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update

Third Circuit Strengthens Defenses to Product Liability Claims

The United States Court of Appeals for the Third Circuit recently established standards for exclusion of evidence in strict product liability cases that will assist defendants at trial. In Moyer v. United Dominion Industries, Inc. (January 9, 2007), several factory workers brought product liability actions alleging that they suffered permanent injuries after extended use of a machine called a "swagger." The plaintiffs used the machine over the course of several years. The allegedly injured workers asserted design defect claims against the manufacturer, arguing that vibrations caused them to develop injuries in their arms and legs.

The Court of Appeals held that the trial court should have permitted evidence that the plaintiffs misused the machine and that their employer improperly maintained it. The Court reasoned that evidence of misuse is admissible to defeat causation in a strict liability design defect case. Thus, it was error for the District Court to exclude the evidence, which tended to show that the plaintiffs' injuries were caused solely by misuse and inadequate maintenance of the machine, rather than by a design defect.

The Court also found reversible error in the exclusion of evidence that the manufacturer had not received prior claims of injuries similar to those at issue in the case, because the defendant/manufacturer established that it had a reliable system for collecting and recording prior claims.

- Michael Blazick, Esquire

Superior Court Expands Scope of Cases Requiring Certificate of Merit

With the adoption of the amendments to the MCARE Act in January of 2003, Plaintiffs in medical negligence matters are now required to file a Certificate of Merit certifying that an appropriately licensed professional has supplied a written opinion stating that there exists a reasonable probability that the care exercised by the Defendant fell outside acceptable professional standards, or that the Defendant is vicariously responsible for the negligent conduct of another. Most medical negligence cases involve injuries occurring in a hospital, physician's office, emergency department, or similar medical setting. However, the Superior Court of Pennsylvania, in Gondek v. Bio-Medical Applications, et al. (March 7, 2007), expanded the Certificate of Merit requirement to include injuries suffered in an automobile accident. In Gondek, Nancy Gondek accompanied, Kermit Wagner to Bio-Medical for Wagner's dialysis treatment. Wagner then drove Gondek to a restaurant for lunch. Afterwards, Wagner lost control of his vehicle, resulting in significant injuries to Gondek. Gondek sued Bio-Medical and Wagner, claiming that Bio-Medical should have known that Wagner could not safely drive after dialysis treatment.

Gondek failed to file a Certificate of Merit against Bio-Medical. Bio-Medical entered judgment of non-pros, thereby dismissing the claims of Gondek against it. On appeal, Gondek argued that she sued Bio-Medical as a joint tortfeasor in an automobile accident case, and not on the basis of any professional liability claim that would trigger the duties to file a Certificate of Merit under the MCARE Act. The Superior Court of Pennsylvania rejected Gondek's argument that her Complaint did not claim that a licensed professional, Bio-Medical, deviated from a professional standard of care. Rather, her allegations were essentially that it permitted Wagner to leave its facility when he was not capable of safely driving. Gondek described her claims as "ordinary negligence," not "medical negligence." The Superior Court rejected this argument because the basis for her claims was Bio-Medical's failure to render proper medical care to Wagner, including proper post-dialysis instructions. Therefore, Gondek's claims were based in medical negligence, requiring the timely filing of a Certificate of Merit against Bio-Medical.

The Gondek decision is consistent with a prior ruling in Rostock v. Anzalone, a case successfully argued by The Perry Law Firm, L.L.C. in the Superior Court of Pennsylvania. The central issue in Rostock, (July 26, 2006), was whether a hospital's failure to mail test results to a physician was a claim of "ordinary negligence," or a claim of "medical negligence." The Rostock plaintiff failed to file a Certificate of Merit, claiming that the case was one of ordinary negligence that did not trigger the duties under the MCARE Act. On appeal, The Perry Law Firm, L.L.C. successfully argued that a hospital's coordination and dissemination of radiographic study test results was attendant to its duty to provide proper medical care to its patients. Therefore, Rostock was required to file a timely Certificate of Merit. The Superior Court agreed and dismissed the claims against The Perry Law Firm's client, a Northeastern Pennsylvania Hospital.

The Superior Court of Pennsylvania, in these two recent cases, has expanded the scope of functions of a medical care provider that require a Plaintiff to seek a licensed medical professional to prepare a Certificate of Merit.

- William J. Aquilino, J.D., M.B.A.

U.S. Supreme Court Makes It Easier To Prove Title VII Retaliation

The United States Supreme Court's recent decision in Burlington Northern & Sante Fe Railway Co. v. White (U.S. Supreme Court, June 22, 2006) expands the anti-retaliation provisions of Title VII of the Civil Rights Act to include any employer action considered "materially adverse" to a reasonable employee or applicant, whether or not the action is work-related.

In Burlington, Sheila White was a forklift driver and the only female employee in her department. She complained about her supervisor's sexual harassment to Burlington officials. Although Burlington disciplined the supervisor, it also re-assigned White to a laborer position but at no change in pay. White filed a charge with the EEOC alleging gender discrimination and retaliation in connection with her reassignment. Thereafter, she was suspended without pay for insubordination after a disagreement with her new supervisor. After White filed an internal grievance, her suspension was overturned and she receive backpay. Nonetheless, she filed another EEOC charge alleging retaliation over the suspension. At trial, the jury found in her favor. Burlington appealed.

Title VII forbids discrimination against one who has made a charge, testified, assisted, or participated in a Title VII proceeding or investigation. A unanimous Court held that it is *not* limited to employer actions that are related to employment or occur at the workplace. However, a plaintiff must demonstrate

that the challenged action causes "materially adverse harm that might dissuade a reasonable employee from making or supporting a charge of discrimination." Recognizing the potential far-reaching impact of its decision, the Court emphasized that trivial harms and petty annoyances often occurring at work are not unlawful retaliation.

Applying this new standard, the Court recognized that while a reassignment of duties is not automatically actionable, it can constitute retaliatory discrimination if the reassignment was materially adverse to a reasonable employee. White met this burden through evidence that her new duties were more difficult, and her prior forklift position was considered more desirable job. In addition, receipt of backpay for her suspension did not bar her claims because indefinite suspension without pay might deter workers from filing a discrimination complaint, even if the suspended employee eventually receives backpay.

Since employers can now be found to have engaged in unlawful retaliation even if the employee's terms and conditions of employment have not changed, employers must ensure that employees who have filed claims of discrimination are not subject to any actions which could be viewed as retaliatory.

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