

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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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

Kalker v. Moyer, et. al., No. 1266 EDA 2006, 2007 Pa. Super. LEXIS 366 (03/19/07).

Two motor vehicle accidents in different counties seven months apart involving injury to the same body part are not sufficiently related to permit joinder of the actions in a single trial.

This was the plaintiff Kalker's appeal from a grant of Preliminary Objections. Ms. Kalker was involved in two motor vehicle accidents seven months apart, one in Philadelphia County and the other in Berks County. She alleged that the injuries, to her right arm, were not separable or at least not readily separable. She filed a lawsuit as to both accidents in Philadelphia County.

The issue, of first impression, was whether two accidents that happened seven months apart should be treated as part of a "series of transactions or occurrences" and joined and treated as a single action where the injury was to the same body part and it was going to be difficult to determine medical causation as between the accidents.

The Court held that these unrelated accidents were not part of a "series of transactions or occurrences" and therefore should not be tried as a single case. The "transactions" needed to be related in time, place, manner and as to the parties. Here, the events were similar and the injury was to the same body part, but otherwise there was no commonality. These same factors would have militated against consolidation had there been two separate lawsuits. The Court noted that the burden of proof belonged to the plaintiff, and that the potential for inconsistent verdicts was simply part of the trial process.

Sackett v. Nationwide Mutual Insurance Company, 919 A.2d 194 (Pa., 04/17/07).

An insured must be given the opportunity to stack or waive stacking as to uninsured/underinsured motorist (UM/UIM) coverage each time the coverage is purchased. 'Purchase' would include adding an additional vehicle to the insurance policy.

Originally, two vehicles were insured under the pertinent policy of insurance, with waiver of stacking of UM/UIM coverage. A third vehicle was added to the policy, with no documented waiver as to that vehicle. Shortly thereafter, Mr. Sackett was injured while riding in a vehicle he did not own, operated by a Mr. Bulger, when that vehicle was struck by an uninsured motorist. The Court held that 75 P. S. 1738 (a) required that the named insured be given the opportunity to waive stacking each time a new vehicle was added to the policy, noting that the amount of available coverage through stacking was increased with the addition of the vehicle and such might influence the decision to stack the coverage. The Court noted that its holding would have an attendant cost, recognizing "spiraling automobile insurance costs" but considered itself bound by the rules of statutory construction.

PREMISES LIABILITY

Ditch, Administratrix of Estate of Verdier v. Waynesboro Hospital, 917 A.2d 317, (Pa. Super., 01/08/07).

Where conduct at issue was an integral part of the rendering of medical treatment, the action sounds in medical malpractice rather than simple negligence, and therefore a Certificate of Merit must be timely filed for the action to be permitted to proceed; equitable relief given a lack of timely filing will not be granted absent compelling excuse for the lack of timely filing - mistaken assumption that the filing of Preliminary Objections tolled the time for filing was not

adequate to overcome discretion of the trial court in entering non pros.

The lower Court entered a non pros after determining that a Certificate of Merit had not been timely filed with the Court.

Ms. Verdier, following a stroke, was being transported from the Hospital's Emergency Department to a hospital room when she fell and sustained a fatal head injury. The Complaint alleged a lack of training of Hospital employees and asserted that it was negligent to leave the decedent alone in the course of transport.

No Certificate of Merit was timely filed with the Court, timely being within 60 days of the filing of the original Complaint. The Court stated that a cause would sound in medical malpractice when alleged conduct or omission arose in the course of the professional relationship and where questions raised address medical judgment. It was pointed out that the decision to transport, and to not use restraints, were medical decisions, unlike a pure 'slip and fall' situation. Hospital employees who assist patients are part of the course of medical treatment. The issue of whether the proper use of restraints requires expert testimony is done on a case by case basis, and the Court concluded that the need for such testimony existed here. The Court upheld the entry of the non pros.

Kovnat v. Shop Rite Supermarket, 2007 Phila. Ct. Com. Pl. LEXIS 144 (05/08/07).

