

A Summary of Recent Pennsylvania, New Jersey & Federal Appellate Court Decisions

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REPORTING DECISIONS ISSUED THROUGH JUNE 7, 2007

PENNSYLVANIA STATE COURT DECISIONS

1. APPELLATE PROCEDURE

1.1. APPEALS & CROSS APPEALS

- ▶ [Basile v. H & R Block, Inc.](#),
2007 PA Super 159 (June 4, 2007)

Holding: Pursuant to Pa.R.A.P. 501 and 511, an initial appellant must be aggrieved by an order to file an “appeal;” a cross-appellant need not be aggrieved by the same order in order to file a “cross-appeal.” Therefore, a party may file a cross-appeal to protect against the possibility that the appellate court will reverse the court below without considering issues raised before the lower court or without addressing other points that would lead to an affirmance.

All decisions are “hyperlinked” 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.

1.2. ISSUES COMPLAINED OF ON APPEAL

- ▶ [Hess v. Fox Rothschild, LLP](#), 2007 PA Super 133 (May 14, 2007)

Holding: When the reasons for a trial court’s rulings are vague or not discernible from the record, an appellant may be forced to and is permitted to file a vague and overly broad Statement of the Issues to be Raised on Appeal under Pa.R.A.P. 1925(b).

2. CAUSES OF ACTION

2.1. LEGAL MALPRACTICE

- ▶ [Hess v. Fox Rothschild, LLP](#), 2007 PA Super 133 (May 14, 2007)

Holding: A Complaint alleging legal malpractice is properly dismissed with prejudice for lack of standing when the plaintiff does not have an attorney-client or other analogous professional relationship with the defendant attorney.

3. CIVIL PROCEDURE

3.1. ABATEMENT

- ▶ [Salvadia v. Ashbrook](#), 2007 PA Super 108 (April 17, 2007)

Holding: Pursuant to 20 Pa.C.S.A. § 3375, a defendant may seek abatement/dismissal of an action based upon a plaintiff's failure to take out Letters of Administration within one year after the Suggestion of Death is filed in the action or proceeding. The fact that a defendant engaged in discovery does not provide a reasonable excuse for a plaintiff's failure to take out Letters of Administration after the death of the original plaintiff and is not a waiver of the defendant's right to seek abatement. Further, the statute does not allow for the consideration of prejudice when determining determination whether to grant a petition for abatement.

3.2. CONFIDENTIALITY

- ▶ [Burger v. Blair Medical Associates, Inc.](#), 2007 PA Super 164 (June 6, 2007)

Holding: The tort of breach of physician-patient confidentiality can be substantively distinguished from other theories of tort liability for invasion of privacy and is therefore governed by the two-year statute of limitations under 42 Pa.C.S.A. § 5524(7).

3.3. FRAUDULENT CONCEALMENT

- ▶ [Delaney v. Archdiocese of Philadelphia](#), 2007 PA Super 129 (May 8, 2007)
[Lazarski v. Archdiocese of Philadelphia](#), 2007 PA Super 142 (May 21, 2007)

Holding: The doctrine of fraudulent concealment does not toll the statute of limitations when a plaintiff fails to show that he relied upon any affirmative act of concealment by the defendant that caused him to forego pursuit of his causes of action. Rather, the doctrine of fraudulent concealment will allow for the tolling of the statute of limitations only when the fraudulent concealment inhibited plaintiff from learning that he had sustained injuries.

3.4. MUNICIPAL LIABILITY

- ▶ [Arocho v. County of Lehigh](#), No. 1008 C.D. 2006 (Pa.Cmwlt., May 3, 2007)

Holding: A municipality is not liable under Section 1983, 42 U.S.C., absent a predicate unconstitutional act by a municipal employee. Thus, a plaintiff in a Section 1983 action alleging unconstitutional treatment of a prisoner must show that a prison official and/or municipality acted with deliberate indifference to a substantial risk of serious harm to him.

