A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH MAY 31, 2012

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

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 decision for you to read in its entirety. Try it!

A. *Animal Claims – Knowledge of Dangerous Propensity*

- ***Rosenberry v. Evans*, 2012 PA Super 91 (April 23, 2012)**
  - **Holding:** To establish negligence against a landlord for injuries by a tenant's dog, a plaintiff must prove that the landlord owed a duty of care, breached that duty, and that the injuries were proximately caused by the breach. A landlord out of possession is not liable for attacks by animals kept by his tenant on leased premises when the tenant has exclusive control over the premises. Actual knowledge of an animal's dangerous propensities is required before a duty is imposed upon a landlord to protect against or remove an animal housed on rental property. Thus, while knowledge of an agent, acting within the scope of his authority, may be imputed to a principal, the agent's awareness of a given fact is not imputed to the principal if knowledge of the fact is not material to his duties to the principal.

B. *Attorneys – Fee Sharing Agreements*

- ***Ruby v. Abington Memorial Hospital*, 2012 PA Super 114 (May 30, 2012)**
  - **Holding:** In a claim for payment of attorney's fees by a law firm against an attorney formerly associated with the firm, the Court held that the attorney's present employer/firm is bound by the terms of an employment agreement between an attorney and his former firm, even if the present employer/firm was not party to the agreement.

C. *Automobile Insurance Coverage/ Bad Faith*

- ***Berg v. Nationwide Mutual Insurance Co., Inc.*, 2012 PA Super 88 (April 17, 2012)**
  - **Holding 1:** Under the Pennsylvania Bad Faith Statute, 42 Pa.C.S.A. § 8371, the phrase "arising under an insurance policy" denotes any case that originates "from a writing setting forth an agreement between the insured and insurer that the insurer would be the insured upon the happening of certain circumstances." Therefore, whether processing claims for loss through a third party repair facility or through a direct repair program, insurers must at all times act in good faith vis-a-vis their insureds.
  - **Holding 2:** A plaintiff may prove bad faith by (1) demonstrating that an insurer has violated one or more provisions of Pennsylvania's insurance statutes or regulations, even if the provisions do not provide for a private cause of action, and (2) introducing evidence of a litigation strategy calling for aggressive tactics designed to deter the filing of small claims.

D. ***Champerty in Assignment of Breach of Contract Claims***

- ***Frank v. TeWinkle*, 2012 PA Super 104 (May 22, 2012)**
  - **Holding**: Champerty remains a valid defense and can apply to assignments of breach of contract claims against attorneys who have no legitimate interest in the suit, but for the agreement, expend their own money prosecuting the suit, and are entitled merely as a result of the bargain to share in the proceeds of the suit.

E. ***Evidence***

- ***Betz v. Pneumo Abex LLC*, 38 WAP 2010 (Pa., May 23, 2012)**
  - **Holding:** This decision clarifies the standards and expounds upon the analysis that a trial court must utilize when reviewing a *Frye* motion. The Court held that a *Frye* hearing is warranted when a trial judge has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions. This decision has generated much analysis, and attorneys whose case involve *Frye*-type issues should review its holding to determine whether, as some believe, the case is a game-changer or, as others believe, it merely clarifies existing law.

F. ***Legal Malpractice***

- ***Smith v. Morrison*, 2012 PA Super 105 (May 23, 2012)**
  - **Holding:** In a claim for legal malpractice, the Rules of Professional Conduct do not constitute valid points for jury instructions independent of common law.

G. ***MCARE - Defense of Medical Professional Liability Claims***

- ***Yussen v. Medical Care Availability and Reduction of Error Fund*, 13 MAP 2011 (Pa., May 30, 2012)**
  - **Holding:** Under Section 715 of the MCARE Act, 40 P.S. §§1303.715(a)-(b), the terms' "claim" and "made" are ambiguous. Thus, for purposes of Section 715, "the mere filing of a praecipe for a writ of summons does not suffice to make a claim, at least in absence of some notice or demand communicated to those from whom damages are sought." Justice Eakin filed a **dissenting opinion** in which Chief Justice Castille joined.