The mere happening of an accident does not establish [actual or constructive] notice; since the plaintiff did not establish liability, the trial court believed it was not error to have accepted a videotape into evidence that had not been produced to the plaintiff prior to trial where that tape did not address liability [and the Court did not reach the question of damages].

Ms. Kovnat tripped and fell on a slippery substance containing glass shards at the Supermarket's checkout. The Supermarket's immediate inspection of the area where the plaintiff alleged she fell indicated it as clean and dry.

The Court considered the fall to have occurred past the check out area, in the vicinity of the general store exit. There was no evidence of a deviation from the standard of care due an invitee. There being no evidence suggesting how long the floor had been wet, the Court found that there was no negligence on the part of the Supermarket, that is there was no evidence establishing constructive notice of a dangerous condition.

PRODUCTS LIABILITY

Lancanese v. Vanderlans and Sons, Inc., No. 05-CV-5951, 2007 U. S. Dist. LEXIS 37102 (05/21/07).

Whether a product is "unreasonably dangerous" in the context of an allegation of strict liability requires a risk/utility analysis. The factors to be considered are (1) usefulness to the user and the public as a whole, (2) the likelihood and seriousness of injury, (3) the availability of a safer substitute product, (4) the manufacturer's ability to make the product safer, (5) the user's ability to avoid danger by the exercise of

care, (6) the presence of suitable warnings or obviousness of dangers, and, (7) whether it is feasible for the manufacturer to spread the loss through pricing or insurance coverage.

The plaintiff was injured when a dome head plug, a device used to test the integrity of pipes by allowing air to be compressed within the pipe to check for leaks, was incompletely deflated and then dislodged while his arm was in front of the plug. The plug contained a warning: "Block plug against movement. Stay clear while in use."

The Court applied its risk/utility analysis in concluding that the utility of the use of the plug outweighed its risk and therefore the plug was not unreasonably dangerous: (1) The testing is done throughout the industry to prevent costly future repairs; (2) There is a risk of serious injury, but of low incidence. A product is not defective simply because accidents may occur with its use; (3) There is no safer substitute available - this testing requires plugging and pressure; (4) The manufacturer could make the process safer by including blocking devices with each plug rather than just recommending the use of blocking devices - this factor weighed in favor of the plaintiff; (5) The plaintiff should have stood clear of the plug while it was in use; (6) The warnings were adequate and the users sophisticated as to use and dangers; and (7) Where overall the first six factors favor the manufacturer, it will be deemed infeasible to spread the cost. "Defendant should not have to spread among its customers the economic loss resulting from injuries from a product for which the risk of harm can be eliminated by proper use of the product and by heeding the safety warnings."

Makadji v. GPI Division of Harmony Enterprises, Inc. et al., Civil Action No. 05-3044, 2007, U. S. Dist. LEXIS 37640 (05/23/07).

The Court is required to determine prior to trial whether the product in issue is "unreasonably dangerous", pursuant to Moyer v. United Dominion Industries, 473 F.3d 532 (3rd Circuit, 2007).

The plaintiff's job at a Philadelphia restaurant included using a trash compactor manufactured by the defendant. The plaintiff was injured when the compactor's hydraulic plunger struck his right hand. He was operating the compactor with its door open. The machine was not intended to work with its door open - there was a safety switch to permit operation only with a closed door. The safety switch here was not functioning, for unknown reason(s).

If a Judge determines pre-trial that a product is "unreasonably dangerous", the jury question then presented is whether the product left the manufacturer lacking any element to make it safe or possessing a feature that made it unsafe. In making its determination, the Court is to use a risk/utility analysis [See, Lancanese, above]. The Court here concluded that the compactor was arguably "unreasonably dangerous". The safety switch should have been installed in such a way that if bypassed the compactor would not operate and/or the bypass procedure - stuffing cardboard in an opening to force the limit switch closed - should have been made less obvious.

