

A Summary of Recent Pennsylvania State & Federal Trial & Appellate Court Decisions

By Daniel J. Siegel, Esquire

LAW OFFICES OF DANIEL J. SIEGEL, LLC

66 West Eagle Road • Suite 1 • Havertown, PA 19083-1425
(610) 446-3457 • Fax (484) 636-3993 • E-mail dsiegel@danieljsiegel.com

REPORTING DECISIONS THROUGH DECEMBER 31, 2012

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

A. *Affirmative Defenses – Products Liability Actions*

- [Reott v. Asia Trend Inc., No. 27 WAP 2011 \(Pa. November 26, 2012\)](#)

- **Holding:** In a strict liability products liability claim under Section 402A of the *Restatement (Second) of Torts*, a defendant must plead and prove, as an affirmative defense, that the plaintiff acted in a highly reckless manner, if such conduct is asserted. Highly reckless conduct is that which occurs when the plaintiff would have been injured despite the curing of any alleged defect, or is so extraordinary and unforeseeable as to constitute a superseding cause, if such conduct is asserted. To prove that a plaintiff would have been injured despite any curing of a defect or that the conduct was extraordinary and unforeseeable, a defendant has the burden of demonstrating that the injured party or decedent knew or had reason to know of facts which created a high degree of risk of physical harm to himself or that he deliberately proceeded to act, or failed to act, in conscious disregard of that risk. Justice Saylor filed a [concurring opinion](#), and Justice Todd filed a [dissenting opinion](#).

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 decision for you to read in its entirety. Try it!

B. *Arbitration – Uniform Arbitration Act Appeals*

- [Schwarz v. Wells Fargo Advisors, LLC, 2012 PA Super 265 \(December 6, 2012\)](#)

- **Holding:** Under Section 7314 of the Uniform Arbitration Act, 42 Pa.C.S.A., a trial court is forbidden from vacating an arbitration award for lack of an agreement to arbitrate when the existence of an agreement has already been determined under Section 7304 of the Act. Once the trial court confirms that the claim is subject to arbitration, and an award is entered as a judgment, then the appellant may raise the issue of the existence of an agreement to arbitrate on appeal to the Superior Court.

C. *Legal Malpractice Claims – Damages*

- [Coleman v. Duane Morris, LLP, 2012 PA Super 281 \(December 20, 2012\)](#)

- **Holding:** A plaintiff may be awarded consequential damages in a legal malpractice claim in assumpsit when the underlying action was a civil action. Such damages as those that would naturally and ordinarily result from the breach, were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and are capable of being proved with reasonable certainty.

D. Delay Damages

□ [Marlette v. State Farm Mutual Automobile Insurance Co., No. 41 WAP 2011 \(Pa. December 28, 2012\)](#)

- **Holding:** Pursuant to Pa.R.Civ.P. 238, a plaintiff may recover delay damages only on the amount of legally-recoverable damages; in the context of an uninsured motorist claim, the plaintiff's recovery is limited to the amount of the legally-recoverable molded verdict, as reflected by the insurance policy limits. Justice McCaffery filed a [dissenting opinion](#).

E. Affirmative Defenses – Assumption of Risk

□ [Longwell v. Giordano, 2012 PA Super 245 \(November 8, 2012\)](#)

- **Holding:** In order to grant summary judgment, the trial court must first conclude, as a matter of law, that the party consciously appreciated the risk that attended a certain action, assumed the risk of injury by engaging in that action despite the appreciation of the risk involved, and that the injury sustained was, in fact, the same risk or injury that was appreciated and assumed. Although this case does not establish new law, it is an excellent exposition of the law vis-à-vis slip and fall claims in which the defendant raises assumption of the risk as a defense.

F. Duty to Warn

□ [Seebold v. Prison Health Services, Inc., No. 9 MAP 2011 \(Pa. December 28, 2012\)](#)

- **Holding:** A physician who treats prison inmates does not have a common law duty to warn specific corrections officers or other third parties that a particular inmate has a communicable disease. While declining to expand a prison physician's common law duty, the Court noted that "the present appeal does not afford an adequate foundation to make an informed social policy assessment which would support the imposition of a new affirmative duty on physicians to make third-party interventions." Justice McCaffery filed a [dissenting opinion](#).

