Getman, Schulthess, Steere & Poulin, P.A.

NEWSLETTER

New Hampshire, Massachusetts, Maine & Vermont

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1838 Elm Street
Manchester, NH 03104
603-634-4300
www.gssp-lawyers.com

TELEPHONE EXTENSIONS

Laurence W. Getman
x 703
Stephen J. Schulthess
x 702
Douglas N. Steere
x 704
Christopher J. Poulin
x 799
Jill A. DeMello
x 766
Naomi L. Getman
x 732
Elizabeth L. Hurley
x 788
Clara E. Lyons
x 725
Debbie L. Makris
x 726
Tracy L. McGraw
x 735
Edwinna Vanderzanden

x 742
Heather S. Ward
x731
Brendan L. Wile

Dear Michael,

This newsletter discusses updates and changes in the law. Should you have questions, please contact Larry Getman at lgetman@gssp-lawyers.com or (603) 634-4300 x 703. Larry Getman's V-Card

MASSACHUSETTS APPEALS COURT

PREMISES LIABILITY - FORESEEABILITY & DUTY

Dubuque v. Cumberland Farms, Inc.
(June 6, 2018)

On November 28, 2010, Kimberly Dubuque was entering a Cumberland Farms store in Chicopee, Massachusetts when she was struck by an SUV. The 81 year-old driver of the SUV had traveled at a high rate of speed across a nearby intersection, passed through an "apex" entrance into the Cumberland Farms parking lot, and crashed through the façade of the store. Dubuque, a 43 year-old wife and mother, was killed as a result of the accident.

At the time of the accident, Cumberland Farms owned and operated nearly 600 convenience stores. During the twenty years leading up to the accident there had been hundreds of documented incidents involving drivers losing control of their vehicles and striking buildings at its stores in various locations. Several of these incidents or "car strikes" involved injuries to customers and employees, including a fatality and a leg amputation. In 2004, Cumberland Farms' director of risk management began advocating for the implementation of a widespread bollard program to protect customers, employees and property from uncontrolled motor vehicles. However, installation of bollards was not required by any statute, regulation or ordinance. In 2010 Cumberland Farms

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Massachusetts
Licensed Attorneys:

Laurence W. Getman
Christopher J. Poulin
Debbie L. Makris
Tracy L. McGraw
Clara E. Lyons
Heather S. Ward

Vermont
Licensed Attorneys:

Debbie L. Makris

Maine
Licensed Attorneys:

Douglas N. Steere
Elizabeth L. Hurley
Edwinna Vanderzanden

New Hampshire
Licensed Attorneys:

Laurence W. Getman
Stephen J. Schulthess
Douglas N. Steere
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Jill A. DeMello
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Tracy L. McGraw
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Heather S. Ward
Brendan L. Wile

compiled an internal report documenting 485 car strikes over the past ten years. In the summer of 2010, its CEO approved a preliminary budget of $2 million for the installation of bollards along the walkways in front of a limited number of Cumberland Farm stores. However, the Chicopee store did not qualify for the bollard program because it did not have at least two prior car strikes and was not among the highest revenue generators. By the time of the accident few stores had bollards and most had been installed to protect property rather than entrances.

Not only did the Chicopee store lack protective barriers, but one of the parking lot entrances came to a point or "apex" which allowed drivers to enter from the road without turning or reducing their speed. At least one Cumberland Farms employee had complained to store managers about the dangers presented by vehicles entering the lot at high rates of speed. Furthermore, the use of apex entrances was discouraged by the Massachusetts DOT and banned by many municipalities, including Chicopee. However, since the Chicopee store was grandfathered it was not required to close the entrance. In 2009 both the DOT and city asked Cumberland Farms to close the entrance, but it declined to do so since it was aware that the DOT had plans to close the entrance itself.

The jury found Cumberland Farms negligent and awarded a verdict in the amount of more than $32 million to the Estate. Cumberland Farms filed motions for judgment notwithstanding the verdict (jnov), new trial and remittitur. The trial judge denied the motion for jnov, but found that the verdict was excessive and ruled that a new trial would be granted unless the plaintiff agreed to a reduced verdict of $20 million. The plaintiff decided to accept the reduction.

Cumberland Farms appealed arguing that: (1) it was error to deny its motion in limine to exclude evidence of prior car strikes and to admit the 2010 internal report; (2) it did not owe a duty in light of the random and unforeseeable acts of the driver; and (3) the jury acted out of passion, partiality or prejudice in reaching its verdict. Plaintiff cross-appealed the decision on remittitur. The Appeals Court affirmed the amended verdict.

(1) Prior car strikes. The trial judge instructed the jury that it may consider evidence of prior car strikes on the issue of notice and not as evidence of negligence unless the car strikes were substantially similar to the incident at issue. The Appeals Court rejected Cumberland Farms' argument that the prior car strikes had to be practically identical to the one at issue, ruling that "absolute

GETMAN, SCHULTHESS, STEERE & POULIN, P.A.

