RHODE ISLAND:

DOG BITE CASES: "THE FIRST BITE IS FREE"

The Supreme Court of Rhode Island recently affirmed the "one bite" rule for cases arising out of attacks occurring inside an enclosure on private property. In *DuBois v. Quilitzsch*, 2011 WL 2517021 (R.I. 2011), the Court held that homeowners will only be subject to liability if they have knowledge that the dog is dangerous.

In September 2007, the defendant homeowner applied to renew his license to maintain a pigeon loft on property in Pawtucket he owned with his father, also a defendant. The plaintiff, an environmental officer for the city of Pawtucket, arrived unannounced at the defendant's home to inspect the pigeon loft. Neither defendant was home at the time, but the defendants' three-year-old Australian Shepherd was tethered in the backyard. As the officer was inspecting the pigeon loft, the dog jumped out from behind some vines, knocked the officer over, and bit his left hand and right calf.

The father arrived at the scene and told plaintiff that the dog was not normally tethered in that spot, but his son had tied him there because he was expecting a delivery later that afternoon. The plaintiff argued that the defendant's placement of the dog in a different location because of the impending delivery created a genuine issue of material fact concerning the defendant's knowledge of the dog's volatility or dangerousness.

However, the defendants testified that the dog had no history of violence. The son testified that his father's statement was incorrect because the dog was tethered outside due to the nice weather, not because of the impending delivery. Furthermore, the son testified that even if he had known that plaintiff was coming for the inspection, he would not have worried about the dog being in the yard. Also, the defendants testified that the dog was tethered in the same spot for backyard barbecues and that guests would pet the dog without any problem.

The trial court awarded summary judgment to the homeowners on the strict liability, premises liability and negligence claims. For the strict liability claim, the Court found that the defendants' fence clearly gave plaintiff notice that the area was private. Because strict liability only applies if the dog is "out of the enclosure of the owner," no such claim existed in this case. As for the premises liability and negligence claims, the Court stated that the defendant's placement of the dog in the backyard in anticipation of the delivery did not create a genuine issue of material fact as to the dog's vicious propensity. Rather, the trial court stated that the defendant might have moved the dog because he knew "people may just not like dogs."

On appeal to the Supreme Court of Rhode Island, the plaintiff did not contest the trial court's strict liability decision, but claimed that a genuine issue of material fact was created by the defendant's relocation of the dog. The Court stated that the burden was on plaintiff to provide specific facts that would constitute a genuine issue for trial. The Court determined that the statement by the father was not sufficient to show that defendants had knowledge of the dog's potential violence. The Court went on to declare that if the Legislature had wanted to expand liability for incidents occurring within enclosed areas, it could have done so when it enacted the strict liability statute (R.I.G.L. § 4-13-16). Instead, the well-established "one-bite rule" was unchanged, showing that the Legislature wished to keep the status-quo. Finally, the Court held that the plaintiff's status as an invitee had no affect on the "one-bite rule"

The *DuBois* decision re-affirms the "one-bite rule" which has been a part of Rhode Island law for more than a century and limits a

Authored By: John A. Donovan, Esq. and Nick Cassidy

homeowner's liability for incidents that occur in an enclosed area.

PUBLIC-DUTY RULE: CITY NOT LIABLE FOR IMPROPER PLACEMENT OF TRAFFIC CONTROL SIGNS

In *Toegemann v. City of Providence*, 2011 WL 2517027 (R.I. 2011), the Supreme Court of Rhode Island held that the public-duty doctrine exempted the city from liability in its placement of traffic control devices that allegedly caused an accident.

In September 2007, plaintiff was involved in an automobile accident at the intersection of Adelaide Avenue and Melrose Street in Providence. Plaintiff had stopped at a stop sign on Melrose Street, where the speed limit was posted as twenty-five miles per hour. When the plaintiff drove through the intersection, his vehicle struck another. Plaintiff argued that: the speed limit was "too fast for the area," the intersection needed more than two stop signs, the speed limit signs were hidden by vegetation growth, and trees blocked the view of the road narrows sign. Plaintiff sought compensation from the City of Providence for damages to his vehicle, for emotional pain and suffering and for correction of the allegedly dangerous conditions.

