A Summary of Recent Pennsylvania & Federal Appellate Court Decisions

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REPORTING DECISIONS THROUGH JULY 31, 2011

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

A. *Asbestos Liability - Statute of Repose*

- *Rabatin v. Allied Glove Corp.*, 2011 PA Super 118 (June 3, 2011)
  - **Holding:** The statute of repose, 42 Pa.C.S.A. § 5536, which bars claims relating to the construction of any improvement to real property beyond twelve years, unless the defendant is in actual possession or control of the property, may apply to asbestos claims. The Court declined, however, to rule upon the statute's general applicability in asbestos cases because the issue was not raised at trial and therefore was unavailable for appellate review. The Court also declined to decide whether the statute protects a manufacturer for defects in the components of an improvement to real property because the appellant failed to establish at trial that the appellee manufactured its own components.

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. *Judgment of Non Pros - Petitions to Open*

- *Madrid v. Alpine Mountain Corp.*, 2011 PA Super 117 (June 3, 2011)
  - **Holding:** Ignorance of procedural rules is not a reasonable explanation for failing to promptly file a petition to open a judgement of *non pros*. Under Pa.R.C.P. 3051, a petitioner must, in addition to filing promptly, reasonably explain the default or delay in prosecuting the underlying claim and show facts supporting a cause of action. Additionally, an appellant must preserve any issues related to the denial of a petition to open, not the judgment of *non pros* itself; otherwise, the issues are waived on appeal.

C. *Jurisdiction*

- *Sehl v. Neff*, 2011 PA Super 153 (July 25, 2011)
  - **Holding:** When a Complaint alleges (1) two separate and distinct causes of action, (2) the defendants are not and cannot be held jointly or jointly and severally liable, and (3) venue is proper only as to one of the defendants, the trial court acted within its discretion by transferring the matter to the county where the cause of action arose and where the defendant, against whom there was improper venue, resided.

D. ***Mental Health and Mental Retardation Act- Immunity***

- ***Potts v. Step By Step, Inc.*, 2011 PA Super 150 (July 22, 2011)**
  - **Holding:** In order to state a cause of action under the immunity section of the Mental Health and Mental Retardation Act ("MHMRA"), 50 P.S. § 4603, the Complaint must sufficiently plead facts upon which a jury could find the conduct constituted gross negligence or incompetence. Further, gross negligence and incompetence may be inferred from the allegations of the Complaint. Of note, in this case, the Court sought to define "incompetence" under the MHMRA, concluding that it means action that is "devoid of those qualities requisite for effective conduct or action."

E. ***Motor Vehicle Accidents - "Occupant" of a Vehicle***

- ***Jones-Molina v. Southeastern Pennsylvania Transportation Authority*, No. 1363 C.D. 2009 (Pa.Cmwlth., July 22, 2011)**
  - **Holding:** A passenger who has disembarked from a bus, and is injured by an unidentified and presumably uninsured vehicle while crossing the street with the intention of transferring to a trolley, is not entitled to first party or uninsured motorist benefits under the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. § 1787 because the passenger was not an "occupant" of the vehicle at the time of the accident. This decision explicitly overrules the Court's decision in *Adeywayd-I v. Pennsylvania Financial Responsibility Assigned Claims Plan*, 648 A.2d 589 (Pa.Cmwlth. 1994), which had held that a passenger remained an occupant of a vehicle when, after disembarking from one bus, he was hit by an unidentified driver while crossing the street with the intent to transfer to a second bus.

F. ***Real Estate - Requirements for Broker Commission***

- ***Michael Salove Co. v. Enrico Partners, L.P.*, 2011 PA Super 128 (June 21, 2011)**
  - **Holding:** Pursuant to the Real Estate Licensing and Registration Act ("RELRA"), 63 P.S. § 455.101 *et seq*., a broker's claim for commissions is properly dismissed when the broker does not set forth in a writing signed by the consumer the nature of the services, the fee to be charged, and the duration of the agreement. As a consequence, "an oral modification of a term of [an exclusive listing] agreement, which is required under the Act to be in writing, cannot support a claim for commissions or fees under RELRA." Also, if a commercial broker lien is stricken, attorney's fees against the non-prevailing party are appropriate even if the non-prevailing party voluntarily initiated dismissal of the lien.

