SIDEBAR

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DELAWARE SUPREME COURT LIMITS GENERAL JURISDICTION

In This Issue...

By Beth E. Valocchi, Esq.

Last month, the Delaware Supreme Court issued a 4-1 opinion overturning Delaware's jurisdiction over foreign businesses that are registered to do business in the state in the case of Genuine Parts Company v. Cepec, 2016 Del. Lexis 247 (Del. Apr. 18, 2016). The Cepec Plaintiffs are residents of Georgia and claim that Mr. Cepec was exposed to asbestos in the states of Georgia and Florida. Genuine Parts Co. is a Georgia corporation with its principle place of business in Atlanta.

In June 2015, Genuine Parts filed a motion to dismiss based on lack of personal jurisdiction. Relying on the U.S. Supreme Court's holding in Daimler AG v. Bauman, 134 S. Ct. 746 (2014), Genuine Parts argued that specific jurisdiction did not exist in Delaware as the suit did not arise out of or relate to activities in Delaware. Further, it was not subject to general jurisdiction under Daimler because (1) it was not incorporated in Delaware; (2) it did not maintain its principal place of business in Delaware; and, (3) it did not have sufficiently exceptional contacts to satisfy the jurisdictional requirements set forth in Daimler to render it subject to general jurisdiction in the State. In August 2015, the Delaware Superior Court denied the motion because Genuine Parts had registered to do business in Delaware and appointed an agent for service of process pursuant to Delaware's registration statute at 8 Del. C. §§ 371 and 376. The Superior Court held that by appointing an agent for service and r egistering to do business in Delaware, Genuine Parts had expressly consented to jurisdiction in Delaware. In reaching that decision the Court relied on its earlier decision in Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988), for the proposition that express consent – by registering to do business in a state in accordance with state statutes – remained a valid basis for personal jurisdiction. Genuine Parts appealed that decision to the Delaware Supreme Court. On March 9, the Delaware Supreme Court, sitting en Banc, heard oral argument.

A month later, on April 18, in a decision penned by Chief Justice Strine, the Supreme Court of Delaware reversed the Superior Court and held

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that express consent by registration is no longer a valid way to obtain general jurisdiction. Instead, the Court held that any use of the service of process provisions for registered foreign corporations, must comport with the Delaware long arm statute and the Due Process Clause.

One Justice declined to join in the Majority. Justice Vaughn, formerly the President Judge of the Superior Court, authored a dissent, citing several Federal Court cases for the proposition that Daimler does not have any effect on general jurisdiction based on consent through corporate registration statutes. He cautioned that the U.S. Supreme Court has yet to decide this issue and that the Delaware Supreme Court should not "divest the trial courts of this state of significant jurisdiction" unless it is sure that the U.S. Supreme Court would agree with the Majority's view on Delaware's registration statute.

Other state and federal jurisdictions have split on whether to follow Daimler and specifically whether Daimler addresses the issue of consent by registration. This issue is likely to bediscussed by the U.S. Supreme Court in the near future. For now, Plaintiffs may be looking to file in states that have registration statutes that expressly state that a corporation avails itself to general jurisdiction by registering to do business in the State.

Beth Valocchi, Esq., is a partner in the firm's Wilmington office.

MULTI-MILLION DOLLAR VERDICT IN FAVOR OF FORMER PTA PRESIDENT

By Josh J.T. Byrne, Esq.

