Further, if there is prejudice, the prejudice created is the result of its own actions.

Snohomish County argues Swank has delayed 15 years in obtaining his allocation of fault. In fact Swank has been seeking allocation of fault since even before the Chouinard Equipment settlement. Snohomish County ignores the fact that Swank had a case filed against Snohomish County alleging negligence based on the same facts since January 27, 1992. CP 94. The clear and stated purpose of that cause of action was to allocate fault to Snohomish County.

The fact that the accident occurred in 1987 is irrelevant. First, Snohomish County itself convened an accident review board which conducted a thorough and extensive investigation of all fact issues within three weeks of the accident, witnesses were questioned under oath and a transcript was taken. Accordingly, all facts necessary to conduct an allocation of fault hearing have been known to Snohomish County since 1987. Snohomish County from that time forward also knew its own accident review board had placed blame for the accident on Snohomish County.

Snohomish County was aware of the Chouinard settlement in June of 1993, when it happened. Snohomish County had been invited to participate in the mediation which led to settlement, but declined. Snohomish County was well aware that settlement had taken place as a result of the mediation, especially since the dismissal order related to the

settlement was entered in the same case the day before the Snohomish County deputy prosecuting representing James Duffy successfully argued the summary judgment motion to dismiss Duffy. That same deputy prosecuting attorney was also attorney of record for Snohomish County in the companion case filed against Snohomish County under the separate cause number. CP 143.

The Duffy trial took place in May of 2000. Lawyers from the Snohomish County Prosecuting Attorney's office represented Duffy. The facts necessary to allocate fault could not have been fresher even if Snohomish County did not also have the benefit of the thorough investigation of the facts by its own accident review board.

Following the trial in which the jury found it negligent, Snohomish County knew or should have known it had a right to ask for a hearing to allocate fault to others if it wished to try to do so. Snohomish County at that point chose not to request a hearing to allocate fault. Its motivation could not be more transparent – it had already taken Dallas Swank's money in 1999, so a hearing to allocate fault could lead to Snohomish County have to return Dallas Swank his money. As long as there was no allocation of fault hearing, Snohomish County with a straight face could argue an intermediary step remained before the money could be returned to Dallas Swank.

With no request made by Snohomish County for a hearing to allocate fault and Snohomish County the only party found at a fault by the finder of fact, counsel for Dallas Swank requested the return of the money. These requests were rejected and a letter subsequently was sent in 2002 from an attorney representing Snohomish County which stated the money was not going to be returned because there had been no allocation of fact. Dallas Swank, realizing Snohomish County was never going to request an allocation of fault as long as it had his money and further realizing Snohomish County was never going to return the money without an allocation of fault hearing, made a motion for a hearing to allocate fault himself. CP 144-5.

Snohomish County instructed counsel for James Duffy to oppose any allocation of fault hearing. Counsel for Snohomish County admitted the reason for the instruction was Snohomish County did not want to have to pay Dallas Swank his money back, and Snohomish County felt that allowing an allocation of fault hearing could lead to that. CP 145.

Dallas Swank submitted the ordered findings, conclusions and documentation in 2004. CP 221; CP 620; CP 653. Snohomish County did not, choosing to appeal. Following loss of the appeal Snohomish County still did not submit findings and conclusions. CP 146.

Snohomish County argues allocation of fault should have taken place at the time of settlement and that it is prejudiced by this failure. Settlement with Chouinard took place in 1993. This was seven years before trial. Since Snohomish County lawyers have been continuously in this case since its inception, it is hard to imagine how the additional benefit of all that was learned in the course of discovery and trial from 1993 throughout 2000 put it at a disadvantage in terms of allocating fault. Post trial delay in allocating fault was created by Snohomish County failing to ask for a hearing to allocate fault and then by aggressively opposing any attempt to allocate fault.

Snohomish County is not harmed by delay. Further, it has been the architect of the delay and should not reap the benefit.

5. Snohomish County asks the court to make certain assumptions based on Clark v. Pacificorp, 118 Wn.2d 167, 190, 822 P.2d 162 (1991) which are unfounded.

