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

A Summary of Recent Appellate Decisions From Pennsylvania & New Jersey State Courts & Selected Federal Courts of Appeal

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In This Issue

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Newsletter Highlights Multiple Important Decisions

Many appellate courts have been during the summer of 2006, issuing opinions at a furious pace. Generally, these have not been mundane opinions reaffirming tried and true principles. Instead, courts in Pennsylvania, New Jersey and throughout the country have tackled many issues of first impression, including criminal and family law cases. Among the topics addressed by Pennsylvania courts, and highlighted on the following pages, are:

- Auto Insurance
  - Cars For Hire Provisions
  - Subrogation by HMOs
  - UM & UIM Arbitration
  - UM & UIM Policy Provisions
- Civil Procedure
  - Collateral Source Rule
  - Fictitious Name Act
  - Forum Non Conveniens
  - Interlocutory Appeals
    - Collateral Orders
    - Protective Orders/Trade Secrets
  - Judgment by Default
  - Settlement
  - Transfer of Cases from Federal to State Court
- Criminal Law – Municipal Police Jurisdiction
- Family Law – Grandparent Visitation Rights
- Federal Arbitration Act
  - Review Under Pennsylvania Law
- Medical Malpractice – MCARE Act
- Sovereign Immunity
  - Real Property Exception
  - Sidewalks Exception
- Unemployment Compensation – Effect of Elimination of Health Care Benefits
- Workers' Compensation
  - Appellate Review Standards
  - Hearing Loss claims
  - Impairment Rating Examinations
  - Physical Examinations

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Pennsylvania State Court Decisions

Every decision is "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.

1. Civil Litigation

1.1. Automobile Insurance

1.1.1. "Cars for Hire" Provisions

►**Supreme Court of Pennsylvania**

♦ ***Prudential Property & Casualty Insurance Co. v. Sartno***
No. 163 MAP 2005 (August 21, 2006)

Holding: An insured's use of his or her private vehicle to deliver pizza does not render the automobile a "car for hire" and does not, therefore, trigger the exclusionary provision of the insurance policy.

1.1.2. Uninsured & Underinsured Motorist Arbitration

►**Superior Court of Pennsylvania**

♦ ***The Hartford Insurance Co. v. O'Mara***
2006 PA Super 236 (August 29, 2006)

Holding: Under the Uniform Arbitration Act of 1980, 42 Pa.C.S.A. § 7301 *et seq.*, when the application or construction of an insurance policy provision is at issue, the dispute is within the exclusive jurisdiction of the arbitrators. A court will take jurisdiction only when the claimant attacks a particular provision as: (1) contrary to a constitutional, legislative or administrative mandate; (2) against public policy; or, (3) unconscionable. The Court also concludes that, in order for an auto insurance policy to comply with the Motor Vehicle Financial Responsibility Law ,75 Pa.C.S.A. § 1734 (relating to reduction of uninsured and underinsured motorist coverage limits), the language utilized need only convey an insured's desire to purchase uninsured and underinsured coverage in amounts less than or equal to the bodily injury limits and the amount of the requested coverage. It is not appropriate to invalidate a Section 1734 election because the arbitrators could conceive of a better way to draft the language.

- ***Nationwide Insurance Co. v. Schneider***
  2006 PA Super 219 (August 17, 2006)

  Holding: Section 1733 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A., specifies the priority for recovery of underinsured motorist benefits, but neither mentions nor requires exhaustion of limits. Further, when an insured settles a claim in contravention of a policy's consent-to-settle clause, an insurer must show that its interests are prejudiced. It is the insurance company's burden, not the insured's, to demonstrate prejudice.

1.1.3. SUBROGATION

►Supreme Court of Pennsylvania

- ***Wirth v. Aetna U.S. Healthcare***
  No. 28 EAP 2005 (August 22, 2006)

  Holding: Pursuant to the Pennsylvania Health Maintenance Organization Act (HMO Act), 40 P.S. § 1560(a), a health maintenance organization (HMO) is exempt from complying with the anti-subrogation provision of the Pennsylvania Motor Financial Responsibility Law (MVFRL), 75 Pa.C.S. § 1720.

1.2. MEDICAL MALPRACTICE CLAIMS

1.2.1. MCARE ACT

►Superior Court of Pennsylvania

- ***McManamon v. Washko***
  2006 PA Super 245 (August 31, 2006)

  Holding: The provisions of Medical Care Availability and Reduction of Error ("MCARE") Act apply only to liability-producing conduct arising from the rendition of professional medical services; the MCARE Act does not apply to injuries not caused by medical negligence.

