

Welcome once again to Wayman, Irvin & McAuley, LLC's bi-annual newsletter, *Your Best Defense*. The articles featured this month look at an array of topics that pertain particularly to the litigator.

If you recall James Creenan's discussion in the Fall 2002 edition of *Your Best Defense* regarding the implementation of the Fair Share Act, you will want to read Marla Presley's article this edition dissecting the recent ruling by the Commonwealth Court that the Fair Share Act is unconstitutional. The Court found that the addition of these provisions in a bill that originally dealt with amending the DNA Act violated the "single subject rule" for legislation contained in the Pennsylvania Constitution. This, in effect, returns the state to joint and several liability, with a huge impact on all civil practitioners.

Jeffrey Kubay addresses yet another refinement to Pennsylvania's Economic Loss Doctrine, which subject has been tackled in *Your Best Defense* a number of times in the past. Jeff traces the doctrine's evolution from a bar to certain product liability and negligence claims to negligent misrepresentation claims and now, with a recent federal court decision, to claims under the Unfair Trade Practices and Consumer Protection Law for intentional misrepresentation and fraud. He looks at, for example, how real estate agents may benefit from this expansion of the doctrine.



Interestingly, however, Richard McMillan looks at a recent interpretation of the Property Disclosure Law and how this might expand the nature and number of claims against real estate agents. He examines Judge Wettick's recent analysis of the Disclosure Law and how any language limiting liability contained in a real estate sales agreement that runs counter to this interpretation should be seen as contrary to public policy. Those defending real estate claims should be aware of the impact of this decision.

This article also includes my analysis of a recent decision which clarifies and helps define a compensable injury as that term is used in the asbestos arena. The recent discussion of "actual impairment" by the Superior Court and the potential impact on motion for summary judgment practice will, hopefully, also be found enlightening. The *Summers* decision will almost certainly be cited by practitioners on a regular basis as they attempt to secure summary judgment on behalf of their clients.

As always, if you know of anyone who might benefit from the information contained in this newsletter who is not currently receiving it, or if you would like to discuss any other needs in the asbestos arena or other areas mentioned in this and past newsletters, please let me know by contacting me at dforsythe@waymanlaw.com.



MEDICAL STANDARDS IN ASBESTOS CASES CLARIFIED BY SUPERIOR COURT

By: Dale K. Forsythe, Esq.

The existence of a compensable injury in the highly specialized field of asbestos litigation has been a subject of numerous court opinions in recent years. The Superior Court has again looked at the medical standards and the evidence needed by plaintiff to survive motion for summary judgment.

In consolidated appeals in *Summers v. Certainteed Corporation*, et. al, #3651 EDA 2003 and *Nybeck v. Union*

Carbide Corporation, et. al, #3652 EDA 2003, the Superior Court this August examined the propriety of the granting of summary judgment in favor of certain defendants by the trial court. In upholding the lower court decisions, the Superior Court examined the existing case law and, interestingly, granted a great deal of deference to the asbestos litigation experience of the trial court in determining that there was no abuse of discretion. In its analysis, the Court first looked at the seminal 1993 *Giffear* case (632 A.2d 880) and its affirmation by the Supreme Court in 1996 by the *Simmons* court (674 A.2d 232). Essentially, these cases established the requirement that there be functional impairment or disability, not merely radiographic changes, for recovery to be triggered. The *Summers* court reiterated how the lack of a presently existing impairment would not preclude later recovery should an impairment or disability arise in the future, noting the unorthodox nature of such a procedural solution but its practicality where there are numerous claimants at various degrees of impairment.

The *Summers* court next looked at the 2003 *Quate* opinion by the Superior Court (818 A.2d 510) and refused to essentially overrule it as plaintiffs requested. *Quate* held that summary judgment for defendants would be proper

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**INTEGRATION CLAUSES
VERSUS PENNSYLVANIA'S
REAL ESTATE SELLER
DISCLOSURE LAW**

By: Richard L. McMillan, Esq.

The standard form of an Agreement of Sale of real estate contains a provision in bold print as follows:

It is understood that Buyer has inspected the Property before signing this Agreement of Sale (including fixtures and any personal property specifically scheduled herein), or has waived the right to do so, and has agreed to purchase it in its present condition unless otherwise stated in this Agreement. Buyer acknowledges that the Agents have not made an independent examination or determination of the structural soundness of the Property, the age or condition of the components, environmental conditions, the permitted uses, or of conditions existing in the locale where the Property is situated; nor have they made a mechanical inspection of any of the systems contained therein.