H. ***Venue - Forum Non Conveniens***

- ***Bratic v. Rubendall*, 2012 PA Super 89 (April 23, 2012)**
  - **Holding:** In order to satisfy its burden under *Cheeseman v. Lethal Exterminator Inc.,* 701 A.2d 156, 162 (Pa. 1997), a defendant must show that plaintiff's choice of forum is vexatious to him by establishing with facts on the record that plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience to plaintiff himself. Alternatively, the defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof, or to the ability to conduct a view of premises involved in the dispute. The defendant must show, however, more than that the chosen forum is merely inconvenient to him**.**

II. WORKERS' COMPENSATION

A. *Calculation of Average Weekly Wage*

- ***Lancaster General Hospital v. Workers' Compensation Appeal Board (Weber-Brown)*, No. 69 MAP 2010 (Pa., May 29, 2012)**
  - **Holding:** Under Section 309 of the Workers' Compensation Act, 77 P.S. § 582, for purposes of a specific loss claim, an employer is deemed to the employer at the time of the initial injury, even if claimant has changed employers. Further, claimant's average weekly wage should be calculated based on wages earned with the employer when claimant suffered the specific loss. Justice Eakin filed a **concurring opinion** in which Justice Baer joined.

B. *Disfigurement Award*

- ***Walker v. Workers' Compensation Appeal Board (Health Consultants)*, No. 492 C.D. 2011 (Pa.Cmwlth., May 3, 2012)**
  - **Holding:** Under Section 306(c)(22) of the Workers' Compensation Act, 77 P.S. § 513(22), a nose injury that amounts to a "slight crookedness" that is not "noticeably disfiguring," does not meet the burden of showing all necessary elements for a disfigurement award.

C. *Pension Offsets*

- ***United Airlines v. Bureau of Workers' Compensation Appeal Board (Gane)*, No. 2028 C.D. 2011 (Pa.Cmwlth., April 23, 2012)**
  - **Holding:** An employer seeking an offset for pension benefits received against benefits payable under the Workers' Compensation Act may establish that it funded a pension plan, and is entitled to an offset, regardless whether other employers or the U.S. Federal Pension Benefits Guarantee Corporation (PBGC) has taken over the plan and assumed liability.

D. *Secondary Liability of Contractors*

- ***Six L's Packing Co. v. Workers' Compensation Appeal Board (Williamson)*, No. 46 EAP 2011 (Pa., May 29, 2012)**
  - **Holding:** This case addresses whether an employer is liable for workers' compensation benefits as a statutory employer of an individual employed by an independent contractor, analyzing Sections 203, 77 P.S.§ 52, and 302(a), 77 P.S. §461, of the Workers' Compensation Act. The Court held that neither *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 292, 153 A. 424, 425 (1930) nor a per se owner exclusion, applies under Section 302(a) of the Act. Rather, the Court ruled that if an independent contractor does not have workers' compensation insurance, the statutory employer would be responsible. In other words, the Court placed responsibility/imposed liability upon a statutory employer when it failed to confirm that its independent/subcontractor failed to have workers' compensation insurance. In reaching its conclusion, the Court analyzed Sections 203 and 302(a) of the Workers' Compensation Act and concluded that it is "plain enough that the Legislature meant to require persons (including entities) contracting with others to perform work which is a regular or recurrent part of their businesses to assure that the employees of those others are covered by workers' compensation insurance, on pain of assuming secondary liability for benefits payment upon a default."

E. ***Specific Loss***

- ***Miller v. Workers' Compensation Appeal Board (Wal-Mart)*, No. 1741 C.D. 2011 (Pa.Cmwlth., May 25, 2012)**
  - **Holding:** When determining whether a claimant has suffered the specific loss of an arm, under Section 306(c) of the Workers' Compensation Act, 77 P.S. § 513(3), there is no bright-line test, and a body part need not be 100 percent useless for the loss to qualify as being for all practical intents and purposes. Rather, the Workers' Compensation Judge must evaluate the degree to which a claimant may continue to use the hand, wrist and forearm.

F. ***Termination for Misconduct***

- ***BJ's Wholesale Club v. Workers' Compensation Appeal Board (Pearson)*, No. 2010 C.D. 2011 (Pa.Cmwlth., May 10, 2012)**
  - **Holding:** Under the Workers' Compensation Act, an injured worker is not entitled to disability benefits if terminated for misconduct amounting to a lack of good faith, *e.g.*, reporting to work intoxicated with a blood alcohol level of .108, rather than the work-related injury.

