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Your Best Defense

Lawyers Solving Problems

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Welcome to the latest edition of the firm's bi-annual newsletter, Your Best Defense.

This installment has important information for anyone involved in the defense of cases filed against any sovereign entities, fire and explosion suppression/protection equipment companies and any entities involved in the design professional/construction industry, as a number of recent decisions and trends look to shape the liability of these types of defendants in Pennsylvania.

Richard McMillan's article, *Sovereign Immunity Not a Bar to Bus Passenger's Claim for Uninsured Motorist Liability,* looks at a couple of recent decisions by the Commonwealth Court dealing with the Port Authority of Allegheny County's attempts to assert sovereign immunity as a defense to claims by passengers for uninsured motorist coverage. For the reasons set forth in Mr. McMillan's article, the Commonwealth Court rejects this defense and requires these state entities to provide this type of coverage.

A recent trend in cases involving fires and/or explosions, as Gregory Knight's article discusses, involves plaintiffs asserting the negligence of providers of various protection devices for not providing a thorough safety analysis for an entire facility, even where their devices are not used in portions of that facility. In *Trends In Litigation Involving Fire/Explosion Protection Companies*, Mr. Knight looks at the different expert interpretations of NFPA regulations and the potential exposure for these types of companies, and he concludes that designers, manufacturers and suppliers of fire and explosion protection equipment (and their insurers) need to take steps to adequately address these emerging trends.

Finally, Paul Mannix, in his fine analysis *Expanding Exposure to Third Party Claims*, examines the recent *Farabaugh* decision by the Pennsylvania Supreme Court and its implications for construction managers and design professionals in terms of their responsibilities for safety and safety programs on a construction site. These professionals, concludes Mr. Mannix, need to be aware of this decision and take steps to carefully craft their contracts so as to clearly establish the exact scope of their duties in these regards.

We hope that the articles in this edition prove both informative and useful. As always, if you have any questions or be in need of any further service, please contact the authors or any of our attorneys. Please visit our Web site, www.waymanlaw.com, for a complete look at the firm's capabilities and professional staff.

SOVEREIGN IMMUNITY NOT A BAR TO BUS PASSENGER'S CLAIM FOR UNINSURED MOTORIST LIABILITY

By: Richard L. McMillan, Esq.

The Pennsylvania Commonwealth Court recently handed down two opinions rendered by a three judge panel concerning the Port Authority of Allegheny County's responsibility for a passenger's claim for uninsured motorist coverage. Both cases involved a collision between a bus and an uninsured vehicle where the collision was a result of the negligence of the driver of the uninsured vehicle.

In *Paravati v. Port Authority of Allegheny County*, 914 A2d 946 (Pa.. Cmwlth. 2006), a pickup truck ran a stop sign, drove into the path of the bus, and then fled the scene. The plaintiff was a passenger in the bus and sued both the unidentified driver of the pickup and the Port Authority. A jury in that case awarded the plaintiff a verdict of $50,000 against the unidentified pickup truck driver only. The bus driver was found not negligent in any degree. Since that verdict was uncollectible against the unidentified driver, the plaintiff received, instead, $15,000 from her own insurance carrier's underinsured motorist coverage in recognition that the Port

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Authority's uninsured motorist coverage of $15,000 per injured person was insufficient to cover the plaintiff's injuries. At issue was the passenger's claim against the Port Authority for its $15,000 limit of uninsured motorist coverage.

Likewise, in the case of *Lowery v. Port Authority of Allegheny County*, 914 A2d 953 (Pa. Cmwlth. 2006), a bus passenger sought uninsured motorist coverage from the Port Authority. Plaintiffs filed an action against the Port Authority alleging that the accident was caused by the driver of an auto that was not covered by insurance and that they had a right to uninsured motorist benefits that the Port Authority is required to provide pursuant to the Motor Vehicle Financial Responsibility Law, 75 P. S. Sec. 1787(a)(3).

