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A Summary Of Recent Appellate Decisions From Pennsylvania (September 2006)

By Daniel Siegel

Pennsylvania State Court Decisions

1. Civil Litigation 1.1. Automobile Insurance 1.1.1. "Cars for Hire" *Supreme Court

f Prudential Property & Casualty Ins. Co. v. Sartno, No. 163 MAP 2005 (August 21, 2006)

Holding: An insured's use of his private vehicle to deliver pizza does not render the automobile a "car for hire" and does not trigger the exclusionary provision of the insurance policy.

1.1.2. Uninsured & Underinsured Motorist Arbitration * Superior Court

f The Hartford Ins. Co. v. O'Mara, 2006 PA Super 236 (August 29, 2006)

Holding: Under the Uniform Arbitration Act of 1980, when the application or construction of an insurance policy provision is at issue, the dispute is within the exclusive jurisdiction of the arbitrators. A court will take jurisdiction only when the claimant attacks a particular provision as: (1) contrary to a constitutional, legislative or administrative mandate; (2) against public policy; or, (3) unconscionable.

f Nationwide Insurance Co. v. Schneider, 2006 PA Super 219 (August 17, 2006)

Holding: Section 1733 of the MVFRL specifies the priority for recovery of underinsured motorist benefits, but neither mentions nor requires exhaustion of limits. When an insured settles a claim in contravention of a policy's consent-to-settle clause, an insurer must show that its interests are prejudiced.

1.1.3. Subrogation * Supreme Court

f Wirth v. Aetna U.S. Healthcare, No. 28 EAP 2005 (August 22, 2006)

Holding: Pursuant to the Pennsylvania Health Maintenance Organization Act, 40 P.S. § 1560(a), a health maintenance organization is exempt from complying with the anti-subrogation provision of the

Pennsylvania Motor Financial Responsibility Law.

1.2. Medical Malpractice Claims 1.2.1. MCARE Act * Superior Court

f *McManamon v. Washko*, 2006 PA Super 245 (August 31, 2006)

Holding: The Medical Care Availability and Reduction of Error Act does not apply to injuries not caused by medical negligence.

1.3. Sovereign Immunity 1.3.1. Real Property & Sidewalks Exceptions * Commonwealth Court

f *Reid v. City of Philadelphia*, No. 1572 C.D. 2005 (August 3, 2006)

Holding: A street owned by a municipality that is designated a Commonwealth highway continues to be owned by the municipality. If a person is injured on a municipal sidewalk that adjoins a designated highway, the municipality remains the owner of the sidewalk and the sidewalk is, therefore, within the "right of way" of a street owned by the municipality for purposes of analyzing governmental immunity under the Political Subdivision Tort Claims Act.

f *LoFurno v. Garnet Valley School District*, No. 2082 C.D. 2005 (May 3, 2006)

Holding: A belt sander, designed to be bolted to the floor, that is not hardwired or permanently attached to the floor or to a dust collection system, is personalty, and not a fixture under the real property exception to governmental immunity under the Political Subdivision Tort Claims Act.

2. Civil Procedure 2.1. Appeal 2.1.1. Conflict Between Federal & Pennsylvania Law * Superior Court

f *Trombetta v. Raymond James Financial Services, Inc.*, 2006 PA Super 229 (August 22, 2006)

Holdings: 1. The standards of review of an arbitration award under the Pennsylvania Uniform Arbitration Act are not preempted by the Federal Arbitration Act (FAA).

2. The standards of review under the FAA cannot preempt the Pennsylvania standards for review of arbitration awards unless the Pennsylvania standards of review frustrate the underlying objectives of the FAA because standards of review are an inherently procedural mechanism used to facilitate judicial resolution of controversies after the underlying arbitration agreement has been enforced in accordance with the FAA.

3. Common law arbitration standards of review do not violate the core objective and principles underlying the FAA. Pennsylvania law governs the question of whether parties can impose de novo review on trial courts by virtue of contractual agreements.

4. De novo review clauses contained in arbitration agreements are unenforceable as a matter of law in Pennsylvania.

f Joseph v. Advest, Inc., 2006 PA Super 213 (August 8, 2006)

Holding: The provision of the Federal Arbitration Act permitting a party three months to challenge an arbitration award is procedural. Pennsylvania's 30-day deadline (under either the Uniform Arbitration Act or common law arbitration) for contesting arbitration awards applies to such appeals, and appeals filed more than 30 days after the entry of the award are untimely.

2.2. Capacity to Sue * Superior Court

f George Stash & Sons v. New Holland Credit Co., LLC, 2006 PA Super 206 (August 2, 2006)

Holding: The Fictitious Name Act provides that an entity that fails to register its fictitious name shall not be permitted to maintain any action in a Pennsylvania tribunal. Where, as here, a person or entity knows the identity of the persons with whom he or she is dealing, he cannot assert the lack of capacity to sue under the Fictitious Name Act.

