

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 31737

WILLIAM E. WEHNER, JR.,
Administrator of the
Estate of Jennifer Wehner,
NICOLE FISHER, JESSICA
LANDAU, MATTHEW KISER,
SIGMA PHI EPSILON,
a national fraternal
organization and association,
a Virginia corporation, and
SIGMA PHI EPSILON BUILDING
ASSOCIATION, INC., a
corporation,

Plaintiffs,

vs.

Civil Action No. 93-C-216

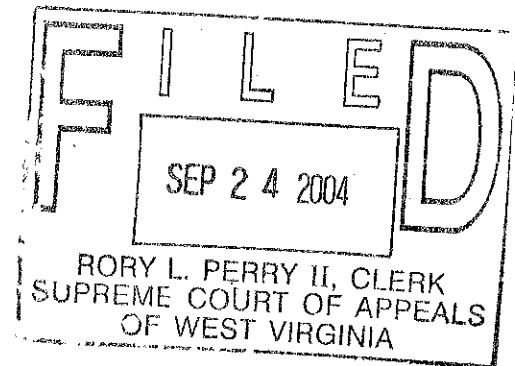
BRETT BARRY WEINSTEIN,
MARK WEINSTEIN, SHIRLEY
R. WEINSTEIN, BOSSIO
ENTERPRISES, INC.,
d/b/a MARIO'S PIZZA,
AETNA CASUALTY & SURETY CO.,
a foreign corporation, and
THE STANDARD FIRE INSURANCE
COMPANY, a foreign
corporation,

Defendants,

vs.

AMERICAN INTERNATIONAL
COMPANIES, NEW HAMPSHIRE
INSURANCE COMPANY, ESSEX
INSURANCE COMPANY, and
PENNSYLVANIA NATIONAL
MUTUAL INSURANCE COMPANY,

Third-Party Defendants.



**REPLY BRIEF OF APPELLANT PENNSYLVANIA
NATIONAL MUTUAL INSURANCE COMPANY**

Respectfully submitted,

Richard W. Gallagher
(W. Va. State Bar I.D.: 1327)
Jeffrey A. Kimble
(W. Va. State Bar I.D.: 4928)
Robinson & McElwee PLLC
Post Office Box 128
140 West Main Street, Suite 300
Clarksburg, WV 26302-0128
(304) 622-5022
Counsel for Pennsylvania National
Mutual Insurance Company

I. INTRODUCTION

In this brief, the appellant, Pennsylvania National Mutual Insurance Company ("PNI"), will reply specifically to the arguments made in the Brief of Appellee in the Discussion of Law section D relating to PNI's argument that American International Companies/New Hampshire Insurance Company (AIC/NH) is estopped from contesting that Kiser was covered by the applicable New Hampshire policies.

II. STATEMENT OF FACTS

It is well established that Matthew Kiser refrained from deposing brother pledges and presenting their testimony at trial in exchange for AIC/NH's withdrawal of its reservation of rights on the question of whether he was acting within the scope of his pledge duties. (See Exhibits B, C and D attached to Reply Memorandum to Response of New Hampshire Insurance Company in Support of Motion for Summary Judgment of Pennsylvania Mutual Insurance Company.) AIC/NH alleges that Kiser's agreement not to depose pledges and/or introduce their testimony was actually in exchange for an agreement by AIC/NH to pay one-half of any verdict Matthew Kiser was called upon to pay. New Hampshire bases this argument on what it well knows to be an erroneous and completely unsupported comment in the Circuit Court's 16 page

"Order Regarding Insurance Coverage Issues" which states as follows:

In a side agreement with PNI made outside of the insuring agreements and prior to trial the underlying claims, New Hampshire voluntarily agreed to pay one-half of Kiser's share of the underlying verdict so as to avoid the presentation of evidence regarding Kiser's duties and obligations as a pledge.

See Order, at 4-5.

