

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO. MRS-L-3810-02
APP. DIV. NO.

SEBASTIAN D'AMATO, et al :
 :
 : TRANSCRIPT
 Plaintiff, :
 : OF
 vs. :
 : SUMMARY JUDGMENT MOTION
 OSHKOSH TRUCK CORPORATION, et al :
 :
 Defendant. :

Place: Morris County Courthouse
Washington and Court Streets
Morristown, New Jersey

Date: September 29, 2005

B E F O R E:

HONORABLE W. HUNT DUMONT, J.S.C.

TRANSCRIPT ORDERED BY:

LESTER, SCHWAB, KATZ & DWYER

Video Recorded by: R. Fisher

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I N D E X
9/29/05

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COURT DECISION
(Oral argument held on:
Friday, 9/23/05)

1 (Decision begins on 9:58 a.m.)

2 THE COURT: On Friday, September 23, the
3 Court heard oral argument on the defendant's motion
4 for summary judgment in the matter of D'Amato v.
5 Oshkosh Truck Corporation, et al.. At the conclusion
6 of oral argument, the Court reserved decision.

7 Having further reviewed the papers and with
8 the benefit of oral argument and review of significant
9 cases, the Court is now prepared to rule and grant
10 summary judgment for the defendant, Oshkosh Truck
11 Corporation.

12 By way of background, the facts are
13 relatively undisputed.

14 The plaintiff, Sebastian D'Amato, is a
15 police officer employed by the Port Authority of New
16 York and New Jersey. He brings this lawsuit as a
17 result of a workplace accident which occurred on
18 December 18, 2000.

19 At the time of the accident, he was
20 climbing down from the cab of an aircraft rescue
21 firefighting (ARFF) vehicle. His foot slipped off and
22 missed the bottom step, leading to the ground. As a
23 result of missing the bottom step leading out of the
24 cab and to the ground, his back was injured when his
25 knee gave out.

1 He has brought a products liability action
2 against the defendant Oshkosh, claiming that the step
3 has a design defect.

4 One of his factual allegations is that the
5 bottom step should have been larger and contained an
6 anti-skid treatment.

7 The ARFF vehicle is a large specialized
8 truck. It is designed to fight airplane fires on
9 airport grounds and in the surrounding area. As a
10 result, it is necessary that the vehicle be designed
11 and equipped to travel off road. As a result, it is
12 both an on/off road vehicle. In other words, it is a
13 vehicle that can leave paved roads to travel across
14 terrain that would normally stop or impede an on-road
15 vehicle.

16 In 1986, the Port Authority requested
17 proposals for ARFF vehicles designed according to
18 specifications that it had developed. These
19 specifications ran numerous pages and were highly
20 detailed, covering almost every characteristic of the
21 vehicle.

22 The design specs were put out for bid, and
23 Oshkosh was the successful bidder.

24 Subsequent to bidding, the defendant
25 Oshkosh told the Port Authority that it was unable to

1 meet the step specification for the step in question.
2 The Port Authority wanted a rigid bottom step, no more
3 than 20 inches off the ground. The defendant
4 indicated that a rigid bottom step 20 inches off the
5 ground conflicted with the requirement for a 30-degree
6 front angle of approach.

7 Therefore, it was proposed by the defendant
8 that the bottom step (the step plaintiff missed) would
9 have a "swing" design, and that the step would be held
10 by a chain on one side. So that the step would swing
11 up as the ARFF climbed over off-road obstacles. The
12 Port Authority approved of the defendant's modified
13 step proposal and amended its original design
14 specification to include it.

15 The defendant then proceeded to construct
16 more than a dozen ARFF vehicles pursuant to its
17 contract with the Port Authority. The defendant
18 manufactured all of the vehicles pursuant to the same
19 design.

20 The vehicle in question entered service in
21 1988, 12 years before the accident in question.
22 Subsequent to its entry into service, the Port
23 Authority never changed to a different step design,
24 nor raised any objection with the defendant concerning
25 the vehicle proposed and manufactured by it.

1 The plaintiff D'Amato has retained an
2 expert who has opined that the step design is
3 defective in that it was not designed in conformance
4 wit SAEJ185, which deals with certain recommended
5 practices for off-road vehicles.

6 The SAEJ185 is silent about ARFF vehicles.
7 In this regard, it should be noted that the Port
8 Authority required compliance with NFPA414 instead of
9 with SAEJ185.

10 The defendant Oshkosh essentially raises
11 the government contractor defense, claiming that it is
12 entitled to immunity from a design defect claim when
13 it manufactures a product according to specifications
14 which a government agency has either specified or
15 approved. It claims that it did this under the
16 circumstances in question, and that it should be
17 immune from any liability.