2.3. Collateral Source Rule * Superior Court

f Simmons v. Cobb, 2006 PA Super 222 (August 16, 2006)

Holding: The collateral source rule does not preclude a plaintiff from introducing evidence of the receipt of Social Security Disability benefits. Rather, the collateral source rule, which is intended to protect tort victims, provides that payment from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer. In this case, plaintiff sought to introduce evidence of receipt of SSD benefits.

2.4. Forum Non Conveniens * Superior Court

f Wright v. Aventis Pasteur, Inc., 2006 PA Super 203 (August 2, 2006)

Holding: In determining whether to dismiss a case pursuant to 42 Pa.C.S.A. § 5322(e) based on forum non conveniens, the trial court must consider two important factors: (1) a plaintiff's choice of the place of suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless there is an alternative forum available to the plaintiff. As Superior Court acknowledges - this decision diverges from "the apparent trend in recent forum non conveniens decisions ... toward dismissing cases brought in Pennsylvania where another forum is available."

2.5. Interlocutory Appeals 2.5.1. Generally * Supreme Court

f Pridgen v. Parker Hannifin Corp., Nos. 8 & 9 EAP 2005 (August 22, 2006)

Holding: In order for a trial court Order to be a "collateral order" under Pa.R.A.P. 313 - and appealable as a matter of right - the following three factors must be present:

1. The Order must be separable from and collateral to the main cause of action;
2. The right involved

is too important to be denied review and must involve rights deeply rooted in public policy going beyond the particular litigation at hand; and, 3. The question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

1.1.1. Trade Secrets * Superior Court

f *Crum v. Bridgestone*, 2006 PA Super 230 (August 23, 2006)

Holding 1: This decision contains the same holding relating to collateral orders as *Pridgen* (above).

Holding 2: Pursuant to Section 757(b) of the Restatement (2d) of Torts and Pennsylvania law, in order to determine whether particular information is to be given trade secret status, a court should consider the following factors:

1. The extent to which the information is known outside of the business; 2. The extent to which the information is known by employees and others involved in the business; and, 3. The extent of measures taken to guard the secrecy of the information. Order must be separable from and collateral to the main cause of action. For a court to determine whether a protective order is appropriate under Pa.R.Civ.P. 4019(a)(9), the discovery standard should embrace both (1) relevance and necessity, and (2) a balancing of need versus harm. Once a party establishes that the information sought is a trade secret, the burden shifts to the requesting party to demonstrate by competent evidence that there is a compelling need for that information and that the necessity outweighs the harm of the disclosure.

1.1. Judgment by Default * Superior Court

f *State Farm Insurance Co. v. Barton*, 2006 PA Super 210 (August 7, 2006)

Holding: After a responsive pleading is filed, even if untimely, a judgment by default cannot be entered because the responding party is no longer in default.

1.2. Settlement * Commonwealth Court

f *Brannam v. Reedy*, No. 2590 C.D. 2005 (August 14, 2006)

Holding: An evidentiary hearing is required when one party disputes the existence of a settlement agreement or its binding effect, and is the appropriate procedure even when there is a written agreement signed by counsel if it is alleged that counsel lacked the authority to bind his client. There must also be a hearing when a settlement is vacated by court order or enforced by court order. A hearing must be held even if the trial court has "intimate knowledge" of the facts as a result of a pre-hearing conference because a trial court's recital of facts is not a substitute for a full record. A hearing must also be held, despite filing a petition and answer, even if no party requests one.

1.3. Transfer From Federal Court to State Court f *Falcone v. The Insurance Company of the State of Pennsylvania*, 2006 PA Super 241 (August 30, 2006)

A Summary Of Recent Appellate Decisions From Pennsylvania (September 2006)

Holding: Pursuant to 42. Pa.C.S.A. § 5103, a party may transfer a case from federal court to the appropriate state court when the federal court lacks diversity jurisdiction. The date of the federal filing becomes the date of the state filing for purposes of the applicable statute of limitations. To comply, a party must promptly file a certified transcript of the final judgment of the federal court and related pleadings in a Pennsylvania court or magisterial district. A party does not comply with the statute by filing a new complaint in state court.

2. Unemployment Compensation 2.1. Necessitous and Compelling Reason to Quit * Commonwealth Court

f Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review), No. 464 C.D. 2006 (August 23, 2006)

Holding: Elimination of health care benefits constitutes a substantial change in employment terms and serves as a necessitous and compelling reason for a claimant to resign from employment, thus entitling the claimant to unemployment compensation benefits.

