

CASES IN WHICH JUDGE ORIE MELVIN AUTHORED THE OPINION OF THE SUPERIOR COURT:

Callahan v. National Railroad Passenger Corp., --- A.2d ----, 2009 WL 2025703, 2009 PA Super 132 (Pa. Super. 2009).

The Superior Court, in ruling on the appeal of an employer who alleged that the expert testimony of the plaintiff's liability expert concerning the employer's past, unrelated OSHA violations were irrelevant to the facts of the case, disagreed with the employer's contentions that the OSHA regulations at issue were preempted by federal railroad regulations and determined that the expert's testimony was properly admitted for the jury's consideration. In determining that the OSHA regulations at issue were not preempted by railroad regulations, the Court rejected a line of decisions from the federal 5th Circuit that adopted an overly-broad interpretation that the federal railroad regulations preempted all areas of OSHA regulations. The Superior Court determined that only a policy expressing the intent of federal railroad regulations to preempt OSHA regulations was insufficient to preempt any specific OSHA regulation when there was no specific railroad regulation yet issued. Accordingly, the expert's testimony was properly admitted.

J.C. Ehrlich Co., Inc. v. Martin, --- A.2d ----, 2009 WL 1962140, 29 IER Cases 752, 2009 PA Super 127 (Pa. Super. 2009)

The Superior Court, in ruling on an appeal of a grant of permanent injunctive relief prohibiting competition with a former employer, determined that a covenant not to compete under an employment contract was enforceable after an assignment of the contract following a corporate stock purchase. In reviewing the cited authority upon which the appellant employee relied, the Superior Court the cases factually distinguishable and not relevant to the facts in the case. In so deciding, the Court determined that the employment contract lacked any provision requiring an affirmative act of the employer in order to enforce the covenant. Moreover, because, the merger of the employer also did not create a new entity because it was a stock purchase transaction, the employer was entitled to enforcement of the restrictive covenant. Accordingly, the Superior Court affirmed the enforcement of the non-compete clause.

Wytiaz v. Dietrick, 954 A.2d 643, 2008 PA Super 165 (Pa. Super. 2008)

The Superior Court ruled upon issues related to jury voir dire and expert testimony, ultimately holding that the plaintiffs' alleged errors were without merit in an action seeking damages arising out medical malpractice claims. In Wytiaz, the plaintiffs brought an action for damages based upon defendants' failure to diagnose plaintiff-

wife's breast cancer at an earlier date. The court, in reviewing the plaintiffs' allegations of error, determined that they had been given a full and fair opportunity to question the prospective jurors relative to potential biases and that there was no palpable error committed by the trial judge in his refusal to permit certain proposed voir dire questions. The court also determined that the plaintiffs' assertion that the verdict was against the weight of the evidence regarding expert testimony on the plaintiff's breast cancer diagnosis was an oversimplification of the trial testimony that consisted of three plaintiff witnesses and three defense witnesses who testified for several days and for about seven hours. After reviewing the trial transcript, the Superior Court determined that there was indeed a conflict in the testimony and that the evidence adduced at trial was sufficient for the jury to reach a verdict in favor of the defendants. Accordingly, the Court affirmed the judgment of the jury in favor of the defendants and denied the plaintiffs' allegations of error.

Pennsy Supply, Inc. v. American Ash Recycling Corp., 895 A.2d 595, 2006 PA Super 54 (Pa. Super. 2006)