G. ***Sovereign Immunity***

- ***Page v. City of Philadelphia*, No. 1542 C.D. 2010 (Pa.Cmwlth., July 18, 2011)**
  - **Holding:** The real estate exception to the Sovereign Immunity Act, 42 Pa.C.S. § 8522(b)(4) does not apply to a motor vehicle accident caused by black ice because the black ice did not derive, originate from, or have the highway as its source. Further, the Court affirmed that improper plowing does not create an artificial condition for which Penndot may be held liable under the Act.

H. ***Statute of Limitations - Discovery Rule and Fraudulent Concealment***

- ***Pulli v. Ustin*, 2011 PA Super 139 (July 5, 2011)**
  - **Holding:** When a plaintiff is immediately aware of an injury, and also aware that he was injured because of a third party, and there is no evidence that the defendant concealed or attempted to conceal that she was driving on behalf of her employer, the statute of limitations is not tolled under the doctrine of fraudulent concealment. In order for the doctrine of fraudulent concealment to apply, the defendant must commit an affirmative independent act of concealment upon which the plaintiff justifiably relied.

I. ***Underinsured Motorist Benefits***

- ***Erie Insurance Exchange v. Conley*, 2011 PA Super 155 (July 27, 2011)**
  - **Holding:** An employee injured when he was struck by vehicle owned and operated by his employer while in the course of his employment, may not recover underinsured motorist benefits based upon the exclusivity provisions of the Workers' Compensation Act, 77 P.S. § 481(a). In this case, the employee could not recover UIM benefits because, analogously, he was not entitled to recover damages from his employer for the negligent conduct of a co-worker.

J. ***Uniform Firearms Act***

- ***McClinton v. Pennsylvania State Police*, No. 1627 C.D. 2010 (Pa.Cmwlth., July 27, 2011)**
  - **Holding:** A conviction for misdemeanor theft, which was graded an M-1, and was punishable by up to five years in prison, is an appropriate basis for denying an application to purchase a firearm under the Pennsylvania Uniform Firearms Act, 18 Pa.C.S. § 6111.1(e).

K. ***Wrongful Death Actions - Pregnancy***

- ***Matharu v. Muir*, 2011 PA Super 134 (June 28, 2011)**
  - **Holding:** When a physician fails to administer specific necessary treatment to an expectant mother, and the omitted treatment puts the viability of the mother's future pregnancies at risk, the doctor is potentially liable for the death of the mother's child in a future pregnancy, even if the doctor did not provide care during the at-risk pregnancy. Under these circumstances, the statute of limitations commences from the date of the death of the child, not from the alleged negligent act of the physician, pursuant to the Medical Care Availability and Reduction of Error Act ("MCARE"), 40 P.S. § 1303.513(d). Whether the doctor owed a duty of care to the future offspring, and negligence can therefore be established, is generally a determination for the fact-finder at trial.

II. EMPLOYMENT LAW

A. ***Restrictive Covenants***

- ***Sheperd v. Pittsburgh Glass Works, LLC*, 2011 PA Super 156 (July 27, 2011)**
  - **Holding:** A restrictive covenant in an employment agreement will not be enforced if no consideration was exchanged for its execution, regardless of whether the covenant is reasonable. Further, in weighing whether to enforce a restrictive covenant, a court must balance an employer's protectable business interest against the employee's interest in earning a living. If the employer has no legitimate interest to be protected by enforcement of the restrictive covenant, however, the interests of the employee must therefore outweigh those of the employer.

III. UNEMPLOYMENT COMPENSATION

A. *Due Process - Referee Assistance of Pro Se Claimants*

- ***Hackler v. Unemployment Compensation Board of Review*, No. 2490 C.D. 2010 (Pa.Cmwlth., July 15, 2011)**
  - **Holding:** In a claim for benefits under the Unemployment Compensation Law, when a Referee fails to elicit information from a pro se claimant, and disrupts the claimant's testimony, the Referee deprives the Claimant of due process under 34 Pa.Code § 101.21, which requires that a Referee aid a claimant in examining and cross-examining witnesses, and give every assistance compatible with the impartial discharge of the Referee's duties.

