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In This Issue:

Worker Compensation Claims In NY Following 9/11 1

Employment Practices 1

Civil Rights Actions Against School Districts in PA 1

Tort Claims Against Public School Districts in PA 2

Class Certification Limited in UTPA Actions 3

Treble Damages Can Be Punitive.......................... 3

Quick Hits........................... 4

The Jerk and Jolt Doctrine in PA.................................. 5

Triplets.............................. 6

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Volume 2 Fall, 2002

Worker Compensation Claims in New York State Following 9/11/01

By David Hom, Esq.

Following the September 11, 2001 attacks on the World Trade Center, New York State has received more that 5,800 claims for workers' compensation in connection with this tragedy and more are expected. The claims include serious burns and injuries, inhalation ailments, scrapes and strains. Those filing the claims are workers in the Trade Center and by those responding to the crisis. According to Workers' Compensation Board (WCB) Chairman Robert Snashall, approximately 1,800 cases involve some component of stress. Uniformed police and firefighters have a separate compensation system for on-the-job injuries.

Only 1% of the 2,200 death cases and 10% of the 3,600 injury cases are being contested. Most of the claims are being paid, according to officials of the WCB.

In New York, workers disabled in a work place injury are entitled to benefits of two-thirds of their average weekly pay, with a ceiling of $400 a week. Spouses and children of those killed also are entitled to benefits. Claims can be filed up to two years after a work-related death or injury. Officials of the WCB expect workers to file for problems related to stress and from inhaling contaminated air.

Continued on page 2

Employment Practices

By: Phillip B. Silverman, Esq. and Susan R. Engle, Esq.

Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP has expanded to include an Employment Practice Group. The Firm has long offered representation to employers and their insurers in the areas of workers' compensation, ERISA and civil rights. The Employment Practice Group provides representation for employment discrimination.

Employment discrimination claims are required by statute to originate in an administrative agency before a lawsuit can be filed. In Pennsylvania, the agencies administering these claims are the Equal Employment Opportunity Commission ("EEOC"), a federal agency and the Pennsylvania Human Relations Commission ("PHRC"), a state agency. PHRC has concurrent jurisdiction with the Philadelphia Human Relations Commission.

Continued on page 4

Civil Rights Actions Against School Districts in Pennsylvania

By: Phillip B. Silverman, Esq. and Joshua D. Harvey, Esq.

Damages recoverable under the Political Subdivision Tort Claims Act against a school district are limited to no more than $500,000 per incident. It is possible, however, for a plaintiff to bypass this damages limitation with a federal civil rights claim under 42 U.S.C. § 1983, thereby exposing the school district and/or its employees to unlimited damages, even though the underlying act is negligent in nature.

This civil rights statute provides that a person who, under color of state law, subjects another person to the deprivation of constitutional rights shall be liable to the party injured.

The United States Supreme Court has held that a school district can be sued

Continued on page 2

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Tort Claims Against Public School Districts in Pennsylvania

By: Joshua D. Harvey, Esq. and Phillip B. Silverman, Esq.

School Districts are considered local agencies under the Political Subdivision Tort Claims Act, ("PSTCA"), 42 Pa. C.S.A. § 8541 and entitled to immunity, subject to certain exceptions. Two common exceptions are real property and sidewalks.

Under the real property exception, a school district could be liable for injuries involving the "care, custody or control of real property." A plaintiff must demonstrate that the real estate was negligently or improperly cared for or controlled and need not show that there was a defect in the real property itself in order to meet their burden. In *Snyder v. North Allegheny School District,* plaintiff slipped and fell on a snow and ice covered concrete landing in front of a school building. The Commonwealth Court found the school district liable even though the landing itself was not damaged or improperly designed.

The sidewalk exception is more narrowly interpreted than the real property exception. A school district could be liable where the damage is caused by "a dangerous condition of sidewalks." A plaintiff must prove that there is something wrong with either the condition or design of the sidewalk itself.

