

A Summary of Recent Appellate Decisions From Pennsylvania State & Federal Courts & Other Appellate Courts

By Daniel J. Siegel, Esquire

LAW OFFICES OF DANIEL J. SIEGEL, LLC

66 W. Eagle Road • Suite 1 • Havertown, PA 19083-1425

(610) 446-3457 • Fax (610) 471-0570 • E-mail dan@danieljsiegel.com

REPORTING DECISIONS THROUGH DECEMBER 31, 2008

PENNSYLVANIA STATE & FEDERAL APPELLATE & TRIAL COURT DECISIONS

I. CAUSES OF ACTION

A. *Asbestos Exposure*

- [*Weible v. Allied Signal, Inc.*,
2008 PA Super 290 \(December 19, 2008\)](#)
and
[*Wright v. Allied Signal, Inc.*,
2008 PA Super 289 \(December 19, 2008\)](#)

- Holding: In order for liability to attach in an asbestos-related products liability claim, the record must contain sufficient evidence of exposure to asbestos-containing material to meet the frequency, regularity and proximity test of *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa.Super. 1988). In addition, the plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. There is no requirement, however, that a plaintiff who suffers an asbestos-related injury must establish the specific role played by each individual asbestos fiber within the body.

All decisions are “hyperlinked” to the slip opinion. All you have to do is “click” (or “ctrl + click”) on the title of the case, and if connected to the Internet, your browser will open up the decision for you to read in its entirety. Try it and see!

B. *Employment*

- [*Dillon v. Homeowner's Select, Affinity Insurance Services, Inc.*,
2008 PA Super 229 \(September 29, 2008\)](#)

- Holding: There is no private cause of action for money damages against a private employer for gender-based discrimination under the Equal Rights Amendment of the Pennsylvania Constitution, Pa. Const., art. I § 28.

C. *Medical Malpractice*

- [*Fitzpatrick v. Natter*,
No. 1 EAP 2007 \(Pa. December 17, 2008\)](#)

- Holding: A patient seeking to prove a lack of informed consent claim in a medical malpractice case may rely solely upon circumstantial evidence to demonstrate that the information that the physician allegedly failed to disclose would have been a substantial factor in the patient's decision to undergo the procedure at issue.

D. Motor Vehicle Accidents - First Party Benefits/Bad Faith

- [Perkins v. State Farm Insurance Co.,
No. 3:08-DV-1084 \(M.D.Pa., December 16, 2008\)](#)

- Holding: The Pennsylvania insurance bad faith statute, 42 Pa.C.S.A. § 8371 is not preempted by the Pennsylvania Motor Vehicle Financial Responsibility Law. Thus, Section 1799(b), 75 Pa.C.S.A. § 1797(b) is not the exclusive remedy for insureds alleging bad faith in the peer review process.

E. Motor Vehicle Insurance - Damages

- [Corbin v. Khosla,
No. 07-05124 \(E.D.Pa., December 15, 2008\)](#)

- Holding: Section 1714 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1714, which bars an uninsured motorist from recovering first party benefits against an insurance company, permits an uninsured owner and operator of a vehicle to recover economic damages from an alleged third party tortfeasor.

F. Motor Vehicle Insurance - Uninsured Motorist Coverage

- [Generette v. Donegal Mutual Insurance Co.,
No. 16 MAP 2007 \(Pa., October 23, 2008\)](#)

- **Holding: 1.** An "Other Insurance" provision, which limits the recovery of underinsured motorist coverage to the amount by which the policy's UIM coverage limit exceeded the coverage of the UIM policy at the first priority level is non-enforceable because it conflicts with the public policy of the Motor Vehicle Financial Responsibility Law to provide "excess" rather than "gap" UIM coverage.

- **Holding 2.** The definition of "insured" under the MVFRL, 75 Pa.C.S.A. § 1702 does not include guest passengers in non-owned vehicles. Because an insured under the MVFRL does not include a guest passenger, Section 1738's stacking provisions do not apply to a guest passenger. Justice Saylor filed a [concurring opinion](#), and Justice Eakin filed a [dissenting opinion](#).

- [Nationwide Assurance Co. v. Easley,
2008 PA Super 240 \(October 10, 2008\)](#)

- Holding: A motor vehicle insurance policy exclusion that precludes coverage for injuries sustained in accidents occurring when using a vehicle for hire is valid. The preclusion applies regardless of whether the vehicle was carrying a passenger for hire at the moment of the accident.

G. Shield Law

- [Castellani v. The Scranton Times, L.P.,
No. 60 MAP 2007 \(Pa., September 24, 2008\)](#)

- Holding: Pennsylvania's Shield Law, 42 Pa.C.S.A. § 5942, protects a newspaper's source of information from compelled disclosure, and does contain a non-textual "crime-fraud" exception.

