

A Summary of Recent Appellate & Trial Court Decisions From Pennsylvania, New Jersey & Other Courts

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REPORTING DECISIONS THROUGH AUGUST 17, 2007

PENNSYLVANIA APPELLATE COURT DECISIONS

1. CAUSES OF ACTION

1.1. BAD FAITH

► SUPREME COURT

- [*Toy v. Metropolitan Life Insurance Co.*](#),
Nos. 33 & 34 WAP 2005 (July 18, 2007)

Holdings: (1) The Bad Faith statute, 42 Pa.C.S. §8371, does not provide a cause of action for claims that an insurer engaged in unfair or deceptive practices soliciting the purchase of a policy. Rather, it applies to “actions an insurer took when called upon to perform its contractual obligations of defense and indemnification or payment of a loss that failed to satisfy the duty of good faith and fair dealing implied in the parties’ insurance contract.”

(2) Under the Unfair Trade Practices and Consumer Protection Law (UTCPL), 73 P.S. § 201-1 *et seq.*, a plaintiff must prove the common law fraud element of justifiable reliance. In addition, a plaintiff who sets forth a claim of fraud in the execution of a contract claim is not precluded as a matter of law from establishing the element of justifiable reliance, and is not under a duty to read the contract in order to allege and prove the element of justifiable reliance in a claim of fraud in the execution of a contract.

► SUPERIOR COURT

- [*Growall v. Maietta*](#), 2007 PA Super 223 (July 26, 2007)

Holdings: (1) A party who is unaware of a material defect at the time of signing an Agreement of Sale and Seller Disclosure Statement does not violate the Real Estate Seller Disclosure Law, 68 Pa.C.S.A. § 7301 *et seq.*, by failing to disclose the defect despite the fact that his or her spouse knew of the defect. The RESDL does not hold a seller to a strict liability standard concerning innocent misrepresentations.

(2) The Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.*, applies to properties purchased for residential purposes, not to properties purchased for investment purposes.

Each decision is “hyper-linked” 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!

1.2. INNKEEPER LIABILITY

► SUPERIOR COURT

- [*Paliometros v. Loyola*](#), 2007 PA Super 242 (August 13, 2007)

Holding: An innkeeper that knows that a fraternity party is going to take place, where there will undoubtedly be underage drinking, owes an affirmative duty to exercise reasonable care under the circumstances, and to take precautions by having some supervisory personnel present to monitor both the premises and conduct occurring on the premises in order to prevent injuries to any business invitees on the premises.

2. DISCOVERY

2.1. ANSWERS TO ADMISSIONS

► SUPERIOR COURT

- [*Reilly v. Ernst & Young, LLP*](#), 2007 PA Super 216 (July 18, 2007)

Holding: When a defendant fails to supply one of two necessary verifications with its Answers and Objections to a Plaintiff's Request for Admissions, but immediately moves to rectify the situation and plaintiff does not suffer any significant prejudice, the trial court errs by imposing the severe sanction of deeming the defendant to have admitted all matters stated in the Request for Admissions. Further, multiple defendants are not required to verify joint Answers to Requests for Admission.

2.2. ATTORNEY-CLIENT PRIVILEGE

► SUPERIOR COURT

- [*Carbis Walker, LLP v. Hill, Barth, and King, LLC*](#), 2007 PA Super 221 (July 23, 2007)

Holding: There are five factors to consider when determining whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege:

- The reasonableness of the precautions taken to prevent inadvertent disclosure in light of the extent of the document production;
- The number of inadvertent disclosures;
- The extent of the disclosure;
- Any delay and measures taken to rectify the disclosure; and
- Whether the overriding interests of justice would or would not be served by relieving the party of its errors.

When a party provides no explanation for failing to act promptly after the opposing party notifies him that he had inadvertently disclosed a document, the inadvertent disclosure will be deemed a waiver of the attorney-client privilege.

3. DRIVER LICENSING

3.1. LICENSE SUSPENSION

► SUPERIOR COURT

- [*Wagner v. Commonwealth of Pennsylvania*](#), No. 1648 C.D. 2006 (August 9, 2007)

Holding: The Department of Transportation may suspend an individual's Commercial Driver License based upon a conviction and suspension of his personal driver's license for operating a personal vehicle while under the influence of alcohol or a controlled substance.

