MASSACHUSETTS LAW UPDATE:

Transitory Water Rule Still Stands After Decision Abolishing Natural Accumulation Rule

Our office recently represented the defendants in a slip and fall case before the Massachusetts Superior Court entitled Donovan v. Massachusetts Bay Transportation Authority and Empire Cleaning, Inc., No. 11-2695E. The defendants moved for summary judgment, and the Court allowed our motion, holding that the Supreme Judicial Court decision abolishing the "natural accumulation rule" in Massachusetts with regard to the clearing of snow and ice did not also abolish the "transitory water rule." Donovan v. Massachusetts Bay Transportation Authority and Empire Cleaning, Inc., No. 11-2695E (Troy, P.)

This matter relates to a plaintiff who allegedly slipped and fell on the wet floor of an elevator in a Massachusetts Bay Transportation Authority ("MBTA") station following three days of heavy rain in October 2010. The plaintiff filed the subject lawsuit against the MBTA and the company contracted to clean the station.

The defendants moved for summary judgment based on the "transitory water rule," or "doctrine of many feet." According to this rule, "a premises owner is not liable in negligence where transitory conditions due to normal use in wet weather could not reasonably have been prevented, according to ordinary experience." Id. The Court held that the plaintiff provided no evidence which would alter the application of the rule to this case.

Moreover, the Court rejected the plaintiff's argument that "the transitory water rule" is no longer in force following the Supreme Judicial Court's Decision in Papadopoulos v. Target Corp., 457 Mass. 368 (2010). In Papadopoulos, the SJC abolished the "natural accumulation rule" under which the landowner had no duty to remove natural accumulations of snow and ice. According to that decision, the landowner has a duty to act reasonably regarding hazards arising from snow and ice.

In Donovan, the Court chose to follow an unpublished Appeals Court decision rejecting the argument that Papadopoulos also abolished the transitory water rule. See Bolafka v. SPG Arsenal LP, 81 Mass. App. Ct. 1103 (2011). Furthermore, the Court held that even without the transitory water rule, the plaintiff failed to raise a genuine issue of material fact concerning whether the defendants acted unreasonably.

Attorneys Gail M. Ryan and Brian W. Haynes from our office were involved in obtaining this great result.

An Occurrence Arising Out Of The Premises Defined As Arising Out Of A "Condition" Of The Premises

In Vermont Mutual Ins. Co. v. Zamsky, No. 13-1172 (1st Cir. 2013), the US Court of Appeals for the First Circuit upheld a lower court's ruling that an exclusion in the policy did not apply because the occurrence did not arise out of a "condition of the premises."

Defendant Andrew Zamsky is an insured under three homeowners' policies issued to his parents by plaintiff Vermont Mutual Insurance Company ("Vermont Mutual") for three different properties. All three policies include bodily injury coverage, subject to several exclusions. One exclusion relates to coverage for injuries "[a]rising out of a premises" owned by the insured which is not an "insured location" ("UL exclusion"). Id. The Zamskys owned a fourth property in Falmouth, Massachusetts, which was not insured with Vermont Mutual. This matter related to the applicability of the UL exclusion to an incident at the Falmouth property.

In November 2008, Zamsky and several friends, while at the Falmouth property, attempted to start a fire in a fire pit.

One of the friends retrieved a container of gasoline from a shed or garage and poured it onto the fire, resulting in at least three people catching on fire. One suffered especially severe burns, and filed suit against Zamsky.

Vermont Mutual shared in the costs of defending Zamsky under a reservation of rights and filed the subject declaratory judgment action in federal court. The United States District Court granted the defendants' motion for summary judgment, holding that the UL exclusion did not apply, and that Vermont Mutual owed Zamsky a duty to defend. Vermont Mutual appealed.

The First Circuit Court of Appeals noted that the Massachusetts Appeals Court had previously interpreted "arising out of a premises" to mean "arising out of a condition of the premises." In Callahan v. Quincy Mutual Fire Ins. Co., 736 N.E. 2d 857 (Mass. App. Ct. 2000), where an insured's dog had bitten a third party at a property owned by the insured, but not insured with Quincy Mutual, the UL exclusion did not apply because the dog "was not a condition of the … premises." While the incident occurred at the uninsured location "it did not 'arise out of'" the premises. Id.

In Commerce Insurance Co. v. Theodore, 841 N.E. 2d 281 (Mass. App. Ct. 2006) a third party fell from a ladder and sustained injuries while working on a dying tree located at a property owned by the insured, but not insured by Commerce. In this case, the Appeals Court held that the UL exclusion applied because there was "a sufficiently close relationship between the injury and the premises." Id.

According to the First Circuit Court of Appeals, Callahan and Theodore together "establish a dichotomy: if the covered occurrence arises out of a condition of the premises, and the exclusion's other requirements are satisfied, the exclusion applies; otherwise, it does not." Vermont Mut. Ins. Co., No. 13-1172, at 9. (Emphasis in original.) Applying this logic, the Court examined whether the incident arose out of a condition of the premises, and it found that this incident did not. The fire pit was not a condition of the property. Rather, it was "a portable item of personal property that happened to be stored in a building on the Falmouth premises." Id. The First Circuit Court of Appeals upheld the lower court's ruling that the exclusion did not apply.

