

PERSONAL INJURY Reporter

IMPORTANT PERSONAL INJURY OPINIONS, AWARDS & SETTLEMENTS FROM THE COMMONWEALTH

CIVIL PRACTICE

Summary Judgment – Expert Reports – Timely Filing of Reports

Claar v. Moore (C.P. Alleg. Cty. Jan. 8, 2010). Friedman, J. PICS Case No. 10-1149 (4 pages).

The defendant was entitled to summary judgment where the plaintiff's expert report, though dated years earlier, was not supplied in a timely fashion.

Facts and Procedural History

The plaintiff filed a lawsuit stemming from an automobile crash that involved a light pole.

The court granted the defendant utility company's motion for summary judgment, and the plaintiff filed a motion for reconsideration, attaching a report of a professional engineer that opined that the defendant did not design or locate the pole in accordance with safety concepts.

The court denied the motion for reconsideration.

Court's Analysis

The court noted that the report was dated 2001, and all that was recent was an affidavit from 2009 confirming that the statements in the report were "true and correct."

The court pointed out that despite the fact that the expert's report was dated so many years earlier, it was not properly and timely filed in response to the motion for summary judgment. However, the court said it would leave it to the Commonwealth Court, on appeal, to decide "whether or not Plaintiff's counsel's various procedural missteps should be ignored so that the merits of the existence or not of a jury question can be reached."



Summary Judgment – Negligence Case – Discovery Sanctions

Menkes v. Fisher (C.P. Montgomery

Cty. Nov. 4, 2009). Tilson, J. PICS Case No. 10-0104 (9 pages).

The defendants were entitled to summary judgment in the plaintiff's negligence action because the plaintiff would not have been able to meet her burden of proof in light of the court's discovery sanction precluding her from testifying at trial.

Facts and Procedural History

The plaintiff, proceeding pro se, filed a negligence action against the defendants stemming from a car accident that occurred in September 2001.

In February 2008, a trial judge entered an order granting the defendants leave to conduct a second deposition of the plaintiff and cautioning the plaintiff that a failure to comply with the order may result in sanctions.

In April 2008, the defendants filed a motion to preclude the plaintiff from testifying at trial. Following a hearing, the court granted the motion. The court found that the plaintiff violated the February 2008 order by leaving the deposition while it was going on.

The defendants then filed a motion for summary judgment, which the court granted.

Court's Analysis

The court said the plaintiff has the burden of establishing, by a preponderance of the evidence, that the defendants engaged in conduct that deviated from the general standard of care expected under the circumstances, and that this deviation proximately caused actual harm.

However, the court said, because the plaintiff was precluded from testifying at trial, she would not be able to sustain her burden of proving her negligence claim at trial. Thus, the court concluded that the defendants were entitled to summary judgment.

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Super. Dec. 28, 2009). Bowes, J. PICS Case No. 09-2212 (9 pages).

The trial court properly granted summary judgment to the insurer on the plaintiff's statutory bad faith claim based on its conclusion that there was no factual dispute as to whether the insurer acted unreasonably in processing the plaintiff's underinsured-motorist claim.

Facts and Procedural History

The plaintiff sustained knee injuries when another car rear-ended his car in June 2005. In July 2006, the plaintiff advised his insurer that he intended to pursue the underinsured motorist coverage under his policy.

The plaintiff demanded the full amount of UIM coverage of \$100,000, but the insurer offered \$30,000. The case proceeded to arbitration, and an arbitrator awarded the plaintiff \$75,000.

The plaintiff then filed suit against the insurer asserting a claim for statutory bad faith under 42 Pa.C.S. §8371. The trial court granted the insurer's motion for summary judgment, and the Superior Court affirmed.

Court's Analysis

Citing *Condit v. Erie Insurance Exchange*, 899 A2d 1136 (Pa. Super. 2006), the Superior Court said bad faith is present if "the insurer did not have a reasonable basis for denying benefits under the policy and ... the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." Bad faith conduct also includes "lack of good faith investigation into facts, and failure to communicate with the claimant."

The court further noted in *Condit* that bad faith is not present merely because an insurer makes a low but reasonable estimate of an insured's damages.

In this case, the court noted, the insurer promptly communicated with the plaintiff and made no misrepresentations to him. The court further noted that the insurer performed a good faith investigation into the fact by such activities as obtaining an independent medical examination. The court said the request for an independent medical exam was reasonable because the pessimistic report of the doctor who repaired the plaintiff's knee was contradicted

by notations in medical records indicating that the surgery was successful and that the plaintiff was improving.

Furthermore, the court noted, the insurer never denied benefits. Instead, it said, the dispute centered upon the amount of damages. The court noted that the arbitrator's award was actually lower than the plaintiff's demand and represented a middle ground between offer and demand.

Thus, the court concluded that there was no genuine issue of material fact that the insurer did not display bad faith in handling the claim.



UM Arbitration – \$1.3 Million Settlement

Waltz v. Travelers Insurance Co. (Aug. 28, 2009).

