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PENNSYLVANIA APPELLATE PRACTICE



Peter J. Neeson

Being granted oral argument before the highest court in the Commonwealth of Pennsylvania is no easy task. In fact, the Pennsylvania Supreme Court grants less than 5% of all petitions seeking allowance of appeal in civil cases. In 2010, 2,383 Petitions for Allowance of Appeal were filed asking the Pennsylvania Supreme Court to accept an appeal for review, but only 104



Carl D. Buchholz, III

were granted. Rawle & Henderson presently has two cases pending before the Pennsylvania Supreme Court, both of which were initiated by petitions filed by Rawle & Henderson on behalf of their clients in 2010.

The first of these cases, *Betz v. Pneumo Abex, et al.*, Supreme Court Dockets No. 38 WAP 2010, was argued by **Peter J. Neeson**, Chair of Rawle & Henderson's Environmental, Toxic and Mass Torts Section, before the Pennsylvania Supreme Court on October 19, 2011; Mr. Neeson represents Allied Signal/Honeywell in the case. In *Betz*, the trial court had granted a *Frye* motion on behalf of several automotive part manufacturers which argued that epidemiological studies have shown that automotive repair workers exposed to automotive friction products do not have an increased risk developing mesothelioma. The defendants also argued that the plaintiffs' experts' theory that "every breath" and/or "every exposure" to a product containing asbestos is a causal factor in the development of an asbestos related disease was "scientifically unsound." The trial court granted the defendants' *Frye* motion rejecting plaintiffs' experts' "every breath" theory of causation and then proceeded to grant summary judgment in favor of the friction product defendants.

The Superior Court was bound to affirm the summary judgments granted by the trial court unless it found the trial court had committed "an abuse of discretion." Although the

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Superior Court did not find the trial court had abused its discretion, the Superior Court, nevertheless, reversed the trial court's summary judgments on the ground that the trial court's *Frye* ruling rejecting plaintiffs' experts' theory of causation "lacked scientific and evidentiary foundation."

The Supreme Court granted an appeal to consider whether the Superior Court had erred in reversing the trial court's decision to reject the "every breath" theory of causation of plaintiffs' experts. In his argument before the Supreme Court, Mr. Neeson argued that although the Superior Court may have disagreed with the trial court's rejection of plaintiffs' experts' "every breath" theory of causation, this did not establish an "abuse of discretion" by the trial court which is necessary to reverse the trial court's decision. Mr. Neeson also argued that a favorable ruling for the plaintiff would abrogate the Supreme Court's prior decision in *Gregg v. V-J Auto Parts Co.*, in which the Supreme Court affirmed that proof of "regular, frequent, and in close proximity" exposure was required in asbestos cases. Mr. Neeson noted that if the Supreme Court affirmed the Superior Court's holding, the Court would be eliminating both the frequency and regularity requirements of causation in asbestos cases.

A favorable decision from the Supreme Court, reinstating the summary judgments in favor of the friction product defendants, would be of significant benefit to those manufacturers who currently face exposure to large jury verdicts in asbestos cases even though the plaintiff's exposure to their product was *de minimus*.

The second of the two cases, *Young's Sale & Service v. Underground Storage Tank Indemnification Board, et al.*, 6 MAP 2011, was argued before the Pennsylvania Supreme

Court on November 29, 2011; **Carl D. Buchholz, III**, Chair of Rawle & Henderson's Appellate Section, represented the Commonwealth's Underground Storage Tank Indemnification Board (the Board) and the Underground Storage Tank Indemnification Fund (USTIF) at the argument. This was Carl's seventh oral argument before the Supreme Court.

The case involves a claim for coverage submitted by Young's Sales & Services to the USTIF pursuant to the Storage Tank Spill Prevention Act, 35 P.S. § 6021.101 *et. seq.*, for certain remediation fees incurred by Young's stemming from underground leaks consisting of both gasoline and kerosene discovered in 2000 during removal of four underground storage tanks on Young's property. USTIF determined that Young's was ineligible for Fund coverage because mandatory tank fees had not been paid. The Board affirmed the decision to deny eligibility on the ground that fees remained outstanding at the time the contamination was discovered, and that Young's had otherwise failed to meet its burden of proving eligibility for Fund coverage.

On July 20, 2009, a panel of the Commonwealth Court of Pennsylvania vacated the Board's decision, agreeing with Young's contention that eligibility for reimbursement for leak-related remediation expenses is on a "per tank" basis, such that if all current fees are paid with respect to any one particular tank at a multi-tank site prior to the discovery of contamination, then the owner should be entitled to recover for the remediation costs associated with that one tank. The Commonwealth Court then remanded the matter for more specific findings on which fees, gallon or capacity, are owing, and on which tank, and for what period of time.

The Pennsylvania Supreme Court granted allowance of appeal to determine whether the Commonwealth Court's

holding that eligibility for recovery from the USTIF is on a “per tank” basis misinterprets the purpose of, and misapplies, both federal and state laws requiring mandatory financial responsibility for underground storage tanks and threatens the overall financial sustainability of the Fund itself.