4. MEDICAL MALPRACTICE

4.1. CERTIFICATES OF MERIT

► SUPERIOR COURT

- [*Bourne v. Temple University Hospital*](#), 2007 PA Super 231 (August 2, 2007)

Holding: A Motion seeking to extend the time within which to file a Certificate of Merit pursuant to Pa.R.Civ.P. 1042.3(d) tolls the time period for filing the Certificate of Merit. The time clock resumes ticking on the date the trial court rules upon the Motion.

5. PLEADINGS

5.1. SERVICE OF PROCESS

► SUPERIOR COURT

- [*Dey Englert v. Fazio Mechanical Services, Inc.*](#), 2007 PA Super 233 (August 3, 2007)

Holding: The filing of a Writ of Summons and the delivery of the writ one time is not a good faith effort to effectuate service when counsel took no action whatsoever once the writ of summons was issued to ascertain whether service was properly made, relying instead on counsel's customary practice of waiting for word from the Sheriff's office, no matter how long that might take and in spite of the difficulties counsel had experienced receiving his mail in a timely manner.

5.2. JUDGMENT (MAGISTERIAL DISTRICT JUSTICES)

► SUPERIOR COURT

- [*Lloyd, Inc. v. Microbytes, Inc.*](#), 2007 PA Super 202 (July 9, 2007)

Holding: A judgment in magisterial district court is "entered" on the date the judgment form is signed by the magisterial district justice, not when notice of the judgment is printed out and the process of providing notice is initiated.

5.3. VENUE

► SUPERIOR COURT

- [*Deymarin v. Consolidated Rail Corp.*](#), 2007 PA Super 218 (July 20, 2007)

Holding: When a Complaint alleges facts sufficient to support venue under Pa.R.C.P. 2179, and the Defendant fails to object to those allegations, a trial court does abuse its discretion by ruling upon the record and denying Preliminary Objections.

6. TRIAL

6.1. JURY INSTRUCTIONS

► SUPERIOR COURT

- [*Gorman v. Costello*](#), 2007 PA Super 224 (July 27, 2007)

Holding: When juries are given incomplete instructions, a new trial is required. Thus, a trial court errs when it reads a portion of a suggested jury instruction to jury and, as a result, the jury was lacking an essential tool needed to make an informed decision based on correct and complete legal principles relevant to its verdict on the issue of damages.

7. WORKERS' COMPENSATION

NEW WORKERS' COMPENSATION BUREAU REGULATIONS

On August 4, 2007, the Commonwealth, Department of Labor and Industry issued new regulations applicable to the Bureau of Workers' Compensation, *i.e.*, these are revised general Regulations 34 Pa. Code Ch.121. Workers' compensation practitioners should review these Regulations carefully. To view the Regulations, go to <http://www.pabulletin.com/secure/data/vol37/37-31/1393.html>.

APPELLATE DECISIONS

7.1. EMPLOYMENT TERMINATION

▶ COMMONWEALTH COURT

- [*Shop Vac Corp. v. Workers' Compensation Appeal Board \(Thomas\)*](#),
No. 217 C.D. 2007 (July 25, 2007)

Holding: A Claimant's absences related to a work-related injury are not "unexcused." Thus, a claimant's discharge under these circumstances for alleged violations of the employer's attendance policy does not constitute willful misconduct or bad faith.

7.2. LIABILITY CLAIMS

▶ SUPERIOR COURT

- [*Integrated Project Services v. HMS Interiors, Inc.*](#), 2007 PA Super 246 (August 16, 2007)

Holding: When a pass-through indemnification clause in a subcontract does not clearly and unequivocally demonstrate that a subcontractor intended to indemnify a general contractor for damages resulting from the general contractor's own negligence, the subcontractor is not required to indemnify the general contractor for the portion of damages attributable to the general contractor.

7.3. OVERPAYMENTS/RECOUPMENTS

▶ COMMONWEALTH COURT

- [*Dollar Tree Stores, Inc. v. Workers' Compensation Appeal Board \(Reichert\)*](#),
No. 797 C.D. 2007 (August 13, 2007)

Holding: A recoupment for overpayment of workers' compensation benefits may not be ordered solely based on the doctrine of unjust enrichment. Rather, an employer is entitled to a recoupment under Section 413(a) of the Act to correct errors in existing agreements.