This comment is made in the context of paragraph 5 of the Order which is simply an informational paragraph intended to demonstrate the manner in which the unsatisfied liability of defendant Weinstein was satisfied by the remaining defendants. Nothing in the record supports this statement by the Circuit Court. A review of the summary judgment motion, response memoranda and reply memoranda filed by PNI and/or AIC/NH clearly demonstrates that no party ever advised the Circuit Court that the "side agreement" concerning the payment of Kiser's pro-rata share of liability had anything to do with the introduction of evidence concerning Kaiser's duties and obligations as a pledge. In fact, all of the documentation and argument presented to the Court on this issue clearly established that the nature of the agreement between Mr. Kaiser and AIC/NH was that Kiser would not depose pledges or call upon them to testify if AIC/NH would withdraw its reservation of rights relating to Mr. Kiser acting

within the scope of his capacity as a pledge at the time of the accident.

For example, Exhibit C to the Reply Memorandum to Response of New Hampshire Insurance Company in Support of Motion for Summary Judgment of Pennsylvania National Mutual Insurance Company clearly reflects that on August 21, 1992, prior to the trial of this matter, counsel for Kiser corresponded with counsel hired by AIC/NH concerning the agreement.

This is to confirm our conversations of yesterday respecting AIC's (AIC/NH) belated agreement to withdraw the reservation of rights letter with regard to Matthew Kiser in his capacity as a pledge of Sigma Phi Epsilon Fraternity. Although you were apparently dismayed by the fact that we have noticed two depositions of former pledges of the fraternity in an effort to demonstrate that Matthew Kiser was acting within the scope of his duties as a pledge with the fraternity, you certainly should have been well aware of our intent to do so as I have expressed this intention on various previous occasions . . .

As I pointed out, AIC's (AIC/NH) failure to withdraw the reservation of rights necessitated the noticing of these depositions. Although I have understood the general desire to refrain from implicating the fraternity to the largest extent possible in order to minimize a jury verdict, AIC's (AIC/NH) failure to withdraw its reservation of rights left me no choice but to take whatever action necessary to establish that any actions by Matthew Kiser at the time of the accident were, in fact, within the scope of his pledge duties.

Not only is the record completely devoid of anything to support the Circuit Court's comment, a review of the transcript

of the hearing of May 10, 2001, which resulted in the entry of said order, reflects that no such information was discussed during said hearing.

Finally, there is correspondence between Kiser's respective counsel hired by PNI and AIC/NH which clearly demonstrates that the "side agreement" concerning the payment of Kiser's liability was not made until November 13, 1992, after the trial of the underlying case. (See correspondence from P. Brennan Hart to R. Gallagher dated November 13, 1992 attached as "Exhibit A".) Said letter was not a part of the record below because the nature of the agreement between Kiser and AIC/NH was not in issue. AIC/NH is raising it now, solely because the erroneous comment in the Circuit Court's Order permits the argument. However, the fact that the Circuit Court's comment in the order is just plain wrong cannot be contested. The agreement between PNI and AIC/NH to pay fifty percent (50%) of Kiser's liability and reserve the coverage issue for later determination was reached after the trial and could not have been the basis for Kiser's agreement not to present the testimony of his pledge brothers.

AIC/NH knows that the Circuit Court's reference in paragraph 5 of its Order indicating that the side agreement to pay one-half of the Kiser liability was made in exchange for Kiser refraining from presenting evidence regarding his duties

and obligations as a pledge is simply and clearly erroneous. AIC/NH should not be using such an error to attempt to mislead this Court to an unjust ruling and is yet another indication of its bad faith toward its insured, Kiser.

Discussion of Law

The appellant, AIC/NH has attempted to confuse the Court with respect to the estoppel issue. PNI is not asserting that AIC/NH should be estopped from denying coverage to Kiser as a result of any agreement it had with PNI. Rather, AIC/NH should be estopped from denying coverage for Kiser as a result of the express withdrawal of the reservation of rights for whether or not Kiser was acting within his duties as a pledge as embodied in the letter to Matthew Kiser from AIC/NH dated August 7, 1992, and attached to the Reply Memorandum to Response of New Hampshire Insurance Company in Support of Motion for Summary Judgment of Pennsylvania National Mutual Insurance Company as "Exhibit B".

It is undisputed that PNI has paid one-half of the verdict attributable to Matthew Kiser. Accordingly, PNI stands in the shoes of Matthew Kiser as his subrogee with respect to any claim he has for coverage against AIC/NH. Ray v. Donahew, 177 W. Va. 441, 352 S.E.2d 729 (1986).

