THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

September 1, 2010

I. GENERAL LITIGATION

Communications Regarding Trial Strategy Between Expert Witness and Attorney are Discoverable.

In *In Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, --- A.2d ----, 2010 WL 3584461 (Pa.Super., September 16, 2010), Appellants, Carl and Brenda Barrick appealed from an order directing the discovery and production of correspondence between counsel for Appellants and Dr. Thomas Green, Mr. Barrick's treating physician and designated expert witness at trial. The only issue for review was whether it was error for the lower court to order disclosures of letters and emails between Dr. Green and counsel for Appellants that addressed the strategy as to how to frame the physician's expert opinions where all of the treatment records of Mr. Barrick have been disclosed to Appellees. The question was one of first impression.

The court acknowledged that a conflict existed between two rules of civil procedure governing discovery, Rules 4003.3 and 4003.5. The former Rule prohibits discovery of the mental impressions of a party's representative, including an attorney, in preparation for litigation; where, the latter Rule requires disclosure of the substance of the facts and opinions underlying a testifying expert's conclusions, which ostensibly would include communications with an attorney.

The court provided “In reconciling this conflict, we are compelled to find that if an expert witness is being called to advance a party's case-in-chief, the expert's opinion and testimony may be impacted by correspondence and communications with the party's counsel; therefore, the attorney's work-product doctrine must yield to discovery of those communications.”

The trial court examined two conflicting Common Pleas Court cases in rendering its decision to compel discovery of the correspondence between Dr. Green and Appellants' counsel: *Shambach v. Fike*, 82 Pa. D. & C. 4th 535 (Lackawanna County 2006) and *Pavlak v. Dyer*, 59 Pa. D. & C. 4th 353 (Pike County 2003).

In *Shambach*, Shambach instituted suit against his employer for alleged injuries caused when Fike struck him with a forklift. Shambach designated his treating physician as an expert for trial. His employer sought to depose the physician. The Shambach court determined that Rule 4003.5 requires that expert discovery other than written requests, i.e. oral discovery such as a deposition, requires cause shown; whereas, Rule. 4003.6 allows a party to depose a treating physician.

In *Pavlak*, plaintiff's treating physician was also designated his expert at trial. Pavlak objected to a subpoena for correspondence between Pavlak's counsel and the expert. The Pavlak court determined that the defendant was entitled to discovery of written correspondence between plaintiff's counsel and the designated expert. However, the court concluded that the attorney work-product contained within said documents should be redacted. In the exercise of caution, the trial court further required plaintiff's counsel to submit the original correspondence for in camera review.

Here, the court agreed with the trial court's determination that the case at hand was similar, if not identical, to the situation faced by the court in Pavlak. The court also agreed with the trial court that a "bright line" rule must be adopted. As such, the court concluded that attorney work-product must yield to the disclosure of the basis of a testifying expert's opinion.

Trial Lawyers Can Google Prospective Jurors During Voir Dire

In an unpublished opinion, *Carino v. Muenzen*, 2010 WL 3448071 (N.J.A.D. August 30, 2010), a medical malpractice case, the plaintiffs' appealed the trial court's ruling in favor of defendant. The appeal was based on the trial judge's ruling that counsel could not make use of the internet during jury selection.

By way of background, the courthouse in which the trial was held provided wireless internet access. During the jury selection, plaintiff's counsel began using a laptop computer to access the internet, intending to obtain information on prospective jurors. Defense counsel objected. The trial judge asked plaintiff's counsel if he was Googling jurors' names during the selection process. The plaintiff's counsel responded, "Your Honor, there's no code law that says I'm not allowed to do that. . . . I'm getting information on jurors — we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says." The trial judge replied, "No, no, here is the rule. The rule is it's my courtroom and I control it." The judge then prohibited counsel from using the internet during jury selection.

On appeal, plaintiff argued that the trial judge abused his discretion during jury selection by precluding his attorney from accessing the internet to obtain information on prospective jurors. He further argued that the trial judge deprived him of "the opportunity to learn about potential jurors one of the most fundamental rights of litigation."

The Court of Appeals held that trial lawyers can Google prospective jurors during voir dire, reversing the trial judge who ordered plaintiff's counsel to disconnect from the court house wireless Internet. The court provided:

There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level

playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.
Nonetheless, the appellate court let the verdict stand because the plaintiff failed to show any prejudice from the Google ruling.

II. INSURANCE COVERAGE

Insurer Not Entitled to Reimbursement for Defense Costs Absent an Express Provision in the Written Insurance Contract

In *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, --- A.2d ---, 2010 WL 3222404 (Pa. August 17, 2010), the action arose out of a suit against Jerry's Sports Center brought by several organizations alleging the firearms industry was liable for injury, death, and other damages to association members through the negligent creation of a public nuisance by virtue of the industry's failure to distribute firearms reasonably and safely. One of the insurers, Royal, agreed to provide a defense, but claimed the right to reimbursement of defense costs if it was found to not have a duty to cover the claim. The Royal policies issued to Jerry's Sports Center did not contain a provision for the right to reimbursement of defense costs.

The trial court held that there was no covered claim and held that Royal had the right to reimbursement of all defense costs. The Superior Court disagreed and reversed the trial court's ruling on the issue of reimbursement. The issue before the court here was whether, following a court's declaration that an insurer had no duty to defend its insured, the insurer is entitled to reimbursement of the amounts paid for the defense of its insured in the underlying lawsuit.

The court held that an insurer is not entitled to be reimbursed for defense costs absent an express provision in the written insurance contract. The court rejected Royal's argument that it was entitled to reimbursement of defense costs for the claims that the trial court found to be outside coverage of the policy. The court provided:

Where the insurance contract is silent about the insurer's right to reimbursement of defense costs, permitting reimbursement for costs the insurer spent exercising its right and duty to defend potentially covered claims prior to a court's determination of coverage would be inconsistent with Pennsylvania law. It would amount to a retroactive erosion of the broad duty to defend in Pennsylvania by making the right and duty to defend contingent upon a court's determination that a complaint alleged covered claims, and would therefore narrow Pennsylvania's long-standing view that the duty to defend is broader than the duty to indemnify.

The court also held that since Royal's policy did not contain a provision providing for reimbursement of defense costs under any circumstances, its attempts to assert in this case, the right to reimbursement, is not a right to which it is entitled based on the policy. And, the court found that Royal could not employ a reservation of rights letter to reserve a right it does not have pursuant to the contract.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.