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NOTABLE CASES AND VOICES FROM THE BENCH

LIMITED TORT ELECTION LIMITS RECOVERY IN PA WHEN SELECTED EVEN THOUGH VEHICLE IS NOT A PRIVATE PASSENGER MOTOR VEHICLE

The Superior Court of Pennsylvania recently held that a motorist who elects limited tort coverage for a vehicle as a private passenger motor vehicle may not later claim the vehicle is not a private passenger vehicle. Bennett v. Mucci, 901A.2d 1038, (Pa. Super 2006).

Plaintiff/Appellant, Michael Bennett, insured his truck as a private passenger vehicle, electing the limited tort option. When injured in an accident, he attempted to claim economic and non-economic damages for his injuries despite the limited tort election. He argued that the van was only used in a flooring business and not used as a private passenger motor vehicle. Accordingly, it was his assertion that the vehicle fit under an exception to the limited tort constraints.

The Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") permits election of full tort or limited tort coverage for private passenger motor vehicles. The limited tort election restricts recovery for non-monetary damages to injuries falling within the definition of "serious injury." Under the MVFRL, non-monetary damages may also be pursued if an exception to the limited tort election may be properly applied. One noted exception is when the person is an occupant of a motor vehicle other than a private passenger motor vehicle.

The trial court held that he was bound by the limited tort selection of his policy. The court gave the jury a "limited tort instruction" that if the injuries suffered by Plaintiff did not result in substantial impairment of bodily function then only

economic damages were allowed. The jury did not find substantial injury and returned a verdict for only economic damages. Plaintiff appealed.

On appeal Plaintiff/Appellant argued that he retains full tort rights because his van was principally used for commercial purposes, thus allowing for a §1705(d)(3) exception. He asserted that the §1705(d)(3) exception is clear and free from ambiguity and should be followed. Additionally, he argued that the General Assembly prefers full tort rights.

The Superior Court agreed with the trial court that Plaintiff should be bound by his prior decision to purchase limited tort coverage. Once the limited tort option is elected and the insured has reaped the benefits of the lower insurance rates, the insured should not be allowed to later claim an exception in order to receive full tort benefits. The Court further opined that this decision supports the legislative goal of promoting financial responsibility by forcing Plaintiff to adhere to his tort election and eliminating questions about the outcome under §1705.

In light of this decision, vehicle owners and drivers should be made aware that if they are taking a lower cost benefit for limited tort coverage of a vehicle, they may be limiting their potential future recovery regardless of whether the vehicle should fall under an exception.

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DISC BULGES INSUFFICIENT TO CROSS NJ LIMITATION ON LAWSUIT THRESHOLD

The Superior Court of New Jersey, Law Division, recently held in Torres v. O'Donnell, 2006 W.L. 2129184 (N.J. Super. A.D.) that Plaintiff's disc bulges were insufficient to cross the "limitation on lawsuit" threshold under the Automobile Insurance Clause Reducation Act (AICRA), N.J.S.A. 39:6A-8(a).

Plaintiff, Louis Torres, had pre-existing, but asymptomatic degenerative disease of the back which was aggravated when he was involved in a motor vehicle accident. Plaintiff underwent a lumbar epidural injection and a short course of physical therapy. Plaintiff's physician, Dr. Goldstein, filed a Physician's Certification of Permanency, N.J.S.A. 39:6A-8(a), in which he stated that, "the plaintiff, as a result of the motor vehicle accident that occurred on January 20, 2001, sustained the following injury: low back problem - presumed lumbar disc herniation. Such injury has resulted in permanent injury."

In reasoning that Plaintiff did not demonstrate credible objective evidence of a significant permanent injury sufficient to pierce the verbal threshold, the court found that the record was devoid of any objective medical evidence to support Dr. Goldstein's presumption that Plaintiff suffered a lumbar disc herniation. Plaintiff's objective evidence, including his lumbar x-rays and MRI films, revealed disc bulging at the L3-4 and L4-5 levels in the setting of some degenerative changes. Plaintiff also had some bone marrow changes consistent with degenerative disease. The MRI study revealed that the pre-existing disc bulges did not impinge or encroach upon the thecal sac or nerve roots. It is crucial to note that Plaintiff did not undergo any EMG/NCV study to support his claims.

The Superior Court noted that the objective medical evidence only supported the conclusion that Plaintiff suffered from a pre-existing degenerative disc condition, not that the disc bulges were caused or aggravated by the accident. Therefore, the Court entered an Order granting Summary Judgment in favor of the Defendant based upon Plaintiff's failure to present sufficient evidence to pierce the verbal threshold.

