

THE EGG SHELL PLAINTIFF: INSTRUCTING JURIES

BY TIM E. CLARKE



Tim E. Clarke

The Nebraska Supreme Court recently clarified the law with regard to the proper jury instruction in cases where the plaintiff suffers an aggravation of a pre-existing condition. In *Castillo v. Young*, the plaintiff, Nancy Castillo, was injured when she was involved in a three-car accident. The accident occurred when a vehicle driven by Megan Young crossed over the center line of the street, hitting Castillo's vehicle head on.

Castillo allegedly suffered multiple injuries as a result of the collision, including an injury to her jaw described as temporomandibular joint disorder, or TMD. This was not the first time Castillo had suffered an injury to her jaw, as she had broken her jaw approximately 17 years prior to the accident. Castillo testified that she had fully recovered from the prior injury before the accident. After the accident, it was determined that Castillo had a disk displacement disorder in her jaw. At trial, her doctor testified with regard to the impact on Castillo's jaw, in light of her condition 17 years earlier:

There are patients – it's like a truck. If you rear end a truck that's full of bricks, you're probably [not] going to hurt your truck – you're going to hurt yourself, not the truck. If you rear end a truck full of eggs, you're more likely to do damage than if you rear end a truck full of bricks.

Unfortunately I think in [Castillo's] case, they rear-ended her being full of eggs. She was fragile. . . . Any time you've had injury to a joint that would cause fracture of that bone, there has to be consequence to the system, whether there [are] symptoms provoked at that time or not.

The doctor could not say whether the disk displacement was caused by the car accident or predated the car accident. He stated that it was quite probable that Castillo had some displacement prior to the accident, but that her symptomology after the incident was a direct result of the motor vehicle accident, and not of any previous injury or condition.

The Defendant successfully argued that the proper jury instruction, referred to as the "pre-existing condition" instruction, should be used, and the trial court instructed the jury as follows:

There is evidence that the Plaintiff had broken her jaw in 1983 and experienced a disk displacement in her jaw prior to the December 20, 2000, accident. The Defendant(s) is liable only for any damages that you find to be proximately caused by the Defendants' negligence relating to the December 20, 2000, accident.

If you cannot separate damages caused by the pre [sic] existing broken jaw from those caused by the accident of December 20, 2000, then the Defendant(s) are liable for all of those damages.

The trial court rejected Castillo's requested instruction, which included what is known as the "egg shell plaintiff" instruction, and states:

The defendant's [sic] may be liable for bodily harm to Nancy Castillo even though the injury is greater than usual due to the physical condition which predisposed Nancy Castillo to the injury. In short, the defendant's [sic] take the plaintiff as they find her.

The jury entered a judgment in Castillo's favor in the amount of \$13,058.67.

After trial, Castillo appealed the trial court's refusal to give the "egg shell plaintiff" instruction. On appeal, the Supreme Court found that the instruction given by the trial court was a correct statement of the law, however, it also found that the tendered instruction did not cover the plaintiff's theory of damages because there was evidence of a pre-existing condition. Under Nebraska law, if a person suffers from a pre-existing condition and is injured by reason of another's negligence, the person may recover all damages proximately resulting from the negligent act, including the right to recover for greater damages because of an aggravation of that pre-existing condition.

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The Court held that the plaintiff's proffered instruction correctly stated the law, was warranted by the evidence, and that refusal to submit the "egg shell plaintiff" instruction to the jury was prejudicial to the plaintiff. It ordered a new trial on the issue of damages.

In sum, the Supreme Court appears to have held that in every case

where the plaintiff suffers from a pre-existing condition and the evidence suggests the condition was aggravated by the accident, the trial court should give the "pre-existing condition" instruction as well as the "egg shell plaintiff" instruction. Practically, this means that adjustors should carefully evaluate the damages in situations where a pre-existing

condition is aggravated, as well as situations where a pre-existing condition may have predisposed the plaintiff to a more significant injury than would have existed without the pre-existing condition.



