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In This Issue...

AZZARELLO DOES NOT HAVE A TENTH LIFE – THE SUPREME COURT'S TINCHER DECISION

By Edmund K. John, Esq. and Philip R. Castagna, Esq.

On November 19, 2014, the Pennsylvania Supreme Court issued a wide-ranging and highly anticipated decision in the matter of Tincher v. Omega Flex, Inc., 104 A.3d. 328. The Court specified a new test to be used for the determination of a design defect in strict liability actions. Additionally, the Court expressly overruled the standard separating strict liability from negligence outlined in Azzarello, and declined to adopt the Third Restatement of Torts as a replacement. However, the Court explicitly declined to address several key points, including retroactive vs. prospective application of the Tincher test, which party bears the standard of proof regarding design defects, what evidence is admissible for purposes of the revised analysis, and what modified jury instructions based on these new tests would pass muster. In the months that have followed, the Pennsylvania Federal District Courts sitting in diversity have attempted to fill in the blanks on some of these issues, but moving forward, the goal of the Pennsylvania Supreme Court is to allow for more fact-sensitive analysis in the products liability arena, as the Court seeks to avoid bright-line rules.

As a new test for defective design, the Supreme Court adopted the following two-prong test: plaintiffs pursuing strict liability claims must prove product is defective by showing either that: (1) the danger is unknowable and unacceptable, or (2) that a reasonable person would conclude risk of harm caused by the product outweighs the burden or costs of taking precautions. Tincher at 335. These standards, colloquially called the "consumer expectation test" and the "risk-utility test", have its basis in California law. The consumer expectation test offers a standard of consumer expectations which, in typical common law

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terms, states that: the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer. Tincher, at 389. On the other hand, the risk-utility test is more case-sensitive and fact specific, asking for a balancing of factors, including the usefulness of the product, desirability of the product, availability of substitute product, and a manufacturer's ability to eliminate the unsafe design aspects. These so-called "Wade Factors", based on legal scholarship, were not specifically adopted by the Pennsylvania Supreme Court, but serve as examples of many factors that could be weighed by the finder of fact. The risk-utility test offers courts an opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability. See Tincher, 335, 391.

Most crucial in the application of this test is that it is no longer the sole province of the trial judge to conduct this analysis prior to the case being presented to the jury with the determination that the product was "unreasonably dangerous", with the underpinning authority being that the term "unreasonably dangerous" was a negligence concept, and was not to be considered for purposes of strict liability. Going forward, the jury will be the party weighing the factors under the risk-utility analysis as the finder of fact and making the determination of whether the product was in a "defective condition" under 402A of the Second Restatement of Torts.

Without a trial judge acting as a type of gatekeeper, it stands to reason that more cases will be allowed to go the jury based on the notion that the jury is the finder of fact, but the countervailing notion as to what evidence a defendant may offer a jury to assist in its balancing of factors has yet to be determined. There are indications in both the Tincher opinion and the limited post-Tincher case law that negligence-based concepts such as foreseeability, state-of-the-art, and industry standards may be admissible under the new standard. Page 389 of the Tincher opinion provides:
The risk-utility test offers courts an opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the negligence roots of strict liability. See Blue v. Envt'l Eng'g, Inc., 215 Ill.2d 78, 293 Ill.Dec. 630, 828 N.E.2d 1128, 1140–41 (2005) ("[I]t has been observed that the kind of hindsight analysis inherent in the risk-utility test, which requires juries to weigh the risk inherent in the product's design, has all the earmarks of determining negligence."

In Capece v. Hess Maschinenfabrik, 2015 WL 1291798, the Middle District of Pennsylvania discussed the risk-utility analysis, and while the Court held that the plaintiff had met their burden to submit the question to a jury, the opinion discussed many negligence-based concepts in its analysis of the test, including the plaintiff's own negligence and foreseeability of misuse. In McDaniel v. Kidde Residential and Commercial Fire Extinguisher, 2015 WL 1326332, the Court held that is for the jury to evaluate plaintiff's and defendants' respective theories as to defect. While keeping with its principles of declining to name the specific types of evidence that are admissible, the Tincher opinion notes that "the point that we have stressed repeatedly in this Opinion, is that courts do not try the "typical" products case exclusively and a principle of the common law must permit just application to myriad factual circumstances that are beyond our power to conceive." See Tincher at 408.
To date, case law supports applying the Tincher decision retroactively, noting that retroactive application furthers the goals of the new rule by helping to define "defective condition", and does not damage the parties. See Nathan v. Technotronic Industries, 2015 WL 679150. Practically speaking, this means that all cases currently on appeal are likely to be remanded for purposes of proceedings consistent with Tincher. Retroactive application is key in Federal Court cases applying Pennsylvania law, which erroneously predicted that the Third Restatement would be adopted by Pennsylvania and have been proceeding in that fashion. The Eastern District has also extended Tincher to include failure to warn and breach of warranty claims, a step that the Supreme Court did not take. Williams v. U-Haul, 2015 WL 171846.

