

IN BRIEF

Vol. 14
January 11, 2008

An Insurance Industry Newsletter of
Recent Issues and Opinions in Virginia Law
by

Sinnott Nuckols & Logan, PC

ATTORNEYS AT LAW

I DIDN'T MEAN TO.... BUT DOES THAT REALLY MATTER???

The Gloucester County Circuit Court recently decided a case involving the validity of the Criminal Act Exclusion in homeowner's policies. The Court held that the exclusion was not ambiguous and that other factors, including the intent of the insured, were not at issue when a criminal act was committed by the insured which resulted in bodily injury.

In July of 2005 William C. Corbitt was insured under a homeowner's policy which "excluded coverage for any claims of bodily injury that result from a criminal act of the insured."¹ The policy language for the criminal act exclusion stated:

1. Exclusions That Apply to Coverages L (Personal Liability) and M (Medical Payments to Others)
 - This policy does not apply to:
 - i. "bodily injury" or "property damage":
 - 2) that is the result of a criminal act of an "insured"...²

¹ "Exclusion Bars Claim Arising Out of Criminal Act," The Journal of Civil Litigation, Vol. XIX, No. 3, Fall 2007, pgs. 505-506

² *Ibid.*, pg. 506

The undisputed facts of the case were fairly straightforward.³ On July 6, 2005 Robert K. Sears was spending the evening at the home of his friend William C. Corbitt. During the course of the evening, Corbitt, who was under the impression that he had previously cleared his shotgun of shells, picked up the shotgun to put it away. When he picked it up, Corbitt raised the barrel of the shotgun toward the light, pressed the button to close the breech and the shotgun discharged. Corbitt accidentally shot Sears in the stomach and the leg.

Corbitt was indicted on two criminal offenses: Discharge Firearm in an Occupied Building (in violation of Va. Code Ann. § 18.2-279) and Reckless Handling of a Firearm (in violation of Va. Code Ann. § 18.2-56.1). He pleaded guilty to a violation of the latter offense. Subsequently, Sears filed a civil action against Corbitt in the Gloucester Circuit Court seeking damages in the amount of \$1,000,000.00 for the personal injuries he sustained when the firearm discharged.⁴

The insurance company filed a Motion for Summary Judgment claiming that Corbitt's criminal act was the direct cause of the bodily injuries to Sears, thus insurance coverage did not apply to the facts of the case pursuant to the criminal act exclusion in Corbitt's policy. The parties agreed that their depositions could be used for the purpose of a summary judgment motion.⁵

Counsel for the parties argued before the Gloucester Circuit Court on May 24, 2007. Having heard the arguments of the insurance company as well as Sears and Corbitt, the Gloucester Circuit Court held that the policy language was not ambiguous, and that under the facts and circumstances of the case, the criminal act exclusion in Corbitt's policy acted to exclude from coverage Sears' claim. The Court also held that pursuant to the criminal act exclusion, the insurance company did not owe any legal defense to the insured under the policy.⁶ Consequently, the insurance company's Motion for Summary Judgment was granted.

A final order was entered by the Court on July 6, 2007.⁷ Neither Sears nor Corbitt filed an appeal. Since neither defendant filed an appeal, it looks like this issue will remain unaddressed by the Supreme Court of Virginia for the time being. It should be noted that because the Gloucester Circuit Court's opinion is persuasive authority for other Circuit Courts in Virginia, it is likely that the criminal act exclusion will continue to act as bar to coverage where the facts and circumstances are similar to those in this case. Until a litigant chooses to appeal the decision of a Circuit Court to enforce the criminal act exclusion, the Virginia Supreme Court will not have a chance to address this issue.

³ Ibid., pg. 505

⁴ Ibid., pg. 505

⁵ Ibid., pg. 506

⁶ Ibid, pgs. 506-507

⁷ Ibid, pg. 507

**DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY ISSUES
JANUARY 7, 2008 SESSION**

062449 Coston v. Bio-Medical Applications 01/11/2008

In a medical negligence case alleging that defendant's employees placed the plaintiff in a defective chair for a kidney dialysis procedure, even though they had knowledge that the chair was not safe, the allegations, if proven at trial, would be sufficient to establish a prima facie case of medical negligence without the necessity of expert testimony. Based upon these allegations, the issue whether the acts or omissions constitute medical negligence is within a jury's common knowledge and experience and, therefore, expert testimony is not necessary. The judgment of the circuit court is reversed and the case is remanded for a trial on the merits.

062620 Ford Motor Co. v. Favinger 01/11/2008

In considering a claim for temporary partial disability benefits under the Virginia Workers' Compensation Act, Code §§ 65.2-100 through 65.2-1310, the Commission's award, affirmed by the Court of Appeals, was not predicated upon evidence that the employee made a reasonable effort to market his residual work capacity. Because the record contains no such evidence, the judgment of the Court of Appeals is reversed and final judgment is entered for the employer.

070091 Hilton v. Martin 01/11/2008

In an action to recover damages for personal injury and death resulting from an assault on the victim by a fellow employee, the trial court erred in concluding that the Virginia Worker's Compensation Act provided the exclusive remedy for the claims. Applying the actual risk test, the assault on the victim had no relationship with her status as an employee. Whether intended as flirtatious, merely playful, or as harassment, the assault was purely personal and thus the resulting injury and death did not "arise out of the employment" under Code § 65.2-101. The judgment is reversed and the case is remanded for further proceedings.

070146 Ahari v. Morrison 01/11/2008

In a wrongful death action, the circuit court did not err in granting the defense plea of the statute of limitations. Because Rule 1:8 requires leave of court to amend any pleading after it is filed, an amended complaint is not deemed filed, and is thus without legal efficacy, until a trial court grants leave to amend. Thus, the claims asserted against the defendants named in an amended complaint were time barred despite plaintiff having sought leave to amend three days prior to the expiration of the limitations period. The judgment is affirmed.

070190 **Lloyd v. Kime** 01/11/2008

In a medical malpractice case, the trial court did not err in using deposition evidence to resolve a motion in limine and subsequent motion for summary judgment where no objection was made, or in holding that an expert witness was not qualified under Code § 8.01-581.20 to testify on standard of care and breach thereof respecting intraoperative negligence. However, it was an abuse of discretion to conclude that the expert was not qualified to testify on these issues with respect to postoperative negligence, or causation as to either allegation of negligence. The judgment is affirmed in part and reversed in part, and the case is remanded.

DISCLAIMER

This newsletter is intended to provide information of general interest to industry professionals. It is not intended to offer legal advice about specific situations or problems. Sinnott, Nuckols & Logan, P.C. does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a Sinnott Nuckols & Logan, P.C. attorney if you have a legal matter requiring attention.

Nothing on or in this material creates an express or implied contract. If you have questions or comments regarding this newsletter, please contact: Mark C. Nanavati, (804) 378-7600 ext. 3316, mnanavati@snllaw.com.