Caroline M. Westerhold

Ready access to medical information relevant to an employee's injury is critical in the handling and management of workers' compensation claims. The most efficient means of accessing medical information is for an employer or its agent to communicate directly with the employee's medical providers. Often, this is accomplished through the use of a medical case manager who is retained to actively oversee an employee's medical treatment and to assist in facilitating a safe return to work.

In the past, employees have frequently sought to prevent employers and their agents from engaging in direct, ex parte contacts with medical providers by taking the position that such contacts are precluded by the physician/patient privilege. Several judges of the Nebraska Workers' Compensation Court have addressed this issue at the trial court level and have consistently held that such ex parte communications are permissible. Until recently, however, this issue had never been addressed by the Nebraska appellate courts and there remained

some uncertainty as to whether such ex parte contacts were permissible.

In April of this year, the Nebraska Court of Appeals addressed this issue in *Scott v. Drivers Management, Inc.* In *Scott*, the employer contacted plaintiff's treating psychologist ex parte on several occasions to discuss plaintiff's treatment. The employer also provided the doctor with additional medical information and requested that the doctor formulate opinions based upon his review of the information. The employee filed a motion to strike the opinions of the doctor, which were obtained ex parte, based on the argument that the communications were precluded by the physician/patient privilege. The trial court rejected plaintiff's argument and overruled plaintiff's motion. Plaintiff appealed.

On appeal, the Nebraska Court of Appeals also rejected plaintiff's argument that the physician/patient privilege precludes an employer or its legal representative from contacting an employee's treating health care provider. The Court referenced, in relevant part, Neb.Rev.Stat. § 48-120(4), which provides:

EX PARTE CONTACTS WITH MEDICAL PROVIDERS

BY CAROLINE M. WESTERHOLD

All medical and hospital information relevant to the particular injury shall, on demand, be made available to the employer, the employee, the workers' compensation insurer, and the compensation court. The party requesting such medical and hospital information shall pay the cost thereof. No such relevant information developed in connection with treatment or examination for which compensation is sought shall be considered a privileged communication for purposes of a workers' compensation claim.

The Court held that the meaning of the statute is plain in that "[w]hen an injured worker is seeking compensation for an injury from his employer and the employer seeks relevant information from the injured worker's treating physician regarding that injury, that information is not privileged."

The decision in *Scott* provides a clear and favorable answer to the question of whether employers and their agents may engage in ex parte communications with an employee's medical providers.

INTRODUCING BAYLOR EVNEN'S NEW ASSOCIATE



Cynthia R. Lamm

Cynthia R. Lamm joined the firm in August, 2006, after two years as a judicial clerk for the Honorable Kenneth C. Stephan, Justice of the Nebraska Supreme Court. She handles personal injury and insurance litigation. Cyndi is a native of California. She and her family moved to Nebraska in 1988. After raising her two children, encouraged by her husband Tim, Cyndi returned to school and achieved her life-long dream of practicing law. Her mantra, repeated

often to friends and family alike, is "there is no expiration date on dreams."

Cyndi was a Chancellor's Scholar at the University of Nebraska-Lincoln and received her degree in communication studies, graduating with high distinction in 2001. While attending the University of Nebraska College of Law, Cyndi was an executive editor for Law Review, a member of the school's National Moot Court team, and president of the student chapter

of the Nebraska Association of Trial Attorneys/American Trial Lawyers Association. She also served as a student mentor and as the classroom assistant for the law college's first Summer Pre-Law Institute, a month-long program designed to introduce a diverse group of undergraduate students to legal study, analytical writing, and the law school application process. Cyndi graduated from UNL College of Law with high distinction in 2004.



Jacob P. Wobig

HAIL DAMAGE TO FADED SIDING: WHAT ARE AN INSURER'S OBLIGATIONS?

BY JACOB P. WOBIG

It's a common problem for home insurers. An insured home suffers hail damage to one side of the building. The home's siding has faded and it is not possible to find replacement siding that will match the appearance of the undamaged sides of the house. Must the insurer pay for only the replacement of the damaged siding, or for the replacement of all the siding on the entire house?

