

Transportation, Premises and Products Liability Law Update – Pennsylvania & New Jersey

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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 (PA)

Progressive Northern Insurance Company v. Universal Underwriters Insurance Company, et. al., 898 A.2d 1116 (Pa. Super., 05/03/06).

Where a person is concurrently insured under two automobile insurance policies that both contain excess clauses, those excess clauses are mutually repugnant and will be disregarded. Each policy of insurance is then deemed to be primary, and both insurers share in the loss.

This was a Declaratory Judgment action. Michael McNeely was permissively operating an automobile owned by car dealer Young Volkswagen and insured by Universal. The Universal policy defined an “insured” to include a permissive user and contained an excess clause. Mr. McNeely was also undisputedly an insured under his father’s Progressive policy, which also contained an excess clause.

Universal relied on State Farm v. Universal Underwriters, 701 A.2d 1330 (Pa., 1997), a case with virtually identical facts as here but which was interpreted under the Motor Vehicle Financial Responsibility Law (MVFRL) in effect in 1988. Here, the law to be interpreted was contained in the MVFRL as it existed in 1990 which included an amendment to the MVFRL, adding Section 1786(f), which required the maintenance of financial responsibility for permissive users. This change in the MVFRL, in the Court’s view, invoked coverage under the Universal policy of insurance, distinguishing State Farm. The Court held that since both policies of insurance contained mutually repugnant excess clauses, both excess clauses would be disregarded. Each carrier was considered primary, and was to share in the loss.

Michael and Crystal Bennett v. Joseph Mucci, 2006 Pa. Super. 133, Pa. Super. LEXIS 1076 (06/06/06).

A limited tort election on an insured private passenger vehicle is binding even if that vehicle is used exclusively for commercial purposes.

The Jury below in this personal injury action was instructed that Mr. Bennett was bound by his limited tort election. The Bennetts asserted that at the time of the subject accident, the vehicle occupied by Mr. Bennett was being used for commercial purposes, that the vehicle was exclusively used for commercial purposes, and that the commercial use rendered Mr. Bennett’s limited tort election for that vehicle essentially voidable. The Court disagreed, reasoning that a limited tort election under a private passenger motor vehicle liability insurance policy for a particular vehicle is binding even if that vehicle is used for commercial purposes.

PREMISES LIABILITY (PA)

Nancy and Jim Harvey v. Rouse Chamberlin, Ltd. and J. L. Watts Excavating, 2006 PA Super 130, 2006 Pa. Super. LEXIS 1069 (06/02/06).

This case revisits the “hills and ridges” doctrine, holding that the doctrine is to be applied only where there is an “entirely natural accumulation” of snow and ice.

Chamberlin and Watts were granted a non-suit below on the basis that Mrs. Harvey’s personal injury claim, stemming from her slip and fall on black ice in the street of her housing development, was barred by the doctrine of hills and ridges. After a prolonged snowfall that began on January 20, 2001 and continued into the early morning hours of the next day, Mrs. Harvey decided to take a walk. While she was walking in the street to avoid an accumulation of snow on a neighbor’s sidewalk, Mrs. Harvey slipped and fell. The street was not yet dedicated, and therefore still controlled by real estate developer Chamberlin. Watts had plowed the street, and was unsure if it had salted, or at least unsure if it had salted sufficiently to prevent ice formation.

The Superior Court reversed the non-suit, holding that human intervention by plowing in the street, also with consideration of the question of whether any salting was sufficient to prevent ice formation, meant that the “accumulation” of the

black ice was not entirely natural and hence the doctrine of hills and ridges would not apply to this case.

Tasha Bullock v. Temple University and Best Personnel, Inc., 2006 Phila. Ct. Com. Pl. LEXIS 272 (06/21/06).

Invitee status might accrue to a person who enters a premises uninvited, where entry is for the convenience of those who are themselves on the land for a business purpose, in particular where there is a history of previous visits and where access is through an unlocked door in proximity to a common area; the Court also addressed the duty of care for a security system in place.

Ms. Bullock was assaulted on the premises of Temple University. She was there to visit her stepfather, a Temple University employee. She had visited her stepfather previously at the University. Ms. Bullock gained access to the University building through an unlocked door facing the main thoroughfare of the University - Broad Street. Temple argued that Ms. Bullock was a trespasser, and second that her security expert testified to an alternative security procedure rather than addressing any negligence as to the security procedures in place, violating the requirements of Feld v. Merriam, 485 A.2d 742 (Pa., 1984) which held that a jury cannot find negligence on the basis that another security system should have been in place but rather only on the basis that the security system in place negligently failed to properly function.