3. Workers' Compensation 3.1. Appellate Review * Supreme Court

f Trimmer v. Workers' Compensation Appeal Board (Monaghan Township), No. 58 MAL 2006 (August 3, 2006)

Holding: The Commonwealth Court (and presumably the Workers' Compensation Appeal Board) may not substitute its determination of the facts and credibility of witnesses for the Workers' Compensation Judge's proper assessments. This per curiam Order summarily reverses the Commonwealth Court's decision because determination of facts and credibility is solely within the province of the Workers' Compensation Judge.

3.2. Hearing Loss/Employer Liability * Commonwealth Court

f Hayduk v. Workers' Compensation Appeal Board (Bemis Co., Inc.), No. 230 C.D. 2006 (August 11, 2006)

Holding 1: When an employer (Company A) purchases the assets, but not the liabilities, of another company (Company B), including the plant where the claimant worked, and the purchase specifically excludes any of Company B's workers' compensation liabilities that arose prior to the purchase of the assets, Company A is not liable for any work-related hearing loss that occurred prior to its purchase of Company B.

Holding 2: Under Section 306(c)(8)(iv) of the Workers' Compensation Act, audiometric testing for a work-related hearing loss must conform to applicable OSHA standards. It is the employer's burden, however, to establish that an occupational hearing loss is attributable to a previous employer. When, as here, the employer fails to meet this burden, it remains liable for all of a claimant's compensable hearing loss.

3.3. Impairment Rating Examinations * Supreme Court

f Dowhower v. Workers' Compensation Appeal Board (Capco Contracting, Inc.), No. 542 MAL 2003 (August 11, 2006)

Holding: The Supreme Court has granted claimant's Petition for Allowance of Appeal and will, presumably, address the issue of whether an employer may request an Impairment Rating Examination before the 104-week period in Section 306(a.2)(1) of the Workers' Compensation Act.

3.4. Physical Examinations * Commonwealth Court

f Knechtel v. Workers' Compensation Appeal Board (Marriott Corp.), No. 140 C.D. 2006 (August 24, 2006)

Holding: Pursuant to Section 314(a) of the Workers' Compensation Act, when an employee's physician attends an employer-requested physical examination, the employee is entitled, at employee's expense, to have a health care provider of his or her own selection participate in such examination. Participation is limited to attendance and observation.

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A Summary Of Recent Pennsylvania & New Jersey Appellate Court Decisions (august 2006)

By Daniel Siegel

A Summary of Recent Pennsylvania Appellate Court Decisions & Rule Changes

REPORTING DECISIONS THROUGH AUGUST 1 2006

PENNSYLVANIA STATE COURT DECISIONS

1. CIVIL LITIGATION 1.1. AUTOMOBILE INSURANCE

*Superior Court of Pennsylvania

*Santorella v. Donegal Mutual Insurance Co., 2006 PA Super 202 (July 31, 2006)

Holding: An individual who owns a registered, uninsured motor vehicle - in a state other than Pennsylvania - is precluded from receiving first party medical benefits under a policy issued to another member of the individual's household. In this case, plaintiff David Santorella, Jr., owned an uninsured car registered in California. The Superior Court denied the plaintiff first party benefits under 75 Pa.C.S.A. § 1714 "because the word `registered" is not qualified by the words `in this Commonwealth' in the statute, we ... refuse to read into the section an exception it does not explicitly declare..."

*Wheeler v. Nationwide Mutual Fire Insurance Co., 2006 PA Super 197 (July 31, 2006)

Holding: An individual whose motor vehicle insurance policy - on which he or she is a named insured - does not provide income loss, may not recover first party income loss benefits from the insurance policy covering the motor vehicle he or she was driving at the time of the accident.

1.2. DAMAGES

*Superior Court of Pennsylvania

*Excavation Technologies, Inc. v. Columbia Gas Co. of Pa., 2006 PA Super 164 (July 7, 2006)

Holding: A utility company is considered to be in the business of supplying information when acting in compliance with the Pennsylvania One Call System and is therefore subject to Section 552(2) of the Restatement (Second) of Torts. In addition, the Court adopts Section 552(3) for negligent misrepresentation cases that arise under the One Call Act. Finally, the Court holds that the economic loss doctrine - which states that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage - does not automatically apply when only economic losses are alleged. Rather, if, in a negligent misrepresentation claim, (1) the defendant was in the business of supplying information, and (2) it was foreseeable that the information would be used and relied upon by third parties, the claim may proceed under Section 552 of the Restatement, and the economic loss doctrine is inapplicable.

1.3. MEDICAL MALPRACTICE CLAIMS & CIVIL PROCEDURE/PLEADINGS

*Superior Court of Pennsylvania

*Rostock v. Anzalone, 2006 PA Super 191 (July 26, 2006)

Holding: A complaint may be dismissed under the doctrine of lis pendens based upon the pendency of a prior action or an agreement for alternative dispute resolution. The mere filing of a second complaint, identical in all respects to the first with the sole exception that the second complaint alleged, "This is a medical malpractice action," does not make the defense of lis pendens unavailable.