New Jersey Law Update



TRANSPORTATION

Flick v. Mollica, Civil Action No. 05-1441, 2007 U. S. Dist. LEXIS 7263 (01/31/07).

In order to vault the “verbal threshold”, a plaintiff must establish permanency that impairs functioning.

The defendant sought a grant of summary judgment in this motor vehicle case where the plaintiff submitted a medical opinion as required by N. J. S. A. 39:6-8 (a) which stated that the plaintiff had a “degree of impairment [that was] not likely to resolve within the next year despite further treatment”, and further that plaintiff “suffered permanent ... injuries” which “*may* prevent him from functioning” normally. The Court deemed this medical opinion deficient, as not reflecting a probability that functioning would be impaired.

Brenman v. DeMello, 2007 N. J. LEXIS 594 (05/30/07).

A photograph of vehicular damage is admissible within the discretion of the trial court without the need for foundational expert testimony for the purpose of raising an inference that the depicted minimal property damage is inconsistent with serious injury. The parties are free to offer expert testimony to strengthen their respective positions on the issue but are not required to do so.

Plaintiff Brenman was rear-ended by Ms. Demello in stop and go traffic. Ms. Brenman described a violent collision. The damage to her vehicle consisted of a dent on the driver’s portion of the rear bumper. Photographs of this damage were shown to the Jury, and argument was made that the claimed injuries could not have resulted from the minimal impact. The Jury found a lack of causation, and the plaintiff appealed for a new trial, which request was granted by the intermediate appellate Court.

The New Jersey Supreme Court held that it was within the trial court’s discretion to admit the photographs as relevant. The jury may give the photographs their proper weight, including an assessment of whether the severity of the impact as depicted in the photographs and the claimed injuries are correlated.

PREMISES LIABILITY

Mastondrea v. Occidental Hotels Management S. A., Hotel Royal Playacar and Liberty Travel, 918 A.2d 27 (N. J. Super., 03/09/07).

A Mexican business entity had sufficient contacts with New Jersey for personal jurisdiction to attach in New Jersey. The business, a hotel, marketed by print in New Jersey and contracted with a Tour Operator in New Jersey. The hotel was part of a “world-wide travel empire” based in the

Netherlands and was well equipped to defend litigation in the United States. The law to be applied was that of the State of Quintana Roo, Mexico.

The plaintiff purchased a vacation package through Liberty Travel for a stay at the Hotel Royal Playacar in Quintana Roo after seeing an advertisement in the Newark Star Ledger. The plaintiff slipped and fell on a wet surface while at the Hotel, resulting in an ankle injury. The Court noted that it was the plaintiff’s burden of proof to establish (1) minimum contacts between the Hotel and New Jersey and (2) that those contacts gave rise to her injury. This burden was met when the plaintiff demonstrated that she would not have been in the hotel but for the local targeted advertising in New Jersey and that the hotel had contracted with a New Jersey entity, Liberty, through a Florida concern, to solicit business.

The Court applied the law of the place of injury to this case, here the Mexican State of Quintana Roo. The Court explained that it would be inappropriate for a New Jersey resident to carry the laws of New Jersey with them wherever they traveled, and that Mexico had a significant interest in regulating the conduct of its hotels/resorts and in protecting its tourist trade.

Sciarrotta v. Global Spectrum, et. al., 920 A.2d 777 (N. J. Super., 04/26/07).

Ms. Sciarrotta was hit in the head by a hockey puck at a game warm up where pucks are shot in different directions rather than directly at the goals. She was there to watch her daughter sing the National Anthem. The goal areas provided plexiglass protection to spectators from errant pucks, but despite heightened vulnerability in other locations during warm ups, there was no spectator protection at these other locations. The Court noted that the standard of care, a limited duty rule, is set forth in Maisonave v. Newark Bears, 881 A.2d 700 (N. J., 2005). Owners and operators must offer sufficient protected seating to those who would seek it on an ordinary basis and provide screening in the most dangerous area of the stands. The Court concluded that activity during warm up created a different level of risk than encountered during the game itself. It was a question of fact as to whether more adequately protective steps were available and should have been implemented.

