

# A Summary of Recent Pennsylvania & Federal Appellate Court Decisions

By Daniel J. Siegel, Esquire

LAW OFFICES OF DANIEL J. SIEGEL, LLC

66 W. Eagle Road • Suite 1 • Havertown, PA 19083-1425  
(610) 446-3457 • Fax (610) 471-0570 • E-mail [dsiegel@danieljsiegel.com](mailto:dsiegel@danieljsiegel.com)

REPORTING DECISIONS THROUGH JANUARY 31, 2011

## PENNSYLVANIA & FEDERAL APPELLATE COURT DECISIONS

### I. ALLOCATUR PETITIONS GRANTED

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

#### A. *MCARE Act*

□ [\*Cottle v. Tenet Health Graduate, LLC., No. 546 EAL 2008 \(January 3, 2011\)\*](#)

- **Issue:** Whether a board certified obstetrician/gynecologist may, under Section 512 of the MCARE Act, testify regarding an emergency room physician's standard of care concerning an alleged misdiagnosis of a patient with an ectopic pregnancy?

□ [\*Anderson v. McAfoos, No. 158 WAL 2010 \(January 28, 2011\)\*](#)

- **Issue 1:** When should the defendant raise an objection to the plaintiff's expert's qualifications under the MCARE Act?
- **Issue 2:** Whether a board certified pathologist may, under Section 512 of the MCARE Act, testify regarding a general surgeon/treating physician's standard of care in deciding to discharge a patient without reading the patient's blood work results?

#### B. *Physician's Duty to Third Parties*

□ [\*Seebold v. Prison Health Services, Inc., No. 195 MAL 2010 \(January 25, 2011\)\*](#)

- **Issue 1:** Does a physician have a duty to a third party with whom he has no doctor/patient relationship when he negligently diagnoses his patient, an inmate, as not having a contagious disease?
- **Issue 2:** Does a physician have a duty to warn third parties who may come into contact with an inmate with a contagious disease that the inmate has a contagious disease to tell third parties and how to avoid contracting the infectious disease from the inmate?
- **Issue 3:** Did the Superior Court impermissibly expand the holding of this Court in *DiMarco v. Lynch Homes-Chester County, Inc.*, 525 Pa. 558, 583 A.2d 422 (199[0])?
- **Issue 4:** Did the Superior Court impermissibly expand its own decision in *Troxel v. A.I. DuPont Institute*, 450 Pa. Super. 71, 675 A.2d 314 (Pa.Super. 1996) *app'l den.* 546 Pa. 668, 685 A.2d 547 (1006) to require that a physician warn third parties where previously the Superior Court had limited that duty to only advise a patient to avoid spreading the infectious disease that he or she had?

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!

C. *Workers' Compensation - Benefits Calculation*

□ [\*Hiler v. Workers' Compensation Appeal Board \(US Airways Group, Inc.\)\*, No. 785 MAL 2009 \(January 3, 2011\)](#)

- **Issue:** What is the proper calculation of a claimant's average weekly wage under Section 309(d) of the Workers' Compensation Act, 77 P.S. § 582(d), when the claimant incurs a period of zero wages due to a voluntary furlough during the relevant look-back period?

II. *Civil Litigation*

A. *Arbitration*

□ [\*Fastuca v. L. W. Molnar & Assocs.\*, No. 7 WAP 2009 \(Pa., January 18, 2011\)](#)

- **Holding:** An arbitrator's interim "findings" do not constitute an award within the meaning of Section 7341 of the Uniform Arbitration Act, 42 Pa.C.S.A. §§ 7301-7362. Thus, a trial court has no authority to review the findings, and does not possess the inherent equitable authority to end the arbitration proceedings before an arbitrator renders a final award. Justice Saylor filed a [concurring opinion](#).

B. *Collateral Order/Lis Pendens*

□ [\*Richner v. McCance\*, 2011 PA Super 4 \(January 6, 2011\)](#)

- **Holding 1:** An order overruling preliminary objections was an appealable collateral order because it created a second lawsuit involving the same parties and issues as a prior action pending in another jurisdiction.
- **Holding 2:** The trial court erred by refusing to dismiss an action pursuant to the doctrine of *lis pendens* because it was filed after an already pending action involving the same parties, issues and relief.

C. *Employment - Tortious Interference*

□ [\*Haun v. Community Health Systems, Inc.\*, 2011 PA Super 15 \(January 19, 2011\)](#)

- **Holding:** An action for intentional interference with the performance of an employment contract applies only to interference with a prospective employment relationship, whether at-will or not, and not to a presently existing at-will employment relationship. Thus, an at-will employee may not sue a third-party for tortious interference with a presently-existing at-will employment contract.

