



A Summary of Recent Pennsylvania Appellate Court Decisions

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At Year's End, Pennsylvania Supreme Court Less Active Than In Prior Years

The Pennsylvania Supreme Court always ends each year with a flurry of decisions. In past years, when a Justice was retiring/leaving the Court, there were usually an even larger number of cases decided – many dated December 31st but released days later. Not in 2006. Although Justice Newman has returned to private practice, the Court did not issue a significantly larger number of decisions. This is not to say that the Court did not issue any decisions. To the contrary, the Court touched on a wide range of issues, including [railroad crossing claims](#), [venue](#), and [employment status](#), "[permanent bad faith](#)" and [res judicata issues](#) in workers' compensation matters. Consequently, practitioners in these areas have some interesting reading ahead.

Personal Update

With more than a year under my belt as a solo practitioner, I can honestly say that I've never been happier – and the reality of operating two businesses has clearly struck home. Yes, I continue to practice law, with a neighborhood practice (one mile from home) focusing on a wide range of civil matters. Plus, the support and referrals from clients and attorneys has been tremendous. It has been a pleasure working with many of you on client matters that differ from your own expertise – from helping clients buy or sell houses, to drafting wills, to handling other matters outside the scope of your practices – and I look forward to building on that relationship.

My technology business is thriving. If you don't know, I help automate the practice of law, from case management to trial preparation to trial presentation to paperless offices. And I'm enjoying myself immeasurably. I work with a wide range of vendors to assure my clients have the best technology available, including Legal Files and Time Matters case management software, Case Map and Time Map, Live Note (deposition summary software), Sanction (trial presentation software), and ViewWise document management solutions. I expect to receive my support certifications shortly for Time Matters and Summation, and am certified on the other products mentioned (and many more). If you have a technology question, feel free to give me a call at (610) 446-3467, or send an email to dan@itsllconline.com.

A Summary of Recent Pennsylvania Appellate Decisions

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REPORTING DECISIONS THROUGH JANUARY 19, 2007

PENNSYLVANIA APPELLATE COURT DECISIONS

1. CIVIL LITIGATION & PROCEDURE

1.1. ARBITRATION

1.1.1. Common Law Arbitration

► Superior Court of Pennsylvania

- ◆ [*U.S. Claims, Inc. v. Dougherty*](#)
2006 PA Super 337 (November 27, 2006)

Holding: Pursuant to 42 Pa.C.S.A. § 7342, a party to a common law arbitration must file a petition to vacate or modify the award within 30 days of the date of the award. Failure to do so is a waiver of any objection to the award.

1.1.2. Compulsory Arbitration Clauses

► Superior Court of Pennsylvania

- ◆ [*Thibodeau v. Comcast Corp.*](#)
2006 PA Super 346 (December 1, 2006)

Holding: Arbitration agreements may be set aside only for generally recognized contracted defenses such as duress, illegality, fraud and unconscionability. When an arbitration clause is contained in an adhesion contract and unfairly favors the drafting party, however, the clause is unconscionable and must be deemed unenforceable.

1.2. AUTOMOBILE INSURANCE

1.2.1. INSUREDS -- PARTNERSHIP

► Superior Court of Pennsylvania

- ◆ [*Continental Casualty Co. v. Pro Machine*](#)
2007 PA Super 18 (January 17, 2007)

Holding: When an insurance policy is issued to an individual operating a business under a trade name, the named insured is the individual. Thus, when an automobile liability policy names a partnership as the insured and then lists the names of the individual partners in describing the named insured, the partners as individuals, as well as the partnership as an entity, are covered.

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. Try it and see!

1.2.2. UNINSURED MOTORIST BENEFITS

► Commonwealth Court of Pennsylvania – *Companion Cases*

◆ [*Lowery v. Port Authority of Allegheny County*](#)

No. 733 C.D. 2006 (December 29, 2006)

Holding: A government agency is required to provide uninsured motorist coverage up to the limits set forth in Section 1774 of the MVFRL.

◆ [*Paravati v. Port Authority of Allegheny County*](#)

No. 234 C.D. 2006 (December 29, 2006)

Holding: A government agency is required to provide uninsured motorist benefits, and a party's entitlement to those benefits does not depend upon a finding of negligence by a governmental party under the exceptions to sovereign immunity in the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8522(b).

