ISSUE ELEVEN – JUNE 2014

Burns & Farrey

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

ALSO IN THIS ISSUE:

Massachusetts Supreme Judicial Court both expands and limits strict liability for injury caused by violation of State Building Code

Massachusetts Supreme Judicial Court has overruled a long-standing statutory interpretation limiting strict liability for State Building Code violations to those violations that concern fire safety. In Sheehan v. Weaver, (April 10, 2014), the court ruled that M.G.L. c. 143, § 51, imposes strict liability on the owner or controller of a commercial "building" for any violation of the State building code that results in a personal injury. At the same time, the Court narrowly construed the term "building" to exclude the residential portion of a mixed-use structure.

William Sheehan was a residential tenant in a mixed-use building owned by Jean and David Weaver. After returning from a night of drinking, Sheehan, who lived on the third floor of the building, ascended an exterior staircase leading to the outer door on a second floor landing. He leaned against the stairway's guardrail, which broke, causing him to fall and sustain serious injuries.

Sheehan sued the Weavers in negligence. He also asserted a claim under section 51, citing 18 violations of the building code and arguing that such violations rendered the Sheehans strictly liable. That statute imposes strict liability on an owner, or other party, in control of "a place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment or building" for violations of c. 143 and the State building code.

At trial, the jury found the Weavers negligent and also determined that the building code violations caused Sheehan's injuries. The Weavers did not contest the finding of negligence, but moved for judgment not withstanding the verdict on the strict liability claim, arguing that section 51 did not apply.

On appeal, the Court was faced with two issues: whether strict liability under section 51 was limited to fire safety violations, and whether the mixed-use property owned by the Weavers was a "building" under the statute.

As originally enacted, section 51 imposed strict liability for violations of certain sections of c. 143 that concerned fire safety violations. When the State building code was enacted in 1972, the statute was amended to impose strict liability for violations of "any" of the "provisions of [s. 143] and the state building code." Despite that change, the Court ruled in a 1999 decision, McAllister v. Boston Housing Authority that section 51 did not apply "to persons using stairways and egresses for purposes other than escape from danger from fire."

Noting that later cases had interpreted the statute more broadly, the Court expressly overruled McAllister, holding that "in accordance with the plain language of the statute, and considered in light of the prior legislation it replaced, § 51 applies to **any** violations of G.L. c. 143 and the State building code." (emphasis added)

Although the court expanded the scope of the violations subject to section 51, it retained a narrow interpretation of what structures constitute "buildings" subject to the statute. The court looked at earlier decisions that had interpreted section 51 as covering "places of public or commercial use, places of assembly or places or work" and had specifically excluded single-family houses and owner-occupied two-family houses whose owners rented one unit to tenants. It also remarked that the fact that portions of a structure are accessible to the general public does not necessarily make that structure a "building".

Noting that such a limited interpretation of the term "building" properly focuses on structures in which building code violations pose a risk to a significant number of people and prevents expansion of the statute beyond what the legislature intended, the Court went on to consider section 15's application to a structure like the Weaver property, that contains both commercial and residential uses.

First, the Court observed that the business and residential components of the Weaver property were segregated. Next, it noted that the building code applies different rules to different portions of a mixed-use structure. Therefore, the Court said, the residential portion of the Weaver property "was both legally and structurally distinct from the business portion" and should be treated separately for purposes of section 51.

Because both the building code violations and Sheehan's accident occurred in the residential portion of the Weaver property, the Court considered whether that specific portion of the structure was >

100 High Street, 11th Floor
Boston, MA 02110
T: 617.439.4758 • F: 617.439.4148

446 Main Street, 22nd Floor
Worcester, MA 01608
T: 508.756.6288 • F: 508.831.9769

10 Weybosset Street, Suite 207
Providence, RI 02903
T: 401.621.7286 • F: 401.621.7348

www.burnsandfarrey.com

In the future, courts likely will impose strict liability for all violations of the State building code that result in injuries, not just fire safety violations, provided that the structure where the violations occur constitutes a "building" under c. 143, § 51.

a "building" within the meaning of the statute. It pointed out the following: the residential portion was not used as a place for a large number of people to gather; the structure contained only 3 apartments; and only 2 of those apartments used the staircase and landing where the accident occurred. Based on those facts, the Court ruled that the residential portion of the Weaver property was not a "building" subject to section 15.