In the same section under the heading "Representations" the standard agreement provides that the "Buyer understands that any representations, claims, advertising, promotional activities, brochures or plans of any kind made by Seller, Agents or their employees are not a part of this Agreement, unless expressly incorporated or stated in this Agreement." Furthermore, that section of the standard Sales Agreement also includes an integration clause that states that "it is further understood that this Agreement contains the whole agreement between Seller and Buyer and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise of any kind whatsoever concerning this sale. Furthermore, this Agreement shall not be altered, amended, changed, or modified except in writing executed by the parties."

The general rule is that where parties have deliberately put their agreement in writing without any fraud or mistake, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreement are merged in and superseded by the subsequent written contract; unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties and its terms and agreements cannot be added to nor subtracted from by

parol evidence. Once a writing is determined to be the parties' entire contract, the parol evidence rule applies and evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract. *Yount v. First National Bank of Port Allegheny*, 868 A.2d 539 (Pa.Super. 2005); *Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425, 436 (Pa. 2004).

Despite the clear meaning of such integration clauses and despite the parol evidence rule, Pennsylvania courts have sometimes permitted claims to be pursued based upon oral representations. In cases involving real estate transactions and inspections of the premises, a line of cases following the decision in *LeDonne v. Kessler*, 256 Pa.Super. 280 (389 A.2d 1123) (1978) has permitted parol evidence in some cases regardless of the existence of integration clauses in the Sales Agreement. Despite the exception noted in the *LeDonne* line of cases, integration clauses have been upheld in real estate transaction cases such as the previously cited *Yount* case wherein the Superior Court, citing the Supreme Court decision in *Bardwell v. Willis Co.*, 375 Pa. 503, 100 A.2d 102 (Pa. 1953), held "that to allow a plaintiff to introduce parol evidence that the defendant made representations regarding the condition of the property, where the contract specifically states that the plaintiff agreed that no such representations were made, would render the language of the contract superfluous." *Yount* at p.548.

The *Yount* case involved a commercial real estate transaction that occurred on or about July 17, 2001. The Pennsylvania legislature enacted the Real Estate Seller Disclosure Law, 68 Pa.C.S. §7301 et.seq., which is applicable to residential real estate transfers and became effective on December 20, 2001. The said Disclosure Law requires a seller of residential property to disclose to the buyer any material defects concerning the property known to the seller. This is done by filling out a standard Seller's Disclosure Form. One of the provisions of the Disclosure Law provides that any seller who willfully or negligently violates or fails to perform any duties required under the said law can be held liable for any actual damages suffered by the buyer. Recently, Judge R. Stanton Wettick of the Court of Common Pleas of Allegheny County re-examined the use of integration clauses and the *LeDonne* line of cases that had sometimes permitted evidence of oral representations in real estate transaction disputes. Judge Wettick's Opinion in *Vaughn v. Drab*, Supplement to the Lawyers

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Journal, Vol. 153, p.17, AR04-2321 in the Court of Common Pleas of Allegheny County (May 25, 2005), examined how the Disclosure Law might affect how buyers can pursue fraudulent misrepresentation claims against sellers. Under the *LeDonne* decision and its progeny, the courts had been applying a balancing test for more than twenty years prior to the enactment of the Disclosure Law. The courts would balance the extent of each party's knowledge concerning a particular problem with the realty based upon a reasonable inspection against the thoroughness of the integration clause in the Sales Agreement to determine whether an exception would be made to the parol evidence rule to enable a party to justifiably rely upon an oral representation.

Judge Wettick concluded that "the only reasonable explanation for the enactment of the Disclosure Law was to provide broader relief to the buyers of residential real estate," *Vaughn* at p.208. Significantly, the Disclosure Law permits a buyer to recover where he or she is able to prove merely by a "preponderance" of the evidence that the seller made misrepresentations in the Disclosure Statement which he or she had reason to know were false, deceptive or misleading. Previously, under the *LeDonne* line of cases the buyer had to prove by "clear and convincing" evidence that the seller made false representations with knowledge of the falsity or recklessness as to the truth or falsity of same. Since the state legislators would have been aware of the existence of integration clauses in the Standard Sales Agreements in Pennsylvania, Judge Wettick reasoned that the Disclosure Law should be interpreted to incorporate into the Sales Agreement the representations made by the seller in the property Disclosure Statement.

