

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

In this edition, a number of very interesting and timely topics are covered. Warren Siegfried discusses this firm's successful defense of a claim for negligent infliction of emotional distress directed against the operator of a tractor trailer which crashed into a residence, Warren analyzes the nature of this type of claim and the court's reasoning under this unusual set of facts. I have the privilege this edition to provide a look at the Superior Court's careful treatment of the sufficiency of proof in an asbestos claim, examining the key Eckenrod opinion in this area of law and fine-tuning it under a set of facts involving a claim of mesothelioma and plaintiffs' counsel's efforts to create a question of fact to defeat a motion for summary judgment. The remaining vestiges of the



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defense of assumption of the risk in Pennsylvania are examined by Scott Stephen, who looks at a number of recent appellate opinions on this topic examined by the Court of Common Pleas in a matter defended by this office. Finally, Kate Fagan offers an insightful look at Section 1983 civil rights litigation.

We hope you enjoy this quarter's submissions. Please remember to look at Wayman Watch for an update on recent happenings at the firm, and look at our Web page, www.waymanlaw.com, for a forthcoming dossier on our newest attorney.

Finally, if anyone knows of someone not on our mailing list who might find Your Best Defense useful or enjoyable, please let us know.

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TRACTOR TRAILER CRASH INTO RESIDENCE NOT SUFFICIENT TO SUPPORT EMOTIONAL DISTRESS CLAIM

By: Warren L. Siegfried, Esq.

It is not enough for Plaintiffs to allege that a truck struck their home in order to recover damages for negligent infliction of emotional distress under a physical impact theory, according to a Fayette County Judge in a recent case handled by our office.

Judge Ralph Warman of the Fayette County Court of Common Pleas dismissed a claim of two Plaintiffs that they suffered negligent infliction of emotional distress and also dismissed the claims of intentional infliction of emotional distress against the trucking company.

In the subject case, the operator of the tractor trailer was employed by Schneider Specialized Carriers. As a result of a sudden brake failure, the operator allegedly lost control of the truck



and collided with the Plaintiffs' home tearing off its front porch, obliterating a retaining wall, altering the home's foundation, smashing the front windows and doors and sending shards of glass flying through the home. The Plaintiffs were in their house at the time of the incident, although they were located in separate rooms.

The Plaintiffs sued the operator and Schneider Specialized Carriers as well as the Pennsylvania Department of Transportation, claiming severe and permanent mental and emotional shock. The Plaintiffs further alleged that the mental and

emotional shock led to a general decline in their health including, but not limited to, high blood pressure, post traumatic syndrome, recurrence of cancer and sleeplessness.

The court began its analysis by indicating that a cause of action based on negligent infliction of emotional distress had been the subject of much controversy and litigation and appeared to be somewhat unsettled in this Commonwealth. The court stated that it was generally recognized that bystanders who suffer emotional distress as a result of witnessing an accident injuring a close relative are eligible for emotional distress damages. Sinn v. Burd, 404 A.2d 672 (1972). However, the court also stated that some courts have recognized a cause of action for negligent infliction of emotional distress in cases where the Plaintiff has sustained some physical impact, however, slight. Botek v. Mine Safety Appliance Corp., 611 A.2d 1174 (1992). Among those cases are those in which occupants of a motor vehicle are jarred by the impact of another car. However, the court indicated that in those cases the Plaintiffs claimed to have felt and heard the impact.

In the instant case, the court found that the Plaintiffs failed to

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show that they felt the impact of the truck when it hit the home. The failure was fatal to their negligent infliction of emotion distress claims. The mere fact of the crash into the dwelling was not enough to establish the requisite physical impact according to Judge Warman. The court rejected the Plaintiffs' argument that the court could reach a reasonable inference that they sustained a severe impact at the time the tractor trailer crashed into their home.

The court also dismissed the claim of intentional infliction of emotional distress against Schneider Specialized Carriers, stating that there was no independent grounds to show that the carrier's

conduct was willful. The court stated that the trucking company could not be vicariously liable under an intentional infliction of emotional distress theory for the actions of the driver.