The verdict holding the Weavers strictly liable was reversed.

Looking forward

Courts likely will impose strict liability under c. 143, § 15 for **all** violations of the State building code, provided that the structure where the violations occur constitutes a "building" under the statute. In deciding whether a particular structure is subject to section 15, courts will look closely at the facts concerning the physical layout and use of the structure, and likely will interpret the statute narrowly.

Massachusetts Appeals Court considers "loss of use" damages in unfair claims settlement suit

In *Rivera v. Commerce Insurance Company*, 84 Mass. App.Ct. 146 (2013), the Massachusetts Appeals Court analyzed the proper measure of damages for loss of use of funds in an unfair claims settlement action, including whether the plaintiffs could recover their expenses in the underlying tort litigation, and the proper rate of interest. After trial on the plaintiffs' c. 93A and c. 176D claims, a Superior Court judge had found that Commerce Insurance Company violated Massachusetts' consumer protection statutes governing insurance practices by failing to conduct a reasonable investigation and to effect a prompt, fair and equitable settlement once liability was reasonably clear.

The suit came about after a dump truck operated by Commerce's insured hit plaintiff, Efraim Martinez Rivera's car head on in August, 2003. Within 9 days, Commerce determined that the accident was solely the fault of its insured. Over the next 3 years later, plaintiffs' lawyer kept the adjuster informed about medical procedures, Rivera's inability to work, and the family's financial difficulties. The plaintiffs filed suit just before the statute of limitations ran, and a few months after that their lawyer made a demand to settle for the policy limits. Commerce declined to make any offer. In July, 2007, the plaintiffs sent a c. 93A demand letter. Commerce made what the court later deemed a bad faith, unreasonable offer. About a year later, with trial imminent, the parties settled for the policy limits.

The c. 93A and c. 176D claims were then tried to a judge. The judge was extremely critical of the insurer, finding that the adjuster, "rather than conduct a reasonable investigation, as required by law . . . was quite prepared to cherry-pick his facts, ignore the unfavorable aspects of [his medical expert's] report and his own counsel's requests for a further investigation, in order to justify the lowest offer he could . . . in the hope that the plaintiffs' financial straits would compel them to accept an offer of settlement far lower than reasonably commensurate with Rivera's injuries."

The judge awarded the plaintiffs damages of $55,000, and then tripled those damages based on Commerce's bad faith. The damages did not include the plaintiffs' expenses from the tort phase of the litigation.

On appeal, the plaintiffs challenged the disallowance of their tort-based expenses. They also asserted that the six percent interest figure used by the trial judge in the damages calculation was too low.

The Appeals Court stated, "In this factual scenario, economic damages consist of lost interest on the amount wrongfully withheld by the insurer in violation of c. 93A for the period of the unlawful delay." Actual damages under c. 93A include all losses that were foreseeable consequences of the defendant's unfair or deceptive act, including the plaintiffs' reasonable tort-related expenses and disbursements caused by the insurer's bad faith delay. The case was remanded for trial on that issue.

With regard to the rate of interest, the Appeals Court noted that the plaintiffs were entitled to a "fair rate" of interest on the amount wrongfully withheld by Commerce, and that no statute required use of the twelve percent figure sought by the plaintiffs. The argument for 12% interest likely was premised on the statutory rate applied when calculating prejudgment interest in Massachusetts. The trial judge had found that the plaintiffs could have invested the funds withheld in low-risk, conservative investments that would have netted a rate of six percent for an 11-month period. In light of prevailing market conditions, the Appeals Court found that the trial judge's selection of six percent as the interest rate was not an abuse of discretion.

Looking forward

Insurers should promptly and thoroughly investigate tort claims and, where fault is reasonably clear, timely make an appropriate offer commensurate with the established damages.

Lack of experts leads defendant to costly settlement

In a recently settled Massachusetts construction defect case, *One Charles Condominium v. MDA Park, LLC,* an early settlement by the primary defendant left the other defendants struggling to refute the plaintiff's theories without expert witnesses.

