LAWYERS WEEKLY

November 29, 1999 http://www.masslaw.com $6.50 per copy

Tort Claim For Poorly Lit Crosswalk Rejected

Injured Pedestrian Brought Suit Vs. Power Co.

BY WENDY L. PFAFFENBACH

A pedestrian who was struck by a car could not sue the electric company that failed to maintain the street lights over the crosswalk where the accident occurred, the Appeals Court has ruled.

The pedestrian argued that the electric company should be held liable to third parties for its failure to maintain the street lights.

But the Appeals Court disagreed and followed a number of other jurisdictions finding that public policy considerations dictated against imposing such liability.

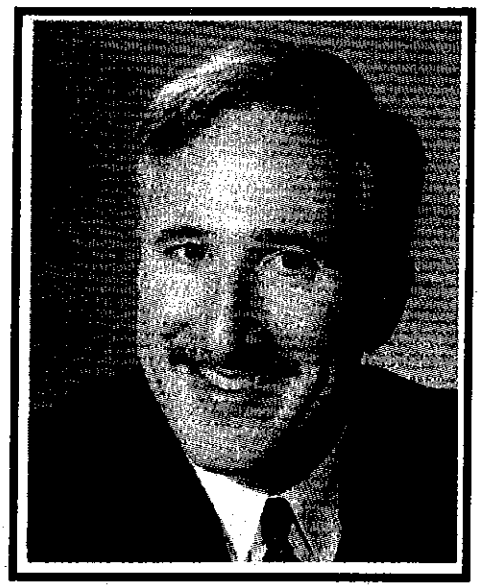
"We conclude that Massachusetts should adopt the rule applied in the majority of other jurisdictions — that ordinarily an electric company under contract to make repairs and maintain street lights has no common law duty to third persons who are injured," wrote Judge Susan S. Beck.

The 11-page decision is *Vaughan v. Eastern Edison Co.*, Lawyers Weekly No. 11-294-99.

Refining The Law

According to Robert A. Curley Jr. of Boston, counsel for the electric company, the case is significant for a number of reasons.

"First, [it] expressly establishes in Massachusetts that utilities are not liable for providing services such as street lighting to members of the public in a place where



ROBERT A. CURLEY JR.
Utilities not liable to public

street lighting is not working," he said.

Curley also added that there is no longer much room left to hold a utility liable to third persons except for in "exceptional situations."

But Kathryn E. Hand of Boston, counsel

■ continued on PAGE 35

Plaintiff Entitled To Carrier's Documents

Including Paperwork Made Prior To Lawsuit

BY MEGHAN S. LASKA

A woman injured in a car accident could discover documents compiled by the other driver's insurance company prior to the lawsuit, a Superior Court judge has held.

The defendant objected to the production of certain documents, arguing that once a party reports a personal injury claim to the insurance company, the file materials accumulated are obtained in anticipation of litigation and are privileged as work product.

But Judge Daniel F. Toomey disagreed, denying the defendant's motion for a protective order.

"[T]he documents at issue in this case were prepared in the ordinary course of the [insurance company's] business and, therefore, fall outside the purview of the ... work product doctrine," wrote Toomey.

The eight-page decision is *Meszar v. Horan*, Lawyers Weekly No. 12-288-99.

■ continued on PAGE 35

Citizens' Group May Sue Over Sewage Plan

Recent Case Raises Issues For Headhunter-Fee Agreements

BY PAUL D. BOYNTON

Attorneys say that oral fee agreements between headhunters and law firms have always been common in the industry.

But a recent ruling gives warning to

Smith said the legislative history indicates the sweep of the statute is broad.

"The legislation covers brokers and finders, which covers a broad set of markets. The Legislature has decided to formalize these agreements," he said.

Plaintiff Is Entitled To Insurance Co.'s Documents

■ continued from PAGE 1

'Steady Erosion'

Edward C. Bassett Jr. of Worcester, counsel for the plaintiff, commented that "this is an extremely significant decision which clarifies for the bar that just because a claims representative puts a document in his file, it does not mean that it miraculously becomes work product."

Matthew P. McCue of Worcester, co-counsel for the plaintiff, agreed.

"Insurance companies will say as a matter of course that claims files are work product," he said.

"The judge held in this decision that he will no longer tolerate such a blanket protection and will require the insurance industry to prove that each document was prepared in anticipation of litigation," said McCue.

He added that this decision will allow the plaintiffs' bar to conduct more effective investigations, as there is "very valuable" information in claims files.

Mark C. Darling of Worcester, who represented the defendant, stated that "the judge did not apply the law properly because where an insurer investigates with an eye to defending its policyholder, an evaluation of the claim as to liability and the nature and cause of damages are all protected work product."

However, he said that he decided not to pursue an appeal, as there is nothing damaging to the defendant in the claim file.

Donald L. Gibson of Marshfield, a personal injury lawyer, commented that the decision is "important" because it realizes the distinction between gathering information for purposes of adjusting an insurance claim and gathering materials in anticipation of litigation.

"There has been a steady erosion of support for documents being classified as work product over the years and I hope this a another nail in the insurance industry's coffin when discussing the sanctity of their claims files," he said.

Discovery Requests

On Feb. 21, 1998, plaintiff Kim Meszar was in an automobile accident allegedly caused by defendant Cynthia Horan's negligence.

In April 1999, the plaintiff filed suit against the defendant, who was insured by Commerce Insurance Company.

On July 26, 1999, the plaintiff served a deposition notice on Raymond Mattress, a claims adjuster for Commerce.