B. *Eligibility - Determination of Independent Contractor*

- ***Tracy v. Unemployment Compensation Board of Review*, No. 2098 C.D. 2010 (Pa.Cmwlth., June 11, 2011)**
  - **Holding:** When a worker is free from control and direction in his or her work performance, and is customarily engaged in an independently established business, an employer can "rebut the presumption that an individual working for wages is an employee eligible for unemployment compensation." Customary trade practice, specific contract language, the absence of tax withholdings, and the absence of supervision or regular meeting attendance may help to determine whether a worker is an ineligible independent contractor rather than an employee.

C. *Self-Employment*

- ***Kress v. Unemployment Compensation Board of Review*, No. 2500 C.D. 2010 (Pa.Cmwlth., June 23, 2011)**
  - **Holding:** A lawyer/claimant who continued to perform prior sideline work when hired by a law firm is not disqualified from unemployment compensation under Section 402(h) of the Unemployment Compensation Law, 43 P.S. § 802(h), barring self-employment when (1) the sideline work began before termination and the claimant continued to receive payment for the sideline work throughout employment, (2) the claimant is not working significantly more hours on the sideline work upon termination or clearly starting his or her own practice, (3) the claimant turned down opportunities to expand the sideline work in order to remain available for full-time work, and (4) the employment from which the claimant was terminated provided significantly more income than the sideline work.

IV. WORKERS' COMPENSATION

A. *Calculation of Benefits to Offset Pension Benefits*

- ***Horner v. Workers' Compensation Appeal Board (Liquor Control Board)*, No. 2155 C.D. 2010 (Pa.Cmwlth., June 14, 2011)**
  - **Holding:** An employer may calculate a workers' compensation pension offset again benefits that are simultaneously received by an employee under Section 204 of the Workers' Compensation Act, 77 P.S. § 71.

B. ***Crime Victims' Employment Protection Act***

- ***Rodgers v. Lorenz*, 2011 PA Super. 154 (July 25, 2011)**
  - **Holding:** The Workers' Compensation Act does not preempt claims under the Crime Victims' Employment Protection Act ("Act"), 18 Pa.C.S.A. § 4957(a), which was enacted to protect crime victims who have not yet attended their hearing from threats, coercion and loss of employment. Thus, a plaintiff fails to state a claim under the Act when the plaintiff was fired before testifying against another employee who assaulted him, despite the employer's directive not to do so.

C. ***Fatal Claims***

- ***Little v. Workers' Compensation Appeal Board (B&L Ford/Chevrolet)*, No. 1857 C.D. 2010 (Pa.Cmwlth., July 28, 2011)**
  - **Holding:** When a work injury appears to bear no relationship to events associated with employment activities, but instead relates to a final act (in this case, receipt of a letter terminating claimant's employment two days after claimant last worked) that is only work-related insofar as the event alters the employment relationship, the injury associated with that final act does not arise in the course of employment.

D. ***Limitation on Attorney's Fees***

- ***Seitzinger v. Commonwealth*, No. 838 M.D. 2010 (Pa.Cmwlth., July 28, 2011)**
  - **Holding:** Section 442 and 449 of the Workers' Compensation Act, 77 P.S. § 998 and 1000.5, respectively, which limit the amount of attorney's fees payable under the Act, do not violate (1) the Pennsylvania Supreme Court's authority under the Pennsylvania Constitution to regulate the legal profession under Article V, Section 10 of the Pennsylvania Constitution and the separation of powers doctrine, or (2) the Fourteenth Amendment of the United States Constitution.