Laurence W. Getman
Getman, Schulthess, Steere & Poulin, P.A.

1838 Elm Street
Manchester, NH 03104
(603) 634-4300
FAX (603) 626-3647

Website:
www.gssp-lawyers.com

Phone Number for ALL New Hampshire Courts

New Hampshire Courts
1-855-212-1234

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identity of circumstance was not required." Evidence that Cumberland Farms was aware of the risk of uncontrolled car strikes endangering customers and employees at its stores was relevant to both foreseeability and breach of duty. The Court also ruled that there was sufficient detail in the internal report to determine that the majority of the 485 car strikes involved uncontrolled vehicles striking the front of a store at or near the door.

(2) Foreseeability. Cumberland Farms also argued that the accident was random and unforeseeable as a matter of law. The Appeals Court noted that Cumberland Farms was obligated to guard against reasonably foreseeable risks of harm and was not a "guarantor of the safety" of persons on its property. However, in light of the evidence of danger associated with the apex entrance, the numerous prior strikes at its stores and the absence of protective barriers, the jury could reasonably conclude that the accident was foreseeable.

(3) Duty of Care. The Court also rejected the argument that Cumberland Farms did not owe a duty as a matter of law, ruling that as owner of business premises open to the public Cumberland Farms owed a duty to use reasonable care to prevent injury whether caused by third persons regardless of whether their acts were accidental, negligent or intentional.

(4) Remittitur. Finally, the Court affirmed the trial judge's decision to order remittitur of the verdict to $20 million. The Court ruled that a trial judge has broad discretion in ruling on a motion for remittitur and may grant such a motion where the award is greatly disproportionate to the injury, represents a miscarriage of justice, or is so large that the jury was influenced by passion, partiality, prejudice or corruption. A trial judge's decision will not be set aside on appeal except in exceedingly rare cases. The trial judge found that the award was excessive and influenced by passion or prejudice, especially in the absence of any evidence of conscious pain and suffering, and in the light of a note left by the jury stating that Cumberland Farms should honor the decedent's life "by investing time and money in the safety of its guests and employees". The Appeals Court held that the trial judge did not abuse his discretion in reducing the verdict and in denying the request for a new trial.

NEW HAMPSHIRE
COOS COUNTY SUPERIOR COURT

MEDIATION

INSURANCE ADJUSTER ATTENDANCE

Davis v. Keniston et al.

(June 14, 2018)

The plaintiff sought an order requiring the defendants' insurance adjuster, who resides in Connecticut, to be physically present during a mediation to be conducted in Concord, New Hampshire. The trial court ruled that it did not have authority to compel the adjuster to attend in person. While former Superior Court Rule 70(D)(3) mandated that a liability insurer have a representative with settlement authority present at ADR sessions unless excused, the current version of the rules does not contain any such requirement. Instead, the court ordered that "the insurance adjuster be readily available by skype or other similar technology" during the mediation.

NOTE: This is a trial court order and is not binding on other superior courts in New Hampshire.

FIRST CIRCUIT COURT OF APPEALS

PREMISES LIABILITY

Potvin v. Speedway, LLC.

(June 4, 2018)

The plaintiff and her boyfriend stopped for gas at a gas station owned and operated by Hess Corporation, a predecessor to defendant Speedway, LLC. While her boyfriend was inside paying for gas, the plaintiff exited the vehicle to look for a squeegee to clean the windshield. She was walking backwards toward the car when the heel of her shoe got caught in a groove in the pavement, causing her to fall and sustain injuries.

The groove was part of a series of grooves known as positive limiting barriers (PLBs) which serve to contain gasoline spills. The PLBs were required by Massachusetts law and complied with the

mandated depth and width requirements.

The district court granted summary judgment in favor of Speedway, ruling that the PLBs, if dangerous at all, presented an open and obvious danger so that there was no duty to warn of their presence.

On appeal, the plaintiff conceded that the PLBs were open and obvious to the average person, but argued that a genuine issue of fact existed as to whether they were dangerous and gave rise to a duty to warn. The court disagreed, explaining that although a property owner generally owes a duty to protect lawful visitors from dangerous conditions on its land, this duty is not that of an insurer and it does not require the property owner to "supply a place of maximum safety." Instead, a property owner is only obligated to maintain its premises in a condition safe to a person who exercises reasonable care under the circumstances. Since the PLBs were open and obvious, there was no duty to warn visitors about them regardless of whether or not they could be regarded as dangerous.

The court also rejected the plaintiff's argument that the potential for customers to be distracted by their surroundings gave rise to a special duty to take extra precautions to warn of the PLBs because the plaintiff failed to raise the issue before the trial court. The court also noted that since the plaintiff was walking backwards when she fell, this case would be a "notoriously poor vehicle for advancing a 'distraction' argument."

