CYNTHIA G. BEAM
KELLY A. COSTELLO
CAROL ANTOFF
SEAN A. DOLAN
MIRANDA D. CLIFTON
ROBERT DEARY

LAW OFFICE OF
CYNTHIA G. BEAM
Employees of Nationwide Mutual Insurance Company®
Not a Partnership

131 CONTINENTAL DRIVE
SUITE 407 - CHRISTIANA EXECUTIVE CAMPUS
NEWARK, DELAWARE 19713-4301
(302) 292-6660
FAX (302) 292-6668

MEMORANDUM

To: Delaware Claims Association

From: Sean A. Dolan, Esquire

Date: November 3, 2009

Re: Case Law Update

GENERAL CONTRACTOR NOT RESPONSIBLE FOR SUBCONTRACTOR'S FAILURE TO OBTAIN WORKER'S COMPENSATION INSURANCE

Pettit v. Country Life Homes, Inc., Del. Supr., No. 219, 2009 (October 30, 2009)

The Plaintiff in this case was injured while working for a subcontractor at a residential construction site. His employer had no worker's compensation insurance, although the general contractor had an agreement with the subcontractor that the subcontractor would supply that insurance. The claimant was awarded over $70,000.00 in worker's compensation benefits, but his employer declared bankruptcy so the Plaintiff was unable to collect. Thereafter, he filed suit against the general contractor, arguing that he was a third party beneficiary under the contract between the general and the sub.

The Superior Court dismissed the claim and the Supreme Court agreed. Here, even assuming the employee was a third party beneficiary of the contract between the general and the sub, it was the subcontractor

who breached the agreement by failing to obtain worker's compensation insurance. The Plaintiff also argued that 19 Del. C. Section 1105 makes a general contractor liable for unpaid wages owed to a subcontractor's employees. The Court rejected the idea that worker's compensation benefits would be considered wages for this purpose.

SUPERIOR COURT DISMISSES THIRD PARTY COMPLAINT FOR INDEMNFICATION FOR WORK RELATED INJURIES

O'Neal v. Mercantile Press, Del. Super., C.A. No. 08-11-070 JRJ (October 8, 2009).

The Plaintiff was employed by McFoy Refrigeration, and filed a lawsuit against Defendant Mercantile after he twisted his ankle while stepping off a ladder at work. At the time of the accident, he was performing work for Mercantile pursuant to a contract between McFoy and Mercantile. Mercantile filed a Third Party Complaint against McFoy claiming entitlement to contribution and/or indemnification pursuant to the contract, which included an implied duty to have its employees perform work at the job site in a workmanlike manner.

The Superior Court dismissed the Third Party Complaint, based on the exclusivity provision of the Worker's Compensation Act, which requires an injured employee to accept compensation for personal injury pursuant to the statute, regardless of the question or negligence, and to the exclusion of all other rights and remedies.

The Court noted an exception set forth in **Precision Air Inc. v. Standard Chlorine of Delaware, Inc.**, where the contract contains provisions requiring the employer to perform work in a workmanlike manner. Even where the contract is silent with regard to this provision, implied indemnification can arise. Here, however, the Court determined that the Third Party Complaint failed to set out facts that would be

sufficient to make out the claim that the employee failed to do the work properly, and thus, the Third Party Complaint was dismissed.

SUPERIOR COURT LIMITS RECOVERY TO MARKET VALUE FOR INJURY TO PET DOG

Naples v. Miller, Del. Super., C.A. No. 08C-01-093 PLA (October 6, 2009).

The Plaintiff filed suit in this case after the Defendant's dog got loose from his yard and attacked the Plaintiff's dog. The procedural posture of the case was somewhat confusing in this decision, but the Court ruled that the Plaintiff's recovery would be limited to the market value of the injuries sustained in the fight, which in this case was $400.00. The Plaintiff, however, wanted to recover for mental distress and punitive damages. The Court concluded that the dog is considered an item of personal property under Delaware law, and damages would be limited to market value. The Defendants had offered to settle the case for the $400.00, but this offer was not accepted. The Court ordered that that amount be set down in the way of a judgment, so that the Plaintiff could take whatever appeal she thought would be appropriate.