Although this opinion is limited to the specific facts of this case and resulted in a successful defense of this particular claim, the opinion does not have precedential value since it was authored by a Court of Common Pleas. However the court did set forth a well reasoned analysis, and the opinion contains a detailed review of the history of the law of negligent infliction of emotional distress in the Commonwealth of Pennsylvania. ■

CIVIL RIGHTS LITIGATION UNDER 42 U.S.C. SECTION 1983

Civil rights litigation today encompasses many forms and opens up a wide variety of potential defendants who may be faced with these kind of claims. Police officers, teachers, administrators, school districts and individual board members, municipalities and many others may find themselves on the receiving end of allegations that they have somehow violated a basic Constitutional right or rights of a plaintiff or group of plaintiffs. Managing these kinds of suits through to settlement or trial calls for some special considerations by both defense counsel and claims handlers.

Under 42 U.S.C. Section 1983, a plaintiff may bring suit in a federal district court and assert that his rights under the Constitution were violated by the defendant. The statute provides that "every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Often, suit is brought in federal court with allegations of the violation of rights coupled with attendant "state claims". An example would be a suit brought by an individual who was stopped by police and, in an ensuing struggle, sustained serious injury. Named as defendants would be the individual police officers involved, their supervisors and the police department itself. Obviously allegations would include a violation of the plaintiff's rights by the excessive use of force on the part of the officers. Additionally, the attendant "state claims" could include Counts in the complaint against the specific individual defendants as to battery, assault, or other tort claims, set forth as either negligent or intentional.

Suit can be brought where Section 1983 claims are made and filed in the state court. When this occurs, it is necessary for a decision to be made as to whether the case should be removed to federal court. Sometimes that choice turns out to be the better choice as federal court judges and magistrates, arguably, are more inclined to seriously consider granting Motions to Dismiss or Motions for Summary Judgment if the situation warrants it. Cases will also often move along more quickly in the federal setting where court schedules are set by the individually assigned judge. However, each case should be viewed under its own set of facts, circumstances and parties involved before any final decision is made.



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Insurance carriers will also have to look closely to the allegations as contained in a given Complaint. Very often, the plaintiff will assert claims in negligence and claims of intent which may trigger the duty to defend if not a complete duty to indemnify. Careful considerations of these issues need to be addressed, ever mindful of the rights of any person who may be an insured under the terms of the specific policy or policies of insurance that may be applicable. Careful reading of each and every allegation as contained in the Complaint is necessary, together with an evaluation as

to the nature of each claim as pled between and among the various defendants.

Many times, these kinds of cases carry with them a higher cost to defend as the parties begin to engage in discovery. This is particularly true in cases where the plaintiff seeks to develop a pattern or practice of, say, regular use of excessive force by certain members of the police department. Many depositions may be scheduled by the plaintiff's attorney in the effort to sustain that level of proof. Extensive written discovery may ensue on the search for documentation of written policies and procedures within a police department or to determine a lack of such required and appropriate policies and procedures. With such an expense a possibility, defendants, together with counsel, must weigh the facts and circumstances of each case carefully, and where appropriate, make determinations as to what cases can and should be settled on a timely basis.

Punitive damages may be available as against individual defendants in these kinds of cases. Here, where there is a duty to defend on the part of the insurance carrier, with the recognition that the carrier is not responsible for punitive damage awards, close and careful cooperation is a must between counsel hired by the carrier and any personal counsel involved by the individual defendants. A close working relationship should be maintained with open communication and full understanding of the potential rights and liabilities of the parties. Conflicts must be recognized and acknowledged, and separate counsel must be provided as needed given the facts and circumstances involved.

Civil rights litigation affords a challenge to all who must handle these suits and make those difficult decisions attendant to these cases. Many cases involve potentially inflammatory facts or situations that could adversely influence potential jurors' emotions. Cases may garner the attention of the media and further challenge the abilities of those who must determine the path that the litigation will take, whether to trial or settlement. Persons who are called on to handle these matters at the insurance carrier level need to be aware of the minefield of possibilities with which they may have to deal as the litigation unfolds. ■

ECKENROD STANDARD FINE-TUNED IN ASBESTOS CASE

By: Dale K. Forsythe, Esq.

