

A Summary of Recent Appellate & Trial Courts Decisions From Pennsylvania, New Jersey & Other Courts

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REPORTING DECISIONS THROUGH NOVEMBER 1, 2007

PENNSYLVANIA APPELLATE COURT DECISIONS

❖ APPELLATE PROCEDURE

➤ Rule 1925 Statements

- [*Donoughe v. Lincoln Electric Co.*](#), 2007 PA Super 309 (October 12, 2007)

- **Holding:** When a Pa.R.A.P. 1925(b) statement, although several pages in length, plainly describes the issues on appeal and, when stripped of subarguments or other extraneous verbiage, appears to be able to fit on a single page, a determination that the issues were waived is inappropriate.

Each decision is “hyper-linked” to the slip opinion. All you have to do is “click” (or “ctrl + click”) on the title of the case, and if connected to the Internet, your browser will open up the decision for you to read in its entirety. Try it and see!

❖ CAUSES OF ACTION

➤ Bad Faith

- [*Ash v. Continental Insurance Co.*](#), No. 35 WAP 2005 (Pa., October 11, 2007)

- **Holding:** A claim under the Pennsylvania bad faith statute, 42 Pa.C.S.A. § 8371, is subject to the two-year statute of limitations applicable to tort actions pursuant to 42 Pa.C.S.A. § 5524(7).

➤ Medical Monitoring

- [*Pohl v. NGK Metals Corp.*](#), 2007 PA Super 306 (October 11, 2007)

- **Holding:** In a claim for medical monitoring, the plaintiffs must establish that they are at an increased risk for contracting the disease alleged.

➤ Political Subdivision Tort Claims Act

- [*Sider v. Borough of Waynesboro*](#), No. 661 C.D. 2007 (Pa.Cmwth., October 4, 2007)

- **Holding:** The loss of cognitive function of the brain is the loss of a bodily function pursuant to Section 8553(c)(2)(ii) of the Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541-8564.

- [*Flood v. Silfies*](#), No., 573 C.D. 2007 (Pa.Cmwth., October 2, 2007)

- **Holding:** Emergency medical technicians (EMTs) affiliated with a volunteer fire company, and the volunteer fire company itself, are local agencies protected against claims for negligent medical care by sovereign/governmental immunity under Section 8542 of the Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541-8564.

➤ **Wrongful Use of Civil Proceedings**

▪ **[D'Elia v. Folino](#), 2007 PA Super 286 (September 14, 2007)**

- **Holding:** In order to bring an action for wrongful use of civil proceedings under 42 Pa.C.S.A. § 8351, the underlying lawsuit must (1) have been brought in a grossly negligent manner or without probable cause and for a purpose other than discovery, joinder or adjudication; and, (2) the proceedings must have terminated in favor of the person against whom they were commenced. When a case is withdrawn, or summary judgment granted, the determination of a “favorable outcome” depends upon the circumstances of the case. Thus, a suit for wrongful use of civil proceedings may be dismissed even if the attorney-defendant in the wrongful use of proceedings suit was not part of the settlement or the settlement language reserves the right to file suit. In addition, when the parties to the underlying suit agree to end the matter in a non-litigious nature, the defendant’s liability in the underlying suit is never determined with finality.

❖ **CIVIL PROCEDURE**

➤ **Jury Size**

▪ **[Gianni v. William G. Phillips, Inc.](#), 2007 PA Super 284 (September 12, 2007)**

- **Holding:** A trial court errs by denying a motion for a trial by a jury of twelve persons and proceeding with a jury of eight persons when a timely request for a jury of twelve had been made.

➤ **Jury Verdicts**

▪ **[Rose v. Annabi](#), 2007 PA Super 308 (October 12, 2007)**

- **Holding:** A trial court acts within its discretion by excluding a settled defendant name from a verdict sheet when there is insufficient evidence presented to establish that the settled defendant was negligent.

➤ **Pre-Complaint Discovery**

▪ **[McNeil v. Jordan](#), 2007 PA Super 305 (October 11, 2007)**

- **Holding:** In order to be entitled to conduct pre-Complaint discovery, a party must establish “probable cause” rather than a *prima facie* case.

