

Welcome once again to Your Best Defense, Wayman, Irvin & McAuley, LLC's quarterly newsletter.

Last quarter, we devoted the newsletter to the concerns and issues of the design professional, the architects and engineers who are consistently being identified as defendants in many construction projects where injuries occur. This edition looks at the concerns of many other entities that our firm can represent, including liquor licensees, small business owners, asbestos manufacturers and suppliers and a variety of other professionals.

In "Employer Liability - Smaller Businesses Need to be on Guard," Kate Fagan takes a look at the development of employer liability over the years and identifies steps that the small business owner can take in an effort to avoid such lawsuits. In "The New Certificate of Merit Rules - Taking the Teeth Out of the Tiger," Ian Walchesky examines the requirement that a plaintiff must include a Certificate of Merit with newly filed actions directed against a variety of professionals and how recent amendments to the statute involved have softened and lessened those requirements for the one asserting professional negligence. Gregory Knight evaluates the impact of a recent Ohio Court of Appeals



opinion involving the *prima facie* medical threshold requirements of House Bill 292 in Ohio, and how those requirements are now to be applied retroactively to cases filed prior to September 2, 2004, in "H.B.292 to be Applied Retroactively in Ohio Asbestos Cases." Finally, I have analyzed a new decision by the Pennsylvania Superior Court which supports expanded liability exposure for liquor licensees who inadvertently allow an adult patron to provide alcoholic beverages to an underage person. Our readers should be aware of the developments discussed in this edition, as they could directly and significantly affect their businesses and liability exposure.

If you know of anyone that is not currently on our mailing list that you feel might find our Newsletter useful and informative, please let me know at dforsythe@waymanlaw.com. We will be sure to send out a copy to them and include them in future mailings.

As always, if you have any questions or are in need of any further service, please contact the authors or any of our attorneys. Please visit our Web site, www.waymanlaw.com, for a complete look at the firm's capabilities and professional staff.



EMPLOYER LIABILITY: SMALLER BUSINESSES NEED TO BE ON GUARD

By *Kate J. Fagan, Esq.*

Cases involving sexual harassment, age discrimination, racial discrimination, gender discrimination and the like garner headlines of mega verdicts coupled often with punitive damages. While large corporations may be able to withstand the verdicts and the cost to battle these types of lawsuits, what can the small business person do?

If we look to the dockets of the Common Pleas Courts here in the Commonwealth of Pennsylvania, as well as to the dockets of the United States District Courts in our state, we can see a clear trend of the ever increasing amount of employment liability cases that are filed each week.

In these very strained economic times, with investments and 401 (k) plans losing ground, it is unrealistic to assume that the trend of employment related lawsuits will diminish. While the premiums for insurance coverage for these kinds of suits has decreased over the years, many smaller businesses still cannot afford the luxury of this kind of coverage. What can be done?

The Federal Government has a series of laws, passed over many years, that protect employees' rights within the

Often, we read about huge verdicts in employment liability cases where very large corporations are involved.

In This Issue:

| | |
|---|---|
| Employer Liability: Smaller Businesses | |
| Need to Be on Guard | 1 |
| The New Pennsylvania Certificate of Merit Rules – Taking the Teeth out of the Tiger | 3 |
| Liquor Licensees Beware New Superior Court Ruling | 4 |
| H.B. 292 to be Applied Retroactively in Ohio in Asbestos Cases | 5 |
| Wayman Watch | 5 |

Lawyers Solving Problems

Employer Liability, continued from page 1

workplace. These include Title VII of the Civil Rights Act of 1964, Section 1981 of the Civil Rights Act of 1866, Age Discrimination in Employment Act, Americans with Disabilities Act, and the like. Most states also have adopted such regulations. Business owners should be aware of the nature and types of claims that can be advanced under the terms of these laws. Claims for sexual harassment, for age discrimination, gender discrimination, discrimination due to disabilities, equal pay disputes and many others can arise and directly affect even smaller businesses.