Moreover, appellee's contention that Kiser cannot demonstrate prejudice as a result of the actions taken by AIC/NH

is ridiculous. It is well documented and was well-documented at the summary judgment stage below that Matthew Kiser made no effort to establish that he was acting within his capacity as a pledge at the underlying trial specifically and solely as a result of AIC/NH agreeing to withdraw its reservation of rights that Mr. Kiser was acting in his capacity as a pledge. Accordingly, Kiser made no effort to establish this otherwise important point during the trial. Importantly, all of the points cited by AIC/NH in support of its position on this issue from the original opinion in Wehner v. Weinstein, 191 W. Va. 149, 444 S.E.2d 27 (1994), directly resulted from the fact that Kiser honored his agreement with AIC/NH and refrained from introducing any such evidence at trial. The prejudice he suffered is apparent on its face; he made no effort whatsoever to establish that he was acting as a pledge and, thus, did not persuade this Court (although the jury was persuaded) that he was acting as the agent of the fraternity. As a result, it is the dicta in the original Wehner opinion which now gives rise to AIC/NH's very argument that Kiser was not covered.

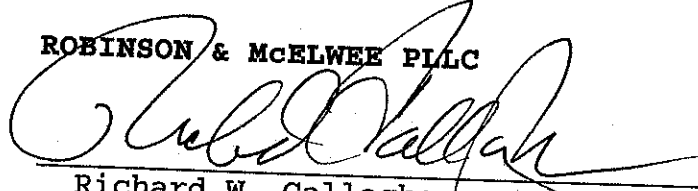
AIC/NH repeatedly misstates PNI's position insinuating that an agreement between PNI and AIC/NH gives rise to the estoppel argument. In fact, the estoppel is based entirely upon the pretrial agreement made between Kiser and AIC/NH that the withdrawal of reservation of rights would be made in exchange for

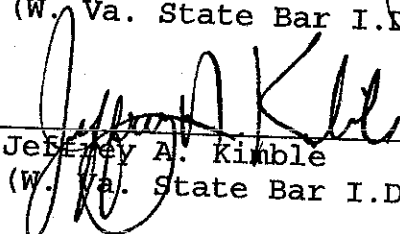
Kiser not proving up his agency relationship with the fraternity at trial. Once the reservation of rights was waived, Kiser did not need to prove the agency relationship because coverage had been acknowledged. As subrogee, PNI is asserting Kiser's rights against AIC/NH and is entitled to a ruling that AIC/NH is estopped from denying coverage for Matthew Kiser.

Conclusion

Accordingly, for the reasons stated herein and in the Brief of Appellant Pennsylvania National Mutual Insurance Company, this appellant respectfully requests that this Court reverse the Circuit Court's ruling denying coverage to Matthew Kiser and Brett Barry Weinstein, pursuant to the AIC/NH policies and such other relief as the Court deems just and proper.

ROBINSON & McELWEE PLLC


Richard W. Gallagher
(W. Va. State Bar I.D.: 1327)


Jeffrey A. Kimble
(W. Va. State Bar I.D.: 4928)

Attorneys for Pennsylvania
National Mutual Insurance Company

Post Office Box 128
140 West Main Street, Suite 300
Clarksburg, WV 26302-0128
(304) 622-5022

"Exhibit A"

ZIMMER, KUNZ, LOUGHREN, HART
LAZAROFF, TRENOR, BANYAS & CONAWAY, P.C.

ATTORNEYS AT LAW • PROCTORS IN ADMIRALTY

43RD FLOOR, ONE OXFORD CENTRE
PITTSBURGH, PENNSYLVANIA 15219-6400
(412) 281-8000
FAX (412) 281-1765

HARRY J. ZIMMER
THOMAS A. LAZAROFF
JOHN E. KUNZ
ANDREW J. BANYAS, III
RAYMOND H. CONAWAY
FRED C. TRENOR, II
P. BRENNAN HART
LOUIS B. LOUGHREN
GEORGE N. STEWART (PA & WV)
JONI M. MANGINO

JOSEPH W. SELEP (PA & WV)
RAYMOND J. CONLON
EDWARD K. DIXON
NANCY DiCARLO FABI
ROSEMARY M. PETRANTONI
SCOTT G. DUNLOP
DARA A. DECOURCY
ALEXANDER P. BICKET
PATRICIA E. CAMPBELL
JOHN W. ZOTTER (PA & OH)