E. ***Notice of Available Work***

- ***Vaughn v. Workers' Compensation Appeal Board (Carrara Steel Erectors)*, No. 1790 C.D. 2010 (Pa.Cmwlth., June 3, 2011)**
  - **Holding:** An employer's letter to a claimant, which contains sufficient notice of an available job within the claimant's capabilities, constitutes a good faith job offer, when (1) known restrictions are attached to the letter, (2) the employer assures the claimant that the restrictions will be accommodated, and (3) the claimant's past experience in the job acquaints him or her with its suitability.

F. ***Notice of Injury - Specificity***

- ***Gentex Corp. v. Workers' Compensation Appeal Board (Morack)*, No. 33 MAP 2010 (Pa., July 20, 2011)**
  - **Holding:** An exact diagnosis is not necessary in order for an employee to provide adequate notice of a work-related injury to an employer under Section 312 of the Workers' Compensation Act, 77 P.S. § 632. Rather, only a reasonably precise description of the injury is required. In addition, the context of the communications between the employee and the employer concerning the work-related injury is relevant in considering whether adequate notice has been provided to the employer. Justice Baer filed a **concurring opinion** in which he lamented the employer's attempt "to pursue a technical defense in the hope of avoiding its rightful obligations." Justice Saylor filed a **dissenting opinion**.

G. ***Provider Billing Codes - Changes by Insurers***

- ***Jaeger v. Bureau of Workers' Compensation Fee Review Hearing Office (American Casualty of Reading)*, No. 2205 C.D. 2010 (Pa.Cmwlth., June 22, 2011)**
  - **Holding:** An insurer may properly change billing codes to calculate a doctor's fee reimbursement for workers' compensation treatment if the insurer follows proper down-coding procedures. Proper procedures include (1) notifying the provider in writing with an explanation of the review and allowing ten days to respond, (2) giving the provider an opportunity to discuss and oppose the proposed changes, (3) having sufficient information to make the changes, and (4) maintaining consistency with Medicare guidelines. Copies of the dated ten-day written notice sent to the doctor and explanations of review combined with evidence demonstrating that the insurer's decision was based on sufficient information are adequate to satisfy the insurer's burden of showing that it followed proper procedures.

H. ***Reinstatement of Benefits - Change in Condition***

- ***Upper Darby Township v. Workers' Compensation Appeal Board (Nicastro)*, No. 1285 C.D. 2010 (Pa.Cmwlth., June 21, 2011)**
  - **Holding:** When a claimant settles all issues by stipulation in a prior litigation, the claimant is bound by the agreement unless he or she can prove entitlement to a reinstatement of total disability benefits by showing "that something changed in his condition or circumstances" after the stipulation was adopted. Merely retaining new counsel and changing treatment to a doctor who renders a different opinion from the previous doctor does not suffice as a change in condition.

I. ***Supersedeas Fund Reimbursement***

- ***Department of Labor and Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Crawford & Co.)*, No. 102 MAP 2009 (Pa., July 19, 2011)**
  - **Holding:** Under Section 413 of the Workers' Compensation Act, 77 P.S. § 1-1041.4, when the medical treatment in question occurred before the supersedeas request, but the bill was submitted to and paid by the insurer after supersedeas was denied, and it was ultimately determined that the treatment in question was not the result of a work-injury, Supersedeas Fund reimbursement was appropriate. Justice McCaffery filed a **dissenting opinion**, in which Justice Todd joined.

J. ***Termination of Benefits - Interaction with NCP***

- ***City of Philadelphia v. Workers' Compensation Appeal Board (Butler)*, No. 1254 C.D. 2009 (Pa.Cmwlth., July 26, 2011)**
  - **Holding:** The date of a Notice of Compensation Payable does not preclude the termination, suspension or modification of benefits as of a date before the filing of the NCP.