If a student is injured on a playground, the real estate exception could apply if the injury was the result of the improper care, custody or control of the playground property. If a piece of equipment causes the injury, it must be permanently attached to the real property and cannot be removed without damaging the equipment itself or the real property. The Commonwealth Court has consistently held that negligent supervision of students is outside the real property exception, and thus not a valid basis for a claim. See *Wilson v. Norristown Area School District,* 783 A.2d 871, 876 (Pa. Commw. Ct. 2001). ⚖

Worker Compensation Claims in New York State

(continued from page 1)

A gay man whose partner died in the attack is seeking benefits as a spouse in what has been called the first effort by gay or lesbian partners to seek coverage under New York State's workers' compensation law. If they had been married the applicant would have been eligible under the workers' compensation law for up to $400 per week for the rest of his life or until he remarried. However, the applicant was denied benefits by CNA Insurance in March 2002 and is challenging that decision. A hearing was held in late April 2002 and a decision is pending. An administrative judge will rule on the applicant's claim. It can then be appealed to the Workers' Compensation Board, and that decision can in turn be appealed to the New York State Court of Appeals.

Insurance companies defer to New York State workers' compensation law in deciding eligibility. There are at least 21 other gay or lesbian people whose partners died in the attack. It was not clear whether any of them will file for benefits. ⚖

Civil Rights Actions Against School Districts in Pennsylvania

(continued from page 1)

directly under § 1983 where the execution of its policy, ordinance, regulation, decision or custom inflicts the injury. The school district cannot, however, be held liable under § 1983 for tortious acts committed solely by one of its employees merely because the district employs that person.

On the other hand, the employee as an individual can be held liable under § 1983 when he or she acts in an official capacity to violate the constitutional rights of a plaintiff. This can occur when the employees conduct, while acting within his or her authority, violates the plaintiff's rights.

An example is the "state-created danger" doctrine. Under this theory, the employee acts to create the opportunity for the danger to occur, which thereby harms the plaintiff. This theory is a valid basis for establishing a constitutional violation under § 1983. ⚖

Class Certifications Limited in UTPA Actions

By: Jeffrey Sotland, Esq.

In a victory for the defense bar, a judge in Allegheny County has ruled on an issue of first impression. Judge Horgos, in *Aronson v. GreenMountain.com,* has ruled that a class action cannot be certified where there are claims under the Unfair Trade Practices Act. The Court followed recently decided appellate cases which found that the Unfair Trade Practices Act still requires that the Plaintiff establish reliance and causation.

The Pennsylvania Supreme Court, in *Weinberg v. Sun Company, Inc.,* opined that the Legislature did not intend that the Plaintiff can prevail without showing reliance and causation. Judge Horgos, on reconsideration, vacated a prior Order granting class certification and decertified the class action. Though these cases dealt with false advertising issues, they are still applicable to the many cases which automobile dealers find themselves defending. Whether the claim relates to sales, financing, or service, Plaintiffs will now find themselves with a difficult task of certifying a class action in the Commonwealth of Pennsylvania.

The importance of this decision lies in the acknowledgment that reliance is required to prevail in a consumer fraud claim. This requires each individual to come forward and prove the facts necessary for his individual claim. That alone is enough to defeat the certification process. Furthermore, the Court is also requiring that each Plaintiff show an ascertainable loss rather than just a violation of the Unfair Trade Practices Act.

We have handled many class actions on behalf of automobile dealerships. One of the fears that dealerships and insurance carriers have is the ease with which Plaintiffs have been able to achieve class certification. Though we have had all class action cases against our clients dismissed before class certification in Pennsylvania and New York, other states have proven a more challenging battleground for dealing with these issues. New Jersey is, by far, the easiest state in the Northeast to have a class action certified under the consumer protection laws. That notwithstanding, the Courts are beginning to see the importance of taking a closer look at the certification process and are rethinking their prior decisions.[1]

Handling of class actions is quite unique, requiring a large amount of work and investigation early on to address the issues presented by the Plaintiff before allowing certification and discovery. With discovery in a class action costing hundreds of thousands of dollars, undertaking a thorough investigation beforehand is always cost effective and beneficial. That notwithstanding, defendants have a new weapon in the war against class actions thanks to Judge Horgos. This is a decision that will effectively stop almost all consumer fraud class actions and place the defendants back on equal footing with the Plaintiffs in our court system. ⚖

[1] One of the cases we are presently handling is on the verge of being decertified by the Court on the eve of trial now that the Court has realized the problems in presenting a consumer fraud case with one class representative and not forcing each Plaintiff to prove their own case.

