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NOTABLE CASES AND VOICES FROM THE BENCH

SAFER ALTERNATIVE DESIGN MUST BE PROVEN IN NJ PRODUCTS LIABILITY ACTION

In a recent decision, the Superior Court of New Jersey, Appellate Division, held that in a products liability action involving design defect of an air bag, an expert opinion must include empirical evidence that a safer alternative design exists. Diluzio-Gulino v. Daimler Chrysler Corp., 385 N.J.Super. 434, 897 A.2d 438.

In *Diluzio*, Plaintiff was involved in a two-car accident when a car pulled into her lane of travel. Plaintiff braked hard but was unable to avoid colliding with the other car. The airbag deployed on impact, slamming her arm into the door and causing a significant fracture to her left elbow.

At trial, Plaintiff tried to prove by expert testimony that the airbag in her car had a manufacturing defect or a design defect that caused it to deploy and injure her when it should not have deployed at such a low speed. The focus of Plaintiff's expert centered around the BEV, or barrier equivalent velocity, of the airbag in question. BEV, in essence is the speed at which a vehicle goes head on into a barrier, measured in miles per hour. No industry standard exists and consequently airbags are set to deploy at various different BEV's.

The expert in *Diluzio* testified as to the BEV levels of the airbag in Plaintiff's vehicle. Testimony revealed that the design of the BEV settings were such that the airbag would not deploy up to 8 BEV, may deploy between 8 and 14 BEV, and would deploy at over 14 BEV. Additionally, it was noted that the BEV for Plaintiff's car was well below 8 at the time of the impact that caused her injuries.

As part of his opinion, Plaintiff's expert testified, that a "may deploy" setting of 8 BEV was too low, in turn causing injury to persons at low impacts, without specifying what the acceptable higher level might be.

Ultimately, the jury found for Plaintiff on her design defect claim. The trial court reasoned a "natural inference" could be drawn from Plaintiff's expert testimony that if a "may deploy" setting of 8 BEV was too low, the reasonable alternative BEV is somewhat higher, concluding the jury could reach a finding on the evidence presented.

On appeal, the trial court's reasoning with regard to Plaintiff proving alternative design was found to be in error. The Appellate Division held that in order to meet their burden on a safer alternative design, Plaintiff had to present an expert opinion supported by empirical evidence, that the number of lives saved (or injuries avoided) by adopting the alternative design would be greater than the corresponding number of lives lost (or injuries sustained) as a result of such an adoption. The Appellate Court looked to the federal court case of Crespo v. Chrysler Corp., 75 F.Supp.2d 225, 229 (S.D.N.Y.1999), in making their determination.

The Appellate Court reasoned further, without such empirical evidence to substantiate an expert's claim in the case at hand, the jury was without any reasonable basis on which to conclude that any of Plaintiff's proposed alternatives (i.e. alternative designs) were safer than the allegedly defective airbag in question.

Finding judgment for the Defendant as a matter of law, and applying the principles in *Crespo*, the Court held that in a design defect products liability case, a Plaintiff must prove not only that the proposed alternative design is feasible and practical, but that the alternative design is also safer than the existing design.

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SELF-INSURED AUTO RENTAL COMPANY NOT OBLIGATED TO REIMBURSE AN INSURER FOR PIP PAYMENTS

The Superior Court of New Jersey, Appellate Division, recently held in Liberty Mutual Insurance Company v. Thomson, that an automobile accident victim's insurer was not entitled to reimbursement of personal injury protection (PIP) benefits from the self-insured lessor of a vehicle registered in another state. 385 N.J. Super. 240, 896 a.2d 1143 (May 3, 2006).

Liberty Mutual's insured, Alexandr Rebe, was injured in New Jersey when his car was struck by a vehicle driven by Christopher Thomson. Liberty Mutual paid PIP benefits totaling \$7,487.55 on Rebe's behalf as a result of this accident.