In both cases the Port Authority argued that, as a Commonwealth agency, it was protected by sovereign immunity from such claims. It asserted that plaintiffs could not recover unless their claims fit within one of the enumerated exceptions to immunity under the sovereign immunity statute, 42 P. S. Section 8522(b). However, the Court held, in an apparent case of first impression, that sovereign immunity was not applicable to these claims. The Court reasoned that "it makes no sense to require self-insured transit systems to provide uninsured motorist coverage and then to interpret other statutes in such a manner that the coverage cannot be claimed." The Statutory Construction Act of 1972, 1 P. S. Section 1922(1), establishes a presumption that the legislature does not intend a result that is absurd, impossible or unreasonable. Hence, in both the *Paravati* case and the *Lowery* case, the Court ruled that the sovereign immunity statute did not protect the transportation authority from uninsured motorist claims.

Attorney McMillan will be happy to discuss these or related issues further if you would like. Please contact him at rmcmillan@waymanlaw.com.

TRENDS IN FIRE/EXPLOSION PROTECTION COMPANY LITIGATION

By: Gregory S. Knight

Attorneys in our Fire/Explosion Litigation Group have been handling cases showing an emerging trend in litigation involving fire and explosion protection companies: negligent failure to warn of hazzards not specifically protected by the company's product and/or within any specific protection scheme. To say it another way, plaintiffs are claiming the fire and explosion protection company has been negligent even though none of their product was in the area of the fire/explosion event, but should have been.

The basic theory used by these plaintiffs is that the protection companies have a duty, under the NFPA, the ethical duties of engineers, advertising and otherwise, to examine the entire facility and warn the facility owners/operators of any gaps in protection or areas that pose a risk of fire and/or explosion, regardless of the actual scope of the engagement. The plaintiff attorneys are arguing that protection from these !gaps in the overall plant-wide fire and explosion protection scheme to be the duty of manufacturers of fire and explosion protection products who have provided equipment for the specific plant. They are expounding this theory, even though the protection companies were not specifically hired to preform an overall hazard analysis for the entire facility.

The primary theory used by these plaintiffs is that both a supplier of fire and explosion protection devices is required under NFPA 69 to perform an overall hazard analysis for the entire facility. There is language in NFPA 69 which can be interpreted that way, however, experts in the field differ as to the practical application. Specifically NFPA 69 (1978) states: 4430. Determination of Hazard to be Protected. A thorough hazard analysis shall be performed to establish the type and degree of explosion hazard inherent in the process.

The question is: who is charged with performing this hazard analysis? The NFPA experts disagree. A plaintiff's expert argued that is was the protection equipment providers duty to perform this analysis. Defense experts argued it was the facility owners duty,

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whether they delegated it or not, to see that the hazard analysis was done. Here, the facility owner/operator assumes the position of the Authority Having Jurisdiction (AHJ), as defined by the NFPA standard. Further, defense experts took the position that protection companies will perform a hazard analysis on the specific piece of process equipment they are being contracted to protect, but are not, and can not, be responsible for the entire facility. It is important to note, that leading NFPA experts have called for changes in and development of specific NFPA standards to address these divergent viewpoints, but at this time none have been propounded.

These opposing viewpoints were tested once in court, however it was part of a bankruptcy proceeding and is not presidential. Other cases have settled out of court and are subject to confidentiality agreements.

Based on these handful of cases, designers, manufacturers and suppliers of fire and explosion protection equipment (and their insurers) need to be cognizant of the emerging trends and theories of liability and how to properly address them.

If you have an questions about this topic, please feel free to contact myself or Warren Siegfried of this office to discuss the matter, at gknight@waymanlaw.com or wsiegfried@waymanlaw.com.

EXPANDING EXPOSURE TO THIRD PARTY CLAIMS

By: Paul M. Mannix

The Pennsylvania Supreme Court Re-analyzes Liability Of Construction Managers/Design Professionals To Injured Employees Of Contractors

Introduction

In *Farabaugh v. Pennsylvania Turnpike Comm.*, 911 A.2d 1264 (Pa. 2006), the Pennsylvania Supreme Court addressed the scope of a construction manager's duties of safety owed to a contractor's employee. The Court ultimately concluded that, under the construction management contract at issue, the construction manager had safety supervision responsibilities and could be held liable to the deceased employee of the contractor. In addition to its specific ruling, the Court demonstrated the dire consequences that can result to the unsuspecting construction manager or design professional who fails to carefully draft its contract so as to limit safety responsibilities.

