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

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REPORTING DECISIONS THROUGH MAY 31, 2011

SPOTLIGHT: APPELLATE & TRIAL COURT WRITING SERVICES BY THE LAW OFFICES OF DANIEL J. SIEGEL, LLC

Effective legal writing can be the difference between winning and losing, or between a large verdict and a de minimus one. At the Law Offices of Daniel J. Siegel, LLC, we understand how to craft legal arguments that can persuade trial and appellate court judges and help obtain the best possible results for your clients.

In this newsletter, for example, we report on the Superior Court's opinion in *Silver v. Thompson,* for which our office authored the amicus brief for the Philadelphia Trial Lawyers Association. The *Silver* case is but one example of our expertise in crafting legal arguments that help to convince judges to rule in our clients' favor, a skill that attorney Dan Siegel has used for more than 25 years. Click here to read the amicus brief in *Silver*.

Dan has authored briefs in numerous significant appellate and trial court decisions on a wide range of subjects, including sovereign immunity, contribution among tortfeasors, and employment law. He also prepares briefs in workers' compensation and other matters. While no one can guarantee success, Dan and his staff view writing as an art, and can help you, regardless what type of case you have. In addition to ***Silver***, our recent successes include:

***Philadelphia Gas Works v. W.C.A.B. (Amodei)*, 964 A.2d 963 (Pa.Cmwlth. 2009)**

This en banc decision reverses a decade of case law and holds that when an employer seeks an offset from workers' compensation benefits for pension benefits paid to an injured employee, the offset must be calculated based upon the net amount of the benefits received by the worker.

***McElheney v. W.C.A.B. (Kvaerner Phila. Shipyard)*, 940 A.2d 351 (Pa. 2008) (Author of the Brief for the Appellant)**

The Supreme Court of Pennsylvania held that a worker injured while on a ship in a graven dry dock was not injured upon the "navigable waters of the United States," and was therefore entitled to benefits under both the federal Longshore and Harbor Workers' Compensation Act and the Pennsylvania Workers' Compensation Act. The Court ruled that the graven dry dock, which by definition was cut and dug out of the land, was not within the limits of the navigable waters of the United States.

When you need a lawyer to help prepare a brief or motion or other pleading, contact the Law Offices of Daniel J. Siegel, LLC at 610-446-3457 or by email to dan@danieljsiegel.com. Flat and hourly rates are available.

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

A. *Tortious Interference with Contractual Relations*

- ***Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, No. 9 EAP 2010 (Pa., May 13, 2011)**

  - **Holding:** Truth is a defense to a claim for tortious interference with a contractual relationship pursuant to the *Restatement (Second) of Torts* § 772(a), which provides that one who intentionally causes a third person not to perform or enter into a contract with another does not interfere improperly with the other's contractual relation by giving the third person truthful information. In so ruling, the Court specifically adopted Section 772(a), which it noted merely explicates the longstanding, existing rule concerning improper interference.

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!

B. *Discovery – Privileged Materials – Bad Faith Litigation*

- ***Rhodes v. USAA Casualty Insurance Co.*, 2011 PA Super 105 (May 17, 2011)**

  - **Holding:** Although a trial court's discovery orders are generally not appealable, when the order is collateral to the main cause of action, an order involving privileged material is appealable as collateral to the principal action. Further, a court cannot compel disclosure of an attorney's files when the material sought for discovery is irrelevant to the cause of action. In this case, the Court refused to permit discovery of plaintiff's counsel's file because the carrier failed to identify any information in the files from the representation during the underlying UIM claim that could have possibly been deemed relevant to the current bad faith litigation.

C. *Judgment of Non Pros – Reasonable Explanation*

- ***Mashas v. Sucich*, No. 356 EAL 2010 (Pa., May 4, 2011)**

  - **Holding:** When the record confirms that the trial court failed to comply with its local rule of civil procedure requiring notice of trial to be given prior to 3:00 p.m. on the day before trial, the petitioner has established a reasonable explanation for the inactivity or delay for purposes of ruling upon a motion to open a judgment of *non pros*. Justice Saylor filed a **dissenting statement** in which Justice Eakin joined, questioning whether the record was sufficient to warrant a remand during the allocatur stage.