The Superior Court reviewed a trial court's sustaining of preliminary objections that dismissed a complaint claiming breach of contract and breach of warranting and seeking damages arising out of the use a product used as part of a contract to pave a parking lot. The plaintiff-appellant, pursuant to its contract to pave a parking lot as a subcontractor, used an approved substitute base aggregate made available for free to all on a first-come, first-served basis by defendant-appellee, only to have the paving begin cracking within a year of completing the project and requiring plaintiff to repair and remedy the project. The Superior Court rejected the arguments that it was a conditional gift or that the defendant's avoiding disposal costs were not part of the bargaining process and determined, although the product was made available at no cost, there was sufficient consideration because the plaintiffs had the detriment of collecting and taking title to the product thereby removing the transaction from the specter of being a conditional gift. The Court further concluded that under the UCC, the detriment incurred by plaintiff constituted consideration to fall with the catch-all language of "or otherwise" because it sufficed to form a contract. The Court further concluded that literature on the subject material published by defendant served as sufficient enough to cause plaintiff to rely on the representations as part of a claim for promissory estoppel to warrant further discovery to determine whether the claim would survive upon failure of the contract-based claims and causes of action. Accordingly, the trial court's grant of dismissal of the action was reversed.

Carter v. The May Dep't Store Co., 853 A.2d 1037, 2004 PA Super 231 (Pa. Super. 2004)

The plaintiff appealed the trial court's denial of a motion for new trial after it failed to instruct the jury that it had to award damages if it found defendant liable for damages, even if nominal, arising out of a claim for false imprisonment. Upon reviewing the Supreme Court's treatment of damages in the context of the intentional tort of false imprisonment, Restatement (d) of Torts, other legal treatises, and the law of other states, the Superior Court determined that the trial court's handling of the matter was an error of law and warranted vacating the entry of judgment. Rather than remand for a whole new trial, the Superior Court remanded for entry of a verdict for nominal damages based upon previous decisions in analogous situations.

Nationwide Insurance Enterprise v. Moustakidis, 830 A.2d 1288, 2003 PA Super 299 (Pa. Super. 2003)

The insured (appellant) appealed to the Superior Court claiming that the trial court erred by failing to compel the matter to arbitration and by granting the insurer's (appellee) petition to enforce the settlement agreement. The insured was involved in a motor vehicle accident and settled his uninsured motorist (UM) claims with his insurer for a lump sum settlement amount and executed a settlement agreement and release. Later, the insured sought additional damages from the insurer and sought to have the issue submitted to arbitration. The Superior Court affirmed the denial of submitting the matter to arbitration because, although there was an enforceable agreement to submit disputes concerning entitlement to UM benefits, the matter was not within the context of a dispute over legal entitlement to or the amount of UM benefits when there has been a final settlement. The "dispute," as claimed by the insured, was simply not within the specific terms of the arbitration agreement and thus not subject to arbitration. The Court went on to conclude that there was no reason to overturn the trial court's conclusion in the absence of "clear, precise, and indubitable" evidence that the settlement agreement was not procured by fraud.

D & H Distributing Co., Inc. v. Nat'l Union Fire Ins. Co., 817 A.2d 1164, 2003 PA Super 62 (Pa. Super. 2003)

The Superior Court determined that, while the parties agreed that the dispute fell within the terms of the arbitration agreements relative to submitting disputes to arbitration, the parties did dispute whether arbitration was merely permissive or mandatory under the terms of the insurer's (appellant) insurance contracts and that the contracts called for mandatory arbitration of the dispute over entitlement to monies for claims after insured's (appellee) customers failed to pay for insured's

products. In reversing the trial court's denial of submitting the dispute to arbitration, the Superior Court looked to cases from the federal courts that dealt with similar phrases that stated "either [party] may make a written demand [...] for arbitration" and to cases arising in the context of disputes over entitlement to UM/UIM benefits. The Court determined that, in the context of arbitration disputes, "may" and "shall" are to be interpreted as the same and that including a right to arbitration in the contract that can be defeated unilaterally would essentially obviate the entire arbitration clause. In drawing upon the federal precedent, the Superior Court analogized the arbitration clause's language as one to mean either submitting the matter to arbitration or foregoing the claim. Accordingly, the trial court's denial of the petition to compel arbitration was reversed with instructions to enter an order granting the petition.