Treble Damages Can Be Punitive

By: Jeffrey C. Sotland, Esq.

On August 20, 2001, the Pennsylvania Superior Court issued a ruling in *Stokes v. Gary Barbera Enterprises, Inc.* which addressed an appeal from a trial involving claims under the Unfair Trade Practices and Consumer Protection Law. Finding in favor of the Plaintiff, the Court, for the first time in Pennsylvania, found that treble damages are punitive. This finding will effect coverage under insurance policies across the Commonwealth.

The Court found that Defendant sold a used vehicle as new, installing a new odometer, after selling the vehicle with a broken odometer. The vehicle was previously used as a demo by a local T.V. personality. The Court held that the treble damages portion of the Unfair Trade Practices and Consumer Protection Law equates to punitive damages and continued to refer to treble and punitive damages as one and the same.

This holding now limits the coverages available to insureds. Punitive damages are not insurable in Pennsylvania except under vicarious liability principals. A holding against a corporate entity for treble damages might very well be uninsurable from this date forward based upon the Superior Court's decision in the *Stokes* case. ⚖

(continued from page 1)

A representative from the administrative agency conducts an investigation of the claim. This procedure is a "fact finding" process. It does not have the conventional constraints and strict rules of evidence applicable to a litigated matter. The administrative agencies are enabled to request information, records and documents from an employer. They may make on-site inspections and interview witnesses. Ultimately, they have subpoena power at their disposal.

A "fact finder" is usually a non-lawyer who conducts an inquiry and makes a determination as to whether there is probable cause that discrimination has occurred. It is the goal of these agencies to resolve the claims as quickly as possible.

Legal representation at the administrative level offers employers and/or their insurers with several distinct advantages. It allows the respondent an opportunity to engage in discovery before the initiation of an actual lawsuit. It also gives the respondent a means to stand up to pressure for the production of burdensome and oppressive document requests and to settle regardless of the merits.

Since no formal transcripts are created, that which
transpires before the administrative agency is not binding, although pleadings are verified.

The administrative forum is an excellent opportunity to explore settlement when justified. Defense counsel can meet with the employer's personnel and informally develop facts. Thereafter, the matter can be resolved without extensive and expensive formal discovery. An appropriate release should include an insulation against attorneys' fees and costs frequently associated with civil rights-type claims.

Our Employment Practice Group is currently handling discrimination claims before the PHRC, EEOC, Philadelphia Human Relations Commission, New York City Commission on Human Rights and State of New York Division of Human Rights. Also, we are available to consult with employers regarding decisions to terminate or transfer employees, and we are available to assist in drafting or revising of employee manuals in order to ensure that all policies, practices and procedures are in compliance with the current state of the law.

QUICK HITS—A ROUNDUP OF RECENT CASES AFFECTING FLORIDA

- **Torts** – In a wrongful death action, the Third District Court of Appeals in Miami-Dade County held that a public utility owed a duty of care to motorists and created a "foreseeable zone of risk" when the utility company's employee intentionally cut power to a traffic signal in connection with repairs in the area. *Florida Power & Light Company v. Walter Goldberg,* 27 Fla. L. Weekly D1177 (3d D.C.A. May 22, 2002)

  The Third District Court of Appeals, in a premises liability case, rejected an argument by Miami-Dade County that the Florida Supreme Court's holding in *Owens v. Publix Supermarkets, Inc.* (recognizing "mode of operation" theory of liability and eliminating the requirement that plaintiff prove actual or constructive knowledge) applies only to food service establishments. In reversing summary judgment in favor of the County, the court held Owens applies to all slip and fall cases involving transitory substances. *Joseph Bien-Aime v. Miami-Dade County,* 27 Fla. L. Weekly D1137 (3d D.C.A. May 15, 2002)