In February 2009, the City moved for and was granted summary judgment. The lower court held that the defendant was protected by the public-duty doctrine and that the plaintiff had failed to show any genuine issue of material fact to exempt the case from public-duty doctrine.

On appeal, the Court affirmed the lower court's decision, stating that the placement of traffic control devices is "precisely the type of discretionary governmental activity that is shielded from tort liability under the public-duty doctrine." The purpose of the public-duty doctrine is to protect state and political subdivisions from tort liability arising out of discretionary actions that are not normally performed by private entities. The Court also identified three exceptions to the public-duty doctrine (1) alleged negligent activities are normally performed by private citizens; (2) breach of a special duty, owed to the plaintiff as a specific, identifiable individual and not merely a breach of some obligation owed to the general public; and (3) state engages in egregious conduct. None of these exceptions applied to the present case because: (1) placement and maintenance of traffic control devices is not normally done by private citizens; (2) plaintiff did not allege a breach of a special duty owed to him; and (3) plaintiff did not present any evidence to suggest that defendant was aware, or should have been aware of any prior accidents at the intersection in question and therefore the conduct was not egregious.

The *Toegemann* decision applies the public-duty doctrine to the placement and maintenance of traffic control devices. This case exemplifies the broad scope of the public-duty doctrine.

NEW HAMPSHIRE:

EXPERT OPINIONS: "BALLPARK" ESTIMATES WILL NOT SUFFICE

In *Gray v. Commonwealth Land Title Insurance Co.*, 2011 WL 2118734 (N.H. 2011), the Supreme Court of New Hampshire held that a "ballpark" estimate by an expert did not meet the requisite standard for expert reliability.

In July 2003, the plaintiff and her sister, in their capacity as trustees of Ocean Estates Realty Trust (Ocean Estates), received a quitclaim deed from the Triple "P" Ranch Realty Trust (Triple "P"). The deed, for which Ocean Estates paid $80,000 or $90,000, was intended to give Ocean Estates a piece of land located in Candia. In December of 2003, Ocean Estates conveyed to the plaintiff a warranty deed to the land. That same month, the plaintiff obtained an insurance policy that provided $328,000 in coverage against a title defect from the insurer.

In June 2006, after plaintiff had already started planning to develop the land, plaintiff discovered that Triple "P" never had title to the land and the state of New Hampshire was the legal owner. Plaintiff subsequently filed a claim with the insurer, who sent an appraiser to the land in September 2007. In the appraiser's report, he determined it was not a legally buildable lot and therefore the insurer decided there was only $15,000 in insurance

coverage. Plaintiff filed a breach of contract claim against the insurer because she wanted the insurer to pay for all of the expenses already spent on preparation.

During the bench trial, plaintiff attempted to call the insurer's expert to testify regarding the fair market value of the property. The lower court granted the insurer's motion to preclude the expert's testimony.

On appeal to the Supreme Court of New Hampshire, the plaintiff claimed that she should have been allowed to call the insurer's expert. The Court determined that the expert's testimony did not rise to the required threshold of reliability because the expert could only give a "ballpark range" of what the property might be worth. The expert had not conducted a market analysis of the lot as a buildable one, and therefore he could not offer anything more than a guess. The Court held that an expert's testimony must: rely on "sufficient facts or data", be the product of "reliable principles and methods," and "apply the principles and methods reliably to the facts of the case."

The *Gray* decision re-affirms the importance of having strong expert opinions that are based on fact rather than mere estimates.

SLOANE AND WALSH LLP
ATTORNEYS AT LAW
THREE CENTER PLAZA
BOSTON, MA 02108
T; 617-523-6010
F: 617-227-0927
WWW.SLOANEWALSH.COM

127 DORRANCE STREET, 4TH FLOOR
PROVIDENCE, RI 02903-2828
T: 401-454-7700
F: 401-454-8855