SUPERIOR COURT
OF THE
STATE OF DELAWARE

JAN R. JURDEN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
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October 12, 2005

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RE: William Costello and Kathy Costello vs.
Volkswagen of America, Inc.
C.A. No. 02C-04-165-JRJ

Dear Counsel:

On appeal, the Delaware Supreme Court held:

> [The trial judge]...did not inform the jury that those landowners who are out of possession are treated differently - that a landowner relinquishing its possessory interests to another cannot be held for dangerous conditions that arise 'after the lessee has taken possession.' For the jury to conclude that Volkswagen owned any duty to...[plaintiff], it must first resolve the interplay between VW's installation and Transworld's maintenance of the flooring surface. But the jury could not, on the basis of the instructions the trial judge gave, reach the question of whether...[defendant] owed a duty until it first determined the extent of the company's continued possessory interest in the...[premises]. Only then could it properly resolve whether the dangerous condition arose because of the failure to maintain the surface where...[plaintiff] fell or from the nature of the flooring surface itself....our premises-liability law...imposes a duty only on landowners that either retain possession or create dangerous conditions before relinquishing possession. Only by answering these preliminary questions could the jury decide whether...[defendant] owed...[plaintiff] a duty, and if so, whether...[it] breached that duty....[1]

[1] *Volkswagen of America, Inc. V. Costello*, No. 306, 2004, Steele, C.J. (July 11, 2005), at 10-11.

In light of this ruling, I would like the counsel to confer and jointly submit a proposed jury instruction (or instructions) consistent with the Supreme Court's holding by November 15, 2005.

During our teleconference of October 6, 2005, I denied defendant's application to add a liability expert. The deadline for expert identification passed long ago, and the plaintiff's theories of liability, known to defendant long before the trial, have not changed. If defendant wanted to call a liability expert, it could have and should have before the Court-ordered expert discovery cutoff. Under the circumstances, the Court will not permit defendant to introduce a new liability expert after trial, after this case was appealed to the Supreme Court, and after the Supreme Court reversed and remanded the case for a new trial.

Finally, this will confirm that the Court will hear oral argument on defendant's renewed Motion for Summary Judgment on Monday, November 28, 2005 at 9:30 a.m.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge

JRJ/mls
Original to Prothonotary
cc: Samantha Kabi, Esq.