CONNECTICUT LAW UPDATE:

Connecticut Supreme Court Holds that Defendant Has Burden of Proof for Statutory Tolling Provision

In Romprey v. Safeco Ins. Co. of America, No. 18858 (Conn. Oct. 29, 2013), the Connecticut Supreme Court held, 5-2, that the defendant insurance company had the burden of proof with regard to a statutory tolling provision related to an underinsured motorist.

In November 2004, the plaintiffs were involved in a motor vehicle accident caused by the negligence of another driver. The plaintiffs filed suit against their insurer more than three years after the accident, seeking to recover under the uninsured/ underinsured motorist provision of their policy. Plaintiffs alleged that they complied with all of their obligations under the policy.

The defendant insurer filed an answer and special defenses in which it asserted that the suit was time-barred pursuant to Connecticut General Statutes §38a-336(g)(1), and moved for summary judgment. The plaintiffs objected, and in support of their objection submitted two unauthenticated copies of letters from their attorney's office from 2005 and 2006 advising the defendant that they had exhausted the tortfeasor's policy limits and demanding arbitration. The trial court granted the defendant's motion for summary judgment.

The policy stated in relevant part:

"All claims or suits under [the uninsured and underinsured motorist provisions] of this policy must be brought within three years of the date of the accident. However, in the case of a claim involving an *underinsured motor*

vehicle, the insured may toll any applicable limitation period by:

1. Notifying us prior to expiration of the three year period, in writing, of any claim *the insured* may have for [u]nderinsured [m]otorists [c]overage; and

2. Commencing suit or arbitration proceedings not more than 180 days from the date of exhaustion of the limits of liability under all automobile bodily injury bonds or policies applicable at the time of the accident by settlements of final judgments after any appeals."
Id. (Emphasis in original.)

Connecticut General Statutes §38a-336(g)(1) states:

"No insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured or underinsured motorist provisions of an automobile liability insurance policy to a period of less than three years from the date of accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (A) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (B) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals." Id.

The trial court determined that the defendant was entitled to judgment as a matter of law, unless there was evidence to support the application of the tolling provision. The tolling provision, however, only applied if the claim involved an underinsured motorist. The court determined that the plaintiffs did not meet the "threshold requirement" of showing that the motorist was underinsured, and therefore the defendant should be granted summary judgment.

Additionally, the trial court stated that even if the claim involved an underinsured motorist, then the plaintiff had still failed to submit evidence establishing that the tolling provision had been satisfied.

In affirming the trial court's ruling, the Appellate Court focused on whether the plaintiff had met the threshold requirement of showing that the tortfeasor was underinsured, and concluded that the trial court had properly determined that the plaintiffs had not demonstrated that their claim involved an underinsured vehicle.

The Supreme Court, however, "concluded that the threshold question of whether the plaintiffs had exhausted the limits of [the tortfeasor's] insurance policy was disputed," and that summary judgment should not have been granted on this ground. Id. The plaintiffs alleged in their complaint that the tortfeasor did not have sufficient automobile coverage, and the defendant acknowledged that this point was disputed. The Supreme Court held that, the defendants as the moving party had not shown the absence of any genuine issue of material facts, and summary judgment was therefore improper.

Additionally, both the trial court and Appellate Court concluded that the plaintiffs had failed to submit evidence to show that they had satisfied the two prongs of the tolling provision (although Appellate Court did so indirectly in a footnote). The Supreme Court held that in doing so, the lower courts improperly shifted the burden of establishing a disputed issue to the plaintiffs as the nonmoving party.

The Supreme Court noted that in summary judgment, the movant has the burden of showing the nonexistence of any issues of fact, which under applicable legal principles entitle the movant to judgment as a matter of law. Once the movant has met this burden, the opposing party must show that there is a genuine issue of fact to justify a trial. In this case, the burden of demonstrating the existence of a disputed issue of material fact regarding the statutory tolling provisions, when the defendant had

failed to introduce any evidence in its Motion for Summary Judgment demonstrating that there was no genuine issue of material fact that the plaintiff failed to comply with the tolling provision, did not shift to the plaintiffs.

The Supreme Court acknowledged that while a defendant can normally meet its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the suit initiated outside the statutory limitation period, it had never previously addressed whether the burden should remain on the moving party when the statute in question includes a tolling provision.

The Supreme Court held that "the party moving for summary judgment should not be able to prevail by showing the absence of a genuine issue of fact solely with respect to one part of the statute upon which it relies, while ignoring the statutory tolling provisions which provide an alternate means of commencing timely action." Id. In this instance, the defendant's Motion for Summary Judgment failed to present any evidence establishing the nonexistence of a genuine issue of material fact regarding the tolling provision, so the burden of proof never shifted to the plaintiff. Accordingly, the Supreme Court reversed the judgment of the Appellate Court.

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