CLAIMS AGAINST FIRE DEPARTMENTS IN WASHINGTON AND OREGON

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In evaluating the subrogation potential of a fire loss, occasionally the fire fighting techniques employed by a public entity are called into question. An issue then arises regarding the feasibility of suing the fire department and/or the public entity in control of that fire department for negligent fire fighting techniques or mishandling of the fire scene. This paper will focus on a recent Washington case that discusses the issue and also briefly discuss how it applies to cases in Oregon.

Historically, Washington and Oregon legislatures and courts have gone to great lengths to protect fire departments from negligent fire fighting lawsuits. The Washington case of Babcock v. Mason County Fire District, 10 1 Wn. App. 677 (2000) reinforces that notion and once again demonstrates that suing a fire department is an uphill battle.

At approximately 4 p. m. on August 3, 1995, James and Kyoko Babcock left their home in Union, Washington to purchase groceries in nearby Shelton. While they were gone, their house caught fire. A neighbor reported it soon thereafter and Harold Silver, Chief of Volunteer Mason County Fire District No. 6, responded at 5:14 p. m. Silver notified the dispatcher that the fire was well underway, was burning through the structure, and that additional units and water tenders were needed. A neighbor immediately told Silver that the 'Babcocks' dog was still inside the house and needed to be rescued. Silver, however, prevented the neighbor from entering to save the dog because he deemed the rescue too dangerous. Two more fire engines soon arrived carrying four volunteer firefighters between them. Having assessed the fire and the available fire fighting capability, Chief Silver then began directing the effort to contain the fire.

The Babcocks returned home around 5:15 p. m. Both Babcocks asserted that when they arrived the garage was not yet on fire. James Babcock contends that one firefighter instructed him not to remove any personal property and to leave matters in the hands of the firefighters who

would "take care of protecting the Babcocks' property. " Mrs. Babcock twice asked the firefighters to spray water on the garage before it caught fire, but was told they could not because they were waiting for public utility district personnel to arrive and turn off the power.

James Babcock stated:

> The firefighters stood around until the garage caught fire and was 3/4consumed before they put the first drop of water on it. My tent trailer caught fire 20 minutes after our arrival from Shelton and it -could have been moved by a single person. A fireman stood next to it, and for a long while sat on the tongue of it until just before it caught fire. If they had moved it another 10 to 15 feet, it could have been saved.

Mr. Babcock's track was parked about 20 feet from the house and he had been directed by firefighters not to move it. Fearing it would bum, Mr. Babcock disregarded the firefighters' directives and moved it anyway thereby preventing it from being consumed in the fire. Mr. Babcock claimed that if he had been allowed into his garage, he, his wife and neighbors could have saved most of the property within. Mr. Babcock stated he did not enter the garage because he "relied on the statement of the fireman, that the firefighters would protect my property and they did not do that. "

In their pleadings, the Babcocks disputed the severity of the fire, questioned the fire districts efforts to fight it and contested the reasonableness of Chief Silver's refusal to move the tent trailer away from the fire. The Babcocks sued District No. 6 and its commissioners alleging:

1) Chief Silver was negligent in delaying deployment of equipment, failing to use the districts personnel and resources effectively to fight the fire, and allowing the Babcocks' shop to catch fire "while crews stood idly by"; and

2) The commissioners were negligent in hiring Silver in failing to manage and employ "the resources of the District" properly.

The Mason County Fire District moved to dismiss this suit on a summary judgment motion. Although the trial court accepted the Babcocks' version of events as true, it nonetheless

granted the motion and dismissed the case. The Babcocks appealed but the Court of Appeals upheld the dismissal, holding that the Mason County Fire District and the commissioners were protected from suit by the public duty doctrine (PDD).

The court began its analysis by explaining that RCW 4. 96. 010, which abolished sovereign immunity, is qualified by the PDD. The PDD limits governmental entities' liability by setting forth the proposition that state and municipal laws impose duties owed to the public as a whole and not to particular individuals. Therefore, for an individual to recover from a governmental entity in tort, the individual must prove that the governmental entity owed a duty to the injured person as an individual and the duty breached was not merely an obligation owed to the public in general. In order to make that showing, a number of exceptions to the PDD exist. The Babcocks claimed two exceptions to the PDD applied to their situation - the rescue doctrine and the special relationship doctrine. The first, the rescue doctrine, applies when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular person. The second, the special relationship doctrine, applies when a relationship exists between the governmental agent and the plaintiff that sets the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent.

In determining whether those exceptions applied, the court was required to assume the facts were as the Babcocks claimed. Working within that framework, the court held that neither exception applied to the Babcocks. The court explained that inherent to the rescue exception is the notion that the rescuer is gratuitously assuming a duty to warn the endangered party. The court pointed out that Mason County Fire District did not gratuitously assume fighting the Babcocks' house fire. Rather, the Fire District was established for that very purpose - to fight fires and to protect the property of all citizens. The Babcocks' theory essentially asked the court

to take a position where the exception would swallow up the rule, something the court declined to do. Similarly, the appellate court ruled that the special relationship exception did not apply.

The Babcocks contended that because one of the firefighters told James Babcock to stay away from the fire and let the firefighters "take care of protecting the property", that firefighter established a special relationship with the Babcocks. Again, the court believed that if they took the Babcocks' position the exception would swallow up the rule and every time a firefighter reassured a home owner the fire department would then become liable. The court discussed how dangerous and unpredictable fires can be and explained that fire departments are simply doing their job in protecting the public by ordering homeowners and bystanders away from fires. The court gave virtually no weight to the Babcocks' contentions that much of their property could easily have been saved if they had been allowed into their garage before it caught fire and if the fire department had simply moved their travel trailer ten to fifteen feet away from the structure. The fact that James Babcock moved his truck was used by the court to point out that Babcock did not rely on the firefighters' statements anyway.

As is obvious from the Babcock holding, Washington courts still lean very heavily towards protecting fire departments from liability in performing their public duties. Oregon, like Washington, also offers great protection to its public entities. Oregon has gone so far as to codify a restriction on actions against fire departments and their employees for injuries to persons or property. ORS 476. 600 states:

> **Liability for Injury to Personal Property:** Neither the state nor any county, city or fire district or other political subdivision, nor any firefighter acting as the agent of any of the foregoing shall be liable for any injury to person or property resulting from the performance of any duty imposed by the authority of ORS 476. 520 2(t)(o) 476. 590. In carrying out the provisions of ORS 476. 5202(t)(o) 476. 590 or while acting within the scope of any duty imposed by authority of those provisions, no person shall incur civil liability, provided that no person shall escape full liability for

> injury to person or property resulting from a willful misconduct or gross negligence of the person.

The above statute provides Oregon's governmental agencies with near complete immunity from negligent fire fighting lawsuits. Although the statute does not bar suits alleging willful misconduct or gross negligence, actions by firefighters that rise to that level are rare. It follows that unless egregious facts are present, a negligent fire fighting lawsuit brought in Oregon will not be successful.

Washington and Oregon have made it clear through both legislation and case law that they intend to protect governmental entities from suits based on negligent fire fighting. Experience has taught us that given the myriad of legal hurdles to overcome, such cases are therefore rarely-viable. Regardless, each case is different and thus, the facts of each should be carefully analyzed to determine whether subrogation potential exists.

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