In particular, the Federal law governing age discrimination is applicable to businesses that have only 20 or more employees.

Ideally, there should be an employee handbook in place that is distributed to each employee at the time of hiring. That handbook should contain clear language that the employee is an employee hired "at will" and set forth that there is no promise of any job security. Any handbook should contain provisions of the business' policies and procedures in clear and concise language. Areas that should be covered include a no harassment policy which covers all forms of harassment, including sexual harassment. The employer should also obtain a handbook acknowledgment form as signed by each new employee upon beginning the job. Outlining the policies of the business as to vacation, sick leave, and the like is also important.

Additionally, employers should diligently and immediately follow up when any complaints are made by employees about conduct in the workplace. This may include complaints that an employee has been subjected to allegedly inappropriate conduct by an outsider, a customer or a vendor. Complaints also can arise in the form of assertions of harassment by an employee's supervisor or fellow employee. Any such complaints should be investigated and addressed as soon as possible, and follow up is a must. Documentation of the steps taken by the employer to resolve the issues fairly often ultimately helps to combat allegations that may be contained in a suit filed at a later time. By taking no action, and not addressing any reported problems and concerns, the employer could be setting itself up for future problems. In any of these cases, the investigation and documentation by the employer, done in a timely manner, is a key to a viable defense to possible claims.

Employment law also embraces the rights of those seeking employment, and how they are to be treated as they are searching for employment. Businesses should be familiar with the laws that govern what can and cannot be asked during the course of a job interview. Interviewers

should stick to job related questions, and avoid improper questions that may probe into an applicant's personal life or affairs. Familiarity with laws governing applicant testing in terms of medical examinations, drug and alcohol testing, psychological testing and others is important for the fair and proper evaluation of candidates for an employee position.

Another source of many employment law claims arises out of the Americans with Disabilities Act, which applies to employers who have employed 15 or more full-time and/or part-time employees in each of the 20 or more calendar weeks during the current calendar year or the preceding calendar year. This law even applies to those who are applying for employment. Again, an employer should become familiar with this Act to protect against those claims where assertions are made that the employer has failed to make reasonable accommodations for a disabled individual.

The smaller business owner(s) should make a diligent effort to know the duties and rights the employer has in the modern workplace today. Often, business organizations offer seminars to aid in the education of the business owner in this regard. Considerations in consulting attorneys who practice in this area of the law, as well as creating a position to oversee personnel, may be further options to help guard against employment claims. Considering carefully the cost and benefit of Employment Practices Liability Insurance is also essential in preparing the business to face potential claims. Education and knowledge are key, and the implementation of good employment practices is foremost in preventing costly employment litigation.

Attorney Fagan will be happy to discuss these or related issues further if you would like. Please contact her at kfagan@waymanlaw.com.

Lawyers Solving Problems



THE NEW PENNSYLVANIA CERTIFICATE OF MERIT RULES – TAKING THE TEETH OUT OF THE TIGER

By Ian Walchesky, Esq.

In 2003, the Pennsylvania Supreme Court adopted Rules 1042.1 through 1042.8 of the Pennsylvania Rules of Civil Procedure. The new Rules required a level of review in advance of filing an action for professional negligence against a health care provider as defined by the Section 503 of the Medical Care Availability and Reduction of Error (MCARE) Act, i.e., an accountant, an architect, a chiropractor, a dentist, an engineer or land surveyor, a nurse, an optometrist, a pharmacist, a physical therapist, a psychologist, a veterinarian, or an attorney, whether licensed in Pennsylvania or any other state. Specifically, the Rules required a party raising such a claim to have a professional licensed in that field to supply a written statement that there is a reasonable probability that the “care, skill, or knowledge exercised or exhibited in the treatment, practice, or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm.” The Plaintiff was required to file a Certificate of Merit with the Complaint, or soon thereafter, certify that the above was true, that the claim was based solely on allegations that other licensed professionals for whom the Defendant is responsible violated the standard, or that expert testimony was not necessary to prosecute the claim. Rule 1042.3 required the Certificate to be filed within sixty days of filing the Complaint, though the court could extend the period for another sixty days so long as the plaintiff filed a timely motion to extend the time requirement. If the plaintiff did not comply with these Rules, the Defendant could praecipe for judgment the day that the time requirement expired.