A California jury recently awarded $5.7 million dollars to a former PTA president due to the attempt by a husband and wife (both attorneys) to frame her for possession of drugs. Kelli Peters was working as a volunteer at Plaza Vista School in Irvine, when attorney Jill Easter came to pick up her son. Ms. Easter asked where her son was, and Ms. Peters responded he was "a little slow." Ms. Easter (who is now known as Eva Everheart) perceived this as an insult. Ms. Easter and her ex-husband Kent Easter, then embarked on a year long campaign to get Ms. Peters fired from her volunteer position. The campaign against Ms. Peters included handing out fliers, filing a police report, seeking a restraining order, and a civil suit. The actions by the Easters against Ms. Peters culminated on February 15, 2011, when the Easters planted a bag filled with a marijuana bowl (according to some sources marijuana as well), Vicodin and Percocet behind the drivers seat of Ms. Peters' car. The next day, Mr. Easter called the police, told them he was a neighbor of Ms. Peters and that he saw her driving irregularly (Mr. Easter claims he did not know his wife planted the drugs). Ms. Easter pleaded guilty to planting the drugs, served 60 days in jail, and was disbarred. Mr. Easter was found guilty of false imprisonment and served 86 days in prison and his license to practice law was suspended. The civil verdict included $2.1 million in compensatory damages, $2.1 in punitive damages against Ms. Easter, and $1.5 in punitive damages against Mr. Easter. The ethical violations involved in the conduct of these two attorneys are staggering. Suffice it to say that Mr. Easter should count himself very lucky not to have been disbarred as well. Under the Pennsylvania Rule of Professional Conduct 8.4 (and ABA Model Rules) it is professional misconduct for an attorney to: "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice."

Josh J.T. Byrne, Esq., is a partner in the firm's Philadelphia office. He is a member of the Professional Liability Department.

EMPLOYER LIABILITY: TO TOOEY AND BEYOND

By Gregory M. Stokes, Esq., Lauren E. Burke, Esq., and Eli Granek, Esq.

Employer liability in asbestos cases recently took center stage in Pennsylvania and Illinois. In Pennsylvania, employers found themselves on the wrong side of that stage following a jury's award of $1.7 million against the employer. The case, captioned Busbey v. The ESAB Group, Inc., is the first asbestos-personal-injury verdict against an employer since the Pennsylvania Supreme Court ruled that the Workers' Compensation Act does not protect employers from liability for latent-disease claims. On the other side of that stage, employers in Illinois were relieved when the Illinois Supreme Court, in Folta v. Ferro Engineering, reinstated the protections afforded by the Workers' Compensation Act against latent-disease claims. While employers in Illinois can find assurance in their Supreme Court's ruling, their brethren in Pennsylvania should be preparing to defend against this new wave of litigation.

I. Employer Liability in Pennsylvania: Busbey v. ESAB Group, Inc.

On November 6, 2015, a Philadelphia jury rendered a $1.7 million verdict in favor of a deceased mesothelioma victim's family, finding the employer solely liable. Following a three-week trial before Court of Common Pleas Judge Lisette Shirdan-Harris, the jury determined that John F. Busbey suffered from and died of mesothelioma as a result of his exposure to asbestos through the course of his employment. The jury also found that Mr. Busbey's exposure to asbestos was caused by his employer, ESAB Group's, negligence. In support of their case against the employer, the plaintiffs called Gerald Markowitz, Ph.D, who testified about the "state of the art" and what companies like Mr. Busbey's employer knew about the hazards of asbestos. The defendant employer did not call any experts to rebut Dr. Markowitz's testimony. The verdict is the first since the Pennsylvania Supreme Court abrogated the protections of the Workers' Compensation Act in Tooey v. AK Steel Corp., 81 A.3d 851 (Pa. 2013).

II. Employer Protections in Illinois: Folta v. Ferro Engineering

On November 4, 2015, the Illinois Supreme Court, in Folta v. Ferro Engineering, declined plaintiffs' invitation to follow Pennsylvania's Supreme Court and impose liability against employers for their employees' work-related exposure to asbestos. The Illinois Supreme Court's decision reversed a lower appellate court's ruling that permitted a plaintiff to pursue such claims. Although short-lived, the intermediate appellate court's decision represented a significant shift in Illinois' jurisprudence, and, like Tooey, made available a new class of defendants in toxic-tort litigation: former employers. In reversing the intermediate court's ruling, Illinois' Supreme Court distinguished Tooey because, unlike in Tooey, where Pennsylvania's Supreme Court concluded that Pennsylvania's 300-week statute of repose "operated as a de facto exclusion of coverage...," the Illinois Supreme Court held that Illinois' statutory scheme did not.

III. Defending the Employer

Despite being stripped of their workers' compensation immunity defense, employers joined as defendants in asbestos-personal-injury cases in Pennsylvania can still prevail. The strategies and defenses available to an employer are case and company specific, but in defending these claims, the employer, insurer, and defense counsel should be aware of the relevant theories of liability, legal defenses, and factual histories.

