

Welcome to the latest edition of Wayman, Irvin & McAuley's quarterly newsletter - "Your Best Defense."

This edition features a look at a variety of topics of interest to those who own a business, produce a product, offer professional services and/or transport goods.

I have submitted an article which examines a recent Pennsylvania Supreme Court decision dealing with the validity of releases signed by customers or visitors to a business operation, in this case a snow-tubing facility. The *Tayar* decision makes clear that a visitor has to be fully aware of exactly what rights he or she is surrendering, particular where the owner/operator tries to protect himself from claims for his own negligence. The decision here is instructional to all business premises owners in this type of situation.

For those readers who might be in the business of manufacturing or supplying products for sale, Richard McMillan reviews the *Schmidt* decision by the Pennsylvania Superior Court. This recently rendered opinion by a divided three judge panel became the first appellate decision in the state to approve the recovery of damages for purely emotional distress in a strict product liability case. Local readers may recall the case where the nozzle of a fire hose came loose and fatally struck a young girl and injured others. The sisters of the two injured young girls were awarded damages for emotional distress in a product liability lawsuit, though neither were actually impacted by the hose. Mr. McMillan addresses the arguments proffered by the plaintiffs and the defendants and the potential for this case to be heard on further appeal.



Jeffrey Kubay updates us on the status of the Certificate of Merit statute in Pennsylvania, and he looks at a pending dispute before the Pennsylvania Supreme Court which, when decided, will have a major impact on the potency of this statute in terms of benefitting a defendant in a professional malpractice action. Mr. Kubay has examined in earlier editions decisions which have chipped away at the statute which, when first enacted, appeared to be a huge gate-keeping tool protecting various professionals. The decision in *Merlini* should help clarify where exactly the professional stands vis-a-vis the Certificate of Merit statute.

Finally, Warren Siegfried looks at a case recently litigated by this firm where the amount of insurance coverage in a trucker's policy was disputed. The plaintiff asserted that there should have been \$2 million in coverage, as both the tractor and trailer were involved in and contributed to a tragic accident. The carrier asserted that the liability limit of only \$1 million was available, based upon the Declarations and policy language. The article directs the carrier and the insured trucker to the types of things to be watchful for so as to ensure that the amount of coverage actually desired is, in fact, secured.

*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](http://www.waymanlaw.com), for a complete look at the firm's capabilities and professional staff.*



**COURT LIMITS COVERAGE FOR TRUCKERS**

*By Warren L. Siegfried, Esq.*

The coverage case arose out of a tragic circumstance. On or about July 7, 2003, a Freightliner tractor owned by E. H. Transport and pulling a box trailer failed to stop at a stop sign and struck a passenger vehicle. The initial impact with the vehicle was with the Freightliner tractor. After the initial impact, the trailer portion swung around and also impacted the passenger vehicle. The passenger vehicle subsequently was engulfed in flames. As a result of the accident and/or fire, four of the occupants of the passenger vehicle died at the scene. The fifth family member died the following day as a result of his burns and injuries.

At the time of the incident, the trucking company was insured under a trucker's policy which purported to include a \$1 million policy limit. That limit was offered to the plaintiffs in full settlement for the fatalities. However, it was the plaintiff's position that the policy limit was actually \$2 million based upon the provisions of the Declarations of the policy indicating that both the tractor and the trailer were insured separately with \$1 million limits and, since both were involved in the accident and contributed to the fatalities, both limits would apply. Our firm filed a

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Declaratory Judgment action on behalf of Harco Insurance Company to declare the applicable policy limits. Accordingly, the issue was confined as to the amount of the liability limit of the policy issued by Harco to E. H. Transport and whether or not there was any ambiguity in the policy language.

After relevant discovery was conducted, we filed a Motion for Summary Judgment on behalf of Harco. The underlying plaintiffs filed Cross-Motions for Summary Judgment, asking the Court to declare that the policy limits were \$2 million. In the alternative, the underlying plaintiffs stated there was an ambiguity in the policy language requiring the case to be submitted to the jury.