❖ **DAMAGES**

➤ **Unfair Trade Practices and Consumer Protection Law**

▪ **[Schwartz v. Rockey](#), Nos. 35 and 35 WAP 2006, 2007 WL 3025027 (Pa., October 17, 2007)**

- **Holding:** Under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-9.2(a), a court’s discretion to treble damages should not be closely constrained by the common law requirements associated with the award of punitive damages. In rendering awards under the UTPCPL, courts should focus on the presence of intentional or reckless, wrongful conduct, as to which an award of treble damages would be consistent with, and in furtherance of, the remedial purposes of the UTPCLP. Justice Cappy filed a concurring and dissenting opinion.

❖ EVIDENCE

➤ Expert Testimony

- [*Vicari v. Spiegel*](#), 2007 PA Super 316 (October 18, 2007)
 - **Holding:** An expert's opinion will not be deemed deficient merely because the witness failed to expressly use the specific words, "reasonable degree of medical certainty." Rather, a court must look to the substance of the expert's testimony to determine whether the opinions were based upon a reasonable degree of medical certainty rather than upon mere speculation.

❖ MOTOR VEHICLE INSURANCE

➤ Uninsured & Underinsured Motorist Coverage/Waivers

- [*Sackett v. Nationwide Mutual Insurance Co.*](#), No. 8 WAP 2006 (Pa., October 16, 2007)
 - The Supreme Court has entered an extremely rare Order granting an Application for Reargument, to which [Justices Baldwin and Cappy filed a dissenting statement](#). The Order did not vacate the Court's prior decision in this matter.
- [*Erie Insurance Exchange v. Weryha*](#), 2007 PA Super 247 (August 20, 2007)
 - **Holding:** A parent whose child does not live with him or her is not entitled to seek underinsured motorist benefits because the child is not a relative resident of the parent's household.

❖ PLEADINGS

➤ Alternative Pleading

- [*Schwartz v. Rocky*](#), Nos. 35 and 35 WAP 2006, 2007 WL 3025027 (Pa., October 17, 2007)
 - **Holding:** A complaint containing a prayer for relief seeking contract-based damages does not foreclose a subsequent amendment substituting an inconsistent, equitable remedy, when (1) it is alleged that the plaintiff lacked knowledge of material facts, and (2) there is an absence of demonstrated detrimental reliance by an opposing party.

❖ PROFESSIONAL NEGLIGENCE

➤ Expert Testimony & Qualifications

- [*Gbur v. Golio*](#), 2007 PA Super 264 (August 24, 2007)
 - **Holding:** In a medical malpractice action, pursuant to 42 Pa.C.S.A. § 1303.512(e), a court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony.

➤ Pleadings

- [*Merlini v. Gallitzin Water Authority*](#), 2007 PA Super 274 (August 29, 2007)
 - ◆ **Holding:** A court must examine the averments of a Complaint to determine whether a Certificate of Merit is required. When a Complaint does not raise questions of professional judgment beyond the realm of common knowledge and experience, a Certificate of Merit is not required.

➤ Procedure - Judgments

▪ [Mumma v. Boswell, Tintner, Piccola & Wickersham](#), 2007 PA Super 322 (October 30, 2007)

- **Holding:** In a professional negligence claim, the Prothonotary must provide notice of the entry of a judgment of non pros for failure to file a Certificate of Merit. If the Prothonotary fails to provide notice under Rule 236, any judgments will not be considered “officially recorded” on the docket, and are therefore defective. Consequently, such a judgment should be stricken.

➤ Res Ipsa Loquitor

▪ [MacNutt v. Temple University Hospital, Inc.](#), 2007 PA Super 279 (September 7, 2007)

- **Holding:** A claim of medical malpractice may only proceed upon the theory of *res ipsa loquitor* under Section 328D of the *Restatement (Second) of Torts* if it may be inferred that the harm suffered by the plaintiff was caused by the defendant’s negligence and (1) the event is the type that does not ordinarily occur in the absence of negligence, (2) other responsible causes, including the conduct of plaintiff and third persons, are sufficiently eliminated by the evidence, and (3) the negligence alleged is within the scope of the defendant’s duty to the plaintiff.

➤ Statutes of Limitation

▪ [Wachovia Bank, N.A. v. Ferreti](#), 2007 PA Super 320 (October 25, 2007)

- **Holding:** The trigger for the accrual of a legal malpractice claim, for purposes of determining the appropriate statute of limitations, is not the realization of actual loss, but the occurrence of a breach of duty. Accordingly, the statute of limitations in a legal malpractice claim begins to run when the attorney breaches his or her duty, and is tolled only when the client, despite the exercise of due diligence, is unable to discover the injury or its cause.

