Transportation, Premises and Products Liability Law Update - Pennsylvania and New Jersey

*A Quick-Reference Update for Risk Management and Claims Professionals**

Volume 8 Winter 2006 -2007

Published by:

Law Offices of Thomas J. Wagner

www.wagnerlaw.net

Pennsylvania Office
8 Penn Center, 6th Floor
1628 John F. Kennedy Boulevard
Philadelphia, PA 19103
Ph: (215) 790-0761
Fax: (215) 790-0762

New Jersey Office
1114 Kings Highway
Swedesboro NJ 08085
(856) 241-7785
(856) 241-7786

Email: litigation@wagnerlaw.net

Pennsylvania Law Update

TRANSPORTATION

McLaughlin v. Mitchell, PCCCP May Term 2004 No. 4393, 2006 Phila. Ct. Com. Pl. LEXIS 368 (09/13/06).

It is not negligent per se to rear end another vehicle, at least in the absence of a prior binding determination; the question is whether the operator of the striking vehicle acted reasonably.

Ms. McLaughlin's vehicle was rear ended by the vehicle operated by Mr. Mitchell. Ms. McLaughlin claimed injury. A Jury found that Mr. Mitchell was not negligent in the operation of his vehicle. Plaintiff appealed.

Mr. Mitchell admitted that this event was a stand still rear end collision at a red light. He also testified that he was traveling 10 to 15 miles per hour just prior to impact, that Ms. McLaughlin's vehicle did not move as a result of the impact, and that he attempted to stop before impact but skidded on the wet roadway. Ms. McLaughlin argued that Mr. Mitchell's actions violated 75 P. S. 3310 (a), Following Too Closely, and 75 P. S. 3361 relating to driving at a speed greater than prudent under the circumstances. [It is assumed from the Court's silence on the subject that no Citations were issued as a result of the accident.] The Court, reviewing this matter on a Motion for Post-Trial Relief, held that whether the noted Statute was violated, so as to establish negligence per se, was a question for the Jury.

Nationwide Mutual Insurance Company v. Merdjanian, U. S. Court of Appeals for the Third Circuit, No. 05-1790, 2006, U. S. App. LEXIS 23902 (09/20/06).

The initial issuance of an insurance policy, and not any subsequent changes in coverage under that insurance policy, is the trigger for obtaining an executed coverage reduction form requesting lower than liability limits as to Uninsured/Underinsured Motorist (UM/UIM) coverage.

Mr. Merdjanian purchased an insurance policy from Nationwide on July 16, 1990, to be effective the next day. The liability limits were $25,000 per person/$50,000 per accident. Mr. Merdjanian chose limits of $15,000 per person/$30,000 per accident as to UM/UIM limits on this policy. On August 26, 1998, Mr. Merdjanian added another vehicle to the policy and increased the liability limits. He was offered a form which could change the UM/UIM limits, but did not sign or return the form. On April 17, 2001, Mr. Merdjanian added another vehicle to the policy, stating that at a meeting with Nationwide's insurance agent, the request was for "full coverage" with the intent of uniform limits for liability and UM/UIM. An April 23, 2001 Declarations Page reflected liability limits of $100,000 per person/$300,000 per accident, and UM/UIM limits of $15,000 per person/$30,000 per accident. Mr. Merdjanian paid the premium reflected on this Declarations Page without complaint. On June 10, 2001, his wife was killed and his two sons injured in a motor vehicle accident. Mr. Merdjanian sought stacked UM/UIM coverage of $300,000 per person/$900,000 per accident based on three policy vehicles.

Mr. Merdjanian argued that Nationwide was obligated to obtain a new signed form from him for his UM/UIM coverage limits when the liability limits were increased, based on the April 17, 2001 meeting with the insurance agent, and did not do so. The Court held that Sections 1731 and 1734 of the Pennsylvania Motor Vehicle Financial Responsibility Law (PMVFRL) required provision of the UM/UIM coverage form as set forth in Section 1791 of the PMVFRL only when an insurance policy is initially issued, not at each or any point when changes in coverage are made to an existing insurance policy, pointing out language in Section 1731: "deliver[y] or issu[ance] for delivery" of a "liability insurance policy" as a trigger for the provision of the UM/UIM coverage form. The

Court noted that reformation of UM/UIM limits to conform to liability limits might be treated more stringently in the case of complete rejection of coverage given the greater statutory requirements as to Notice regarding the complete rejection of UM/UIM coverages.

PREMISES LIABILITY

Bonsall v. Kutztown Fire Company and Barclay Contracting Co., 2006 Pa. Dist. & Cnty.Dec. LEXIS 116 (Berks County, 07/10/06).