*McSorley v. Deger, 2006 PA Super 200 (July 31, 2006)

Holding: In a claim alleging lack of informed consent, it is a jury question whether the doctor's actions were within the terms of the consent provided by the patient. In this case, the pre-surgery consent form permitted the physician to perform such surgical or other procedures as are necessary and desirable in the event of unforeseen conditions that necessitate an extension of the original procedure.

2. CIVIL PROCEDURE 2.1. FORGERY

*Superior Court of Pennsylvania

*De Lage Landen Financial Services, Inc. v. The Urban Partnership, LLC, 2006 PA Super 169 (July 12, 2006)

Holding: Generally, when an allegation of forgery is raised - in this case, it was alleged that the document conferring jurisdiction in Pennsylvania was forged - the party claiming forgery has the burden of proving the existence of a forgery by clear and convincing evidence. Because the allegation of forgery raises an issue of fact, resolution of the issue will turn upon the court's assessment of the witnesses' credibility; however, there is no legal requirement that a party alleging forgery present a handwriting expert to support the claim.

3. WORKERS' COMPENSATION 3.1. RETIREMENT

*Commonwealth Court of Pennsylvania

*Pries v. Workers' Compensation Appeal Board (Verizon Pennsylvania), No. 1870 C.D. 2005 (July 25, 2006)

Holding: Affirming its decision in County of Allegheny (Dept. of Public Works) v. Workers' Compensation Appeal Board (Weis), 872 A.2d 263 (Pa.Cmwlth. 2005), the Court holds that, in order for disability compensation to continue following retirement, a claimant must show that he or she is seeking employment after retirement and that he was forced into retirement because of his work-related injury. It is the claimant's burden to show that he or she has not withdrawn from the entire work force.

3.2. PSYCHIATRIC TREATMENT

*Commonwealth Court of Pennsylvania

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*Huddy v. Workers' Compensation Appeal Board (U.S. Air), No. 1031 C.D. 2005 (August 1, 2006)

Holding:A Notice of Compensation Payable is properly amended to include depression and anxiety when a claimant proves that the work injury was a substantial contributing factor to the psychological injury/diagnosis.

3.3. SUBROGATION

*Superior Court of Pennsylvania

*Urmann v. Rockwood Casualty Insurance Co., 2006 PA Super 201 (July 31, 2006)

Holding:A settlement agreement, which apportions a settlement between an injured worker's claim and the worker's spouse's loss of consortium claim, will not be overturned when it is adjudicated by the trial court based upon an evidentiary hearing and the execution of a settlement agreement. In this case, the facts demonstrate that the trial court attempted to assure that the apportionment was fair and consistent with Darr Construction Co. v. Workmen's Compensation Appeal Board (Walker), 522 Pa. 400, 715 A.2d 1075 (1998).

3.4. WAIVER OF ISSUES ON APPEAL

*Commonwealth Court of Pennsylvania

*McGaffin v. Workers' Compensation Appeal Board (Manatron, Inc.), No. 2168 C.D. 2005 (July 19, 2006)

Holding:Because the claimant failed to raise/preserve the issue before the Workers' Compensation Judge of whether an impairment rating under Section 3006(a.2) of the Act, 77 P.S. § 511.2(1), precludes a termination of benefits, the Court declines to address the issue.

NEW PENNSYLVANIA RULE OF CIVIL PROCEDURE

PA.R.CIV.P. 204.11 (FORMAT OF PLEADINGS AND OTHER LEGAL PAPERS)

*Effective February 1, 2007, all pleadings, motions and other legal papers must conform to the following requirements:

1. Documents must be on 8–1/2 by 11 inch paper
2. Documents shall be on white paper (except dividers and similar sheets)
3. The first sheet shall contain a 3–inch space at the top for court stampings, filing notices, etc.
4. Text must be double–spaced
5. Quotations more than two lines long may be indented and single spaced
6. Margins must be at least one inch on all four sides
7. Letter shall be clear and legible, and no smaller than 12 point in size
8. Lettering shall be on only one side of a page (except for exhibits and supporting documents)
9. Documents must be firmly bound.

NEW JERSEY STATE COURT DECISION

WORKERS' COMPENSATION -- INTOXICATION

*Supreme Court of New Jersey

*Tluma v. High Bridge Stone, No. A-69-05 (July 19, 2006)

Holding: In order for the statutory defense of intoxication to bar the recovery of workers' compensation benefit, an employer must prove by a preponderance of the evidence that the employee's work-related injuries were caused solely by intoxication.

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