Likewise, Judge Wettick held that provisions in the standard Sales Agreement stating that a waiver of the buyer's right to inspect constituted a waiver of contingencies and a release of sellers and brokers from any and all claims could not defeat the provisions of the Disclosure Law. "If the Disclosure Law could be waived through language in a standard form agreement releasing the sellers from liability for failure to disclose defects, this would occur in virtually every case and the Disclosure Law would be rendered meaningless," *Vaughn*, at p.209.

Unless the appellate courts of Pennsylvania choose not to follow the reasoning expressed by Judge Wettick in the *Vaughn* case, waivers and releases in the standard form sales agreements that purport to alter the remedies afforded to a buyer of residential property will not be given effect. As a practical matter, this means that

sellers and their real estate agents will not be able to use the strongly worded provisions of the standard real estate sales agreements to protect themselves against accusations by the buyer that certain oral representations were made that are not reflected in the Seller's Disclosure Statement or in the Sales Agreement. Where once such concepts as the parol evidence rule, the statute of frauds, waiver of inspection provisions, and integration clauses may have protected the seller and the seller's real estate agent through written documents signed by both seller and buyer, the seller and the seller's real estate agent will be repeatedly dragged into court where they will have to refute claims that oral misrepresentations were made about the real estate.

Feel free to contact Richard McMillan at rmmillan@waymanlaw.com with any questions you may have in this area of law.



THE ECONOMIC LOSS DOCTRINE HAS EVOLVED TO BAR UTPCPL CLAIMS

By: Jeffrey A. Kubay, Esq.

Under Pennsylvania's well-settled Economic Loss Doctrine, courts of this Commonwealth have consistently rejected products liability and negligence claims for purely economic damages. *REM Coal Co., Inc. v. Clark Equipment Co.*, 563 A.2d 128 (Pa.Super. 1989) (products liability action); *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 577 A.2d 631 (Pa.Super. 1990) (negligence action). This Doctrine has operated to bar products liability and negligence actions claiming consequential damages in the nature of repair costs or replacement of property, as well as lost profits arising from the loss of use of property. In those decisions, the Superior Court of Pennsylvania has reasoned that such economic losses are typically the failure of a purchaser to receive the benefit of its bargain, which is properly the concern of a contract action. The Doctrine has since been applied to negligent misrepresentation claims for economic losses. *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604 (3d.Cir. 1995).

The United States Court of Appeals for the Third

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Circuit has extended the preclusive effect of the Economic Loss Doctrine to claims brought under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). *Werwinski v. Ford Motor Company*, 286 F.3d 661 (3d.Cir. 2002). The UTPCPL proscribes certain unfair or deceptive business practices, including intentional misrepresentation and fraud. 73 P.S. §201-1, et seq. (Amended 1996). The *Werwinski* case involved a class action against Ford Motor Company, alleging the installation of defective components in Ford vehicles. The trial court, the United District Court for the Eastern District of Pennsylvania, dismissed fraudulent concealment and UTPCPL claims under the Economic Loss Doctrine. Plaintiffs appealed to the Third Circuit Court of Appeals, arguing that the District Court erred in applying the Economic Loss Doctrine to their fraud claims under the UTPCPL. The Court of Appeals predicted that the Supreme Court of Pennsylvania would apply the Economic Loss Doctrine to UTPCPL claims. The Court noted that there was no case precedent for treating fraud or intentional misrepresentation claims differently from negligence misrepresentation claims, which have been barred by the Doctrine under Pennsylvania case law where the alleged misrepresentations concern the parties' contracts. The Court of Appeals further reasoned that Pennsylvania case law has treated common law and other statutory fraud claims similarly under the Economic Loss Doctrine. Finally, the *Werwinski* court relied upon Pennsylvania case law that has rejected tort liability for purely economic loss.