Thomson, a resident of Australia, was operating a Hertz rental vehicle that was registered in New York and rented to Thomson in North Carolina. The rental agreement provided that Thomson would return the car to New York state. The agreement also contained a provision whereby Hertz acknowledged that it had an obligation to provide mandatory insurance coverage that was "imposed by operation of law" in any jurisdiction where an accident might take place.

Liberty Mutual filed suit against Hertz, a self-insured company, to recover the amount of benefits paid in PIP on Rebe's behalf. At the trial court, Hertz's Motion for Summary Judgment was granted and Liberty Mutual's claim for reimbursement of the PIP benefits was dismissed. Additionally, Liberty Mutual's cross-motion to compel arbitration of its PIP claim under N.J.S.A. 39:6A-9.1 was denied. On Liberty Mutual's appeal, the Appellate Division affirmed.

The Appellate Division reviewed New Jersey law, and noted that under N.J.S.A. 45:21-8 and the case law, a motor vehicle rental company may self-insure "if it can reasonably satisfy" the State about "the permanence and financial standing of its business." The Court also stated that under the law, the coverage obligations of a self-insurer are "co-extensive with the obligations of those possessing liability

policies." Therefore, every motor vehicle rental company must provide the coverage that is mandated by New Jersey's No Fault Law while the company's vehicles are on New Jersey roads.

Additionally, under N.J.S.A.17:28-1.4, New Jersey's deemer statute, any insurer that issues a policy on an out-of-state vehicle and that does business in New Jersey is deemed to have contracted to provide the minimum amount of coverage, including PIP coverage, that is required by New Jersey law for its insured vehicles while they are on New Jersey roads.

The Court found that Hertz self-insured the vehicle driven by Thomson, and was considered to have issued an insurance policy to itself. If the insurance carrier does business in New Jersey and issues a motor vehicle policy covering a car registered in New York, the carrier is deemed to have agreed to provide the minimum coverage mandated by New Jersey law. Therefore, as a self-insured, Hertz was obligated to provide PIP coverage (and liability and uninsured motorist coverage) to renters while driving in New Jersey, regardless of where the rental car was registered.

In New Jersey, under N.J.S.A. 39:6A-9.1, an insurer paying PIP benefits as a result of an accident occurring in New Jersey has the right to recover the amount of PIP benefits paid from any tortfeasor who was not, at the time of the accident, required to maintain PIP coverage or, although required, did not maintain PIP coverage at the time of the accident. Liberty Mutual sought to recover the benefits paid on behalf of Rebe under this statute.

The Court found that Hertz, with its self-insured status, was required to and did provide PIP coverage on Thomson's rental car, and thus, Hertz did not fall into either category of N.J.S.A. 39:6A-9.1—Hertz was not a non-PIP insurer nor an uninsured from which PIP reimbursement may be obtained. Therefore, Liberty Mutual had no right of reimbursement against Hertz

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DECLARATORY JUDGMENT AFFIRMED AGAINST INSURER OF LOANED OUT CAR

The Superior Court of Pennsylvania recently upheld a trial court declaratory judgment imposing liability and physical damage coverage on a primary basis on both the insurer of the vehicle owned by a car dealership and the insurer of the driver to which the vehicle was loaned. Progressive Northern Insurance Company v. Universal Underwriters Insurance Company, 2006 WL 1163315 (Pa. Super. 2006)

In *Progressive*, a driver was given permission to drive a vehicle owned by a car dealership. The driver was covered under a Progressive policy owned by his father. The car dealership carried insurance on the car from Universal. The driver and vehicle were involved in an accident with a third party. Both the third party and Universal submitted claims with Progressive; the third party's claim was for damages to their vehicle and Universal's claim was for damages to the car dealership's vehicle. The trial court held that both policies were to provide liability and physical damage coverage on a primary basis. Both Progressive and Universal filed cross appeals.

The initial issue was whether the driver was an insured under the Universal policy. It was agreed that the driver was covered as an insured under the Progressive policy. The Universal policy defined an insured as "any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission." [emphasis added]. The Universal policy defined a covered auto as "an auto owned ... by YOU" [emphasis added]. The trial court found that under the Motor Vehicle Financial Responsibility Law (MVFRL) the driver was required by law to be an insured and fit the definition of an insured under the Universal policy.