An arbitration panel awarded \$1.3 million on an uninsured-motorist claim a man submitted to his employer's insurer seeking damages for injuries allegedly stemming from a car crash while he was driving a company-owned truck.

•Type of Action: Uninsured motorist arbitration.

•Plaintiffs' Attorney: Michael P. McDonald, McDonald at Law, Lancaster, Pa.

•Defense Counsel: Harry D. McMunigal, Bingaman Hess, Reading, Pa.

•Plaintiffs' Experts: Steven J. Triantafyllou, M.D., orthopedic surgeon, York, Pa.; Gary C. Dennis, M.D., orthopedic surgeon, Baton Rouge, La.; Donald E. Jennings, vocational expert, Feasterville, Pa.; Robert P. Wolf, economist, Cherry Hill, N.J.

•Defense Experts: V. Benjamin Nakkache, M.D., orthopedic surgeon, Scranton, Pa.; Richard G. Schmidt, M.D., orthopedic surgeon, Bala Cynwyd, Pa.; Gary R. Kutay, vocational expert, Lancaster, Pa.

Comment

An arbitration panel awarded \$1.3 million to a grounds custodian and his wife for damages incurred

as a result of a car crash on April 29, 2005.

According to the plaintiffs' attorney, Michael Waltz, 43, was stopped at a red light while driving a company-owned truck when he was hit by Christy Ann Smith, who was uninsured. Waltz made claim for a number of injuries causing his leave from employment with the Lancaster County Solid Waste Management Authority. He suffered carpal tunnel syndrome and permanent injuries to his cervical and lumbar spine. Waltz sought reimbursement for past and future medical expenses, a loss of past earnings and a loss of future earning capacity as a result of his injuries. Waltz's wife, Melissa Waltz, claimed a loss of consortium, as Waltz's injuries would have a detrimental effect upon their marriage.

Travelers Insurance Co. provided uninsured motorist coverage for Waltz's employer.

"The claim was made against the uninsured motorist coverage provided by Solid Waste Management Authority" McDonald said.

"The severity of this man's injuries eliminated his earning potential."

Michael McDonald, of McDonald at Law in Lancaster, Pa., represented Waltz, and said the accident affected Waltz's ability to perform in the labor market.

"This was a man who lost his ability to earn. He had very little transferable skills. He was completely disabled," McDonald said.

According to the plaintiffs' pretrial memorandum, Waltz underwent physical therapy, but continued to suffer back pain and numbness in his left hand. He attended physical therapy for roughly two years as his condition worsened. Waltz, wanting to return to work, underwent a Functional Capacity Evaluation July 12, 2005, according to the plaintiffs' pretrial memorandum. The evaluation allowed Waltz to return to work only under a sedentary work capacity. Further evaluations reduced Waltz's capacity to half-day sedentary work in May 2007.

The plaintiffs' pretrial memorandum states that Steven Triantafyllou, an orthopedic surgeon, performed back surgery on Waltz Dec. 12, 2006, to repair his herniated disk. Waltz met with Triantafyllou again Nov. 19, 2007, to correct carpal tunnel syndrome affecting his left hand. The surgeries, while successful, were insufficient in resolving Waltz's condition, as a FCE conducted in July of

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2007 denied him the opportunity to return to work

Travelers Insurance Co., in the defense's pretrial memorandum, pointed to an independent medical exam conducted by neurosurgeon B. Benjamin Nakkache, July 23, 2009. Nakkache described

Waltz's back pain and carpal tunnel syndrome as unrelated to the car accident. Travelers argued that Waltz's lumbar spine injury wasn't caused by the car accident because it did not become an issue until a year after the accident, a claim that would greatly reduce Waltz's arbitration award if accepted by the arbitration panel.

Instead the arbitration panel gave deference to a damages report submitted by the plaintiff's counsel. McDonald cited a July 23 independent medical report by Laszlo Geder, a neurologist that asserted Nakkache ignored important medical records regarding Waltz's back problems. After consolidating Waltz's medical records, Geder opined that Waltz's injuries were caused by the accident in question.

"Dr. Geder was physically present during the examination of Dr. Nakkache, so was able to see what Dr. Nakkache did in the examination, and was able to have a first hand view of the examination so was able to refute it," McDonald said.

According to the plaintiffs' damages report, Waltz suffered a gross earnings loss of \$1.085 million. Vocational economic loss experts Robert P. Wolf and Gary R. Kutay, the insurer's expert, agreed on this figure.

The uninsured motorist arbitration hearing was held Aug. 26, 2009. The arbitration panel awarded Waltz \$1.15 million for damages stemming from the accident. Melissa Waltz was awarded \$150,000 for her loss of consortium claim. The total award of \$1.3 million was molded to the policy limit of \$1 million.

Harry D. McMunigal represented Travelers Insurance Co. and declined to comment.

TORTS

Immunity – Recreational Use of Land and Water Act – Possessor of Land

Davis v. City of Philadelphia (Pa. Commw. Jan. 13, 2010). Cohn Jubelirer, J. PICS Case No. 10-0038 (11 pages).