Harco's position was based on the limiting provision found in the policy. That provision set forth that:

“Regardless of the number of covered ‘autos’, ‘insureds’, premiums paid, claims made, or vehicles involved in the ‘accident’, the most we will pay for the total of all damages and ‘covered pollution cost or expense’ combined, resulting from any one ‘accident’ is the limit of insurance for liability coverage shown in the Declarations.”

In the Declarations, Item 2 identified the total coverage limits referenced in the Limits of Insurance section as being \$1 million. Specifically, Item 2 of the Declarations stated the liability limit for covered auto symbol “46” is \$1 million. A description of the covered auto designation symbols states that symbol “46” includes only those autos described in Item 3 of the Declarations for which a premium charge is shown.

Item 3 of the Declarations then provided there was liability coverage for covered auto 1 and auto 2. This designated covered auto 1 as the 1998 Freightliner tractor which was involved in the accident. Covered auto 2 was described as any trailer you do not own while attached to any described power unit not to exceed \$20,000. Next to covered auto 1 and covered auto 2 in Item 3 of the Declarations page was the liability limit of \$1 million. Plaintiffs interpreted that entry of liability limits to conclude that each of the covered autos had a separate liability limit of \$1 million. They bolstered this argument by indicating Item 3 of the Declaration page also stated that “absence of a limit entry in any column means that the limit or deductible entry in the corresponding Item 2 column applies instead” (emphasis added). Plaintiffs argued the use of the word instead clearly meant that both the tractor and the trailer had separate \$1 million limits and, therefore, the provision in Item 2 stating the most Harco would pay for one accident or loss was \$1 million was not applicable. The plaintiff further argued all the insurance company would of had to do to make sure the \$1 million limit applied was to leave blank the columns for liability limits in Item 3. Therefore, the plaintiffs argued

that since both the tractor and trailer were involved in this accident, the policy limits were \$2 million or, at the very least, Item 2 and Item 3 conflicted with each other rendering the policy ambiguous.

Based on our arguments, however, the Court held the policy limit was clearly \$1 million. The Court agreed with our position that Item 2 and Item 3 of the Declarations page had to be read together in their entirety. Additionally, the limiting provision was clear in that the \$1 million policy limit would apply regardless of the number of covered autos indicated on the policy. It was our position that Item 3 sets forth the covered autos. The Court further agreed with us that coverage of every vehicle does not in itself equate to availability of the full policy limit for every vehicle.

With respect to both the tractor and the trailer being involved in the impact, the Court also agreed this constituted one accident for the purposes of the limiting provision in the policy. The Court also agreed with our position that the Federal Regulations provide that a tractor and trailer combination is considered as one unit. Therefore, even though there were multiple impacts, for the purposes of the policy, the Court held this was one unit involved in one accident invoking the appropriate limiting provision of the trucker's policy. Accordingly, the Court held that \$1 million was the most that Harco would be required to pay under the insurance policy for this incident. The underlying plaintiffs did appeal this Order to the Superior Court with the appeal subsequently being dismissed.

This was a creative argument made by the underlying plaintiffs which, upon a reading of the policy, did have the possibility of being supported by the Court under the facts of this accident. We believe the Court recognized the clear intent of the policy was to provide \$1 million in limits. However, both trucking companies and insurers should review what information is included in the Declarations pages to be sure it reflects the amount of coverage being provided on the part of the carrier and if the coverage is the amount requested and paid for by the trucking company.

*Attorney Siegfried will be happy to discuss this or related issues further if you would like. Please contact him at [wsiegfried@waymanlaw.com](mailto:wsiegfried@waymanlaw.com).*



### **SUPREME COURT TO ADDRESS CERTIFICATE OF MERIT**

By Jeffrey A. Kubay, Esq.

In September 2008, the Supreme Court of Pennsylvania heard oral arguments in the professional liability case of *Merlini v. Gallitzin Water Authority*, 207 Pa. Super. 274, 934 A.2d 100 (2007) (allowance of appeal granted by Pa. Supreme Court on May 20, 2008 (docket no. 28 WAP 2008)). This Commonwealth's highest court has taken this matter under advisement. The issue before the Court is whether a legal claim against a professional is one of professional negligence subject to the Certificate of Merit procedural requirement if the prosecution of that claim depends upon expert testimony. The intermediate appellate court had concluded that, even though expert testimony was required to determine the liability of an engineer in plotting a municipal water line, the plaintiff's claim was for ordinary negligence, not professional negligence. Accordingly, that Court ruled that the plaintiff was not required to file a Certificate of Merit as to the validity of her claim. This pending case will potentially have a significant impact on professional liability cases, particularly those claims against engineers or land surveyors relative to the fundamental, yet technical, task of locating and plotting property lines and easements.