A. Find the Right Forum

Since Tooey, the majority of asbestos cases filed in the Commonwealth of Pennsylvania now include a claim against the plaintiff's employer(s). In some instances, the employment forming the basis of the claim occurred in jurisdictions other than Pennsylvania. Out-of-state employers should seek a dismissal based on forum non conveniens, or because the law of the state in which plaintiff was employed bars asbestos-personal-injury claims against an employer. For example, if the case involves a worker employed at a facility in New Jersey, the employer may be insulated from liability through the New Jersey Workers' Compensation Act. Just because the case is filed in Pennsylvania does not mean that an out-of-state employer can be subjected to liability.

B. The Good Corporate Citizen

Plaintiffs in employer-liability cases will attempt to paint the employer as just another "big, bad" corporation. The defense counsel and employer must combat the negative depiction, and humanize the employer to demonstrate that the employer was a good corporate citizen. To do so, an employer must identify or develop a corporate representative who is familiar with the employer's premises and operations during the period of alleged exposure. A credible representative should know what industry and government regulations required during the relevant period, what safety policies the employer enforced, and how the employer responded to any issues. The representative should also know when the first asbestos-related workers' compensation claim against the employer was filed, and how the claim was resolved. In addition, the representative should know what efforts the employer expended to safely remove or abate any asbestos on its premises.

C. The State of the Art

Employers should not shy away from the "state of the art" in these cases. As in Busbey, plaintiffs will present experts to testify to their version of the "state of the art"—what was known within the industry at the time of the alleged exposure.

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GREEN V. SEPTA:
JURY AWARD VACATED AS COMMONWEALTH COURT AFFIRMS JERK AND JOLT DOCTRINE

By: Eli Granek, Esq

The Commonwealth Court recently affirmed the Jerk and Jolt Doctrine's viability in Green v. SEPTA. The decision also held that SEPTA is a common carrier, and rejected SEPTA's argument that Pennsylvania Suggested Standard Jury Instruction 13.130 (Civ. 2014) mischaracterizes the law.

Facts

Plaintiff in Green sued SEPTA for negligence after he purportedly tore his right rotator cuff when a bus on which he was a passenger stopped suddenly. Plaintiff and his wife had boarded the bus moments earlier, and were walking down the bus's aisle when the jolt occurred. The jolt caused Plaintiff's body to swing backwards. He grabbed a nearby pole with his right hand to arrest his momentum, and allegedly felt the muscle in his shoulder separate from the bone. The jolt also caused other passengers to gasp and shift in their seats. Plaintiff's wife corroborated her husband's story, and volunteered that although she did not fall, she had to grab a pole to maintain her balance. Plaintiff also testified that he did not expect the bus to stop suddenly. He explained that he had ridden SEPTA buses along that route many times in his life, and that the next bus stop was a full city block away from where the bus stopped. He testified further that "[the bus stopping suddenly was] not a normal thing for a bus to do. I mean that was just unexpected. It was way out of the ordinary."

No one informed the bus's driver that Plaintiff had nearly fallen or that Plaintiff had hurt his shoulder. Consequently, video footage of the alleged incident was not preserved.

The Jerk & Jolt Doctrine

After the discovery deadline had passed, SEPTA moved for summary judgment, arguing that Plaintiff lacked the evidence necessary to overcome the Jerk and Jolt Doctrine. Under the doctrine, a plaintiff must do more than allege he or she was injured because of a bus's sudden movement. A plaintiff must present evidence of additional facts and circumstances that demonstrate the bus's movement was so unusual and extraordinary it exceeded a reasonable passenger's expectations. This can be done in one of two ways. A plaintiff can either: (1) show that the bus's movement had an extraordinarily disturbing effect on other passengers, or (2) demonstrate that the manner in which the incident occurred or the manner in which the incident affected him or her inherently establishes that the bus's movement was unusual or extraordinary.

The purpose of the Jerk and Jolt Doctrine—which has been recognized and applied consistently for more than 100 years—is to guard against claims in which plaintiffs lack proof that the driver was negligent. Buses and trolleys, even when operated with proper care, will jerk and jolt when they start and stop. That is a mechanical fact. Showing merely that a bus jolted is insufficient to establish that the bus was operated negligently.