The original Certificate of Merit rules allowed licensed professionals against whom claims were made to obtain a snap judgment against the Plaintiff if a Certificate of Merit was not filed within sixty days of the date the Complaint was filed. There was no requirement that the licensed professional have any particular relationship with the claimant, only that the claim was for professional liability against a licensed professional. While this Rule was beneficial to many licensed professionals as Defendants, there were problems with the initial rule. Most notably, some trial courts had ruled that the Certificate of Merit rules did not apply to firms or corporations, although the Superior Court held in 2007 that the Rules did. Regardless, the procedural committee decided to re-draft the Rules in

order to clarify that the Rules apply to individual licensed professionals, as well as the firms that engage in professional activity via licensed professionals.

However, although there is no case law on the new rules yet, it appears that the new rules severely limit the strength of the Certificate of Merit rules for licensed professionals, especially architects and engineers. First, under new Rule 1042.1, the rules govern only a professional liability action “asserted by or on behalf of a patient or client of the licensed professional...” This particular language is troubling for professionals such as architects and engineers who work on larger scale projects who face professional negligence claims from tenants or persons near to a project. For instance, if a property owner sues a professional engineer who performed work on an adjacent parcel for damages, the neighbor would not be required to file a Certificate of Merit against the engineer, while the person who employed the engineer would be required to file a Certificate. There appears to be no real distinction beyond the contractual relationship between the professional and the client. For architects and engineers, this change to the rule severely limits the rule’s protective features.

More over, the amendments to Rule 1042.6 provide new time requirements for filing a judgment for failure to comply with the Certificate of Merit rules. First, Rule 1042.6(a) requires that a Defendant who wishes to obtain a judgment of non pros for a plaintiff’s failure to file a Certificate of Merit must file a written notice of intention to file a praecipe, which allows an additional thirty-day period within which the Plaintiff must comply. Second, the Rules authorize Plaintiffs to file a Motion seeking a determination of whether a Certificate is required. Thus before the amendment, once the Plaintiff missed the deadline for filing a Certificate of Merit, a professional could immediately file a judgment of non pros; now, under the amendment, the Defendant must provide written notice to the Plaintiff of the intent to seek a judgment. Accordingly, the Court has given the Plaintiff even further opportunity to either comply or contest the requirement of providing a Certificate of Merit.

In conclusion, the recent amendments to the Rules of Civil Procedure appear to have taken away many of the protections afforded by the Rule to licensed professionals such as architects and engineers. The Rules limit their applicability only to actions by the clients of the licensed professionals, and also limit the ability Defendants have to obtain a judgment for the failure to comply with the Rules. Perhaps the protections will return as case law develops under this issue, but as the law stands, the Certificate of Merit rules appear to afford significantly less protection for architects and engineers than they previously provided.

Attorney Walchesky will be happy to discuss these or related issues further if you would like. Please contact him



LIQUOR LICENSEES BEWARE NEW SUPERIOR COURT RULING

By Dale Forsythe, Esq.

A very recent decision by the Superior Court of Pennsylvania makes clear that a liquor licensee in the Commonwealth of Pennsylvania must be ever vigilant in ensuring that its underage patrons are not served alcoholic beverages, even where there is no direct evidence that an employee served the minor.