The *Merlini* case involved a lawsuit by a property owner against a water authority, its engineer, and its contractor relative to a water line project in the vicinity of the plaintiff's property. Therein, plaintiff alleged that the contractor, while working under contract with the Authority and under the supervision and direction of its engineer, came upon her property and, without right of way or easement, constructed a water line on that property, impairing its use. The defendant engineer obtained a judgment of non pros for the plaintiff's failure to file a Certificate of Merit pursuant to the Pennsylvania Rules of Civil Procedure, and the trial court denied the plaintiff's petition to open the judgment.

On appeal to the Superior Court of Pennsylvania, the plaintiff asserted that no certificate of merit was required in this case because her suit was not in the nature of a professional liability claim, but rather was based on common law principle that one cannot come on another's land and install a water line without a right of way or easement. By contrast, the engineer argued that the allegations of the complaint demonstrate that the case involved whether the engineer properly designed the placement of the water line within the existing right of way and whether the engineer correctly directed the contractor where exactly to install the water line with reference to the

plans designed by the engineer. The engineer further argued that the determination of the right of ways and the design and placement of the water lines within the right of ways were an integral part of the professional services that the engineer rendered to the Authority as engineer for the water line project.

In reversing the trial court's denial of the plaintiff's petition to open the judgment of non pros, the Superior Court considered the distinction between ordinary and professional negligence and whether the alleged activities of the engineer required professional judgment. That court recognized that the engineer had a duty to her to determine the position of the right of ways and/or easements applicable to the project. The Superior Court further held that such conduct does not require the professional judgment of an engineer; "it requires only an understanding of the location of *Merlini's* property, the location of any applicable easements or right of ways, and how these intersect with the installed water line." The court recognized that expert testimony may be required to interpret the applicable state, county, and municipal records which evidence the property rights at issue, and thus allow a factual determination in that regard. However, the Superior Court concluded that once that factual issue is determined, no expert will be required to opine regarding whether the engineer breached a duty to the plaintiff not to trespass on her property.

Because review by the Supreme Court is discretionary in civil cases, the engineer filed a Petition for Allowance of Appeal with that Court, which was granted because of the importance of the issues in this case. Therein, the engineer argued that the Superior Court decision in *Merlini* was contrary to a previous decision of that court in *Varner v. Classic Communities Corporation*, 2006 Pa. Super 2, 890 A.2d 1068 (2006). The *Varner* court unequivocally held that, if a claim depends upon expert testimony for "elucidation," it is one of professional negligence subject to the Certificate of Merit requirement under the Pennsylvania Rules of Civil Procedure. The *Varner* court recognized that professional negligence, as distinguished from ordinary negligence, involves the "unwarranted departure from generally accepted standards" of a particular profession which result in injury from the rendition of those professional services and raises questions of professional judgment "beyond the realm of common knowledge and experience." Finally, *Varner* further reinforced the underlying purpose of the Certificate of Merit to require a plaintiff who is asserting a professional liability claim to specifically demonstrate on the record at an early stage of the litigation that said claim has merit.

The engineer further argued on appeal to the Supreme Court that the Superior Court overlooked controlling and directly relevant authority, namely the Engineer, Land Surveyor, and Geologist Registration Law relating to the practice of land surveying, a branch of the profession of

*Supreme Court, continued from page 3*

engineering. That Law provides that the “practice of land surveying” involves the “location, relocation,...of any property line or boundary of any parcel of land or any road right of way, easement or alignment.” Through its decision, the Superior Court seemingly redefined Pennsylvania statutory law by narrowly interpreting what is considered the exercise of professional judgment under the Engineer, Land Surveyor and Geologist Registration Law.