4. MEDICAL MALPRACTICE

4.1. EXPERT WITNESS & OTHER TESTIMONY

- ▶ [Jacobs v. Chatwani](#), No. 2855 EDA 2005 (Pa.Super., April 13, 2007)

Holding 1: Pennsylvania law does not require a defense expert in a medical malpractice case to state an opinion to the same degree of medical certainty applied to plaintiff's experts because the plaintiff bears the burden of proof at trial. In a concurring opinion, Judge McEwen observed that (1) the Pennsylvania Supreme Court has never ruled whether "a defense medical expert can offer opinion testimony without having that testimony subjected to the condition precedent that such opinion be founded upon a reasonable degree of medical certainty," and

(2) such a conclusion “establishes a double standard that runs contrary to the core values of American jurisprudence.”

Holding 2: A trial court may permit the introduction of evidence of a plaintiff’s religious affiliation when it is relevant in describing the course of plaintiff’s medial treatment and does not cause prejudice or bias.

- ▶ [Winschel v. Jain](#), 2007 PA Super 121 (May 1, 2007)

Holding: When the testimony by plaintiff’s expert witnesses concerning causation is uncontradicted and undisputed, a jury’s conclusion that the defendant doctor’s negligence was not a factual cause of decedent’s death bears no rational relationship to the disputed evidence, thereby warranting a new trial.

- ▶ [Wexler v. Hecht](#), No. 29 EAP 2005 (Pa., June 5, 2007)

Holding: Because (1) Section 512(b)(1) of the MCARE Act. 40 P.S. § 1303.512(b)(1), requires an expert in a medical malpractice matter to possess an unrestricted physician’s license to practice medicine, (2) Section 512(c)(1) of the MCARE Act. 40 P.S. § 1303.512(c)(1), requires the expert to be substantially familiar with the applicable standard of care at issue as of the time of the alleged breach, and (3) Section 512(c)(2) of the MCARE Act. 40 P.S. § 1303.512(c)(2), requires the expert to practice in the same subspecialty as the defendant physician, or in a subspecialty that has a substantially similar standard of care the specific care at issue, a podiatrist is not competent to testify as an expert concerning the applicable standard of care in a medical malpractice action against an orthopedic surgeon. Justice Castille filed a [dissenting opinion](#) in which he was joined by Justices Baer and Baldwin.

5. PRODUCTS LIABILITY

5.1. PRE-EMPTION

- ▶ [Arnoldy v. Forklift, L.P.](#), 2007 PA Super 143 (May 22, 2007)

Holding: A state tort law requiring the manufacturer of a product to install additional safety devices in direct conflict with the purpose behind the Occupational Safety and Health Act serves “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and is therefore preempted.

6. UNEMPLOYMENT COMPENSATION

- ▶ [Skowronek v. Unemployment Compensation Board of Review](#), No. 2150 C.D. 2006 (Pa.Cmwlt., April 9, 2007)

Holding: An Unemployment Referee does not abuse his discretion by denying a request for a continuance made one day before the hearing. Further, a party communicating by fax has the responsibility of ensuring that the fax contains all information necessary to the request and that it was received in its entirety.

7. WORKERS' COMPENSATION

7.1. CLAIM PETITIONS – FAILURE TO FILE TIMELY ANSWER

- ▶ [*Brady v. Workers' Compensation Appeal Board \(Morgan Drive Away, Inc. and U.S. Specialty Insurance Co.\)*](#), No. 1713 C.D. 2006 (Pa.Cmwlt., April 16, 2007)

Holding: A carrier's failure to file a timely Answer to a Claim Petition listing it as the Employer's insurer barred it from later claiming that any of the petition's allegations were untrue. Because Claimant had submitted a letter from the carrier into evidence in which it stated that it was the Employer's insurer, there was substantial evidence to support the Workers' Compensation Judge's decision it was the insurance carrier at the time of Claimant's injury.

7.2. DEPENDENCY

- ▶ [*Wyoming Valley Health Care Systems v. Workers' Compensation Appeal Board \(Kalwaytis\)*](#), No. 2109 C.D. 2006 (Pa.Cmwlt., April 9, 2007)

Holding: Although a parent is not a *per se* partial dependent of a deceased child who contributes to the parent's room and board, when the child pays for other expenses, including the parent's car, prescription medicines, and for certain entertainment ordinary to the parent's lifestyle, the parent will be deemed a partial dependent entitled to workers' compensation benefits.