The Trial & Appeal

The trial court denied SEPTA's summary-judgment motion, and the case proceeded to trial. The jury ultimately found in Plaintiff's favor and awarded him $250,000 in damages. SEPTA moved for judgment notwithstanding the verdict and post-trial relief, which the trial court denied. On appeal, SEPTA argued that the trial court erred in denying its motions for summary judgment, nonsuit, directed verdict, and JNOV because the record lacked the proof necessary to meet the Jerk and Jolt Doctrine. SEPTA also challenged the court's instruction that SEPTA is a common carrier, and argued that the instructions were further improper because the court read Pennsylvania Suggested Standard Jury Instruction 13.130, which mistakenly shifts the burden of proof from the plaintiff to the defendant, omits critical elements of the law, and presents an objective test as a subjective standard. Plaintiff responded that SEPTA was a common carrier, that the suggested instruction accurately stated the law, and that his testimony that he did not expect the bus to jolt suddenly was sufficient to establish that the bus's driver was negligent.

The Commonwealth Court reversed the trial court's rulings and ordered the jury's award vacated, holding that Plaintiff failed to present evidence sufficient to prove that the bus's sudden movement was unusual. The Court rejected SEPTA's argument that SEPTA was not a common carrier, however, and found that the trial court properly instructed the jury on the law.

The Takeaways

The Green decision contains at least three important lessons that will impact similar cases going forward. First, the decision answers whether SEPTA is a common carrier for the purposes of tort law. Second, the decision reinforces that a plaintiff's subjective expectations about a bus's movement is not the type of evidence that can establish a jolt was unusual. Third, the decision signals that the Court's decision in Buzzelli v. Port Authority of Allegheny County is limited to its facts. Green also leaves at least one important question unanswered.

I. SEPTA is a Common Carrier

SEPTA has argued that the Public Utility Code excludes it from the definition of a common carrier. The Court in Green agreed, but held that the Public Utility Code is irrelevant to SEPTA's status under tort law. "While SEPTA may not fall within the definition of 'common carrier' within the provisions of the Public Utility Code ... [the Court wrote,] SEPTA clearly fits within the foregoing definition [of a common carrier] by providing public transportation by bus for compensation ...."

II. The Jerk & Jolt Standard Requires Objective Proof

The Green decision reinforces that a plaintiff's expectations are insufficient to establish that a jolt was unusual. Plaintiff in Green argued that he proved the jolt was unusual because: (1) he and his wife testified that they were familiar with the route, that the stop was unusual, and that they did not expect it; (2) the stop occurred away from any traffic-control devices or bus stops; and (3) the force generated by the jolt tore his rotator cuff when he grabbed a pole to avoid falling. Despite crediting Plaintiff and his wife's testimony, the Commonwealth Court still held that the record lacked evidence "necessary to make out liability." If evidence that the bus's movement surprised the plaintiff or one passenger were adequate, then the Commonwealth Court should have affirmed the verdict in Plaintiff's favor. After all, Plaintiff and his wife testified that they did not expect the bus to jolt, and that the jolt was different than other jolts they had experienced during previous trips on buses. That the Commonwealth Court accepted Plaintiff's testimony yet concluded that Plaintiff failed to meet his burden of proof illustrates that evidence of a plaintiff's subjective expectations is irrelevant to proving that a jolt was unusual.

Green adds a new arrow to defense counsels' quiver because this is the first case in which the Commonwealth Court squarely rejected the type of proof Plaintiff offered here. Green's predecessors have rejected plaintiffs' attempts to rely on, among other things, their injuries and testimony characterizing the jolt. Green provides a case in which the Court rejected a plaintiff's attempt to rely on his personal experience and expectations.

