Law Offices of Daniel J. Siegel, LLC & Integrated Technology Services, LLC

A Summary of Recent Appellate Decisions & Rules Changes

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In This Issue

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Pennsylvania Supreme Courts Ends 2005 With A Flurry of Important Opinions

You can always rely on reading major year-end decisions by the Pennsylvania Supreme Court – at least at the end of any year in which one or more members of the Court is leaving. 2005 was certainly no exception. On the final days of Justice Nigro's tenure, the Court issued a slew of decisions, including major auto and workers' compensation pronouncements – and all are summarized here – with convenient hyperlinks. Whatever the Court says in 2006 will be hard to top decisions essentially eliminating arbitration of uninsured/underinsured motorist claims and granting workers' compensation carriers the right to seek IREs whenever they want. Because of the significance of these decisions, this issue provides more in-depth analysis than usual. Enjoy!

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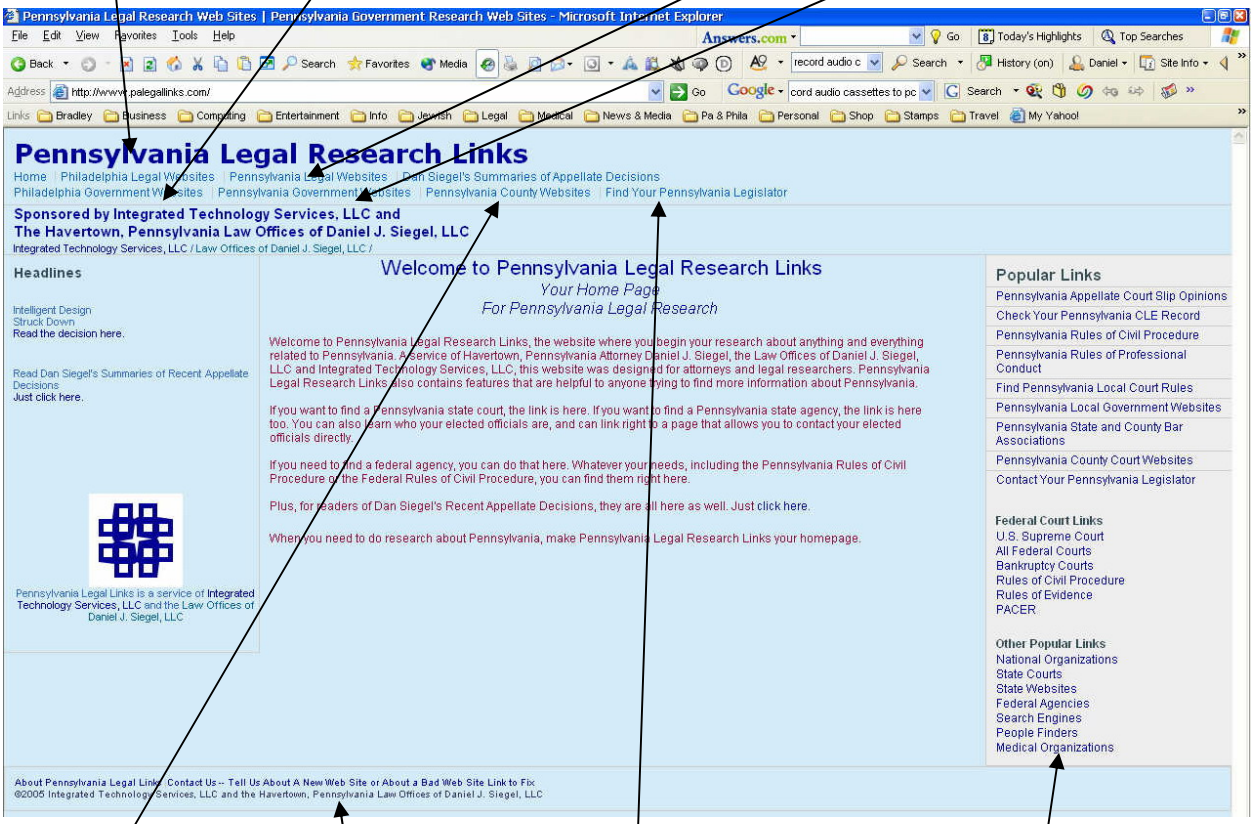

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REPORTING DECISIONS THROUGH DECEMBER 30, 2005

PENNSYLVANIA STATE COURT DECISIONS

It seems as though the Pennsylvania Supreme Court ends every calendar year by issuing numerous Opinions, with the volume increasing any year in which a Justice is leaving the bench. With Justice Nigro's unceremonious removal from the bench at the behest of voters irate because the legislature decided to award a large pay raise to itself and the judiciary, 2005 was no exception. Consequently, the decisions reviewed in this issue are grouped by Court rather than by topic.

