PennDOT Must Pay All of Settlement In Suit Over Fall

BY DANIELLE N. RODIER
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PennDOT is responsible for the maintenance of a traffic-control median located between state- and city-owned highways, a common pleas court judge has ruled.

Determining liability for a settlement in a suit against PennDOT, the city of Philadelphia and SEPTA, Philadelphia Common Pleas Judge Nitza I. Quinones Alejandro said the island could not be defined as a traffic-control device, which would cause the city to assume responsibility under an exception to governmental immunity.

Quinones rejected PennDOT's argument that a Commonwealth Court ruling making the same distinction regarding a median did not apply because the median in that case was located between two state-designated highways.

"Absent an agreement as to what entity maintains the traffic island, the purpose of the traffic island is the same whether it is between two state-designated highways or as here, a state-designated highway and a city-owned street," Quinones said.

Therefore, in *Morton v. Pennsylvania Department of Transportation*, Quinones said PennDOT was responsible for the entire amount of a settlement with a plaintiff who fell on the island.

According to the opinion, Alfred Morton was walking on a traffic island located between Broad Street and Old York Road, south of Olney Avenue, on June 27, 2000, when he tripped and fell over an alleged defect in the island.

Quinones said photographs of the accident site showed there was a pothole on the island.

The island, Quinones said, separates traffic

Fee Fight: *Dilworth Paxson Wins Argument That Disputes Should Be Arbitrated*

BY SHANNON P. DUFFY
U.S. Courthouse Correspondent

In a victory for Dilworth Paxson, a federal judge has ordered that a former client of the firm must submit to arbitration for both his dispute over the size of the firm's fee and his claim of malpractice because the fee agreement called for arbitration of "any future dispute."

U.S. District Judge Eduardo C. Robreno rejected Manuel Asensio's claim that he was "fraudulently induced" by the firm to enter into the arbitration agreement by promises that the arbitration clause was meaningless and unenforceable.

In his 19-page opinion in *Dilworth Paxson v. Asensio*, Robreno found that Asensio's testimony about his conversations with attorney Lawrence McMichael at the time he signed the agreement was inadmissible under the parol evidence rule.

As a result, Robreno found that Asensio had a heavy burden to prove that, under "the totality of circumstances," he was fraudulently induced to sign.

After holding a non-jury trial, Robreno concluded that Asensio was a "highly sophisticated" businessman and therefore could not have reasonably relied on any assurance that the arbitration clause was unenforceable.

Robreno also found that, as a registered broker, Asensio works "in an industry where arbitration is a common mechanism for dispute resolution ... and it is therefore logical to infer that he is familiar both with written agreements and with arbitration clauses."

Asensio also claimed that he signed the agreement under duress because he was facing sanctions of $1,000 per day if he did not secure counsel for himself and his company within 72 hours.

At the time, Asensio said, the Dilworth firm had withdrawn from his case over a fee dispute but refused to turn over its files to his new lawyers. As a result, Asensio said, he was forced to pay his balance to the Dilworth firm and sign its fee agreement in order to persuade the firm to defend him at an upcoming trial.

In the case, *Hemispherx Biopharma Inc. v. Asensio*, a drug company accused Asensio and his company of defamation for statements he made in short-selling HBI's stock.

HBI claimed that it was in the development and testing stage of the antiviral drug Ampligen for the possible treatment of chronic fatigue syndrome, chronic hepatitis and AIDS.

The suit alleged that Asensio falsely claimed that Ampligen was "highly toxic," "medically useless" and "obsolete."

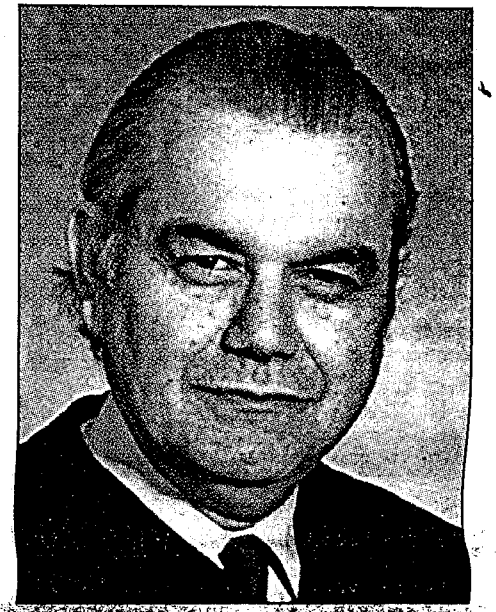
HBI sued Asensio, Asensio & Co. Inc. and asensio.com, asserting claims of defamation, product disparagement, civil conspiracy and tortious interference with contract, seeking more than $80 million in damages.