1.3. SOVEREIGN IMMUNITY

1.3.1. Real Property & Sidewalks Exceptions

►Commonwealth Court of Pennsylvania

- ***Reid v. City of Philadelphia***
  No. 1572 C.D. 2005 (August 3, 2006)

  Holding: A street owned by a municipality that is designated a Commonwealth highway continues to be owned by the municipality. If a person is injured on a municipal sidewalk that adjoins a designated highway, the municipality remains the owner of the sidewalk and the sidewalk is, therefore, within the "right of way" of a street owned by the municipality for purposes of analyzing governmental immunity under the Political Subdivision Tort Claims Act, 42 Pa. C.S. Thus, a municipality can be held primarily liable pursuant to 42 Pa.C.S. § 8542(b)(3) as a property owner for failing to satisfy its obligation to make sidewalks safe for pedestrian travel. It should be noted that the trial court's analysis also considered Philadelphia City Ordinance, Section 10-720, which relates to snow removal.

- ***LoFurno v. Garnet Valley School District***
  No. 2082 C.D. 2005 (May 3, 2006 – published by Order dated August 23, 2006)

  Holding: A belt sander, designed to be bolted to the floor, that is not hardwired or permanently attached to the floor or to a dust collection system, is personalty, and not a fixture for purposes of the real property exception to governmental immunity under the Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541-8542.

2. CIVIL PROCEDURE

2.1. APPEAL

2.1.1. CONFLICT BETWEEN FEDERAL & PENNSYLVANIA LAW

►Superior Court of Pennsylvania

- ***Trombetta v. Raymond James Financial Services, Inc.***
  2006 PA Super 229 (August 22, 2006)

  Holdings: 1. The standards of review of an arbitration award under the Pennsylvania Uniform Arbitration Act are not preempted by the standards of review in the Federal Arbitration Act (FAA).

  2. The standards of review under the FAA cannot preempt the Pennsylvania standards for review of arbitration awards unless the Pennsylvania standards of review frustrate the underlying objectives of the FAA because standards of review are an inherently procedural mechanism used to facilitate judicial resolution of controversies *after* the underlying arbitration agreement has been enforced in accordance with the FAA. Thus, the FAA standards of review do not apply to a state court's review of an arbitration award created and enforced under the FAA.

  3. The common law arbitration standards of review under 42 Pa.C.S.A. § 7341, do not violate the core objective and principles underlying the FAA. Accordingly, Pennsylvania law governs the question of whether parties can impose *de novo* review on trial courts by virtue of contractual agreements.

  4. *De novo* review clauses contained in arbitration agreements are unenforceable as a matter of law in Pennsylvania.

- ***Joseph v. Advest, Inc.***
  2006 PA Super 213 (August 8, 2006)

  Holding: The provision of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, permitting a party three months to challenge an arbitration award is a procedural provision. Thus, Pennsylvania's 30-day deadline (under either the Uniform Arbitration Act, 42 Pa.C.S. § 7341 *et seq.*, or common law arbitration) for contesting arbitration awards applies to such appeals, and appeals filed more than 30 days after the entry of the award are untimely.

2.2. CAPACITY TO SUE

►**Superior Court of Pennsylvania**

- ***George Stash & Sons v. New Holland Credit Co., LLC***
  2006 PA Super 206 (August 2, 2006)

Holding: The Fictitious Name Act, 54 Pa.C.S.A. § 331, provides that an entity that fails to register its fictitious name shall not be permitted to maintain any action in a Pennsylvania tribunal. Because the statute is penal in nature, it should not be construed to extend beyond the purposes for which it was enacted, *i.e.*, to protect persons giving credit in reliance on the fictitious name, and to definitely establish the identity of those owning the business. Where, as here, a person or entity knows the identity of the persons with whom he or she is dealing, he cannot assert the lack of capacity to sue under the Fictitious Name Act.

2.3. COLLATERAL SOURCE RULE

►**Superior Court of Pennsylvania**

- ***Simmons v. Cobb***
  2006 PA Super 222 (August 16, 2006)

Holding: The collateral source rule does not preclude a *plaintiff* from introducing evidence of the receipt of Social Security Disability (SSD) benefits. Rather, the collateral source rule, which is intended to protect tort victims, provides that payment from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer. In this case, plaintiff sought to introduce evidence of receipt of SSD benefits. Thus, the purpose of the collateral source rule – protecting plaintiff and prevention of a benefit to the wrongdoer – is not implicated.

