Vermont Bar Association
Seminar Materials

62nd Mid-Year Meeting

Torts & Worker's Compensation Summary

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VERMONT SUPREME COURT
TORTS YEAR IN REVIEW 2018
(Jennifer McDonald, Esq.)

Brown v. State, 2018 VT 1 (Jan. 1, 2018) (Eaton, J.)
Plaintiff sued the State following a traffic accident in 2012 in which plaintiff's vehicle was hit from behind at low speed by a Vermont State Police sergeant. Plaintiff appealed a jury verdict finding the State responsible for the motor vehicle accident, but also finding plaintiff had failed to prove resulting injuries and thus was not entitled to damages. Appeal involved several pre-trial and trial rulings, and failure to grant a new trial. Affirmed.

The Court concluded that evidence of Sergeant's post-collision conduct in moving his vehicle, leaving the scene without providing identifying information, or decisions by the State not to charge the Sergeant for leaving the scene of an accident were properly excluded and not relevant to whether he was negligent in causing the accident. Because this evidence was properly excluded from trial testimony, it was properly excluded from opening statements and during voir dire.

In reviewing the denial of Plaintiff's motion for a new trial under V.R.C.P. 59(a), the Court recognized that the "law favors upholding jury verdicts, and that the decision to grant or deny a motion for a new trial is committed to the sound discretion of the trial court." Accordingly, the Court will reverse a decision of the trial court on a Rule 59(a) motion only where "viewing the evidence in the light most favorable to the verdict, [the Court]concludes that there has been an abuse of discretion."

The state's medical expert witness testified that Plaintiff did not sustain a new injury in the 2012 accident and that structural abnormalities in a post-accident MRI were likely the result of the natural aging process. This evidence was sufficient for the jury to find no injury had been caused in 2012. Although there was competing testimony from the plaintiff, it was jury's role to resolve conflicting testimony and credibility issues.

Kuligoski v. Rapoza, 2018 VT 14 (Feb. 16, 2018) (Skoglund, J.)
VSC affirms trial court order granting summary judgment for grandparents of Evan Raposta who assaulted Michael Kuligoski while Mr. Kuligoski was repairing the furnace of defendants' rental property. Evan was at the building to help his father repair an apartment. Father managed defendants' rental property and was doing work at the building for defendants. The majority decision rejects Plaintiffs' argument that father was an employee of Defendants, such that father's negligence in hiring Evan and supervising him on the day of the attack could be imputed to grandparents because of their employer-employee relationship with father.

Vermont applies the right-to-control test as the primary standard for determining whether a worker is an employee for the purpose of respondeat superior. Under the test, a worker is an employee if the party for whom work is being done may prescribe not only the result, but also may direct the means and methods by which the other shall do the work. If the answer is not clear from the right-to-control test, Courts will look to other factors set forth in Restatement §220 of Agency to help analyze the nature of the relationship.

The majority concluded that there was no employment relationship between father and grandparents because father managed the building and did work that he recommended without any control or expectation of control by grandparents over the means or methods of his work. Although grandparents paid for work and gave final approval for any major renovation, father chose the means and methods to do the work without any oversight.

Justice Reiber dissented on the grounds that the right-to-control test is whether there was a right to control, not whether that right was exercised in this case.

Quinlan v. Five-Town Health Alliance Inc., d/b/a Mountain Health Center et al., 2018 VT 53 (May 18, 2018) (Skoglund, J).
Court explicitly holds that a 12 V.S.A. § 1042 Certificate of Merit must be filed simultaneously with a medical malpractice Complaint and failure to do so requires dismissal of the Complaint to effectuate the statutory purpose of screening out frivolous claims.

The statutory Certificate of Merit is a certificate from the attorney or plaintiff that they have consulted with a qualified expert who, based on reasonably available information, has described the applicable standard of care and indicated that there is a reasonable likelihood that plaintiff will be able to show that the defendant failed to meet that standard of care causing plaintiff's injury. Section 1042 includes a tolling provision to allow plaintiff whose claims are about to expire to petition the clerk for a 90-day extension.

In this case, Plaintiff filed a Complaint without the Certificate of Merit. Defendant moved to dismiss. In response, the Plaintiff filed a separate action with a certificate of merit and a petition for extension of the statute of limitations. Both actions were dismissed.

The Court rejected the Plaintiff's request that the Court use its equitable powers to reverse dismissal because he substantially complied with Section 1042 by obtaining an expert opinion. The Court held that this approach conflicts with Vermont law and the legislative intent behind Section 1042 "to screen out meritless claims at the outset" and "avoid subjecting healthcare providers to the ordeal of being named in and having to defend against meritless lawsuits [where] eventual dismissal was an inadequate remedy for the associated professional and personal costs."