Sobien v. Mullin, 783 A.2d 795, 2001 PA Super 259 (Pa. Super. 2001)

In a case of first impression, the Superior Court determined that, despite the establishment of a prescriptive easement in an adjoining property's party wall, the owners who sued for damages resulting from its removal because of condemnation were not entitled to compensation. Because the wall was entirely within the property of the building that was demolished, would have been structurally unsound if it had remained, and did not have any structural tie-ins to the remaining structure, the wall was rendered useless and its destruction terminated any rights the owners who had developed a prescriptive easement had no right to have the wall rebuilt by the property owner who removed it. Because the trial court had erred in giving a jury instruction to the contrary, the property owner was entitled to entry of a jnov.

Cangemi v. Cone, 774 A.2d 1262, 2001 PA Super 119 (Pa. Super. 2001)

In an appeal from denial of post-trial motions, the Superior Court determined that the decedent's family doctor's failure to diagnose the fatal condition after two X-rays and admissions to the emergency room was the substantial factor in causing the decedent's death and that the jury erred in not so finding after concluding that the family doctor had been negligent in his diagnosis. Thus, it was in error that the trial court denied the plaintiff's motion for new trial. The Superior Court also concluded that when negligence and want of care is obvious, expert testimony is not required to establish a deviation from the standard of care. Accordingly, the Superior Court reversed and remanded for a new trial.

Fischer v. Troiano, 768 A.2d 1126, 2001 PA Super 35 (Pa. Super. 2001)

In an appeal by defendants appellants from a grant of plaintiffs appellee's post-trial motions for a new trial on the issue of damage, the Superior Court determined because the jury had awarded damages to the plaintiffs in the form of medical expenses following injuries sustained in a slip-and-fall, the jury erred by not awarding damages in the nature of pain and suffering to the plaintiffs when they had sustained fractured bones and the uncontroverted evidence showed that the plaintiffs underwent treatments for their pain. Accordingly, it was appropriate for the trial court to grant the plaintiffs' motion for a new trial on the issues of pain and suffering damages because the lack of award bore no rational relation to what the evidence had proven.

Cataldi v. Methodist Hospital, 747 A.2d 1239, 2000 PA Super 65 (Pa. Super. 2000)

In an appeal from the petition for writ of execution filed by a Medicaid lienholder, the Superior Court determined the lienholder's assertion that it was not obligated to pay attorney's fees was not supported by statutory interpretation and analogous cases. The trial court determined that the lienholder was obligated to have its share of the settlement amount reduced by its pro rata share of the award based upon governing legislation. Consequently, the trial court's holding to that effect was affirmed.

Yaros v. Trustees of the Univ. of Pa., 742 A.2d 1118, 140 Ed. Law Rep. 968 (Pa. Super. 1999)

In an appeal from a petition to enforce settlement taken by the defendant appellant, the Superior Court concluded that the settlement was enforceable under the circumstances. The Superior Court noted that the general rule is that an oral offer to settle ends when the conversation ends unless some other contrary intent exists. When the offer was made to counsel for the plaintiff appellee by counsel for the defendant during a brief recess before closing arguments, the plaintiff was not present and defense counsel said "you've got to get back to me." Plaintiff authorized her counsel to accept the offer during closing arguments and her counsel accepted immediately after rebuttal at a sidebar before the jury was given its charge. A defense verdict was returned. Following post-trial motions and hearings, the trial court enforced the settlement agreement. Because the oral offer obviously extended beyond the conversation's conclusion, the issue became for what amount of reasonable time was the offer still valid because defense counsel did not express any finite time period and in light of no clear rejection of the offer. The Superior Court determined that based upon the trial court's factual findings of the circumstances of the offer, the offer was acceptable within a reasonable amount of time and was thus

enforceable. As such, the trial court's grant of the petition to enforce the settlement agreement was affirmed.