Although the Supreme Court of Pennsylvania has not ruled on the viability of the Economic Loss Doctrine, generally or in its application to UTPCPL claims, this Superior Court has recently adopted the reasoning of the *Werwinski* decision in its dismissal of a statutory claim by virtue of the Economic Loss Doctrine. *Adams v. Copper Beach Townhome Communities*, 816 A.2d 301 (Pa.Super. 2003). In *Adams*, the Superior Court applied the *Werwinski* holding in concluding that the Economic Loss Doctrine barred the plaintiffs' statutory cause of action under Pennsylvania's Storm Water Management Act ("SWMA"). In *Adams*, plaintiffs were employees of a manufacturing plant that temporarily closed due to storm water run off damage from a neighboring property. Plaintiffs brought an action against the adjoining property owners for lost wages and benefits. The trial court sustained Preliminary Objections on the basis that the Economic Loss Doctrine barred the plaintiffs' statutory claims under SWMA. On appeal, the Superior Court

affirmed the trial court's application of the Economic Loss Doctrine as a bar to claims under the SWMA. In reaching its decision, the Superior Court specifically looked to the *Werwinski* case for guidance and acknowledged that the Economic Loss Doctrine barred the UTPCPL claims asserted by the plaintiffs therein.

In a recent Pennsylvania common pleas court decision, the court rejected a UTPCPL claim against a real estate agent and broker, presumably based upon the *Adams* and *Werwinski* decisions. *Vitalie v. Putt*, No. 11499 CD 2004 (Indiana County). There, plaintiffs entered into an agreement of sale for certain property that they had intended to use as a dental office. Plaintiffs alleged that they had made their intentions known to the defendant real estate agent and broker. In reliance upon the agreement of sale for the property, plaintiffs incurred certain expenses including architectural plans, a survey, and a site plan approval for their perspective dental office. Prior to the closing, plaintiffs caused a title search to be conducted which revealed that the property was subject to a restrictive covenant limiting the property to use as a private residence. The plaintiffs alleged that the restriction was not made known to them prior to the execution of the agreement of sale and that they would not have purchased the property with that knowledge. The plaintiffs brought an action for misrepresentation, negligence, and violations of the UTPCPL and Real Estate Licensing and Registration Act. Although the Court did not expressly rely on *Adams* or *Werwinski*, the defendant agent and broker relied on those decisions in arguing against the validity of the UTPCPL claims. Moreover, it was the Indiana County Court of Common Pleas' decision that was affirmed by the Superior Court in *Adams*.

The application of the Economic Loss Doctrine has evolved from a bar to certain products liability and negligence claims, to negligent misrepresentation claims and now to claims under the UTPCPL for fraud or intentional misrepresentation. Although our state Supreme Court and Superior Court have not had the opportunity to specifically rule on the validity of a UTPCPL claim in light of the Economic Loss Doctrine, the Superior Court in *Adams* has all but expressly held that UTPCPL claims are barred by that Doctrine. The foregoing case law should serve to insulate businesses, such as real estate brokers from statutory liability under the UTPCPL, including liability thereunder for treble damages, fines, and attorney's fees.

Attorney Kubay will be happy to discuss these issues further if you would like. Please contact him at jkubay@waymanlaw.com.



FAIR SHARE ACT FOUND UNCONSTITUTIONAL

By: Marla N. Presley, Esq.

On July 26, 2005, the Pennsylvania Commonwealth Court determined that the Fair Share Act of 2002 was unconstitutional and void. In *Deweese v. Weaver*, No. 567 M.D. 2002, Slip. Op. at 14 (Pa. Comm. Ct. 7/26/2005) (Kelley, S.J.), the Court determined that the legislation creating the Fair Share Act violated Article 3, § 3 of the Pennsylvania State Constitution by not containing provisions germane to any single subject.

Act 57 or the “Fair Share” law was originally introduced into the Pennsylvania Senate in October 2001 and Governor Schweiker signed the bill into law on June 19, 2002. The law was originally established to amend the “DNA Act” which provided for the establishment of state DNA data banks for use by law enforcement officials by requiring individuals convicted of certain sex offenses to register their DNA with a DNA bank. In June 2002, a second section was added to the bill providing for an amendment to the current Pennsylvania law on comparative negligence. That second portion of the Fair Share Act applied to cases in which two or more defendants are found liable in a civil lawsuit. The Act serves to limit the liability of each defendant to the proportional damage equal to its proportion of the total liability. See 44 Pa. C.S. § 2301-2336. The Fair Share Act successfully eliminated the Pennsylvania theory of joint and several liability under which any one single defendant could be held responsible for the entire verdict.

The constitutionality of the Fair Share Act was challenged by members of the House of Representatives who voted against the passage of the Act. They challenged the constitutionality of the dual purposes of the bill under Article 3, § 3 of the Pennsylvania Constitution which prohibits the passage of bills containing one or more subject.