For Defendants in a post-Tincher world, aside from the push to introduce additional relevant evidence, such as foreseeable dangers, state-of-the-art or industry standards, there are other practical implications where Tincher can be invoked. In the context of a test that must be met by the plaintiff, Defendants can now challenge the pleadings as insufficient to meet either test, or if they believe they have strong rebuttal evidence on either the consumer expectation or risk-utility test, Defendants can force the plaintiffs to choose which test they are seeking to meet.
A final question left unanswered by the Tincher opinion is its impact on the Pennsylvania Standard Jury Instructions. The Court struck down the provision pertaining to a supplier being a guarantor of its safety, but did not provide any specific language to be used going forward in this context. Normally, Standard Jury Instructions are updated every several years, but cases undoubtedly will go to trial on this issue prior to revisions and how those instructions will read has yet to be determined.

Cont. on page 11

SWARTZ CAMPBELL'S CLEVELAND OFFICE WINS MOTION TO STRIKE PLAINTIFF'S EXHIBITS AND MOTION FOR SUMMARY JUDGMENT

By Michele L. Larissey, Esq.

Swartz Campbell's Cleveland, Ohio office was recently victorious in obtaining summary judgment on behalf of an equipment manufacturer in the heavily contested Summit County case of Verne Scott (Estate) v. PPG Industries, et al., Summit County Court of Common Pleas, Case No. AC-2013-06-3128, by first arguing successfully to strike from the record the prior deposition testimony and affidavit of former jobsite product identification witnesses as well as the expert affidavits submitted by Plaintiff in an attempt to overcome summary judgment.

The record indicated that Mr. Scott ("Decedent") worked at PPG Industries' Barberton, Ohio facility from 1959 to 1983. Plaintiff alleged that Mr. Scott died of mesothelioma as a result of asbestos exposure incurred during the course of his employment at PPG. Mr. Scott was not deposed in the case prior to his death. Instead, Plaintiff relied on the deposition testimony of only one individual, who claimed to be both Mr. Scott's friend and coworker at PPG, in an effort to further her case.

The coworker that testified in this matter did not mention Swartz Campbell's client in any capacity and only spoke in generalities regarding the type of equipment that the company manufactured. Furthermore, he did not discuss any asbestos-containing component parts in association with his nonspecific testimony about the type of equipment.

In an effort to overcome the equipment manufacturer's motion for summary judgment based on lack of product identification, Plaintiff relied on the previous deposition testimony of an individual who had also worked at the PPG facility, but who testified in another asbestos case, for purposes of placing an asbestos-containing component part associated with the equipment of the manufacturer-company at the PPG facility. The availability of this individual to testify was unknown at the time the motion for summary judgment was filed. In a further attempt to establish product identification, Plaintiff also submitted the previously executed affidavit of a now deceased individual that also worked at the facility. The affidavit was executed several years earlier for purposes of the individual's own asbestos case.

In additional support of Plaintiff's opposition to the summary judgment motion, Plaintiff relied on the affidavits of two experts, namely Steven Paskal, C.I.H., and pulmonologist Laxminarayana Rao, M.D., for the proposition that an asbestos-containing product manufactured or supplied by the equipment manufacturer was a substantial contributing factor in causing Mr. Scott's mesothelioma and ultimate death.

The equipment manufacturer, through its counsel, responded to Plaintiff's Brief in Opposition by moving to strike the aforementioned four exhibits. Under Ohio Civil Rule 56(C), a court may only decide a motion for summary judgment based on "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ. R. 56(C). The rule further provides that "[n]o evidence or stipulation may be considered except as stated in this rule." Id. Ohio Civ. R. 56(E) provides, in pertinent part, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Ohio Civ. R. 56 (E).

In addition, "[t]he proper procedure for introducing evidentiary matter not specifically authorized by Civ. R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ. R. 56(E). Biskupich v. Westbay Manor Nursing Home, 33 Ohio App. 3d 220, 222, 515 N.E.2d 632 (8th Dist. 1986). "Submitted documents that are neither sworn, certified, nor authenticated by affidavit have no evidentiary value and are not to be considered by the trial court in deciding a motion for summary judgment." Wolk v. Paino, 8th Dist. No. 50519, ¶ 26.

Regarding deposition transcripts, in order for the deposition testimony to be considered to rebut a motion for summary judgment pursuant to Rule 56(C), the general rule is that the deposition transcript must be otherwise admissible under Ohio Civil Rule 32 and the Ohio Rules of Evidence. See Napier v. Brown, 24 Ohio App.3d 12,14, 492 N.E.2d 847 (2d Dist.1985). Civil Rule 32

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provides that "any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof..." Civ.R. 32(A).

In Ohio, the prior testimony of an individual is generally deemed inadmissible hearsay unless a certain criterion is met. Specifically, Ohio Evidentiary Rule 801(B)(1) provides that the prior testimony of a now unavailable witness can be relied on only "if the party against whom the testimony is now offered,...had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination." Evid.R. 801(B)(1).(emphasis added).