Universal argued that under the Pennsylvania Supreme Court decision in State Farm Mut. Auto. Ins. v. Universal Underwriters Ins. Co., 549 Pa. 518, 701 A.2d 1330 (Pa. 1997), a factually similar case to *Progressive*, the driver/customer

was not required to be an insured where the driver/customer was covered under their own policy. In the 1988 version of §1786 of the MVFRL (75 Pa. C.S.A. § 1786) the court in *State Farm* found that “the MVFRL did not contain an express clause requiring all permissive users of a vehicle to be insureds under the vehicle owner’s policy” and that §1786 is “silent as to whom the coverage of the owner’s policy runs.” The court determined that in *State Farm*, §1786 could not be used as a mandate requiring insured drivers using another’s vehicle with permission to be insured under the owner’s policy.” The Superior court disagreed that *State Farm* was controlling in this case because of a 1990 addendum to §1786.

In 1990 subsection (f) was added to §1786 providing that the owner of a vehicle shall not permit a vehicle to be operated without financial responsibility required by §1786. The change requires coverage for the operated motor vehicle and requires financial responsibility when the owner allows another to operate the vehicle. The Superior Court found that the 1990 version of the MVFRL suggests a result contrary to *State Farm*, setting forth material changes which makes *State Farm* inapplicable in this case. The court found that §1786(f) requires financial responsibility for vehicles by owners and others who have the owner’s permission to operate the vehicle. Section 1786 supports the Superior Court statement that the requirements of the MVFRL “are consistent with the concept that primary coverage follows ownership of the vehicle.” Nationwide Ins. Co. v. Horace Mann Ins. Co., 759 A.2d 9, 13 n. 3 (Pa.Super.2000). As such, the Superior Court upheld the trial court ruling that while using the dealership vehicle with permission the driver was an insured under the dealership’s policy.

The Second decision of the Superior Court upheld the finding that both policies provided liability and physical damage coverage to the driver on a primary basis regardless of the mutually repugnant clauses concerning priority of coverage. The Progressive policy owned by the driver’s father provided that when there was other liability and physical damage insurance, the insurance Progressive provided for a vehicle, other than a covered vehicle, was excess over any other collectable insurance. Universal’s policy provided that its liability coverage is excess when a person

is required by law to be an insured while using an auto with the owner’s permission who is an insured with respect to the auto hazard. Since the driver was found to be an insured under the policy, the insurance provided by Universal was deemed to be excess. Universal’s policy limited its primary damage coverage to when the owner, a member of the owner’s household or member of the policy owning company, was in control of the vehicle. This application would exclude the driver.

The trial court found that since both policies would find the liability and physical damage coverage to be excess, the clauses were mutually repugnant. “Where two policies each purport to be excess over the other, such clauses are mutually repugnant; both must be disregarded and the insurers must share in the loss.” The Superior Court affirmed.

The policy advanced in this decision is that the scope of coverage can be expanded in the case where an insured permits a covered vehicle to be operated by an individual who is covered under a separate policy. At the time of this article, appeals had not been taken by either party.

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RECENT VERDICTS

PA SUPERIOR COURT UPHOLDS SUMMARY JUDGMENT IN MEDICAL CASE

The Pennsylvania Superior Court has upheld, among other issues, the trial court’s granting of Summary Judgment in the matter of McSorley v. Deger, M.D. et al.

After hearing oral argument on March 22, 2006, the Superior Court, in a published opinion, agreed with Kent & McBride Partner, John Shea, that several Counts in Plaintiff’s Complaint required expert testimony. Plaintiff filed a medical malpractice matter against, amongst others, Randolph Deger, M.D., a gynecological-oncologist alleging negligence and lack of informed consent. Defendant Deger was to perform an exploratory surgery to evaluate an ovar-

ian mass. In the course of performing the procedure, Defendant Deger and Co-Defendant, Albert El-Roeiy, M.D. observed a portion of Plaintiff’s small bowel that did appear to be normal. Defendants Deger and El-Roeiy requested the consult of Defendant Edward R. Russell, M.D., a general surgeon, to assess the portion of the Plaintiff’s small bowel which appeared to be abnormal. After evaluating the situation, Defendant Russell removed a portion of the Plaintiff’s small bowel.