In its July 26, 2005 decision, the Commonwealth Court of Pennsylvania granted summary judgment in favor of the petitioners. The Court held that the legislature, by adding the Fair Share Act onto a bill that originally dealt with amending the DNA Act, violated the single subject rule. The Court held that the portions of the bill relating to negligence were not sufficiently “germane” or within a “proper legislative relation” to the original subject of the bill as to fairly constitute a single

subject under the Constitution. Therefore, the Court ruled that the Fair Share Act was unconstitutional and void.

The Commonwealth Court’s ruling in *DeWeese* will result in the reinstatement of joint and several liability, as set forth in Pennsylvania’s Comparative Negligence Statute. 42 Pa. C.S. § 7102 (Hn) (b1). The Pennsylvania Attorney General’s office, which was defending the *DeWeese* case, has said it intends to appeal this matter to the Pennsylvania Supreme Court. Recently, the Pennsylvania Supreme Court has indicated it would be reviewing this same issue in *Hicks v. Dana Corp.*, PA Superior Court Docket No. 84 EDM 2004. In *Hicks*, Judge James Murray Lynn concluded that Act 57 of 2002 addresses two entirely different subjects. Judge Lynn noted that the additions to the DNA Act regarding apportionment of liability in civil cases had nothing to do with DNA testing in a criminal context. The Court ruled that DNA testing for convicted sexual offenders is “not germane, is not related to, is not connected with, and has nothing to do with assisting the public in understanding or applying the principles of comparative negligence standards in civil cases”. Judge Lynn stated that there was no rational basis to consider the two bills a single subject. Judge Lynn concluded that the “legislature took a wildly popular and bipartisan plan to track down rapists and felony sex offenders and concealed within it a contentious amendment designed to apportion money damages among defendants in civil lawsuits involving multiple defendants. This is precisely the type of ‘sneak’ legislation that our Supreme Court has long held to be unconstitutional.” It is a possibility that *DeWeese* will be consolidated with *Hicks* for review before the Supreme Court.

Attorney Presley will be happy to discuss these issues further if you would like. Please contact her at mpresley@waymanlaw.com.



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Wayman Watch...

- *Congratulations to Paul Mannix and his wife on the birth of their new baby girl on October 7, 2005.*
- *Mark Gesk has been selected as Chairman of the Construction Law Section of the Federation of Defense and Corporate Counsel (FDCC).*
- *James Creenan and Kevin Eddy of this office, along with Judges Bowes, Lally-Green and Bender will be presenting a CLE course on Appellate Advocacy this November, sponsored by the Young Lawyers Division of the Allegheny County Bar Association.*
- *We are also pleased to announce that Mr. Creenan has been appointed to a three-year term on the Pennsylvania Bar Association Planning Committee, as well as to the position of Vice Chair of the American Bar Association Young Lawyer Division Litigation Committee.*

Medical Standards, continued from page 1

where “multiple medical conditions made it impossible to causally relate [his] shortness of breath to any particular asbestos-related condition.” In the cases here, the Court was faced with plaintiffs with a number of conditions that could have caused shortness of breath. The *Summers* Court held that plaintiffs could not meet their burden of demonstrating impairment or disability beyond the breathing difficulty from smoking and other ailments, following the dictates of the Superior Court in *Taylor* (666 A.2d 681) and *Quate, supra.*, to the effect that shortness of breath alone would not be sufficient in light of other conditions. What is interesting about the opinion, however, is that the Court examined the trial judge’s extensive experience in asbestos litigation and allowed for some disregard of plaintiffs’ experts’ opinion where an experienced judge would see that it would not add to the

burden of proof. The judge could disregard a finding that each exposure to asbestos could be a substantial factor in impairment, under appropriate circumstances. He could use his knowledge of pulmonary function tests and their establishment of obstructive (smoking caused) versus restrictive (asbestos caused) conditions. His examination of the evidence as a whole would take into account his presumed expertise. In short, the judge here was given wide discretionary latitude in examining the evidence based on his own experience.

While the *Summers* opinion was not particularly novel, following *Quate* in a rather true fashion, the case did open the potential for widening the discretion of the court in making its determination of the existence or lack of a compensable injury in this type of case.

Please contact Dale Forsythe at dforsythe@waymanlaw.com with any questions or concerns you may have in this area of law.