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

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

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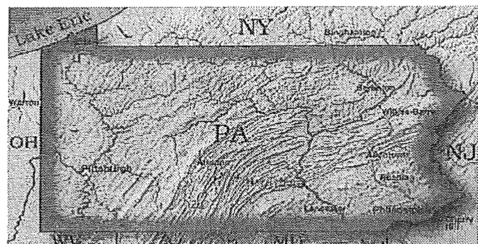

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Pennsylvania Law Update

TRANSPORTATION

Abramowitz v. Pipher, 2007 Pa. Dist. & Cnty. Dec. LEXIS 127, September 18, 2007.

The use of prescription pain medication will not support an award of punitive damages.

The decedent was killed in a head on motor vehicle accident, with an allegation that the defendant was under the influence of prescription pain medication at the time of the accident. The Court noted that the use of prescription pain medication would not be considered outrageous behavior, and was not akin to alcohol intoxication to support the outrageousness necessary for an award of punitive damages. The Court noted that the *Restatement (Second) of Torts* explains that punitive damages are damages other than compensatory or nominal damages, awarded against a person to punish outrageous conduct.

In striking the complained of language from the Complaint, the Court refused to otherwise enter a demurrer as to a Count of negligent entrustment, pointing out that the employer of the defendant, an employee in the course and scope of employment at the time of the accident, had reason to know of the defendant's chronic use of prescription pain medication and that the Court would accept such allegation as true for the purpose of Preliminary Objections.

Johnson v. Seawright, Philadelphia County Court of Common Pleas, 2007 Philadelphia Ct. Cm. Pl., LEXIS 280, September 24, 2007.

Spoliation: Negligent repair requires preservation of the evidence.

In this one vehicle accident, the Plaintiff struck an embankment, alleging that the left rear tire blew out, causing the accident. The car had recently been in for repair, and the plaintiff asserted that it was this repair that was negligent and resulted in the accident. The repair shop contended that it replaced the front tires - not the left rear tire - and had nothing whatsoever to do with the cause of the accident. The plaintiff disposed of the vehicle before it could be determined whether the repair shop's contention was correct. The Court considered the evidence "spoiled" and granted summary judgment in favor of the repair shop.

The Court explained that the mere assertion of a negligent repair did not establish the plaintiff's prima facie case, that is the burden of production did not shift to the defendant repair shop to prove that it had properly repaired the vehicle. The test for the severity of the sanction where a party destroys, conceals or fails to preserve evidence is a three pronged test, set forth in the case of *Schmidt v. Milwaukee Electric Tool Corporation, 13 F. 3d 76 (3rd Cir., 1994)*, and *Schroeder v. Commonwealth Department of Transportation, 710 A.2d 23 (Pa., 1998).*

The three pronged test is (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree or prejudice suffered by the opposing party; and (3) the availability of a lesser sanction to protect the opposing party's rights and deter future similar conduct.

The Court noted that the Plaintiff failed to preserve not only the subject tire that was claimed defective, but the car itself. The Plaintiff was completely at fault for failing to preserve the evidence as there was no break in the chain of custody. "Mere speculation that defendant may have negligently repaired portions of the car does not establish a prima facie case." The defendant repair shop was prejudiced since it had no way of defending itself. Indeed, the repair shop came forward with the contention that it had not performed any repair in the area of the car. The Court considered a lesser sanction, other than dismissal, but concluded that the entire case rested on proving that the car was negligently repaired and that the tires were either

negligently replaced or repaired. Whether the accident was caused by the tire, steering, human error or other defect or repair could not be determined, hence the dismissal.

PREMISES LIABILITY

Palinkas v. Petro Holdings, Inc. CCP, Montgomery County, PA.

Summary Judgment was granted as to alleged personal injuries claimed to have resulted when the plaintiffs left the area of an environmental release, as the plaintiffs failed to establish a causal relationship between the release and the injuries allegedly sustained.

The Plaintiffs alleged property damage to their residence after an environmental release. The plaintiffs further claimed that in exiting the area of release, and by being exposed to the released substance, they sustained personal injuries.

