Civil Litigation UPDATE

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To submit ideas for articles, please contact editor Pamela Lee at plee@diriosereni.com

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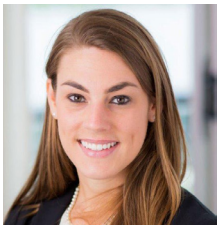
Estate of Wilson v. Roxborough Memorial Hospital, et al

By Thomas G. Wilkinson Jr. and Leigh Ann Benson

Wilkinson



Benson

In a closely watched decision, the Superior Court of Pennsylvania reversed a contempt order and monetary sanctions against a defense attorney arising from an alleged failure to instruct an expert witness to conform to pretrial evidentiary rulings that resulted in the grant of a new trial.

In *Estate of Wilson v. Roxborough Memorial Hospital, et al.,* No. 3494 EDA 2014 (June 15, 2016), the Superior Court vacated an order of civil contempt imposed against attorney Nancy Raynor and Raynor & Associates PC, and reversed an award of sanctions imposed in the amount of $946,197.16. In a 79-page opinion authored by President Judge Susan Gantman, the court characterized the sanctions imposed by the trial court as "gratuitous," "unprecedented and punitive," and concluded that there was no basis for the plaintiff's attorney's claims that the actual cost of retrying the underlying medical malpractice case was so high.

In the underlying medical malpractice case, the trial court — presided over by Philadelphia Common Pleas Judge Paul P. Panepinto — entered a pretrial 2012 order (by agreement of all parties) precluding defendants from "presenting any evidence, testimony and/or argument regarding decedent's smoking history" either before or after her cancer diagnosis.

During the first trial in May 2012, plaintiff's counsel asked the trial court to direct defense counsel to speak with the defense witnesses about the preclusion of any testimony relating to the decedent's smoking history immediately before each witness took the stand. The trial court did *not* grant that request. During the direct examination of a defense emergency-medicine expert, Dr. John J. Kelly, attorney Raynor asked

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RECENT PA. CASES OF NOTE

Opinions from the Pennsylvania Supreme Court

SUPREME COURT

Attorneys representing mortgage lenders may be subject to treble damages for imposing unreasonable or excessive fees

In *Glover v. Udren Law Offices,* PC, 139 A.3d 195 (Pa. 2016) (Opinion by Saylor, J.), the Pennsylvania Supreme Court put attorneys representing mortgage lenders on notice that they may be considered proxies for residential-mortgage lenders and subject to treble damages for imposing fees that are deemed unreasonable or excessive. The decision, issued on June 20, arose from a mortgagor class action originally filed in the Allegheny County Court of Common Pleas. The mortgagors alleged that counsel for their respective lenders violated the Pennsylvania Loan Interest and Protection Law, or Act 6. In relevant part, Section 406 of the statute limits the attorney's fees that a residential-mortgage lender may contract for or receive from a debtor mortgagor. Section 502, in turn, allows mortgagors to recover treble damages from "the person who has collected such excess interest or charges."

The mortgagors alleged that lenders' counsel collected excessive and unearned fees related to the foreclosure of their homes, in violation of Section 406. The mortgagors also sought treble damages under Section 502. The trial court dismissed the case on preliminary objections in the nature of a demurrer, in favor of lenders' counsel. The court reasoned that because Section 406 only applies to residential-mortgage lenders, mortgagors could not recover from lenders' counsel under Section 502. The Superior Court, though divided, affirmed and adopted the same reasoning. The Superior Court noted that the Legislature could have expressly included lenders' counsel in Section 406, but failed to do so.

On appeal, the Supreme Court reversed over a dissent by Justice Max Baer. The court employed its own plain-language analysis, this time focusing on Section 502. The court noted that Section 502 is not limited to residential-mortgage lenders, but instead allows recovery against any "person." The court cautioned against an unduly narrow interpretation of that term and instead concluded that attorneys, debt collectors or third parties could be considered a "person" who is subject to treble damages under Section 502. The court implicitly acknowledged the far-reaching effects of this decision by acknowledging that those same proxies are routinely employed by mortgage lenders. Nonetheless, the court suggested that third-party liability may still be avoided. As a parting missive, the court declared that *Glover* does not interpret the term "collected" in Section 502, which is the operative behavior that will trigger liability for treble damages. As a result, expect more to come on this important issue.

— Contributed by Erin N. Kernan, Esq., Eastburn & Gray PC, Doylestown, EKernan@eastburngray.com

Insurers not bound by MVFRL in calculating usual and customary charges

In *Freedom Medical Supply Inc. v. State Farm Fire & Casualty Co.,* 131 A.3d 977 (Pa. Feb. 16, 2016) (Opinion by Todd, J.), the Pennsylvania Supreme Court determined that insurers were permitted but not required to utilize one of the two methods of calculating usual and customary charges found in Section 1797(a) of the Motor Vehicle Financial Responsibility Law (MVFRL) and its regulations.

A provider of medical products to accident victims brought the class-action claim, alleging that State Farm violated the MVFRL because when there was no federally determined Medicare fee, its calculation for reimbursements was not dependent on either of the two bases provided for in the regulation: 1) the requested payment amount on the provider's bill for services or 2) data collected by the carrier or intermediaries, to the extent that data is made available.

The provider billed approximately $1,600 for electric muscle stimulators and $525 for portable whirlpools and, because neither device had a federally-determined Medicare fee, it sought 80 percent reimbursement from State Farm. Because the devices cost no more than $40 to manufacture, State Farm viewed the charges as excessive and conducted its own investigation, pricing the devices from several different sellers. State Farm began paying $120.88 for the muscle stimulators and $77.75 for the whirlpools, which represented 80 percent of the usual and customary charge for each device based on its research and calculations.

Originally filed in state court, the action was removed to federal court, where the district court granted State Farm's motion for summary judgment, finding the language in the insurance regulations was merely permissive not mandatory. On appeal, the 3rd U.S. Circuit Court of Appeals sought to cer-

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