Lorman v. City of Rutland, 2018 VT 64 (June 29, 2018) (Reiber, C.J.)
Court explicitly maintains and acknowledges discretionary-function immunity for municipalities, but suggests that the legislature, not tort common law, is better suited to analyze the framework of municipal immunity.

Under 12 V.S.A. §5601(e)(1), the State is protected from any claim based on the exercise or performance or failure to exercise or perform a "discretionary function". The purpose of the discretionary function exception is to assure that courts do not invade the province of government through judicial second guessing. The Court applies a two-part test to determine if the policy judgments are entitled to immunity: (1) were the acts involved discretionary in nature involving an element of judgment or choice and if so (2) whether the judgment involved considerations of public policy which the discretionary function was designed to protect.

The Court noted, however, that in its opinion tort law does not provide an adequate framework for analyzing governmental actions where the questions are not negligence, due care, or reasonableness, but social wisdom, economic expediency, political practicability, or other factors that involve balancing priorities and weighing budgetary considerations. Although the Court affirmed dismissal of Plaintiffs' claims by applying discretionary-function immunity, it concluded that "it would be beneficial for the Legislature to act in this area."

Gross v. Turner, 2018 VT 80 (Aug. 10, 2018) (Reiber, C.J.)
Dog-bite case involving claims against the landlord and a guest at the property. The dog attacked another dog outside the property and injured plaintiff who was walking by when the guest accidentally let the dog out of the house. In affirming summary judgment, the Court rejected Plaintiffs' broad argument that a landlord assumes a duty to protect all persons outside the property from physical harm by simply permitting a tenant to keep a domestic dog on unfenced premises even if dog might travel beyond the property line.

The Court did, however, recognize that the Restatement (Second) Torts § 379A provides a basis for a cause of action against the landlord in dog-bite cases if the landlord knows or has reason to know the dog is vicious. As in other Vermont cases, the dog breed alone is insufficient to put its owners or the landlord on notice that it poses an unreasonable risk of harm. Instead, Vermont's dog-bite liability depends on the propensities of the individual animal. Moreover, Section 379A does not create a duty to investigate or an obligation on the part of the landlord to actively inquire into the dog's history before permitting it to reside on the premises.

Because the landlord and a guest at the property had no reason to know the dogs posed a threat to anyone, summary judgment for defendants was affirmed.

Zullo v. State, 2019 VT 1 (Jan. 4, 2019) (Eaton, J.)
The Court concludes that Article 11 of the Vermont Constitution provides a constitutional tort private right of action against the State and that such claims are not barred by sovereign immunity.

The Court first considered whether the Vermont Tort Claims Act (VTCA) governed plaintiffs' lawsuit. The VCTA waives the State's sovereign immunity in cases involving ordinary common law torts where there is a private analog, i.e. where a cause of action against the State is comparable to one that could be made against a private citizen. Because the Plaintiffs' constitutional claims under Article 11's constraints against governmental searches and seizure do not have a private analog, the Act's statutory waiver of sovereign immunity does not apply.

The Court nonetheless concluded that the common law doctrine of sovereign immunity does not bar constitutional tort claims against the State. In reaching this decision, the Court relied on the absence of language on this issue in either the Vermont Constitution or other legislative action. It referenced a prior case in which it "discerned no logic or policy purpose in recognizing a constitutional tort derived from our fundamental charter of rights while simultaneously granting the Town immunity because it was performing a governmental function." The Court recognized that other states to have considered the issue are divided and suggested that the Legislature has authority to limit or confine constitutional tort claims against the State.

Bernasconi v. City of Barre: Hope Cemetary, 2019 VT 6 (Jan. 25, 2019) (Robinson, J.)
The Court affirmed a trial court order granting summary judgment on grounds that Plaintiff had failed to establish causation as a matter of law. Here, Plaintiff fell into a hole and injured his knee while visiting the cemetery. He argued that his injury was caused by the City's negligent maintenance of the cemetery. Even assuming that the City was not sufficiently diligent in inspecting for holes, Plaintiff cannot prove that a lack of diligence caused his injury because there was no evidence of how long the hole existed. Without that evidence, a jury could not find that the City would have found the hole if it had been more diligent about inspecting for holes and prevented Plaintiffs' injury.

Montague v. Hundred Acre Homestead, LLC, 2019 VT 16 (March 8, 2019) (Robinson, J.)
The Court again considered the scope of the mental healthcare professional's tort-law duty to warn a potential victim of violence. Because this case was filed before the legislative enactment that overturned *Kuligoski v. Brattleboro Retreat*, 2016 VT 64A, the Court concluded that 18 V.S.A. § 1882 did not apply.