1.2.3. WAIVERS

► Superior Court of Pennsylvania

◆ [*American International Insurance Co. v. Vaxmonsky*](#)

2006 PA Super 373 (December 21, 2006)

Holding: Removing "all" from an underinsured motorist waiver form under Sections 1731(c) and (c.1) of the MVFRL invalidates the rejection of UIM benefits.

1.3. CAUSES OF ACTION – RAILROAD CROSSINGS

► Supreme Court of Pennsylvania

◆ [*Krentz v. Consolidated Rail Corp.*](#)

No. 165 MAP 2005 (November 21, 2006)

Holdings: 1. The Court declines to abandon the Occupied Crossing Rule despite the existence of the Comparative Negligence Act, 42 Pa.C.S. § 7102; and,
2. The Federal Rail Safety Act, 49 U.S.C. §§ 20102-55, preempts 18 Pa.C.S. § 6907, commonly known as the Pennsylvania "blocked crossing" statute.

1.4. DAMAGES -- PUNITIVE DAMAGES

► Superior Court of Pennsylvania

◆ [*Dillow v. Myers*](#)

2007 PA Super 17 (January 16, 2007)

Holding: Allowing a truck on the road where the load could not properly be distributed because of a broken loading rack; not braking when traveling down hills so that the truck exceeded the speed limit; driving with limited visibility because the listing of the back of the truck obscured the view from the side mirror; and changing lanes under these circumstances without signaling are sufficient to justify a jury's conclusion that a defendant's conduct was outrageous, entitling plaintiff to punitive damages. It was also proper for the jury to assess punitive damages at a higher amount against a defendant's employer based upon its financial status. There is no rule that an employer's punitive damages must be limited or proportionate to those caused by its employee when fault is premised upon vicarious liability.

1.5. MEDICAL MALPRACTICE CLAIMS & CIVIL PROCEDURE/PLEADINGS

1.5.1. CERTIFICATES OF MERIT

► Superior Court of Pennsylvania

- ◆ [*Ditch v. Waynesboro Hospital*](#)
2007 PA Super 5 (January 8, 2007)

Holdings: 1. Although a complaint does not specify that a professional liability claim is being raised, the plaintiff must still file a Certificate of Merit and other Rules relating to professional liability actions when the conduct at issue constitutes an integral part of the process of rendering medical treatment.

2. A defendant may, but is not required to, raise the issue of whether a complaint asserts a professional liability claim by way of preliminary objection.

3. A plaintiff must file a Certificate of Merit within 60 days after filing a complaint; the filing of an amended complaint does not extend the period within which the Certificate must be filed.

1.5.2. EXPERT WITNESS TESTIMONY

► Superior Court of Pennsylvania

- ◆ [*Cimino v. Valley Family Medicine*](#)
2006 PA Super 342 (November 28, 2006)

Holding: A physician whose medical license is restricted under Section 1303.512(b)(1) of the MCARE Act, 40 P.S. § 1303.101 *et seq.*, may not testify in a medical malpractice case as an expert on the applicable standard care. In this case, the proposed witness was on probation for five years and thus did not possess an “unrestricted physician’s license.”

1.6. PREMISES LIABILITY – DUTY TO WARN

► Superior Court of Pennsylvania

- ◆ [*Campisi v. Acme Markets, Inc.*](#)
2006 PA Super 368 (December 20, 2006)

Holding: Because of the known and obvious dangers of a grocery store, the store has no duty to warn business invitees of the dangers posed by the presence of a disabled employee on the premises.

1.7. RELEASES

► Superior Court of Pennsylvania

- ◆ [*Nissley v. Candytown Motorcycle Club, Inc.*](#)
2006 PA Super 349 (December 6, 2006)

Holdings: A Release and Indemnity Agreement (exculpatory clause) in a membership application is valid if it (1) does not contravene public policy; (2) was between persons and related to their own personal affairs; and, (3) the agreement was not a contract of adhesion. To relieve a party of liability, the exculpatory agreement (1) must be construed strictly since it is not favored by law; and, (2) must spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation.

1.8. VENUE

► Supreme Court of Pennsylvania

- ◆ [*Zappala v. Brandolini Property Management, Inc.*](#)
No. 12 EAP 2005 (November 27, 2006)

Holding: An objection to venue may only be raised by preliminary objection pursuant to Pa.R.C.P. 1006(3); any later objection is deemed waived. Thus, if venue was proper at the time the Complaint was filed, and venue is later appropriate in a different county (as here), a defendant must then challenge venue pursuant to Rule 1006(d)(1) or (2) and not by preliminary objection. Justice Eakin filed a [dissenting opinion](#), in which Justice Castille joined.