In the instant case, as it relates to the prior deposition transcript of the jobsite witness from a previous case, the equipment manufacturer argued that the deposition testimony, from several years prior, must be excluded from the record because the company had no knowledge of Mr. Scott or his forthcoming case at the time the deposition was taken and thus could not cross examine the deponent about his knowledge of Mr. Scott and whether or not the deponent ever observed Mr. Scott working with or around the company's alleged asbestos-containing equipment. Counsel for the company further argued that many questions in asbestos litigation are determined by where a particular plaintiff worked, what trade that plaintiff practiced, and whether the witness personally observed the plaintiff. The prior deponent was not asked about Mr. Scott by counsel for the equipment manufacturer during his deposition because the company had no knowledge about Mr. Scott or his future case at the time of the deposition, which occurred several years prior to the filing of Mr. Scott's case. Moreover, Ohio law in asbestos litigation focuses on the frequency, proximity, and regularity of a plaintiff/decedent's exposure to a specific product for purposes of determining whether or not the product could have been a substantial contributing factor in causing the plaintiff/decedent's injury. See O.R.C.§ 2307.96(B)(1)-(4). Based on the aforementioned, the equipment manufacturer argued that it had no opportunity to develop pertinent testimony during the prior deposition and that, as such, the prior transcript cannot be relied on by Plaintiff for purposes of attempting to overcome the company's motion for summary judgment and must instead be stricken from the record pursuant to Ohio Evidentiary Rule 804(B)(1). Regarding Plaintiff's efforts to rely on the 2010 affidavit of a now-deceased individual, the equipment manufacturer made a similar argument to the one above. The company argued that it had no opportunity to cross-examine the affiant about Mr. Scott and whether or not Mr. Scott was exposed to the company's alleged asbestos-containing equipment in any capacity. Ohio Civil Rule 56(E) provides that an affidavit being submitted as evidence in relation to a motion for summary judgment pursuant to Rule 56(C) must otherwise be admissible evidence. The company argued that the affidavit of the now deceased affiant is inadmissible hearsay that does not meet any of the exceptions to the hearsay rule, outlined in Evidence Rule 804. Thus, pursuant to Ohio Civil Rule 56, the affidavit could not be contemplated as evidence to rebut the company's motion for summary judgment.

Next, the equipment manufacturer argued that the affidavits of the two claimed experts must also be stricken from the court's consideration because the factual statements made within the affidavits, of which the experts depended upon in reaching their ultimate conclusions, relied exclusively on hearsay and were not based on the experts' own personal knowledge. Both experts stated in their affidavits that they reviewed the deposition transcript of the coworker in the instant case (who did not implicate the equipment manufacturer in any capacity) and the affidavits of two individuals that were never deposed in the case (one being that of the now-deceased individual discussed above). So, the company argued that the experts were relying on the hearsay of others to draw their conclusions that the company's equipment was a substantial contributing factor in causing Mr. Scott's mesothelioma and that the opinions stated in their affidavits were not based on their own personal knowledge. As such, the company argued that the experts' affidavits were not admissible evidence and thus, pursuant to Ohio Civil Rule 56(E) and Ohio Evidentiary Rule 804(B)(1), could not be considered by the court in ruling on the company's motion for summary judgment.

Plaintiff counter-argued that the prior product identification witnesses were previously subject to the company's cross-examination in the other cases and that the experts relied on information contained in the record to draw their conclusions.

In its written opinion, the court ruled in the company's favor and found that all four exhibits should be stricken from the record for purposes of the court ruling on the company's motion for summary judgment. In so holding,

the court found that:

1) The prior deposition testimony of the product identification witness was inadmissible because it was taken in a prior case involving another plaintiff and did not specifically relate to the present case;

2) The affidavit of the attempted product identification (and now deceased) witness was inadmissible hearsay;

3) The affidavit of Dr. Rao "does not appear to be based on personal knowledge and is not sufficiently supported by facts"; and,

4) The affidavit of Steven Paskal was based upon facts not in evidence.

Upon granting the equipment manufacturer's motion to strike, the court then granted the company's motion for summary judgment based on lack of product identification and dismissed all of the claims against the company. In doing so, the court issued a written opinion acknowledging that Plaintiff produced no evidence in this case implicating the company and stated "[a]t best, Plaintiff has cobbled together past testimony going back as far as 2001 which indicates that at some point in time...[the company's equipment was] used at PPG." The court further found that there was no evidence demonstrating that Mr. Scott himself worked with or around any of the company's asbestos-containing equipment. The court concluded that there was no evidence in the record demonstrating that Mr. Scott " was exposed to an asbestos-containing product manufactured by Defendant and that these products caused Mr. Scott's mesothelioma." Thus, because there was no evidence of exposure to an asbestos-containing product manufactured or supplied by the equipment manufacturer, the court further concluded that there also was no evidence that any such product was a substantial factor in causing Mr. Scott's mesothelioma.

In granting the equipment manufacturer's summary judgment motion and dismissing the case in its entirety as against the company, the court also assigned costs to the plaintiff.

Michele Larissey is an associate in the firm's Cleveland office.

THE EXTINCTION OF WRONGFUL DEATH CLAIMS IN ASBESTOS LAWSUITS

By Gregory M. Stokes, Esq. and Patrick J. Fitzmaurice, Esq.