H. *Sovereign Immunity*

- [*McCarthy v. City of Bethlehem*,
No. 997 C.D. 2008 \(Pa.Cmwth., December 23, 2008\)](#)
 - Holding: In order to set forth a claim under the utility service facilities except to governmental immunity under 42 Pa.C.S.A. § 8542(b)(5), a plaintiff must establish that (1) the damages claimed were the result of a dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within the rights-of-way, (2) the dangerous condition created a reasonably foreseeable risk of the kind of injury incurred, and (3) the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.
- [*Clark v. Penndot*,
No. 122 C.D. 2008 \(Pa.Cmwth., December 8, 2008\)](#)
 - Holding: Sovereign immunity bars a claim against the Commonwealth under 42 Pa.C.S.A. § 8522(b)(4), that it was liable for injuries suffered in an action caused by a tree located on private property that fell onto a state highway.
- [*Reid v. City of Philadelphia*,
No. 16 EAP 2007 \(Pa., October 21, 2008\)](#)
 - Holding: Although a local agency is liable for damages on account of an injury to a person arising from its care, custody or control of real property pursuant to 42 Pa.C.S.A. § 8542(b)(3) of the Political Subdivision Tort Claims Act, the legislature explicitly distinguished "sidewalks" from "real property" in Section 8542(b)(3)(iv); thus, the real property exception does not apply to injuries arising from sidewalks, even if the sidewalk abuts local agency property. In sum, a municipality is primarily liable for injuries caused by dangerous conditions of the sidewalks abutting its own property, and a municipality is secondarily liable only when some other party is primarily liable.

II. CIVIL PROCEDURE & TRIAL

A. *Discovery(Pre-Complaint)*

- [*Cooper v. Frankford Health Care System, Inc.*,
2008 PA Super 248 \(October 20, 2008\)](#)
 - Holding: When seeking discovery in aid of preparation of a complaint, merely stating that the information sought is "material and necessary" to "draft a legally sufficient Complaint," and then simply listing the materials requested, does not satisfy the probable cause standard of presenting "facts supporting a reasonable belief that the evidence sought will support a cognizable cause of action."

B. *Jury Selection*

- [*Bednar v. Dana Corp.*,
2008 PA Super 283 \(December 16, 2008\)](#)
 - Holding: Pursuant to Pa.R.Civ.P. 221, each party is entitled to four peremptory challenges, regardless whether the jury is comprised of eight or twelve jurors. Accordingly, a new trial is warranted when a party is limited to three peremptory challenges; prejudice arises from the denial of the prescribed procedural right to four peremptory challenges.

C. Punitive Damages

- [*Jurinko v. The Medical Protective Co., Nos. 06-3519 & 06-3666 \(3rd Cir., December 24, 2008\)*](#)
 - Holding: To determine whether an award of punitive damages is excessive, a court must consider three "guideposts:" (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases. Thus, a 1:1 ratio is an appropriate benchmark for calculating punitive damages when the compensatory damages are substantial.

D. Procedure/Validity of Local Rules

- [*McCarthy v. City of Bethlehem, No. 997 C.D. 2008 \(Pa.Cmwth., December 23, 2008\)*](#)
 - Holding: Lehigh County Rule 1035.2(a), which authorizes the trial court to grant summary judgment based solely upon an opposing party's failure to file a brief in response to a dispositive motion, is invalid as inconsistent with Pa.R.Civ.P. 126, 239(f) and 1035.3(d).

III. WORKERS' COMPENSATION

A. Employment - Scope of Employment

- [*Employers Mutual Casualty Co. v. Boiler Erection and Repair Co., 2008 PA Super 280 \(December 12, 2008\)*](#)
 - Holding: Drinking alcohol in violation of a company policy does not *per se* take an employee outside the scope of his or her employment. Even if it is proven that an accident would not have occurred but for a co-worker's intoxication, that fact alone does not necessarily take an employ outside the course and scope of his or her employment. *This is a decision of note to both workers' compensation and third party practitioners.*

B. Notice of Ability to Return to Work

- [*Miegoc v. Workers' Compensation Appeal Board \(Throop Fashions/Leslie Fay and ITS Hartford\), No. 948 C.D. 2008 \(Pa.Cmwth., December 3, 2008\)*](#)
 - Holding: Section 306(b)(3) of the Workers' Compensation Act, 77 P.S. § 512(3), which created the Notice of Ability to Return to Work, requires an employer to share new medical information about a claimant's physical ability to work and to notify a claimant that this new information *could affect* the claimant's entitlement to benefits. Because the notice requirement of Section 306(b)(3) does not affect the substantive rights of either party, it applies retroactively.