7.3. MENTAL/MENTAL CLAIMS

- ▶ [*Babich v. Workers' Compensation Appeal Board \(CPA Dept. of Corrections\)*](#), No. 1472 C.D. 2006 (Pa.Cmwlt., April 12, 2007)

Holding: A prison nurse exposed to "horrible" conditions and incidents involving inmates did not establish entitlement to workers' compensation benefits for post-traumatic stress disorder because he failed to prove that (a) he was exposed to abnormal working conditions and (b) the events at work caused his mental injury.

7.4. PENALTIES

- ▶ [*Mercer Lime & Stone Co. v. Workers' Compensation Appeal Board \(McGallis\)*](#), No. 2008 C.D. 2006 (Pa.Cmwlt., May 17, 2007)

Holding: Upholding an assessment of penalties, the Court ruled that "an employer's obligation to pay compensation benefits under an award is immediate; the Act and accompanying regulations do not provide for any grace period, thirty-days or otherwise." The Court noted it is unclear how quickly an employer must pay an unappealed award to avoid being found in default, adding that an employer is not in default if it pursues an appeal and seeks supersedeas.

- ▶ [*Sims v. Workers' Compensation Appeal Board \(School District of Philadelphia\)*](#), No. 2165 C.D. 2006 (Pa.Cmwlt., June 1, 2007)

Holding: Once a workers' compensation claimant makes a *prima facie* case that an employer has violated the Act, the burden shifts to the employer to prove no violation. In order to prove that an employer violated the Act by failing to pay medical bills, a claimant must establish that the medical bills were submitted on the proper form and with all information necessary to permit an employer to ascertain that the billed treatment is related to the work injury.

7.5. RES JUDICATA IMPACT OF IRE – WAIVER

- ▶ [*Pryor v. Workers' Compensation Appeal Board \(Colin Service System\)*](#),
No. 536C.D. 2006 (Pa.Cmwlt., December 19, 2006, Ordered Reported June 5, 2007)

Holding: This case is relevant for what did not occur. Claimant alleged that the Workers' Compensation Judge erred by terminating benefits as of December 2001 when a November 2003 IRE concluded that the claimant was five (5) percent permanently impaired. Unfortunately, because claimant failed to formally admit the IRE into evidence and failed to pursue methods available to obtain its inclusion, the Court had no basis to consider whether a petition to terminate was barred based upon a finding of permanent impairment.

7.6. TERMINATION OF BENEFITS

- ▶ [*Huynh v. Workers' Compensation Appeal Board \(Hatfield Quality Meats\)*](#),
No. 30 C.D. 2007 (Pa.Cmwlt., May 22, 2007)

Holding: A claimant seeking to overturn the termination of his or her benefits must produce evidence that his or her disability has increased or recurred after the date of the termination, *and* that his or her physical condition has actually changed in some manner. In this case, Claimant sought to relitigate a prior termination by claiming (probably correctly) that the ruling in the underlying termination petition had been incorrect. Because Claimant failed to appeal that decision, however, he was precluded here from relitigating the ruling and had to demonstrate a change in his condition.

- ▶ [*Lewis v. Workers' Compensation Appeal Board*](#), No. 6 EAP 2006 (Pa., April 18, 2007)

Holding: In order to terminate workers' compensation benefits on the theory that claimant's disability has either ended or been reduced because of an improvement in his or her physical ability, the petition must be based upon medical proof of a change in the claimant's physical condition. Only then can a Workers' Compensation Judge determine whether there is a change in a claimant's disability status. When there have been prior petitions to modify or terminate, an employer must also demonstrate a change in physical condition since the last disability determination. Once an employer produces evidence of the requisite change in condition, it must still prove that all disability related to the injury has ceased or that the improvement in the employee's condition has reduced his or her degree of disability.

7.7. TRANSFER OF LIABILITY

- ▶ [*Risius v. Workers' Compensation Appeal Board \(Penn State University\)*](#),
No. 791 C.D. 200 (Pa.Cmwlt., April 18, 2007)

Holding: An employer may transfer its liability and subrogation rights to a third party.

7.8. UTILIZATION REVIEW

- ▶ [*Sweigart v. Workers' Compensation Appeal Board \(Burnham Corp.\)*](#),
No. 1714 C.D. 2006 (Pa.Cmwlt., April 4, 2007)

Holding: Although a utilization reviewer may not determine that treatment is unreasonable or unnecessary solely on the basis that the other courses of treatment exist, the doctor/reviewer is permitted to conclude that safer alternatives exist.