III. The End of Buzzelli?

We have seen an increasing number of Jerk and Jolt cases in the last few years, and all have at least one thing in common: plaintiffs invariably argue that the Court's decision in Buzzelli v. Port Authority of Allegheny County lowered the evidentiary threshold. According to these plaintiffs, Buzzelli stands for the proposition that testimony that a bus accelerated suddenly is sufficient to inherently establish that the jolt was unusual. This, of course, is incorrect. Perhaps in response to this trend, the Court in Green devoted nearly half of its analysis to reviewing Buzzelli and cases that distinguish it, before concluding that Plaintiff lacked evidence "of the bus's excessive speed or any other factors" that formed the basis for the Buzzelli court's decision. By focusing on, and distinguishing, Buzzelli, the Court may have been signaling plaintiffs to stop seeking refuge in Buzzelli's text.

The Court has now distinguished Buzzelli in four decisions over the last fifteen years, providing a roadmap past Buzzelli to summary judgment. The Court in Buzzelli found evidence sufficient to satisfy the Jerk and Jolt Doctrine's second prong—that the manner in which the incident occurred inherently establishes the jolt's unusual character—because there were no circumstances in which the jolt the plaintiff described could result from a bus's ordinary operation. One of the factors the Court highlighted was the testimony that the bus was accelerating immediately before stopping abruptly. But the Court also focused on evidence that showed: (1) the bus was speeding excessively; and (2) that, after stopping, the bus sat in the street for more than one minute without any passengers embarking or alighting. The Court has emphasized these last two factors—especially the second one—each time it distinguished Buzzelli. Defense counsel should be sure to develop these facts during discovery so plaintiffs are left without authority to cite when the case reaches the summary-judgment stage.

IV. Remaining Questions

Notwithstanding its contributions to Jerk and Jolt jurisprudence, The Green decision fails to adequately address whether Pennsylvania's Suggested Standard Jury Instruction 13.130 correctly explains the law. The Court in Green concluded summarily that the trial court did not abuse its discretion when it read the suggested instruction. But the Court's language reveals that the Court misunderstood SEPTA's argument.

SEPTA challenged the suggested instruction because, among other issues, the instruction conflates an objective test with a subjective standard. When listing the elements a plaintiff must prove, part of the charge instructs the jury to determine whether: "the passenger could not reasonably anticipate the sudden stop, jolt, [or] jerk." But directing the jury to view the jolt through the lens of "the passenger," and to assess whether "the passenger" could anticipate the jolt, invites the jury to answer whether the plaintiff anticipated the alleged jolt. The proper test is not whether the plaintiff could have anticipated the jolt; the proper test is whether the archetypal "reasonable person" could have anticipated the jolt.

The Court dismissed this argument in one clause, writing: "the trial court ... did not mistakenly present an objective test as subjective by using the differing terms of 'plaintiff' and 'passenger.'" This misses the point. The error lies in the article preceding the noun("the passenger" v. "a passenger"). The former refers to a particular person; the latter, to an objective, hypothetical person.

Why is this important? If evidence that "the passenger" could not reasonably anticipate the jolt were sufficient, a plaintiff's testimony that he or she could not expect the jolt might be adequate. On the other hand, if the plaintiff is required to prove that "a passenger could not have anticipated the jolt, then a plaintiff's testimony about his or her expectations is irrelevant. Words matter—even monosyllabic ones.

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The Court's holding thus is difficult to comprehend. The Court appears to have misunderstood SEPTA's argument, and the decision provides no analysis to explain why improperly using the definite article "the" does not misrepresent the law.

In addition, it is difficult, if not impossible, to reconcile the Court's holding about the suggested instruction with the Court's ruling. If the jury instruction is correct, evidence that the plaintiff could not reasonably anticipate the jolt should be sufficient to prove that the jolt was unusual. Plaintiff arguably provided such evidence when he and his wife testified that they did not expect the jolt and that the jolt was different than any jolt they had experienced during their lifetime of riding SEPTA buses. Yet the Court ruled that Plaintiff failed to present evidence from which a jury could conclude the bus was operated negligently. The Court ruled correctly. How to reconcile its ruling with its holding about Pennsylvania's Suggested Standard Jury Instruction 13.130, however, is unclear.