- **Medical Malpractice** – The Second District Court of Appeals held that a patient who tested positive for HIV was not put on constructive notice of his HIV positive status (triggering stature of limitations for medical malpractice action) merely because the test results were placed in his file, and in dicta, stated that the hospital's failure to inform the patient as required by statute may constitute concealment. *John Doe v. Hillsborough County Hospital Authority,* 27 Fla. L. Weekly D1215 (2d D.C.A. May 22, 2002)

Continued on page 5

The Jerk and Jolt Doctrine in Pennsylvania

By: Meredith R. Krain, Esq.

Recently, we received a favorable decision by the Superior Court of Pennsylvania upholding a motion for summary judgment in the case of *Ilse Donaldson v. Leisure Line and Coach USA, Inc.* Plaintiff, a passenger, alleged that as she rose from her seat, the bus slowed down and then quickly sped up, causing her to fall and sustain injuries. The Court, affirming the lower court, held that Defendants were not liable under the "jerk and jolt" doctrine.

The "jerk and jolt" doctrine requires more than falling on a bus to impose liability on the common carrier. Liability under this doctrine exists only if there is "a showing of additional facts and circumstances from which it clearly appears that the movement of the car was so unusual and extraordinary as to be beyond a passenger's reasonable anticipation." See *Connolly v. Philadelphia Transp. Co.,* 216 A.2d 60, 62 (Pa. 1966). The movement of a bus is deemed unusual if it had an extraordinarily disturbing effect on other passengers, or the accident affected the plaintiff so has to inherently demonstrate that the movement of the bus was unforeseeable. Id.

In our case, Plaintiff offered no evidence that any other passenger fell or was affected by the movement of the bus. Plaintiff also failed to show "intrinsic evidence of an unusual jolt," *McClusky v. Shenango Valley Traction Co.,* 161 A. 424, 425 (Pa. Super. 1932). Intrinsic evidence existed in one case where a trolley came to a sudden halt and the plaintiff was thrown out of the trolley onto the street. See *Sanson v. P.R.T. Co.,* 86 A. 1069 (Pa. 1913). In contrast, there was no such evidence where a plaintiff was walking to her seat on a moving trolley when it stopped "real hard" causing her to fall and fracture her hip. See *Hill v. West Penn Railways Co.,* 16 A.2d 527, 528 (Pa. 1940). Most recently, the Pennsylvania Commonwealth Court held that there was no such intrinsic evidence where plaintiff was walking on a moving bus when it came to a stop, causing him cuts to his face. *Meussner v. Port Authority of Allegheny Cty.,* 745 A.2d 719, 721 (Pa. Cmwlth. 2000).

Ultimately, the courts distinguish between a passenger who is injured while standing in a moving vehicle and one who is seated. The rationale is that only an extraordinary jerk could throw a passenger out of his seat, while any ordinary jerk could cause a standing passenger to lose their balance. *Smith v. Pittsburgh Railways Co.,* 171 A. 879, 880 (Pa. 1934). Therefore, a common carrier is less likely to be held liable for negligent operation of his vehicle under the jerk and jolt doctrine when a passenger is injured while standing. ⚖

Quick Hits—a roundup of recent cases affecting Florida

(continued from page 4)

In a medical malpractice action by an artist against a surgeon where consent to the amputation of artist's fingers was at issue; expert testimony was held not to be necessary to resolve issues of whether artist-patient ever consented to surgical amputation of patient's fingers because Florida law distinguishes between whether consent was ever given and whether consent was informed and requires expert opinions for the latter but not the former. *Carl Gouveia v. F. Leigh Phillips M.D., et. al.,* 27 Fla. L. Weekly D930 (4th D.C.A. April 24, 2002)

- **Insurance** – The Florida Supreme Court, in *Seigle v. Progressive Insurance Co.,* upheld a trial court's dismissal of a case where the insured sued for the diminution in value of her car where the insurance company had paid for repairs that were to the complete satisfaction of the insured. *Carole M. Seigle v. Progressive Consumers Insurance Company,* 27 Fla. L. Weekly S492 (Fla. May 23, 2002)

