

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH DECEMBER 15, 2011

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

A. *Admissibility of Evidence*

□ [*Schuenemann v. Dreemz, LLC, 2011 PA Super 236 \(November 4, 2011\)*](#)

- **Holding 1:** In a Dram Shop Act claim under 47 Pa.C.S.A. § 4-493, evidence about an establishment's compliance with the responsible alcohol management provisions of the Liquor Code, as well as evidence regarding internal policies for employees with regard to service of alcohol to visibly intoxicated persons, is relevant and material to the issue of whether the establishment served alcohol to a visibly intoxicated person.
- **Holding 2:** Although a person's blood alcohol content (BAC) alone may not be admitted for the purpose of proving intoxication, a BAC may be introduced to corroborate the testimony of witnesses. Furthermore, if there is extensive evidence of a person's intoxication through a person's conduct and behavior, the introduction of testimony about the legal BAC limit for operating a vehicle in Pennsylvania may be considered harmless.

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. *Asbestos Litigation*

□ [*Howard v. A.W. Chesterton Co., 2011 PA Super 230 \(October 28, 2011\)*](#)

- **Holding:** When ruling upon a motion for summary judgment in an asbestos case, a trial court must make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury. The Court must, however, continue to evaluate the evidence in a light most favorable to the non-moving party.

C. *Chiropractic Practice Act and MVFRL*

□ [*State Farm Mutual Automobile Ins. Co. v. Cavoto, 2011 PA Super 250 \(November 21, 2011\)*](#)

- **Holding:** The Chiropractic Practice Act (CPA), 63 P.S. §§ 625.101-625.1106 and the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa.C.S. §§ 1701-1799.7, permit licensed chiropractors to delegate certain adjunctive procedures to unlicensed support personnel and seek reimbursement from insurers, provided the procedures are performed under the direct supervision of a licensed chiropractor. Determinations must be made on a case-by-case basis, in which the trial court must evaluate whether the procedure, or an aspect of the procedure, requires formal education or training.

D. Class Certification

- [*Samuel-Bassett v. Kia Motors America, Inc., Nos. 22, 23 & 24 EAP 2008 \(December 2, 2011\)*](#)
 - **Holding:** Because reliance is not an element of the cause of action for breach of contract; therefore, in the context of class certification, it is unnecessary to prove individual reliance on a written warranty or contract. Justice Saylor filed a [dissenting opinion](#).

E. Complaint - Pleading - Contracts - Pa.R.Civ.P. 1019

- [*Discover Bank v. Stucka, 2011 PA Super 241 \(November 14, 2011\)*](#)
 - **Holding:** Although Pa.R.Civ.P. 1019 requires a plaintiff to attach a copy of any writings upon which the Complaint is based, provided the Complaint apprises the defendant of the nature and extent of plaintiff's claim so that the defendant has notice of what the plaintiff intends to prove at trial. A party is permitted, however, to proceed, and Preliminary Objections should be denied, when the plaintiff fails to include the writing but provides sufficient notice for the defendant to be able to defend against the claim.

F. Default Judgment

- [*Kelly v. Siama, 2011 PA Super 234 \(November 3, 2011\)*](#)
 - **Holding:** A default judgment may be opened if the moving party has (1) promptly filed a petition to open the default judgment, (2) provided a reasonable excuse or explanation for failing to file a responsive pleading, and (3) pleaded a meritorious defense to the allegations contained in the complaint. The moving party must offer a reasonable excuse or explanation for its inactivity and delay in failing an answer to the original complaint.

G. Discovery - Expert Witness

- [*Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity, 2011 PA Super 251 en banc \(November 23, 2011\)*](#)
 - **Holding:** Pa.R.Civ.P. 4003.5 *exclusively* controls discovery regarding expert testimony. Under this Rule, a party may serve expert interrogatories upon another party, but may not serve them, or other discovery, directly upon the expert. Thus, a party seeking information beyond the material specifically permitted under the Rule must first show cause and obtain a Court Order permitting the additional discovery.

H. Expert Testimony - Negligence Claim

- [*Brandon v. Ryder Truck Rental, Inc., 2011 PA Super 240 \(November 14, 2011\)*](#)
 - **Holding:** Expert witness testimony is necessary to prove negligence when, without an expert, it is not possible to discern whether (1) a defect existed at the time of the accident; (2) if it existed, whether it was discoverable in advance of the accident upon reasonable inspection; (3) whether the claimed defect is a design or manufacturing defect; or (4) whether the defect was a latent one not discoverable upon reasonable inspection.