An owner temporarily out of possession of the pertinent portion of the premises due to work previously done by an independent contractor, here a roof, had no duty to a person injured by falling through the roof of a building when working for a new, different, contractor repairing the roof.

Mr. Bonsall was independent contractor Barclay's employee, present on the Fire Company's roof to perform repairs. Barclay had previously repaired damage to the roof caused by snow accumulation. Mr. Bonsall was presently on site to patch the roof due to intervening leakage. Mr. Bonsall and his employer knew that portions of the roof were in poor condition and might not support Mr. Bonsall's weight.

The Court concluded that the risk here was a usual and ordinary risk associated with the roofing industry, rather than a distinct risk outside usual and ordinary. An exception might exist where an owner maintained control/supervision over an independent contractor or where there was a peculiar risk of harm, neither the case here. The Court granted Summary Judgment in favor of the Fire Company, finding this case indistinguishable from the holding in Hader v. Coplay Cement, 189 A.2d 271 (Pa., 1963).

Ziacik v. Conocchia, 2006 Pa. Dist. & Cnty. Dec. LEXIS 175 (Allegheny County, 07/20/06).

There is no duty to a licensee [a person permitted to be present on the premises but not invited] for injury resulting from a danger that is known or should have been appreciated by the licensee.

Ms. Ziacik injured her hand after falling on a sidewalk owned by Ms. Conocchia. Ms. Ziacik admitted at deposition that she was being attentive and was aware of the unevenness of the sidewalk before she fell. The Court held that Ms. Ziacik was barred from recovery under Section 342 of the Restatement (Second) of Torts since she knew or had reason to know of the potential danger of traversing that sidewalk, namely that its unevenness could cause her to fall and be injured. The Court pointed out that Ms. Ziacik was not distracted from the obvious danger when she fell, a factor it considered important but not dispositive.

PRODUCTS LIABILITY

Grafstom v. Sysco Corporation, 2006 Phila. Ct. Com. Pl. LEXIS 381 (09/07/06).

A product may be defective, but such defect need not be the factual cause of injury; where a person is aware of the risk of injury by using a product, that person will be legally charged with the consequences of their conduct, not based on negligence but as a matter of factual causation.

Ms. Grafstom alleged an injury from contacting the sharp edge on a box of aluminum foil while working as a cafeteria worker. She further asserted that if there had been an adequate warning of this danger, a danger that she did not consider to be open or obvious, she would have heeded it. This is referred to as the "heeding presumption". The manufacturer may likewise benefit from the "heeding presumption". If the manufacturer renders an adequate warning, there is a presumption that it will be heeded. If such a warning is not heeded, there is no liability.

A manufacturer charged with placing a product into the stream of commerce with a non-existing or inadequate warning can rebut the "heeding" presumption in favor of a plaintiff by establishing that factual causation for injury rests on the plaintiff's conduct, rendering the adequacy of the warning irrelevant. It is then the plaintiff's burden to establish that the conduct would not have happened in the face of an adequate warning. The Court denied the plaintiff's Motion for Post-Trial Relief here, holding that the plaintiff's conduct was the factual cause of her injury, not any defect of the product or lack of adequate warning.

Schieber v. Black & Decker, 2006 U. S. Dist. LEXIS 77737 (U. S. Dist. Ct., Eastern District PA, 10/25/06).

Under a theory of strict liability, a defect in a product causing injury must be present at the time that the product leaves the hands of the' seller'; a repair service is not in the chain of potential 'sellers' for this purpose where the repair service is not selling/distributing a product but rather repairing a product supplied to it by its customers.

Mr. Schieber was injured in the course of his employment while using an angle grinder. He alleged that the lack of a "lock-off button" was a defect and caused his injury. He could not prove that the grinder was lacking a "lock-off button" when it left Black & Decker's hands - deposition testimony established that "most" grinders of this type were built with "lock-off buttons", but there was no evidence that this particular grinder was built with a "lock-off button".

Mr. Schieber contended that DeWalt Tool Company, an authorized Black & Decker repair facility, was within the chain of "seller" as defined in Section 402A of the Restatement (Second) of Torts, and therefore DeWalt had a duty to install a "lock-off button" before returning the grinder to Mr. Schieber's employer. The Court disagreed, holding that DeWalt was not a "seller" as contemplated in Section 402A, but rather a repair service that did not sell product but instead repaired customer supplied products. The question was not what the repair service should have been told by Black & Decker or what the repair service should have done before returning the grinder, but rather whether the grinder was defective when sold [by Black & Decker]. The Court granted Summary Judgment in favor of the repair service.

New Jersey Law Update

TRANSPORTATION

Jones v. Naser City Transportation Corp. and American Millenium Insurance Company, 2006 N. J. Super. LEXIS 294 (11/02/06).