In deciding the *Merlini* case, the Supreme Court of Pennsylvania will have an opportunity to resolve an apparent conflict in Superior Court case law. It should be noted the apparently inconsistent decisions in the *Varner* and *Merlini* cases were decided by two entirely different panels of the Superior Court. The forthcoming decision in *Merlini* will likely have a significant impact on claims asserted against both land surveyors and engineers involving any type of dispute over the location of property, easements, and/or right-of-ways. The Superior Court has held that the determination of the location of property, easements, and/or right-of-ways is not a matter of professional judgment of an appropriate, duly licensed individual. The potential result of this decision, if affirmed by the Supreme Court, is to effectively permit unlicensed individuals, without the requisite knowledge, training, and experience, to perform professional activities of engineers and land surveyors. The *Merlini* decision by the Superior Court appears to be contrary to the purpose of The Engineer, Land Surveyor and Geologist Registration Law of protecting the public, as well as the purpose of the Certificate of Merit procedural rules requiring a plaintiff to preliminarily demonstrate the merit of a claim against a professional involving his or her use of professional judgment. The forthcoming decision by the Supreme Court will likely provide guidance to professionals, their attorneys, and their professional liability carriers as to whether a particular claim is for professional or ordinary negligence. Moreover, the Supreme Court’s decision will also decisively indicate whether the location or plotting of boundary lines and easements entails the exercise of professional judgment for purposes of the application of the professional liability/Certificate of Merit procedural rules.

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### **BYSTANDER RECOVERY FOR EMOTIONAL DISTRESS IN PRODUCT CASE**

*By Richard L. McMillan, Esq.*

A divided opinion by a three judge panel of the Pennsylvania Superior Court recently became the first appellate decision in Pennsylvania to approve the recovery of damages for purely emotional distress in a strict products liability case, *Schmidt v. Boardman*, 958 A2d 498, 2008 Pa. Super. LEXIS 3771 (Pa. Super. 2008), reargument denied, Nov. 7, 2008, Petition for Allowance of Appeal filed with the Pennsylvania Supreme Court on December 5, 2008.

On August 19, 2004 a fire truck was responding to a fire alarm when a fire hose came loose and the nozzle of the hose struck several people as the fire truck passed by. A 10 year old girl suffered severe injuries when the nozzle struck her head and face; another young girl suffered fatal injuries; and the deceased girl’s mother was also struck. Although not physically contacted by the nozzle, the sisters of the two injured young girls were standing nearby and witnessed the awful injuries to their sisters as they occurred. The jury trial included their claims for emotional distress and resulted in a cumulative verdict for all of the plaintiffs of more than 4.5 million dollars.

All three judges agreed that the accident was horrific, and all three judges agreed on other issues that were involved in the appellate court case, such as the applicability of the product line exception to the general rule that a company that purchases the assets of another company does not become liable for the liabilities of the prior company. Much of the opinion dealt with those other issues on which the three judges were in complete agreement. However, the case may be most remembered for the issue upon which the three judges could not agree, namely, whether a remedy is available for a purely emotional injury based upon a claim of product liability.

In her dissent, Judge Joan Orié Melvin noted that Section 402A of the Restatement of Torts (Second), as adopted by the Pennsylvania Supreme Court in the case of *Webb vs. Zern*, 422 Pa. 424, 220 A2d 853 (1966), provides strict liability only “for physical harm” caused by a defective product. Furthermore, she pointed out that the courts have repeatedly stressed that “negligence concepts have no place in a case based on strict liability,” *Schmidt* at pp. 521, 522. Based upon those two observations about the state of the law in strict liability cases in Pennsylvania, Judge Melvin succinctly voiced her dissent to the majority’s creation of a new remedy.

In contrast, the majority spent several pages rationalizing their creation of a never before recognized strict liability

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*Bystander Recovery, continued from page 4*

remedy in Pennsylvania. They stated the issue as being whether “bystander Plaintiffs should be denied recovery on the ground that the Plaintiffs who suffered physical injury asserted a claim for products liability,” *Schmidt* at p. 519. The majority adopted the rationale stated by the trial judge, who, while acknowledging that the underlying cause of action was based on strict product liability rather than negligence, followed the rulings of two out of state cases “in which recovery for emotional distress was awarded where the underlying tort was based on strict product liability,” *Shepard v. The Superior Court of Alameda County*, 76 Cal. Appl 3d 16, 142 Cal. Rptr. 612 (1977) and *Walker v. Clark Equipment Co.*, 320 N. W. 2d 561 (Iowa 1982).

