Gasser Law Firm, LLC

Client Quarterly

Winter 2014-2015

Decisions of Interest

Complaint Must Put Defendant on Notice of Malfunction Doctrine and *Res Ipsa* Theories

In products liability cases, the "malfunction doctrine," based on the *res ipsa loquitur* doctrine from negligence law, allows the trier of fact to infer the existence of product defect without evidence of a specific defect where (1) the incident causing plaintiff's harm is of a type that ordinarily does not occur in the absence of a product defect and (2) the defect most likely existed when the product left the manufacturer or seller's control and was the result of reasonably possible causes attributable to the manufacturer or seller. *See Metro. Prop. & Cas. Ins. Co. v. Deere & Co.*, 302 Conn. 123, 139-140 (2011).

Recently, in *White v. Mazda Motor of America*, 313 Conn. 610 (2014), the Supreme Court held that a plaintiff may not wait until the summary judgment stage to assert the malfunction theory of liability—in other words, the complaint must allege facts to put the defendant on notice that the plaintiff intends to rely on an inference of defect. Importantly, the Court reached this conclusion by analogizing to *res ipsa* jurisprudence, noting that neither the malfunction doctrine nor *res ipsa* are independent causes of action but stating explicitly for the first time that both *res ipsa* and the malfunction doctrine require a complaint to allege facts alerting the defendant that "plaintiff's claim is anything other than a garden variety specific negligence [or product defect] claim."

Golf Cart Not UM Vehicle

In *Andrade v. Kemper Independence Insurance Co.*, et al., Docket No. NNH-CV-13-6039774-S, the court (Nazzaro, J.) granted a summary judgment motion filed by this office on behalf of Kemper, holding that a golf cart was not a "motorized land vehicle" qualifying as an uninsured motor vehicle. Plaintiff argued that since the policy did not specifically define the term motor vehicle and the golf cart was a motorized vehicle, it qualified as an uninsured motor vehicle. The court held otherwise, finding that the golf cart did not meet the definition of a motorized land vehicle as it was not designed primarily for use on the highway. The court also found that the vehicle did not have any of the safety features required of a motor vehicle pursuant to Connecticut vehicle registration law.

Client Quarterly is designed to keep our clients and friends informed about court decisions, legislation, and issues that affect them. *Quarterly* is published in both print and electronic formats.

Clients are encouraged to submit questions and topics of interest to be addressed in future issues.

To receive copies of these publications, please provide our office with your contact information.

Vehicle Operator Prevails in Pedestrian Dart-Out Case

In *Harder v. Brenner*, Docket No. CV-12-6005334-S (2014), the jury found in favor of defendant driver, represented by this office, despite significant and permanent injuries to plaintiff. Although plaintiff alleged that the defendant was inattentive and traveling unreasonably fast, the jury accepted the defendant's version (cont'd.)

was inattentive to traffic when she ran across the roadway. The court properly charged the jury that pedestrians lose the right of way when not in a crosswalk and that the farther someone is from a crosswalk, the less reason a driver has to expect them to be in the road.

Statute of Limitations Period Begins with Oral Decision

In *Yancik v. Demiri*, Docket No. CV-14-6010416-S, 2014 Conn. Super. LEXIS 2674 (2014), the court (Pickard, J.) granted the motion to dismiss filed by this office, confirming that the one-year period for filing suit under the accidental failure of suit statute (§ 52-592) begins to run when the court articulates the judgment in the underlying matter. Here, the court granted a motion to dismiss in the underlying matter with all counsel present but issued the written decision five days later. Plaintiff and intervening plaintiff filed an accidental failure of suit claim using the written decision date.

The court held that the clock begins to run when the parties are informed of the decision, not when the written notice is received.

UIM Claim Defective, But . . .

In *Manka v. Allstate Insurance Co.*, Docket No. CV-11-6012325-S, 2013 Conn. Super. LEXIS 1199 (2013), not involving this office, the court (Wiese, J.) granted Allstate's motion to strike a UIM claim in which plaintiff did not allege that the insurance coverage for the tortfeasor was exhausted. The court held that exhaustion of the available coverage was a requisite element. However, it is the opinion of this office that the motion should not have been filed as plaintiff had the right to amend the complaint to allege exhaustion. The better course of conduct would have been not to alert plaintiff to the required element and instead to move for a directed verdict at trial. Often, motions such as this, or, for example, those arguing that plaintiffs have failed to allege sufficient facts to plead recklessness claims, are made merely to increase firms' billings. These motions merely educate plaintiff's counsel of defects in the complaint, and should not be filed until the complaint can no longer be amended.

Psychological Injury Claim Barred by Sexual Molestation Exclusion

In *Metropolitan Property & Casualty Insurance Co. v. Briggs*, Docket No. 3:12-CV-00389, 2013 U.S. Dist. LEXIS 74885 (2013), the court (Eginton, J.) held that a homeowner's policy exclusion barring coverage for sexual molestation also excludes claims for physical and psychological injuries resulting from the molestation. The court held that to allow the claim to proceed would "render the exclusionary provision of the contract meaningless."

Client Quarterly

Client Quarterly is published by Gasser Law Firm, LLC as an educational tool for its clients. Materials contained within this publication are not copyrighted and may be copied freely without permission.

Editors:
Edward W. Gasser, Esq.
Lisa M. Anderson, Esq.
Sara Green, Esq.
Joseph E. Gasser
Comments and questions may be directed to:

Client Quarterly
Gasser Law Firm
20 East Main St.
Avon CT 06001

Past copies of *Client Quarterly* can be found at the office website gasserlawfirm.com
Readers can also use the site to contact members of our staff.