SUPERIOR COURT DISCUSSES PRIMARY VS. SECONDARY ASSUMPTION OF THE RISK

Farrell v. University of Delaware, Del. Super., C.A. No. 07C-09-175 PLA (October 8, 2009)

This case discusses the distinction between primary and secondary assumption of the risk. The Plaintiff was a figure skater who was injured at the University of Delaware when she fell. Apparently a child was skating in the wrong direction and skated into the Plaintiff, causing her to slip on the ice and fall. She was an experienced figure skater and she said that she had also seen other skaters skating in the wrong direction prior to her incident. On the other hand, the University of Delaware's handbook for

skating rink employees spoke to the notion that employees should monitor the flow of the skaters and take steps to correct skaters who were breaking the rules.

Under Delaware law, primary assumption of the risk would be a complete bar to the Plaintiff's claim, while secondary assumption of the risk has been subsumed into the comparative negligence concept. Primary assumption of the risk involves the Plaintiff expressly consenting to "relieve the Defendant of an obligation of conduct toward him and to take his chances of injury from a known risk arising from what the Defendant is to do or leave undone." The express consent does not have to be spoken or written, but can be implied. The Court noted that Plaintiff's participation in a sport does not imply that he or she has assumed the risk of all possible harms that could occur. Here the Court concluded that the Plaintiff had not assumed the risk of reckless conduct by another skater which would relieve the University of its duty.

The Court noted that this decision does not necessarily apply to unsupervised public skating sessions. Rather, in this case, University of Delaware personnel were actively directing the skaters with regard to their direction and conduct. Thus, while the Defendant could certainly argue that the Plaintiff was comparatively at fault, primary assumption of the risk would not apply.

SUPERIOR COURT DISCUSSES CONDUCT OF DEFENSE MEDICAL EXAMINATION.

Phillips v. Damon's Grille, Del. Super., C. A. No. 08C-08-160 JRJ (September 21, 2009)

This case involved the Defendant's Motion to Compel a physical examination of the Plaintiff. The Plaintiff had injured her wrist in a slip and fall on the Defendant's property. The Defendant arranged to have the Plaintiff seen by Dr. Gelman. When she

arrived, a staff member of the doctor's office asked the Plaintiff to fill out several forms. According to the Plaintiff, these were "new patient" forms. When she told the staff she was not a patient, but was there for a defense exam, the staff member told the Plaintiff to "take up the issue with the doctor." Thus, the Plaintiff did not fill out the forms and waited to see the doctor.

According to the Plaintiff, the doctor behaved rudely and antagonistically, wanting to know why the forms had not been filled out. He told her that her exam would have to be rescheduled. She claimed that all of this occurred before her scheduled start time.

The Plaintiff also argued that the forms requested by the doctor were essentially Interrogatories which forced the claimant to answer immediately, without consulting with counsel or without referring to medical records or other documents. She argued that an error on this form could be used to attack the credibility of the Plaintiff.

The doctor indicated that, when the Plaintiff refused to fill out the forms, he told her that the exam could not be completed. He said the Plaintiff's husband made a comical remark, and at that point he excused them from the evaluation but would agree to re-do it once the forms were completed.

Because of the Plaintiff's allegations, Dr. Gelman apparently indicated he would no longer be willing to conduct the examination of the Plaintiff, which meant that the only issue would be whether the Plaintiff should have to pay Dr. Gelman's $1,000.00 cancellation fee.

The Court discussed in detail the purpose of the defense medical examination and the particular concerns raised by the conduct of

both parties in this particular case, including the staff members of the doctor's office. The Court determined that the Plaintiff did not act inappropriately or in bad faith and did not find any basis to assess the Plaintiff with the cost of the missed appointment. The Motion to Compel the defense examination by Dr. Gelman would be moot, but obviously an appointment with another physician could be scheduled. The Court also commented on its on-going concern that the doctor's forms are essentially Interrogatories and that the examination could lead to an informal discovery deposition.