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NOTABLE CASES AND VOICES FROM THE BENCH

INSURER NOT RESPONSIBLE TO DEFEND AND INDEMNIFY UNDER POLICY'S FELLOW EMPLOYEE EXCLUSION

The Superior Court recently ruled that an auto insurer was not required to defend and indemnify an employee who consumed alcohol and caused a single-vehicle accident injuring a fellow employee who was acting within the course and scope of his employment. Atlantic States Ins. Co. v. Northeast Networking Systems, Inc., et al., 893 A.2d 741 (Pa. Super. 2006).

Clinton Boyd and Charles Fornicoia were sent by their employer, Northeast Networking Systems, Inc. ("Northeast") to Richmond, Virginia for work. They drove a company owned vehicle which only Boyd was permitted to drive. Boyd and Fornicoia went to dinner and both consumed alcoholic beverages. After dinner, Boyd drove the car with Fornicoia as a passenger. The two were involved in a single car accident and Fornicoia was seriously injured. Fornicoia filed a negligent tort action against Boyd and Northeast.

Boyd and Fornicoia both filed Workers Compensation claims against Northeast. Boyd drove the car after consuming alcohol, in violation of his employment policy, thus his claim was denied as he was found to be outside the scope of his employment at the time of the accident. Despite his consumption of alcohol, Fornicoia's claim was granted and he was found to have been within the scope of his employment at the time of the accident because he was a passenger in the vehicle.

Atlantic States Insurance Company ("Atlantic"), the insurer of the car involved in the accident, filed a Declaratory Judgment action, arguing that the policy provided no liability coverage to Boyd. Atlantic argued several provisions for disclaiming coverage for Boyd.

First, Atlantic argued that its policy did not provide coverage for Boyd due to the Workers Compensation exclusion. The Superior Court found that Boyd could not be denied coverage under the Workers Compensation exclusion of the policy since Boyd was found to be outside the scope of his employment at the time of the accident.

Second, Atlantic argued that the policy does not provide coverage for bodily injury to an employee of the insured for claims arising in the course of employment by the insured. The Court found that this exclusion was not applicable in this situation because Fornicoia was not suing Northeast for bodily injury arising out of, or in the course of, his employment.

Third, Atlantic attempted to deny coverage because Boyd consumed alcohol. The Superior Court found that 75 Pa.C.S.A. §1724 applied in this case. §1724 provides that insurance benefits cannot be denied solely because the driver of the insured vehicle is found to be under the influence of drugs or alcohol. The Court held that §1724 applied because Boyd's permission to drive the company vehicle was not negated by his alcohol consumption.

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Lastly, Atlantic argued that the fellow employee exclusion applied in this matter and therefore Atlantic was not obligated to provide coverage. Under the fellow employee exclusion, the policy would not apply to bodily injury to any fellow employee (Fornicoia) of the insured (Boyd) arising out of and in the course of the fellow employee's (Fornicoia's) employment. The Worker's Compensation referee determined that Fornicoia was in the course and scope of his employment at the time that he was injured.

Based upon the fellow employee exclusion, the Superior Court held that Atlantic was not responsible to defend Boyd in the negligent tort action, nor were they responsible for paying any verdict in favor of Fornicoia and against Boyd.

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COVERAGE ISSUE FOR "CLAIMS MADE POLICIES" IN PA

A Philadelphia Jury has recently returned a Defense Verdict in an insurance company coverage dispute. Ace American Insurance Co. v. Underwriters at Lloyds and Cos. Of interest in this matter was the ruling of the Court of Common Pleas Judge, the Honorable Howland W. Abramson, on pretrial Motions. Since 1977, Pennsylvania has required that an insurer demonstrate prejudice due to late notice to be relieved of its coverage obligations on an "occurrence policy." Brakeman v. Potomac Ins. Co., 371 A. 2d 193 (Pa. 1977). In Ace, Judge Abramson found that under Pennsylvania law, an insurer seeking to deny coverage on a "claims made policy" due to late notice, does not need to show prejudice if the insurer's notification requirements were not met.

This is an issue of first impression in Pennsylvania. We will continue to watch this recent decision to determine if this matter is taken up to the Appellate Court

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REVISIONS TO CIVIL JURY INSTRUCTIONS

The Pennsylvania Suggested Standard Civil Jury Instructions, Third Edition, published in October 2005, makes revisions to the Second Edition that was published in January 2003. The revisions in the Third Edition are based upon new Rules of Civil Procedure, new legislation and suggestions from lawyers and judges on how to make the instructions more understandable for the jury.

The following is a list of some of the jury instructions that have been changed: 1.42 Burden of Proof and Preponderance of Evidence; 1.51 Note-Taking by Jurors; 2.16 Subsequent Remedial Measures; 3.15 Factual Cause; and 3.20 Comparative Negligence and Apportionment Among Joint Tortfeasors; and 11.08A Informed Consent.

The following are some of the new instructions: 6.09 Past and Future Non-Economic Loss; 8.04A Factual Cause-Products Liability; 8.04B Factual Cause- Products Liability Multiple Defendants; 11.03 Medical Malpractice-Burden of Proof; 11.11A Medical Malpractice-Damages (Under the Mcare Act; Effective for All Claims Arising Subsequent to March 20, 2002); and 11.11B Medical Malpractice- Suggested Special Jury Interrogatories (Under the Mcare Act Effective for All Claims Arising Subsequent to March 20, 2002).