1.9. WITNESSES & EVIDENCE

► Superior Court of Pennsylvania

- ◆ [*In re Estate of Wolfe*](#)
2006 PA Super 350 (December 6, 2006)

Holding: A person can recover a portion of the proceeds of a wrongful death action if he or she is a child or spouse of the deceased, and stands in a family relation to the deceased. Once a person qualifies as standing in a family relation to the deceased, the person shares in the wrongful death proceeds in accordance with his or her intestate share. A family relation exists when a child receives services or maintenance or gifts from a parent with such frequency as to lead to an expectation of future enjoyment of the services, maintenance or gifts.

1.10. WRONGFUL DEATH ACTIONS

► Commonwealth Court of Pennsylvania

- ◆ [*Smith v. Southeastern Pennsylvania Transportation Authority*](#)
No. 719 C.D. 2006 (December 19, 2006)

Holdings: When a party violates Pa.R.Civ.P. 4003.5 and does not disclose the identity of an expert witness/treating physician, a trial court acts within its discretion by refusing to permit the expert witness to testify at trial.

2. CIVIL PROCEDURE

2.1. PLEADINGS

► Superior Court of Pennsylvania

- ◆ [*Gojmerac v. Naughton*](#)
2006 PA Super 366 (December 14, 2006)

Holding: Because a dead person cannot be a party to an action commenced after his death, substitution of a personal representative of the dead person's estate is improper, and an attempt to substitute as a party the personal representative of a decedent's estate is invalid and has no effect because there is no pending action. Rather, the proper course of action is to file a new action against the decedent's estate or against the personal representative in his or her capacity as personal representative of the decedent's estate.

3. WORKERS' COMPENSATION

3.1. COURSE & SCOPE OF EMPLOYMENT – FURTHERING EMPLOYER'S BUSINESS INTERESTS

▶ Commonwealth Court of Pennsylvania

- ◆ [*Allegheny Ludlum Corp. v. Workers' Compensation Appeal Board \(Hines\)*](#)
No. 1022 C.D. 2006 (December 19, 2006)

Holding: Even if not actually engaged in the employer's work, an employee is considered to have suffered an injury in the "course of employment" if the injury occurred on the employer's premises at a reasonable time before or after the work period.

3.2. EMPLOYMENT RELATIONSHIP

▶ Supreme Court of Pennsylvania

- ◆ [*Brookhaven Baptist Church v. Workers' Compensation Appeal Board \(Halvorson\)*](#)
No. 35 MAP 2005 (December 27, 2006)

Holding: To be deemed an employee, a worker must meet three requirements: (1) the presence of valuable consideration; (2) whether the employment was casual in character; and, (3) whether the employment was in the regular course of an employer's business. To be deemed "casual," employment must be irregular, sporadic, or incidental. Thus, if a church member is employed only to cut the grass, he is an employee under the Act. Because trimming bushes and overhanging tree limbs were not contemplated by the parties and not included in the fee arrangement between the parties, the work was not in the course of the employment, thereby precluding the award of workers' compensation benefits.

3.3. FATAL CLAIM – DEPENDENT CHILDREN

▶ Commonwealth Court of Pennsylvania

- ◆ [*A-Jon Contractors v. Workers' Compensation Appeal Board \(DiMarzio\)*](#)
No. 1520 C.D. 2006 (January 19, 2007)

Holding: A decedent is considered to stand in *loco parentis* to his or her children if the children can prove that they were members of the deceased's household and actual dependents. The deceased must have intended to function as the child's parent and assume all daily responsibilities commensurate with the position. Courts must evaluate the fact of each case in order to determine whether a decedent stood in *loco parentis* to his or her children.

3.4. HEARING LOSS CLAIMS

▶ Commonwealth Court of Pennsylvania

- ◆ [*Helvetia Coal Co. v. Workers' Compensation Appeal Board \(Learn\)*](#)
No. 592 C.D. 2006 (December 15, 2006)

Holding: A claimant has the burden of establishing that he or she suffers from a permanent loss of hearing of greater than ten percent that is medically established to be work-related and caused by the long-term exposure to hazardous occupational noise. It is an affirmative defense, however, and not a part of claimant's burden of proof in a claim, whether the claimant had been exposed to or had long-term exposure to hazardous occupational noise.

