The Honorable Thomas J. Felnagle
October 12, 2007
9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

GREGORY POTTER, as Personal Representative of the Estate of DAVID POTTER on behalf of the Estate of DAVID POTTER and on behalf of DAVID POTTER'S Surviving Children,

Plaintiff,

v.

The CITY OF PUYALLUP, a Municipal Subdivision of the State of Washington, PENSER NORTH AMERICA, INC., and SAFETY NATIONAL CASUALTY CORPORATION, jointly and severally.

Defendants.

NO. 07-2-09219-1

PLAINTIFFS' REPLY TO DEFENDANTS CITY OF PUYALLUP AND SAFETY NATIONAL CASUALTY CORPORATION IN SUPPORT OF MOTION TO AMEND COMPLAINT UNDER CR 15

I. INTRODUCTION

Plaintiffs initially filed their Complaint based on the premise that this case falls under the provisions of LEOFF that specifically confers jurisdiction upon superior courts to provide relief to firefighters from ***omissions*** of their employers that result in injury or death to the firefighter. *See* RCW 41.26.281. For this reason, Plaintiffs did not plead intentional infliction of emotional distress as a cause of action in their original Complaint. Although Plaintiffs still believe that LEOFF applies in this case, after this Court's ruling that this case falls under the IIA, Plaintiffs

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are now in a position that requires them to amend their Complaint to specifically include intentional infliction of emotional distress as a cause of action against the Defendants.

Amendment under Rule 15(a) is to "be freely given when justice so requires." The principal factor in determining whether amendment will be granted is the presence or absence of prejudice to the nonmoving party. *Del Guzzi Constr. Co. v. Global N.W., Ltd,*. 105 Wn.2d 878, 888, 719 P.2d 120 (1986). None of the three Defendants even mention prejudice in their opposition to the Plaintiffs' motion to amend their Complaint. Because leave to amend should be freely given under CR 15(a) when justice so requires and none of the Defendants have alleged, let alone shown, prejudice, Plaintiffs' motion to amend their Complaint should be granted.

II. ARGUMENT

A. The issue of whether or not Plaintiff can establish the elements of the claim of outrage goes to the merits of the case – not whether or not Plaintiffs should be granted leave to amend their complaint.

Defendant City of Puyallup objects to the amendment of the Plaintiffs' Complaint on the basis that "Plaintiff cannot establish the elements of a claim of outrage as a matter of law." *Def. City of Puyallup's Opposition to Plaintiff's Mot. to Amend* at 3. This argument goes to the merits of the Plaintiffs' amendments to their Complaint, rather than whether or not the Plaintiffs should be granted leave to amend their Complaint. If it wishes to challenge the sufficiency of the evidence to support the allegations of the Plaintiffs' amended Complaint, the City certainly has the right to do so with a summary judgment motion ***after*** the facts of the case have been fully developed through the discovery process. As set forth above, leave to amend is to be freely given absence a showing of prejudice under CR 15(a). Defendant City's argument does not establish any prejudice, but instead goes to the sufficiency of the evidence. Because the City has

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failed to show any prejudice to it by allowing the Plaintiffs to amend their Complaint, the Plaintiffs should be given leave to do so.

B. Contrary to Defendant SNCC's arguments, the Plaintiffs Amended Complaint includes new causes of action to the Complaint that are not barred by the IIA.

Like Defendant Penser, Defendant Safety National Casualty Corp. (SNCC) fails to grasp that Plaintiffs' proposed Amended Complaint is not a rehash of their previous complaint. The Amended Complaint adds claims of intentional infliction of emotional distress against all three Defendants and removes the claims that this Court dismissed for want of subject matter jurisdiction.

SNCC claims that this Court dismissed all claims against it as an insurer because such claims were barred by RCW 51.04.010. But the claims added in the Plaintiffs' do not fall under the bar of the statute. As SNCC's co-Defendant the City of Puyallup points out in its brief, under *Deeter v. Safeway*, 50 Wn. App. 67, 76, 747 P.2d 1103 (1987), "a self-insured employer or ***its third party administrator*** may lose its immunity under the Industrial Insurance Act upon allegations that the defendants embarked 'upon a deceitful course of conduct constituting the tort of outrage.'" *Def. City of Puyallup's Opposition to Plaintiff's Mot. to Amend* at 3. Defendant City of Puyallup's comment accords with our Supreme Court's statement in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995) that the IIA does not bar a cause of action for the tort of outrage arising out of outrageous conduct in the administration of a worker's compensation claim:

> In *Wolf v. Scott Wetzel Servs., Inc.*, 113 Wn.2d 665, 782 P.2d 203 (1989), we held that the IIA bars a civil action for wrongful delay or termination of benefits. We noted, however, that such an action might lie if the wrongful delay or termination was so egregious as to constitute the tort of outrage: "This is because outrageous conduct in the administration of a workers' compensation claim is too tenuous in its relationship to the underlying workplace injury." *Wolf*,

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> 113 Wn.2d at 677. This is another way of saying what we said in *Reese:* an injury that is of a different nature, arises at a different time, and stems from different causes than a workplace injury is not barred by the IIA, even though it may result from actions by an employer that injure an employee. *Reese*, 107 Wn.2d at 574.

Birklid, 127 Wn.2d at 869-870.

The Plaintiffs' Amended Complaint merely adds a cause of action for outrage or intentional infliction of emotional distress[1] in the administration of David Potter's IIA claim. Our courts have specifically held that such claims are not barred by RCW 51.04.010. Nothing under Washington law or this Court's previous ruling prohibits the Plaintiffs from amending their complaint to include this cause of action against all three Defendants.

II. CONCLUSION

For these reasons, the Plaintiffs should be granted leave to amend their Complaint as requested in their motion.

DATED this 11th day of October, 2007.

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[1] The *Birklid* opinion equates the tort of outrage with the *intentional* infliction of emotional distress. *See Birklid*, 127 Wn.2d at 873.

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