In March, the Superior Court of Pennsylvania limited the availability of wrongful death claims in asbestos-related lawsuits in Wygant v. General Elec. Co., et al., No. 470 WDA 2014, 2015 WL 1259947 (Pa. Super. Ct. March 19, 2015). Before Wygant, a plaintiff with an asbestos-related disease could file an action during his lifetime, and upon death, his estate could bring a claim under the Wrongful Death Act within two years of death. Following the Wygant decision, if a plaintiff files an asbestos action during his lifetime, his estate is precluded from filing a wrongful death claim. The court also held that all claims in asbestos cases, including claims for wrongful death, must be brought within two years of the date of diagnosis of the asbestos-related disease. This means that a wrongful death claim can only be filed if a plaintiff does not file a claim during his lifetime, dies, and his estate files the wrongful death claim within the statute of limitations – two years from the date of the diagnosis of the asbestos-related disease.

As a result of Wygant, there will be fewer wrongful death claims in Pennsylvania asbestos cases because plaintiffs will be unable to amend the complaint to add a claim for wrong death following death. By precluding plaintiffs a potential basis for recovery, juries will be limited in their ability to award a plaintiff or his estate for injuries.

How Does Wygant Change the Statute of Limitations in Asbestos-Related Cases?

Wygant answered two simple questions:

1. What are the applicable statutes of limitations for asbestos-related claims?
2. Who can bring a claim under the Wrongful Death Statute?

In Wygant, the decedent was diagnosed in June 2011 and died in July 2012. The estate filed survival and wrongful death actions in January 2014. Plaintiff's complaint was filed more than two years after the diagnosis but less than

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two years after the death. The estate unsuccessfully argued that the wrongful death statute of limitations began to run upon the decedent's death and, therefore, the action was not time-barred. After reviewing statutory and case law history, the court determined that the applicable statutes of limitations for asbestos-related actions can be found at 42 Pa.C.S. §5524(8). The court held that §5524(8)'s plain language makes clear that the statutes of limitations for all claims in asbestos actions, including wrongful death claims, begin to run at the time of diagnosis. The court also repeatedly noted that once a plaintiff brings an action for damages during his lifetime, his estate is barred from later filing a wrongful death claim.

How Are Plaintiffs Now Limited in Filing Wrongful Death Claims?

After the Wygant Court's ruling, plaintiffs are limited to filing wrongful death actions within two years of diagnosis. In some instances, the window for a wrongful death claim will close completely because a decedent lived for two years beyond his diagnosis. Based on an average survival rate of two years for some types of mesothelioma (depending on treatment and stage) and five years for various types and stages of lung cancer, some plaintiffs will outlive the two year statute of limitation and be barred from a wrongful death claim.

Additionally, the Wygant Court explained that "[i]f the decedent had commenced an action during her lifetime . . . no wrongful death action could have been filed upon her death." Previously, a plaintiff filed an asbestos-related lawsuit for damages and his estate later added a wrongful death claim. Plaintiffs filed during their lifetimes in order to preserve the testimony of the plaintiff during his lifetime. This testimony served as the basis for product identification and damages. Now, plaintiffs may be forced to forego the opportunity to recover for any wrongful death in order to timely bring a claim and preserve the injured plaintiff's testimony.

How Will Wygant Impact Jury Verdicts?

The import of Wygant can best be seen by evaluating a selection of recent mesothelioma verdicts in Philadelphia County in which the juries awarded the estate of a deceased plaintiff for a wrongful death claim. In each of these cases, the plaintiff filed an asbestos-related lawsuit during his lifetime, died, and the estate then pursued a wrongful death claim:

Plaintiff	Total Verdict Award	Award for Wrongful Death Claim	% Award
Ford, Edward	$478,450.30	$300,000.00	63%
Ihlenfeld, William	$500,251.61	$240,000.00	48%
Seaman, William	$1.4 million	$800,000.00	57%
Viniguerra, Frank	$2.3 million	$1 million	43%

Under Wygant, a wrongful death claim would be barred in each of these cases. As a result, the jury would have one less opportunity to award damages. By eliminating the wrongful death claim and recovery under the claim, the resulting verdicts would have been decreased by an average of 52%. Based on these four example cases, the verdict in a case in which the wrongful death claim is barred would be cut in half.

How Will Wygant Effect Trial Strategy?

Defendants should move to strike any wrongful death claim barred by Wygant prior to trial. At trial, defendants should also move to preclude any evidence related to the decedent's death, including his cause of death, on relevancy grounds – if the claim is not permitted, then any evidence of the death is irrelevant and would unjustly prejudice the defense. If the jury is permitted to hear evidence of the decedent's death, then they may improperly take the death into consideration when issuing a verdict award and unfairly compensate the estate for the wrongful death.

Cont. page 11

Third Party Litigation Loans – Ethical Considerations

By Sharon McGrail-Szabo, Esq., and Lauren J. Cheever, Esq.

Imagine that you are a plaintiff in a personal injury suit, or a claimant in a workers' compensation matter. Your case has been in litigation for over a year, and as a result, what little savings you may have had has gone to help pay the bills. You are not sure how you are going to pay the rent next month, or buy groceries to feed your children. What can you do? No one in your family has money to lend you, and even if they did, perhaps you are too proud to even ask. Your attorney has told you that while he would like to help, the rules of ethics prevent him from lending you money directly. The likelihood of a bank giving you a loan under these circumstances is slim to none.

