Supreme Court Update

by Evy M. Jarrett and Tammy G. Lavalette

Smith v. Erie Ins. Co., Slip Opinion No. 2016-Ohio-7742 (November 16, 2016)

This certified conflict case involved the interpretation of a provision in an uninsured-motorists-contract coverage requiring "independent corroborative evidence" that an unidentified vehicle caused an accident. The insured claimed an unidentified vehicle caused him to swerve off the road, colliding with several trees. However, the vehicles did not make physical contact. He provided a statement to the responding trooper, and was treated for injuries at an emergency room. The insured's claim for UM coverage was denied based upon a policy provision stating that there must be "independent corroborative evidence" of the hit-and-run, and further stating that testimony of the insured did not constitute independent corroborative evidence unless "supported by additional evidence." The insured argued that police reports and other documents containing his statements as to what occurred constituted "additional evidence." The trial court denied coverage. The Sixth District reversed, finding the policy language at issue was ambiguous as to what constituted "additional evidence."

Affirming, the Supreme Court noted the policy's language required "additional evidence" to support the insured's testimony, not "additional testimony." The evidence only had to be supportive of the insured's testimony and "[s]upport is an exceedingly broad concept." The Court found the language at issue to be susceptible of the insured's interpretation that statements of the insured in police reports could constitute "additional evidence."

**Note, as of December 14, 2016, a motion for reconsideration is pending.*

Burnham v. Cleveland Clinic, Slip Opinion No. 2016-Ohio-8000 (Dec. 7, 2016)

The Supreme Court reversed the Eighth District and ruled that an order compelling disclosure of materials allegedly protected by attorney-client privilege is a final appealable order pursuant to R.C. 2505.02(B)(4). In so ruling, the Court clarified *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480. In *Chen*, which involved the attorney-work product privilege, the Court had held that the appellant must establish that it would not be afforded a meaningful or effective remedy through appeal after final judgment in order to proceed on an interlocutory appeal. Here, the Court discussed and distinguished the attorney-client privilege as compared to the attorney-work product doctrine. The Court concluded that prejudice is inherent in the production of attorney-client privileged materials, and thus such orders are immediately appealable.

State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm., Slip Opinion No. 2016-Ohio-8024 (Dec. 8, 2016)

The Industrial Commission granted an injured worker an award of permanent-partial- disability compensation based on physical conditions after the worker had already been granted an award of permanent-total-disability for her psychological condition based upon the same claim (stemming from the same injury). The Commission reasoned that the worker was not barred from receiving permanent partial disability if the award was based on conditions that were not the basis for the prior finding of permanent-total-disability on the same claim. Employer sought a writ to compel the Industrial Commission to vacate the permanent-partial-disability award, which was denied by the court of appeals.

The Supreme Court reversed the court of appeals and issued granted the writ. The Court noted that the award of concurrent benefits for the same claim was not authorized by statute, and was not supported by case law. The Court further noted that its decision was supported by "the purpose of permanent-total-disability – to compensate for the impairment of earning capacity... It logically follows that a claimant who is receiving permanent-total-disability compensation is ineligible for concurrent permanent-partial-disability compensation based on a different condition in the same claim."

State v. V.M.D., Slip Opinion No. 2016-Ohio-8090 (Dec. 13, 2016)

Attempted robbery is a crime of violence, and a person convicted of attempted robbery is ineligible to have the record of the conviction sealed pursuant to R.C. 2953.36.