The plaintiff also argued that even though the PLBs were open and obvious, the defendant had a duty to remedy the danger they presented. The court was unpersuaded, ruling that the PLBs were required by and conformed to state law and, furthermore, the plaintiff did not propose a feasible remedy that might alleviate any danger presented by their presence. Warnings, such as signs or brightly colored paints, are not remedies. Where no feasible remedy is proposed, the owner cannot be held liable for breaching a duty to remedy.

NEW HAMPSHIRE SUPREME COURT

WORKERS' COMPENSATION

Appeal of Redmond

(June 5, 2018)

The claimant appealed from a decision of the Compensation Appeals Board (CAB) denying her claim for physical therapy treatment expenses as not reasonable, necessary or causally related to her workplace injury.

The claimant sustained injuries to her knee and hip apparently as the result of an assault that occurred in the course of her employment. Her treating physical therapist testified that although she initially treated the claimant for her knee and hip, she soon began to focus on other aspects of the claimant's health, including PTSD and craniosacral therapy (CST) treatments to reduce pressure in her injured eye. The physical therapist's treatments, which were devoted to assisting the claimant in achieving "calm and quiet in her mind", could not be recreated from her notes, and her outcome measurements consisted only of her observations and claimant's reports.

The CAB found that only the first 12 treatments were reasonable and necessary as a result of the injury.

An eye specialist who conducted an IME agreed that although some physical therapy was helpful in the claimant's recovery from the psychological shock and musculoskeletal effects of the injury, the duration was excessive since there was no medical indication for such treatment related to the eye. In fact, the claimant's own eye specialist did not credit physical therapy for relieving pressure in her eye.

An orthopedist who reviewed the claimant's records also found the number of physical therapy treatments to be excessive and questioned the medical indications for physical therapy as treatment for PTSD. Furthermore, another medical expert who reviewed the claimant's records reported that CST was not an accepted treatment for PTSD.

The claimant challenged the opinions of the employer's experts, arguing that they were not experts in treating adults suffering from PTSD. She argued that RSA 281-A:38 requires that all doctors submitting opinions be certified in and maintain a current practice in the applicable specialty. The Court rejected this argument, noting that the statute applies only to providers conducting IME's, not to all doctors who submit opinions to the board. The Court also rejected the argument that it was error to rely on medical opinions from doctors who did not conduct IME's.

The claimant also argued that the CAB erred in failing to give her physical therapist's opinion "substantial weight", noting that even if it was to assume, without deciding, that the treating physical therapist's opinion was entitled to weight comparable to that of a treating physician, the board could reasonably have concluded that the physical therapist's opinion was based on the claimant's subjective reports and, therefore, rejected it in favor of the other medical opinions.

The Court concluded that the CAB did not err as a matter of law in rejecting the opinions of claimant's treating physician and therapist, and did not improperly substitute its own opinion.

AUTOMOBILE INSURANCE - ARBITRATION

Rizzo v. Allstate insurance Company
(May 1, 2018)

Rizzo was injured when the car in which he was a passenger was rear-ended by another vehicle. After settling his personal injury claim against the responsible driver for the liability policy limits of $20,000, he asserted a claim for underinsured motorist benefits under the policy issued by Allstate to the driver of the vehicle he occupied. Allstate denied the claim based on its position that the injuries were pre-existing and the settlement with the tortfeasor fully compensated Rizzo for his injuries.

Rizzon demanded arbitration pursuant to a provision in the Allstate policy which stated that:

If the insured person or we don't agree on that person's right to receive any damages or the amount, then at the

written request of either the disagreement will be settled by arbitration.

...

Regardless of the method of arbitration, any award not exceeding the limits of the Financial Responsibility law of New Hampshire will be binding and may be entered as a judgment in a proper court.

The arbitration panel awarded $63,000 with a $20,000 offset for the tortfeasor settlement. Allstate rejected the award and invoked its right to a trial pursuant to the following provision in its policy:

Regardless of the method of arbitration, when any arbitration award exceeds the Financial Responsibility limits in the State of New Hampshire, either party has a right to trial on all issues in a court of competent jurisdiction. ...

Rizzo filed a breach of contract suit in superior court seeking to have the arbitration award confirmed, arguing that the trial de novo provision was unenforceable, ambiguous and void in violation of public policy. The parties filed cross motions for summary judgment. The trial court granted Rizzo's motion for summary judgment and confirmed the arbitration award.

The Supreme Court reversed the decision on appeal. The Court ruled that the trial de novo provision does not violate New Hampshire public policy regarding arbitration. Although, as a general rule, New Hampshire favors arbitration, parties to a contract are free to elect forms of alternative dispute resolution other than arbitration. The Court also ruled that the provision did not contravene the uninsured motorist statute. Furthermore, the provision was not an unfair settlement practice since it gave either party the right to a de novo trial when the award exceeds the financial responsibility limits.

Additionally, the Court ruled that Rizzo's status as a passenger had no bearing on the unconscionability argument. Although as a passenger Rizzo was a third party beneficiary and an insured, he was bound by the terms and conditions of the policy.