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NEW JERSEY SUPREME COURT BROADENS COMPANY'S DUTY TO WARN IN ASBESTOS LITIGATION

The New Jersey Supreme Court in Olive v. Exxon Mobil has extended a landowner's obligation to workers' spouses who handled clothing allegedly covered with asbestos. 186 N.J. 394 (N.J. 2006). Justice Jaynee LaVecchia, writing the 5-0 decision, held that a landowner has a duty to warn workers' spouses of the foreseeable risk of exposure to asbestos on clothing. The New Jersey Court unanimously found that the company should have known that spouses were faced with potentially hazardous conditions.

The landowner, Exxon Mobil, argued that it had no duty to someone who never set foot on its premises. Exxon Mobil further argued that the finding of a duty in this matter would open up a flood gate of liability from anyone who came into contact with asbestos soiled clothing off-premises. The Court found that those fears were overstated.

This ruling is at odds with rulings in The New York Court of Appeals and Georgia, both of which found that there is no duty to inform spouses of potentially hazardous conditions. This ruling is significant and may represent a shift to impose greater liability on landowners.

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PA PROMPT PAY ACT REQUIRES CONSTRUCTION COMPANY TO DEAL IN GOOD FAITH WITH SUBCONTRACTORS

The Superior Court of Pennsylvania recently held that under the Prompt Pay Act (62 Pa.C.S.A. §§3922,3935) a construction company has a duty to deal in good faith with respect to payments to sub-contractors, and that the construction company's withholding of a payment that it conceded was owed to the subcontractor until the subcontractor agreed to waive all other claims of

payment was a coercive negotiation tactic that was vexatious and violated the Prompt Pay Act. The Pietrini Corporation v. Agate Construction Co., Inc., 901 A.2d 1050 (Pa. Super 2006).

This litigation stems from the construction of a tower foundation to support a tram line spanning the Delaware River. In November of 2000, the Delaware River Port Authority (DRPA, a public authority), engaged Turner Construction Company as the general contractor on the project. In March 2001, Turner hired Agate Construction Company to erect a tower foundation for which Agate subcontracted with the Pietrini Corporation to provide labor and concrete materials for a portion of the project. Pietrini completed work on the project and submitted invoices to Agate totaling \$194,251.92.

The project was closed out by Turner and Agate in September 2002, and in January 2003 Agate received Turner's final payment for the project. Agate informed Pietrini that they would only pay Pietrini the sum of \$101,251.92 and demanded that Pietrini sign a full release of all liens and claims for the project before Agate would issue payment. Pietrini refused to sign the releases and continued to maintain that they were owed the \$194,251.92.

Pietrini filed a complaint against Agate in January 2003 alleging, in part, violations of the Commonwealth Procurement Code. The Procurement Code applies to every expenditure of funds by Commonwealth agencies under any contract or written agreement for the procurement or disposal of supplies, services or construction. 62 Pa.C.S. §103. Under the Prompt Pay Act, in the absence of sufficient reason, a contractor must pay a subcontractor within twenty (20) days of receiving payment itself. 62 Pa.C.S. §3922. A trial court may award a subcontractor penalties and attorneys' fees if it concludes that, under the circumstances, the contractor acted in a vexatious manner in withholding payment. 62 Pa.C.S. §3935.

Prior to trial, Agate stipulated that Pietrini was entitled to judgment in the sum of \$101,900.39 for undisputed claims. The jury returned a verdict for Pietrini, however, the trial court denied Pietrini's claims for penalties and attorneys' fees under the Procurement Code. Pietrini filed an appeal to the Superior Court.

The Superior Court examined Agate's decision to refuse payment to Pietrini unless Pietrini signed the release. The intended effect of Agate's conduct was to force Pietrini to give up the ability to pur-

sue other legal claims by denying Pietrini money undisputedly owed under the subcontract. The Court found that the Prompt Pay Act was intended to negate harsh negotiating tactics in public projects, such as that employed by Agate. Despite Agate's argument that the subcontract required Pietrini to submit a release of all claims prior to final payment, the Court determined that Agate's conduct was not negotiation, but coercion that supported a finding of vexatious behavior.

The Superior Court concluded that no good faith dispute existed regarding the \$101,900.39 and that Agate's withholding of that sum of money was vexatious. Therefore, the Superior Court remanded the case to the trial court for an assessment of penalties on that amount under the Prompt Pay Act.

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PENNSYLVANIA SUPERIOR COURT HOLDS "HILLS AND RIDGES" DOCTRINE INAPPLICABLE IF CONDITION DUE TO HUMAN INTERVENTION

The Pennsylvania Superior Court has recently reversed the granting of a nonsuit and clarified the application of the "hills and ridges" doctrine in Pennsylvania. Harvey v. Rouse Chamberlin, Ltd., et al., 901 A.2d 523 (Pa. Super. 2006). The "hills and ridges" doctrine is well established in Pennsylvania and protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations.