The Court held that whether Ms. Bullock was a trespasser was a jury question, noting that in Argo v. Goodstein, 228 A.2d 195 (Pa., 1967), a person was considered an invitee where that person previously visited the premises and presently entered through an unlocked door that had easy access to the sidewalk.

The Court also held that the jury was properly instructed under Feld v. Merriam. The jury was told that a person should have a reasonable expectation that a security system in place would be operated in a non-negligent manner, but that the owner had no duty beyond reasonable care within the parameters of the existing security program. "The person can only expect the benefits reasonably expected by the program as offered and that that program will be conducted with reasonable care."

PRODUCTS LIABILITY (PA)

Demetrios S. Touloumes, Connie A. Touloumes and 31 S. Baltimore, Inc. D/B/A Holly Inn v. E. S. C., Inc., 899 A.2d 343 (Pa., 06/19/06).

Rule 238 Delay Damages are not available in a breach of contract case where damages are measurable by actual property damage; pre-judgment interest is adequate to compensate for the delay in obtaining relief.

Holly Inn contracted with E. S. C. for roofing services in 1994. The work was done, with a ten year warranty on the roof. Leakage from the roof in 1996 resulted in property damage. The Inn undertook some repair itself, and E. S. C. later repaired the roof, refusing to pay the Inn for other

property damage caused by the leak. The Inn sought \$45,762. for property damage and \$29,855. for replacement of the roof. At trial the Inn was awarded \$14,397. to replace the existing roof, \$18,976.78 for repairs already undertaken and \$2,200. to repair damaged ductwork.

The Inn, in post trial motion, sought Rule 238 Delay Damages on its award, pointing out that Rule 238 explicitly permitted Delay Damages in cases involving "property damage". The request was denied by the trial Court, affirmed by Superior Court.

The Supreme Court held that Rule 238 Delay Damages are to be considered in the context of both the cause of action and the requested relief, explaining that in Loeffler v. Mountaintop Area Joint Sanitary Authority, 516 A.2d 848 (Pa. Cmnlwth., 1986), it was held that the applicability of Rule 238 Delay Damages was based on the nature of the relief, while in a later intermediate appellate case, McIntyre v. Philadelphia Housing Authority, 816 A.2d 1204 (Pa. Cmnlwth., 2003), it was held "delay damages are not recoverable in contract actions". The Supreme Court held that although the relief requested was for "property damage", Rule 238 Delay Damages are only available in tort cases.

Joseph and Darlene Creazzo v. Medtronic, Inc., 2006 PA Super 152, 2006 Pa. Super. LEXIS 1511 (06/27/06).

To determine the appropriate sanction for spoliation in this implanted device failure case, the Court utilized a three prong test: (1) degree of fault of the offending party, (2) degree of prejudice to the opposing party, and (3) whether there is a fair lesser sanction than dismissal of the claim; the Court also held that the "learned intermediary doctrine" may apply in cases involving an implanted medical device.

Mr. Creazzo had a Medtronic's Neurological Electrical Pulse Generator, Itril 3 (device) implanted in his back in an attempt to control chronic pain. The device failed. Mr. Creazzo brought claims of product defect, failure to warn and strict liability. The suit was brought about ten months prior to the removal of the device from Mr. Creazzo's body. Medtronic, Inc., through counsel, asked Mr. Creazzo to preserve the device prior to removal. Mr. Creazzo's counsel advised the Hospital of this request, but did not ask the Hospital for the device until some two years later. The Hospital informed counsel then that it could not locate the device.

Medtronic's Motion for Summary Judgment was granted on the basis of (1) spoliation and (2) the learned intermediary doctrine. Mr. Creazzo knew of the request for preservation and was responsible for that preservation but nevertheless waited some two years before requesting the device from the Hospital, thus spoliation at the hands of that third party was not relevant to the Court.