V. Conclusion

Green got a lot of things right. It advanced the current body of law by holding that a plaintiff's expectations are irrelevant to determining whether a bus's movement was unusual. It reinforced that Buzzelli is limited to its facts. But it also muddied the waters by holding that Pennsylvania Suggested Standard Jury Instruction 13.130 accurately presents the law. Defense counsel will need to be prepared to explain why, despite Green, trial courts should not rely on the suggested instruction. Counsel should focus on Green's ruling, and argue that Green's holding regarding the suggested instruction either was a mistake or cannot mean that subjective evidence is sufficient, so the trial court should use language that clarifies the point.

Defense counsel also may need to guard against plaintiffs invoking Green in an attempt to reduce their burden of proof. Plaintiffs may seek to use the Court's approval of the suggested instruction to argue that the law requires a plaintiff to show only that the plaintiff—as opposed to an objective reasonable person—could not anticipate the jolt.

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No. 65 C.D. 2015, 2015 WL 6529273 (Pa. Cmwlth. Oct. 28, 2015)

See, e.g., Martin v. SEPTA, 52 A.3d 385, 391 (Pa. Cmwlth. 2012) (citing Connolly v. Phila. Transp. Co., 216 A.2d 60, 62 (Pa. 1966)).

674 A.2d 1186 (Pa. Cmwlth. 1996).

Unlike the suggested standard jury instruction, the cases from which the instruction purportedly derives its content reflect this critical nuance. See Connolly v. Phila. Transp. Co., 216 A.2d 60, 62 (Pa. 1966) (holding that the law requires proof that the vehicle's movement "was so unusual and extraordinary as to be beyond a passenger's reasonable anticipation") (emphasis added).

In the grammatical context, "the" is called a definite article. It is used to signal a specific person, place, or thing. "A" and its variant "an" are called generic articles. They are used to signal a generic reference. See, e.g., BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 173 (2nd ed. 2006).

Subrogation in Workers' Compensation:
ARE INSURANCE CARRIERS ENTITLED TO SUBROGATION AGAINST A CLAIMANT'S RECOVERY OF UNINSURED MOTORIST BENEFITS FROM A NON-NEGLIGENT CO-EMPLOYEE'S PERSONAL AUTOMOBILE POLICY?

By Lauren J. Cheever, Esq.

In workers' compensation matters, employers and insurers have a subrogation interest, or right of recovery, when a negligent third party is responsible for a workers' compensation injury. In matters where a negligent third party is involved, the injured employee has the right to sue the third party for damages. These damages are subject to subrogation by the employer or insurer. However, subrogation tends be a contentious issue, especially when the injured worker recovers from a non-negligent co-worker's personal automobile policy after a motor vehicle accident.

In a recent decision, the Commonwealth Court of Pennsylvania affirmed the decision of the workers' compensation judge to grant the petition to review compensation benefits offset filed by the employer and its insurance carrier. Davis v. WCAB (PA Social Services Union and Netherlands Insurance Company). The Davis case involved a constitutional challenge by Claimant. More specifically, this matter involved a review of the January 28, 2015 decision of the Workers' Compensation Appeal Board (hereinafter, "WCAB"), which affirmed the decision of a workers' compensation judge (hereinafter, "WCJ") to grant the petition to review compensation benefits offset filed by PA Social Services Union (hereinafter, "Employer") and its insurance carrier,

Netherlands Insurance Company (hereinafter, "Netherlands"). Ms. Karen Davis (hereinafter, "Claimant") was involved in a motor vehicle accident on November 9, 2010 while in the course of her employment with Employer. Claimant was a passenger in the vehicle, which was owned and operated by Vandallia Jarvie, a co-employee. It was not known who operated the vehicle that hit Jarvie's vehicle. As a result of this collision, Claimant sustained injuries to her cervical and lumbar spine. Claimant was paid $54,213.00 in wage-loss benefits and $33,572.22 in medical benefits by Netherlands pursuant to the Workers' Compensation Act.

Afterwards, Claimant filed an uninsured motorist claim with Jarvie's motor vehicle insurance carrier, Allstate Insurance Company (hereinafter, "Allstate"). In the third party uninsured motorist claim, Employer and Netherlands asserted a lien in the amount of $89,785.22, which was the total amount paid to Claimant for both medical and wage-loss benefits. Claimant settled her uninsured motorist claim with Allstate for $25,000.00.