In this matter, snow began falling on January 20, 2001 and continued through the early morning hours of January 21, 2001. After the snow ended and the roads had been plowed, Plaintiff took a walk around the development. At times, Plaintiff was forced to walk on the street as portions of the sidewalk had not yet been cleared. Plaintiff came upon a sidewalk that had not been cleared and decided to walk in the street which appeared to be clear and dry. While walking in the street, Plaintiff slipped and fell on black ice. Plaintiff commenced this action against the developer and snow plow contractor.

After the close of Plaintiff's case at trial, Defendants moved for nonsuit arguing that the "hills and ridges" doctrine precluded liability in this matter. The trial court agreed and granted nonsuit. Plaintiffs filed post trial motions which were denied. Plaintiffs then appealed this matter to the Superior Court.

Appellants argued that the black ice was an artificial condition because it formed as a result of plowing and therefore the "hills and ridges" doctrine was inapplicable. The Superior Court relied upon Bacsick v. Barnes, 341 A.2d 157 (Pa. Super. 1975) and held that the granting of a nonsuit was inappropriate in this matter. In Bacsick, the Superior Court held that the "hills and ridges" doctrine only applies where snow and ice are the result of entirely natural accumulation following a recent snowfall. The Superior Court found that the evidence at trial suggested that the condition was influenced by human intervention and therefore the trial court erred in entering the nonsuit.

This case is important as it arguably constricts the application of the "hills and ridges" doctrine. The case suggests that once the landowner makes an effort to remove the ice and snow from the premises, the "hills and ridges" doctrine may not preclude liability.

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RECENT VERDICTS

NJ APPELLATE DIVISION FURTHER DEFINES DUTY OWED TO BUSINESS INVITEE AND OPINES ON REQUIREMENT FOR EXPERT TESTIMONY

David A. Semple, Esq., of Kent & McBride's North Jersey office, was recently successful in persuading the New Jersey Appellate Division to affirm the trial court's granting of Summary Judgment, and dismissal of Plaintiff's Complaint for failure of Plaintiff to establish a *prima facie* case against Defendants. Derkacs v. Pathmark Stores, Inc., et al., Docket No. MID-L-9200-03

In Derkacs, Plaintiff Richard Derkacs alleged that he was injured while making a delivery to the Pathmark Store in Fairlawn, New Jersey. In particular, Plaintiff alleged that the delivery ramp was narrow and cluttered, and therefore, did not provide him with a safe means for ingress and egress. Nevertheless, Attorney Semple filed a Motion for Summary Judgment on behalf of Defendants, asserting that Plaintiff had been using the same ramp for approximately 10 years, and that the items along the side of the ramp on the date of the incident were typically present. In fact, Plaintiff had traversed the subject ramp the date of, but prior to, the alleged injury. In following, Mr. Semple argued that Plaintiff could not establish a *prima facie* case, as any condition on the subject ramp was open, obvious, and well known to Plaintiff. Mr. Semple also argued that Plaintiff was required to provide expert testimony in regard to the allegation that the subject ramp was "too narrow."

The trial court agreed with Mr. Semple's position, and dismissed Plaintiff's Complaint, with prejudice. On appeal, Plaintiff's attorney asserted that the trial court used the "wrong legal standard" in evaluating the duty owed to Plaintiff, and that expert testimony was not required as to the condition of the ramp. In citing Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559 (2003), the Appellate Division held that Defendant Pathmark had a duty to: 1.) provide Plaintiff, a business invitee, with a safe environment for doing that which is in the scope of the invitation; 2.) discover and eliminate dangerous conditions; 3.) maintain the premises in a safe condition; and 4.) avoid creating conditions that render the premises unsafe. However, the Court opined that Pathmark did not have a duty to take precautions or warn against conditions which were open, obvious, or apparent. In following, the Court ruled that Plaintiff failed to present evidence of a condition which Pathmark had a duty correct. The Court also found that Plaintiff was required to present expert testimony as to the allegation that the subject ramp was "too narrow." As such, the trial court's ruling was affirmed.

Derkacs v. Pathmark Stores, Inc., et al., 2006 WL 1896182.

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LEGISLATIVE UPDATE

PENNSYLVANIA HOUSE SEEKS TO CURB FORUM SHOPPING

The Pennsylvania House of Representatives has introduced HB 2651. HB 2651 seeks to amend the venue rules now in place. HB 2651 would provide that any tort action for damages due to personal injury may only be filed in the county where the cause of action arose. This amendment is the same amendment that became effective in 2003 regarding medical malpractice cases.

Under the current law, any tort action, except a medical malpractice action, may be brought against an individual in the county where the individual may be served or where the cause of action arose. Further, any corporation doing business in Philadelphia County may be sued in Philadelphia County despite the fact that the cause of action arose at a location outside of Philadelphia County.

The proposed legislation would protect corporate defendants that conduct business outside and inside of Philadelphia County. Under the proposed bill, the Plaintiff would be required to file in the county where the action occurred, not in the venue likely to award the most damages.

This bill was recently referred to the Judiciary Committee. We will continue to track this important bill and report on any developments.

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