

## Stacking

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Ayers was entitled to the stacking benefits.

"This is it," Crosby said. "He paid for it."

Signifying he had done his homework on where the justices fell on the issue by reading previous opinions, he suggested that "at least five of you would agree."

A Superior Court panel had disagreed with Crosby, however, ruling that an insured was barred from collecting stacked underinsured motorist benefits because the policy's household vehicle exclusion clause was unambiguous and did not violate public policy.

"The household vehicle exclusion prohibits the application of stacked coverage under narrow circumstances, which were triggered in the first accident," Senior Judge Robert E.

Colville wrote for the 2-1 majority. "Thus, the exclusion prohibits the application of stacked coverage under narrow circumstances, which were triggered in the first accident."

Colville was joined in the majority by now-Justice Joan Orié Melvin.

Orié Melvin did not participate in the decision to grant allocatur, according to the per curiam order.

In a dissent, Judge John L. Musmanno wrote that denying benefits to an insured under the circumstances presented in *Ayers* "deprives an insured of the benefits for which he or she paid." Further, he wrote, the majority was wrong in its ruling that the "stripping of inter-policy stacking" would only occur in "narrow circumstances."

In contesting Crosby's argument and arguing for the high court to uphold the Superior Court's decision, GEICO's attorney, Joseph

A. Hudock Jr. of Summers McDonnell Hudock Guthrie & Skeel in Pittsburgh, tried to downplay the case's distinguishing factor.

Motorcycles and automobiles are "far different," Hudock said, and GEICO's household exclusion was designed to remedy the "mischief" of insureds placing the "bare minimum" on their motorcycle policy and higher limits, at a cheaper rate, on their safer vehicles, such as sport utility vehicles.

Hudock told the court that Ayers had \$15,000 policy limits on his two motorcycles and \$50,000 policy limits on his two trucks. Had he wanted to be better protected, Ayers could have paid a premium for that protection, Hudock said.

"If Ayers wanted to be protected, he could have done so up to \$100,000," Hudock said, noting Section 1791 of the Motor Vehicle Financial Responsibility Law required

insurance companies to offer policies up to that level per person. "I can assure you it would have been rated at a much higher premium."

Baer and Justice Seamus P. McCaffery challenged Hudock's position, however, asking what would stop the insurance industry from putting each of an insured's vehicles on a separate policy or issue an all-out prohibition against stacking.

To the latter question, posed by McCaffery, Hudock responded that such a policy would violate the MVFRL.

But to Baer's question regarding separate and distinct policies for each vehicle, Hudock suggested that such an option was a possibility.

"If [the household exclusion] is invalidated," Hudock warned, "They may have to." •

## Bracelets

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The school district's lawyers, John E. Freund III and Keely Espinar of King Spry Herman Freund & Faul in Bethlehem, argued that the word "boobies" is vulgar and that the phrase on the bracelets is vulgar in context because it can be viewed as a double entendre.

McLaughlin disagreed, finding that the word alone cannot be deemed vulgar because the Oxford English Dictionary includes numerous definitions, including "a dull, heavy, stupid fellow," "a clown" or "a nincompoop."

It may also refer to "the last boy in a school class, the dunce," McLaughlin noted, and while "boob" is defined as a slang word for breasts, it may also be "a foolish mistake or blunder."

On the bracelets, McLaughlin found, the phrase was "always accompanied by the foundation's name 'Keep A Breast.'"

"If the phrase 'I [Heart] Boobies!' appeared in isolation and not within the context of a legitimate, national breast cancer awareness campaign, the school district would have a much stronger argument that the bracelets fall within *Fraser*. This is not the case here," McLaughlin wrote.

The students, McLaughlin noted, "testified that 'boobies' is the word that they use to refer

to their breasts," and that the phrase on the bracelets "is a shorthand way of communicating the importance of breast cancer awareness and of keeping one's breasts healthy."

Turning to the *Tinker* test, McLaughlin found that was "no evidence before the court of any incidents that caused the type of disruption required by *Tinker*."

At the time the ban was imposed, McLaughlin said, the school "had at most a general fear of disruption."

And the only incidents cited by the school district were two minor ones after the ban took effect. One girl reported that one or possibly more boys had made remarks to girls about their "boobies" in relation to the bracelets. Later, two female students were discussing

the bracelets at lunch and were interrupted by a boy who said "I want boobies" while making inappropriate gestures with two spherical candies. The boy admitted to the incident, and he was suspended for a day.

McLaughlin concluded that such isolated incidents fell short of establishing a *Tinker*-style disturbance.

Freund could not be immediately reached for comment.

(Copies of the 41-page opinion in *H. v. Easton Area School District*, PICS No. 11-0643, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.) •

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