DAVID F. RYAN
DANIEL E. KRAUTH
GEORGE R. FARNETH II
ANTHONY C. CARONE

ANTITRUST COUNSEL
JOHN W. THOMAS
OF COUNSEL
DAVID WARD MURPHY

DIRECT DIAL

REFER TO:

BUTLER OFFICE:
SUNSET OAKS PLAZA, SUITE 4, 205 SUNSET DRIVE
BUTLER, PA 16001
(412) 265-6677

0170.0137

November 13, 1992

Richard Gallagher, Esquire
ROBINSON & McELWEE
P. O. Box 128
Clarksburg, WV 26302-0128

Re: Wehner, Fisher & Landau v. Weinstein, Bossio,
Kiser, and Sigma Phi Epsilon, Inc.
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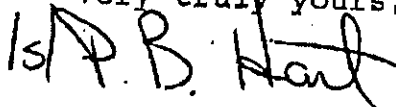
Dear Mr. Gallagher:

I am writing to confirm our discussion of November 13, 1992 in which I advised you that AIAC was willing to accept Pennsylvania National's proposal regarding the payment of Matthew Kiser's share of the ultimate verdict if Post-Trial Motions are unsuccessful. As per our discussion, both AIAC and Pennsylvania National agree to pay 1/2 of whatever monies are owed by Mr. Kiser as a result of the aforesaid jury verdict. In addition, each carrier is unconditionally and unequivocally preserving all rights and remedies they may have in regard to determining the priority of their respective policies.

I informed you that a direct letter from AIAC confirming this agreement would be impossible at this time. The file is in transit to the Atlanta office's complex litigation unit. The file will be reassigned sometime next week which makes any direct correspondence before your deadline to file Post-Trial Motions impossible. I discussed this proposed agreement with Ward Turnquist, Vice President and Managing Director of AIAC, who gave full authority to agree to the 1/2 payment and complete reservation of rights.

If you have any questions or comments concerning the above, please do not hesitate to call.

Very truly yours,



P. BRENNAN HART

PBH/mkb

VIA FAX
ORIGINAL MAILED

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September,
2004, I served the foregoing Reply Brief of Appellant
Pennsylvania National Mutual Insurance Company upon all counsel

of record, by depositing true copies thereof in the United States
mail, postage prepaid, in envelopes addressed to them as follows:

Marvin W. Masters, Esquire
Masters & Taylor, L.C.
181 Summers Street
Charleston, West Virginia 25301-2177
Attorney for William E. Wehner, Jr.,
Nicole Fisher and Jessica Landau

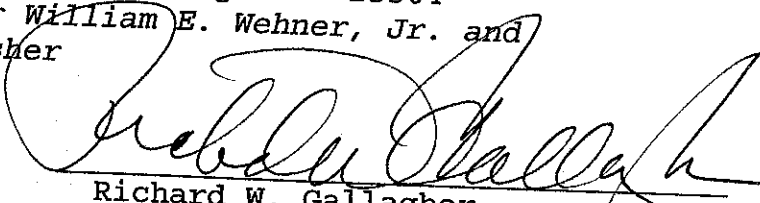
Avrum Levicoff, Esquire
Levicoff, Silko & Deemer, PC
Centre City Tower
650 Smithfield Street, Suite 1900
Pittsburgh, Pennsylvania 15222-3911
Attorney for Aetna Casualty & Surety Company,
Standard Fire Insurance Company and Bossio
Enterprises, Inc., d/b/a Mario's Pizza

Ancil G. Ramey, Esquire
Steptoe & Johnson
Post Office Box 1588
Charleston, West Virginia 25326-1588
Attorney for American International Companies
and New Hampshire Insurance Company

Laurie C. Barbe, Esquire
Steptoe & Johnson
Post Office Box 1616
Morgantown, West Virginia 26507-1616
Attorney for Sigma Phi Epsilon Fraternity

Mark E. Gaydos, Esquire
Widmer, Coombs & Gaydos
211 New Jersey Avenue
Morgantown, West Virginia 26505
Attorney for Jessica Landau

Thomas W. Pettit, Esquire
Thomas W. Pettit, L.C.
Post Office Box 189
Barboursville, West Virginia 25504
Attorney for William E. Wehner, Jr. and
Nicole Fisher


Richard W. Gallagher
(W. Va. State Bar I.D.: 1327)