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. SUPREME COURT OF PENNSYLVANIA

1.1. AUTOMOBILE INSURANCE

► **Uninsured & Underinsured Motorist Claims**

♦ ***Insurance Federation of Pennsylvania, Inc. v. Commonwealth, Department of Insurance***
No. 2007 MAP 2003 (December 30, 2005)

Holding: The Insurance Department overstepped its legislative mandate and does not have the authority to require mandatory binding arbitration in uninsured and underinsured motorist disputes. Consequently, insurance carriers may require that UM and UIM claims be resolved in the courts or, presumably, by other means specified under the insurance contract. Justice Saylor filed a dissenting opinion, joined by Justice Castille.

This decision will likely portend the demise of arbitration as the preferred method for deciding uninsured and underinsured motorist claims. It seems ironic, however, that carriers would seek to avoid arbitration when insurers, credit card companies, and businesses of all types, are including arbitration clauses in their agreements. Of course, these anti-consumer provisions generally preclude appeals, limit punitive damages, and otherwise restrict the nature of allowable claims. It is safe to assume that auto insurers will likely propose similar provisions for approval by the Insurance Department. With this Supreme Court Opinion, the question arises whether the Insurance Department can prohibit such provisions. Time will tell.

- ***State Farm Mutual Automobile Insurance Co. v. Foster***
  No. 2007 MAP 2003 (December 30, 2005)

  Holding: An insurer may deny uninsured motorist benefits to an insured claimant who fails to report the accident to the police or other governmental authority as required by the policy and the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. §§ 1701-1799.7. Justice Saylor filed a concurring opinion, concluding that regardless of the language of the MVFRL, a carrier may include a police notification provision in the terms of an auto insurance policy. Justice Baer filed a dissenting opinion, joined by Justice Castille, in which he characterized the provision at issue as a "technical escape hatch by which to deny coverage in the absence of prejudice." Justice Nigro did not participate in the decision of the case.

1.2. CIVIL PROCEDURE

► Service of Process

- ***McCreesh v. City of Philadelphia***
  No. 31 EAP 2005 (December 28, 2005)

  Holding: After an action has been commenced, a plaintiff must provide notice of the action to the defendant in order for the purpose of the statute of limitation to be fulfilled. A complaint should, therefore, only be dismissed in those cases in which the plaintiff has demonstrated an intent to stall the judicial machinery or when plaintiff's failure to comply with the Rules of Civil Procedure has prejudiced the defendant. Justice Newman filed a dissenting opinion. Justice Eakin also filed a dissenting opinion, joined by Justice Nigro.

The Supreme Court has yet again revisited its decision in *Lamp v. Heyman*, 366 A.2d 882 (Pa. 1976). In *McCreesh*, the Court now holds that a plaintiff need not strictly comply with the Rules by repeatedly reissuing a writ of summons; instead, the Court looks to the good faith efforts of a plaintiff to effectuate service, including considering whether a defendant has actual notice of the litigation and is not prejudiced by the lack of strict compliance with the Rules of Civil Procedure. The facts here – in which plaintiff attempted to serve the writ by certified mail in clear violation of the Rules – are certain to generate further litigation. The true food for thought – and further litigation – appears in Justice Eakin's dissent, in which he states:

> The "majority has developed a new rule holding a trial court may only dismiss a case where there is ineffective service in two distinct situations: (1) where the plaintiff's actions evidence an intent to stall the judicial machinery, or (2) where the plaintiff's failure to comply with the Rules of Civil Procedure has actually prejudiced the defendant. . . .The majority goes so far as to suggest that without prejudice, actual notice itself, much less proper service, may be unnecessary."

1.3. WORKERS' COMPENSATION

►Impairment Rating Evaluations (IREs)

- ***Gardner v. Workers' Compensation Appeal Board***
  No. 14 EAP 2004 (December 28, 2005)

  Holding: An employer/workers' compensation carrier must request that a workers' compensation claimant submit to an Impairment Rating Evaluation within sixty (60) days from the date that the claimant receives, or comes into possession of 104 weeks of total disability benefits in order to obtain the automatic relief under 77 P.S. § 511.2(2). If an employer fails to request an IRE within this time period, it may still request an IRE at a later date pursuant to 77 P.S. § 511.2(6), but must utilize the traditional administrative process in order to modify a claimant's disability status. Justice Nigro filed a concurring opinion, and Justice Newman filed a dissenting opinion.