Mr. Buchholz argued that the Board properly determined that Young’s failed to meet its burden of proof because it did not establish that all statutorily-mandated underground storage tank fees had been paid and, therefore, was not entitled to any coverage from the USTIF. Mr. Buchholz first pointed out that the Commonwealth Court improperly usurped the Board’s statutorily-mandated function and, instead, substituted its own interpretation of the Act’s eligibility requirements which conflicts with the explicit language of the Act itself

and completely ignores the mixed (gasoline and kerosene) nature of the contamination, as well as the sources of the contamination. Additionally, Mr. Buchholz argued that eligibility cannot be determined on a “per tank” basis as such an interpretation, in its application, would compromise the financial stability of the USTIF. The holding of the panel of the Commonwealth Court in this case would permit the owner of a multi-tank site to pick and choose the tanks to be eligible for coverage under the USTIF which, in its application, would cause payouts for remediation expenses to exceed the income generated by the fees assessed under the Act, ultimately jeopardizing the financial sustainability of the USTIF.

**Decisions in both appeals are expected
sometime in mid-2012.**

Peter J. Neeson is Chair of the Environmental, Toxic and Mass Torts Section. He has been involved in numerous toxic tort matters in multi-district litigation and class action cases in both state and federal courts, including formaldehyde, multiple chemical sensitivity, sick building, latex glove, benzene, underground storage tank, silica, orthopedic bone screw, asbestos litigation and CERCLA Superfund cases. In 2007, he served as Chair of TIPS, the Tort Trial and Insurance Practice Section of the American Bar Association. In 2012, the ABA TIPS section awarded Mr. Neeson its most prestigious honor, the James K. Carroll Award for outstanding leadership qualities and service to the Section. In 2009, he was elected to serve as a Trustee for a three-year term on The National Judicial College’s Board of Trustees. Mr. Neeson graduated from the University of Notre Dame with a B.S. in Aerospace Mechanical Engineering in 1970 and from the University of Miami (*cum laude*) with a J.D. in 1978.

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Carl D. Buchholz, III is Chair of the Maritime, Insurance Coverage and Appellate Sections. His federal appellate practice includes an argument before the U.S. Supreme Court as well as numerous arguments before the U.S. Court of Appeals for the Third Circuit. His state appellate practice includes six arguments before the Pennsylvania Supreme Court as well as numerous arguments before the Pennsylvania Superior Court and Commonwealth Court.

In 2006, the Pennsylvania Supreme Court appointed Carl to the Disciplinary Board of the Supreme Court of Pennsylvania. In 2010, the Pennsylvania Supreme Court designated Carl as Chair of the Disciplinary Board. Mr. Buchholz graduated from Muhlenberg College in 1967 and Villanova Law School in 1970 where he was a member of the *Villanova Law Review* and graduated with honors.

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ABA TOXIC TORT SEMINAR



Eric K. Falk

Eric K. Falk, partner in the firm's Pittsburgh office, chaired the Benzene Mock Trial Panel at the 2012 ABA Toxic Tort Seminar on March 30-31 in Phoenix, Arizona. The panel presented a mock mini-trial of a benzene/solvent exposure toxic tort case. Mr. Falk is currently a Vice Chair of the ABA Toxic Tort and Environmental Law Committee and is a past chair of the DRI Industrywide Litigation Committee. He has concentrated his practice in the area of toxic tort litigation since 1988, defending both Fortune 500 companies and regional businesses against allegations of various diseases due to exposures to asbestos, silica, coal tar pitch and coal tar pitch volatiles, and a variety of chemicals and solvents, including benzene, toluene, xylene, isocyanates and various other aromatic and chlorinated hydrocarbons.

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DISPUTE RESOLUTION INSTITUTE



Valerie Kellner

Valerie Kellner was a presenter at the 14th Annual Personal Injury Potpourri sponsored by the Dispute Resolution Institute on April 17, 2012 at the Pennsylvania Convention Center. Valerie discussed the update of Product Liability Law in Pennsylvania and the current tension between federal and state court in applying Pennsylvania strict product liability law. Valerie is a partner in the firm's Philadelphia office and focuses her practice on product liability litigation as well as general negligence. She is the current Chairperson of the Product Liability Committee of the ABA/TIPS (Tort Trial & Insurance Practice) Section. She has previously served as the Chair-Elect and the Newsletter Editor for the Products Liability Committee. Valerie also serves as a Judge Pro Tem as well as an Arbitrator for the Philadelphia Court of Common Pleas.

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PENNSYLVANIA BAR INSTITUTE



John T. Donovan

John T. Donovan spoke at the Pennsylvania Bar Institute's seminar on Pennsylvania's New Joint and Several Liability Law on Friday, April 13, 2012 at the CLE Conference Center in the Wanamaker Building in Philadelphia. The seminar addressed questions such as what the effect of the new law is on joint tortfeasor releases, how settlements will be affected, how the defense perspective will be changed, how the new law will affect who is brought into a case, and how specific types of cases will be affected. John concentrates his practice on the defense of premises liability, product liability, toxic tort and construction law matters. He is admitted to practice in the federal and state courts of Pennsylvania and New Jersey and the Third Circuit Court of Appeals. He has tried dozens of cases to verdict in both Pennsylvania and New Jersey.

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