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A Summary Of Recent Pennsylvania Appellate Decisions

By Daniel Siegel

PENNSYLVANIA STATE COURT DECISIONS

It seems as though the Pennsylvania Supreme Court ends every calendar year by issuing numerous Opinions, with the volume increasing any year in which a Justice is leaving the bench. With Justice Nigro's unceremonious removal from the bench at the behest of voters irate because the legislature decided to award a large pay raise to itself and the judiciary, 2005 was no exception. Consequently, the decisions reviewed in this issue are grouped by Court rather than by topic.

1. SUPREME COURT OF PENNSYLVANIA

1.1. AUTOMOBILE INSURANCE

° Uninsured & Underinsured Motorist Claims

f Insurance Federation of Pennsylvania, Inc. v. Commonwealth, Department of Insurance No. 2007 MAP 2003 (December 30, 2005)

Holding: The Insurance Department overstepped its legislative mandate and does not have the authority to require mandatory binding arbitration in uninsured and underinsured motorist disputes. Consequently, insurance carriers may require that UM and UIM claims be resolved in the courts or, presumably, by other means specified under the insurance contract. Justice Saylor filed a dissenting opinion, joined by Justice Castille.

This decision will likely portend the demise of arbitration as the preferred method for deciding uninsured and underinsured motorist claims. It seems ironic, however, that carriers would seek to avoid arbitration when insurers, credit card companies, and businesses of all types, are including arbitration clauses in their agreements. Of course, these anti-consumer provisions generally preclude appeals, limit punitive damages, and otherwise restrict the nature of allowable claims. It is safe to assume that auto insurers will likely propose similar provisions for approval by the Insurance Department. With this Supreme Court Opinion, the question arises whether the Insurance Department can prohibit such provisions. Time will tell.

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f State Farm Mutual Automobile Insurance Co. v. Foster No. 2007 MAP 2003 (December 30, 2005)

Holding: An insurer may deny uninsured motorist benefits to an insured claimant who fails to report the accident to the police or other governmental authority as required by the policy and the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. §§ 1701–1799.7. Justice Saylor filed a concurring opinion, concluding that regardless of the language of the MVFRL, a carrier may include a police notification provision in the terms of an auto insurance policy. Justice Baer filed a dissenting opinion, joined by Justice Castille, in which he characterized the provision at issue as a "technical escape hatch by which to deny coverage in the absence of prejudice." Justice Nigro did not participate in the decision of the case.

1.2. CIVIL PROCEDURE

° Service of Process

f McCreesh v. City of Philadelphia No. 31 EAP 2005 (December 28, 2005)

Holding: After an action has been commenced, a plaintiff must provide notice of the action to the defendant in order for the purpose of the statute of limitation to be fulfilled. A complaint should, therefore, only be dismissed in those cases in which the plaintiff has demonstrated an intent to stall the judicial machinery or when plaintiff's failure to comply with the Rules of Civil Procedure has prejudiced the defendant. Justice Newman filed a dissenting opinion. Justice Eakin also filed a dissenting opinion, joined by Justice Nigro.

The Supreme Court has yet again revisited its decision in *Lamp v. Heyman*, 366 A.2d 882 (Pa. 1976). In *McCreesh*, the Court now holds that a plaintiff need not strictly comply with the Rules by repeatedly reissuing a writ of summons; instead, the Court looks to the good faith efforts of a plaintiff to effectuate service, including considering whether a defendant has actual notice of the litigation and is not prejudiced by the lack of strict compliance with the Rules of Civil Procedure. The facts here - in which plaintiff attempted to serve the writ by certified mail in clear violation of the Rules - are certain to generate further litigation. The true food for thought - and further litigation - appears in Justice Eakin's dissent, in which he states:

The "majority has developed a new rule holding a trial court may only dismiss a case where there is ineffective service in two distinct situations: (1) where the plaintiff's actions evidence an intent to stall the judicial machinery, or (2) where the plaintiff's failure to comply with the Rules of Civil Procedure has actually prejudiced the defendant. . . .The majority goes so far as to suggest that without prejudice, actual notice itself, much less proper service, may be unnecessary."

1.3. WORKERS' COMPENSATION

° Impairment Rating Evaluations (IREs)

f Gardner v. Workers' Compensation Appeal Board No. 14 EAP 2004 (December 28, 2005)

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Holding: An employer/workers' compensation carrier must request that a workers' compensation claimant submit to an Impairment Rating Evaluation within sixty (60) days from the date that the claimant receives, or comes into possession of 104 weeks of total disability benefits in order to obtain the automatic relief under 77 P.S. § 511.2(2). If an employer fails to request an IRE within this time period, it may still request an IRE at a later date pursuant to 77 P.S. § 511.2(6), but must utilize the traditional administrative process in order to modify a claimant's disability status. Justice Nigro filed a concurring opinion, and Justice Newman filed a dissenting opinion.