The Third District Court of Appeals rejected insurance company's argument that insured must first have surgery and incur medical expenses for injuries allegedly sustained in an automobile accident before initiating suit to recover those expenses under a personal injury protection policy. *State Farm Mutual Automobile Insurance Co. v. Antonio Geuimunde,* 27 Fla. L. Weekly D1188 (3d D.C.A. May 22, 2002) ⚖

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TRIPLETS

By: Renee Mazzeo

In general, birth rates in the human species have fluctuated considerably over time. However, the number of multiple births, especially higher order (three or more) is increasing at the fastest rate ever. According to the National Center for Health Statistics, triplets or more have increased fivefold in the past twenty (20) years. This is most likely due to the increasing numbers of mothers who delay pregnancy until later in life and the widespread use of technology to assist reproduction.

An extremely improbable event has occurred in our firm. Two of our associates, **Judith Ring** and **Josh Harvey**, are triplets.

Judith and her sisters, Jennifer and Jeanette, were born on October 4, 1967 at the Philadelphia College of Osteopathic Medicine. Total birth weight for Judith and her sisters was approximately 12 pounds. Multiple births run in the Ring Family with Judith's aunt giving birth to twins.

Josh Harvey and his brothers, Joe and Jeremy, were born on June 7, 1971 at Geisinger Medical Center. This birth of triplets was the first ever born at Geisinger. Also, it was the first multiple birth for the Harvey Family. Josh and Jeremy are identical siblings while their brother is fraternal. Similar to Judith and her sisters, Josh and his brothers weighed approximately 12 pounds.

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SPECIAL REPORT

Pennsylvania Overhauls Comparative Negligence Statute

By Lawrence M. Kelly, Esq..

For those in the claims industry, August 18, 2002 will soon become a date etched in your mind. That is the date Pennsylvania's 2002 Act 57 took effect.

Act 57, which originated primarily as a bill aimed at the testing and reporting of DNA in criminal matters, somehow evolved to substantially renovate comparative negligence in the Commonwealth.

> *For causes of actions which accrue on or after August 18, 2002, joint and several liability will only apply in a case where a defendant is found liable for 60% or more of the total dollar amount of damages.*

The modified law sharply reduces the application of joint and several liability with minor exceptions. For causes of actions which accrue *on or after* August 18, 2002, joint and several liability will only apply in a case where a defendant is found liable for 60% or more of the total dollar amount of damages. The prior law, which still remains in effect for incidents occurring prior to the above date, allowed for a plaintiff to recover the full amount of a damages award from any defendant (i.e. any insured defendant) who is found jointly and severally liable, even if that defendant's liability was assessed to be only a 1% contributing factor. This, in turn, forced the insured defendant to obtain contribution at a later stage from the more culpable defendant(s), usually with very limited success if those culpable defendant(s) were uninsured.

The exceptions under the new law are limited to cases in which the plaintiff can show that the defendant intentionally injured the plaintiff or made an intentional misrepresentation or cases involving certain Dram Shop or Toxic Tort matters. In these actions, full joint and several liable as recognized by the prior law will still apply. Interestingly, although no doubt judicial determination will be necessary, the present Dram Shop exception does not appear to include claims for social host liability or illegal sales to minors.

The practical effect of the new law is that defendants with substantial insurance coverage but objectively minor, if any, culpability are no longer faced with trying to determine whether they will be found at least 1% comparatively negligent (thus subjecting them to more than their percentage of payment to render the plaintiff whole). Now, a finding of 5 or 10% negligence on one defendant simply requires that defendant to pay that corresponding percentage of the overall damage award, nothing more. Of course, in multiple defendant cases, the defendant who is found to be 60% or more causally negligent is inherently the "main" defendant and, under the new law, can be required to pay up to the full verdict amount.

We will continue to monitor this law and the impending changes to Pennsylvania's legal landscape and keep you informed. If you would like a copy of the new law, please e-mail your request to lkelly@defensecounsel.com. ⚖