PENNSYLVANIA FEDERAL COURT DECISION

STATUTE OF LIMITATIONS – UNDERINSURED MOTORIST CLAIMS

- ▶ [*State Farm Mutual Automobile Insurance Co. v. Rosenthal*](#),
3rd Cir., No. 06-2158 (March 13, 2007)

Holding: Pennsylvania's four-year statute of limitations for underinsured motorist claims begins to run when the insured driver settles with or obtains an award from the underinsured driver for less than the value of his or her damages. In its opinion, the Court attempted to predict how the Pennsylvania Supreme Court would rule upon the issue.

NEW JERSEY COURT DECISION

AUTOMOBILE INSURANCE – COLLATERAL SOURCE RULE

- ▶ [*Portnoff v. New Jersey Manufacturers Insurance Co.*](#),
No A-1442-05T51442-05T5 (N.J. Super., App. Div., April 25, 2007)

Holding: The collateral source rule, N.J.S.A. 39:6A-6 in the Automobile Insurance Cost Reduction Act, authorizes a setoff against income continuation benefits for workers' compensation total permanent disability benefits.

OTHER FEDERAL COURT DECISION

SOCIAL SECURITY COUNSEL FEES

- ▶ [*Binder & Binder, PC v. Barnhart*](#), 2nd Cir., No. 05-6794-cv (March 27, 2007)

Holding: In this case, a Social Security disability claimant filed for bankruptcy, listing the attorney's fees owed to her attorney in the Social Security proceedings on her petition. The bankruptcy was discharged, and the claimant objected to any fee payment to counsel. Fees were paid, after which the Social Security Administration sought repayment of the fee. The U.S. Court of Appeals for the Second Circuit held that, absent any authority permitting the Social Security Administration to interpret and apply bankruptcy law or to enforce Bankruptcy Court orders, the Social Security Administration's unambiguous and limited duty was to certify payment of the counsel fee.

AMENDMENT TO THE PENNSYLVANIA RULES OF CIVIL PROCEDURE

PA.R.C.P. 4017.1 – VIDEO DEPOSITIONS

The rule now clearly permits all depositions to be videotaped.

AMENDMENT TO THE PENNSYLVANIA RULES OF APPELLATE PROCEDURE

PA.R.A.P. 1925 – OPINION IN SUPPORT OF ORDER

PA.R.A.P. 1925 has been a continuing source of controversy. (*See, Hess v. Fox Rothschild, above.*) The newly revised Rule, which should be read carefully by any attorney handling any appeal, seeks to clarify the Rule and to eliminate confusion. Only time will tell whether the revised Rule is successful at eliminating confusion.

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and make www.palegallinks.com your home page for Pennsylvania research.*

The screenshot shows a Microsoft Internet Explorer browser window displaying the website <http://www.palegallinks.com/>. The browser's address bar shows the URL, and the search bar contains the text "cord audio cassettes to pc". The website's main heading is "Pennsylvania Legal Research Links". Below the heading, there is a navigation menu with links to Home, Philadelphia Legal Websites, Pennsylvania Legal Websites, Dan Siegel's Summaries of Appellate Decisions, Philadelphia Government Websites, Pennsylvania Government Websites, Pennsylvania County Websites, and Find Your Pennsylvania Legislator. The page is sponsored by Integrated Technology Services, LLC and The Havertown, Pennsylvania Law Offices of Daniel J. Siegel, LLC. The main content area features a welcome message: "Welcome to Pennsylvania Legal Research Links, the website where you begin your research about anything and everything related to Pennsylvania. A service of Havertown, Pennsylvania Attorney Daniel J. Siegel, the Law Offices of Daniel J. Siegel, LLC and Integrated Technology Services, LLC, this website was designed for attorneys and legal researchers. Pennsylvania Legal Research Links also contains features that are helpful to anyone trying to find more information about Pennsylvania." Below this, there are three paragraphs providing information on how to find Pennsylvania state courts, state agencies, and federal agencies, as well as a link to Dan Siegel's Recent Appellate Decisions. A logo for Pennsylvania Legal Links is displayed, consisting of a grid of squares. The footer contains contact information and copyright details: "©2005 Integrated Technology Services, LLC and the Havertown, Pennsylvania Law Offices of Daniel J. Siegel, LLC".