In *Commonwealth v. Koratich's Golden Rail, Inc.*, 950 A.2d 340 (Pa.Super. 2008), the Superior Court addressed an appeal by corporate liquor licensee Golden Rail, which had been convicted of furnishing alcoholic beverages to a minor under 21 years of age. In 2004, at 2:00 a.m., 18-year old James Superack was involved in a one car vehicular collision resulting in his death and the death of his passenger at the time, 21-year old Chad Seybold. The paramedic involved at the scene smelled alcohol and the scene was a short distance from the defendant establishment. A jury later found the Golden Rail in violation of 47 P.S. Section 4-493(1). The statute involved makes it unlawful for any licensee...or any employee, servant or agent of such licensee...or any other person to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given....to any minor.

Here, on appeal, the licensee maintained that the conviction was improper in that there was insufficient evidence to support the jury's finding, i.e., there was no trial testimony or evidence that any employee served Mr. Superack alcohol. The argument raised by the Golden Rail was that Mr. Seybold purchased the alcoholic beverages and provided them to Mr. Superack, which should not be construed as "furnishing alcohol to minors" under the statute.

The Superior Court rejected the licensee's arguments. While the court acknowledged that there was indeed no direct evidence that any employee served Mr. Superack, the court held that the circumstantial evidence was overwhelmingly supportive of a finding that an employee had furnished prohibited beverages to the minor decedent. The court noted that the jury had found, beyond a reasonable doubt, that all elements of the crime had occurred. That being the case, the Superior Court, viewing the evidence in a light favorable to the verdict winner Commonwealth and drawing all proper inferences in favor of the Commonwealth, was charged on appeal with

determining the sufficiency of the evidence. The court noted that this standard applied not only to direct evidence, but to circumstantial evidence as well, as long as there is a finding beyond a reasonable doubt. 950 A.2d at 344, citing *Com. v. Oliver*, 693 A.2d 1342 (Pa.Super. 1997), et. al.

Here, the court noted that the licensee "has a duty to see that adult patrons do not furnish alcoholic beverages to minors." at 344, citing *Com., Pa. Liquor Control Board v. Mignogna*, 548 A.2d 689 (Pa. Cmwlth.1998) (a licensee "permits" this under the liquor code if it acquiesces by failing to prevent it) and *Com., Pa. Liquor Control Board v. Abraham*, 489 A.2d 306 (Pa.Cmwlth. 1985) (licensee failed its duty where minors surreptitiously gained entrance to establishment and had adults buy alcohol for them). In this case, there was a plethora of evidence that Mr. Superack was drinking alcoholic beverage on the premises, with several of his underage acquaintances who were also at the premises testifying that Mr. Superack was intoxicated. The court looked carefully at the trial testimony, which included testimony that Superack and Seybold were drinking beer until the bar closed, that Superack had vomited in the parking lot, that Superack had at times been sitting at or standing right next to the bar, and that Superack had taken a shot of liquor at one point. Many of the minor witnesses had gotten into the bar using false identification and had been doing so for years. There was also evidence that Superack had gained entrance without being carded and had been "tipsy" upon arrival at the Golden Rail. Although no one could testify that a bartender had provided alcohol to Mr. Superack or that he had definitely acquired it at the establishment, the court held that given all of the circumstantial evidence, a jury could have concluded that appellant furnished alcohol to Mr. Superack in violation of the code. The conviction was upheld.

While not a case of first impression, the Superior Court opinion makes clear that the facts and circumstances surrounding a minor's acquisition of alcohol can all be taken into account when a jury determines whether a licensee had furnished the minor alcohol in contravention of the liquor code. It serves as an excellent and poignant reminder to all licensees to be very careful not only in ensuring that employees properly check identification and not serve minors, but also in making sure that other legal patrons are not securing the alcohol and providing it to other minor patrons. The consequences of a lack of diligence can be catastrophic to the licensee and its business as well as to, obviously, those minors served.

Attorney Forsythe will be happy to discuss these or related issues further if you would like. Please contact him at dforsythe@waymanlaw.com.



H. B. 292 TO BE APPLIED RETROACTIVE IN OHIO IN ASBESTOS CASES

By Gregory S. Knight, Esq.

