

A Summary of Recent Pennsylvania State & Federal Appellate Court Decisions

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REPORTING DECISIONS THROUGH OCTOBER 1, 2010

A REQUEST

For more than 22 years, I have circulated my Summaries of Appellate Decisions to lawyers, judges and other interested persons in the legal community.

While I don't ask for anything in return, I would be honored if you considered making a donation to the [Foundation for Ichthyosis and Related Skin Types \(FIRST\)](#), a national organization that works to educate and connect those touched by ichthyosis and related disorders through emotional support, information, advocacy, and research funding for better treatments and eventual cures. Both of my sons have X-Linked Ichthyosis, but are fortunate to have the most mild form of the condition. Others are not so fortunate, and it has been a great pleasure for me to serve on FIRST's Board for many years, and to serve as their legal counsel for well over a decade.

Thus, I would hope that, as a token of your appreciation of my efforts to educate the legal community about changes in the law, you would donate to FIRST during Ichthyosis Awareness Week. [Just click here to visit their website and learn about the condition and FIRST's inspiring efforts.](#)

PENNSYLVANIA & FEDERAL APPELLATE COURT DECISIONS

I. Pennsylvania Supreme Court - Granting Allocatur

The Pennsylvania Supreme Court has granted allocatur in [City of Philadelphia v. Workers' Compensation Appeal Board \(Kriebel\), No. 691 EAL 2009 \(September 9, 2010\)](#) on the following issue:

Whether the Commonwealth Court's decision to reverse the decision of the Workers' Compensation Appeal Board and reinstate the decision of the Workers' Compensation Judge is supported by substantial competent evidence, given (1) the rebuttable statutory presumption, under Section 301(e) of the Workers' Compensation Act, that Decedent's occupational disease, *i.e.*, hepatitis C, arose out of and in the course of his employment as a fire fighter; and (2) the absence of any evidence establishing that Decedent was an intravenous drug user, shared needles and/or came in contact with contaminated needles.

II. Civil Litigation

A. Cause of Action - Asbestos

[Moore v. Ericsson Inc. 2010 PA Super 173 \(September 17, 2010\)](#)

- **Holding:** To establish causation in an asbestos case, the plaintiff must prove the exposure to asbestos caused the injury and that it was the defendant's asbestos containing product that caused the injury. To satisfy this burden, the plaintiff must meet the "regularity, frequency and proximity" test. Conflicts in the weight of the evidence and a "battle of the experts" do not *per se* warrant a directed verdict.

B. Discovery - Attorney Work Product

□ [*Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, 2010 PA Super 170 \(September 16, 2010\)](#)

- **Holding:** Communications and correspondence between an attorney and an expert who is being called to advance a party's case-in-chief are discoverable, *i.e.*, the attorney work product doctrine must yield to the disclosure of the basis of a testifying expert's opinion. This conclusion is consistent with Pa.R.C.P. 4003.5, which permits discovery of facts known and opinions held by an expert.

C. Electronic Communications - Probable Cause

□ [*In the Matter of the Application of the United States of America For an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, No. 08-4227 \(3rd Cir., September 7, 2010\)](#)

- Cell Site Location Information ("CSLI") from cell phone calls may be obtained pursuant to a Court Order issued under § 2703(d) of the Stored Communications Act, 18 U.S.C. Such an order does *not* require the traditional probable cause determination. The standard for obtaining this information is less than probable cause under the Act, *i.e.*, there must be "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

D. Expert Testimony - Nurses

□ [*Freed v. Geisinger Medical Center*, No. 77 MAP 2007 \(Pa., September 29, 2010\)](#)

- **Holding:** Affirming *Freed v. Geisinger Medical Center*, 971 A.2d 1202 (2009), which overruled *Flanagan v. Labe*, 690 A.2d 183 (1997), the Court holds that an otherwise competent, qualified nurse is not prohibited by the Professional Nursing Law, 63 P.S. §§ 211, *et seq.*, from giving expert testimony regarding medical causation. Further, there is no bar to *sua sponte* reconsideration of precedent. Justice Castille filed a [concurring opinion](#). Justice Saylor filed a [dissenting opinion](#); Justice Eakin also filed a [dissenting opinion](#).

E. Products Liability - Burden of Proof

□ [*Reott v. Asia Trend, Inc.*, 2010 PA Super 176 \(September 21, 2010\)](#)

- **Holding:** In products liability cases, the key inquiry is whether there is a defect, not the defendant's conduct or plaintiff's contributory negligence. Limited evidence of plaintiff's conduct may be admissible when the defendant alleges voluntary assumption of risk, product misuse or highly reckless conduct as affirmative defenses, for which it bears the burden of proof.

F. Products Liability - Grounds for New Trial

□ [*Lewis v. CRC Industries, Inc.*, 2010 PA Super 179 \(September 27, 2010\)](#)

- **Holding:** In a Pennsylvania case involving the application of New Jersey products liability law, the trial court abused its discretion by charging the jury on the principles of comparative and contributory negligence and assumption of risk, and by failing to limit the jury's consideration of the plaintiff's conduct. The Court noted that it is only when, as here, "the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse

rather than clarify a material issue” that error in a charge will be found to be a sufficient basis for the award of a new trial.” [*The Law Offices of Daniel J. Siegel, LLC assisted the Law Offices of Charles A. Tannenbaum on the brief.*](#)

➤ [*Click here to read the Superior Court Brief.*](#)

G. *Sovereign Immunity*

☐ [*Thornton v. Philadelphia Housing Authority, No. 2186 C.D. 2008 \(Pa.Cmwlt., September 23, 2010\)*](#)

➤ **Holding:** In ruling on a motion for summary judgment under the real estate exception to sovereign immunity, 42 Pa.C.S. §8522(b)(4), it is not for the court to decide whether the alleged defects factually amounted to dangerous conditions of real estate. Rather, the jury must determine whether the dangerous condition was the proximate cause of plaintiff's injuries or death. Of note, this case involved a claim that the defendant failed to provide and maintain a safe and adequate fire protection system for the residents of the building. This factual scenario seems destined for review by the Pennsylvania Supreme Court.