There is one possibility. You've seen it advertised on midday television. It goes by many different names: a "bridge" loan; a "personal injury lawsuit" loan; "third party litigation financing;" "consumer litigation funding;" and others. It all means the same thing. You can get money from someone to help pay the bills based on your pending case.

Not everyone will qualify for these loans. Most of these companies will only lend the money if they believe you have a good chance of success in your pending litigation. This is because these loans are "non-recourse" loans, which means that if you do not win your case, you do not have to pay the loan back.

Even those who qualify will find that these loans are limited. In order to minimize their exposure, most companies will only lend ten percent of the amount that they think you will receive from your suit. This protects them from a verdict or decision or settlement that ends up being much lower than expected.

The most important thing that a plaintiff or claimant considering one of these loans should consider, however, is the cost. These loans are expensive. There are sometimes origination fees, which can be several hundred dollars. If you use a broker to help you find one of these loans, you will also pay brokerage fees. The most expensive part of these loans, however, is the interest. The interest is exorbitant, some might say usurious. The borrower can end up paying the loan company two or three times the amount that was borrowed by the time the case settles. Worse, they may rush to settle their case in order to pay off the loan quickly, and perhaps not get as much in settlement as they otherwise would have.

Should a plaintiff or claimant's attorney recommend to their client that they utilize these types of loans? There are ethical questions for plaintiff and claimant attorneys involved with the use of these loans. For example, one

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major problem is that in order to determine whether to make the loan, the loan company needs to be privy to details of the case, thus causing a waiver of the attorney/client privilege. Even if the client approves of this, it can create issues. Another potential ethical pitfall is the fact that there is a loan company waiting to be paid, which may interfere with the lawyer's professional judgment of how to handle the case, especially if the client is anxious to pay the loan back. Another ethical question is whether the attorney can receive a fee for referring the case to the loan company. The New York City Bar Association in 2011 issued an opinion that stated that the attorney is barred from receiving such a fee "if the fee would impair the lawyer's exercise of professional judgment in determining whether a financing transaction is in the client's best interest..." The opinion goes on to say that "even where a fee is permitted, the lawyer may be required to remit the fee to the client."

The Philadelphia Bar Association in 2000 also issued an ethics opinion regarding whether it is permissible under the Pennsylvania Rules of Professional Conduct for an attorney to provide information about their client's claim to a third party lender. The Pennsylvania Rules of Professional Conduct (hereinafter "Rules") prohibit a lawyer from "represent[ing] a client if the representation involves a concurrent conflict of interest." This concurrent conflict of interest includes when the representation of one client is adverse to another client, or when the representation is adverse to the lawyer's own personal interests. The Philadelphia Bar Association's ethics opinion argues that, "assuming full disclosure to the client of the advantages and disadvantages of this transaction to the client including, in particular, the risk of waiver of the attorney-client privilege (and the potential ramifications thereof), as well as the attorney's financial interest in the additional fee from the lender, the contemplated transaction does not violate the current Rules."

