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Evidence--Breathalyzer Test--Property Foundation for Admissibility into Evidence

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ment on the pleadings, claiming there was a failure to state a cause of action. The trial court sustained the motion and plaintiff appealed. *Held*, judgment affirmed. An employer may not recover damages from a tort-feasor for loss of services of an employee caused by mere negligence. An employee can only maintain such an action when it is shown the injuries were *intentionally inflicted*. *Nemo Foundations, Inc. v. New River Co.*, 181 S.E.2d 687 (W. Va. 1971).

The court noted that recovery by the master for injury to the servant, the husband for loss of a wife, and the father for loss of service of a child are all the results of a particular social status involved. The employer-employee relationship, based on contract, has no such special relationship; thus the ordinary rules of tort law apply. The damages to the employer are too remote and indirect for plaintiff to prove the necessary element of proximate cause. As to the element of foreseeability, the court held the tort-feasor could not foresee injury to the employer as a consequence of his negligence. For the above reasons, the court agreed that recovery may be had only when the injury is intentionally calculated to harm the employee. *Crab Orchard Improvement Co. v. Chesapeake and O. Ry.*, 115 F.2d 277 (4th Cir. 1940). It is generally agreed that one party to a contract should not be allowed to recover from a tort-feasor for negligent injuries inflicted on the other party to the contract. *Standard Oil Co. v. United States*, 153 F.2d 958 (9th Cir. 1946).

Plaintiff relied on *Coal Land Development Co. v. Chidester*, 86 W. Va. 561, 103 S.E. 923 (1920), which held that an employer could recover damages for wrongful injuries to his servant resulting in loss of services to the employer. In *Chidester*, however, the injury was the result of an *intentional* assault and battery occurring during the employee's course of employment. The consequences of the act to the employer could easily be foreseen, and thus the cases are distinguishable. The court expressly disapproved language in the *Chidester* case and held the tort-feasor, under the facts in *Nemo Foundations, Inc.*, owed no legal duty to the employer.

Evidence—Breathalyzer Test—Proper Foundation for Admissibility into Evidence

The defendant was arrested by a municipal police officer for the offense of operating a motor vehicle while under the influence of intoxicating liquor. A state police officer administered a Breathalyzer

test to the defendant. The test, which was not administered at the direction of the arresting officer, showed 0.13 percent of alcohol in the blood — sufficient by statute to establish prima facie that the individual was under the influence of alcohol. At the trial the only foundation laid for the admissibility of this test was the experience and training of the state police officer, and the reasonable grounds for the arrest of the defendant. The court admitted the results of the test into evidence and the defendant was found guilty. *Held*: Judgment reversed and verdict set aside. *State v. Hood*, 184 S.E.2d 334 (W. Va. 1971).

The court held that the state had failed to lay a proper foundation for the admissibility of the Breathalyzer test results. The Implied Consent Statute [W. VA. CODE, ch. 17C, art. 5A, §1 (Michie Supp. 1971)] establishes that an amount of 0.10 percent of alcohol in the blood creates prima facie evidence of intoxication. The jury could have given this evidence great weight; therefore, the court held that the error in admitting the test results was prejudicial to the defendant. The court would not accept the state's contention that the evidence was merely cumulative and not prejudicial.

In reversing this case, the court reaffirmed the requirements of admitting chemical tests in evidence. The state must not only lay a proper evidentiary foundation, but also must fulfill the statutory requirements in administering the tests.

As to the evidentiary matters, the state did not show that the equipment used in the test was in proper working order (a basic requirement for the admissibility of any scientific test). The court also stressed an additional item peculiar to the Breathalyzer test. The defendant should be observed for at least fifteen minutes prior to the test to insure that he does not take any food, drink, or other substance in his mouth. A foreign substance in the mouth will destroy the validity of the test.

In considering the statutory requirements, the court held that the state had failed to show three of the four basic requirements set out by statute for the admissibility of these tests. In interpreting the Implied Consent Statute, the court held that the West Virginia Code, required the state to show the test was incidental to a lawful arrest by a law enforcement officer; that it was administered *at the direction of the arresting officer*; and that the law enforcement officer was: (a) a member of the department of public safety; (b) any sheriff

or deputy sheriff of any county; or (c) a member of a municipal police department *under civil service*.

Also the court stated that the West Virginia Code, [ch. 17C, art. 5A, §5 (Michie Supp. 1971)] required that the test be performed in accordance with methods and standards approved by the State Department of Health.

The state did show that the test was given incident to a lawful arrest. However, there was no showing that the test was administered at the direction of the arresting officer. Nor did the state show that the municipal police force was under civil service. The state also did not show that the test was administered according to methods approved by the State Department of Health. This the court said *must* be shown before the evidence can be admitted. However the State Department of Health, as of this writing, has not formulated any methods and standards by which the test could be administered. Until these standards are issued the Breathalyzer test would appear to be incompetent evidence in a West Virginia courtroom.

Torts—Liability Imposed on General Contractor For Independent Contractor's Negligence

Defendant Crown Construction Co., a general contractor, contracted with the Kent Steel Co. to erect the steel framework of buildings for a shopping center. As an independent contractor, Kent supplied all materials, personnel, and supervision required to accomplish its portion of the project. A power crane, supplied by Kent and used to handle steel for the project, had slipped two times because of a defective clutch. The defendant had become aware of the crane's faulty condition. The plaintiff, Summers, an ironworker employed by Kent, was severely injured when on a third occasion the crane dropped a load of steel. Summers sued Crown for negligence in the federal district court. The jury returned a verdict for plaintiff and defendant appealed to the Court of Appeals for the Fourth Circuit. *Held*: judgment affirmed. Evidence proved that Crown had retained general authority to enforce the safety precautions to be taken by its independent contractors. The accident resulted in part from a failure of Crown to exercise this authority to force Kent to have the defective crane fixed, especially after the defendant became aware of its