According to a recent unpublished opinion of the Nebraska Court of Appeals, insurers are required to replace only the damaged siding, provided that the policy so states in clear, unambiguous language. In *Weiler v. Union Ins. Co.*, a homeowner sued his insurer for refusing to replace all the siding of his home when it was determined that no replacement siding for the damaged portion of his house would match the appearance of the undamaged siding. The opinion turned on the language of the insurance policy, which was as follows:

SECTION I - PERILS INSURED AGAINST COVERAGE A - DWELLING and COVERAGE B - OTHER

STRUCTURES *We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.*

SECTION I - CONDITIONS

. . . . 3. Loss Settlement. *Covered property losses are settled as follows: b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following: (1)If, at the time of the loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts: (b) The replacement cost of that part of the building damaged for like construction and use on the same premises[.]*

The homeowner argued that the phrases "direct loss" and "like construction and use" were ambiguous, and should be construed

in his favor. He offered testimony of an expert witness who claimed that it was accepted practice in Nebraska for insurers to pay for the replacement of siding on all sides of a home when a reasonably close match in replacement siding could not be obtained.

The law is well established that while an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous. In *Weiler*, the Nebraska Court of Appeals determined that the phrase "direct loss" in the insurance policy unambiguously meant that coverage was provided for physical loss to property caused by a covered peril. Additionally, the Court determined that the phrase "like construction and use" unambiguously meant returning the structure as nearly as possible to its pre-damaged condition.

Applying these terms, the Court stated:

[T]he policy, at least, requires [the insurer] to cover the cost of replacing the siding that was

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damaged by hail. According to our reasoning . . . the policy does not require [the insurer] to cover replacement of the other three sides, the faded condition of which was not due to hail damage during the coverage period. In its predamage condition, the residence had four sides of faded, aging siding. Replacing just one side of the siding would return the residence as nearly as possible to its predamage condition.

This ruling clarifies this area where property insurers have long encountered significant disputes arising from storm damage to roofs and siding of buildings. Of course, any ambiguity or uncertainty in the

language may lead to a different outcome.

It should be noted again that *Weiler* is an unpublished opinion. This means that the opinion does not establish precedent and cannot be cited in future cases involving other parties. Notwithstanding, the decision does provide some insight into an appellate court's analysis of this issue. The insured did not appeal to the Nebraska Supreme Court; therefore, how that Court would decide this issue remains unknown.

MARK YOUR CALENDARS

Baylor Evnen's annual client seminar is scheduled for March 22, 2007. The agenda will focus on workers' compensation issues. Further details will be provided in our January, 2007 newsletter.

NOTES FROM THE FIRM

In September, **Don Witt** was elected Chairman of the State Committee of the Nebraska Chapter of the American College of Trial Lawyers. The College is comprised of less than one percent of the lawyers in the State of Nebraska, selected by their peers in recognition of their trial skills, legal knowledge and integrity. Also in September, Don was responsible for presenting a seminar by the American College for public sector lawyers on all aspects of a jury trial. He spoke on how to conduct voir dire.

Caroline Westerhold was elected by her peers to the Executive Committee for the Nebraska State Bar Association's Young Lawyers section.

Darla Ideus was selected to be one of 25 members of the Nebraska State Bar Association's first annual Leadership Academy, a program designed to develop future leaders of the Association and profession.

In September, **Dallas Jones** spoke at the Nebraska Health Care Association Annual Convention. He addressed what employers can and should do to mitigate workers' compensation exposure. Also in September, Dallas spoke at the Nebraska Trucking Association Convention, addressing issues surrounding independent contractors and owners/operators.

Jill Schroeder, **Dallas Jones** and **Tim Clarke** were speakers at the Nebraska State Bar Association Workers' Compensation Seminar held in September. Jill and Dallas spoke about Medicare's interest while Tim provided a case law update.

Scott Davis served as a panelist at the National Association of Motor Vehicle Industry Licensing Boards meeting held in Utah in September. He spoke about due process and administrative hearings.



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