Cunningham v. Byers, 732 A.2d 655, 1999 PA Super 146 (Pa. Super. 1999)

In an appeal in an action for personal injuries following a motor vehicle accident, the Superior Court determined that the trial court committed reversible error when it gave jury instructions on both the assured clear distance ahead rule and sudden emergency doctrine. The plaintiff appellant was rear-ended by defendant appellee while stopped waiting to make a left turn. The defendant claimed he did not see the brake lights or turn signal and was unable to avoid the collision, despite applying the brakes. The Court determined that the assured clear distance ahead rule and sudden emergency doctrine are mutually exclusive and that, generally, jury instructions on both should not be given. The defendant was consistent in his testimony that he had previously seen the plaintiff's car, but did not see her stopped at the stop sign. This was not a sudden emergency according to precedent. Because it was error to instruct on the law that was not applicable to the facts and it may have misled the jury in reaching its determination on liability, reversible error was committed and warranted a new trial. Thus, the Superior Court reversed the trial court and remanded for a new trial.

Antz v. GAF Materials Corp., 719 A.2d 758, 36 UCC Rep. Serv.2d 726 (Pa. Super. 1998)

In an appeal for denial of motions for jnov, the Superior Court affirmed the trial court's entry of judgment in favor of the plaintiff appellee based upon causes of action based on claims for breach of express warranty, warranty of merchantability, and warranty of fitness for a particular purpose, seeking recovery of replacement costs for new shingles and their installation on his residence. The defendant appellant appealed the trial court's denial of its motion for jnov. The Court determined that although the general rule under the UCC is that a breach of warranty occurs upon delivery of the goods with the appropriate statute of limitations being four years, an exception allows for the tolling of the statute limitations until such defect is found when the warranty explicitly covers future performance of the goods. Because the appellee initiated the suit within four years of discovery the shingles' defects, his claim for damages under an express warranty were not time-barred. The Court then went on to that appellant's limitation of damages clauses were unconscionable because appellee had no meaningful choice regarding the limitation on replacement labor costs and those particular provisions unreasonably favored the appellant in light of the fact that the terms of the limitations were not provided to appellee, thereby depriving him of any meaningful choice. Because the Superior Court determined that the express warranty was

enforceable, appellee was entitled to recovery for replacement labor costs instead of such right to recovery being based upon breach of implied warranties, as found by the trial court. Accordingly, the trial court's denial of appellant's motion for jnov was affirmed.

Tenos v. State Farm Ins. Co., 716 A.2d 626 (Pa. Super. 1998)

In an appeal from the trial court's grant of summary judgment in favor of the insureds against their homeowner's insurance company and the court's refusal to allow the insureds to amend their complaint, the Superior Court found that entry of the summary judgment was in error, reversed in favor of the insurance company, and affirmed the denial of the motion to amend the complaint. After the insureds' residence was burglarized, they submitted a claim for the theft of two all-terrain vehicles (ATVs), which was denied because the insurance company determined that the ATVs were not "solely for the service of the insured location." Although the insured admitted that the ATVs were used for both work *and* recreational purposes, they argued that the language of the exclusion was inherently ambiguous because it was undefined by the policy. As a matter of first impression, the Superior Court looked to other jurisdictions' interpretations of similar exclusions and determined that the issue of whether recreational use in addition to work use was contemplated by the exclusion was not reached by the other courts, and thus provided no guidance. Ultimately, the Court concluded that because the insured admitted to recreational use of the ATVs with only some minor service of the property, their uses were not solely for the benefit of the insured residence/property. The Court went on to conclude that, based upon the allegations and facts of the matter, the trial court properly determined that amendment of the complaint was not proper because a claim under the Unfair Trade Practices and Consumer Protection Act require an allegation of misfeasance and not simply nonfeasance and because the subject exclusion was not ambiguous, a claim for bad faith could not be arise out of the circumstances as there was no dishonest purpose in denying the claim. Accordingly, summary judgment in favor of the insureds was reversed in favor of the insurance company and the order denying the leave to amend the complaint was affirmed.