Employer and Netherlands filed the offset petition on April 22, 2013. In that petition, Employer and Netherlands alleged that they were entitled to assert a subrogation lien on the settlement proceeds from Claimant's uninsured motorist settlement. The WCJ concluded that Netherlands was entitled to subrogate against Claimant's settlement proceeds from Allstate. This conclusion was based on the fact that Jarvie, not Claimant, purchased the motor vehicle insurance that provided the uninsured motorist benefits in dispute. Furthermore, the WCJ's decision hinged on the fact that Netherlands was entitled to subrogation in accordance with section 319 of the Act because the motor vehicle insurance was purchased by someone other than Claimant.Section 319 of the Act provides:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer. . . 77 P.S. § 671.

In Davis, Claimant argued that the courts have addressed uninsured motorist benefits and subrogation in several cases. Claimant cited several cases in an attempt to argue that Employer and Netherlands were not entitled to subrogate against Claimant's settlement proceeds from Allstate. In one such case, Gardner v. Erie Insurance Company, 691 A.2d 459 (Pa. Super. 1997), aff'd, 722 A.2d 1041 (Pa. 1999), the Superior Court held than an injured employee, who received workers' compensation benefits for an injury incurred while operating a co-employee's vehicle during the course of employment, could seek uninsured benefits from the co-employee's personal automobile policy. However, the Superior Court did not address whether the injured employee's employer had a right to subrogation of those funds.

Additionally, in another case cited by Claimant, Standish v. American Manufacturers Mutual Insurance Company, 698 A.2d 599 (Pa. Super. 1997), the Superior Court held that an employer's workers' compensation insurance carrier could not subrogate against the uninsured motorist benefits received by the claimant from the claimant's personal automobile policy. Furthermore, in American Red Cross v. WCAB (Romano), 745 A.2d 78 (Pa. Cmwlth. 2000), aff'd, 766 A.2d 328 (Pa. 2001), the Commonwealth Court of Pennsylvania concluded that the employer could not subrogate against proceeds received by the claimant from an uninsured/underinsured motor vehicle policy paid for by the claimant. Proceeds obtained by the injured employee that were obtained through the employee's own insurance policy, paid for by the employee, were not subject to subrogation.

However, in Hannigan v. WCAB (O'Brien Ultra Service Station), 860 A.2d 632 (Pa. Cmwlth. 2004) (en banc), the Commonwealth Court of Pennsylvania concluded that the employer was entitled to subrogate against the uninsured motorist benefits the employee received under the customer's motor vehicle insurance policy. In Hannigan, the employee was injured in a car accident with an uninsured motorist while driving a customer's car. The employee received workers' compensation benefits in addition to receiving a settlement from the customer's motor vehicle insurance policy. As a result, the employer sought subrogation against the employee's third-party recovery of uninsured motorist benefits. In Hannigan, the Commonwealth Court noted: [W]here a claimant has purchased his own insurance which pays for his injuries because of the premiums he has paid, he is entitled to the double recovery ordinarily barred by [s]ection 319 [of the Act]. The same cannot be said, however, of a claimant who recovers under a policy of insurance purchased by some third-party, such as a co-worker or, as here, a customer. Hannigan, 860 A.2d at 640 n. 11.

Since a third party paid for the policy, Hannigan held that the employer had a right to subrogation.

Much like Hannigan, the Davis case also involved a motor vehicle accident where a third party paid for the uninsured motorist insurance policy. As a result, the Commonwealth Court of Pennsylvania held that employer was entitled to subrogate against Claimant's settlement proceeds.

What does the recently decided Davis mean for subrogation in workers' compensation matters? The Commonwealth Court of Pennsylvania has made it very clear, first in Hannigan and more recently in Davis, that employers and insurance carriers do have a subrogation interest when the injured employee recovers uninsured motorist benefits from a non-negligent co-employee's personal automobile policy. When the injured employee pays for the policy themselves, however, no such interest exists.

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In doing so, plaintiffs will present the jury with every study and publication under the sun that discusses asbestos and asbestos disease to suggest that the employer knew or should have known of the hazards of asbestos. The employer must combat this evidence by cross-examining the plaintiffs' experts and presenting its expert's testimony to illustrate that those studies—many of which relate to asbestos miners, insulators and shipyard workers—are unrelated to the employer's operations. How, for example, do studies relating to asbestos miners in Africa relate to a hand tool company in suburban Philadelphia? The employer should consider motions in limine to preclude these studies and publications based on relevancy.