Here, a woman with a history of violence left her residential treatment facility in Vermont, went to a shooting range, and shot the shooting instructor. The victim filed a civil suit alleging negligent failure to warn. The trial court granted the facility's Rule 12(b)(6) dismissal motion on the grounds of no duty. The Vermont Supreme Court affirmed.

The general rule is that there is no legal duty to control the conduct of a third person to protect another from harm. *Peck v. Counseling Service of Addison County, Inc.*, 146 Vt. 61, 64-65 (1985). A mental health professional's relationship with his or her patient, however, is sufficient to create an exception to the general rule and a duty to exercise reasonable care to protect a potential victim of another's conduct if the healthcare professional knows or based on the standards of the mental health profession should know that their patient poses a serious risk of danger to an identifiable victim."

The Court was divided in *Kuligoski* as to whether the *Peck* standard was limited to specifically identifiable individuals or whether that duty extends to individuals who have not been specifically identified but are foreseeable victims or whose membership in a particular class (e.g. those living with the patient) places them within the zone of danger. The Court was not, however, divided that *Peck* does not create generalized duty to protect or warn the general public. It further noted that it has never decided whether the duty recognized in *Peck* applies to identifiable (though not actually identified) members of a discrete and determinate class of people.

Regardless of whether *Peck* applies to readily identifiable victims or actually identified victims, the Plaintiffs' complaint would still fail to state a claim. When the resident left the facility the therapist knew only that the resident had expressed a desire to go to a target range and shoot. Therefore, the Court held, even under *Kuligoski* the trial judge was correct to find that the facility had no duty to warn.

Lyons v Chittenden Central Supervisory Union, 2018Vt 26 (Mar. 16, 2018)

In three-way split decision, Court reverses Commissioner's decision finding that Student teacher is in fact an employee of school for WC purposes, remands for determination of benefits including AWW calculation. The plurality decision written by Justice Dooley and supported by Chief Justice Reiber concluded that: "If this were a case where the loss of the educational opportunity were not so directly tied to the ability to obtain a license to practice a profession, we would conclude that the question of whether the lost advantage could be estimated in money would require separate factual development so that summary judgment would be inappropriate. Where, however, the loss of the educational program equates to a loss of the license to practice a profession, we can say as a matter of law that the value of the lost advantage can be estimated in money." Justice Robinson, concurring in the result only of the plurality opinion argued for a broader interpretation: I would reverse, on the grounds that claimant is a statutory employee under the workers' compensation laws because she worked under apprenticeship with the Chittenden Central Supervisory Union." Justice Eaton and Justice Skoglund dissented arguing that: "First, I do not believe an employer-employee relationship exists in the absence of the 'employee receiving wages; whatever benefits claimant received from her student teaching experience were not quantifiable remuneration, and thus were not wages.... Regardless of whether the value of training or certification can be estimated in monetary terms, claimant could not receive, and was not intending or expecting to receive, her teaching certification from CCSU..... The plurality acknowledges the 'grand bargain' underlying workers' compensation. Yet, this Court's decisions continue to chip away at the bargain so that only one side of it, the employer's liability without regard to fault, would be recognizable today to those who crafted it. The other side of the bargain, a liability for employers that is limited and determinate, has become a vacuous mantra."

Perrault v. Chittenden County Trans. Auth., 2018 VT 58 (June 1, 2018) (J. Carroll)

Court upholds Commissioner's decision that mileage reimbursement does not equate to wages for purposes of determining employer-employee relationship. "Put simply, a reimbursement makes the recipient whole, but is not an earning - that is, the reimbursement is not a gain to the recipient." Differentiates Lyons v, Chittenden Central Supervisory Authority, 2018 VT 26 by showing that in the instant matter there were no wages. "The Commissioner's reasoning on this point makes explicit what our prior decisions have made implicit, and we therefore adopt the rule that employment under the first prong of the statutory definition requires wages as they are defined for workers' compensation."

Martel v Connor Contracting Inc., 2018 VT 107 (Oct 12, 2018) (AJ Carroll)

Return to the Kittell specific intent to injure standard for exclusion to exclusivity doctrine for WC Act. Claimant falls off roof alleges substantial certainty of injury when Supervisor allegedly takes safety device off job site to use on another job site. "We hold that under Vermont law, an injured employee must show specific intent to injure. Exclusivity

protections extend to co-employees and owner of company as “the duty to provide a safe workplace is a non-delegable corporate duty and the presence or absence of the [safety device] is part of the safe workplace equation.” Robinson and Reiber concur in mandate but argue that given the facts of the case it is “unnecessary ... to readopt the specific-intent standard set forth in Kittell v Vermont Weatherboard, Inc., 138 Vt. 439, 417 A.2d 926 (1980).”