Curiously, the actual averments of the bystanders’ Complaints were only mentioned in a footnote in the majority opinion and not at all in the dissent. Footnote 7 at p. 520 of the *Schmidt* opinion notes that the bystanders stated only a cause of action for the tort of negligent infliction of emotional distress and never alleged a products liability claim. It would appear that this decision relieves the bystanders from having to prove “negligence” as an element of their negligent infliction of emotional distress case, since the holding of the majority opinion is that “a bystander plaintiff who witnesses injury to a close relative can recover emotional distress damages when the injured person’s underlying cause of action is based on products liability rather than negligence,” *Schmidt* at p. 519. While not explicitly saying so, the opinion implies that the bystander plaintiffs can piggy back their claims on that of the plaintiff who suffered the physical injury and recover simply upon a showing of a “defect” in the product making it unreasonably dangerous under product liability concepts, even though the defendant has exercised all possible care in the preparation and sale of his product (i.e.-no need to show proof of negligence in order for the defendant to be found liable).

Hopefully, the Pennsylvania Supreme Court will agree to hear the case and provide clearer guidance on the issue.

*Attorney McMillan will be happy to discuss this or related issues further if you would like. Please contact him at [rmmcmillan@waymanlaw.com](mailto:rmmcmillan@waymanlaw.com).*



## **BOILERPLATE RELEASE HELD INVALID**

*By Dale K. Forsythe, Esq.*

The Pennsylvania Supreme Court has once again recently addressed the issue of whether release language on a ticket stub, in this case a snowtubing lift ticket, is sufficient to insulate the operators of the facility from liability for injury. Under the circumstances presented here, the court said it did not.

*Tayar v. Camelback Ski Corp., Inc.*, 957 A.2d 281 (2008), presented a plaintiff who had completed his descent on the snowtube track but who had not as yet removed himself from the path. The facility’s employee sent a second snowtuber down the track, who ultimately crashed into and injured plaintiff. Plaintiff asserted negligent operation of the amusement on the part of the facility. The facility claimed it was relieved of liability by virtue of a release signed by plaintiff prior to engaging in the activity and exculpatory language, unsigned, which was printed on the lift ticket.

The language on the reverse side of the lift ticket, which the lower court had found to be a valid waiver of liability, including the following language in fine print:

PLEASE READ! Acceptance of this ticket and the Acknowledgment Not to Sue that you have just signed constitute a contract. Snowtubing, including the use of lifts, is a dangerous sport with inherent and other risks. These risks include but are not limited to those risks outlined in the Acknowledgment of Risks you have signed. All of the inherent and other risks of snowtubing present the risk of serious and/or fatal injury.

In consideration of using Camelback’s snowtubing facilities, the purchaser or user of this ticket agrees to accept the risks of snowtubing and agrees not to sue Camelback or its employees if hurt while using the snowtubing facilities regardless of any negligence of Camelback or its employees or agents.

The purchaser or user of this ticket voluntarily assumes the risk of injury while participating in this sport and agrees to abide by the rules and regulations of the snowtubing park.

The *Tayar* court initially looked to its earlier decision in *Beck-Hummel v. Ski Shawnee, Inc.*, 902 A.2d 1266 (2006) for guidance. That court held that summary judgment for a facility should not have been granted on the basis of an unsigned waiver of liability, without some evidence that the patron had been made aware of the release language. *Id.* at 1275. The defendant here tried to distinguish *Beck-Hummel*, as *Camelback* had two signs, purportedly describing the release language, hanging over the lift ticket windows. The

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*Boilerplate, continued from page 5*

*Tayar* court rejected this evidence, however, as the version of these signs presented in pictures at the trial court level was unreadable. Thus, the decision would be made solely upon the validity of the language cited above.