Workers' compensation practitioners who had been awaiting the decision in Gardner now know that an employer/insurer can request an IRE up to two times within any twelve-month period. The only limitation on an employer's right to an IRE is that the employer cannot avail itself of the automatic relief under the Act if the exam is not requested within 60 days of the employee's receipt of 104 weeks of benefits. In reality, this means that a workers' compensation carrier is now able to reduce virtually every claimant to partial disability status at any time after the claimant has received two years of benefits. Although a claimant can try to defend against a modification petition based upon an IRE, the fact that literally no claimant can meet the statute's requirement that he or she have a 50 percent impairment means that any defenses will, at best, delay the inevitable.

°Physical Versus Mental Injuries

f Panyko v. Workers' Compensation Appeal Board No. 37 WAP 2004 (December 28, 2005)

Holding: A claimant who suffers a purely physical injury, such as a heart attack, because of a psychic reaction to a working condition, is not required to establish that the working condition was abnormal. Thus, claimants allegedly suffering from physical injuries are not required to show that their injuries are the result of abnormal working conditions. Rather, they need only show that (1) they are suffering from an objectively verifiable physical injury, and (2) the injury arose in the course of employment and was related thereto. Justice Saylor filed a concurring opinion, and Justice Newman filed a dissenting opinion.

°Supersedeas Fund Reimbursement

f Comm., Dept. of Labor & Industry v. Workers' Compensation Appeal Board (Exel Logistics) No. 37 WAP 2004 (December 28, 2005)

Holding: An employer is not entitled to Supersedeas Fund reimbursement for compensation and medical bills paid while a Petition for Forfeiture is pending because the petition for forfeiture was pursuant to § 306(f.1)(8), and not § 413 or § 430 of the Act. Justice Newman filed a dissenting opinion, in which Justices Castille and Baer joined.

1.4. NEW RULES OF CIVIL PROCEDURE

°Disclosure of Legal Malpractice Insurance Coverage

f Rule of Professional Conduct 1.4(c)

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Effective July 1, 2006, lawyers in private practice are required to notify their clients if they do not have professional liability insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate per year, subject to commercially reasonable deductibles. The Rule also specifies the language of the required disclosures, and mandates that attorneys maintain a record of the disclosures for six years after termination of the representation of a client.

°Consumer Credit Transactions

f New Rules of Civil Procedure 1326 to 1331

Effective February 1, 2006, the Court has promulgated Rules of Civil Procedure governing proceedings to compel arbitration and to confirm an arbitration award in a claim arising from a consumer credit transaction.

2. SUPERIOR COURT OF PENNSYLVANIA

2.1. °Defamation - Conditional Privilege

f Moore v. Cobb–Nettleton 2005 PA Super 426 (December 21, 2005) Holding: A social worker, who makes professional disclosures required by Pennsylvania law, is entitled to a conditional privilege in a defamation lawsuit.

2.2. °Learned Intermediary Doctrine

f Lineberger v. Wyeth 2005 Westlaw 3547682 (Pa. Super., December 21, 2005) Holding: In a pharmaceutical failure to warn case, the plaintiff must establish both a duty to warn and a failure to warn. The plaintiff must also show that, had the defendant issued a proper warning to the physician (the learned intermediary), the learned intermediary would have altered his or her behavior, i.e., would not have prescribed the drug, and the injury would have been avoided.

This is an unpublished opinion, although counsel for Wyeth has stated that he will request that the Court publish the opinion.

3. COMMONWEALTH COURT OF PENNSYLVANIA

3.1. °Workers' Compensation - Hepatitis C f City of Philadelphia v. Workers' Compensation Appeal Board (Sites) No. 1410 C.D. 2005 (December 21, 2005)

Holding: Hepatitis C may be deemed an occupational disease even if the condition was not specifically identified as an occupational disease until after the claimant's diagnosis.

3.2. °Workers' Compensation - Suspension/Bad Faith

f Virgo v. Workers' Compensation Appeal Board (County of Lehigh–Cedarbrook) No. 1167 C.D. 2005 (December 22, 2005)

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Holding: An employer is entitled to a suspension of benefits when an employee is discharged from employment because of "bad faith" in carrying out her job responsibilities. This is a classic example of bad facts making bad law (at least for workers' compensation claimants). One of the most common questions raised by injured workers is what happens if they return to work at light duty and are then fired because of allegedly unsatisfactory job performance. This case answers the questions, holding that workers' compensation benefits may be suspended under those circumstances. Of course, in this case, the employee did not have a "clean" record, and it was easy for the Court to uphold the suspension. What happens, however, when the unsatisfactory performance occurs only after the employee is at light duty and, as employees frequently claim, their firing is a pretext because the employer only wants them to work at full duty? Time will tell.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION OPINION

° Doe v. XYZ Corp. No. A-2909-04T2 (December 27, 2005)

Holding: An employer on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third parties. No privacy interest of the employee stands in the way of the duty on the part of the employer.

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Daniel J. Siegel is an attorney in Havertown, Pennsylvania. Dan has authored the newsletter, "A Summary of Recent Appellate Decisions," since 1988. For more information about Dan Siegel, go to

<http://www.danieljsiegel.com>

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

*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

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*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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Daniel J. Siegel, an attorney in Havertown, Pennsylvania, has authored this newsletter since 1988. He is the creator of Pennsylvania Legal Links (

<http://www.palegallinks.com>

) and founder of Integrated

Technology Services (

<http://www.itsllonline.com>

). To subscribe or contact Dan Siegel, go to

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