Snohomish County asks this court to assume the following: (1) allocation of fault hearings must take place before settlement is entered; (2) allocation of fault hearings must be requested by the worker; (3) the “trier of fact” for purposes of allocation of fault should have been the jury and cannot now be the judge.

Clark was a case in which the Supreme Court interpreted a statute which on its face said neither L&I nor a self-insured employer could recover on its lien if the employer was at fault. RCW 51.24.060(f). Clark interpreted the statute to mean an absolute bar to recovery on the L&I lien when the employer was 50% or more at fault; otherwise Clark mandated the lien be reduced in proportion to the fault. In Clark procedures were also promulgated for dealing with ambiguities created by the Tort Reform Act in the context of the Industrial Insurance Act as those statutes existed at that time. The procedures were not intended to be jurisdictional to the extent that failure to apply them literally would result in dismissal or denial or relief.

The first assumption Snohomish County makes is that Clark absolutely requires allocation of fault hearings to take place before settlement. Allocation of fault hearings do not have to take place before settlement, particularly where the Department of Labor and Industries is aware of the case and its facts. In fact, one of the workers in Clark had already settled prior to holding any hearing, which the Department in Clark attempted to use as a bar to recovery under RCW 51.24.060(1)(f). The Supreme Court specifically allowed the determination of fault proceeding to go forward even though it was years after settlement, since the Department had had notice. Clark at 195. The preferred method is to

hold allocation of fault hearings at the time of settlement. Failure to do so does not strip away employee rights where the Department has notice. Failure to hold an allocation of fault hearing prior to the Chouinard Equipment settlement does not operate to bar Dallas Swank's recovery here; since as in Clark, Snohomish County was well notified.

Snohomish County cannot claim it lacked notice of the case against Duffy and Chouinard. Snohomish County Prosecuting Attorneys defended Duffy from the inception of that case in 1987. Those same attorneys also appeared and defended Snohomish County in the companion case against it brought in 1992. Snohomish County Attorneys also had notice of the mediation and settlement with Chouinard.

Reasons, also, existed for Swank to not request allocation of fault at the time of settlement. At the time of settlement Swank had his separate cause of action under another cause number pending against Snohomish County. CP 94. This case would have decided what, if any, fault Snohomish County had. The other cause of action proceeding against Snohomish County was the ultimate allocation of fault hearing. There accordingly was no need to hold the very abbreviated hearing contemplated in Clark v. Pacificorp to determine the fault of Snohomish County. It was going to be determined at a full blown jury trial. Until

January of 2005, when Swank's case against Snohomish County was dismissed, there was no need for an allocation of fault hearing.

The second assumption is the insinuation that allocation of fault hearings must be requested by the worker. Snohomish County blames Dallas Swank for not moving the court for a hearing to allocate fault or for not asking the Duffy jury to allocate fault. However, Clark makes it clear that Snohomish County also had the right to request a hearing to allocate fault. In fact, one of the central themes of Clark was that the Department or self-insurer was specifically given the right to request such a hearing.

The Washington Supreme Court in Clark stated:

RCW 51.24.060(1)(f) provides that if an employer is at fault, the Department loses its right to reimbursement. In order to protect this right, the Department should be permitted to request a determination of fault of each entity.

Id. at 180. Snohomish County thus blames Dallas Swank for not doing in 1993 that which it also failed to do at that time, despite having the same right and motivation.

The third assumption suggested by Snohomish County is that the "trier of fact" for allocation of fault should have been the jury and cannot be the judge. This argument by Snohomish County represents a misunderstanding of Clark. Clark on its face permits a judge to allocate

fault without requiring settling parties to have to go through a full-blown jury trial. The Clark court addressed the issue in the following passage:

RCW 4.22.070 on its face does not require a full trial to determine the issue of fact. The words “trier of fact” refer to a judge; they do not implicate a full trial.

Id. at 191. Snohomish County now argues only the jury can be “trier of fact” for purposes of allocation of fact.