A recent opinion of the Superior Court, upholding the granting of an asbestos defendant's Motion for Summary Judgment, helps to clarify the seminal Eckenrod standard for establishing product exposure.

In Wilson v. A.P.Green Industries, Inc., et.al., 807 A.2d. 922 (Pa.Super. 2002), decedent's estate brought the subject action against numerous manufacturers and suppliers of asbestos products in use at decedent's place of employment, a naval shipyard during World War II. Decedent, many years after employment, contracted mesothelioma, a fatal disease strongly associated with asbestos exposure. One defendant, after the deposition of a co-worker of decedent (decedent died before she could be deposed), filed a Motion for Summary Judgment, citing lack of evidence to show that decedent was exposed to and breathed in fibers from defendant's asbestos-containing product. Plaintiff appealed the ruling, and the Superior Court addressed the sufficiency of the identification under the standard articulated in Eckenrod v. GAF Corp., 375 Pa.Super.187, 544 A.2d 50, 52 (1988).

Decedent's co-worker in Wilson had testified that she worked with decedent and had worked around defendant's product, but she could not say that she saw decedent working with the product or that she used it while in a specific area where she was working with plaintiff. She later said she could not say for sure whose products



were being used at the time in question. On leading questioning from plaintiff counsel, which the court saw as mischaracterizing the witness' testimony, the witness stated that "at one time or another" during the years in question people would use defendant's product near the witness and decedent. 807 A.2d at 926. The trial court saw this as insufficient to raise a question of fact to defeat a motion for summary judgment.

In Eckendrod, noted the Wilson court at p.924, the Superior Court held that to identify product exposure in an asbestos case, a plaintiff must produce evidence he "inhaled asbestos fibers shed by the specific manufacturer's product." It was insufficient to simply show presence of the product in the workplace - one needed to establish plaintiff worked on a regular basis in physical proximity with the product and that the contact with it was of such a nature as to raise a reasonable inference that she inhaled its asbestos fibers (the "frequency, regularity, and proximity standard"). Citing Eckenrod, 544 A.2d at 53. Plaintiff challenged this standard, on the basis that Wilson suffered and died from mesothelioma, as opposed to asbestosis, and that a different standard should be applied since mesothelioma can be caused by inhaling small amounts of asbestos. The Court rejected this argument. Plaintiff had relied on the lack of the "frequency, regularity and proximity" standard in Gutteredge v. A.P.Green Services, Inc., 804 A.2d 643 (Pa.Super.2002), a mesothelioma case in which the court noted the distinction between

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THE EROSION OF THE DEFENSE OF ASSUMPTION OF RISK

Recently, the Court of Common Pleas addressed the doctrine of assumption of the risk in a case handled by this office, relying heavily on two relatively recent Superior Court decisions, Straub v. Toy Factory, Inc., 2000 Pa.Super. 87, 749 A.2d 522 (2000) and Bullman v. Giuntoli, 2000 Pa. Super. 284, 761 A.2d 566 (2000).

In Straub, plaintiff was injured when he caught his foot on curbing around a roof opening, causing him to fall through the opening. In addressing the doctrine, it was noted that "a plaintiff will not be precluded from recovering except when it is beyond question that he voluntarily and knowingly proceeded in the face of an obvious and dangerous condition and thereby must be viewed as relieving the defendant of responsibility for his injuries," citing Long v. Norriton Hydraulics, Inc., 443 Pa. Super. 532, 662 A.2d 1089 (1995), *appeal denied*, 544 Pa. 611, 674 A.2d 1074 (1996). A plaintiff has assumed the risk where he has gone so far as to abandon his right to complain and has absolved the defendant from taking any responsibility for the plaintiff's injuries. Struble v. Valley Forge Military Academy, 445 Pa. Super. 224, 665 A.2d 4, 6 (1995). In this case, rather than employing the doctrine, the employee's "conduct is better judged by its reasonableness, that is, by negligence principles." Fish, 463 A.2d at 1049.