I. Liability of a Contractor or Employee

- [*Gresik v. PA Partners, L.P., Nos. 20 & 21 WAP 2010 \(Pa., December 1, 2011\)*](#)
 - **Holding:** Section 385 of the *Restatement (Second) of Torts* imposes liability on a defendant who makes an alteration "on behalf of a possessor of land." Thus, Section 385 contemplates two distinct entities -- a possessor, and a person acting on a possessor's behalf -- and only pertains to the potential liability of the latter.

J. Local Rules of Civil Procedure

☐ [Cogley v. Duncan, 2011 PA Super 258 \(November 30, 2011\)](#)

- **Holding:** A Prothonotary cannot refuse to accept a complaint for filing by relying on an unpublished local rule of civil procedure.

K. Motion for Leave to Appeal *Nunc Pro Tunc*

☐ [Fischer v. UPMC Northwest, 2011 PA Super 247 \(November 18, 2011\)](#)

- **Holding:** Pursuant to Pa.R.Civ.P. 236, the Prothonotary must give written notice to the parties of the entry of an Order denying post-trial motions and to note on the docket that notice was given. The failure to do so constitutes a breakdown in court operations entitling a party to appeal *nunc pro tunc*.

L. Negligence *Per Se*

☐ [Sodders v. Fry, No. 403 C.D. 2011 \(Pa.Cmwlt., December 9, 2011\)](#)

- **Holding:** When a party admits to a violation of a statute designed to prevent public harm, the jury should be instructed on the issue of negligence *per se*.

M. Real Estate Exception to Sovereign Immunity

☐ [Nardella v. SEPTA, No. 123 C.D. 2011 \(Pa.Cmwlt., November 30, 2011\)](#)

- **Holding:** In order to meet the real estate exception to sovereign immunity, 42 Pa.C.S.A. § 8522(b)(4), a claimant must show that the ice on which he slipped was a dangerous condition that derived, originated from, or had its source on the government agency's property. Furthermore, allegations of improper maintenance of governmental property must result in a defect of the actual property.

N. Sovereign Immunity

☐ [Wright v. Denny, No. 530 C.D. 2011 \(Pa.Cmwlt., October 25, 2011\)](#)

- **Holding:** Claims brought under the Motor Vehicle Financial Responsibility Law (MVFRL) against Septa are barred by sovereign immunity if the accident occurred when the Septa bus was stopped. Specifically, the Court concluded that a stopped bus is not in "operation" and therefore the immunity exception is inapplicable.

☐ [Walhour v. Commonwealth, Dept. of Transportation, No. 390 C.D. 2011 \(Pa. Cmwlt., November 17, 2011\)](#)

- **Holding:** Under Section 8522 (b)(5) of the Sovereign Immunity Act, 42 Pa.C.S. § 8522(b)(5), sovereign immunity is waived if the Commonwealth agency had actual written notice of the dangerous condition of a highway. Because the sufficiency of the notice to the Commonwealth is a material fact, it should be decided by the trier of fact; thus, the entry of summary judgment would be in error.

O. Spoliation of Evidence

☐ [Pyertiz v. Commonwealth, State Police, No. 9 WAP 2009 \(Pa., November 23, 2011\)](#)

- **Holding:** Pennsylvania law does not recognize a cause of action for negligent spoliation of evidence. The Court chose not to recognize the tort because (1) the tort would permit the imposition of liability based on speculation, (2) would create the potential for the proliferation of litigation, and (3) would confer a benefit already sufficiently achievable under existing law. Justice Eakin filed a [concurring opinion](#) and Justice Todd also filed a [concurring opinion](#).

P. *Statute of Limitations - Guaranty*

□ [*Osprey Portfolio, LLC, v. Izett, 2011 PA Super 248 \(November 21, 2011\)*](#)

- **Holding:** A Guaranty is an instrument under seal, and claims for payment are governed by the 20-year statute of limitation, 42 Pa.C.S.A. § 5529(b)(1), not the four-year statute of limitation, 42 Pa.C.S.A. § 5525.

Q. *Unfair Trade Practices and Consumer Protection Law (UTPCPL)*

□ [*Meyer v. Community College of Beaver, No. 1141 C.D. 2008 \(Pa.Cmwlt. en banc, October 27, 2011\)*](#)

- **Holding:** Because the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201.1-201-9.3, (1) uses the term "person" to mean both plaintiff and defendant, (2) includes provisions for suits in the public interest, and (3) provides additional filters to protect all "persons," a community college is considered a "person" and is subject to suit under the statute. In addition, a community college is not immune under the Tort Claims Act when the claims relate to the sale of educational services, and sound in contract not tort. In dissenting opinions, Judge Pelligrini argued that the community college should have been deemed immune from suit because (1) the claim sounded in tort not contract and (2) the Act should not apply because a governmental agency does not engage in the business of "trade or commerce." There were multiple dissenting and concurring opinions.