2.4. FORUM NON CONVENIENS

►**Superior Court of Pennsylvania**

- ***Wright v. Aventis Pasteur, Inc.***
  2006 PA Super 203 (August 2, 2006)

Holding: In determining whether to dismiss a case pursuant to 42 Pa.C.S.A. § 5322(e) based on *forum non conveniens*, the trial court must consider two important factors: (1) a plaintiff's choice of the place of suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless there is an alternative forum available to the plaintiff. Of note, this is a pharmaceutical products liability action, and this decision – as the Superior Court acknowledges – would appear to diverge from "the apparent trend in recent *forum non conveniens* decisions rendered by [the Superior Court] toward dismissing cases brought in Pennsylvania where another forum is available."

2.5. INTERLOCUTORY APPEALS

2.5.1. GENERALLY

►Supreme Court of Pennsylvania

- ***Pridgen v. Parker Hannifin Corp.***
  Nos. 8 & 9 EAP 2005 (August 22, 2006)

Holding: In order for a trial court Order to be a "collateral order" under Pa.R.A.P. 313 – and appealable as a matter of right – the following three factors must be present:

1. The Order must be separable from and collateral to the main cause of action;
2. The right involved is too important to be denied review and must involve rights deeply rooted in public policy going beyond the particular litigation at hand; and,
3. The question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

2.5.2. TRADE SECRETS

►Superior Court of Pennsylvania

- ***Crum v. Bridgestone/Firestone North American Tire, LLC***
  2006 PA Super 230 (August 23, 2006)

Holding 1: **This decision contains the same holding relating to collateral orders as *Pridgen*** (above).

Holding 2: Pursuant to Section 757(b) of the *Restatement (2d) of Torts* and Pennsylvania law, in order to determine whether particular information is to be given trade secret status, a court should consider the following factors:

1. The extent to which the information is known outside of the business;
2. The extent to which the information is known by employees and others involved in the business; and,
3. The extent of measures taken to guard the secrecy of the information. Order must be separable from and collateral to the main cause of action.

In order for a court to determine whether a protective order is appropriate under Pa.R.Civ.P. 4019(a)(9), the discovery standard should embrace both (1) relevance and necessity, and (2) a balancing of need versus harm. Once a party establishes that the information sought is a trade secret, the burden shifts to the requesting party to demonstrate by competent evidence that there is a compelling need for that information and that the necessity outweighs the harm of the disclosure.

2.6. JUDGMENT BY DEFAULT

►Superior Court of Pennsylvania

- ***State Farm Insurance Co. v. Barton***
  2006 PA Super 210 (August 7, 2006)

Holding: After a responsive pleading is filed, even if untimely, a judgment by default cannot be entered because the responding party is no longer in default.

2.7. SETTLEMENT

►Commonwealth Court of Pennsylvania

- ***Brannam v. Reedy***
  No. 2590 C.D. 2005 (August 14, 2006)

Holding: An evidentiary hearing is required when one party disputes the existence of a settlement agreement or its binding effect. An evidentiary hearing is the appropriate procedure to be followed even when there is a written agreement signed by counsel if it is alleged that counsel lacked the authority to bind his client. There must also be a hearing when a settlement is vacated by court order or enforced by court order. A hearing must be held even if the trial court has "intimate knowledge" of the facts as a result of a pre-hearing conference because a trial court's recital of facts is not a substitute for a full record. A hearing must also be held, despite filing a petition and answer, even if no party requests one.

2.8. TRANSFER FROM FEDERAL COURT TO STATE COURT

- ***Falcone v. The Insurance Company of the State of Pennsylvania***
  2006 PA Super 241 (August 30, 2006)

Holding: Pursuant to 42. Pa.C.S.A. § 5103, a party may transfer a case from federal court to the appropriate state court when the federal court lacks diversity jurisdiction. The date of the federal filing becomes the date of the state filing for purposes of the applicable statute of limitations. In order to comply with the statute, a party must promptly file a certified transcript of the final judgment of the federal court and the related pleadings in a court or magisterial district of the Commonwealth. A party does *not* comply with the statute by filing a new complaint in state court.

