

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

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REPORTING DECISIONS THROUGH JULY 6, 2007

PENNSYLVANIA APPELLATE COURT DECISIONS

1. CIVIL LITIGATION & PROCEDURE

1.1. ARBITRATION

► Superior Court of Pennsylvania

- ◆ [*Alaia v. Merrill Lynch, Pierce, Fenner & Smith Inc.*](#)
2007 PA Super 177 (June 11, 2007)

Holding: Holding: If an arbitration award is so manifestly irregular and drastically contrary to the relief sought that it, in effect, changes the Statement of Claim, a court may modify the award in accordance with 42 Pa.C.S.A. § 7341.

1.2. BAD FAITH

► Superior Court of Pennsylvania

- ◆ [*Zappile v. Amex Assurance Co.*](#)
2007 PA Super 171 (June 8, 2007)

Holding: A legitimate dispute about an insured's entitlement to an amount for settlement does not, by itself, demonstrate that an insurance company has acted in bad faith in the handling of its claim. Moreover, Pennsylvania does not recognize a duty by an insurer to make partial payment of any undisputed amount when the overall claim is being contested.

1.3. CAUSES OF ACTION

1.3.1. BREACH OF CONFIDENTIALITY

► Superior Court of Pennsylvania

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

Holding: The tort of breach of physician-patient confidentiality is distinguishable from the tort of invasion of privacy. A claim for breach of physician-patient confidentiality is therefore governed by the two-year statute of limitation in 42 Pa.C.S.A. § 5524(7) rather than the one-year limitation under 42 Pa.C.S.A. § 5523(1), which governs actions based on invasion of privacy.

Each opinion is "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. Try it and see!

1.3.2. DEFAMATION

► Supreme Court of Pennsylvania

- ◆ [*Weaver v. Lancaster Newspapers, Inc.*](#)
No. 42 MAP 2006 (Pa., June 28, 2007)

Holding: Republication of a statement, after a defendant receives a complaint alleging that the statement is defamatory, is relevant to the presence of actual malice in the initial publication.

1.3.3. MEDICAL MALPRACTICE/NEGLIGENCE

► Superior Court of Pennsylvania

- ◆ [*Smith v. Friends Hospital*](#)
2007 PA Super 188 (June 21, 2007)

Holding: A plaintiff is not required to file a Certificate of Merit under the MCARE Act when the action alleges only corporate negligence, negligent supervision and negligence generally. In this case, the Complaint sought damages for injuries sustained when plaintiff was sexually and physically assaulted and beaten during a hospitalization at the defendant hospital.

1.4. PERSONAL JURISDICTION

► Superior Court of Pennsylvania

- ◆ [*Nutrition Management Services Co. v. Hinchcliff*](#)
2007 PA Super 167 (June 7, 2007)

Holding: The mere fact that a citizen of Pennsylvania suffered pecuniary loss as a result of an out-of-state defendant's failure to act in another state does not establish personal jurisdiction when the defendant's connections to Pennsylvania are random and wholly attributable to a course of dealings in another state.

2. WORKERS' COMPENSATION (*All Commonwealth Court Cases*)

2.1. HEART & LUNG ACT

- ◆ [*Duvall v. Department of Corrections*](#)
No. 2200 C.D. 2006 (Pa.Cmwth., June 13, 2007)

Holding: When the issue of whether a Claimant is capable of returning to work is resolved under the Workers' Compensation Act, a hearing examiner under the Heart and Lung Act is precluded by collateral estoppel from revisiting the issue.

2.2. IMPAIRMENT RATING EXAMINATIONS

- ◆ [*Weismantle v. Workers' Compensation Appeal Board \(Lucent Technologies\)*](#)
No. 1393 C.D. 2006 (Pa.Cmwth., June 18, 2007)

Holding: An employer's request for an Impairment Rating Evaluation (IRE) does not render a pending termination petition moot. The Court also affirmed that IRE remedies are in addition to, not a replacement for, other remedies available to an employer. This ruling eliminates any questions that resulted from the Court's prior decision in *Pryor v. Workers' Compensation Appeal Board (Colin Service*

System), No. 536 C.D. 2006 (June 5, 2007), in which the Court held that, because clamant 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.