A medical doctor opined that the plaintiffs were at increased risk adverse medical effects from the exposure, and suggested medical monitoring for the next twenty years. The cost of the monitoring was estimated at $240,000.00. The Court agreed that there was no unequivocal medical opinion of a causal relationship between any alleged "injury" and the actual and anticipated exposure to the substance released, granting partial Summary Judgment in favor of the releaser as to these claims of personal injury.

Salazar v. Franklin Mills Associate and Waste Management of Pennsylvania, 3284 2007 Philadelphia Ct. Cm. Pl. LEXIS 290, October 10, 2007.

An owner is not liable to an independent contractor's employee for an open and obvious condition encountered in the ordinary course of the execution of job responsibilities by that employee.

The plaintiff, Ms. Salazar was injured when she slipped on grease around a dumpster at the Franklin Mills Mall. She was there as an employee of her employer, which employer stood in an independent contractor relationship to the Mall. Ms. Salazar's employer was charged with maintaining the appearance and cleanliness of the inside and the outside of the Mall.

The Court concluded that the Mall was not liable for the plaintiff's injuries. The Court reasoned that where an independent contractor is hired by the owner of real estate to clean and maintain the premises, an employee of the independent contractor performing that contractual duty, in the face of an open and obvious condition, should not result in liability on the land owner. The Court, in granting Summary Judgment in favor of the Mall, emphasized that the condition was not unusual or specially or inherently dangerous, and that the plaintiff was fully aware of the condition.

PRODUCTS LIABILITY

Coleman v. Wyeth Pharmaceuticals, Inc., Philadelphia County Court of Common Pleas, No. 3179, 2007, Philadelphia Ct. Cm. Pl. LEXIS 262, September 24, 2007.

The Statute of Limitation for bringing a products action against a drug manufacturer will not be tolled by mistake, misunderstanding or lack of knowledge; rather a plaintiff must demonstrate diligent investigation and reasons for the failure to discover the injury itself for consideration of whether a discovery rule should instead apply.

The plaintiff, Ms. Coleman, a resident of Arkansas and in her late 60's, was diagnosed with breast cancer on October 20, 2000. She had been taking hormone replacement therapy in the nature of conjugated estrogens for about 9 years previous, under the direction of her family doctor. Her family doctor did not specifically discuss the increased risk of breast cancer with hormone replacement therapy at the time of the initial prescription as the issue was unsettled - some studies indicated an increased risks while others suggested a protective effect.

The plaintiff continued to refill her prescription medication through the mail. In that time frame, prior to the diagnosis of breast cancer in the year 2000, the increased risk of breast cancer with the use of hormone replacement therapy became more commonly understood. Articles concerning the association were published in the lay and medical press and, importantly, also discussed within the inserts sent to the plaintiff within her refill medication packages, which inserts she admitted at deposition that she had read with a view towards being aware of any side effects with the use of the medication. One of those stated side effects was the increased risk of breast cancer.

The plaintiff brought suit against the drug manufacturer in the year 2004, approximately four years after her diagnosis. It was held that she failed to meet the two year statute of limitation for personal injury and therefore her suit was barred. The plaintiff argued that the discovery rule should apply, as she was unaware of the relationship between the use of the hormone replacement therapy and the increased risk of breast cancer until a doctor told her near the time of filing suit that there might be such a relationship in her case.

The Court disagreed that the discovery rule should apply, noting that a mistake, misunderstanding or lack of knowledge does not toll the running of the two year statute; rather a plaintiff must demonstrate diligent investigation and reasons for the failure to discover the injury itself. Here, the fact of an injury was clear with the diagnosis, and the plaintiff, in the Court's view, could have discovered the potential causal link with the exercise of due diligence, given the by then long term use of hormone replacement therapy medication. The Court noted that the lay press that discussed the issue included the publications *Good Housekeeping* in 1997 and two articles in the plaintiff's local newspaper, the *Arkansas Democrat Gazette* between 1998 and the year 2000.