3. CRIMINAL LAW

3.1. MUNICIPAL POLICE JURISDICTION & SUSPENSION OF DRIVING PRIVILEGES

►Supreme Court of Pennsylvania

- ***Martin v. Commonwealth, Dept. of Transportation***
  No. 100 MAP 2005 (August 22, 2006)

Holding: Pursuant to the Municipal Police Jurisdiction Act, 42 Pa.C.S. § 8951 *et seq.*, a municipal police officer lacks statutory authority to stop and arrest an individual outside the officer's territorial jurisdiction. In making such a stop, the officer is not acting as a police officer for purposes of the Implied Consent Law, 75 Pa.C.S. § 1547. Because probable cause did not exist here to arrest the individual within

the officer's jurisdiction, the extra-territorial jurisdiction provisions of the MPJA, 42 Pa.C.S. § 8953(a)(2) or (a)(5) did not apply. Thus, the stop was unlawful, the arrest was unlawful, and the suspension of Martin's operating privileges under the Implied Consent Law was also improper. This Opinion reverses the prior Commonwealth Court opinion published at 870 A.2d 982 (2005). Justice Eakin filed a concurring opinion.

4. FAMILY LAW

4.1. GRANDPARENT VISITATION

Supreme Court of Pennsylvania

- ***Hiller v. Fausey***
  No. 197 MAP 2004 (August 22, 2006)

  Holding: The statute, 23 Pa.C.S. § 5311, which permits a Court to grant partial custody or visitation rights to grandparents upon the death of their child, who is also the grandchild's parent, is Constitutional. Justices Castille, Saylor and Eakin joined in the decision by Justice Baer. Justice Newman filed a concurring opinion, and Chief Justice filed a dissenting opinion.

5. UNEMPLOYMENT COMPENSATION

5.1. NECESSITOUS AND COMPELLING REASON TO QUIT

►Commonwealth Court of Pennsylvania

- ***Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review)***
  No. 464 C.D. 2006 (August 23, 2006)

  Holding: The elimination of health care benefits constitutes a substantial change in employment terms and serves as a necessitous and compelling reason for a claimant to resign from employment, thus entitling the claimant to unemployment compensation benefits.

6. WORKERS' COMPENSATION

6.1. APPELLATE REVIEW

►Supreme Court of Pennsylvania

- ***Trimmer v. Workers' Compensation Appeal Board (Monaghan Township)***
  No. 58 MAL 2006 (August 3, 2006)

  Holding: The Commonwealth Court (and presumably the Workers' Compensation Appeal Board) may not substitute its determination of the facts and credibility of witnesses for the Workers' Compensation Judge's proper assessments. This is a *per curiam* Order in which the Supreme Court summarily reverses the Commonwealth Court's decision because the determination of facts and credibility is solely within the province of the Workers' Compensation Judge.

6.2. HEARING LOSS/EMPLOYER LIABILITY

►**Commonwealth Court of Pennsylvania**

- ***Hayduk v. Workers' Compensation Appeal Board (Bemis Co., Inc.)***
  No. 230 C.D. 2006 (August 11, 2006)

Holding 1: When an employer (Company A) purchases the assets, but not the liabilities, of another company (Company B), including the plant where the claimant worked, and the purchase specifically excludes any of Company B's workers' compensation liabilities that arose prior to the purchase of the assets, Company A is not liable for any work-related hearing loss that occurred prior to its purchase of Company B. In its holding, the Commonwealth Court distinguishes this case from *LTV Steel Co., Inc. v. Worker's Compensation Appeal Board*, 562 Pa. 205, 754 A.2d 666 (2000), in which the Pennsylvania Supreme Court held that when a surviving corporation succeeds to *both the right and liabilities* of the company it purchases, it would not permit the surviving company to deny its responsibility for work-related hearing loss.

Holding 2: Under Section 306(c)(8)(iv) of the Workers' Compensation Act, 77 P.S. § 513(8)(iv), audiometric testing for a work-related hearing loss must conform to applicable OSHA standards. It is the *employer's* burden, however, to establish that an occupational hearing loss is attributable to a previous employer. When, as here, the employer fails to meet this burden, it remains liable for all of a claimant's compensable hearing loss.