II. UNEMPLOYMENT COMPENSATION

A. *Necessitous and Compelling Resignation*

□ [*Earnest v. Unemployment Compensation Board of Review, No. 1823 C.D. 2010 \(Pa.Cmwlt., November 3, 2011\)*](#)

- **Holding:** Perpetual lack of work, a reduction in available work to a few days per month, and the refusal to accommodate a reasonable scheduling request are necessitous and compelling reasons to resign from employment entitling a claimant to unemployment compensation benefits.

III. WORKERS' COMPENSATION

A. *Burden of Proof*

□ [*Soja v. Workers' Compensation Appeal Board \(Hillis-Carnes Engineering Associates\), No. 455 C.D. 2011 \(Pa. Cmwlt., November 7, 2011\)*](#)

- **Holding:** While surveillance video is not sufficient evidence to satisfy an employer's burden of proof in a termination petition, a suspension petition, or a petition to reduce benefits from total to partial disability, video may be used to impeach credibility and to establish facts.

B. *Calculation of Average Weekly Wage*

□ [*Bucceri v. Workers' Compensation Appeal Board \(Freightcar America Corp.\), No. 2021 C.D. 2010 \(Pa.Cmwlt., November 22, 2011\)*](#)

- **Holding:** Unemployment Compensation benefits are not included in the calculation of average weekly wage (AWW) under Section 309 of the Workers' Compensation Act, 77 P.S. § 582. Supplemental unemployment benefits payments to a claimant under a collective bargaining agreement are "in the nature of wages," however, and should be included in the calculation of the average weekly wage.

C. *Fee Review*

- [*Roman Catholic Diocese of Allentown v. Bureau of Workers' Compensation Fee Review Hearing Office \(Lehigh Valley Health Network\), No. 2711 C.D. 2010 \(Pa.Cmwlt., October 28, 2011\)*](#)
 - **Holding:** Under the Workers' Compensation Cost Containment regulations, 34 Pa. Code § 127.252, a provider seeking review of a fee dispute must file a fee review application no more than 30 days following notification of disputed treatment or 90 days following the original date for the treatment subject to dispute. An employer's explanation of benefits (EOB) qualifies as notification of disputed treatment and a provider has 30 days from an EOB to file a fee review application.

D. *Modification of NCP*

- [*Namani v. Workers' Compensation Appeal Board \(A. Duie Pyle\), No. 552 C.D. 2011 \(Pa.Cmwlt., December 6, 2011\)*](#)
 - **Holding:** A medical expert's opinion on causation is legally insufficient if the expert is unaware of or does not address an earlier decision granting a termination of benefits, because the opinion on causation is contrary to the established facts of record and are based on inaccuracies. Further, res judicata bars a claimant from modifying a Notice of Compensation Payable when evidence of an injury is available to the claimant before a termination petition is granted.

E. *Specific Loss*

- [*Argyle v. Workers' Compensation Board \(John J. Kane McKeesport Regional Center and UPMC Work Partners Claims Management\), No. 43 C.D. 2011 \(Pa.Cmwlt., November 10, 2011\)*](#)
 - **Holding 1:** In order to establish a specific loss, a claimant must present medical evidence to show that the loss of use is permanent and for all practical intents and purposes. If the medical evidence presented is contrary to the established facts in the record or based on assumptions not in the record, the medical opinion is valueless and not competent.
 - **Holding 2:** In a modification petition, a Claimant has the burden to prove, through the presentation of competent medical evidence, that his or her condition has changed since the prior petition hearing. A claimant fails to demonstrate a change in physical condition if he or she presents medical evidence that predates the prior WCJ Order that determined the extent of the claimant's injury.

F. *Statutory Immunity Under the Workers' Compensation Act*

- [*Soto v. Nabisco Inc., 2011 PA Super 249 \(November 21, 2011\)*](#)
 - **Holding:** The "dual persona" doctrine permits a worker to sue his or her employer only if the employer has a distinct and separate role that could subject it to liability for injuries to an employee. Absent such circumstances, an injured worker is barred by the exclusivity provisions of the Workers' Compensation Act, 77 P.S. § 481(a), from recovering against an employer, even if the employer is the successor in interest to a prior employer.

G. *Supersedeas Fund*

- [*Comcast Corp. v. Workers' Compensation Appeal Board \(Jones\)*, No 2208 C.D. 2010 \(Pa.Cmwlt., December 12, 2011\)](#)
 - **Holding:** Under Section 443(a) of the Act, an employer is entitled to reimbursement from the Supersedeas Fund when (1) the WCJ found material misrepresentations by Claimant at the time Employer issued the Notice of Compensation Payable, and (2) the employer made four years of compensation payments to someone who was not entitled to those payments.