Uninsured motorist (UM) coverage for a taxicab can be limited to the owner and driver; this limitation complies with N. J. S. A. 17:28-1.1; the exclusion of coverage for others [here passengers] does not violate public policy.

Ms. Jones was a passenger in a taxicab struck by a hit and run driver. She sought UM benefits under the taxicab's insurance policy. Ms. Jones agreed that the insurance policy provided UM benefits only for the owner and driver of the taxicab, but asserted that her exclusion from coverage violated public policy. The Court disagreed, noting that N. J. S. A. 17:28-1.1 provided for UM coverage [only] for "the insured or his legal representative". The Court rejected Ms. Jones' argument that the extension of Personal Injury Protection benefits elsewhere to individuals similarly situated to Ms. Jones should be analogized to UM benefits and such benefits extended to her as the result of this collision.

Brun v. Cardoso, 2006 N. J. Super. LEXIS 299 (11/09/06).

The report of a Magnetic Resonance Imaging (MRI) study is not admissible at trial where foundational testimony is not offered by the author of the Report; an MRI film may be interpreted only by an expert qualified to do so; expert testimony should not be used as a vehicle for the wholesale introduction of evidence that does not have an independent basis for admission into the record of the case.

Ms. Brun claimed a back injury resulting from a motor vehicle accident. An MRI study was done and interpreted by Dr. Steven Meyerson, a radiologist. This MRI study post-dated a subsequent motor vehicle accident.

In a pre-trial ruling, the Court held that the treating physician could not testify regarding herniation/causation unless either qualified to interpret MRI films or in reliance on expert radiology testimony concerning the MRI film. Dr. Meyerson - the original radiologist - was unavailable for testimony. Two days before trial, Ms. Brun determined that she would call Dr. Howard Kessler, another radiologist, instead of Dr. Meyerson. Dr. Kessler, in voir dire outside the hearing of the jury, testified that he believed the herniation was more severe than described by Dr. Meyerson is the Report of the MRI study. The defense argued surprise and requested dismissal of the case.

The lower Court dismissed Ms. Brun's case. The reviewing Court held that dismissal was too severe a sanction in what was not a matter of gamesmanship but rather of surprise to both sides. The reviewing Court remanded for a new trial, not discounting the defense argument that the plaintiff would essentially be given, in the words of the trial Judge, a "do over".

PREMISES LIABILITY

Geringer v. Hartz Mountain Development Corp., 908 A.2d 837 (N. J. Super., 09/13/06).

A lease that allocates responsibility for construction and maintenance of premises to a tenant is enforceable as to that term, and acts as a bar to a negligence claim against the owner of the premises; the owner did, however, owe a co-extensive duty of reasonable care to invitees [such status not being controlling as to duty] such as Ms. Geringer for proper design and safety in this incident that occurred when Ms. Geringer tripped and fell on carpeted interior stairs.

Hartz leased the pertinent portion of the premises to Ms. Geringer's employer, Metropolitan Life Insurance Company. Ms. Geringer fell on an interior stairway. The theory against Hartz was negligence in the design, maintenance and repair of the stairway within its building.

The lower Court, based on the terms of the [triple net] lease between Hartz and Metropolitan, granted Summary Judgment in favor of Hartz. The reviewing Court agreed that Metropolitan owed no duty to Ms. Geringer as an invitee regarding maintenance or repair of the stairway, but might have a duty to Ms. Geringer as to the stairway's design and construction. The lease provision in question essentially provided that Metropolitan was to be responsible for all construction and work to prepare the premises for its occupancy, at its expense. Hartz, nevertheless, reviewed and approved the construction, and had the authority not to approve it, arguably creating the noted duty by Hartz to Ms. Geringer.

Mathieux v. Bally's Atlantic City, 2006 U. S. LEXIS 80210 (U. S. District Court for the District of NJ, 11/01/06).

Shopkeepers are required to warn business invitees of hazardous conditions of which the shopkeeper knew or should have known; Summary Judgment will be denied where there may be an inference, based on the plaintiff's testimony alone, that a shopkeeper failed to take "reasonable, prudent precautions to protect its visitors from harm".

Ms. Mathieux tripped and fell on a carpet in Bally's casino, the carpet allegedly carelessly and improperly placed on the floor in a folded condition within a high traffic area. The matter before the Court was Bally's Motion for Summary Judgment. Surveillance videotape from the casino that recorded the incident was submitted to the Court on the

Motion, but was not helpful in determining the condition/placement of the carpet. Summary Judgment was denied on the basis that there existed a material dispute as to whether the carpet, as existing, constituted an unreasonably dangerous condition.

PRODUCTS LIABILITY

Mathews v. University Loft Company, 903 A.2d 1120 (N. J. Super., 08/15/06).