6.3. IMPAIRMENT RATING EXAMINATIONS

►**Supreme Court of Pennsylvania**

- ***Dowhower v. Workers' Compensation Appeal Board (Capco Contracting, Inc.)***
  No. 542 MAL 2003 (August 11, 2006)

Holding: Reversing its April 19, 2006 Order, the Supreme Court has granted claimant's Petition for Allowance of Appeal and will, presumably, address the issue of whether an employer may request an Impairment Rating Examination (IRE) prior to the 104-week period set forth in Section 306(a.2)(1) of the Workers' Compensation Act, 77 P.S. § 511.2(1). The Court had previously denied the Petition based upon its decision in *Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures)*, 888 A.2d 758 (Pa. 2005), with dissents by Justices Saylor and Newman.

6.4. PHYSICAL EXAMINATIONS

►**Commonwealth Court of Pennsylvania**

- ***Knechel v. Workers' Compensation Appeal Board (Marriott Corp.)***
  No. 140 C.D. 2006 (August 24, 2006)

Holding: Pursuant to Section 314(a) of the Workers' Compensation Act, 77 P.S. § 651(a), when an employee's physician attends an employer-requested physical examination (commonly called an "Independent Medical Examination" or

"IME"), the employee is entitled, at the employee's expense, to have a health care provider of his or her own selection "participate in such examination." The Court holds that a physician's "participation" is limited to "attendance and observation." Judge Friedman filed a dissenting opinion in which she argues that "participation" should mean "taking part in something," pursuant to the Statutory Construction Act and as "participation" is defined by the majority.

NEW JERSEY STATE COURT DECISIONS

1. NEW JERSEY

1.1. CIVIL LITIGATION

1.1.1. ARBITRATION AGREEMENTS

►Supreme Court of New Jersey

- ***Muhammad v. County Bank of Rehoboth Beach, Delaware***

No. A-39-05 (August 9, 2006)

Holding: The provision of a consumer loan contract that prohibits class-wide arbitration is unconscionable and unenforceable. Consequently, the unconscionable provision should be severed from the arbitration agreement, with the remaining provisions continuing to be enforceable.

1.1.2. EXCULPATORY CLAUSES/PRE-INJURY RELEASES

►Supreme Court of New Jersey

- ***Hojnowski v. Vans State Park***

No. A-17/45-05 (July 17, 2006)

Holding: Although a parent may agree to bind a minor child to an arbitration provision, a parent may not bind a child to a pre-injury release of a minor child's prospective tort claims arising from the minor child's use of a commercial recreational facility.

1.2. MEDICAL MALPRACTICE

1.2.1. ATTORNEY ASSESSMENTS

►Superior Court of New Jersey, Appellate Division

- ***New Jersey State Bar Association v. McCormac***

No. A-6188-04T3 (July 26, 2006)

Holding: The $75 annual fee payable by each licensed attorney, which is deposited into the Medical Malpractice Liability Insurance Premium Assistance Fund, is Constitutional.

1.2.2. FAILURE TO NOTIFY PATIENT OF MEDICAL STATUS

►Superior Court of New Jersey, Appellate Division

- ***C.W. v. The Cooper Health System***

No. A-6100-04T2 (August 10, 2006)

Holding: A health care provider who orders an HIV test for a patient has a duty to take reasonable measures to notify that patient of the results of the test. Consequently, a physician and/or hospital can be held civilly liable in damages to an individual who contracted HIV from a former patient who was not informed of the results of an HIV test ordered by the physicians responsible for the patient's medial care. This duty is paramount when the test results indicate that the patient is positive for HIV.

UNITED STATES COURTS OF APPEALS DECISIONS

1. DISTRICT OF COLUMBIA CIRCUIT

1.1. TAXATION OF PERSONAL INJURY AWARDS

- ***Murphy v. Internal Revenue Service***

No. 05-5139 (August 22, 2006)

Holding: Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C., is unconstitutional insofar as it permits the taxation of an award of damages for mental distress and loss of reputation. Further, damages received solely in compensation for a personal injury are not income within the meaning of that term in the Sixteenth Amendment to the U.S. Constitution.

2. SECOND CIRCUIT

2.1. PREEMPTION

- ***Richards v. Home Depot, Inc.***

No. 05-5205-cv (July 14, 2006)

Holding: State law claims that an injurious product failed to comply with the warning requirements of the Federal Hazardous Substance Act (FHSA) are not preempted as a matter of law.

3. FIFTH CIRCUIT

3.1. CLASS ACTIONS

- ***Frazier v. Pioneer Americas LLC***

No. 06-30434 (July 6, 2006)

Holding: Under the Class Action Fairness Act, when seeking remand of a claim to state court, the burden is on the plaintiff to show that one of the exemptions to federal court jurisdiction applies.

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