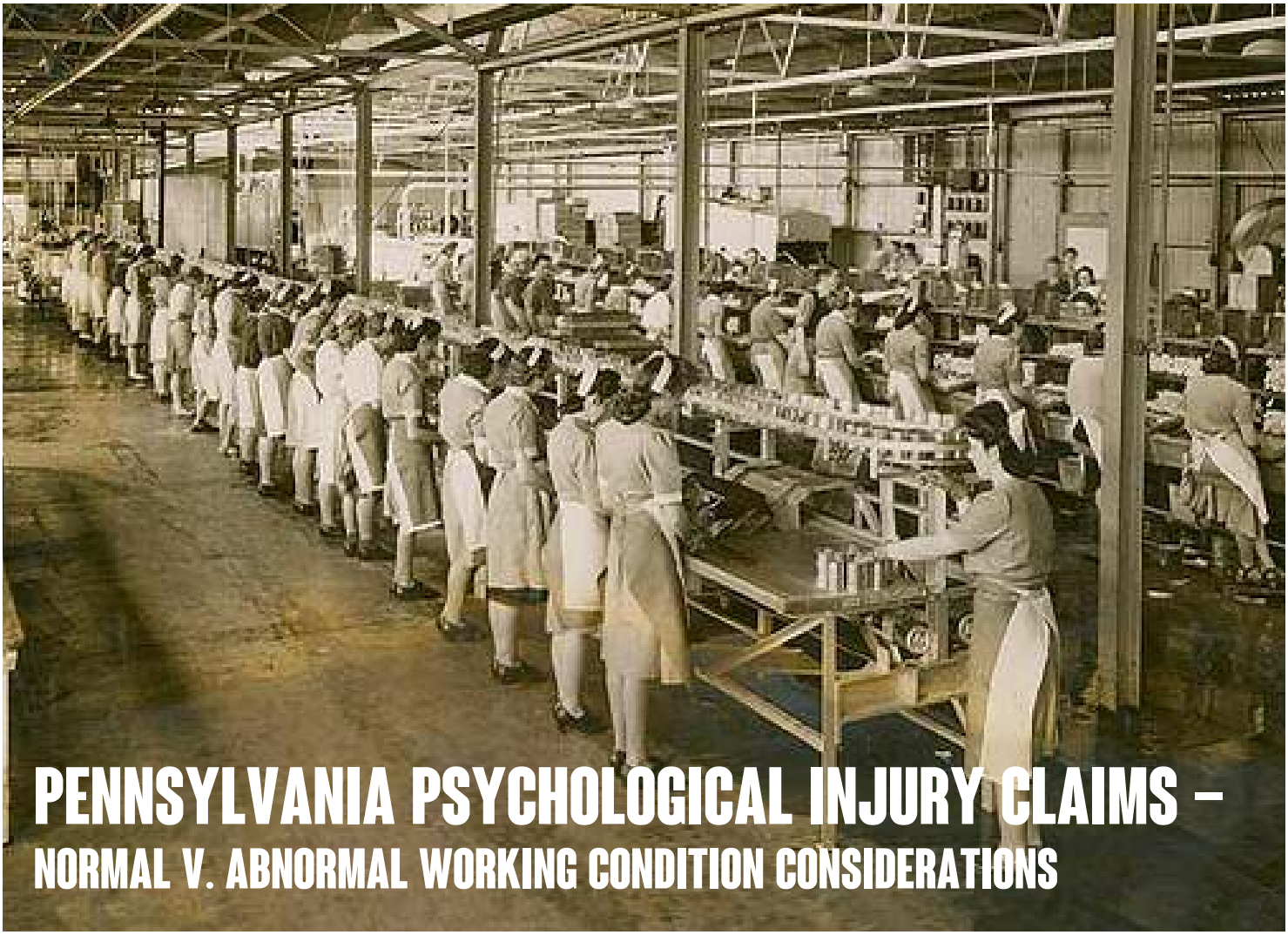
New Jersey is currently considering an Act regulating these types of transactions in an effort to address some of these ethical issues. That Act, as it is currently under consideration, prohibits an attorney from accepting a referral fee from the loan company, as follows: "The contract shall contain a written acknowledgment by the attorney retained by the consumer in the legal claim that attests to the following... the attorney has not received a referral fee or other consideration from the consumer litigation funding company in connection with the consumer litigation funding, nor will the attorney receive that fee or other consideration in the future." Interestingly, the Act under consideration also prohibits the funding company from offering "commissions, referral fees, or other forms of consideration to any attorney, law firm, medical provider, chiropractor, or physical therapist or any of their employees..." The Act also attempts to preserve the sanctity of attorney client privilege by providing that "no communication between the consumer's attorney in the legal claim and the consumer litigation funding company as it pertains to the consumer litigation funding shall limit, waive or abrogate the scope or nature of any statutory or common-law privilege, including...the attorney client privilege."

These loans can cause issues for defense attorneys and their clients and their insurance companies, as well. Plaintiffs and claimants who settle their cases or obtain a favorable verdict want the insurance company to issue separate checks to the loan company. Presumably, the fear is that if a check is issued to the plaintiff or claimant for the entire settlement or verdict (minus attorney's fees), he or she will spend the money and not repay the loan. The insurance company, however, views this as the plaintiff or claimant's own problem, and does not want to spend the extra time or money to calculate the amount of the several checks and issue them. Nor should they have to do so. The contract is between the plaintiff or claimant and the loan company, the insurance company is not a party to it. Would the insurance company potentially be opening itself up to liability by issuing a separate check that for some reason never arrives?

In the workers' compensation arena, at least in Pennsylvania, claimants have to execute a form if they want the proceeds of a settlement or a portion thereof sent somewhere other than to themselves directly (other than child support). If the claimant requests that a check be sent to the loan company, but neglects to sign the form, the insurance company could be subject to penalties for sending the check somewhere other than to the claimant.

One solution that insurance companies can use to avoid this problem is making the check for the plaintiff or claimant's portion of the proceeds payable to the plaintiff or claimant and their attorney, such that the client must come in to the attorney's office and sign the check, and then the attorney can make sure that the loan is paid. (The claimant still needs to execute the form for alternative delivery). This is more responsibility for the plaintiff or claimant's attorney, and not all of them want to be involved. Since there is no law against it in Pennsylvania, however, some claimant's attorneys are willing to do this because they have referred their client to the loan company in the first place, and are receiving a referral fee. They want to maintain a good relationship with the loan company so they can continue to receive these fees from other client referrals.

Sharon McGrail-Szabo is a partner in the firm's Allentown office and Lauren Cheever is an associate in the firm's Allentown office.



PENNSYLVANIA PSYCHOLOGICAL INJURY CLAIMS – NORMAL V. ABNORMAL WORKING CONDITION CONSIDERATIONS

By John P. Ziegler, Esq.

