

DCA Meeting – February 5, 2013

Case Law Update

Civil:

The Delaware Superior Court Declines to Extend Delaware Premises Guest Statute to Unlisted Tenant in Rental Property

Demello v. Liu, C.A. No. N11C-08-037 WCC (Del. Super. Ct. Jan. 16, 2013)

In this premises liability case, Plaintiff filed suit to recover damages for injuries sustained when he stepped on a nail in a shed next to the rental property where he was residing. Plaintiff was one of several friends that rented a property from the Defendant-Landlord. Only two of the tenants were listed in the lease; Plaintiff was not named in the lease. The Defendant-Landlord, however, was aware that Plaintiff was living in the rental property.

The shed in which Plaintiff was injured was located behind an adjacent property, also owned by the same landlord. Testimony confirmed that Defendant-Landlord gave permission to tenants of both properties to use the shed for storage purposes. No one other than the Defendant-Landlord and the tenants of the two rental properties were permitted to access the shed.

The Defendant-Landlord filed a motion for summary judgment, arguing that Plaintiff should be considered a guest without payment and his conduct, therefore, should be covered under the Delaware Premises Guest Statute. Under the Delaware Premises Guest Statute, a guest without payment only has a cause of action against an owner or occupier of land for intentional acts or willful and wanton disregard of the rights of others by such owner or occupier. Defendant-Landlord argued that under the facts of this case, there was no evidence of intentional or willful and wanton acts on his part and the case should be dismissed.

In denying the Defendant's motion for summary judgment, the Court expressly held that the Delaware Premises Guest Statute did not apply in this case. In so holding, the Court found that it was of no relevance that the Plaintiff was not on the lease given that the Defendant was aware that the Plaintiff was living in the rental property. The Court also noted that the Defendant knew and allowed Plaintiff to enter the shed where the injury occurred. Finally, the Court concluded that only renters of the two rental properties owned by the Defendant-Landlord were permitted to use the shed and, therefore, use of the shed was conditioned on the payment of rent. Finding the Delaware Premises Guest Statute inapplicable, the Court denied Defendant's motion for summary judgment.

Insurance Law:

The Delaware Supreme Court finds that an individual injured in an automobile accident while driving personal vehicle for non-work related purpose was not entitled to UM/UIM benefits under a business insurance policy covering his company issued vehicle.

Bermel v. Liberty Mutual Fire Insurance Company, 56 A.3d 1062 (Del. 2012).

In this appeal from a grant of summary judgment in favor of defendant-appellee Liberty Mutual (“Liberty Mutual”), plaintiff-appellants sought review of the trial court’s decision denying them entitlement to underinsured motorists benefits provided by a business policy issued to plaintiff Bermel’s employer.

Plaintiff-appellant Bermel (“Bermel”) was involved in an automobile accident while driving his personally-owned and insured motorcycle and suffered significant personal injuries as a result. At the time, Bermel was an employee of Siemens Corporation (“Siemens”) and was assigned a company car for his business and personal use. Liberty Mutual issued a business policy to Bermel’s employer covering his company car. Siemens was the named insured on the policy. Following the accident, Liberty Mutual denied coverage under the Siemens’s business policy on the ground that Bermel was not a covered insured under the policy while operating a personally-owned motorcycle outside of the course and scope of his employment.

In the underlying case, Bermel sought entitlement to underinsured motorist benefits from the business policy covering his work vehicle. Bermel argued that the business policy covering his company car was personal to him, even though Siemens was the named insured, because excluding coverage based upon the vehicle being occupied at the time of the accident was tantamount to an impermissible “other motor vehicle” exclusion. Secondly, Bermel argued he was entitled to personally access the business policy since Siemens automatically deducted a nominal fee from his paycheck for his personal use of his company vehicle. Finally, Bermel argued the policy was ambiguously drafted and should be construed in his favor.

In granting summary judgment, the trial court found that the exclusionary language of the policy was consistent with the Delaware Supreme Court’s decision on *Frank v. Horizon Assurance Co.*, 553 A.2d 1199 (Del. 1989) and, therefore, not tantamount to a “other motor vehicle” exclusion. Further, the trial court determined that Bermel was not a named insured under the terms of the policy, that the nominal fee deduction did not convert Bermel into a named insured, and that the policy was unambiguously drafted.

On appeal, the Delaware Supreme Court affirmed the decision of the trial court. First, the Court found that Bermel was not a named insured under the business policy and, therefore, had no expectation of benefits under the policy. In so concluding, the Court relied upon the language contained in Delaware’s UM/UIM statute (10 Del. C. §3902) limiting coverage to “protection of persons insured” and Delaware case law since *Frank* comporting with that interpretation.

Further, the Court found Bermel had no expectation of benefits since he was not a named insured on the policy, did not pay the premiums for the policy and was not acting in his capacity as a covered employee when he was injured in the automobile accident. The Court further found that since Bermel had not purchased the policy and had no expectation of coverage, the policy's language limiting coverage to persons occupying fleet vehicles was not tantamount to an impermissible "other vehicle exclusion."

Second, the Court found that the minimal deductions from Bermel's paychecks did not qualify him as an insured under the policy. The Court's decision on this issue was one of first impression and it looked to *Frost v. Dep't of Labor and Indus. of the State of Washington*, 954 P.2d 1340 (Wash. Ct. App. 1998), as persuasive authority. In *Frost*, the issue was whether the employee or the employer owned the policy. In that case, the parties disputed the purpose of the deductions from plaintiff's paycheck (i.e. to cover insurance premiums or only to cover plaintiff's personal use of the car). If the payments were determined to be for insurance premiums, the plaintiff-employee would be the owner of the policy. The Washington Court of Appeals concluded the evidence was insufficient to find that the deductions were for insurance premiums. Here, there was no dispute that Bermel's deductions were for his personal use of the company car. Therefore, the Court followed the reasoning in *Frost* and found Bermel's payments did not qualify him as named insured under the Liberty Mutual policy.

