

A Summary of Recent Pennsylvania & Federal Appellate Court Decisions

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REPORTING DECISIONS THROUGH FEBRUARY 28, 2011

PENNSYLVANIA APPELLATE & U.S. SUPREME COURT DECISIONS

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Civil Litigation

A. Admissibility of Evidence - Drugs & Alcohol

☐ [Knowles v. Levan, 2011 PA Super 31 \(February 15, 2011\)](#)

- **Holding:** The admission of evidence relating to the defendant's consumption of drugs and alcohol must be harmful or prejudicial to constitute reversible error. Evidence relating to the consumption of drugs and alcohol is not relevant, however, to the determination of damages when negligence is conceded.

B. Admissibility of Evidence - Consumption of Drugs & Alcohol

☐ [Commonwealth Financial Systems, Inc. v. Smith, 2011 PA Super 30 \(February 14, 2011\)](#)

- **Holding:** Pennsylvania courts have not adopted the federal "rule of incorporation," which provides that the record a business takes custody of is "made" by the business. Rather, under Pa.R.E. 8003(6), business records consisting of documents generated by third parties, which are not sufficiently authenticated, are inadmissible. Of note, this case involved a claim for payment of credit card debt filed by a company whose sole business is debt purchasing and collection; these cases have become quite common.

C. Attorney's Fees - Award on Appeal

☐ [Feingold v. Hendrzak, 2011 PA Super 34 \(February 22, 2011\)](#)

- **Holding:** An appellate court may *sua sponte* award attorney's fees Pa.R.A.P. 2744 against a party, in this case a former Pennsylvania attorney who was disbarred, who repeatedly files vexatious litigation when "the appeal is wholly frivolous ... or that the conduct of the participant against costs are imposed is dilatory, obdurate or vexatious."

D. Products Liability/Pharmaceutical Claims

☐ [Daniel v. Wyeth Pharmaceuticals, Inc., 2011 PA Super 23 \(February 7, 2011\)](#)

- **Holding 1:** In order to award a new trial based upon after-discovered evidence, the evidence must have been discovered after the trial and must be of such a nature that it could not have been obtained at trial with reasonable diligence, must not be cumulative or merely impeach credibility, and must be such as would likely compel a different result. Any expert "with similar education and experience" to a physician's is qualified to opine on the adequacy of a drug's warning label.

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!

- **Holding 2:** In order to bar a pharmaceutical products liability claim based upon the "learned intermediary doctrine," the defendant must establish with sufficient evidence that the physician would have changed his prescribing decision if presented with an adequate warning.
- **Holding 3:** Federal constitutional law does not preclude a punitive damages award when all of the defendant's conduct relevant to the jury's assessment of the award of punitive damages occurred in Pennsylvania, even if the plaintiff resides in another state.

E. Property Owner Liability - "Retained Control Exception"

☐ [Beil v. Telesis Construction, Inc., No. 13 EAP 2009 \(Pa., January 19, 2011\)](#)

- **Holding:** For a property owner to be liable under the "retained control" exception, and consistent with the *Restatement (Second) of Torts*, § 414, it is insufficient that the property owner has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations that need not necessarily be followed, or to prescribe alterations and deviations. Rather, there must be such a retention of the right of supervision that the contractor is not entirely free to perform the work in its own way. Thus, a property owner retaining a certain degree of authority over safety issues, such as supervising and enforcing safety requirements, and even imposing its own safety requirements at a work site, does not constitute control for purposes of imposing liability under the "retained control exception." Justice McCaffery filed a [dissenting opinion](#).