Psychological claims are on the increase, presenting challenges for employers and insurers in mitigating workers' compensation exposure. Recently, the Pennsylvania appellate courts have addressed the burden of proof necessary for a physical injury relative to a subsequent alleged mental injury and have also analyzed what constitutes an abnormal working condition as it pertains to a psychological injury. Pennsylvania workers' compensation provides for three types of psychological injuries with different burdens of proof for each. Specifically, psychological injuries are either "mental/physical," where some psychological stimulus causes a physical injury; "physical/mental" in which a physical stimulus causes a psychological injury; or "mental/mental" meaning a psychological stimulus causes a psychological injury. A mental injury, resulting from a mental incident, known as a "mental/mental claim," is the one which generates the most litigation. For a mental/mental claim the mental injury must be the result of an "abnormal working condition" in order to be compensable. If there is a physical aspect of the injury, which then leads to a mental injury, the Claimant's burden is less than it would be for a mental/mental claim. Accordingly, the Employer seeks to persuade the fact finder that whatever physical incident took place was not significant enough to categorize the claim as a "physical" injury, and thus force the Claimant to the more difficult burden of having to prove an abnormal working condition. Conversely, the Claimant seeks to establish that whatever physical event may have taken place was enough of a physical trauma to avoid having to prove an abnormal working condition.

Recently, in Pamela Murphy v. WCAB (Ace Check Cashing Inc.),1604 C.D. 2013, the Commonwealth Court addressed both the level of physical injury necessary to separate a mental/mental claim from a physical/mental claim, and the

scope of review for abnormal working condition analysis. In Murphy, the injured worker was a general manager for a check cashing company. Her responsibilities included, among other things, managing money for her employer's eight stores. Upon arriving at work one morning, she was confronted in the parking lot by a gunman hiding in a trash dumpster next to Claimant's usual parking spot. Her husband was with her in the car at the time. The gunman pointed the gun at her husband's face stating, "This doesn't have to be a murder but it will be if you don't do what I tell you." The gunman directed the husband to the back seat, handcuffed him and tied his legs together while Claimant screamed for him not to hurt her husband. Claimant was first forced, at gunpoint, to disarm the store and to open safes, then she was hogtied. Before hogtieing her, the gunman threw her to the ground. Throughout the robbery, the gunman held her very tight with the gun to her back and squeezed her tightly as they moved through the office.

The Claimant testified that she was told that if she did not cooperate, her husband would be killed by another individual waiting outside. A few minutes after the gunman left, Claimant was able to free her hand and call for help. At some point after the police arrived there was a period where she was uncertain if her husband was still alive and the police would not let her see her husband. Claimant became hysterical. Ironically, Claimant had a son-in-law who had been killed as a result of another robbery six years earlier while working as a courier for this employer.

There were security procedures in place, and there had been a few previous robberies over the years with some of the robberies having been alleged "inside" jobs. Claimant had some training and access to a personal panic button and ambush code as well as a decoy safe at each location which could be used. Claimant was trained though, that she should give up the money rather than risking her life.

Physically, the Claimant had mild bruising of her wrists and ankles from being tied up but she alleged other injuries, including her neck, shoulders, thoracic spine, wrists, and ankles. Claimant alleged that as of the date of her testimony most of the physical conditions had resolved but that she still had back pain from being thrown down. Her allegation was that she aggravated a pre-existing arthritic back condition and she was unable to work and was still undergoing physical therapy. Claimant also alleged that she suffered post-traumatic stress disorder. After hearing the evidence offered in the Claim Petition, the Workers' Compensation Judge (WCJ) ultimately denied the Claim Petition. Specifically, the WCJ rejected the testimony of the injured worker, and her physician, regarding her physical injuries. This in turn forced Claimant to have to prove that an abnormal working condition existed.

Claimant's psychological medical evidence was uncontested and was credited by the WCJ, however the WCJ concluded "that the robbery was not an abnormal working condition for Claimant who was a general manager for [Employer], a check cashing business." On appeal, the Workers' Compensation Appeal Board (WCAB) affirmed, concluding the physical injuries which did not require medical treatment would be insufficient to trigger the more lenient physical/mental claim standard. Additionally, given the security procedures and the prior robberies, the WCAB observed that "an armed robbery was foreseeable or could have been anticipated," meaning the working conditions were not abnormal. The Commonwealth Court affirmed the WCAB, noting that physical contact alone is not enough to make a claim into a physical/mental claim. Although not requiring the physical injury to have to be disabling, the Court noted that the physical contact would require medical treatment to support physical injury. The Court thus looked to whether Claimant met the burden for a mental/mental injury.

Claimant first argued that per the Supreme Court case of Philip Payes v. WCAB (Commonwealth of Pa State Police), 621 Pa. 564 (PA 2013), the Court must consider " . . . the actual events of the June 19, 2010 armed robbery to determine whether they represented "a singular, extraordinary event occurring during [Claimant's] work shift" that caused Claimant's PTSD." In Payes, although a state police officer was noted to normally be expected to deal with intense situations potentially involving fatalities; a deranged woman jumping in front of his patrol car with the intention of committing suicide resulting in her death was outside the realm of what could be expected. The Supreme Court opined that the WCJ's determination in Payes that such an event was completely outside the realm of what would be a normal occurrence was thus supported by substantial evidence and should not have been disturbed on appeal. The Court held these situations were a complex mix of facts and law with deference given to the WCJ findings specific to the nature of the working conditions.