It needs to be remembered that an allocation of fault hearing at the time of the Chouinard settlement in 1993 would have taken place 7 years before the trial and would have been conducted by a judge who had no real familiarity with the facts beyond what the abbreviated version presented at a 1993 hearing 7 years before trial would have afforded him. In contrast the Honorable John M. Meyer, who presided over the full blown Duffy trial, not to mention all other aspects of this case, as well as the case against Snohomish County in the other cause, is, and was, in a much better position to allocate fault than a 1993 judge, coming to the case cold and trying to allocate fault 7 years before any trial or significant discovery had taken place.

However, since the statute provided Snohomish County could not collect its L&I lien if it was at fault, why was there no hearing requested by either Snohomish County or Swank at the time of the settlement to determine Snohomish County’s fault? The answer becomes obvious

upon reflection. A hearing to allocate fault to Snohomish County was already pending at the time of the Chouinard settlement. It was called Swank v. Snohomish County, cause number 92-2-00453-2. It had been filed January 27, 1992. Thus, holding a separate allocation of fault hearing including Snohomish County was unnecessary and would have been superfluous. Allocation of fault for purposes of RCW 51.24.060(f) was going to be handled in Swank v. Snohomish County through a full blown trial exploring thoroughly all aspects of the subject.

6. Snohomish County argues that because all claims against all parties were not settled prior to July 1, 1993 that the amendments to RCW 51.24.060 apply even though the Chouinard Equipment settlement took place before that date. This construction is erroneous.

Conclusion of Law 3 states:

The Court finds that Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) was statutorily overruled by the amendments to RCW 51.24.060 in 1993. The 1993 statutory amendments to RCW 51.24.060 control this case.

Snohomish County defends Conclusion of Law 3 on two bases. First, it argues Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) was statutorily overruled. Second, it argues the amendments to RCW 51.24.060 apply to the Chouinard settlement. Both arguments are based on unfounded assumptions.

Snohomish County's argument that the amendments to RCW 51.24.060 apply to the Chouinard settlement are easily refuted. The modification to RCW 51.24.060 applied "to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1991." [1983 c2111 §3] Snohomish County argues that, because not all claims by Swank against all parties remaining after the Chouinard settlement were settled prior to July 1, 1993, the amendments to RCW 51.24.060 apply to the Chouinard settlement even though it settled prior to July 1, 1993. To achieve its argument, Snohomish County has redefined "cause of action" to mean "cause number."

There can be multiple causes of action under a given cause number. Further, the same event can give rise to multiple causes of action. In the Swank case there were at least two distinct causes of action: products liability and negligence. A products liability cause of action was brought against Chouinard; a negligence action was brought against James Duffy. Settlement of the products liability cause of action did not eliminate the negligence causes of action.

The Ninth Circuit has explained a "cause of action" does not consist of facts, but of the unlawful violation of a right which the facts show. Pattern v. Dennis, 134 F.2d 137 (1943). The Washington Supreme Court distinguished "right of action" from "cause of action", explaining a "right

of action” is the right to pursue a judicial remedy while a “cause of action” is based on the substantive law of legal liability. Thorgaard Plumbing & Hearing Co. v. King County, 71 Wn.2d 126, 426 P.2d 828 (1967). The Supreme Court of Washington, construing a statute that provided persons having “claims” against the state had a right of action in Thurston County, construed “claims” to mean “cause of action.” State ex rel. Robinson v. Superior Court for King County, 182 Wash. 277, 46 P.2d 1046 (1935).

Turing back to the facts at hand, the involved statute states the amendment of RCW 51.24.060 applies to all “causes of action” that had not settled prior to July 1, 1993. To put it another way, the amendment of RCW 51.24.060 does not apply to “causes of action” that settled prior to July 1, 1993.

The Chouinard products liability claim was settled in June of 1993. This clearly was before July 1, 1993. The remaining question is: Was the products liability claim against Chouinard a “cause of action”? It is plain that it was a “cause of action.” Under the plain and unambiguous language of the statute, then, the modifications to RCW 51.24.060 do not apply to the Chouinard settlement.

This brings us back to the first contention raised by Snohomish County – that Clark v. Pacificorp was statutorily overruled by the amendments to RCW 51.24.060 that became effective July 1, 1993. The

first and most obvious answer is that, since the amended statute did not apply to the Chouinard settlement, then Clark v. Pacificorp applies to the Chouinard settlement regardless of whether it would apply to settlements after July 1, 1993. By definition the old law remained applicable to settlements of “causes of action” before July 1, 1993, which the Chouinard settlement was.

