CHADWICK WASHINGTON MORIARTY ELMORE & BUNN P.C.

The Litigation Report

Welcome to the inaugural edition of the Chadwick Washington Litigation newsletter, *The Litigation Report!* In addition to Chadwick Washington's *Special Assessment* newsletter addressing important issues in the community association world, the Litigation Team will be sending out a quarterly newsletter to keep our insurance and corporate clients up-to-date on issues that may have an impact on claims.

NEW VIRGINIA LEGISLATION ELIMINATES UIM CREDIT

New legislation in Virginia will significantly change insurers' exposure under the UIM coverage provisions of the auto policies they issue. The amended statute, which becomes effective July 1, 2023, provides that insurers will no longer receive the benefit of any credit or offset for available liability coverage.

Prior to passage of this bill, a credit in the amount of any available liability coverage would be applied to reduce the insurer's obligation to pay its UIM policy limits. For example, if an insured had $100,000 in UIM coverage, and there was $50,000 available for payment under the tortfeasor's automobile liability coverage, the insured would only have a total of $50,000 available in UIM coverage. Once this new legislation goes into effect, under the same scenario, the insured will have the full $100,000 in UIM coverage available, thus increasing the insurer's exposure.

The following language is being added to the Virginia Code section regarding uninsured motorist insurance coverage - ***§38.2206 A:***

The endorsement shall provide that underinsured motorist coverage shall be paid without any credit for the bodily injury and property damage coverage available for payment, unless any one named insured signs an election to reduce any underinsured motorist coverage payments by the bodily injury liability or property damage liability coverage available for payment by notifying the insurer as provided in subsection C of ***§38.2-2202****. This election by any one named insured shall be binding upon all insureds under such policy.*

Subsection C of ***§38.2-2202*** has been amended to state as follows:

C. *No policy of insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued, delivered, or renewed after July 1, 2023, in the Commonwealth unless the following statement, printed in boldface type, is enclosed with the policy:*

IMPORTANT NOTICE PREVIOUSLY, YOUR UNDERINSURED MOTORIST COVERAGE PAID DAMAGES DUE TO AN INSURED AFTER ANY CREDIT OF THE BODILY INJURY OR PROPERTY DAMAGE LIABILITY COVERAGE APPLICABLE TO THE INSURED'S DAMAGES HAD BEEN APPLIED.

THE LAW HAS BEEN AMENDED TO REQUIRE INSURERS TO PROVIDE UNDERINSURED MOTORIST COVERAGE THAT PAYS ANY DAMAGES DUE TO AN INSURED IN ADDITION TO ANY BODILY INJURY OR PROPERTY DAMAGE LIABILITY THAT IS APPLICABLE TO THE INSURED'S DAMAGES. THIS CHANGE MAY AFFECT YOUR PREMIUM.
YOU MAY ELECT TO REFUSE THIS CHANGE IN YOUR UNDERINSURED MOTORIST COVERAGE.

AN ELECTION TO DECREASE YOUR UNDERINSURED MOTORIST COVERAGE MUST BE IN WRITING.
ONCE ANY ONE NAMED INSURED ELECTS TO DECREASE THE UNDERINSURED MOTORIST COVERAGE, THAT ELECTION IS BINDING ON ALL INSUREDS ON THE POLICY. LATER, IF YOU DESIRE TO PURCHASE INCREASED UNDERINSURED MOTORIST COVERAGE, YOU MUST MAKE A SPECIFIC REQUEST TO YOUR INSURER. YOU MUST PUT THIS REQUEST IN WRITING.

BEFORE ELECTING TO DECREASE YOUR UNDERINSURED MOTORIST COVERAGE, YOU SHOULD CAREFULLY CONSIDER THAT THIS COVERAGE PROVIDES IMPORTANT PROTECTION IN THE EVENT YOU ARE INJURED OR YOUR MOTOR VEHICLE IS DAMAGED DUE TO THE ACTIONS OF AN UNDERINSURED MOTORIST.

As noted above, this new law applies to policies issued, delivered, or renewed after July 1, 2023. To see the full text of the bill, go to: https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0308

Look out for our April *Litigation Report* for a full synopsis of all new legislation going into effect in July that may have an impact on the insurance industry.

EXPANDED DUTY OF LANDOWNERS TO CONTROL CONDUCT OF THIRD PARTIES ON THEIR PROPERTY

In order to establish liability for negligence against a landowner, it first must be established that a legal duty is owed. Whether a legal duty in tort exists under a particular set of circumstances has been an issue that the Virginia Supreme Court has often had to grapple with.

Of course, all individuals have a duty to conduct themselves in such a way as not to cause harm to others. But what duty does an individual have to protect others from harm due to the actions of third parties? The Virginia Supreme Court has held that "generally a person does not have a duty to protect another from the conduct of third persons." *See, e.g., Kellermann v. McDonough, 278 Va. 478, 492, (2009).* However, as with every rule, there are exceptions. For example, one exception to the general rule is where a "special relationship" exists either between the defendant and the third party, or the defendant and the plaintiff. Some examples of special relationships include an innkeeper and guest, common carrier and passenger, and employer and employee.

This general rule also traditionally applied to landowners. As the Virginia Supreme Court has held, a landowner generally owes no duty to protect others from harm arising from the conduct of third persons on their property.