18 In response, the plaintiff argues that the
19 New York/New Jersey Port Authority is not immune from
20 liability; and even if this Court were to conclude
21 that it was, the government contractor defense does
22 not meet the test set forth by the United States
23 Supreme Court in the matter of Boyle v. United Tech
24 Corp, 487 U.S. 500 (1988).

25 First, with respect to the plaintiff's

1 contention that it is a matter in which there is no
2 governmental immunity.

3 The plaintiff essentially relies on New
4 Jersey Statute, Title 32:1-162. In that statute, the
5 plaintiff argues that the New Jersey Legislature did
6 not intend the Port Authority to be treated like other
7 public entities, and that the statute provides that
8 the Port Authority has no immunity to private
9 lawsuits.

10 The plaintiff cites 32:1-162 for the
11 proposition that the Port Authority is specifically
12 exempted as a public entity for New Jersey Tort Claims
13 Act purposes.

14 The defense responds by indicating that the
15 plaintiff's contention is true under certain
16 circumstances, but based on the New Jersey Supreme
17 Court case of Lieberman v. Port Authority, 132 N.J. 76
18 (1993), the Court held that the Port Authority is only
19 to be treated as a private corporation for purposes of
20 liability when it is not acting in a primarily
21 governmental function.

22 The Court agrees that the Lieberman case
23 controls here. In Lieberman, a homeless man knocked
24 down the plaintiff and stole her purse at a Port
25 Authority bus terminal. The plaintiff sustained an

1 injury and filed an action against the Port Authority.
2 In Lieberman, the Port Authority was acting purely as
3 a landlord, and the State's highest court held that
4 the plaintiff's complaint stated a cause of action.
5 However, on Page 93 of the Lieberman decision, the
6 Court indicated:

7 "Because of its dual role, we stress that
8 any cause of action brought against the
9 Port Authority must involve an extremely
10 fact-sensitive inquiry into the injury
11 alleged, the remedy requested, and the role
12 (either governmental or as a landlord) that
13 the Port Authority played at the time of
14 the alleged injury."

15 On the last page of the Lieberman decision,
16 the Court indicated:

17 "In sum, because the Port Authority has
18 consented to suit as though it were a
19 private corporation and has acted as a
20 landlord in its operation of the terminal,
21 it is subject to the same liability as a
22 private landlord, as long as the failure
23 alleged does not concern police protection
24 or any other primarily governmental
25 function."

1 This Court agrees that the Lieberman case
2 controls, and that the subject case is different than
3 the fact pattern in Lieberman; as a result, this Court
4 is not prepared to hold that the Port Authority, under
5 the facts here, is subject to suit as it was in the
6 Lieberman case.

7 As a result, this Court moves to the next
8 issue, that being whether the defendant has raised a
9 meritorious argument under the government contractor
10 defense.

11 In order to meet the government contractor
12 defense, the Boyle test requires:

13 (1) Government approval of reasonably
14 precise specifications; (2) Conformance with the
15 specifications; and, (3), The defendant-contractor
16 warned the government about the use of the equipment
17 known to the contractor, but not known by the
18 government. See Boyle v. United Tech and Silverstein
19 v. Northrop Grumman Corporation, 367 N.J. Super. 361
20 (App. Div. 2004).

21 The Court concludes under the circumstances
22 of this case, that the defendant meets all three of
23 the components of the Boyle test, and that there is no
24 material fact issue under any one of the three
25 components which would require this matter to proceed

1 to trial.

2 The Silverstein case is most helpful in
3 guiding the Court with respect to this decision.

4 In that case, the plaintiff Silverstein
5 was employed by the United States Postal Service.
6 Silverstein was seriously injured when the postal
7 vehicle he was driving rolled over after being struck
8 by a car.

9 The vehicle in question was a right-side
10 operated vehicle, and while it was attempting to make
11 a left turn, the vehicle was struck in the rear by
12 another vehicle, causing it to roll on to its right
13 side, slide along the pavement, and pinned the
14 plaintiff's arm beneath the vehicle.

15 As a result of serious injuries, the
16 plaintiff filed suit against the Northrop Grummon
17 Corporation based upon the vehicle's defective design,
18 and the defendant raised the government contractor
19 defense, as the defendant has in this case.

20 In Silverstein, the Court held that a
21 government contractor was immune from state tort
22 claims brought by third parties where the government,
23 in that case the United States, had approved
24 reasonably precise specifications, the equipment
25 conformed to those specifications, and the supplier

1 warned the government about the dangers in the use of
2 the equipment that were known to the supplier but not
3 to the United States.

4 In that case, just as in this case, the
5 United States Postal Service never relinquished
6 control over whether the design met the government's
7 performance requirements. The Supreme Court indicated
8 that the government need not deprive the manufacturer
9 of all discretion pertaining to a particular design
10 feature in order for the government contractor defense
11 to apply. "It is necessary only that the government
12 approve, rather than create, the specifications."