Factual Background

In December 1999, James Farabaugh sustained fatal injuries while driving a dump truck during the course of a construction project on a site owned by the Pennsylvania Turnpike Commission ("PTC"). At the time of the accident, Mr. Farabaugh was acting in the scope of his employment with New Enterprise Stone and Lime ("NESL"), the general contractor on the project. Following the accident, Mr. Farabaugh's estate filed a lawsuit against PTC and Trumbull Corporation ("Trumbull"), which acted as the construction manager on the project.

The trial court granted summary judgment to both PTC and Trumbull prior to trial. In an unpublished decision, the Commonwealth Court reversed summary judgment in favor of Trumbull, concluding that Trumbull owed a duty of care to the decedent. Thereafter, the Supreme Court granted an allowance of appeal and addressed two issues, including whether Trumbull owed a duty of care to protect Mr. Farabaugh from dangerous conditions.

In its ruling, the Supreme Court refused to establish a

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standard rule as to safety responsibilities of a construction manager. Rather, the Court turned to the contractual language, which defined the construction manager's duties on this specific project, and made its decision based on those terms.

Terms of the Construction Management Agreement

The Court first considered the terms of the contract between PTC and Trumbull. The Court noted that under the contract, Trumbull was to "[d]evelop, implement, maintain and monitor a comprehensive project safety/insurance program in accordance with the ëwrap-up' insurance guidelines. Monitor each contractor and subcontractor for compliance with the contractors' insurance provisions in the contract documents. Quarterly safety/insurance review meetings will be required."

The Court also reviewed the Technical Proposal submitted by Trumbull to the PTC. This document stated:

> Safety is of paramount importance to [Trumbull] in every activity we perform. On the basis that PTC will purchase and maintain a "wrap-up" insurance program for this project, we will provide a Safety/Insurance Monitor to oversee the program...We will review and approve contractor emergency procedures and site safety plans, interview applicants for contractors' Safety Representatives, and make recommendations, monitor the Safety Representatives' performance, and monitor the contractors' compliance with OSHA. Monitoring will be frequent and on a regular schedule. We will organize monthly walk-through safety tours with PTC, Insurance carrier, and contractor representatives, and arrange and conduct other safety/insurance meetings as required...We will continually monitor the performance of all contractor's workers and recommend removal from work any employee deemed unsuitable for reasons of safety and loss control.

In addition, Trumbull had distributed a safety videotape which stated that Trumbull was "looking after your interests as well as the owner's [interests]."

As for the General Contract between NESL and PTC, it stated that PTC, its Engineer or other authorized Safety Representatives "have the authority to suspend work in progress when necessary to enforce mandatory safety requirements until the condition is corrected." Under the General Contract, NESL further agreed that "the acceptance of NESL's Safety Program shall not relieve or decrease the liability of [NESL] for safety" and that "no provision of these contract documents shall act to make [PTC], the Engineer or any party other than [NESL] solely responsible for safety."

Supreme Court Analysis

In arguing that it owed no duty, Trumbull sought application of Pennsylvania case law which found no duty owed by general contractors out of possession of property. See *Leonard v. Commonwealth Dept. of Transp.*, 771 A.2d 1238 (Pa. 2001). However, the Court found these cases inapplicable, explaining that, while the *Leonard* line of cases involved the delegation of oversight obligations by the general contractor, this matter involved the assumption of safety supervision duties by the defendant construction manager. The Court further reasoned that the role of construction managers are more aligned to that of an engineer or architect, as opposed to a general contractor.

With that in mind, the Court referred to the case of *Marshall v. Port Auth. of Allegheny County*, 568 A.2d 931 (Pa. 1990) and compared the contractual undertakings by the engineer in Marshall to those of Trumbull. In *Marshall*, an engineering firm was found to owe no duty to an injured employee of the general contractor on a Port Authority construction project. The *Farabaugh* Court noted that, in *Marshall*, while the engineer had construction management duties, the engineer's on-site safety role involved passive duties, such as the collection of written safety programs and reports. According to the Supreme Court, this was in contrast to the active role assumed by Trumbull in assuring safety through the development of a safety plan and monitoring the contractor's compliance with the safety regulations on a frequent and regular schedule. The Court concluded that these contractual responsibilities assumed by Trumbull could form the basis for Trumbull owing a duty to protect the plaintiff-decedent from unsafe conditions at the site. The case was therefore remanded to the trial court.