G. ***Total Disability Benefits***

- ***Sladisky v. Workers' Compensation Appeal Board (Allegheny Ludlum Corp.)*, No. 67 C.D. 2011 (Pa.Cmwlth., May 15, 2012)**
  - **Holding:** A claimant is not entitled to a reinstatement of total disability benefits merely because his light-duty job with another employer ended, even if the job was funded by the pre-injury employer. Rather, the claimant is still required to the elements necessary for a reinstatement of total disability after collecting 500 weeks of partial disability, or show that the disability has increased.

III. ALLOCATUR GRANTED

A. The Pennsylvania Supreme Court grated allocatur on the following issues:

- ***Herd Chiropractic Clinic, P.C. v. State Farm Mutual Automobile Insurance Co.*, 625 EAL 2011 (April 30, 2012)**
  - Whether the Superior Court improperly interpreted § 1797 of the MVFRL and its own case of *Barnum v. State Farm Mut. Auto. Ins. Co.,* 635 A.2d 155 (Pa.Super. 1993) *rev'd in part by Terminato v. Pennsylvania National Ins. Co.,* 645 A.2d 1287 (Pa. 1994), to allow attorney's fees even when an insurer has utilized the Peer Review process?
- ***Levy v. Senate of Pennsylvania*, 834 MAL 2011 (May 14, 2012)**
  - Did the Commonwealth Court err in adopting a general rule that client identity is not protected by the attorney-client privilege and by adopting and formulating the "legal advice" or "confidential communications" exception to the general rule?
  - Are descriptions of legal services protectable under Pennsylvania's attorney-client privilege, and if so, under what circumstances?
  - Does the Right-to-Know Law require an agency to assert every challenge it may have to a Right-to-Know request in its initial pre-appeal response, with all other challenges per se waived thereafter?
  - Did the Commonwealth Court err by not deferring to the final determination of the Senate Appeals Officer and by supplementing the factual record on a Right-to-Know appeal, including by holding an ex parte hearing, conducting in camera review of privileged documents, and soliciting an affidavit in support of the agency's privilege redactions?

- ***Lipsky v. State Farm Mutual Automobile Insurance Company*, 576 EAL 2011 (April 24, 2012)**
  - Whether a claim for emotional distress without physical injury is covered by a liability insurance policy which provides coverage for "bodily injury" defined as "bodily injury to a person and sickness, disease or death which results from it."
  - Assuming, *arguendo*, that such claims do constitute bodily injury, whether plaintiffs' claims for emotional distress are subject to the "each accident" liability limits of the State Farm insurance policy, rather than the "each person" liability limits, despite the fact that plaintiffs' emotional distress resulted from the bodily injury suffered by Benjamin Lipsky, and the policy includes within its "each person" limits "all injury and damages to others resulting from this bodily injury."
- ***Passarello v. Grumbine*, 645 WAL 2011 (May 23, 2012)**
  - Is it ever within the discretion of a trial judge to instruct the jury in a medical malpractice case that a doctor is not liable for a nonnegligent error of judgment?
  - Was the Supreme Court's retroactive application to the present case of the rule it announced in *Pringle v. Rapapor*t[,] 980 A.2d 159 (Pa. Super. 2009) (en banc), contrary to the Supreme Court's decisions in *Cleveland v. Johns-Manville Corp.*[,] 547 Pa. 402, 690 A.2d 1146 (1997)?
- ***Passarello v. Grumbine*, 653 WAL 2011 (May 23, 2012)**
  - Whether the Superior Court violated longstanding precedent and deviated from existing law by granting [respondents] a new trial based on a purportedly faulty "error in judgment" jury instruction in circumstances where [respondents] failed to object to the instruction at trial, and, accordingly, failed to preserve the issue for appeal.
  - Whether the Superior Court contravened controlling precedent by not considering a trial court's jury charge in its entirety to determine whether a trial court's reference to the error-in-judgment concept was harmless and the charge in its entirety was a correct statement of law[?]
  - Whether the Superior Court contravened controlling precedent by relying on its decision in *Pringle v. Rapaport*, [ ] 980 A.2d 159 (Pa. Super. 2009) to vacate a verdict in circumstances where the instruction given by the trial court was a proper statement of the law even assuming Pringle applied[?]

IV. OTHER

A. *Title VII Employment Discrimination for Transgender Status*

- ***Macy v. Holder*, EEOC Commission Appeal No. 0120120821 (April 20, 2012)**
  - **Holding:** A complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e, *et seq.*

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