On September 4, 2008, the Court of Appeals of Ohio for the Eighth Appellate District, Cuyahoga County, entered an Opinion reversing and remanding an Order issued by the Cuyahoga County Court of Common Pleas finding that the provisions of H. B. 292 were not to be applied retroactively to cases filed prior to September 2, 2004.

For a little background on the history of House Bill 292, the Court discussed that by the end of the year 2000, over 600,000 people had filed an asbestos claim nationwide and Ohio had become a haven for asbestos claims. As a result, Ohio is one of the top five state court venues for filing. The Court additionally noted that the current docket in Ohio continues to increase at an exponential rate. In 1999, there were approximately 12,800 pending asbestos cases in the county. By the end of October of 2003, there were over 39,000 cases with approximately 200 additional cases being filed each month.

The legislature found that the vast majority of these asbestos claims were filed by individuals who alleged they had been exposed to asbestos but did not suffer from any asbestos related impairment. In response to this asbestos litigation crisis, the legislature enacted R. C. 2307.91 through 2307.98 to clarify when a plaintiff has accrued a cause of action for an asbestos injury. Basically, no person can bring or maintain a tort action alleging an asbestos claim on a non-malignant condition in the absence of a *prima facie* showing of physical injury caused by the asbestos exposure. The statute further required that new filing claimants had thirty days after initiating their action to comply with the *prima facie* requirements and, in cases pending at the time of the Bill's passing, claimants had one hundred twenty days to comply.

Failure to file the reports resulted in administrative dismissals of cases currently active. The administrative dismissal is a procedure by which the case is essentially rendered inactive but the Court retains jurisdiction over the matter. A claimant may move to reinstate the case to the active docket if the claimant makes a *prima facie* showing which meets the minimum requirements specified in the Bill.

As a result of enacting this legislation, numerous defendants moved to administratively dismiss actions which failed to meet the *prima facie* requirements. In response, the claimants contended that retroactive

application of H. B. 292 violated the Ohio Constitution. The Court conducted hearings and in January of 2006, entered an Order saying "The retrospective application of AM. Sub. H. B. 292 is substantive rather than merely remedial in its effect and, insofar as it impairs the substantive rights of plaintiffs who filed their claims before the effective date of the statute it violates Section 28, Article II of the Ohio Constitution". It is this Order, after some additional procedural wrangling, that was under review in this most recent case.

After reviewing plaintiffs' constitutional challenges one by one, the Court of Appeals of Ohio for the Eighth Appellate District of Cuyahoga County found that H. B. 292 was essentially procedural, and not substantive, and did not violate the Constitution of the State of Ohio.

For an in-depth discussion of how this decision may or may not affect any of your particular clients, please contact either Dale Forsythe or Greg Knight of this law firm, at dforsythe@waymanlaw.com or gknight@waymanlaw.com.

Wayman Watch...

- *Congratulations to Kate Fagan, who will become the President Elect of the Allegheny County Academy of Trial Lawyers for the coming year.*
- *Kate was also named as a "Super Lawyer" by Philadelphia Magazine for 2008 in the area of Insurance Coverage Law.*
- *Mike Magulick and Dale Forsythe coordinated the Executive Breakout Session Roundtable Discussion, "E-Discovery and Record Keeping - What Everyone Should Know," for the joint meeting of the PAMIC/VAMIC/WVAIC mutual insurance company professional associations held at Nemaquin Resort this past August.*
- *Dale Forsythe also presented the topic "Negotiations for Claims Adjusters" for the Reading offices of CNA Insurance Company on September 10.*
- *Congratulations to Jim Creenan, who has been appointed Newsletter Vice Chair for the Insurance Coverage Litigation Committee of the ABA's Tort Trial and Insurance Practice Section.*
- *Mark Gesk was recently a presenter/panelist at a PBI Seminar on trial tactics, an examination of "A Few Good Men."*