Finally, the Court found the policy was not ambiguous. Bermel argued the policy was ambiguous because the named insured, Siemens, is a corporation that cannot sustain bodily injury or have family members. The Court found that since the policy defined the meaning of an insured when it is a corporation, the references in other sections of the policy to "bodily injury" and "family member" did not render the policy language ambiguous. Further, the Court found that even if the policy was ambiguous, Bermel would not be entitled to benefits under the "reasonable expectations" analysis. Under that analysis, the Court looks to the reasonable expectations of the insured at the time when he entered into the contract. In finding Bermel had no reasonable expectation of coverage, the Court followed *Ruggiero v. Montgomery Mut. Ins. Co.*, 2004 WL 1543234 (Del. Super.). In that case, the Superior Court found plaintiff did not have a reasonable expectation of coverage under her employer's policy because she was not working for her employer or driving a company-owned vehicle at the time of the accident. The Court agreed with the trial court in following the persuasive analysis in *Ruggiero* and affirmed the grant of summary judgment.

Workers' Compensation Case Updates

Alfonso Smith v. United Water Delaware, IAB No. 1387093 (Jan. 23, 2013)

The Board finds that a Claimant's unexplained loss of consciousness while driving to a car wash was within the course and scope of his employment.

Claimant was injured in a motor vehicle accident while driving his company vehicle. Claimant had a responsibility to maintain the company vehicle and in that vein Claimant testified that he was en route to vacuum the interior of the vehicle when he inexplicably lost consciousness and was involved in the accident. Employer defended on two grounds: first, that the Claimant was not within the course and scope of his employment when he was injured and second that his loss of consciousness was not in any way related to his employment.

With respect to the course and scope analysis, Claimant testified that he was unaware of vacuuming facilities on the employer's premises and therefore routinely used the "Five Points Car Wash" to vacuum the interior of his vehicle. The employer representative acknowledged that it was not forbidden to use another facility to maintain the interior of the vehicle and that it was possible that Claimant was unaware of the employer's vacuuming equipment; however, Claimant had never sought reimbursement for his expenses of vacuuming at "Five Points". Further, Claimant would have had to travel almost four miles past the employer's location to get to "Five Points" and along this path would have passed four or five other car washing businesses. In its analysis the Board found Claimant's testimony credible and concluded that Claimant was indeed en route to vacuum the interior of his company vehicle at the time of the motor vehicle accident. Accordingly, the Board did not accept the Employer's defense that Claimant was on "detour and frolic" during his work day, and that the accident was within the course and scope of his employment.

Secondly, Employer alleged that the inexplicable loss of consciousness of the Claimant rendered the claim non-compensable under the idiopathic fall doctrine, basically arguing that Claimant's loss of consciousness was due to an underlying medical condition and that the Claimant's employment did not trigger or otherwise contribute to the loss of consciousness. The Board did not agree and characterized the loss of consciousness as unknown and analyzed the issue under the "unexplained fall" doctrine utilizing the positional risk theory of compensability. In sum, the Board concluded that because the loss of consciousness of unknown or unexplained (i.e. not personal to the employee) and the employment placed the Claimant in a position to sustain the injury, the injury was compensable.

Puckett v. Matrix Services, Del. Supr. No. 435, 2012 (Jan. 7, 2013)

The Delaware Supreme Court concludes that in the context of a termination petition the Employer is not required to prove a change in the medical condition of the Claimant.

In this case Claimant was injured at work by way of aggravation of an underlying spinal condition. The Claimant had a condition known as a “syrinx” (a spinal cord cyst). While working for Employer, the condition became aggravated and symptomatic. Claimant filed a Petition to Determine Compensation Due, Employer opposed Claimant’s Petition. Ultimately the Board concluded that Claimant’s condition, as aggravated by the work injury, rendered him totally disabled.

Several years elapsed and Employer had the Claimant undergo two DME exams. The DMEs concluded that Claimant was no longer medically disabled from working. Claimant argued at the Hearing that his medical condition had not changed or improved. It is unequivocal that Claimant’s condition had not changed nor improved. In this regard, Claimant argued that the Board was precluded under the doctrine of res judicata (and collateral estoppel) from finding that he was not totally disabled. Claimant’s theory was that the prior Board decision had determined that his condition was totally disabling and that, absent a change in that condition, he was still totally disabled. Employer argued that the Board was statutorily empowered under 19 Del. C. 2347 to review prior compensation agreements and awards and that the passage of time had indicated the stability of Claimant’s condition.

The Board ultimately determined that Claimant was no longer medically totally disabled; noting that they found Employer’s expert more credible in that Claimant was at no greater risk of further aggravation of his syring condition while performing sedentary work than he was while staying at home. Claimant appealed to the Superior Court, which affirmed, and then the Supreme Court.

The Delaware Supreme Court agreed with the Board, and the Employer, that the Employer is not required to prove that Claimant’s medical condition has changed in order to prevail on a termination petition, only that the circumstances have changed such that the Claimant is no longer totally medically disabled at that time. Thus, res judicata (and collateral estoppel) are inapposite as the temporal component of the inquiry was not, nor could be, addressed by a prior Board. In sum, the Board’s decision on any given petition is not an adjudication of future disability and res judicata will not prohibit the Board from exercising its statutorily-authorized review under 19 Del. C. 2347.

M for Reargument, Supr. Ct. denied