Plaintiff alleged that as result of the removal of the portion of her small bowel she has suffered permanent damages including, but not limited to chronic diarrhea. Plaintiff alleged that Defendant Deger was negligent in allowing Dr. Russell to perform the operation. Plaintiff also alleged that she did not give informed consent for the bowel surgery. Plaintiff did not produce any expert report against Defendant Deger on the issue of negligence or informed consent. A Motion for Summary Judgment was filed on behalf of Defendant Deger alleging that Plaintiff had failed to prove a prima facie case. Plaintiff maintained that expert testimony was not necessary since this was a case of simple negligence and lack of informed consent, at least with respect to Defendant Deger.

The trial court granted Defendant Deger’s Motion for Summary Judgment approximately two-weeks before the start of the trial. The trial did proceed and resulted in a Defense Verdict. The trial court denied Plaintiff’s Post-Trial Motions and this Appealed followed. The Superior Court held that Plaintiff’s Negligence claim against Defendant Deger required expert testimony. The Court agreed with the trial court that “it would not be within the knowledge of the average layperson to identify when the need for a consult would arise in a surgical procedure.”

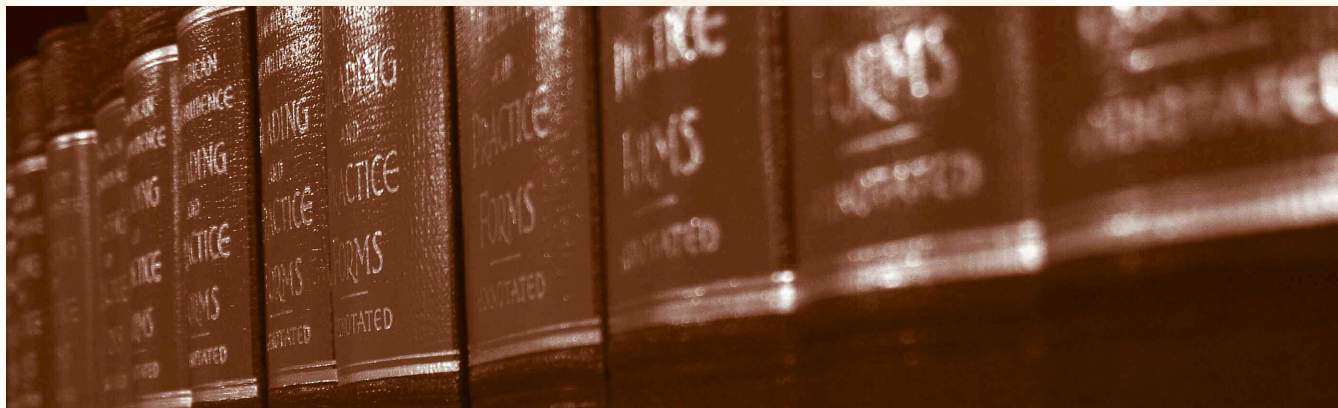
As for the informed consent allegation, the Superior Court held that “expert testimony was required to assess whether Dr. Deger..., acted in accordance with [the informed] consent form...” The Court noted that Plaintiff did not provide expert testimony on either one of these issues. Accordingly, the Superior Court found no error in the trial court’s grant of summary judgment in favor of Defendant Deger. Plaintiff has filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

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OFF THE RECORD

COMMITTEEMAN JEFFREY W. MCDONNELL

JEFFREY W. MCDONNELL, a senior associate with Kent & McBride, P.C. in Philadelphia, was recently elected Committeeman of the Eighth Precinct in Montgomery Township, Montgomery County, PA. Jeff primarily represents defendants in medical malpractice, products liability, and general civil litigation.



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