The trial court properly held that the city of Philadelphia was immune from liability for injuries suffered by a participant in a flag football game played in a city-owned park.

Facts and Procedural History

The plaintiff played in a flag football game organized by a sports club on a field in Fairmount Park, which is owned by the city of Philadelphia. During the game, he tripped in a depression in the field and fractured his tibia. He had not yet paid his dues to the club at the time he was injured.

He sued both the city and the club. The trial court granted both defendants' motions for summary judgment, and the Commonwealth Court affirmed.

Court's Analysis

On appeal, the plaintiff argued that the trial court erred in holding that the Recreational Use of Land and Water Act, 68 P.S. §§477-1 – 477-8, shielded the city from liability. According to the plaintiff's argument, the RULWA did not insulate the city from liability because the park is a highly developed and regularly maintained recreational area. The plaintiff pointed to the Supreme Court's holding in *Mills v. Commonwealth*, 633 A.2d 1115 (Pa. 1993), that the protections of the RULWA are not intended to extend to "a highly developed recreational area."

The Commonwealth Court disagreed with the plaintiff's argument. Citing *Bashoum v. County of Westmoreland*, 747 A.2d 441 (Pa. Commw. 2000), the Commonwealth Court said the question was whether the field itself, rather than the park, is a highly developed recreational area.

The court noted that the field on which the plaintiff was injured is an open, grassy area bordered by a few trees, which serves primarily as overflow parking for the Philadelphia Zoo. Although the field's grass is mowed regularly, the court said its determination was dependent on whether there were "improvements that require maintenance" not on whether the land was maintained.

Finding no evidence of any improvement on the field, the court concluded that the field was the sort of unimproved property to which the RULWA therefore applied.

The court also rejected the plaintiff's argument that because participants pay a fee for use of the field, the RULWA did not protect the city from liability. The plaintiff based his argument on section 6(2) of the RULWA, which provides that the act does not limit liability when the landowner charges the person who goes on the land for recreational use. The court said the exemption did not apply because the plaintiff's team never paid its registration fee to the club, and there was no evidence that the plaintiff paid his dues to his team's captain.

The plaintiff's final argument with respect to the RULWA was that the city was liable under section 6(1) of the act because it willfully or maliciously failed to warn or guard the plaintiff against the depression in the field. But the court said that even assuming the city willfully or maliciously failed to warn of a dangerous condition, the city would be immune from liability under the Political Subdivision Tort Claims Act.

Thus, the court concluded that the trial court properly held that the city was immune under the RULWA and the Tort Claims Act from liability for the plaintiff's injury on the field.

The court also held that the trial court properly granted summary judgment to the defendant club. Citing *Blackman v. Federal Realty Investment Trust*, 664 A.2d 139 (Pa. Super. 1995), the court determined that the club could not be liable to the plaintiff for harm caused by a defect on the field because the club was not the "possessor of land."



Negligence – Amusement Park – Roof Collapse – \$1.9 Million Settlement

Wilkerson v. Kennywood Park Co. (C.P. Alleg. Cty., No. GD 02-011519, Jan. 15, 2010).

The parents of a woman killed when a roof covering an amusement park ride at Kennywood Park collapsed during a storm reached a \$1.9 million settlement with the park and the contractor that built the pavilion.

• Judge: Paul F. Luty.

• Injuries: Death.

• Plaintiff's Attorneys: Thomas R. Kline, Jonathan M. Cohen and Royce W. Smith, Kline & Specter, Philadelphia.

• Plaintiff's Experts: Tom Shingler, structural engineering, Dallas; Victor Dozzi, civil engineering, Cranberry Township, Pa.; James Secosky, architecture, Cranberry Township, Pa.; William Avery, amusement industry safety, Orlando, Fla.; Richard J. Mancini, meteorology, Canonsburg, Pa.; Raymond Lee, visibility and meteorological events, Lancaster, Pa.

• Defense Counsel: David B. White, Jennifer L. McPeak and Jeffery D. Roberts, Burns White & Hickton, Pittsburgh; James W. Kraus and Kathryn M. Kenyon, Pietragallo Gordon Alfano Bosick & Raspanti, Pittsburgh; Thomas P. Mannion, Todd A. Gray and Rami M. Awadallah, Mannion & Gray Co., Cleveland.

• Defense Experts: Randy King, theme park safety, Contoe, Texas; Lee E. Branscome, climatology, Palm Beach Gardens, Fla.; Jim D. Koontz, roofing, Hobbs, N.M.; Walter G.M. Schneider III, architectural engineering, State College, Pa.; Edward J. Tuczak, engineering, Ann Arbor, Mich; John Feick, construction, Sandusky, Ohio.

Comment

Stephanie Wilkerson, 29, was killed when a roof covering the Whip ride at Kennywood Park collapsed during a May 2002 storm, the plaintiff's amended pretrial statement said. Wilkerson was pushed into a wrought iron fence, and her body and skull were crushed.

The case settled Jan. 15 in front of Allegheny