The board of directors of One Charles, a luxury high-rise condominium near Boston Common, sued the condominium's "declarant", MDA Park LLC, claiming that the building's HVAC system was defective. In addition to the developer, the defendants included numerous contactors, subcontractors, architects and engineering firms.

As the party with the greatest risk, MDA Park was leading the defense. Some other defendants, including the HVAC design engineer, Cosentini Associates, were relying on MDA Park to coordinate the defense and to cover any potential damages. MDA Park, on the other hand, was expected to sue its contractors and subcontractors to recoup any judgment entered against it.

Plaintiff's counsel decided to settle with MDA Park for a relatively low figure, in order to convince the other defendants that they would have to contribute to a judgment or settlement. When MDA Park was dismissed, its experts also terminated their involvement in the case, leaving the other defendants without a big source of funds, a leader of their defense, or the experts necessary to refute the plaintiff's case.

Almost all of the experts on whom the defendants were relying had been retained and designated as experts by MDA Park. Once MDA Park settled, the other defendants had no access to those experts.

Cosentini struggled to meet disclosure requirements and deadlines, submitting supplemental expert disclosures, but the court ruled that those disclosures were inadequate, and granted a motion to strike.

Just before the start of trial, the court allowed the plaintiff's motion to preclude Cosentini from calling any experts at trial, based on the inadequacy of the expert disclosures.

Without expert witnesses, and without MDA Park to lead the defense or, even more importantly, to absorb a judgment, Cosentini and the other defendants were in a weak settlement position. While MDA Park had settled at a discount, the others were forced to pay more than they had expected.

Looking forward

In a case with multiple defendants, it is crucial that one party not rely on another to run the case and, more specifically, to retain the necessary experts. Where expert testimony is required, a party should have a relationship with each expert sufficient to withstand the dismissal of another party using the same expert, and to maintain a strong settlement position or move forward to trial.

Where expert testimony is required, a party should have a relationship with each expert sufficient to withstand the dismissal of another party using the same expert, and to maintain a strong settlement position or move forward to trial.

Rhode Island Supreme Court declines to extend landowner duty to traffic control

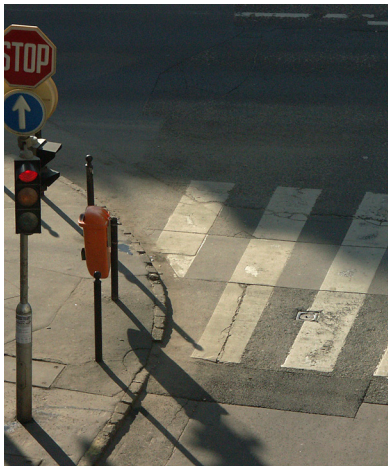
Good deeds sometimes do go unpunished. When deciding a joint tortfeasor's claim for contribution, in *Brown v. Stanley,* 84 A.3d 1157 (R.I. 2014), Rhode Island's highest court found that a landowner abutting a public way has no duty to control traffic, even where the landowner took steps to provide safe passage for those using the highway.

On Good Friday of 2005, Project Hope and the Providence Diocesan Bureau of Social Services sponsored a fundraising walk in Central Falls, Rhode Island. Walkers left Notre Dame Church, descended the church steps and made their way across Broad Street to Sacred Heart Avenue, and thence to a predetermined route.

Project Hope staff members were present to assist with the walk. One employee, Kerry O'Connell, went to the middle of Broad Street to stop traffic so that walker could cross. Among the drivers who stopped was James Brown, the driver of an 18-wheel truck. After the walkers crossed, O'Connell looked back at the church and observed an elderly woman, Mary Cummings, standing on the church steps. It was not clear whether Cummings was part of the walk, but another employee indicated that he would help her cross the street. O'Connell waived the traffic on and Brown drove forward, signaling to make a left turn, and then waiting for a break in traffic.

The other Project Hope employee approached Cummings, who was using a cane, and twice offered to help her cross. She declined assistance. Cummings proceeded to the street and waved at Brown's truck, which was still stopped waiting to turn. Brown did not see Cummings and, when another driver motioned for him to proceed, drove ahead and struck her. She was badly injured.