➤ Releases

▪ [Wang v. Whitetail Mountain Resort](#), 2007 PA Super 283 (September 11, 2007)

- **Holding:** A release on a ticket (such as a ski lift or similar ticket) is enforceable when it is placed prominently in a separately titled paragraph in the middle of a single page document, is written in a font larger than the one used for other portions of the form, and is highlighted with “emboldened capital letters.” This decision, on its face, appears to be inconsistent with the Court’s prior ruling in *Chepkevich v. Hidden Valley Resort*, 911 A.2d 946 (Pa.Super. 2006).

❖ WORKERS’ COMPENSATION

➤ Average Weekly Wage

▪ [Lennon v. Workers’ Compensation Appeal Board \(Epps Aviation, Inc.\)](#),
No 757 C.D. 2007 (Pa.Cmwlth., October 10, 2007)

- **Holding:** The calculation of an employee’s average weekly wage includes reimbursed board and lodging expenses paid by the employer.

▪ [Lahr Mechanical v. Workers’ Compensation Appeal Board \(Floyd\)](#),
No. 844 C.D. 2007 (Pa.Cmwlth., October 9, 2007)

- **Holding:** Under Section 309(d.2) of the Act, a Workers’ Compensation Judge may calculate a worker’s average weekly wage by multiplying the worker’s hourly wage by the number of hours the worker expected to work per week.+

➤ **Collateral Estoppel**

▪ [John T. Gallagher Timber Transfer v. Hamilton](#), 2007 PA Super 273 (August 29, 2007)

- **Holding:** The doctrine of collateral estoppel bars relitigation in a civil action of a determination by a Workers' Compensation Judge that an entity was a statutory employer responsible for payment of compensation.

➤ **Credits**

▪ [Kelly v. Workers' Compensation Appeal Board \(US Airways Group, Inc.\)](#), No. 2199 C.D. 2006 (Pa.Cmwlt., October 26, 2007)

- **Holding:** An employer is not entitled to a credit against workers' compensation benefits for furlough benefits paid to an employee because these are not "severance benefits" under Section 204(a) of the Workers' Compensation Act, 77 P.S. § 71. In this *en banc* decision, the Court distinguishes between furlough and severance benefits, noting that severance benefits are paid to an employee who "separates from employment for any reason," whereas when an employee is subject to a "furlough," the employment relationship is maintained but held in abeyance because of an employer's lack of work or financial resources.

➤ **Description of Injury**

▪ [Cinram Manufacturing, Inc. and PMA Group v. Workers' Compensation Appeal Board \(Hill\)](#), No. 158 C.D. 2007 (September 7, 2007)

- **Holding:** A Workers' Compensation Judge may amend the description of a Claimant's injury (as stated on the Notice of Compensation Payable) in ruling upon a termination petition even though the Claimant never petitioned to have the condition recognized as a work injury. Judge Pellegrini filed a dissenting opinion arguing that an NCP cannot be amended in a termination petition unless a Petition for Review is filed.

➤ **Notices of Temporary Compensation Payable**

▪ [Galizia v. Workers' Compensation Appeal Board \(Woodloch Pines, Inc.\)](#), No 96 C.D. 2007 (Pa.Cmwlt., September 24, 2007)

- **Holding:** The first day of the ninety (90) day period for payment of temporary compensation under a Notice of Temporary Compensation Payable (NTCP) pursuant to Section 406.1 of the Act, 77 P.S. § 717.1, begins on the first date of a claimant's disability. Thus, an employer must issue a Notice Stopping Temporary Compensation within the ninety (90) day period of disability, or the NTCP will convert to a Notice of Compensation Payable.

➤ **Penalties**

▪ [City of Philadelphia v. Workers' Compensation Appeal Board \(Sherlock\)](#), No. 881 C.D. 2007 (Pa.Cmwlt., October 10, 2007)

- **Holding:** When an employer utilizes "self-help" and refuses to comply with a Workers' Compensation Judge's Order, a WCJ properly imposed a penalty of fifty (50%) percent against the employer.