The learned intermediary doctrine, that there is no duty to warn an end user where a learned intermediary (e.g., a physician) is advised of the risk associated with product use, was held by the Court to encompass this implanted device, which it considered akin to a prescription drug. The Court cited to Hahn v. Richter, 673 A.2d 888 (Pa., 1996) which involved a prescription drug. The Court in Hahn adopted comment k to Section 402A of the Restatement (Second) of

Torts, addressing “Unavoidably unsafe products”, for the proposition that strict liability could not be applied to prescription drugs where adequate warnings of risk had been provided [to a learned intermediary].

“automobile”, with no requirement that the operator of a motorcycle, or here a motor scooter, maintain medical expense benefits [PIP] coverage.

NEW JERSEY LAW UPDATE

TRANSPORTATION (NJ)

Universal Underwriters Group a/s/o Harley Davidson of Edison v. George E. Heibel, Superior Court of New Jersey, Appellate Division, 2006 N. J. LEXIS 177 (06/20/06).



New Jersey’s compulsory motor vehicle liability insurance statute, N. J. S. A. 39:6B-1, imposes no requirement on an automobile dealer to provide first party coverages (i.e., collision or comprehensive coverage) on a permissively used vehicle.

Mr. Heibel was test driving a motorcycle owned by defendant, a Harley Davidson dealership, when he lost traction with the road, damaging the motorcycle. He stating to the State Police that a tire of the motorcycle came out from under him due to loose gravel in the roadway.

Summary Judgment was granted and upheld in favor of Universal, the dealer’s carrier, on the basis of no first party coverage for a permissive user under the Universal policy.

Andres Solorzano v. Peter Sapunarich, J & S Di Feo Ford, J & S Ford, Superior Court of New Jersey, Appellate Division, 2006 N. J. Super. LEXIS 181 (06/23/06).

A motor scooter is similar to a motorcycle and is not an “automobile”; the operator of a motor scooter is not required to carry Medical Expense Benefit [Personal Injury Protection (PIP)] coverage.

Mr. Solorzano, operating an uninsured motor scooter, was injured in a collision with a Ford Explorer being operated at an intersection in Jersey City by Mr. Sapunarich, an employee in the course and scope. Summary Judgment was granted in favor of Mr. Sapunarich, and his employer, with consideration of N. J. S. A. 39:6A-4.5, which provides: Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain medical expense benefits coverage [i.e., PIP coverage] mandated by [N. J. S. A. 39:6A-4] shall have no cause of action for recovery of economic or non-economic loss sustained as a result of an accident while operating an uninsured automobile”. The Court examined the definition of “automobile”, noting that it did not include a motorcycle, and held that a motor scooter was similar to a motorcycle for the purpose of defining

PREMISES LIABILITY (NJ)

Linda Argent, individually and as guardian ad litem of Vincent Argent v. Linda Brady et. al. v. New Jersey Manufacturers Insurance Company, 2006 N. J. Super. LEXIS 186, Superior Court of New Jersey, Appellate Division (06/27/06).

A severability clause in a homeowners’ policy of insurance, providing separate application of the insurance coverage to each insured, is operative if there is coverage. It does not create an ambiguity as to the applicability of an exclusion of coverage in the same policy of insurance.

Mrs. Brady, in the course of operating a home daycare, was caring for Vincent Argent when the child was bitten by a dog arguably owned or under the control of Mrs. Brady’s son, Michael. Mr. and Mrs. Brady, as well as their son Michael, sought coverage under their homeowner’s policy of insurance, issued to the Bradys by New Jersey Manufacturers Insurance Company (NJM). NJM refused coverage, on the basis of a business pursuits exclusion in the policy, which excluded coverage where a claim arises from the pursuit of a business. The Bradys argued that the severability clause of the insurance policy, providing separate coverage for each insured, created an ambiguity as to the application of the business pursuits exclusion against Michael, who was not engaged in the day care business or indeed any business pursuit on the premises.

The Court ruled that the business pursuits exclusion in the insurance policy applied to Michael since the policy language excluded coverage if “an” insured was engaged in a business pursuit giving rise to the claim. The severability clause of the policy became operational only if there was coverage under the policy.

Andrew Hojnowski, a minor, by and through his parents Jerry and Anastasia Hojnowski v. Vans Skate Park et. al., 2006 N. J. LEXIS 1080 (07/17/06).

New Jersey public policy prohibits a parent from releasing a child’s potential tort claim where it arises out of the use of a commercial recreational facility; a parent’s agreement to arbitrate any such claim on behalf of the child is enforceable absent fraud, duress, unconscionability or ambiguity.