D. *Internet Providers - Disclosure of Anonymous Posters*

□ [\*Pilchesky v. Gatelli\*, 2011 PA Super 3 \(January 5, 2011\)](#)

- **Holding:** In order to compel an Internet service provider to reveal the identity of an individual who has posted material anonymously, a court must consider four requirements to ensure the proper balance between a speaker's right to remain anonymous and a defamation plaintiff's right to see redress: (1) that the defendant received proper notification of a petition to disclose his or her identity and a reasonable opportunity to contest the petition, (2) every plaintiff who petitions the court to disclose the identity of an anonymous or pseudonymous communicator must present sufficient evidence to establish a *prima facie* case of defamation, (3) a petitioner must submit an affidavit that the requested information is sought in good faith, is unavailable by other means, is directly related to the claim, and is fundamentally necessary to secure relief, and (4) the Court must balance the defendant's First Amendment rights against the strength of the plaintiff's *prima facie* case. In so holding, the Court considered the decisions in *Dendrite International, Inc. v. Doe, No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) and *Doe No. 1 v. Cahill*, 884 A.2d 451 (De. 2005).

**E. MCARE - Scope of Coverage**

- [\*\*\*Polyclinic Medical Center v. Medical Availability and Reduction of Error Fund, No. 399 M.D. 2010 \(Pa.Cmwlt., January 4, 2011\)\*\*\*](#)
  - **Holding:** The Medical Care Availability and Reduction of Error Fund (MCARE) is not required to provide coverage for professional liability insurance to a Hospital for a patient's claim of negligence when the injury was caused by a third party. The failure to properly supervise the patient does not constitute "an injury or death resulting from the furnishing of medical services" and therefore the incident is not covered by the Health Care Services Malpractice Act.

**F. Physicians - Duty to Inform**

- [\*\*\*Resser v. NGK North American Inc., 2011 PA Super 17 \(January 24, 2011\)\*\*\*](#)
  - **Holding:** Pursuant to Section 324A of the *Restatement Second of Torts*, an independent consultant, hired to conduct testing and report the results to an owner of a facility, does not have a duty to report the results of the testing to the public.

**G. Products Liability - Emotional Distress Claim**

- [\*\*\*Schmidt v. Boardman Co., No. 13 WAP 2009 \(Pa., January 24, 2011\)\*\*\*](#)
  - **Holding:** For purposes of a strict products liability claim, a plaintiff's recovery for emotional distress is limited to that which is proximately caused by contemporaneous physical impact. [\*\*Justice Baer filed an opinion concurring in part\*\*](#) and in support of vacation and remand in part, in which Justice McCafferty joined and in which Justice Todd joined in part. [\*\*Justice Todd filed an opinion concurring in part\*\*](#) and in support of vacation and remand in part.

**H. Products Liability - Vaccines**

- [\*\*\*Wright v. Aventis Pasteur, Inc., 2011 PA Super 9 \(January 11, 2011\)\*\*\*](#)
  - **Holding:** Section 300aa-22(b)(1) of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. § 300aa-1 *et seq.*, expressly preempts all design defect claims that arise from *unavoidable* vaccine side effects. Before granting summary judgment, a trial court must conduct a case-by-case inquiry to determine the nature of the vaccine side effects presented in the case.

**I. Right to Know Law - Attorney-Client Privilege**

- [\*\*\*Board of Supervisors of Milford Township v. McGogney, No. 2387 C.D. 2009 \(Pa.Cmwlt., January 6, 2011\)\*\*\*](#)
  - **Holding 1:** The inadvertent disclosure of 57 invoices under the Right to Know Law (RTKL), 65 P.S. §§ 67.101-67.3104, does not compel a finding that the attorney-client privilege was waived.
  - **Holding 2:** An open records officer has a duty to respond to an RTKL request. Because the officer's duties are ministerial and administrative in nature, the officer does not possess the actual authority to waive attorney-client privilege.

**J. Settlement Agreements**

- [\*Lesko v. Frankford Hospital-Bucks County\*, Nos. 104 & 105 MAP 2009 \(Pa., January 19, 2011\)](#)
  - **Holding:** Settlement agreements are governed by contract law principles, and a court's fundamental role in contract interpretation is to ascertain the intent of the parties. Thus, when the unambiguous language of a settlement agreement terminated all periodic payments at death, the defendants were not required to pay any funds other than those specified in the agreement. Justice Saylor filed a [concurring opinion](#).