A warning is not required as to obvious and generally known risks inherent in the use of a product that is not defectively designed. Such obviousness is an "absolute defense" to an alleged duty to warn.

Mr. Mathews, a resident college student with a School assigned loft bed [a bunk bed where the lower portion is a desk or dresser], fell from the loft bed in the process of awakening to a paging cell phone and reaching for it to turn it off. He injured his head and a shoulder. He contended that he did not know that he could fall from a bed that was six feet off the floor. There were no warning labels on the bed.

The lower Court denied University Loft's Motion for Summary Judgment as to Mr. Mathews' failure to warn theory. The reviewing Court reversed, holding that the danger here was "open and obvious", constituting an "absolute defense". The Court noted that the lower Court had held that the bed, notwithstanding its lack of guardrails, was not defective as a matter of law and that the issue of possible defect had not been preserved on appeal. The Court commented that Mr. Mathews' argument was more properly with the School for knowingly purchasing beds that were six feet off the floor and did not contain guardrails.

McNellis, on behalf of DeAngelis v. Pfizer, Inc., 2006 U. S. Dist. LEXIS 70844 (U. S. District Court for the District of NJ, 09/29/06).

The deceased, DeAngelis, committed suicide in the course of using anti-depressant medication Zoloft manufactured by Pfizer. The legal theory presented was failure to adequately warn the prescribing physician of the risk [of suicide] with use of the drug. The lower Court held that if Ms. McNellis, the executrix of the Estate, could prove that Pfizer had reasonable evidence of a serious hazard [of the risk of suicide with use of the drug] pursuant to 21 C. F. R. 201.57, then the requirement of that enhanced warning would not be preempted by the Federal Food, Drug and Cosmetic Act [FDC]. The Federal Regulatory language was not inconsistent with New Jersey's failure-to-warn laws, so there was no conflict between Federal and State law, and the Food and Drug Administration's [FDA] internal inconsistency regarding the preemptive effect of its Regulations suggested that less deference was required regarding any asserted Federal preemption of State law in favor of FDA Regulation. The reviewing Court, given the dispositive nature of the issue, allowed immediate appeal of the interlocutory issue pursuant to 28 U. S. C. S. 1292 (b).

Mr. DeAngelis began taking Pfizer manufactured anti-depressant Zoloft, after expressing a dislike for Lexapro [the product of another manufacturer], shortly before committing suicide. There was no antecedent history of depression or suicidal tendencies.

The executrix, Ms. McNellis, argued that the warning for Zoloft use was inadequate pursuant to the New Jersey Product Liability Act regarding the risk of suicide as the result of a possible adverse reaction to the drug. Pfizer sought Summary Judgment, arguing that the state law tort claims were preempted by the FDC and its implementing Regulations.

The lower Court denied Pfizer's request for Summary Judgment, without prejudice to make the request again following a period of factual discovery. Pfizer appealed, and the reviewing Court agreed to consider the matter despite the Interlocutory nature of the lower Court's Order.

There was evidence in the nature of a preamble to a Final {Regulatory] Rule that the FDA's position was that its Regulations preempted state law. The reviewing Court considered this "preamble" to be an "advisory opinion", noting that an Agency cannot interpret its own Regulations so as to nullify those Regulations. The Court explained that preemption under the FDC can only occur when there is a conflict between its provisions and State law, noting that the U. S. Supreme Court, in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U. S. 645 (1995)*, held that, moreover, there is a presumption against conflict preemption. A 1976 Amendment to the FDC provided broader preemption than on the sole basis of a conflict between the laws, which the reviewing Court considered as rendering the Federal government's position on preemption inconsistent but without ambiguity, and on that basis warranting less deference to the asserted Federal preemption of State law.

The reviewing Court held that there was no actual conflict between Federal law and New Jersey's failure-to-warn laws and hence no preemption here, noting that Federal law did allow and indeed require manufacturers to unilaterally enhance warnings [without Regulatory approval] as new risks statistically emerge, without regard to causal relationship.

"TJW" denotes defenses prepared by the Law Offices of Thomas J. Wagner

The Law Offices of Thomas J. Wagner defend business entities, individuals, insurers and their insureds from lawsuits seeking to recover damages for personal injury, property damage or death arising from the transportation function; the ownership, use and control of land; and the design, manufacture, sale or use of industrial and consumer products in the States of Pennsylvania and New Jersey.

*Note: The Update is intended to inform of new developments. It is not intended as advice on legal strategies or to substitute for legal assistance and consultation. Legal strategies, duties and obligations vary according to the facts involved.
Questions? Comments? Kindly call Tom Wagner, Esquire, Direct Dial (215) 790-0767
e-mail: tjwagner@wagnerlaw.net