13 Silverstein at Page 378.

14 Where there is continuous back-and-forth
15 dialogue between the parties concerning the design
16 process and the final specifications which result in
17 the final product are reasonably precise and met, the
18 first prong of the Boyle test is met.

19 In other words, if the government simply
20 rubber stamps the specifications which are prepared by
21 another, then the defense may not be applicable.

22 As stated in Silverstein, when the
23 government merely accepts without any substantive
24 review or evaluation decisions made by that government
25 contractor, then the contractor not the government is

1 exercising discretion. Silverstein at Page 380.

2 In this case, the parties took the
3 deposition of Edward L. Anderson, an employee of the
4 Port Authority, who began work at the Port Authority
5 in 1979. He has held the title of supervisor of
6 automotive engineering since 1996. He is a
7 professional engineer, who described himself as
8 "design engineer" during his deposition. Page 14 of
9 the transcript.

10 He indicated that the vehicle in question
11 was to be designed in conformance with NFPA414.

12 Further, he indicated that the only
13 specification which the Port Authority put in their
14 contract was that the height of the step in question
15 be no more than 20 inches, which is lower than the
16 NFPA requirement. Page 33 of the transcript.

17 Further, he indicated that in order to meet
18 the Port Authority's height requirement, it was
19 necessary that the step have a 'swing-up design.'
20 Page 33 of the transcript.

21 While he conceded that the defendant
22 actually designed the bottom step, nevertheless, it
23 was pursuant to the Port Authority requirement
24 concerning height and the need for the step to swing
25 up when it encountered off-road obstacles.

1 He indicated that, in the first instance,
2 the specifications were prepared by an engineer who
3 worked for him, one Jim Keegan, and that he -- meaning
4 Mr. Anderson -- was responsible to review and approve
5 the specifications.

6 Further, he indicated that the Port
7 Authority intended that the vehicle comply with
8 NFPA414 not SAEJ185, which is referred to by
9 plaintiff's expert. See Page 38 of the transcript.
10 See Page 38 of the transcript.

11 Finally, he indicated that the original
12 step provided by Oshkosh was rigid and was rejected by
13 the Port Authority because it did not comply with
14 NFPA414. See Page 42 of transcript.

15 This led to a "whole series of deviations
16 from specifications as we published them," and a
17 "series of meetings" within which the final
18 specifications were ironed out with the defendant
19 Oshkosh. See Page 42-43 of transcript.

20 In the words of Mr. Anderson, "All we cared
21 about was the swing-away design and 20-inch ground
22 height." See Page 43 of transcript.

23 Moreover, he agreed that after a prototype
24 of the unit was constructed by the defendant Oshkosh,
25 the Port Authority sent a group out to the defendant's

1 plant to inspect the vehicle and to do testing on it.

2 See Page 58 of transcript.

3 Finally, he agreed that the vehicle,
4 including the step, was acceptance tested by the Port
5 Authority. See Page 58 of the transcript.

6 Under the circumstances, it is clear in
7 this case that the government, meaning the Port
8 Authority, approved reasonably precise specifications
9 for the vehicle in question, and as a result, the
10 first component of the Boyle test has been met.

11 Additionally, there is no disagreement that
12 the contractor's product met the specifications as
13 they were finally approved.

14 Accordingly, the only component which
15 remains is whether the contractor -- meaning the
16 defendant -- informed the government -- meaning
17 the Port Authority -- of risks that it, the
18 contractor, knows of and of which the government is
19 ignorant.

20 As stated by the Supreme Court in
21 Silverstein at Page 35: Government contractors are
22 not obligated to warn the government about risks of
23 which the government is already aware.

24 A similar argument was raised in the
25 Silverstein case, and the Court rejected it.

1 In that case, the Court indicated that the
2 plaintiff pointed to no material circumstances that
3 the defendant Grumman knew of that the USPS did not
4 that in any way amounted to a known risk, or if a
5 known risk existed, that the USPS was not already
6 aware of the risk.

7 The same can be said here. The plaintiff
8 has not shown that the defendant Oshkosh had greater
9 knowledge of a risk of injury to users than did the
10 Port Authority. After all, the Port Authority knew or
11 should have known about the risk entailed in someone
12 missing the bottom step when he exited the cab,
13 regardless of how well the step was designed.

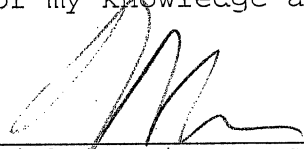
14 As a result, the Court, upon further review
15 of this matter and with the benefit of oral argument,
16 finds that there is no material fact issue which
17 requires this matter to proceed to trial, and the
18 Court grants summary judgment for the defendant under
19 the government contractor defense.

20 (Proceedings concluded)
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I, MICHELE VICARO, the assigned
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Date: 10/7/09
CASE #:



Michele Vicaro, AD/T 352

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