PRODUCTS LIABILITY

Nafar v. Hollywood Tanning Systems, Inc., No. 06-CV-3826, 2007 U. S. Dist. LEXIS 26312 (04/05/07).

A “material” failure to disclose a cancer risk may result in liability under the Consumer Fraud Act (CFA) outside the confines of a theory of strict liability under the New Jersey Products Liability Act (NJPLA); a failure to disclose is “material” where the knowledge is outside common knowledge.

The plaintiff, a customer of the defendant, alleged that the Company had a duty to warn her that any exposure to ultraviolet (UV) rays increased the risk of cancer. The defendant, on its Motion for partial judgment on the

pleadings, countered that its tanning machines were approved by the Food and Drug Administration (FDA) and carried labels explaining recommended exposure times. There was a specific warning on the machine that repeated UV exposure could cause skin cancer. The plaintiff argued that she suffered economic harm in the nature of membership fees she would not have incurred with prior knowledge to the risk rather than actual physical injury, placing the matter outside the exclusive purview of the NJPLA and encompassing the Consumer Fraud Act which allowed for treble damages and counsel fees.

The Court held that it was a question of fact as to whether Hollywood Tanning failed to disclose a material fact prior to the purchase of the membership, which would implicate the CFA. The “fact” was that any exposure to UV rays can cause skin cancer. If the matter was one of common knowledge, then the failure to disclose would not be “material” and a CFA action would fail.

Roberto Torres v. Lucca’s Bakery, Oshikiri Corporation of America and Gemini Bakery Equipment Company, Civil Action No. 04-3793, 2007 U. S. Dist. LEXIS 36861 (05/22/07).

An employer [Lucca’s] and distributor [Gemini] were granted Summary Judgment in a strict liability case where the employer engaged in no intentional conduct and the distributor did not exercise significant control over the design of the product relative to the alleged defect in the product which caused the injury. The manufacturer’s [Oshikiri’s] request for Summary Judgment as to the strict liability claim was denied on the basis that genuine issues of material fact existed as to whether the product was defectively designed and the adequacy of the provided warning.

Mr. Torres, while employed by Lucca’s Bakery, sustained a serious injury to his right arm when it became caught in a machine used to prepare dough. The circumstances of the injury were disputed. Mr. Torres indicated that he did not know how the accident happened but that he never reached in to the machine. A co-worker that was present indicated that Mr. Torres reached into the machine to retrieve pieces of dough from the floor.

Mr. Torres alleged intentional conduct by the employer, which would vault the exclusivity of the workers’ compensation law. Here, the workers’ compensation bar applied. Claims of negligence, strict liability and breach of warranty claims were asserted against the machine’s manufacturer and distributor.

The Court was faced with a choice of law issue on these claims. The machine was manufactured [and perhaps designed] in Pennsylvania. The manufacturer and distributor had principal places of business in Pennsylvania. Under a governmental-interests analysis, the Court chose to apply New Jersey law. The Court considered it important that the accident happened in New Jersey and that New Jersey workers’ compensation benefits were involved. Applying New Jersey law, the negligence and breach of warranty claims were dismissed as not cognizable under the New Jersey Products Liability Act (NJPLA). A seller [here the “distributor”] would be strictly liable under the NJPLA if it exercised significant control over the design of the product relative to the alleged defect in the product which caused the injury. There being no such acceptable evidence in the record, the Court granted summary judgment in favor of the distributor.

The Court then considered the claims against the manufacturer, noting that the claim was of defective design and an inadequate warning. A risk/utility analysis was employed by the Court. The Court considered these claims to be controlled by factual issues to be resolved by the fact finder, given a threshold showing of the potential for a practical and feasible design alternative as well as issues raised relative to the adequacy of the provided warning(s).

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