There was no evidence that the plaintiff actually read these articles either in the lay or medical press, but again the Court referred back to her duty of diligence commencing from the time of her diagnosis in the year 2000.

New Jersey Law Update

TRANSPORTATION

Brierley v. Huntley Tavern and New Summit Car Wash, 931 A.2d 614, N. J. Super., September 27, 2007.

An agreement between a tavern and a car wash where the car wash agreed to provide after hours parking for the tavern's customers did not extend a duty to the car wash to render the intervening roadway reasonably safe.

The decedent was struck by a car at night as he was walking across a road from a tavern he had just frequented to a car wash where his car was parked. The arrangement between the tavern and the car wash was that ten spaces at the car wash were reserved for use by tavern customers, only to be used after the car wash had closed each evening. The contention here was that the car wash should have made the crossing safer. The decedent was intoxicated at the time of his death.

In reviewing the record, the Appellate Court noted that when the arrangement for parking at the car wash was originally made between the tavern and the car wash, all parking in the car wash parking lot was to be done exclusively by the tavern's valets. Over time, this practice changed and self parking in the car wash lot became available to patrons of the tavern.

The Court declined to extend responsibility for the roadway to the car wash. The relationship was between the tavern and its customers. The car wash had a duty to maintain its parking lot in safe order, but had not duty as to the roadway.

The Court considered it important that the car wash was closed when these cars were being parked on its lot, and that the tavern would therefore be in a better position to evaluate the need for additional safety measures at the crossing.

Livsui v. Mercury Insurance Group, 2007 N. J. Super. LEXIS 330, October 24, 2007.

Whether there is uninsured motorist coverage is viewed from the claimant's perspective; where injury results from the ownership, maintenance, operation or use of an uninsured or hit and run motor vehicle, there will be coverage.

The plaintiff was the victim of a random drive by shooting that occurred as she was stepping into her car which was parked on the street. She sought Personal Injury Protection and Uninsured Motorist coverage benefits from her carrier. The Court held that the incident arose out of the use of an uninsured motor vehicle and therefore there would be coverage as to both the Personal Injury Protection benefits as arising out of the use of a motor vehicle and the Uninsured Motorist benefits based on the presumed uninsured status of the fleeing vehicle.

The relevant statute, *NJSA 17:28.1.1 (a) (ii)* provides for uninsured motorist coverage for bodily injury caused by accident and arising out of the ownership, maintenance, operation or use of an uninsured or hit and run motor vehicle. The determination of whether an incident causing bodily injuries in an accident is determined from the viewpoint of the insured party. It is not the intentional act that controls, but rather the unintended victim's status from the plaintiff's perspective.

The Court noted that prior precedent supported its conclusion that the Personal Injury Protection benefits were available to the plaintiff, citing to *Lindstrom v. Hanover Insurance Company, 649 A.2d 1272 (N. J., 1994)*. The availability of the Personal Injury Protection coverage depended on there being a substantial nexus between the accident and the use of the automobile. That nexus having been established here, there was no reason to differentiate the availability of Uninsured Motorist benefits, which also required that same substantial nexus. The Court noted that prior precedent established that random drive by shootings are becoming an increasingly common part of the American experience. The Court considered the expectation of coverage to be objectively reasonable.

Morel v. State Farm Insurance Company, 2007 N. J. Super. LEXIS, 344, November 16, 2007.

The Court may reviewed an arbitration award stemming from an action brought pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act within the Court's supervisory powers, as a matter of public policy.

The plaintiff demanded arbitration of his claim for $2100.00 due in Personal Injury Protection benefits. The matter was arbitrated pursuant to the *New Jersey Alternative Procedure for Dispute Resolution Act, NJSA 2A:23A1-30 (APDRA).*

The issue to be resolved at arbitration was whether the plaintiff was in a vehicle at the time of the accident. That contention was rejected and a finding entered for the carrier. The plaintiff appealed, arguing that the arbitrator's decision was not supported by substantial evidence and failed to preserve the burden proof on the carrier to prove a fraudulent claim.