D. ***Jurisdiction***

- ☐ ***Lilliquist v. Copes-Vulcan, Inc.*, 2011 PA Super 102 (May 13, 2011)**
  - **Holding:** In an action against an out-of-state corporation, a Pennsylvania court should apply the law of the state in which the corporation is organized in determining the applicable statute of limitations. Thus, because the defendant was organized in Alabama, and Alabama law provides that all claims filed more than two years after published notice of corporate dissolution, the action should have been dismissed.

E. ***Venue – Service of Process***

- ☐ ***Silver v. Thompson*, 2011 PA Super 114 (May 27, 2011)**
  - **Holding:** Pursuant to Pa.R.Civ.P. 1006 and Pa.R.Civ.P. 402, venue is proper in any county where an individual may be and was personally served with process.

The Law Offices of Daniel J. Siegel, LLC authored the amicus curiae brief for the Philadelphia Trial Lawyers Association in this matter. Click here to read the Brief.

F. ***Products Liability/Admissibility of Evidence***

- ☐ ***Blumer v. Ford Motor Co.*, 2011 PA Super 99 (May 6, 2011)**
  - **Holding:** Although Pa.R.E. 407, generally prohibits the admission of subsequent remedial measures, the Rule permits the introduction of evidence of product design changes that were contemplated prior to the accident at issue.

G. ***Property Owner Liability***

- ☐ ***Wombacher v. Greater Johnstown School District*, No. 1929 C.D. 2010 (Pa.Cmwlth., May 3, 2011)**
  - **Holding:** When a dangerous condition is caused by the action of the plaintiff, *i.e.*, the defective condition was created by the work of an independent contractor or its employees, the landowner has no further liability in connection with the work to be done.

H. ***Spoliation of Evidence***

- ☐ ***Papadoplos v. Schmidt, Ronca & Kramer, PC.*, 2011 PA Super 95 (May 5, 2011)**
  - **Holding:** When a party willfully spoliates evidence, and had an opportunity to defend a motion for dismissal, a trial court properly acts within its discretion by dismissing the underlying action.

I. ***Sovereign Immunity – Section 8546 (Official Immunity)***

- ☐ ***Dorsey v. Redman*, No. 59 C.D. 2010 (Pa.Cmwlth., May 4, 2011)**
  - **Holding:** An employee of a local agency is entitled to governmental/official immunity under Section 8546 of the Tort Claims Act, 42 Pa.C.S., only if the trial court determines, based upon the testimony and evidence, that the employee, in good faith, reasonably believed that his conduct was authorized or required by law.

J. ***Sovereign Immunity – Section 8522 (Negligence)***

- ***Weckel v. The Carbondale Housing Authority*, No. 666 C.D. 2010 (Pa.Cmwlth., May 5, 2011)**

  - **Holding:** A claim for common law negligence against a Commonwealth agency is barred, and sovereign immunity is not waived, unless the claim falls within one of the enumerated exceptions under the Sovereign Immunity Act, 42 Pa.C.S. §§ 8521-8527.

II. WORKERS' COMPENSATION

A. ***Average Weekly Wage Calculation***

- ***Pike v. Workers' Compensation Appeal Board (Veseley Brothers Moving)*, No. 1227 C.D. 2010 (Pa.Cmwlth., May 23, 2011)**

  - **Holding:** The method specified for calculating a claimant's average weekly wage under Section 309(d) of the Workers' Compensation Act, 77 P.S. § 582(d), should be used unless the injured worker establishes that the method used would lead to a grossly and demonstrably inaccurate measure of a worker's weekly wage. In addition, a claimant is bound by his or her filed tax return for purposes of the AWW calculation when deducting business expenses from his total gross income.

B. ***Application for Fee Review***

- ***Crozer Chester Medical Center v. Dept. of Labor and Industry, Bureau of Workers' Compensation, Health Care Services Div.*, No. 59 MAP 2008 (Pa., May 25, 2011)**

  - **Holding:** The Department of Labor and Industry appropriately rejected a healthcare provider's Application for Fee Review because it sought to resolve an insurer's denial of liability rather than the amount and timeliness of payments for a particular treatment under the Workers' Compensation Act. Justice Baer filed a **dissenting opinion** in which Justices McCaffery and Todd joined, arguing that the Notice of Compensation Payable ("NCP") issued by the employer, through the insurer, is a binding admission of liability, and a provider should be permitted to petition the courts for *mandamus* to compel the Department to entertain a fee review petition in the matter.