H. *Supersedeas Fund Reimbursement*

- [*Bureau of Workers' Compensation v. Workers' Compensation Appeal Board \(Excalibur Insurance Management Service\)*, No. 376 C.D. 2011 \(Pa.Cmwlt., November 17, 2011\)](#)
 - **Holding:** The Workers' Compensation Judge and the Appeal Board have subject matter jurisdiction to adjudicate requests for Supersedeas Fund Reimbursement when the decisions and orders under review were based on the Workers' Compensation Act and not the Heart and Lung Act. Further, when an employer is self-insured for workers' compensation purposes, and is required to pay Heart and Lung benefits in addition to workers' compensation benefits, two-thirds of the amount paid automatically represent workers' compensation benefits.

I. *Utilization Review Determinations*

- [*J.D. Landscaping v. Workers' Compensation Appeal Board \(Heffernan\)*, No. 1866 C.D. 2010 \(Pa.Cmwlt., December 2, 2011\)](#)
 - **Holding:** Because a Utilization Review determination concerns only the reasonableness and necessity of the treatment, the determination is irrelevant in determining whether a decedent's death was causally related to the decedent's work-related injury. Therefore, even if a UR determination finds medical treatment to be unnecessary, death as a result of the unnecessary medication treatment is still causally linked to the decedent's work injury.

J. *WCJ Determinations*

- [*Boyertown Foundry and ESIS Wilmington WC v. Workers' Compensation Appeal Board \(Martinez\)*, No. 1273 C.D. 2011 \(Pa.Cmwlt., December 8, 2011\)](#)
 - **Holding:** A claimant is precluded from raising the same cause of action, or the same previously litigated and validly determined issues of law or fact, regardless of whether the WCJ's Order specifically dismissed the Claim Petition "with prejudice," because the language is mere surplus under the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges.

IV. ALLOCATUR GRANTED

The Pennsylvania Supreme Court has granted allocatur in the following matters on the issues stated:

- [*Marlette v. State Farm, Nos. 17 & 18 WAL 2011 \(Pa., November 7, 2011\)*](#)
 - Did the Superior Court err (as identified in the dissenting opinion) in holding, in conflict with *Allen v. M[e]llinger*, that plaintiffs may recover delay damages based on the full amount of the jury verdict rather than on the legally recoverable molded verdict, which was reduced to reflect the insurance policy limits that plaintiffs were permitted to receive?

- [*Newmann Development Group of Pottstown, LLC v. Genuardi's Family Markets, Inc. and Safeway Inc., No. 458 MAL 2011 \(November 1, 2011\)*](#)
 - Did the Superior Court err in quashing Genuardi's appeal for failure to file a post-trial motion, where the appeal was from the trial court's recalculation of damages in accordance with the Superior Court remand order and where no additional evidence was received?

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and make www.palegallinks.com your home page for Pennsylvania research.**

The screenshot shows a Microsoft Internet Explorer browser window displaying the website <http://www.palegallinks.com/>. The browser's address bar shows the URL, and the page title is "Pennsylvania Legal Research Links". The website content includes a navigation menu with links to Home, Philadelphia Legal Websites, Pennsylvania Legal Websites, Dan Siegel's Summaries of Appellate Decisions, Philadelphia Government Websites, Pennsylvania Government Websites, Pennsylvania County Websites, and Find Your Pennsylvania Legislator. The main content area features a "Welcome to Pennsylvania Legal Research Links" message, identifying it as the "Your Home Page For Pennsylvania Legal Research". A central paragraph explains that the website is a service of Havertown, Pennsylvania Attorney Daniel J. Siegel, the Law Offices of Daniel J. Siegel, LLC, and Integrated Technology Services, LLC, designed for attorneys and legal researchers. Below this, three paragraphs provide instructions on how to find state courts, state agencies, and federal agencies, as well as how to find elected officials and recent appellate decisions. A final paragraph encourages users to make the website their homepage for research. On the right side, there are two columns of "Popular Links" and "Federal Court Links". The "Popular Links" column includes links to Pennsylvania Appellate Court Slip Opinions, Check Your Pennsylvania CLE Record, Pennsylvania Rules of Civil Procedure, Pennsylvania Rules of Professional Conduct, Find Pennsylvania Local Court Rules, Pennsylvania Local Government Websites, Pennsylvania State and County Bar Associations, Pennsylvania County Court Websites, and Contact Your Pennsylvania Legislator. The "Federal Court Links" column includes links to U.S. Supreme Court, All Federal Courts, Bankruptcy Courts, Rules of Civil Procedure, Rules of Evidence, and PACER. At the bottom of the page, there is a footer with contact information and a copyright notice for 2005 Integrated Technology Services, LLC and the Havertown, Pennsylvania Law Offices of Daniel J. Siegel, LLC.