H. *Trial - Harmless Error*

☐ [*Boyle v. Independent Lift Truck, Inc., No. 56 EAP 2009 \(Pa., September 29, 2010\)*](#)

➤ **Holding:** When a jury never reaches the issue of comparative negligence, any alleged error concerning the verdict sheet in that regard is harmless and a new trial is not warranted.

I. *Trial - Prejudice*

☐ [*Lockley v. CSX Transportation Inc., 2010 PA Super 167 \(September 13, 2010\)*](#)

➤ **Holding 1:** Even if a trial court commits error by not allowing a defendant to conduct post-surgical discovery of plaintiff's medical condition, the defendant must establish that it suffered prejudice in order to warrant a new trial.

➤ **Holding 2:** Even if a trial court abuses its discretion by striking a juror for cause when the juror was competent to serve, the aggrieved party must establish prejudice in order to be granted relief in the form of a new trial.

III. *Workers' Compensation*

A. *Collateral Estoppel - Act 632 Proceedings*

☐ [*Commonwealth, Dept of Corrections v. Workers' Compensation Appeal Board \(Wagner-Stover\), No. 1133 C.D. 2008 \(Pa.Cmwlt., October 1, 2010\)*](#)

➤ **Holding:** A finding in an Act 632 (now codified as 61 Pa.C.S. § 1101) proceeding that a claimant had fully recovered from his or her work-related injuries collaterally estops a WCJ from finding that the worker was not fully recovered.

B. *Death Benefits - Remarriage/Meretricious Relationship*

☐ [*PPL v. Worker's Compensation Appeal Board \(Rebo\), No. 2264 C. D. 2009 \(Pa.Cmwlt., September 10, 2010\)*](#)

➤ **Holding:** In a workers' compensation claim in which a party seeks to terminate the payment of spousal death benefits based upon the spouse's remarriage or the existence of a meretricious relationship, the petitioner must present proof of the actual intention of the spouse to form a new marriage contract.

C. *Impairment Rating Examinations*

- [*Diehl v. Workers' Compensation Appeal Board \(I.A. Construction\)*, No. 26 WAP 2009 \(Pa., September 29, 2010\)](#)
 - **Holding:** An employer seeking to modify a claimant's benefits under Section 306(a.2) of the Act, 77 P.S. § 511.2, based upon an Impairment Rating Examination, need not produce evidence of job availability or earning power in order to change a claimant's workers' compensation disability status from total to partial, provided the employer is only seeking to change disability status and not the amount of compensation paid to the claimant. "If the IRE is requested within the 60-day period and the claimant's impairment rating is less than 50 percent, then the change in disability status is automatic. If, however, the employer requests the IRE outside of the 60-day window and claims that the claimant's impairment rating is less than 50 percent, the IRE merely serves as evidence that the employer may use at a hearing before a WCJ on the employer's modification petition to establish that the claimant's disability status should be changed from total to partial. In that event, the IRE becomes an item of evidence just as would the results of any medical examination the claimant submitted to at the request of his employer. It is entitled to no more or less weight than the results of any other examination. The physician who performed the IRE is subject to cross-examination, and the WCJ must make appropriate credibility findings related to the IRE and the performing physician. The claimant, obviously, may introduce his own evidence regarding his degree of impairment to rebut the IRE findings."

D. *Retirement/Voluntary Withdrawal from the Workforce*

- [*City of Pittsburgh v. Workers' Compensation Appeal Board \(Robinson\)*, No. 1770 C.D. 2009 \(Pa.Cmwlt., September 22, 2010\)](#)
 - **Holding:** In order to show that efforts to return a claimant to the workforce would be unavailing because a claimant has retired/voluntarily withdrawn from the workforce, an employer must show, by the totality of the circumstances, that the claimant has chosen not to return to the workforce. The Court noted that, to impose a lesser standard on the employer, would be inconsistent with the humanitarian purposes of the Act.

E. *Social Security Offsets*

- [*Muir v. Workers' Compensation Appeal Board \(Visteon Systems LLC\)*, No. 274 C.D. 2010 \(Pa.Cmwlt., October 1, 2010\)](#)
 - **Holding:** An employer is not entitled to a retrospective offset for Social Security benefits. To permit otherwise might subject claimants to large retrospective offsets if a large amount of time elapsed between the time the claimant received the LIBC-756 forms.

IV. *Unemployment Compensation*

A. *Willful Misconduct - Grounds*

- [*Oliver v. Unemployment Compensation Board of Review*, No. 1798 C.D. 2009 \(Pa Cmwlt., September 1, 2010\)](#)
 - **Holding:** Failing to supervise all of the children in a worker's care at a day care center constitutes willful misconduct, precluding a worker from receiving unemployment compensation benefits.

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