The Court also reviewed PA Liquor Control Board v. Workers' Compensation Appeal Board (Kochanowicz), 760 C.D. 2010. The Claimant in that case was a liquor store clerk who was robbed for the first time in his thirty-year career. The Court in Kochanowicz noted, "notwithstanding

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The Supreme Court's Tincher Decision
Cont. from page 2

In conclusion, while the overruling of the oft-derided Azzarello decision is a welcome development, the myriad of unanswered questions leave strict products liability law in largely unchartered waters. The Supreme Court made several references to actions (or inactions) by the Legislature, noting that if the Legislature did not enact the Third Restatement, the Court was hesitant to do so, noting that the concept of socially acceptable economic incentives is best left to the Legislature and is not within the purview of the Courts. The Tincher decision returns multiple times to the principle that, given the plethora of products on the market, the self-selective process of reaching appellate review discourages bright-line rules, but necessitates more fact-specific reviews. Working within that framework, it stands to reason that the fact-specific analysis will include concepts that sound in negligence that were previously deemed inadmissible, albeit without the trial court judge to act as a gatekeeper to dispose of cases in the Summary Judgment stage.

Ed John is a partner in the firm's Philadelphia office and Phil Castagna is an associate in the firm's Philadelphia office.

Psychological Injury Claims
Cont. from previous page

the employer's evidence that its stores had been robbed in the past and that Claimant had received some training on safely in reacting to robberies, the WCJ, and this Court, had to review the particular robbery and determine whether that robbery was not a normal working condition."

Ultimately, the decision of the WCJ in Murphy was vacated by the Court, and the matter was remanded back to the WCJ "to consider whether Claimant established, under [Payes] and [Kochanowicz], that the June 19, 2010 armed robbery that caused her PTSD was an abnormal working condition." The WCJ is charged with looking at the specific facts to see if they represent a singular extraordinary event as opposed to a foreseeable normal possible occurrence for Claimant's job. It will be interesting to see the ultimate ruling in Murphy. On one hand, the facts support that it was certainly foreseeable that robberies would occur in this check cashing business with the Claimant trained and having a relative in fact previously killed from an armed robbery with this employer. On the other hand, will the WCJ be swayed by Claimant's anticipated argument that a situation where Claimant suffered psychological trauma from the threats and uncertainly of whether her husband had been killed takes this to the level of an extraordinary occurrence that could not have been anticipated and thus outside of what could be considered a normal situation for this business? If so, does it beg the question of when such events are ever considered routine insofar as following a foreseeable predictable pattern, and thus in what instance such events would ever held to not be abnormal? Are the Courts ignoring the basic premise relied upon prior to Payes, Kochanowicz and Murphy, that a Claimant's individual subjective reactions to a situation are not enough to render same compensable where the nature of the job is one in which such events in fact can and do happen and are thus foreseeable?

John Ziegler is a partner in the firm's Harrisburg office.

Wrongful Death Claims in Asbestos Lawsuits
Cont. from page 6

By eliminating the wrongful death claim in appropriate cases, the Wygant decision will limit the ability of juries to award damages to the estates of deceased plaintiffs. For example, prior to Wygant, the verdict sheet in a case involving a deceased plaintiff who was married at the time of the diagnosis would typically include three lines of potential recovery on the verdict sheet: a line for recovery under the Survival Act, a second line for recovery for the widow's loss of consortium claim, and a third line for recovery under the Wrongful Death Act. Following Wygant, the verdict sheet under the same circumstances will only include two lines of recovery: one for recovery under the Survival Act and a second for the loss of consortium claim – the third line for recovery under the Wrongful Death Act will be eliminated. The elimination of a line for recovery under the Wrongful Death Act will take away an opportunity for the jury to award damages.

Conclusion

Moving forward, defendants should be aware of the significant limitations that Wygant places on filing wrongful death claims in asbestos-related lawsuits. A claim under the Wrongful Death Act can only be brought by an estate within two years of the date of diagnosis of the asbestos-related disease in cases in which there was no lawsuit filed in relation to the asbestos-related disease during the decedent's lifetime. Because of these limitations, fewer wrongful death claims will be brought and juries will be limited in awarding damages in asbestos-related cases.

Greg Stokes is a partner in the firm's Philadelphia office and Patrick Fitzmaurice is an associate in the firm's Philadelphia office.

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WALTER, McDONOUGH, ESQUIRE, EDITOR
SWARTZ CAMPBELL LLC
115 N. JACKSON STREET, MEDIA, PA 19063
PHONE: (610) 566-9222
wmcdonough@swartzcampbell.com

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NEWS & FIRM NOTES

Swartz Campbell partners, **Jeffrey McCarron, Esq.** and **Josh Byrne, Esq.** successfully defended their physician clients in a medical malpractice death case before a Philadelphia jury. Following trial, the jury found the doctors did not breach the applicable standard of care.

John Ziegler, Esq. and **Matthew Esslinger, Esq.** recently spoke at the Commonwealth of Pennsylvania Annual Workers' Compensation Training Conference on the topic of Recent Case Law Updates.

Swartz Campbell

Two Liberty Place, 28th Floor
50 South 16th Street
Philadelphia, PA 19102