Additional facts considered by the appellate court were that plaintiff received her lift ticket only after having signed the release form and paid her entry fee, she did not recall if she had read any of the language, and there was no evidence that she was ever verbally advised that she would be bound by that language. Also, the language in question was barely legible, although defendant had larger text setting forth the Camelback logo, "NOT TRANSFERABLE," "NOT FOR RESALE," "VOID IF DETACHED," and "NON-REFUNDABLE." Also, "Tubing Area Use Ticket" and "2003-2004 Season" was in larger print, as well as was the website for the facility printed on the ticket. Over half of the front of the ticket was taken up by space reserved for a date stamp.

In finding that the trial erred in affording protection to the facility, the *Tayar* court noted that "We cannot conclude as a matter of law that [the language] was sufficiently conspicuous such that, without any further indications from the ski facility, a purchase would be put on notice of its contents." 957 A.2d at 287, citing *Beck-Hummel* at 1275.

Defendant also tried to take advantage of the language on the release that had been signed by *Tayar*. In finding that there was sufficient evidence of record to allow an inference that the operator who released the ensuing tubers, which operator admittedly was not careful in doing so although he knew injuries could occur, engaged in reckless conduct, which clearly was not included in the specific language of the Release. Defendants however pointed to the following language:

IN CONSIDERATION OF THE ABOVE AND OF BEING ALLOWED TO PARTICIPATE IN THE SPORT OF SNOWTUBING, I AGREE THAT I

WILL NOT SUE AND WILL RELEASE FROM ANY AND ALL LIABILITY CAMELBACK SKI CORPORATION IF I OR ANY MEMBER OF MY FAMILY IS INJURED USING ANY OF THE SNOWTUBING FACILITIES OR WHILE BEING PRESENT AT THE FACILITIES, .....EVEN IF I CONTEND THAT SUCH INJURIES ARE THE RESULT OF NEGLIGENCE OR ANY OTHER IMPROPER CONDUCT ON THE PART OF THE SNOWTUBING FACILITY .

The court noted that "any improper conduct" in the above language, under the facility's interpretation, would insulate the facility from intentional physical assault by an employee, and a patron would certainly not understand that result. It was held that, for the Release to have been effective against claims of reckless or intentional conduct, the language had to explicitly state that the releasor was waiving claims based upon allegations of recklessness and intentional conduct. Mere catch-all phrasing was not sufficient to warn a patron of the important rights covered by the Release. In short, the language fails to explicitly and clearly convey that the releasor is surrendering the right to compensation for intentional and reckless torts committed by Camelback employees. These types of allegations clearly fall outside the typical dangers of recreational activities, as all of the examples in the Release related, and of allegation of ordinary negligence. at 292-93.

Thus, the focus is clearly upon what type of expectations would have existed on the part of the patron, i.e., was he knowingly and willingly releasing rights by the signing of the documents? Without such a showing, patrons will likely continue to challenge the persistent use by amusement facilities of this type of disclaimer language and boilerplate release language.

*Attorney Forsythe will be happy to discuss this or related issues further if you would like. Please contact him at [dforsythe@waymanlaw.com](mailto:dforsythe@waymanlaw.com).*

## Wayman Watch...

- *Congratulations to Michael Magulick and Mark Gesk, both recently included among 2009 Best Lawyers in America, Western Pennsylvania designees.*
- *Warren Siegfried, Michael Magulick and Kate Fagan have also been named as Pennsylvania Super Lawyers for 2009, and Mark Gesk has been named again for 2009 as a Super Lawyer in the area of construction law.*
- *James Creenan was re-appointed to a three-year term on the Murrysville Zoning Hearing Board.*
- *Wayman, Irvin & McAuley, LLC, is sponsoring the 17th Annual ABA Insurance Coverage Litigation Committee Midyear Meeting in Los Angeles, California.*
- *Congratulation to James Creenan and Paul Mannix, who have been named as Rising Stars for 2009 by Super Lawyers Magazine.*
- *Jeffrey Kubay was recently appointed by Judge Wettick as a "Special Arbitrator" to the Court of Common Pleas of Allegheny County.*
- *Wayman, Irvin & McAuley, LLC, along with Seubert and Associates will sponsor a luncheon and educational program in March for the Pennsylvania Motor Truck Association.*