7.4. PENALTIES

7.4.1. INDEMNITY PAYMENTS

▶ COMMONWEALTH COURT

- [*Graphic Packaging, Inc. v. Workers' Compensation Appeal Board \(Zink\)*](#),
No. 1066 C.D. 2006 (July 24, 2007)

Holding: An Employer violates the Act if it does not begin making payments within 30 days of the date its obligation to pay arises. Only a grant of supersedeas obviates an employer's obligation to pay compensation. Absent supersedeas, the employer carries the burden of paying benefits during the litigation period.

7.4.2. MEDICAL PAYMENTS

▶ COMMONWEALTH COURT

- [*Hough v. Workers' Compensation Appeal Board \(AC&T Companies\)*](#),
No. 2198 C.D. 2006 (July 17, 2007)

Holding: A fee review request is not the sole remedy for an employer's failure to pay medical bills in a timely manner, and is also not a condition precedent to the imposition of penalties. Thus, Section 306(f.1)(5) of the Workers' Compensation Act, 77 P.S. §531(5), does not require that a provider seek a fee review before a claimant may proceed on a penalty petition alleging untimely payment of medical bills.

7.5. PENSION & SOCIAL SECURITY BENEFITS

7.5.1. OLD AGE BENEFITS

▶ COMMONWEALTH COURT

- [*Maxim Crane Works v. Workers' Compensation Appeal Board \(Solano\)*](#),
No. 2244 C.D. 2006 (August 14, 2007)

Holding: Under Section 204 of the Act and 34 Pa. Code § 123.501, an employer is required to notify an injured worker of the obligation to notify the employer of the receipt of old age Social Security benefits. Thereafter, an employer may be entitled to an offset to the claimant's workers' compensation benefits. When an employer fails to exercise due diligence in seeking the offset, and there is prejudice to the other party, the doctrine of laches precludes the employer's right to recoup the offsetable benefits.

7.5.2. PENSION BENEFITS

▶ COMMONWEALTH COURT

- [*Gadonas v. Workers' Compensation Appeal Board \(Boeing Defense & Space Group\)*](#),
No. 1943 C.D. 2006 (August 1, 2007)

Holding: Pursuant to 34 Pa. Code § 123, "Pension benefits which are rolled over into an IRA or other similarly restricted account may not offset workers' compensation benefits, so long as the employee does not withdraw or otherwise utilize the pension benefits from the restricted account while simultaneously receiving workers' compensation benefits from the liable employer." Further, an Employer is estopped from disputing that pension payments received should be treated as a rollover when the evidence establishes that Claimant relied on a benefits administrator's assurance that the disability pension would not affect the workers' compensation benefits.

7.6. PHYSICAL EXAMINATION PETITIONS

▶ COMMONWEALTH COURT

- [*Davis v. Workers' Compensation Appeal Board \(Woolworth Corp.\)*](#),
No. 1873 C.D. 2006 (July 5, 2007)

Holding: The mere passage of time constitutes a reasonable basis for granting a petition under Section 314 of the Workers' Compensation Act. There is no need to allege a specific reason in support of a Petition to Compel Physical Examination.

7.7. SICK LEAVE CREDIT

► COMMONWEALTH COURT

- [*Bartholetti v. Workers' Compensation Appeal Board \(School District of Philadelphia\)*](#), No. 2058 C.D. 2006 (July 10, 2007)

Holding: An employer is not entitled to a credit for sick leave benefits used by a claimant during the initial period of disability before a claim has been deemed compensable. The Court also ruled that, because a claimant's average weekly wage is based upon his or her annual income, a seasonally-employed claimant is entitled to weekly compensation benefits regardless of the period of the year in which the claimant regularly worked.

7.8. VOCATIONAL INTERVIEWS

► COMMONWEALTH COURT

- [*Vaneman v. Workers' Compensation Appeal Board \(Apollo Moving\)*](#), No. 1711 C.D. 2006 (August 6, 2007)

Holding: An Employer may require a Claimant to submit to a vocational interview without the need for and before filing a petition to modify benefits. A request for a vocational interview may occur even if the claimant has returned to work at a modified wage and concurrently receives partial disability benefits.