Comparison to Marshall

This decision reinforced the holding in *Marshall* that determining whether a duty is owed to third parties by

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an engineer or construction manager is governed primarily by the contractual responsibilities assumed in the agreements. At the same time, the ruling highlighted how thin the line is between a construction manager successfully insulating itself from third party claims and a construction manager exposing itself to substantial claims by injured workers.

The Court in *Farabaugh* provided a cursory overview of the relevant language in the engineering contract in *Marshall* and distinguished the language in the Trumbull / PTC Agreement. However, closer inspection of the language in *Marshall* and *Farabaugh* reveals that there were significant similarities between the contract language.

Both Trumbull and the *Marshall* engineer had the ability to stop the work when unsafe conditions were detected. Likewise, in both cases, the general contract stated that safety was the sole responsibility of the general contractor. Interestingly, the Court in *Marshall* placed great weight on this fact, stating that "imposing a duty on Baker to be actively involved in procedures for safety compliance would be inconsistent with the provision in the PAT-Mosites contract stating that Mosites shall supervise and direct the work and be solely responsible for all construction means." On the other hand, the *Farabaugh* Court, while recognizing the contractor's assumption of sole responsibility in its factual summary, appeared to discount this fact in arriving at its conclusion.

In the agreement between the defendant and the owner, both Trumbull and the engineer in *Marshall* had obligations related to safety programs. The prime distinction was that Trumbull was required to develop a safety program and monitor it, while the Marshall defendant only agreed to assure that the contractors submitted their own safety programs. Granted, the duties for safety assumed by Trumbull in *Farabaugh* were greater than the safety obligation contractually undertaken by the engineer in *Marshall*. However, a complete comparison of the facts demonstrates that both defendants had safety obligations and the difference in these safety responsibilities were not drastically different.

Lessons Learned

From the standpoint of a construction manager or design professional, this ruling could prove extremely important. Undertaking responsibilities for project safety should not be done lightly. The Pennsylvania Workers' compensation law generally immunizes the contractor from tort claims of its employees. Therefore, if a contractor's employee is injured at a project, the construction manager or design professional could be the primary target in a personal injury lawsuit. Careful attention to the terms used in defining the responsibilities towards safety could mean the difference between liability immunity and high exposure.

According to the recent ruling in *Farabaugh*, the Court will determine the duties owed by the professional by focusing on the contractual provisions, as opposed to whether the company adopts the role of construction manager, engineer, architect, clerk-of-the-works or some other title. Furthermore, the decision indicated that the controlling provisions will be found in the agreement with the owner, rather than the specifications or other contract documents. When drafting the agreement, the construction manager or design professional might be best served if responsibilities towards safety are wholly avoided. However, to the extent clients require that some duties of safety are accepted, the construction manager or design professional should adhere to the more limited scope of work outlined in the *Marshall* case, and not the safety tasks accepted by the construction manager in *Farabaugh*. Agreeing simply to assure submission of safety plans by contractors, while avoiding responsibilities for developing safety programs and performing site inspections, should help to greatly limit liability.

Attorney Mannix will be happy to discuss these or related issues further if you would like. Please contact him at pmannix@waymanlaw.com.

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Wayman Watch...

- *Congratulations to Kate Fagan, recently nominated and selected as a Fellow of the Allegheny County Bar Foundation.*

- *Kudos also to Richard McMillan, who was recently appointed a member of the Allegheny County Bar Association's Civil Litigation Section Council.*

- *Mr. McMillan's father was also the recipient of quite an honor. In February, Grove City College selected Donald "Doc" McMillan among the first group of inductees into its newly formed Athletic Hall of Fame, for his tireless decades of work as a recruiter and ambassador for the school and its athletics.*

- *James Creenan has been named to the 2007 edition of "Who's Who in American Law," and he has also been appointed as the American Bar Association Young Lawyers Division Liaison to the Tort Trial and Insurance Practice Section (TIPS). Congratulations Jim!*