However, it needs to be explained that, even ignoring the obvious application of Clark to the Chouinard settlement, it is wrong to call Clark v. Pacificorp statutorily overruled. Supreme Court precedent is not treated so cavalierly.

The Supreme Court of the State of Washington has repeatedly stated: “Once this court has decided an issue of state law that interpretation is binding until we overrule it.” Hamilton v. Labor & Industries, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). The Washington Supreme Court has also repeatedly stated:

In fact, principles of statutory construction compel us to overrule the Court of Appeals and reaffirm our precedent in this area. The legislature is presumed to be aware of judicial construction of prior statutes. Absent an indication that the legislature intended to overrule the common law, new legislation will be presumed to be consistent with prior judicial decisions.

Marriage of Williams, 115 Wn.2d 202, 208, 796 P.2d 421 (1990)

[citations omitted].

There is nothing about the modification to RCW 51.24.060 that overrules application of Clark to pre-July 1, 1993 settlements. Since the Supreme Court precedent is not clearly overruled and since the legislature is presumed to be aware of it, Clark must be followed until overruled by the Supreme Court.

Snohomish County appeals to the Court of Appeals for application of laches on its behalf. However, there was no finding of laches by the trial court, and there is no cross appeal by Snohomish County with respect to that issue.

These considerations aside, laches is not an appropriate remedy here. First, Swank, from before the Chouinard Equipment settlement through 2005, had a cause of action pending against Snohomish County to determine fault. Second, laches is an equitable remedy, requiring that its seekers have “clean hands.” The delays in this case were orchestrated by Snohomish County.

Story’s Equity Jurisprudence (14th Ed.) Vo. I, §99, describes with principles underlying the “clean hands” doctrine:

Equity imperatively demands of suits in courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who

has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly “within the law.”

Id.

The maxim that one who comes in to equity must come with “clean hands” expresses a principle of inaction rather than action. It means the court will refuse to use its equitable powers to aid in any manner one that has been guilty of inequitable conduct with respect to the subject matter of the litigation.

Justice Brandeis stated the following about “unclean hands” when the government seeks equity from the courts”

The maxim of unclean hands comes from the courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive.

Olmstead v. United States, 277 U.S. 438, 483-84 (1928).

Snohomish County, as a government entity, has a higher obligation to come to the court with “clean hands” in order to be a beneficiary of laches. Laches against Swank for the benefit of Snohomish County is not appropriate.

The 1993 amendments do not apply. The trial court had the power to allocate fault.

7. Allocation of relative fault by the Duffy jury would not have eliminated the need for a hearing to allocate fault involving Snohomish County. The trial court should not have used the failure to submit that issue to the Duffy jury as a basis for estoppel.

Conclusion of Law 6 states: “The Plaintiff is estopped from raising the issue of % of allocation of fault in light of F of F #16.”

Finding of Fact 16 provides:

The jury instructions, and verdict form, provided by the Court to the Jury were those proposed by the Plaintiffs. Plaintiffs’ proposed verdict form did not invite the jury to allocate a percentage of fault to any other potentially negligent party – including Snohomish County, Chouinard or Swank himself – if it found Defendant Duffy not negligent.

CP 309, 313.

Swank respectfully submits that this conclusion of law reflects error. The conclusion of law states Swank is estopped from raising the issue of percentage allocation of fault because he failed to provide the Duffy jury with an instruction and jury verdict form to make the allocation.

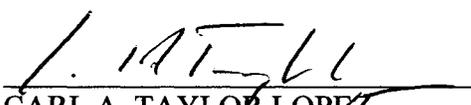
An allocation of fault by the Duffy jury would have had no binding effect on Snohomish County, because it was not formally a party

CONCLUSION

This cause should be remanded for allocation of fault.

Dated this 15th day of March, 2010.

LOPEZ & FANTEL, INC., P.S.


CARL A. TAYLOR LOPEZ,
WSBA No. 6215
Of Attorneys for Appellants