After nearly four weeks at trial, a Philadelphia Common Pleas jury cleared Asensio. Judge Albert W. Sheppard had dismissed all claims against asensio.com and trimmed a few of HBI's claims during the trial. As a result, the jury decided only the defamation and disparagement claims against Asensio and Asensio & Co.

But after the victory at trial, another fee dispute erupted between Asensio and Dilworth.

When Dilworth filed in the Philadelphia Court of Common Pleas to invoke the arbitration clause, Asensio removed the suit to U.S. District Court and challenged the enforceability of the agreement.

His lawyers, Fredric L. Goldfein and



ROBRENO: USES PAROL EVIDENCE RULE

Samantha L. Conway of Goldfein & Hosmer, argued that Asensio executed the March 16, 2000, agreement and arbitration clause "under duress and as a direct result of material misrepresentations by Dilworth."

In an affidavit, Asensio said, "I was specifically and deliberately informed by Mr. McMichael, at the time he asked me to sign the letter which included the arbitration clause, that I would not be relinquishing any right to sue for some future event."

The affidavit said, "McMichael advised me that he was making me sign the March 16, 2000, letter only for the purpose of allowing him to fulfill the executive committee's request to obtain some sort of document as a condition of taking the Asensio defendants ... on as clients again."

Asensio also said McMichael "informed me

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that even though the letter included an arbitration clause that the arbitration clause was not legally enforceable."

Robreno found that significant portions of Asensio's testimony were inadmissible under the parol evidence rule, which bars any evidence of negotiations leading to the formation of an agreement that would conflict with the intent expressed on paper.

Robreno found that Asensio failed to prove that he was fraudulently induced to sign since the evidence showed that he was a sophisticated client who took the issue seriously.

Robreno noted that Asensio had repeatedly said he was troubled by the presence of the arbitration clause, and that he questioned McMichael extensively about it.

"Indeed, Asensio states that he took the fee agreement as a whole quite seriously, an assertion corroborated by the fact that he not only signed the document, but initialed every page," Robreno wrote.

Robreno also found that Asensio's practice of "reviewing documents with great care" was "reflective of [his] background as a highly sophisticated, highly educated businessman, the president of an investment management and investment brokerage company."

Asensio's story was implausible, Robreno found, because he claimed that he had lost trust in the Dilworth lawyers, but nonetheless believed that the contract he was signing was meaningless.

"Notwithstanding his distrust of Dilworth and his ready access to other attorneys, however, Asensio claims that he blindly relied on McMichael's representations that an arbitration clause contained in a signed, written document was either unenforceable or not intended to be enforced," Robreno wrote.

"Asensio further contends that he signed the document even though he and McMichael knew that it contained another untruth, i.e., that he had consulted with an outside lawyer when he had not, in fact, done so. Finally, assuming Asensio's testimony was true, the court concludes that for a sophisticated businessman of Asensio's caliber, the reliance evidenced by these actions is not reasonable," Robreno wrote.

Goldfein and Conway argued that McMichael never informed Asensio that by signing the agreement to arbitrate, he was giving up his right to a jury trial with respect to future disputes between the parties.

But Robreno said that argument was a "red herring."

"Indeed, had McMichael issued the kind of warning proposed by plaintiff's counsel, that action would undercut the primary assertion on which Asensio relies to prove his fraudulent inducement claim, namely that the clause was unenforceable, and, by implication, that Asensio was giving up no rights by signing it," Robreno wrote.

Goldfein and Conway also argued that Asensio should not be forced to arbitrate his malpractice claim against Dilworth since the fee agreement's arbitration clause applies only to fee disputes.

Robreno disagreed, saying the arbitration clause covers "any future dispute" between Dilworth and Asensio.

"Given the apparent breadth of this language, however, and the directive that courts must give effect to arbitration clauses as written, absent positive assurance that the parties did not intend to submit a particular dispute to arbitration, the court concludes that Asensio's malpractice and other claims fall within the scope of the language of the arbitration clause, and must be arbitrated, along with the fee dispute at issue in this case," Robreno wrote.

(Copies of the 19-page opinion in Dilworth Paxson v. Asensio, *PICS NO. 03-0662, are available from* The Legal Intelligencer. *Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m. .)* •