II. Ethics & Professional Responsibility

A. Attorney- Client Privilege

☐ [Gillard v. AIG Insurance Co, No. 10 EAP 2010 \(Pa., February 23, 2011\)](#)

- **Holding:** The attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice. Justice Eakin filed a [dissenting opinion](#); Justice McCaffery also filed a [dissenting opinion](#).
- **This is an important decision, which reverses prior decisions holding that the attorney-client privilege *only* applies to communications *to* attorneys from clients, and not communications *from* attorneys to clients.**

III. Workers' Compensation

A. Credibility Determinations

☐ [Hershgordon v. Workers' Compensation Appeal Board \(Pepboys\), No. 2031 C.D. 2010 \(Pa.Cmwlt., February 8, 2011\)](#)

- **Holding:** A party may not challenge or second-guess a Workers' Compensation Judge's credibility determinations under Section 422(a) of the Act, 77 P.S. § 834. An appellate court may not reweigh evidence or substitute its judgment based upon a party's disagreement with a Worker's Compensation Judge's findings and credibility determinations.

B. *Scope of Employment - Furtherance of Employer's Business*

□ [Penn State University v. Workers' Compensation Appeal Board \(Smith\), No. 630 C.D. 2010 \(Pa.Cmwlt., February 22, 2011\)](#)

- **Holding:** A claimant was not in furtherance of the employer's business or affairs, and therefore not entitled to workers' compensation benefits, for injuries that occurred when he jumped down a flight of stairs after leaving the dorm he was cleaning to take a one-half hour unpaid lunch leave at an on-campus dining facility where the claimant had an employer-sponsored meal plan. This decision appears to focus more on claimant's stupidity and is distinguishable from cases holding that employees injured in similar situations (*i.e.*, taking a break while remaining on an employer's premises) are entitled to benefits under the Act.

IV. Unemployment Compensation

A. *Overpayments*

□ [Stelter v. Unemployment Compensation Board of Review, No. 1219 C.D. 2010 \(Pa.Cmwlt., February 16, 2011\)](#)

- **Holding:** A claimant who receives an over-payment of emergency unemployment compensation may be required to repay the benefits under Section 4001(b) of the Emergency Unemployment Compensation Law, 26 U.S.C. § 3304. Although the over-payment was not claimant's fault, requiring such repayment is not contrary to equity and good conscience because claimant received both benefits concurrently.

B. *Good Cause for Untimely Appeal*

□ [Russo v. Unemployment Compensation Board of Review, No. 791 C.D. 2010 \(Pa.Cmwlt., February 16, 2011\)](#)

- **Holding:** A claimant who fails to follow the instructions in the Notice of Determination does not show good cause for an appeal *non pro tunc*. The failure is not an extraordinary circumstance involving a non-negligent act, fraud or breakdown in administrative process.

V. Amendments to Pennsylvania Rules of Appellate Procedure

A. *Rule 1114 ("Considerations Governing Allowance of Appeal")*

□ [In Re: Amendment of the Pennsylvania Rules of Appellate Procedure, No. 208 Appellate Procedural Rules Docket \(Pa., February 4, 2011, Effective March 7, 2011\)](#)

- The Court has clarified the bases on which it will consider granting a petition for allocatur:
- the holding of the intermediate appellate court conflicts with another intermediate appellate court's opinion;
 - the holding of the intermediate appellate court conflicts with a holding of the Pa. Supreme Court or the U.S. Supreme Court on the same legal question;
 - the question presented is one of first impression;
 - the question presented is of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court;
 - the issue involves the constitutionality of a statute of this Commonwealth;
 - the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority; or
 - an intermediate appellate court has erroneously entered an order quashing or dismissing an appeal.

UNITED STATES SUPREME COURT DECISION

A. Federal Motor Vehicle Safety Standards - Preemption

- [Williamson v. Mazda Motor of America, Inc., No. 08-1314, \(U.S., February 23, 2011\)](#)
- **Holding:** Under ordinary conflict preemption principles, a state law that "stands as an obstacle to the accomplishment" of a federal law is preempted. In this case, Federal Motor Vehicle Safety Standard 208, which requires auto manufacturers to install seat belts on the rear seats of passenger vehicles, does not preempt state tort suits claiming that manufacturers should have installed lap-and-shoulder belts, instead of lap belts, on rear inner seats because the regulation made clear that manufacturer choice was an important means for achieving the goals of this particular federal regulation.

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