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DELAWARE CLAIMS ASSOCIATION
LEGAL UPDATE – SEPTEMBER 2010

AFFIDAVIT OF MERIT

Kemp v. Christiana Care Health Services, Inc., et. al., C.A. No. N10C-07-012 RRC, 2010 WL 3432300 (Aug. 26, 2010)

In *Kemp*, the Superior Court considered whether the plaintiff's affidavit of merit complied with 18 *Del. C.* § 6853, the statute requiring affidavits in medical negligence cases. Although the affidavit stated that the defendants' conduct fell below the standard of care, the court held that the affidavit failed to comply with the statute because Delaware law adheres to a "but for" standard of causation, and the affidavit was unclear as to whether the doctor's negligence was a "but for" cause of the injury, or simply a contributing factor to the plaintiff's injury.

INSURANCE COVERAGE

Ewell v. Those Certain Underwriters of Lloyd's, London, C.A. No. S09C-07-031, 2010 WL 3447570 (Del. Super. Aug. 27, 1010)

In this case, the court addressed a condition in a **Course of Construction/Renovation Endorsement** appended to an insurance policy issued by Lloyd's for coverage of the plaintiff's residence. The endorsement required that the insureds have fire extinguishers on each level of the residence during a planned renovation. After the residence burned down, Lloyd's denied coverage. The specific issues addressed by the court were: 1) whether the fire extinguisher condition was plain on its face, and unambiguous; 2) if the condition was unambiguous, whether the condition was breached; and 3) if there was a breach, whether the breach was material, thereby rendering the policy null and void. The homeowners argued, among other things, that any breach was not material because they were asleep when the fire started and, thus, Lloyd's could not show any prejudice from the lack of fire extinguishers. The court rejected this argument, finding that the plaintiff's argument that the fire extinguisher condition pertains only to times when someone is present in the house to be strained and unsupportable. Ultimately, the court held that the fire extinguisher requirement was clear and unambiguous, and that the insureds breached the condition. The court, however, did not grant summary judgment in favor of Lloyd's because it held that the question of the materiality of the breach of the fire extinguisher condition was a fact question for the jury.

NEGLIGENCE – DUTY OWED

Hudson v. Old Guard Ins. Co., No. 560, 2009, -- A.2d --, 2010 WL 3178426 (Del. Aug. 12, 2010)

In *Hudson*, the Supreme Court of Delaware affirmed the trial judge's grant of summary judgment and a directed verdict in a case addressing claims by a 12-year-old child who was hit by a car while riding his bicycle. The court found that the driver of the car had no duty to anticipate the bicycle "darting into the road," and did not otherwise act negligently.

NEGLIGENCE – GROSS OR WANTON CONDUCT

Brown v. United Water Delaware, Inc., No. 291, 2009, -- A.2d --, 2010 WL 3342358 (Del. Aug. 26, 2010)

In this case, the Supreme Court of Delaware addressed claims of gross negligence and willful and wanton conduct against the defendant, a water company, after the plaintiff's house burned down when the fire department was unable to open the two closest fire hydrants to their house. The Supreme Court upheld the Superior Court's ruling that denied the defendant's motion for summary judgment on the plaintiff's gross negligence claims, finding that a jury could find gross negligence if the water company was on notice of improper maintenance of the fire hydrants but failed to correct the problem. The Supreme Court also upheld the Superior Court's ruling that any such improper maintenance would not constitute willful or wanton conduct.

PIP SUBROGATION

Government Employees Ins. Co. @1156317 v. State Farm Mut. Automobile Ins. Co., C.A. 09C-08-042 RRC, 2010 WL 3447721 (Del. Super. Aug. 27, 2010)

In this case, the court addressed, in an **issue of first impression**, a Motion for Summary Judgment filed by State Farm arising from an alleged **PIP overpayment** by Government Employees Insurance Company (GEICO) to State Farm, which GEICO made pursuant to intercompany arbitration. GEICO sought reimbursement based on the language of 21 *Del. C.* § 2118(g)(5), which states, relevant to this case, that when a liability insurer pays a PIP subrogation claim to the injured party's insurer prior to settling the injured's party's bodily injury claim and the amount of the subsequent settlement, combined with the subrogation payment, exceeds the maximum amount of the tortfeasor's liability coverage, the PIP insurer must reimburse the tortfeasor's liability insurer that portion of the claim exceeding the policy limits. In this case, GEICO paid a total of $12,959 to State Farm, then settled the personal injury claim for the sum of $20,000, for a total payment of $32,959. The tortfeasor's policy limits were $25,000. Thus, GEICO sought to be reimbursed the sum of $7,959. The court denied GEICO's request for reimbursement because it viewed the action as, in effect, a request to modify the arbitration award, and requiring reimbursement after an intercompany arbitration would undermine the importance of the finality of intercompany arbitration awards. Alternatively, the

court held that GEICO could not recover because although it had the opportunity to defer the PIP arbitration hearing, it failed to do so, and its unilateral mistake regarding the existence of personal injury claim did not warrant relief.

PREMISES LIABILITY

Wilson, et. al. v. Urquhart, et. al., C.A. No. 08C-08-135 PLA, 2010 WL 2683031 (Del. Super. July 6, 2010)

In *Wilson*, the court addressed claims in a wrongful death action following the death of a seven-year-old boy, Damond, whose body was found in a residential swimming pool during a party organized by Defendant Tiera Brown for her daughter's birthday. Damond had been brought to the party by a babysitter. Tiera Brown and her mother, Tracy Brown, moved for summary judgment on the basis that they were not under any duty to supervise Damond, and did not act unreasonably in arranging the party. Neither Brown owned the property where the pool was located. The court held that the Browns did not have a duty to supervise or warn Damond of the obvious hazards posed by the pool because his babysitter attended the party and remained responsible for his supervision. Of note, although the plaintiff argued that the Browns owed duties to Damond as "possessors of the pool and deck area," the court held that this argument failed because the allegations in the complaint against the Browns did not properly plead theories of premises liability and attractive nuisance. Because the Browns did not owe a duty to Damond, the court granted summary judgment in favor of the Browns.

PROPOSED REGULATIONS

The Department of Insurance has issued proposed regulations seeking to revise the procedures for Responding to Freedom of Information Act Requests. The proposed regulations can be found at 14 DE Reg. 144 (9/1/10). Comments on the proposed changes should be received by the Department of Insurance no later than 4:00 p.m., Monday, October 4, 2010.

FINAL REGULATIONS

The Department of Labor recently issued Workers' Compensation regulations providing guidelines for the treatment of low back injuries. Those regulations can be found at 13 DE Reg. 1558a (6/1/10).

The Department of Insurance recently revised its regulations related to the arbitration of automobile and homeowner's insurance claims. Of note, the revised regulation permits arbitrators to award attorney's fees in homeowner's insurance cases. The revised regulation can be found at 14 DE Reg. 44 (7/1/10).

White and Williams issues a weekly newsletter, Court Crier, that digests recent appellate decisions from state and federal appellate courts in Delaware, Pennsylvania and New Jersey, as well as the Supreme Court of the United States. If you would like to subscribe to Court Crier, please send me an e-mail at: doerlerw@whiteandwilliams.com.