Workers' compensation practitioners who had been awaiting the decision in *Gardner* now know that an employer/insurer can request an IRE up to two times within any twelve-month period. The only limitation on an employer's right to an IRE is that the employer cannot avail itself of the automatic relief under the Act if the exam is not requested within 60 days of the employee's receipt of 104 weeks of benefits. In reality, this means that a workers' compensation carrier is now able to reduce virtually every claimant to partial disability status at any time after the claimant has received two years of benefits. Although a claimant can try to defend against a modification petition based upon an IRE, the fact that literally no claimant can meet the statute's requirement that he or she have a 50 percent impairment means that any defenses will, at best, delay the inevitable.

►Physical Versus Mental Injuries

- ***Panyko v. Workers' Compensation Appeal Board***
  No. 37 WAP 2004 (December 28, 2005)

  Holding: A claimant who suffers a purely physical injury, such as a heart attack, because of a psychic reaction to a working condition, is not required to establish that the working condition was abnormal. Thus, claimants allegedly suffering from physical injuries are not required to show that their injuries are the result of abnormal working conditions. Rather, they need only show that (1) they are suffering from an objectively verifiable physical injury, and (2) the injury arose in the course of employment and was related thereto. Justice Saylor filed a concurring opinion, and Justice Newman filed a dissenting opinion.

►Supersedeas Fund Reimbursement

- ***Comm., Dept. of Labor & Industry v. Workers' Compensation Appeal Board (Exel Logistics)***
  No. 37 WAP 2004 (December 28, 2005)

  Holding: An employer is not entitled to Supersedeas Fund reimbursement for compensation and medical bills paid while a Petition for Forfeiture is pending because the petition for forfeiture was pursuant to § 306(f.1)(8), and not § 413 or § 430 of the Act. Justice Newman filed a dissenting opinion, in which Justices Castille and Baer joined.

1.4. NEW RULES OF CIVIL PROCEDURE

►Disclosure of Legal Malpractice Insurance Coverage

- ***Rule of Professional Conduct 1.4(c)***

Effective July 1, 2006, lawyers in private practice are required to notify their clients if they do not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles. The Rule also specifies the language of the required disclosures, and mandates that attorneys maintain a record of the disclosures for six years after termination of the representation of a client.

►Consumer Credit Transactions

- ***New Rules of Civil Procedure 1326 to 1331***

Effective February 1, 2006, the Court has promulgated Rules of Civil Procedure governing proceedings to compel arbitration and to confirm an arbitration award in a claim arising from a consumer credit transaction.

2. SUPERIOR COURT OF PENNSYLVANIA

2.1. ►Defamation – Conditional Privilege

- ***Moore v. Cobb-Nettleton***
  2005 PA Super 426 (December 21, 2005)

Holding: A social worker, who makes professional disclosures required by Pennsylvania law, is entitled to a conditional privilege in a defamation lawsuit.

2.2. ►Learned Intermediary Doctrine

- ***Lineberger v. Wyeth***
  2005 Westlaw 3547682 (Pa. Super., December 21, 2005)

Holding: In a pharmaceutical failure to warn case, the plaintiff must establish both a duty to warn and a failure to warn. The plaintiff must also show that, had the defendant issued a proper warning to the physician (the learned intermediary), the learned intermediary would have altered his or her behavior, *i.e.,* would not have prescribed the drug, and the injury would have been avoided.

This is an unpublished opinion, although counsel for Wyeth has stated that he will request that the Court publish the opinion.

3. COMMONWEALTH COURT OF PENNSYLVANIA

3.1. ►Workers' Compensation – Hepatitis C

- ***City of Philadelphia v. Workers' Compensation Appeal Board (Sites)***
  No. 1410 C.D. 2005 (December 21, 2005)

Holding: Hepatitis C may be deemed an occupational disease even if the condition was not specifically identified as an occupational disease until after the claimant's diagnosis.

3.2. ►Workers' Compensation – Suspension/Bad Faith

- ***Virgo v. Workers' Compensation Appeal Board (County of Lehigh-Cedarbrook)***
  No. 1167 C.D. 2005 (December 22, 2005)

  Holding: An employer is entitled to a suspension of benefits when an employee is discharged from employment because of "bad faith" in carrying out her job responsibilities.

This is a classic example of bad facts making bad law (at least for workers' compensation claimants). One of the most common questions raised by injured workers is what happens if they return to work at light duty and are then fired because of allegedly unsatisfactory job performance. This case answers the questions, holding that workers' compensation benefits may be suspended under those circumstances. Of course, in this case, the employee did not have a "clean" record, and it was easy for the Court to uphold the suspension. What happens, however, when the unsatisfactory performance occurs only after the employee is at light duty and, as employees frequently claim, their firing is a pretext because the employer only wants them to work at full duty? Time will tell.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION OPINION

► ***Doe v. XYC Corp.***
No. A-2909-04T2 (December 27, 2005)

Holding: An employer on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third parties. No privacy interest of the employee stands in the way of the duty on the part of the employer.

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