2.3. MEDICAL EVIDENCE – PRESERVATION OF OBJECTIONS

- ◆ [*DeGraw v. Workers' Compensation Appeal Board \(Redner's Warehouse Markets, Inc.\)*](#)
No. 2036 C.D. 2006 (Pa.Cmwlt., June 11, 2007)

Holding: A medical expert's testimony is competent, even when based upon medical records and other information outside the record, if the opposing party (1) does not object to the testimony at the time it is given, and (2) does not preserve the objections in accordance with the applicable Rules.

2.4. PENALTIES

2.4.1. COMPROMISE & RELEASE PETITIONS

- ◆ [*Shaffer v. Unemployment Compensation Board of Review*](#)
No. 119 C.D. 2007 (Pa.Cmwlt., June 25, 2007)

Holding: Although the inability of a parent to care for a child may constitute a necessitous and compelling reason for terminating employment, particularly when an employer relocates, it is an insufficient basis by itself to entitle a person to unemployment compensation benefits. In order to establish entitlement to unemployment benefits, however, a Claimant must offer establish that he or she has exhausted all other alternative childcare arrangements.

2.4.2. MEDICAL BILLS

- ◆ [*Gregory v. Workers' Compensation Appeal Board \(Narvon Builders\)*](#)
No. 2021 C.D. 2006 (Pa.Cmwlt., June 8, 2007)

Holding: Section 430(b) of the Workers' Compensation Act applies to payments under a Compromise and Release Agreement. As a result, a Workers' Compensation Judge does not abuse his or her discretion by declining to award penalties against an employer who filed an appeal from a decision approving a Compromise and Release Agreement for which supersedeas was granted by the Appeal Board.

Workers' Compensation Bureau Issues Final Regulations for Vocational Experts

On June 23, 2007, the Bureau of Workers' Compensation issued final regulations for the "Qualifications for Vocational Experts," which went into effect upon publication. The Regulations distinguish between individuals who conducted earning power assessment interviews under Section 306(b) of the Workers' Compensation Act before June 23, 2007 and those who did not.

In order for a vocational expert who has conducted earning power assessment interviews before June 23, 2007 to be approved, the individual must possess one of the following four qualifications:

- 1) Certification by a nationally recognized professional organization (a list of which is published in the *Pennsylvania Bulletin*) **and** one year experience analyzing labor market and other information; or,
- 2) Certification by a nationally recognized professional organization under the direct supervision of an individual with the experience specified in paragraph (1); or,
- 3) A bachelor's degree or license issued by the Bureau of Professional and Occupational Affairs, as long as the individual is under the direct supervision of an individual with the experience specified in paragraph (1); or,
- 4) At least five (5) years experience primarily in the workers' compensation field prior to August 23, 1996, as a vocational evaluator, as well as other experience listed in the regulations.

In order for a vocational expert who has not conducted earning power assessment interviews before June 23, 2007 to be approved, the individual must:

- Be certified by a nationally recognized professional organization; and,
- Have a bachelor's or postgraduate degree in rehabilitation counseling or a related counseling field.

A complete copy of the new Regulations is available at <http://www.pabulletin.com/secure/data/vol37/37-25/1081.html>.

STUDY DEMONSTRATES THAT PENNSYLVANIA'S WORKERS' COMPENSATION SYSTEM IS MORE EFFICIENT THAN THE SYSTEMS IN MANY OTHER STATES

According to a recently released study by the Workers Compensation Research Institute, Pennsylvania was one of four states (out of nine examined) that provided a "better" value proposition for employers and injured workers." The study concluded that Pennsylvania "Employers paid less for medical care, yet workers achieved outcomes that were better than or in the middle of the range compared to workers in other study states. Workers in these states had generally better recoveries, were more likely to return to sustainable employment (and do so more quickly), experienced more timely medical treatment, had fewer problems accessing their medical care, and were less likely to be dissatisfied with their care." To read more about the study, go to http://www.wcrinet.org/studies/public/abstracts/wkrsurvey_9states-ab.html.