PENNSYLVANIA COMMON PLEAS COURT DECISION

8. INSURANCE BAD FAITH

► DELAWARE COUNTY

- [*Pa. National Mutual Casualty Insurance Co. v. Johnson*](#), No. 05-2045 (June 21, 2007)

Holding: In a claim for insurance bad faith, a plaintiff must present clear and convincing evidence of bad faith, *i.e.*, a showing by the insured that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of, or recklessly disregarded, its lack of a reasonable basis in denying the claim.

UNITED STATES SUPREME COURT DECISION

9. PLEADINGS

- [*Bell Atlantic Corp. v. Twombly*](#), No. 05-1126 (May 21, 2007)

Holding: Fed.R.Civ.P. 8(a)(2) requires a party to include a short and plain statement of the claim showing that the pleader is entitled to relief in order to provide the defendant fair notice of what the claim is and the grounds upon which it rests. While a Complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of the entitlement to relief requires more than labels and conclusions; consequently, a formulaic recitation of the elements of a cause of action will not do. This very controversial case is viewed by many observers as increasing the requirements of what must be pleaded in a Federal Court Complaint to overcome a Rule 12(b)(6) motion.

UNITED STATES COURTS OF APPEALS DECISIONS

10. JURISDICTION

▶ **THIRD CIRCUIT**

- ***O'Connor v. Sandy Lane Hotel Co., Ltd.*, No. 05-3288 (July 26, 2007)**

Holding: A Pennsylvania court may exercise personal jurisdiction over an international corporation that mailed seasonal newsletters to citizens of Pennsylvania, encouraging the citizens to purchase the services and/or products that consequently cause them injury, even if the services were provided outside of the Commonwealth.

11. TAXATION OF VERDICTS

▶ **D.C. CIRCUIT**

- ***Murphy v. Internal Revenue Service*, No. 05-5139 (July 3, 2007)**

Holding: A compensatory award that is expressly based upon non-physical injuries is not compensation “received...on account of personal physical injuries” excludable from gross income under §104(a)(2) of the Internal Revenue Code, 26 U.S.C., despite evidence that the Plaintiff suffered both physical and non-physical injuries.

12. VENUE

▶ **THIRD CIRCUIT**

- ***Lafferty v. St. Riel*, No. 05-5357 (July 13, 2007)**

Holding: When a District Court transfers venue to another district under 28 U.S.C. §1406(a), the initial filing date in the transferor forum applies for purposes of calculating the applicable statute of limitations.

UNITED STATES DISTRICT COURT DECISION

13. REFERRAL FEES

▶ **EASTERN DISTRICT, PENNSYLVANIA CIRCUIT**

- ***Judge v. Parke McCay*, No. 07-975 (July 18, 2007)**

Holding: Holding: Because lawyers who share fees are required to obtain the client’s informed consent to the arrangement , an oral fee-splitting or referral fee agreement made in New Jersey without the client’s informed consent is unenforceable under New Jersey law, and will not be enforced by a Pennsylvania court.

NEW JERSEY APPELLATE COURT DECISIONS

14. JURISDICTION – CONTACTS WITH FORUM

▶ **SUPREME COURT**

- ***Goldhaber v. Kohlenberg*, No. A-5114-05T2 (August 2, 2007)**

Holdings: (1) When a defendant authors libelous messages targeted to an individual in New Jersey, as well as the municipality in which the individual resides, a New Jersey court may properly exercise personal jurisdiction over the defendant; and,

(2) A defendant who submits a certification that he relied upon the word of his attorney that New Jersey did not have jurisdiction over him when he decided not to file an Answer to a Complaint sufficiently establishes that the failure to answer the Complaint was the result of excusable neglect.

15. VENUE – FOREIGN PLAINTIFFS FORUM

► SUPREME COURT

- [***In Re Vioxx Litigation***](#), No. A-1731-06T1 (July 31, 2007)

Holding: A lawsuit filed in New Jersey by individuals residing in another country may be dismissed based upon forum *non-conveniens* when plaintiffs can assert their cause of action in their own country, and the place of injury and the majority of the evidence are located in that country.

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