C. ***Notice of Compensation Denial/Equivocal Testimony Determination***

- ***Potere v. Workers' Compensation Appeal Board (KEMCORP)*, No. 1349 C.D. 2010 (Pa.Cmwlth., May 20, 2011)**

  - **Holding:** Equivocal medical testimony based solely upon conjecture is incompetent and thus an insufficient basis upon which a Workers' Compensation Judge may base his or her decision. In addition, an employer's timely issuance of a Notice of Compensation Denial ("NCD") does not constitute an illegal supersedeas when an employer first issues a Notice of Temporary Compensation Payable ("NTCP") stating that, although claimant sustained a work-related injury, no disability resulted.

D. *Voluntary Removal From Workforce*

- ☐ ***Keener v. Worker's Compensation Appeal Board (Ogden Corp.)*, No. 1421 C.D. 2010 (Pa.Cmwlth., May 19, 2011)**

  - **Holding:** When an employer seeks a suspension of benefits based upon a claimant's alleged voluntary retirement, a claimant's failure to seek employment is relevant only after the employer initially proves that the claimant has voluntarily retired from the workforce. An employer cannot rely upon a claimant's failure to seek work to prove voluntary retirement from the workforce because a claimant has no duty to seek work until the employer meets its initial burden to show a voluntary retirement.

III. UNITED STATES DISTRICT COURT – WESTERN DISTRICT OF PENNSYLVANIA

A. *Discovery Costs*

- ☐ ***Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2: 07-cv-1294 (W.D.Pa., May 6, 2011)**

  - **Holding:** Discovery costs may be assessed against a plaintiff, including costs for electronic discovery, as a taxed cost pursuant to Fed.R.Civ.P. 54(d) and 28 U.S.C. § 1920(4).

IV. U.S. DISTRICT COURT – EASTERN DISTRICT OF PENNSYLVANIA

A. *Admissibility of Expert Testimony (Daubert)*

- ☐ ***Wolfe v. McNeil-PPC, Inc.*, No. 07-348 (E.D.Pa., May 3, 2011)**

  - **Holding:** Expert testimony that posits an improper legal opinion, does not fit the case, is not based on "objective, reliable, scientific knowledge," or would unfairly prejudice a jury should be excluded under the *Daubert* standard and Fed.R.E. 702. A proposed expert does not have to be the most qualified or have the most appropriate specialization, however. Rather, testimony that satisfies the "trilogy of restrictions" of qualifications, reliability and fit is admissible under Rule 702 and *Daubert*.

V. NEW JERSEY SUPREME COURT

A. *Entire Controversy Doctrine – Party Joinder Rule*

- ☐ ***Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co.*, A-102/103-09 (May 18, 2011)**

  - **Holding:** Under the "Entire Controversy Doctrine" and Rule 4:5-1(b)(2), there is a preference that related claims and matters among related parties be decided in the same case, thereby ensuring fairness to parties and economy of judicial resources. The Rule requires parties to identify any non-party who should be joined or might have "potential liability" to a party. Thereafter, the court decides whether to compel joinder. The court may also impose "an appropriate sanction" for failure to disclose -- including dismissing a later action against a party whose existence was not disclosed if the failure was "inexcusable" and the undisclosed party's right to defend was "substantially prejudiced," *i.e.*, loss of witnesses and evidence, by not having been identified in the prior action. Cases interpreting the phrase "substantial prejudice" have equated it with loss of witnesses and evidence.