NEW PENNSYLVANIA RULE OF CIVIL PROCEDURE GOVERNS TRANSFER OF STRUCTURED SETTLEMENT PAYMENTS

New Rule 229.2

Effective September 1, 2007, [Pa.R.Civ.P. 229.2](#) provides specific procedures for the transfer of structured settlement payments. Promulgated in response to the Structured Settlement Protection Act, 40 P.S. § 4001, *et seq.*, the new Rule closely parallels the procedure instituted in Allegheny County by the Hon. R. Stanton Wettick, Jr.

NEW JERSEY APPELLATE COURT DECISIONS

1. DUTY OF CARE

1.1. BYSTANDERS

▶ Superior Court, Appellate Division

◆ [Podias v. Mairs](#)

No. A-6312-05T5 (N.J.Super., App.Div., June 26, 2007)

Holding: Passengers involved in an automobile collision may, in some circumstances, owe a duty to a pedestrian struck by a driver who is either unwilling or unable to seek emergency aid or assistance himself. In this case, an intoxicated teenager driver and two friends were in a car that struck a motorcycle, whose driver was lying in the roadway and not moving; the motorcyclist died as a result of the accident. The teenagers left the scene, and later concealed information from the police. Under these very compelling facts, the Court held that a reasonable jury could find that the defendants had breached a duty that proximately caused the victim's death.

1.2. SCHOOLS

▶ Supreme Court

◆ [Jerkins v. Anderson](#)

No. A-49-06, (N.J., June 14, 2007)

Holding: Schools have a duty to exercise reasonable care for supervising students' safety at dismissal. The duty requires districts to adopt and comply with a reasonable dismissal supervision policy, provide adequate notice of the policy to parents and guardians, and comply with parents' reasonable requests regarding dismissal.

2. CAUSES OF ACTION

2.1. LEAD PAINT

▶ Supreme Court

◆ [In Re: Lead Paint Litigation](#)

No. A-73-05, (N.J., June 15, 2007)

Holding: Public entities do not have cognizable common-law tort claims for public nuisance against the manufacturers of lead paint and lead pigment.

2.2. LEGAL MALPRACTICE

▶ Superior Court, Appellate Division

◆ [Estate of Albanese v. Lolio](#)

No. 1861-05T21861-05T2 (N.J.Super., App. Div., June 4, 2007)

Holding: A plaintiff cannot generally state a claim for legal malpractice if there is no attorney-client relationship. However, whether a duty exists to a third party is a question of law in which a Court must balance the attorney's duty to represent clients vigorously with the duty not to provide misleading information on which third parties foreseeably will rely. Frequently, as in this case, the determination of the duty owed may be ascertained by review of the engagement letter or similar documents.

3. EVIDENCE

3.1. PHOTOGRAPHS

► Supreme Court

- ◆ [Brenman v. Demello](#)
No. A-13-06, (N.J., May 30, 2007)

Holding: Expert testimony is not necessarily required as a foundation for the admissibility of photographs of vehicle damage for the purpose of showing a correlation between the damage to the vehicle and the cause or extent of the injuries claimed by plaintiff.

UNITED STATES SUPREME COURT DECISION

1. JURISDICTION/REMOVAL

- ◆ [Watson v. Philip Morris Cos., Inc.](#)
No. 05-1284 (U.S., June 11, 2007)

Holding: The fact that a federal agency directs, supervises, and monitors a company's activities in considerable detail does not by itself bring that company within the scope of 28 USC § 1442(a)(1) and thereby permit removal of the action from state to federal court.

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