V. UNITED STATES SUPREME COURT

A. *Class Action Certification*

- ***Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (June 20, 2011)**
  - **Holding 1:** Class action certification is not appropriate for a company-wide employment discrimination claim when the party seeking class certification does not provide "significant proof" that the employer has a general policy of discrimination because, under Federal Rule of Civil Procedure 23(a), representative claims must be typical of those of the class as a whole, and the class must share common questions of law or fact.
  - **Holding 2:** Class certification under Federal Rule of Civil Procedure 23(b)(2) is not proper when "each individual member would be entitled to a different injunction or declaratory judgment," or "an individualized award of monetary damages." These types of claims are more appropriately certified under Rule 23(b)(3) because that Rule affords class members procedural protections such as a notice requirement and the option to opt-out of the litigation.
  - **Dissent:** Justice Ginsburg filed an opinion which concurred in part and dissented in part, in which Justices Breyer, Sotomayor, and Kagan joined, agreeing with the majority that class certification was improper under Rule 23(b)(2). The dissent argued that the majority erred in ruling that the case does not meet the commonality requirement in Rule 23(a), and should have been remanded for consideration of whether it meets the requirements of Rule 23(b)(3).

B. *Food and Drug Administration Regulations - Preemption*

- ***Pliva, Inc. v. Mensing*, No. 09-993 (June 23, 2011)**
  - **Holding:** Because federal drug regulations prohibit generic drug manufacturers from independently changing warning labels without FDA approval, state laws requiring generic drug manufacturers to adequately strengthen warning labels are preempted by federal law under the Supremacy Clause of the United States Constitution, because it is impossible for a generic manufacturer to comply with both. Justice Sotomayor filed a dissenting opinion, in which Justices Breyer, Ginsburg, and Kagan joined, arguing that (1) being incapable of independent compliance does not trigger impossibility under federal preemption doctrine, and (2) although generic manufacturers cannot unilaterally change warning labels, federal law does not require them to remain idle when they conclude that their labeling is inadequate. Thus, the dissent reasoned, generic drug manufacturers should have a duty to request that the FDA to approve a label change if the manufacturer believes that the current label should be strengthened.

VI. UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A. *School Discipline - Off Campus Speech*

- ***J.S. v. Blue Mountain School District*, No. 08-4138 (3rd Cir., June 13, 2011)**
  - **Holding:** A school may not punish off-campus speech that does not cause substantial disruption at school, is not school-sponsored, or did not occur at a school event.

- ***Layshock v. Hermitage School District*, No. 07-4465 (3rd Cir., June 13, 2011)**
  - **Holding:** A school district may not punish a student for creating a false social media profile of a high school principal when the profile was created off of the school's campus, unless the student's conduct created a "substantial disruption" of the school's campus.

B. ***Social Security Act - Judgment Liens***

- ***Tristani v. Richman*, Nos. 09-3537 and 09-3538 (3rd Cir., June 29, 2011)**
  - **Holding:** Agencies responsible for administering Medicaid programs may assert liens against Medicaid beneficiaries who secure judgments for medical expenses in third-party liability claims, and are a permissible exception to 42 U.S.C. § 1396p(a)(1) of the Social Security Act, which prohibits "liens ... against the property of Medicaid beneficiaries." Such liens are an exception because that provision is in conflict with 42 USC section 1396a(a)(25)(B) of the Act, which requires "states to 'seek reimbursement' for medical assistance payments made on behalf of Medicaid beneficiaries whenever legal liability of a third party is found to exist." Allowing liens in such cases ensures that beneficiaries do not "receive a windfall by recovering medical expenses they did not pay."

VII. PENNSYLVANIA SUPREME COURT - GRANTING ALLOCATUR

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

A. ***Jurors - Removal***

- ***Bruckshaw v. The Frankford Hospital*, No. 724 EAL 2010 (Pa., July 14, 2011)**
  - Whether a court is empowered to remove a principal juror without any reason and without any notice to the parties, and replace her with the last possible alternate, again without any notice to the parties, after all evidence was submitted and the jury had retired to deliberate.

B. ***Statutory Employer***

- ***Six L's Packing Co v. Workers' Compensation Appeal Board (Williamson)*, No. 453 EAL 2010 (Pa., July 14, 2011)**
  - Whether a claimant must meet the five part test articulated by the Supreme Court in the seminal case of *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 153 A. 424 (1930) to establish "statutory employer" status.
  - Whether an owner of property can be a "statutory employer," under the Pennsylvania Workers' Compensation Act and existing case law, in the face of 80 years of precedent finding the contrary.

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