Andrew Hojnowski, then age 12, while skateboarding at Vans Skate Park (Vans), was injured by the actions of an aggressive skateboarder. A Release signed by Andrew's mother was on file at Vans. It contained a waiver of liability for negligent conduct, along with a one year limitations period. The Release also provided for the arbitration of all disputes.

The Court held that the forum selection of arbitration was binding on the child since no substantive rights were impacted by that choice of forum, but the Court invalidated the waiver of liability as to negligent conduct, noting that statutory or judicial approval was required to dispose of a minor's cause of action, The Court also observed that permitting the waiver would discourage owners of commercial recreational establishments from exercising due care and caution in the operation of those facilities.

This holding is consistent with the law in Pennsylvania. Apicella v. Valley Forge Military Academy & Junior College, 630 F. Supp 20 (E. D. Pa. 1985).

PRODUCTS LIABILITY (NJ)

Armando and Mirna Gonzalez v. Ideal Tile Importing Company, Inc. et. al., 877 A.2d 1247 (NJ, 07/27/05).

Where a product (here a forklift) is manufactured in compliance with Federal standards, State tort claims for workplace injuries directed against that manufacturer are field preempted (i.e., preempted in total) by those Federal standards unless it is demonstrated that other (i.e, State) standards exist that arguably supplant or supplement the Federal standards as to the duties of the manufacturer, at which point the Court, if it agrees, undertakes a conflict preemption analysis.

Mr. Gonzalez was injured in a forklift accident and sued Komatsu, the forklift's manufacturer. Komatsu was granted Summary Judgment on its argument that the allegedly defective forklift was manufactured in compliance with Federal standards preempting asserted State tort claims that might impose an additional duty or duties beyond those Federal Standards. Mr. Gonzalez maintained that the OSHA Standards in issue applied only to employers and not to manufacturers. That argument was rejected by the Court.

The Court explained that preemption can be express or implied, and then could be either "field" or "conflict". Express preemption is typically set forth in a Savings Clause in enacting legislation, and otherwise may be implied.

The Law Offices of Thomas J. Wagner defend business entities, lawsuits seeking to recover damages for personal injury, professional malpractice, transportation function; the ownership, use and control of land, industrial and consumer products in the States of NJ and PA.

*Note: The Update is intended to inform of new developments. It is not intended as a legal consultation. Legal strategies, duties and obligations vary by fact. Questions? Comments? Kindly call Tom Wagner, Esquire at 908-762-1100 or e-mail: tjwagner@wagnerlaw.com

"Field" preemption refers to total preemption, while "conflict" preemption refers to those situations where there is a conflict between Federal and State Standards which then requires an analysis of whether the State Standard(s) supplant or supplement the Federal Standards (i.e., impose an additional duty or duties beyond those contemplated in the Federal Standards) and hence have viability, or whether indeed the issue is field preempted. Here, the Court found field preemption, on the basis that the applicable OSHA standards

regulated the universe of the issue here - the nature of warning devices to be utilized on a forklift.

Nicole DiLuzio-Gulino v. Daimler Chrysler Corporation and Dodge Automotive Manufacturing, 897 A.2d 438, Superior Court of New Jersey, Appellate Division (05/17/06).

In a design defect case, a plaintiff must establish that an alternative design is feasible, practical and that it is empirically safer than the manufacturer's original design.

Ms. DiLuzio-Gulino's air bag deployed following a collision, Her left elbow was slammed into her door by the bag, causing serious injury. She alleged that the air bag erroneously deployed due to a design defect.

Ms. DiLuzio-Gulino's engineering expert testified that the air bag settings for the DiLuzio-Gulino vehicle were "would not deploy" up to 8 Barnes Equivalent Velocity [BEV- a measure of force at impact], may deploy between 8 and 14 BEV, and would deploy at over 14 BEV. The air bag should not have deployed here, it was argued, since this collision had a velocity below 8 BEV. Moreover, the "would not deploy" setting of below 8 BEV was considered too low by this expert. The expert did not quantify testimony implying that a higher BEV for "may deploy" would reduce injuries in the general population.

The Court held that a plaintiff asserting a design defect must prove, under a risk-utility analysis, the existence of an alternate design that is practical, feasible and empirically safer than the [original] design used by the manufacturer. To meet this burden, a plaintiff needs to show not just an injury, but must also present empirical evidence quantifying the increase in safety under the alternate design.