However, in 2021, the Virginia Supreme Court for the first time recognized an exception to this general rule as it applies to landowners specifically. *Shoemaker v. Funkhouser, 299 Va. 471 (2021).*

In *Shoemaker*, the plaintiff's decedent, Ms. Shoemaker, was accidentally shot and killed while visiting her mother. The shooter was visiting his grandparents who lived next door to Ms. Shoemaker's mother. The grandparents had given permission to their grandson to shoot targets with a rifle on their property in the direction of the mother's house. One of the bullets penetrated the walls of the neighboring house striking Ms. Shoemaker and killing her. Ms. Shoemaker's estate filed a wrongful death action against the grandparents alleging that they were negligent in allowing their grandson to shoot the rifle in the direction of the neighboring house. Citing the general rule, the defendants demurred, contending they owed no duty to their neighbor or her visitors for the actions of their grandson. The trial court sustained the demurrer and the plaintiff appealed.

In overruling the trial court's decision, the *Shoemaker* Court adopted §318 of the Second Restatement of Torts which provides:

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Consistent with this section of the Restatement, the Court concluded that now, under Virginia law, **"a landowner has a duty in tort to exercise reasonable care to control the conduct of a third party, who has been granted permission by the landowner to use the land, to prevent that third party from intentionally harming others or from conducting himself so as to create an unreasonable risk of bodily harm to others."** This duty is contingent on the landowner: 1) being **present**; 2) knowing or having reason to know that they have the **ability to control** the third person; and 3) knowing or having reason to know of the **necessity and opportunity** for exercising such control.

Based upon this legal principle, the Court held that the Funkhousers owed a duty to their neighbors not to grant permission to their grandson to shoot targets on their property in the direction of a neighboring house when they knew or should've known that the bullets were likely to strike that house. Additionally, the Court held that although the grandparents were inside their home when the shooting took place, they were nevertheless considered to be "present" to satisfy the requirements of the Restatement. The Court explained that being "present" does not mean standing at the shoulder of the person engaging in the injurious activity. Rather, it only requires being within reach, sight, or call or being in view or at hand. Here, the grandparents were close enough to have had the ability to exercise oversight over the activity and were, therefore, "present."

At least one Circuit Court decision has been handed down following the holding in *Shoemaker*. In *D.H. v. Trousdell*, the Newport News Circuit Court decided in June 2022 that a homeowner owed a legal duty to his neighbor where the homeowner granted permission to Trousdell to aim (but not fire) a loaded rifle in the direction of the plaintiff's house which was immediately next door. Trousdell fired the rifle which resulted in a bullet traveling through the wall of the plaintiff's home and significantly injuring the ten-month-old plaintiff.

The Supreme Court's adoption of this section of the Restatement represents a substantial increase in potential liability for landowners in Virginia. As more cases are decided under this rule, we will all have a better notion of the specific circumstances where the rule will apply and the kinds of situations where homeowners will need to control the activity of their guests.

ASKED AND ANSWERED

This is where we answer legal questions commonly posed to us by our insurance and corporate clients. If you have any burning questions that need quick answers, or if you have any suggestions for questions in future newsletters, please e-mail Janeen at jkoch@chadwickwashington.com.

Q: Why do things move so quickly in General District Court?

A: General District Court – or "GDC" – is a court "not of record" in Virginia, usually involving smaller claims. The jurisdictional cap is $50,000 for personal injury claims and $25,000 for all others. There is no formal discovery permitted in GDC other than issuing subpoenas to obtain documents. Cases are also not heard by a jury, but rather, the fact-finder is the judge. Formal discovery and the timeframe required for setting jury trials are the two primary reasons why trials in Circuit Court typically won't be scheduled for years from the initiation of a lawsuit. Without these factors, trials in GDC can be set much more quickly, usually within 4-6 months of filing the Warrant in Debt (the "Complaint" in GDC). This expedited procedure has advantages, (primarily lower costs), and disadvantages (plaintiffs generally benefit most from this truncated timeline, as it allows some degree of "trial by ambush" without discovery).

Q: Can you appeal a verdict from GDC? What does that require?

A: Yes, the losing party in any case where more than $50 is in controversy has an automatic right of appeal from GDC to Circuit Court, and the Circuit Court will hear the case de novo. This means that the losing party gets a complete do-over and the Circuit Court does not consider the rulings or verdict of the General District Court. This also means that the case can be tried before a jury if either party requests one. One interesting wrinkle is that if the defendant appeals a GDC verdict, the plaintiff may then increase the amount sued for to an amount greater than the jurisdictional limit of the General District Court. However, if it is the plaintiff who is appealing, no amendment to the amount sued for is permitted.

All that is required to appeal is that the appealing party must notice their appeal with the GDC clerk's office within 10 days of judgment and post an appeal bond within 30 days.

Janeen has been practicing primarily insurance defense since her admission to the Virginia Bar in 1994, focusing primarily on handling catastrophic accident cases and insurance coverage matters. Janeen joined Chadwick Washington in 2021 and handles insurance defense cases as well as major community association litigation. Here is a link to her bio: https://www.chadwickwashington.com/attorneys/janeen-b-koch/.

Henry earned his J.D. in 2018 and joined Chadwick Washington's litigation practice group in 2021, focusing his practice primarily on insurance defense and handing community association litigation matters. Here is a link to his bio: https://www.chadwickwashington.com/attorneys/henry-moore/.

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