D. Shift the Burden

Plaintiffs will attempt to place all of the blame on the employer, arguing that the employer owed the highest duty to the employee. The employer, where possible, should remind the jury that they did not manufacture or supply the products through which the plaintiffs allege exposure to asbestos. Rather, the employer should direct the jury's attention to the manufacturers, suppliers, and outside contractors who owed a duty to warn of the hazards of asbestos. If the manufacturers and suppliers of these products did not warn the employer, how can the employer be expected to warn its employees? In addition, employers should explore the potential comparative negligence of the employee: Did the employee fail to use respiratory protection that was available? Was the employee aware of the hazards of asbestos but worked with the products anyway? When possible, the employer should shift the focus of the case to third parties.

IV. Conclusion

To successfully defend against a former employee's negligence claim, knowledge is key. Employers must research their corporate history immediately, and develop their narrative through strategic use of written discovery and skilled questioning during fact-finding depositions. Experts on the "state of the art" should be developed. The focus of liability should be shifted. With the right counsel and effective strategy, employers can defeat their workers' asbestos-personal-injury claims.

Gregory Stokes, Esq. and Lauren Burke are partners and Eli Granek, Esq., is an associate in the firm's Philadelphia office.

NEWS & FIRM NOTES

Swartz Campbell is proud to announce its newest partners, **Lauren E. Burke** and **Kristin Mutzig**, and newest equity partner, **Gregory M. Stokes**. Swartz Campbell congratulates Lauren, Kristin and Greg in their accomplishment and looks forward to their continued success in defending the firm's clients moving forward.

Lauren E. Burke. Esq. is a partner with Swartz Campbell's Products Liability Team in Philadelphia and New Jersey. Lauren defends claims involving allegations of exposure to asbestos and other toxic substances in courts across the Commonwealth and New Jersey. Lauren joined Swartz Campbell in 2010 and leads the firm's Diversity Initiative.

Kristin Mutzig, Esq. is a partner with Swartz Campbell's General Litigation and Casualty Team. She defends government entities, private entities, insurance companies and private individuals in state and federal courts in Pennsylvania and New Jersey. Kristin joined Swartz Campbell in 2013. Kristin also serves as an arbitrator for the Philadelphia Court of Common Pleas' Compulsory Arbitration Program.

Greg Stokes, Esq. is a partner in Swartz Campbell's Products Liability Team and practices in Pennsylvania and New Jersey. Greg represents manufacturers, suppliers, premises owners and employers in toxic tort claims and general liability matters. Greg joined Swartz Campbell in 2007 and has been a firm partner since 2014.

Andrea M. Graf, Esq., of the firm's Workers' Compensation department presented a Lunch and Learn program to clients on May 12, 2016 regarding the effects of the City of Philadelphia's pension system on payment of employees' workers' compensation benefits. The City of Philadelphia offers several pension options to its employees, all of which affect the receipt of workers' compensation benefits differently. Ms. Graf discussed legal analyses of the entitlement to those pension programs, as well as the consequences of the various pensions in offsetting workers' compensation benefits and procedures to reduce exposure in administering such claims. Present at the event were City of Philadelphia Risk Management counsel and personnel, and the dedicated team of claims adjusters handling these cases at Amerihealth, which serves as the third party administrator for the City of Philadelphia workers' compensation program.

Several employees from Swartz Campbell LLC took part in the 37th Annual Philadelphia Bar Association 5k Run/Walk on May 15, 2016 at Memorial Hall. Those who participated included **Jeffrey McCarron, Josh Byrne, Vincent Iozzi, Michael Cognetti, Kristin Mutzig, Jim Murray, Andrea M. Graf,** and **Donna Evans.** One of our firm's teams placed seventh overall out of over thirty teams, and **Andrea M. Graf** placed first in her gender and age division among Philadelphia Bar Association members. Proceeds from the event benefitted the Support Center for Child Advocates to help abused children find more stable lives.

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