At trial, the defendants argued that they were entitled to judgment as a matter of law because they had no duty to protect Cummings from tortious acts while she was on a public way, based on a 20-year old decision, *Ferreira v. Strack*. The judge instructed the jury that the defendants "owed a duty >



to exercise reasonable care for the safety of persons participating in the walk." The jury found the defendants negligent. The trial judge overturned that verdict and entered judgment for the defendants as a matter of law, and the plaintiffs appealed.

On appeal, the plaintiffs conceded that the defendants initially had no duty to provide for the safety of the walkers, but argued that they assumed that duty when they undertook to protect the participants by controlling traffic on Broad Street. The defendants claimed that even if such a duty existed, it was extinguished as to Cummings when she refused the offer of assistance in crossing the street.

The Supreme Court of Rhode Island restated that principles announced in Ferreira: (1) the control and regulation of traffic is a duty of the government, not private individuals; (2) the church had no control over the property where the injury occurred, even it had at times requested traffic control for the public way; (3) the church had no control over the instrumentality that caused the injury; (4) imposing a duty to control traffic on public ways on the church would blur the cutoff line for landowner liability; and (5) the public, rather than a landowner, should bear the cost of traffic control.

The plaintiffs argued, unsuccessfully, that the defendants had assumed a duty to protect the walkers when they stopped traffic on Broad Street, and that O'Connell breached that duty when she motioned for the traffic to move.

The court rejected that theory, and went on to hold that even if the defendants had assumed such a duty, it was extinguished, rather than breached, when O'Connell waved the traffic on and traffic resumed. At that point, the Court noted, Cummings was nowhere near the street where O'Connell had been directing traffic, and Brown's truck had already moved when Cummings entered the roadway.

The Court found that the defendants did not owe any legal duty to the walkers, and affirmed the lower court's grant of judgment for the defendants as a matter of law.

Looking forward

Rhode Island continues to limit a landowner's duty of care to persons on the property, and will not extend that duty to persons on a public way, even when their presence is related to some purpose of the landowner. The rule appears to be based both on the common law and on public policy.

VERDICTS & SETTLEMENTS

January 2014

John Connarton of our Boston office obtained a dismissal of all claims against our insured, a Texas company that sold motorcycle goggles to the plaintiff. While the plaintiff was riding, the goggles were struck by a hard object and shattered, resulting in the loss of her eye. The claims against the insured were dismissed for lack of personal jurisdiction, based on its lack of contact with Massachusetts.

March 2014

Frank S. Puccio, Jr. of our Boston office settled a personal injury suit pending in Plymouth (Massachusetts) Superior Court. The insured was a snow removal contractor. The property manager was a co-defendant. The plaintiff alleged that she fell on snow and ice as a result of the negligence of the defendants, claiming inadequate plowing and sanding during a heavy snow storm. Her injuries included a broken ankle. Medical expenses were approximately $79,000. In addition, the plaintiff claimed that she was permanently unable to work, and alleged lost wages of over $300,000. Based on liability defenses, the case was settled for substantially less than the amount of the medicals.

NEWSROOM

February 2014

Brooke Seliger of our Worcester office participated in a seminar presented by the Worcester County Bar Association at the Worcester Superior Court as part of its "First Monday Educational Series." The program involved a mock direct and cross examination of a medical expert in a personal injury matter before Honorable Daniel M. Wrenn of the Massachusetts Superior Court. Attorney Seliger conducted the direct examination of the expert.

The well-attended program was hosted by Judge Wrenn and Honorable Timothy S. Hillman of the United States District Court for the District of Massachusetts.

March 2014

James P. McLarnon, Jr. of our Worcester office presented a seminar to a liquor liability insurance carrier. The seminar focused on claims handling issues and litigation under the Massachusetts and Rhode Island Consumer Protection and Unfair Claims Settlement Practices Acts.

April 2014

Senior Partner **Thomas B. Farrey, III** and **John T. Farrey** of our Boston office attended a 3-day National Association of College and University Attorneys (NACUA) workshop entitled, "Higher Education Employment Law: Developments and Emerging Issues for College and University Counsel", held in Boston.