In Bullman, plaintiff was injured when she was visiting a new home which was being built. The house had been framed, however



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around the perimeter of the house was an open excavation ditch. After safely traversing the plank over the excavation ditch, a board shifted, causing plaintiff to lose her balance. She then stepped onto the flooring of the porch to regain her balance and fell through the insulation boards to the basement below, sustaining severe injuries. The Court in that case noted that "[I]f one thing is clear from a thorough review of assumption of the risk law it is that a failure to apprehend a danger that then occasions injury is negligence, not assumption of the risk. An

apprehension of a danger, followed by a conscious decision to temp fate and accept what fate may bring, which then occasions injury, while indeed constituting contributory negligence, is additionally assumption of the risk, and a complete bar to recovery." Bullman, 761 A.2d at 570. The Court further reasoned that the only cases where the risk has been found to be perceived is where the risk is always dangerous, known and obvious, e.g., ice or fireworks. [citations omitted]. Plaintiff could not have assumed the risk, since she was not aware that the porch was only covered with insulation boards. She had no appreciation of the risk that she could fall through the insulation boards. In other words, she could not have assumed a risk that she did not subjectively ascertain, even if the injury actually sustained was similar to the risk assumed.

Clearly, the Superior Court continues to send a resounding message to trial courts throughout this Commonwealth that only in the clearest of cases should the doctrine be applied to bar a plaintiff's cause of action. ■



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Wayman Watch

- *Please welcome our newest attorneys, **April C. Morgan, Rebecca A. Flick, Gregory S. Knight and Jaime N. Fabert.** Read more about them soon at our Web site, www.waymanlaw.com.*
- ***Warren Siegfried** will serve as the co-chairman for the Trucking Insurance Defense Association’s national convention October 16-17, 2003 in Denver Co.*
- ***Dale Forsythe** will once again be coordinating the Liability portion of the Pittsburgh Claims Association Seminar March 13, 2003.*
- ***John Bogut** has joined a number of attorneys at the firm by becoming a member of the Defense Research Institute.*

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a cancer case and a mesothelioma case, the latter being “medically attributable” to asbestos exposure. 807 A.2d at 925. The Wilson court, however, noted that Gutteredge still required the same specificity of exposure to a particular defendant’s product, and that in Andolaro v. Armstrong World Industries, Inc., 799 A.2d 71 (Pa.Super.2002), this court two months before the Gutteredge opinion had in fact used the Eckenrod language in a mesothelioma case. The fact that the magic language was not used in Gutteredge was not to be seen as an abandonment of the standard in a mesothelioma case. 807 A.2d at 925.

The Wilson court rejected the prompted testimony of the witness, noting that such inappropriate leading questions are inadmissible and cannot be used to defeat a motion for summary judgment. Although plaintiff argued also that Eckenrod should only apply to circumstantial evidence, not direct, the Court held that there was no direct evidence of exposure to defendant’s product.

Even if the testimony were allowed, the same was too vague to meet the regular usage standard required by Eckenrod. The Court also noted that a plaintiff’s sole witness who contradicts herself in this fashion cannot establish a genuine issue of material fact to defeat a summary judgment motion. Defendant’s summary judgment was affirmed. 807 A.2d at 926-27.

[Note, however, the Superior Court’s opinion one week earlier in McNeal v. Eaton Corp., 806 A.2d 899 (Pa.Super.2002), where a co-worker testified that he worked with decedent and saw defendant’s product being used various times and dust falling down on him and decedent. There, the evidence was sufficient under Eckenrod to raise a question of fact and overturn a summary judgment, though again there was no testimony from the decedent.]

The Wilson opinion will likely be cited by defense counsel in Pennsylvania asbestos cases as demonstrating the court’s unwillingness to lessen the tough requirements of Eckenrod and its continued requirement of specific proof of exposure to a particular defendant’s products. ■