

November 30, 2007 and the Court reserved decision to consider party's arguments and permit subsequent written submissions.

The undisputed facts in these proceedings indicate that New Castle County previously promised to pay medical expenses which Hamm claims under the Worker's Compensation Act (hereinafter "DCA"). In reliance on New Castle's promise to pay, Hamm underwent surgery and physical therapy, thereby incurring surgery and physical therapy bills. To date, New Castle has failed to pay these medical bills and Hamm is seeking to recover \$9,872.00 in benefits, which remain outstanding.

Defendant, New Castle, moves this court to dismiss Hamm's complaint pursuant to *Court of Common Pleas Civil Rule 12(b)(6)*. The City of New Castle, a municipal entity existing under the laws of Delaware, relies on *Arthur Turner v. City of Wilmington*, 919 A.2d 562, (Del. 2007) arguing statutory immunity. The argument was first raised during a motion hearing on November 30, 2007.

In *Turner*, the plaintiff employee filed a civil action against the City of Wilmington (hereinafter, "the City") claiming liquidated damages, attorney fees and costs under the Wage Payment and Collection Act on the basis of the City's delay in payment of worker's compensation benefits. While the City of Wilmington had paid medical benefits, Turner brought the action on the basis that the City of Wilmington was subject to liquidated damages, fees, and costs under the Supreme Court decision in *Huffman v. C.C. Oliphant & Son, Inc.*, 432 A.2d 1207 (Del. 1981). In *Huffman*, the Court granted recovery of damages for wrongfully withheld WCA benefits, pursuant

to the Wage Payment and Collection Act (hereinafter “WPCA”). However, the Court in *Turner* rejected plaintiff’s claim because the State of Delaware and its political subdivisions enjoy statutory immunity from WPCA remedies. *Turner* at 562.

The instant case is distinguishable from *Turner*. In *Turner*, the action was brought to recover the damages based upon the City’s delay in paying benefits. The instant case does not present this problematic issue because while there is a request for liquidated damages, Plaintiff also seeks to recover previously agreed upon medical expenses. New Castle interprets *Turner’s*, holding to mean governmental entities, is precluded from having to pay worker’s compensation benefits under the WCA because of the doctrine of statutory immunity as applied under the WCA. If the Court were to accept this argument of *Turner’s* interpretation, it would produce inequitable results for those persons who are entitled to recover benefits under the WCA. The more reasonable interpretation of *Turner* is that governmental entities are immune from actions to recover liquidated damages and other remedies provided pursuant to the WCA.

Plaintiff moves this Court for Entry of Default Judgment against defendant pursuant to *Court of Common Pleas Civil Rule 55(b)(2)* for defendant’s failure to file a responsive pleading within the time period prescribed by the rule. Plaintiff filed the complaint in this action on July 18, 2007 with a notice to the Clerk that the attorney for defendant Mayor and Council of New Castle will accept service. Defendant has not raised an issue regarding proper service. After plaintiff moved for judgment by default, defendant without filing a responsive pleading orally, raised the immunity

issue at a hearing. The provisions of *Court of Common Pleas Civil Rule 12(a)* requires a defendant to serve an answer within 20 days after service of the complaint. In plaintiff's affidavit for default, plaintiff avers that service was accepted by defendant's attorney on July 16, 2007. Defendant does not challenge this position.

Plaintiff Hamm argues that defendant waived its affirmative defense of statutory immunity by failing to assert it in a responsive pleading as required by *Court of Common Pleas Civil Rule 8(c)*. Hamm relies on *Jackson v. Wilmington Housing Authority*, 1986 WL 630317 (Del.Super.), which states "immunity is an affirmative defense that must be pled under Rule 8(c)." *Jackson at *1*. New Castle's response to Hamm's Motion only dealt with the ramifications of the *Turner* decision and failed to address the issue of pleading immunity as an affirmative defense.

Civil Rules 8(b) and 8(c) require parties to state their defenses to plaintiff's claims, and set forth any affirmative defenses. *Civil Rule 55(b)* permits this Court to enter default judgment when a party "against whom affirmative relief is sought has failed to . . . plead." In the instant matter, defendant New Castle failed to file a responsive pleading to the complaint, and did not assert any affirmative defenses until November 30, 2007, during oral argument on plaintiff's motion for default. Defendant New Castle's decision to respond to the complaint and raise an affirmative defense for the first time by oral motion is not supported by the rules of the Court or established case law. However, failure to file a responsive pleading and properly raise the immunity defense does not permit this Court to grant any amount which was previously held by the Delaware Supreme Court, nor recoverable under the statute.

ACCORDINGLY, judgment is entered for plaintiff as follows:

(a) Unpaid PIP benefits as of October 4, 2007	\$9,872.00
(b) Attorney's fees	6,580.67
(c) Costs	<u>75.00</u>
TOTAL	<u>\$16,527.67</u>

SO ORDERED this 30th day of January, 2008

Alex J. Smalls
Chief Judge

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