**K. Sovereign Immunity - Real Estate & Highways Exception**

- [\*Brown v. Commonwealth, Department of Transportation\*, No. 1298 C.D. 2010 \(Pa.Cmwlt., January 19, 2011\)](#)
  - **Holding:** Under the real estate/highway exception to sovereign immunity under the Tort Claims Act, 42 Pa.C.S.A. § 8522(b)(4), a claim that the absence of rumble strips, like the absence of guardrails, does not set forth a viable cause of action; the *absence* of these safety features does not make the highway unsafe for its intended use and does not, in and of itself, *cause* accidents to occur.

**L. Subrogation - Heart and Lung Act**

- [\*Oliver v. City of Pittsburgh\*, No. 31 WAP 2009 \(Pa., January 28, 2011\)](#)
  - **Holding:** By its plain language, an employer that pays benefits under the Heart and Lung Act, 53 P.S. §§ 637-638, is not entitled to subrogate against the proceeds of a recovery under the Motor Vehicle Financial Responsibility (MVFRL).

**III. Workers' Compensation**

**A. Credibility Determinations**

- [\*Shannopin Mining Co. v. Workers' Compensation Appeal Board \(Sereg\)\*, No. 1185 C.D. 2010 \(Pa.Cmwlt., January 6, 2011\)](#)
  - **Holding:** A party may not challenge or second-guess a Workers' Compensation Judge's credibility determinations under Section 422(a), 77 P.S. § 834. Unless made arbitrarily or capriciously, a WCJ's credibility determinations will be upheld on appeal.

**B. Evidence - Aggravation**

- [\*City of Pittsburgh v. Workers' Compensation Appeal Board \(Wilson\)\*, No. 235 C.D. 2010 \(Pa.Cmwlt., January 20, 2011\)](#)
  - **Holding:** A Workers' Compensation Judge may not amend the description of an injury in a Notice of Compensation Payable without competent medical testimony. The testimony of a physician, which is later recanted, is not competent, credible evidence.

**C. Fee Review**

- [\*Fidelity & Guaranty Insurance Co. v. Bureau of Workers' Compensation \(Community Medical Center\)\*, No. 1766 C.D. 2009 \(Pa.Cmwlt., October 29, 2010\)](#)
  - **Holding:** Pursuant to Section 306(f.1)(5) of the Act, an Application for Fee Review must be filed either within thirty (30) days following notification of a disputed treatment, or within ninety (90) days following the original billing date.

**D. Mental Injury**

□ [\*\*Washington v. Workers' Compensation Appeal Board \(Commonwealth, State Police\), No. 476 C.D. 2010 \(Pa.Cmwlth., January 5, 2011\)\*\*](#)

- **Holding:** A state trooper/claimant is not entitled to benefits under the Workers' Compensation Act for post-traumatic stress disorder because (1) it was a normal working condition for a trooper to view, photograph, and attend the autopsy of the maimed cadaver of an infant, and (2) claimant did not demonstrate by objective evidence that the post-traumatic stress disorder was more than a subjective reaction to a normal working condition.

**E. Work Injury Description**

□ [\*\*Pizza Hut, Inc. v. Workers' Compensation Appeal Board \(Mahalick\), No. 996 C.D. 2010 \(Pa.Cmwlth., January 20, 2011\)\*\*](#)

- **Holding:** A WCJ may correct an NCP during a termination proceeding under Section 413 of the Act, 77 P.S. §§ 771-772, without the claimant filing a separate petition to support a corrective amendment. Because it was not necessary for Claimant to file a separate petition and because Employer filed its termination petition within three years of the last payment of benefits, the expansion of the description of Claimant's work injury was not time-barred.

**IV. UNITED STATES DISTRICT COURT**

**A. Motion to Dismiss**

□ [\*\*Graboff v. The Colleran Firm, No. 10-1710, \(E.D. Pa., November 5, 2010\)\*\*](#)

- **Holding:** A medical expert states a viable case of action for breach of contract, negligence and breach of the duty of confidence and trust when a defendant attorney "whited out" the words "Draft Report" on the medical expert's report and used it in settlement negotiation without the expert's approval or knowledge.

**V. SUPREME COURT OF THE UNITED STATES**

**A. Title VII of the Civil Rights Act - Retaliation**

□ [\*\*Thompson v. North American Stainless, LP, No. 09-291, \(U.S., January 25, 2011\)\*\*](#)

- **Holding:** A plaintiff who was fired after his fiancée filed a sex discrimination charge against their employer is "a person aggrieved" under Title VII of the Civil Rights Act. Because the plaintiff falls within the zone of interest protected by Title VII, *i.e.*, to prevent unlawful retaliation, he has standing to sue.

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