3.5. JOB AVAILABILITY – “PERMANENT BAD FAITH”

► Supreme Court of Pennsylvania

- ◆ [*Pitt Ohio Express v. Workers' Compensation Appeal Board \(Wolff\)*](#)
No. 54 WAP 2005 (December 27, 2006)

Holding: Where a claimant's benefits have been suspended or reduced because of a bad faith refusal to pursue employment, the claimant's bad faith relieves an employer of the requirement to demonstrate the availability of a continued suitable position. In other words, the bad faith of the claimant is essentially “permanent.” Justice Baer filed a [dissenting opinion](#).

3.6. PENSION OFFSETS

► Commonwealth Court of Pennsylvania

- ◆ [*Commonwealth, Dept. of Public Welfare v. Workers' Compensation Appeal Board \(Cato\)*](#)
No. 2521 C.D. 2006 (November 17, 2007)

and

- ◆ [*Pa. State University v. Workers' Compensation Appeal Board \(Hensal\)*](#)
No. 2521 C.D. 2006 (November 17, 2007)

Holding: When an employer cannot provide evidence of actual pension contributions for the use of an individual member of a defined benefit pension plan, it may meet its burden of establishing the amount of the pension offset with expert actuarial evidence, if the testimony is accepted as credible.

3.7. PSYCHOLOGICAL INJURIES

► Supreme Court of Pennsylvania

- ◆ [*Rag \(Cyprus\) Emerald Resources, L.P. v. Workers' Compensation Appeal Board \(Hopton\)*](#)
No. 1 WAP 2005 (January 16, 2007)

Holding: Sexually harassing comments may constitute abnormal working conditions giving rise to a claim for a psychological injury under the Workers' Compensation Act. This is the case even if the employment aggravates a pre-existing injury.

3.8. RES JUDICATA – “PARALLEL” PROCEEDINGS

► Supreme Court of Pennsylvania

- ◆ [*Cohen v. Workers' Compensation Appeal Board \(City of Philadelphia\)*](#)
No. 43 EAP 2005 (November 22, 2006)

Holding: A Workers' Compensation Judge is not required to give preclusive effect to determinations by the Philadelphia Civil Service Commission under Philadelphia Civil Service Regulation 32. Recognizing the substantial procedural and economic disparities between the different proceedings, the Supreme Court has ruled that WCJs are permitted to conduct their own evaluation of evidence in matters in which there are workers' compensation and City of Philadelphia Regulation 32 proceedings.

3.9. RETIREMENT

► Commonwealth Court of Pennsylvania

- ◆ [*Ragno v. Workers' Compensation Appeal Board \(City of Philadelphia\)*](#)
No. 924 C.D. 2006 (January 16, 2007)

Holding: A claimant is estopped from challenging a previous decision by a Workers' Compensation Judge that the claimant was retired. In other words, once retired, always retired.

3.10. UNREASONABLE CONTEST

► Commonwealth Court of Pennsylvania (*En Banc*)

- ◆ [*Wood v. Workers' Compensation Appeal Board \(Country Care Private Nursing\)*](#)
No. 1272 C.D. 2005 (January 10, 2007)

Holding: In a reinstatement petition, it is claimant's burden to prove that a work-related disability continues. When the claimant meets this burden, it is the employer's burden under Section 440 of the Act to prove a reasonable contest, *i.e.*, it is the employer's burden to establish that a conflict in the evidence existed or that contrary inferences could be drawn from the evidence. When an employer does not establish any conflicting evidence, and offers no testimony or evidence from which contrary inferences could be drawn, the contest is unreasonable.

3.11. UTILIZATION REVIEWS

► Commonwealth Court of Pennsylvania (*En Banc*)

- ◆ [*Gazzola v. Workers' Compensation Appeal Board \(Ikon Office Solutions\)*](#)
No. 1138 C.D. 2006 (November 22, 2006)

Holding: A WCJ has jurisdiction to rule upon the adequacy of a Utilization Review Organization's pursuit of records, including whether (1) records were mailed in a timely manner or (2) there was a reasonable excuse for not supplying records in a timely matter or at all. The WCJ can then decide whether to uphold the determination based on the failure to provide records or vacate the determination and order records to be sent to a reviewer for a URO determination on the merits of whether the treatment was reasonable and necessary. The WJC cannot rule, however, on the merits of whether the treatment was reasonable and necessary.

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