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VOIR DIRE ALLOWED ON MED-MAL CRISIS

In a recent ruling, the Pennsylvania Superior Court held that voir dire of potential jurors may include questions as to whether the recent medical malpractice media coverage would have an impact on an individual's ability to be a fair and impartial juror. Capoferri v. Childrens Hospital, et. al., 893 A.2d 133 (Pa. Super. 2006)

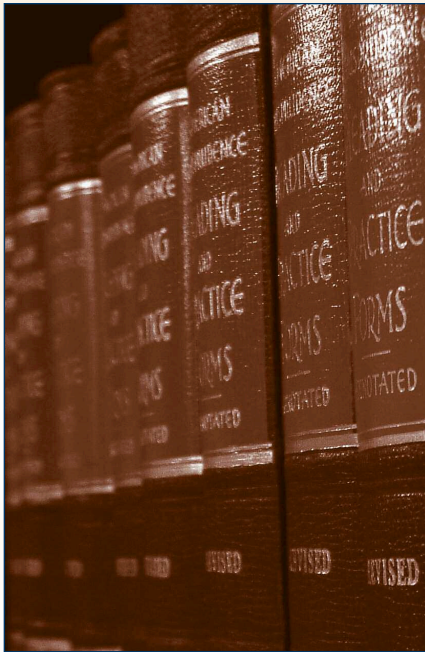
This case was brought up on appeal after the Philadelphia County Court of Common Pleas entered a judgment on a jury verdict in favor of the Defendants. One of the issues presented by the Appellants was whether the court erred in not allowing the Plaintiffs to question individual jurors about the media coverage on the alleged "medical malpractice crisis."

The Supreme Court held that Plaintiffs were entitled to question prospective jurors on whether they were affected by the media coverage. In so holding, the Court reasoned that the purpose of voir dire examination is to ensure that the case is heard by a fair and impartial jury. Therefore, in light of the pervasive media coverage on the issue, the questions should have been permitted.

Based on the Court's holding on this issue, the trial court's decision was reversed and a new trial was granted on the merits.

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LEGISLATIVE UPDATE

GOVERNOR VETOES JOINT AND SEVERAL LIABILITY REFORM

The Pennsylvania Senate and House of Representatives passed SB 435, which seeks to address the Joint and Several Liability Reform. In March 2006, Governor Edward G. Rendell vetoed SB 435. This legislation would have substituted a Comparative Negligence Doctrine for the Joint and Several Doctrine. Under current law, all parties are jointly and severally liable to the other tortfeasors. Under the current approach, the Plaintiff may collect a judgment solely from one Defendant and require that Defendant to collect from the other responsible parties.

The proposed legislation would have provided that a Defendant was only responsible to pay a portion of the damages attributable to their liability, regardless of the collectibility from other sources. Under the proposed legislation, a Plaintiff would only be entitled to a Joint and Several Judgment if a Defendant was found more than 60% liable or their actions were intentional.

Supporters of the litigation argue that it will protect businesses from frivolous lawsuits. Opponents argue that it unjustly limits the ability of victims to receive adequate compensation for their injuries. Opponents also argue that larger corporations, in an effort to ensure that their liability is less than 60% will join smaller businesses and multiple defendants in a lawsuit.

In issuing his veto, Rendell found that the proposed legislation does not offer enough protection to victims in negligence cases. The Governor has called on the Legislature to formulate a bill that strikes a better balance between the needs of businesses and the victims of negligence.

We will continue to track this important issue and advise you of any further developments in joint and several liability reform.

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RECENT VERDICTS

NJ SUPREME COURT TO HEAR VERBAL THRESHOLD CASE

The New Jersey Supreme Court recently granted certification and agreed to hear the case of Davidson v. Slater, 381 NJ Super 22 (App. Div. 2005). In *Davidson*, the Supreme Court will be asked to render a decision on a verbal threshold issue that has caused a split among the New Jersey Appellate courts. William J. Markwardt of the Kent & McBride Cherry Hill office represents the Defendant in this matter. It was upon his petition for certification that the Supreme Court agreed to hear this case.

The *Davidson* case questions the necessity of a *Polk* comparative analysis in order for a plaintiff to cross the verbal threshold and pursue damages for pain and suffering. Under the *Polk* analysis, plaintiffs must provide a comparative analysis between prior injuries and injuries sustained as a result of the instant motor vehicle accident. It has been argued that requiring this added analysis essentially creates a higher burden on plaintiffs who allege that the accident at issue aggravated a pre-existing condition, as opposed to Plaintiffs who allege that all prior injuries were resolved before the instant accident occurred.

It is anticipated that the Court will schedule arguments on this matter some time in late Spring/early Summer. We will certainly keep you updated on this significant and controversial decision.

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HEART ATTACK CLAIMANT NEED NOT PROVE ABNORMAL WORKING CONDITIONS

Claimant who suffered a heart attack while meeting with a supervisor at work is not required to show that his injury was the result of abnormal working conditions in order to obtain benefits. Panyko v. WCAB (U.S. Airways), 888 A.2d 724 (Pa. 2005). The Pennsylvania Supreme Court found that a Claimant only had to show that he suffered from an objectively verifiable physical injury and that the injury arose in the course of his employment and was related thereto.

In reaching this decision, the Pennsylvania Supreme Court noted that a Claimant must only prove that the injury was a result of abnormal working conditions when seeking benefits for psychic injuries, which are inherently subjective.

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OFF THE RECORD

KENT & MCBRIDE ANNOUNCES MONICA O'NEILL

We are pleased to welcome **MONICA O'NEILL** to the firm. Monica was most recently the Director of the Property Litigation Group at Post & Schell, P.C., and she will serve in that capacity with us. Monica brings not only a wealth of experience and expertise, but also a terrific presence in the office. We are looking forward to growing our Property Litigation practice with her at the helm.

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