➤ Reasonableness of Medical Care & Utilization Review

- [Armstrong v. Workers' Compensation Appeal Board \(Haines & Kibblehouse, Inc.\)](#),
No. 680 C.D. 2007 (August 27, 2007)
 - **Holding:** An employer may seek utilization review of medical care when it acknowledges a work-related injury, even if it issues a Notice of Compensation Denial disputing the employee's disability status.
- [Stafford v. Workers' Compensation Appeal Board \(Advanced Placement Services\)](#),
No. 542 C.D. 2007 (September 21, 2007)
 - **Holding:** A Workers' Compensation Judge lacks jurisdiction to review the reasonableness and necessity of a Claimant's medical treatment when the Claimant's medical provider has failed to provide medical records to the Utilization Review Organization, even though the URO issued a report prepared by a peer review physician.
- [Enterprise Rent-A-Car v. Workers' Compensation Appeal Board \(Clabaugh\)](#),
No. 863 C.D. 2007 (Pa.Cmwth., September 27, 2007)
 - **Holding:** When an employer pays a bill for medical care for a compensable injury under the Workers' Compensation Act, a medical provider seeking to challenge the amount paid must file a fee review petition pursuant to Section 306(f.1)(5) of the Act, 77 P.S. § 531(5). If the provider fails to file the fee petition, it may not seek other relief, including penalties.
- [Ryndycz v. Workers' Compensation Appeal Board \(White Engineering\)](#),
No. 318 C.D. 2007 (Pa.Cmwth., October 18, 2007)
 - **Holding:** The tolling of the thirty (30) day period for challenging medical bills under the Workers' Compensation Act does not apply to termination petitions. In such a circumstance, an employer may only challenge medical bills submitted no more than thirty (30) days before the filing of the utilization review request under 34 Pa. Code * 127.404(b).

➤ Unemployment Compensation

- [Jackson v. Unemployment Compensation Board of Review](#),
No. 2286 C.D. 2006 (Pa.Cmwth., September 27, 2007)
 - **Holding:** In order to receive unemployment compensation benefits pursuant to Section 204(b) of the Workers' Compensation Act, 77 P.S. § 71 – which permits an employee seeking unemployment compensation benefits, but who does not meet the monetary and credit week requirements because of a compensable work-related injury, to have his or her base year consist of the four complete calendar quarters immediately preceding the date of his or her work-related injury – the injury must have been deemed compensable under the Workers' Compensation Act.

Practice Note: *Practitioners should consider this provision carefully when (1) advising clients about whether to apply for unemployment compensation benefits while they are receiving workers' compensation benefits (because of the credit to which an employer is entitled), and (2) agreeing to a resignation upon settlement of a claim. In the first instance, there is no financial benefit to an employee to receive both types of benefits. In the latter circumstance, a resignation would appear to preclude a claimant from then applying for unemployment compensation under this provision.*

➤ **Unreasonable Contest**

- [*Delarosa v. Workers' Compensation Appeal Board \(Masonic Homes\)*](#), 437 C.D. 2007 (Pa.Cmwlth., October 11, 2007)

- **Holding:** When an employer defends against a workers' compensation petition based upon a false statement of law, a Workers' Compensation Judge errs by denying a request for an assessment of attorney's fees for an unreasonable contest.

NEW RULE OF CIVIL PROCEDURE

❖ **PRE-COMPLAINT DISCOVERY PERMITTED UNDER NEW RULE**

- Effective November 1, 2007, the Pennsylvania Supreme Court has promulgated [Pa.R.Civ.P. 4003.8](#), which permits a plaintiff to obtain pre-complaint discovery when the information sought is material and necessary to the filing of the complaint, and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

FEDERAL COURT DECISIONS

❖ **CAUSES OF ACTION**

➤ **Fair and Accurate Credit Transactions Act**

- [*Korman v. The Walking Company*](#), No. 07-1557 (E.D. Pa., August 28, 2007)

- **Holding:** A plaintiff sets forth a cause of action for a violation of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), which requires that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number *or* the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."

➤ **Family and Medical Leave Act/Sovereign Immunity**

- [*Wampler v. Commonwealth of Pennsylvania*](#), No. 1:06-CV-1877 (M.D. Pa., September 14, 2007)

- **Holding:** A complaint against the Commonwealth of Pennsylvania seeking damages under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, under the doctrine of state sovereign immunity, which bars suits against states unless the state consents to suit or Congress has validly abrogated such immunity.

➤ **Personal Jurisdiction**

- [*Marten v. Godwin*](#), No. 03-cv-06734 (3rd Cir. August 22, 2007)

- **Holding:** A Pennsylvania court may not exercise personal jurisdiction over non-Pennsylvania defendants that do not expressly aim their conduct at Pennsylvania.

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