The plaintiff sought four categories of documents:

1) any photographs of the vehicles involved in the accident;

2) any statements or reports by the parties related to the accident;

3) any documents related to any surcharge or any appeal to the Division of Insurance Board of Appeal relating to the accident; and

4) any documents related to the accident.

In response, the insurance company agreed to produce photographs as far as they exist, but it maintained that the second and third categories of requested documents did not exist.

As for the fourth category, the defendant petitioned the court for a protective order prohibiting or circumscribing the deposition testimony of the claims adjuster.

The insurance company contended that the documents identified in that category include the file which it kept in the course of defending the plaintiff's suit.

It argued that once a personal injury claim is reported, the file materials accumulated are obtained in anticipation of litigation and are privileged as work product.

Three Approaches

Pursuant to Mass. R. Civ. P. 26(b)(3), a party may obtain discovery of documents prepared in anticipation of litigation only upon a showing that the party seeking discovery has a substantial need of the materials and cannot obtain the substantial equivalent of them by other means without due hardship, said Toomey.

He found that the burden is upon the party requesting a protective order to demonstrate that the materials sought are work product within the scope of that rule.

"The question that this Court must resolve is whether the work product doctrine applies to investigative documents compiled by an insurance company in advance of the commencement of suit and in response to an insured's report of an automobile accident in which a third party alleges that he was injured," wrote the judge.

He held that the outcome of this issue depends upon whether the insurance company created such documents in the ordinary course of business or in anticipation of litigation.

Toomey noted that the Appeals Court and the Supreme Judicial Court have never addressed this issue in a published opinion.

Given the lack of caselaw, the judge reasoned that the federal courts' interpretation of Federal Rule Civ. P. 26, which substantially mirrors the state counterpart, should be looked to for guidance.

Toomey found that "the federal courts have adopted three separate and distinct methods of determining whether investigative files compiled by an insurance company constitute documents compiled in the ordinary course of its business or, on the other hand, documents prepared in anticipation of litigation."

The most restrictive of the three, he said, denies the protection to insurance reports that are not prepared under the guidance of an attorney.

"This restrictive approach presumes that any report or statement made by or to a party's insurer — other than a report or statement to an attorney acting in the role of counsel of one which has been requested by or prepared by an attorney employing legal expertise — has been prepared in the ordinary course of business and does not fall within the scope of the work product doctrine," wrote the judge.

"[Carriers] will say as a matter of course that claims files are work product. ... The judge held in this decision that he will no longer tolerate such a blanket protection."

— Matthew P. McCue, co-counsel for plaintiff

In the second approach, any documents prepared by an insurance investigator immediately following an accident are documents made in anticipation of litigation and are within the work product doctrine, he said.

Toomey found that "[b]etween the two extremes is a third view which employs a case-by-case approach to determine whether documents prepared by an insurance investigator comprise documents made in anticipation of litigation."

Case-By-Case Analysis

As the 1st U.S. Circuit Court of Appeals utilizes the case-by-case approach, the judge determined that this is the method which the Superior Court should follow.

"The mere possibility that a certain event might lead to future litigation does not render privileged all documents prepared subsequent to that event," said Toomey.

He found that the determinative question is whether the prospect of litigation was the main motivating purpose behind the creation of the documents.

"We begin with the recognition that Rule 26(b)(3) does not protect materials compiled in the ordinary course of business, pursuant to regulatory requirements or for other nonlitigation purposes," he said.

Further, Toomey stated that the fact that documents produced in the ordinary course of business might later be useful to a party in litigation does not "cloak" the documents with the protection of Rule 26(b)(3).

"The controlling test is whether, in light of the nature of the document and the factual context of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation," he wrote.

Applying that principle to the case at hand, the judge noted that the plaintiff did not file suit until more than a year after the accident occurred and the defendant's attorney did not file an answer until approximately 16 months after the accident.

"A review of analogous decisions suggests that the documents sought to be discovered at bar were not created with a view towards litigation," held Toomey.

Further, he stated that Commerce failed to present any evidence suggesting that it prepared the documents at the request of the defendant's attorney or that the expected recipient of the documents at the time they were prepared was the defense attorney.

"Commerce compiled the documents that [the plaintiff] seeks to discover long before [she] filed suit against [the defendant]," said the judge.

Toomey held that an insurance company resisting discovery must establish a factual basis upon which it can show that it did not prepare the documents in the ordinary course of business.

"Such a demonstration might be accomplished by segregating documents contained in its claims files, into trial preparation materials and nontrial preparation materials," he noted.

As there is no such factual basis present in the case at hand, Toomey held that the work product doctrine does not shield the documents from the deposition notice. MLW

Tort Claim For Poorly Lit Crosswalk Is Rejected

■ continued from PAGE 1

for plaintiff, said the case still leaves "room for a duty to be imposed [on a utility.]"

"This case is rough on the facts," she said. "If you had some other compelling fact ... like increased risk or detrimental reliance [the court could find differently.]"

Hand also mentioned that there is

caused by the defendant's failure to properly maintain the light.

In response, the defendant moved for summary judgment, claiming it had no legal duty to the plaintiff.

After Superior Court Judge Gerald F. O'Neill Jr. allowed the defendant's motion, the plaintiff appealed — urging the court to expand the defen-

Among these factors were: the large number of street lights; the cost of imposing liability on the utility; the availability of auto insurance; the fact that cars have headlights; and the likelihood that street lights become periodically inoperable, Beck said.

After considering the law of other jurisdictions, the judge

gument that the defendant had a duty under §324A(a) and (c) of the Restatement (Second) of Torts.

The judge noted that §324(a) and (c) provides that a person who renders services, which he should recognize as necessary for the protection of a third person, will be held liable to third parties when his failure