C. Notice of Compensation Payable - Amendments

- [*Weney v. Workers' Compensation Appeal Board \(Mac Sprinkler Systems, Inc.\), No. 678 C.D. 2008 \(Pa.Cmwth., November 26, 2008\)*](#)
 - When a Claimant seeks to amend a Notice of Compensation Payable to include injuries of which the claimant was aware and knew to be related to a particular work incident during an earlier review petition proceeding, the claimant's second Petition to Review Compensation Benefits is barred by technical *res judicata*.

D. Pension Offsets

- [*Department of Public Welfare v. Workers' Compensation Appeal Board \(Harvey\)*, No. 802 C.D. 2008 \(Pa.Cmwlth., November 26, 2008\)](#)
 - For purposes of calculating a pension benefit offset, an actuarially-estimated rate of return, when supported by expert testimony, is sufficient to determine the amount of an employer's contribution to a claimant's pension.
- [*Jones v. Workers' Compensation Appeal Board \(City of Chester\)*, No. 621 C.D. 2008 \(Pa.Cmwlth., November 12, 2008\)](#)
and
[*Bingnear v. Workers' Compensation Appeal Board \(City of Chester\)*, No. 335 C.D. 2008 \(Pa.Cmwlth., November 19, 2008\)](#)
 - Holding: A Workers' Compensation Judge has jurisdiction to entertain a Petition to Review Pension Benefit Offset to determine whether an employer is permitted to offset a claimant's pension benefits in accordance with a Collective Bargaining Agreement, or in the alternative, whether any offset must be taken in accordance with the Act. Evidence of a claimant's injury date, compensation rate and pension benefits are necessary for meaningful appellate review.

E. Reasoned Decisions

- [*Casne v. Workers' Compensation Appeal Board \(STAT Couriers, Inc., and State Workers' Insurance Fund\)*, No. 801 C.D. 2008 \(Pa.Cmwlth., December 4, 2008\)](#)
 - Holding: In reviewing a Workers' Compensation Judge's decision, an appellate court is not required to reverse or remand the case if it finds any flaw in the decision. Rather, the reasoned decision requirement does not differ appreciably from the traditional notions of deference owed credibility determinations.

F. Termination of Benefits

- [*Delaware County v. Workers' Compensation Appeal Board \(Browne\)*, No. 788 C.D. 2008 \(Pa.Cmwlth., December 22, 2008\)](#)
 - Holding: If an employer presents credible medical evidence that a claimant's physical condition is different from how it was at the time of the last disability adjudication, *i.e.*, claimant had totally recovered, this medical evidence satisfies an employer's burden of providing a change in a claimant's physical condition. Such evidence is consistent with the Supreme Court's decision in *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007) and the Commonwealth Court's decision in *Prebish v. Workers' Compensation Appeal Board (DPW/Western Church)*, 954 A.2d 677 (Pa.Cmwlth., 2008).

PENNSYLVANIA RULES CHANGES

- [**Pennsylvania Rule of Civil Procedure 2951 \(Confessions of Judgment\)**](#)
 - By Order dated December 29, 2008, and effective immediately, the Supreme Court has rescinded subdivision (a) of Pa.R.Civ.P. 2951, which permitted the entry of judgments by confession without the necessity of filing a Complaint. Under the Rule, as amended, all actions confessing judgment must be commenced by filing a Complaint.

UNITED STATES SUPREME COURT OPINION

I. Preemption

- [*Altria Group, Inc. v. Good,*](#)
[No. 07-562 \(U.S., December 15, 2008\)](#)
 - Holding: Neither the Federal Cigarette Labeling and Advertising Act nor the actions of the Federal Trade Commission preempt a state law fraud claim. When the text of an express preemption provision is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption. Justice Thomas filed a dissenting opinion, in which Justices Roberts, Scalia and Alito joined.

NEW JERSEY SUPREME COURT OPINION

I. Attorney Advertising

- [*In re Opinion 39 of the Committee on Attorney Advertising,*](#)
[No. A-30/31/32-08 \(N.J., December 17, 2008\)](#)
 - Holding: State bans on truthful, fact-based claims in lawful advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading. Thus, the use of terms such as "Super Lawyers" in legal advertising is not *per se* improper or prohibited.

GEORGIA SUPREME COURT OPINION

I. HIPAA

- [*Moreland v. Austin,*](#)
[S08G0498 \(Ga., November 3, 2008\)](#)
 - Holding: In a medical malpractice case, the Privacy Rule of the Health Insurance Portability and Accountability Act ("HIPAA") precludes a defendant's attorney from informally interviewing a plaintiff's prior treating physicians. The Court specifically found that "After reviewing HIPAA, Georgia law, and the case law of other jurisdictions ... HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians." This is a well-written opinion that has implications in litigation throughout the country.

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