The reviewing Judge took the view that because no allegation of corruption, fraud or the like was raised in the Appeal, there was no basis for review, and dismissed the Appeal. The Appellate Court reversed, finding that although indeed the primary basis for an appeal in such a case would be an allegation of corruption, fraud or the like, the Court could review the matter under its supervisory authority. Public policy allowed the Court to evaluate the issue of whether the burden of proof had been improperly shifted. The Court concluded that the Judge that initially reviewed the Appeal from the arbitrator's decision should have written an opinion, and the matter was remanded.

PREMISES LIABILITY

State of New Jersey v. Wayne DeAngelo, 930 A.2d 1236 (N. J. Super., September 13, 2007).

A municipality can ban the use of a protest balloon made to look like a rat when it prohibits the use of balloon signs generally other than for a Grand Opening.

The defendant, a senior Union Official, authorized the Union to display a balloon in the shape of a rat as a symbol of protest against alleged unfair labor practices. The record reflected that the rat was a well known symbol of a labor dispute and a signal to third parties of an invisible picket line. Lawrence, New Jersey had a Municipal Ordinance which banded the display of balloon signs other than at a Grand Opening. This case stemmed from the use of the balloon at a protest.

The Union challenged the constitutionality of the Municipal Ordinance. The Court concluded that the rat balloon was prohibited by the Ordinance, although the word "sign" was never defined in the ordinance. The Ordinance set forth examples of signs. The Court then resorted to a dictionary meaning of the term "sign" to include the balloon - which had no writing on it but which conveyed a symbolic message.

The Court further concluded that the *National Labor Relations Act* was not preemptive, as there was no express congressionally established exclusivity of federal jurisdiction. The contention of the violation of Free Speech was rejected. There was no prior restraint because the union could express its message, needing merely to restrict the location of the message. The property in front of the target of the protest was a "traditional public forum". The Ordinance prohibiting the "sign" was content neutral. Disparate impact did not defeat the content neutrality of the Ordinance.

The exception for Grand Openings presented a clear public policy benefit in fostering the start up of new businesses. The Ordinance did not "prevent entirely" the communication of the Union's message.

Where violations of law are quasi criminal or criminal, vagueness is a consideration. The Court considered here that the law was not vague in that the types of signs it would restrict were listed, a listing which included balloon and inflated signs such as the inflated rat balloon here. The contention of selective enforcement was not supported by the Record.

The dissenting Judge observed that there could be an issue of whether the Ordinance was content neutral as it favored businesses that might display an inflated rat shaped balloon to promote, for example, a Disney character, as part of a Grand Opening but prevented a Union from the same type of display to promote its commercial interests.

PRODUCTS LIABILITY

Mercer Mutual Insurance Company v. Proudman, et al. v. R.J. Reynolds Tobacco Company, 933 A.2d 967 (N. J. Super., October 22, 2007).

No products liability action will lie where the inherent dangerous characteristic of a product that is unsafe would be recognized by the ordinary person who used or consumed that product.

This Appeal by the third party plaintiffs (Mercer Mutual) reflected the allegation that the cigarette manufactured by defendant was defective and caused a fire which destroyed their residence. It was asserted that the cigarette was not a self-extinguishing cigarette, known as a 'fire safe cigarette' sold and distributed elsewhere. The trial Court had dismissed the styled products liability case on the basis that it was not possible to eliminate the risk of ignition and fire from a burning cigarette. Burning was an inherent characteristic of cigarettes, apparent to the ordinary user, and elimination of the burning characteristic would impair the usefulness of the product.

The Court considered it important that the plaintiffs conceded at Oral Argument before the reviewing Court that a self-extinguishing cigarette could reduce, but not eliminate, the stated danger. The Court concluded that *NJSA 2A:58C3 (a) (2)* of the *New Jersey Products Liability Act* provided this cigarette manufacturer with an absolute defense as the inherent characteristic of the product that was unsafe would be recognized by the ordinary person who used or consumed the product.

The Law Offices of Thomas J. Wagner, LLC 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.
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