VI. PENNSYLVANIA SUPREME COURT – GRANTING ALLOCATUR

The Pennsylvania Supreme Court has granted allocatur in the following matters on the issues stated:

A. *Workers' Compensation – Supersedeas Fund Reimbursement*

- ***Department of Labor & Industry v. Workers' Compensation Appeal Board (Excelsior Insurance)*, No. 100 MAL 2010 (May 10, 2011)**
  - **Issue 1:** Whether the payments made by Excelsior Insurance to Claimant, for which Excelsior Insurance sought reimbursement from the Supersedeas Fund, constituted payments of compensation within the meaning of Section 443 of the Workers' Compensation Act ("Act"), 77 P.S. § 999(a), and were, therefore, subject to reimbursement by the Supersedeas Fund, or whether such payments constituted the payment of costs associated with obtaining the settlement of Claimant's third-party tort action under Section 319 of the Act, 77 P.S. § 671.
  - **Issue 2:** Whether equity requires that the Supersedeas Fund reimburse the insurer's *pro rata* share of attorney fees and costs incurred by a claimant in recovering from a third-party tort feasor?

B. *Workers' Compensation – Abnormal Working Conditions*

- ***Payes v. Workers' Compensation Appeal Board (Commonwealth of PA/State Police)*, No. 804 MAL 2010 (May 17, 2011)**
  - **Issue:** Whether the Commonwealth Court erred as a matter of law in concluding that the Claimant was not exposed to abnormal working conditions when the WCJ found that he was exposed to an unusual event which made his job more stressful than it had been.

C. *Workers' Compensation – "Disease Manifestation"*

- ***Tooey v. AK Steel Corp.*, No. 647 WAL 2010 and *Landis v. A.W. Chesterton Co.*, Nos. 648 & 649 WAL 2010 (May 17, 2011)**
  - **Issue 1:** Whether application of 77 P.S. § 411(2), the "disease manifestation" provision of the Pennsylvania Workers' Compensation Act ("Act"), in concert with 77 P.S. § 481, the "exclusive remedy" provision of the Act, results in an unconstitutional denial of the "reasonable compensation" mandate of Article III Section 18 of the Pennsylvania Constitution, which underlies the historical *quid pro quo* worker's compensation bargain, for a latent occupational disease that is invariably non-compensable under the Act?
  - **Issue 2:** Whether it is a violation of the Open Courts and Remedies Clause of Article I Section II of the Pennsylvania Constitution and the Due Process and Equal Protection Clauses of the federal and state constitutions to foreclose a common-law remedy in exchange for providing a wholly emancipated "substitute remedy" in contravention of the "reasonable compensation" mandate of Article III Section 18 for an occupational disease which is invariably non-compensable under the Act?
  - **Issue 3:** Whether the plain language of 77 P.S. § 411(2) defines an "injury" under the Act such that it excludes from its definition an occupational disease that first manifests more than 300 weeks after the last occupational exposure to the hazards of such disease, so that the exclusivity provision of 77 P.S. § 481 is not invoked?

D. ***Unemployment Compensation – Voluntary Layoff***

- ***Diehl v. Unemployment Compensation Board of Review (ESAB Group, Inc.)*, No. 750 MAL 2010 (May 25, 2011)**
  - **Issue 1:** Whether the voluntary layoff provision of section 402(b) of the Unemployment Compensation Law is applicable where a claimant accepted a voluntary layoff negotiated between his union and his employer and the terms of which provided for certain employer-provided health insurance?
  - **Issue 2:** Whether the Commonwealth Court erred when it refused to apply the section 402(b) voluntary layoff proviso of the Unemployment Compensation Law by characterizing the voluntary layoff as an "early retirement" package?

E. ***Rescue Doctrine – Damages Recovery***

- ***Bole v. Erie Insurance Exchange*, No. 455 WAL 2010 (May 17, 2011)**
  - **Issue:** Whether the Superior Court erred in holding that [Petitioner Ronald] Bole, who was engaged in a rescue, could not recover under the rescue doctrine because the collapse of his bridge, which caused him severe injuries, was the result of a superseding cause when it collapsed as a result of flood waters in a blinding nocturnal rain storm when that same storm caused the original accident and created the rescue situation to which Bole was responding, when:

    A. Bole, who like other members of the McKean Volunteer Fire Department resided throughout McKean Township, had been summoned by the original tortfeasor by use of his cell phone for emergency assistance for his critically injured passenger; and

    B. But for the use of modern telecommunications by which Bole and the other members of his volunteer fire department were summoned, [the original tortfeasor's] Finazzo's passenger would likely not have survived.

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