G. MCARE Act – Expert Testimony

□ [Anderson v. McAfoos, No. 9 WAP 2011 \(Pa. December 18, 2012\)](#)

- **Holding:** When a party does not properly raise and preserve a claim that an expert's credentials satisfy the requirements of Section 512(e) of the MCare Act, 40 P.S. §§ 1303.101-1303.1115, the party cannot later assert that the expert should have been permitted to render standard-of-care testimony in an action against a board-certified general surgeon. There is also no general legal requirement that an objection to a proposed expert's qualifications under the MCARE Act be made prior to voir dire, and a case management order that merely establishes deadlines for filing pre-trial motions does not create such a requirement. Justice Baer filed a [concurring opinion](#), in which Justices Todd and McCaffery joined.

H. MCARE Act – Statute of Repose

□ [Osborne v. Lewis, 2012 PA Super 283 \(December 21, 2012\)](#)

- **Holding:** Under the MCare Act's statute of repose, 40 Pa.C.S.A. § 1303.513(a), no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract. Thus, when the alleged tort occurred on June 1, 2000, and suit was filed on July 24, 2007, the claim is barred by the statute of repose.

I. *New Trial*

□ [*Shelhamer v. Crane, 2012 PA Super 250 \(November 20, 2012\)*](#)

- **Holding:** The granting of a new trial is improper under Pa.R.Civ.P. 227.1(b) when no objection for inconsistency was raised when the verdict was rendered, thereby precluding the possibility that the error could have been corrected during trial.

J. *Independent Contractors*

□ [*Keefer v. Bob Nolan's Auto Service, Inc., 2012 Pa. Super. 255 \(Pa. Super. November 26, 2012\)*](#)

- **Holding 1:** An individual is an independent contractor, and the company that contracted with the individual cannot be held vicariously liable, when the contract between the parties stated that the individual was acting as independent contractor, that the contracting party shall not have nor shall it exercise any right of control as to the manner, methods or means employed by the contractor in the rendering of services, and that the contracting party would defend and indemnify the contractor from any and all claims, including punitive damages, court costs and attorney's fees, performed by the contractor and maintain its own liability insurance at its own expense.
- **Holding 2:** Under 75 Pa.C.S.A. § 6107 and the regulations found at 67 Pa.Code §§ 15.1-15.3, a tow truck may be an "authorized vehicle" permitted to use the medial opening in a highway when it is turning around in furtherance of public road service efforts.

K. *Pennsylvania Human Relations Act – Jurisdiction*

□ [*Blackman v. Lincoln National Corp., No. 10-6946, 2012 \(E.D. Pa. December 10, 2012\)*](#)

- **Holding:** Under the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 951, *et seq.*, an employee who neither works in nor resides in Pennsylvania, but who works at a business with its corporate headquarters and principal place of business in Pennsylvania, cannot seek relief under the PHRA.

L. *Unfair Trade Practices and Consumer Protection Law – Right to Jury Trial*

□ [*Fazio v. The Guardian Life Insurance Co. of America, 2012 PA Super 273 \(December 12, 2012\)*](#)

- **Holding:** There is no right to a jury trial for a private cause of action under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* because the UTPCPL did not codify common law claims of fraud, but instead created a separate and distinct cause of action.

M. *Motor Vehicle Insurance – Occupying a Vehicle/Trailer*

□ [*Barnes v. Keller, 2012 PA Super 259 \(November 27, 2012\)*](#)

- **Holding:** Under the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §102, a trailer that is attached to a truck tractor, which is then operated as one unit, may be classified as a motor vehicle. Moreover, an individual may be deemed to be "occupying" the vehicle when the individual is engaged in work that required use of the trailer and is in close proximity to the vehicle and using equipment attached to the trailer when he is struck. *The Law Offices of Daniel J. Siegel, LLC assisted counsel, Joseph Aversa, Esquire of Aversa & Linn, with the appeal of this matter.*

N. Real Estate Seller Disclosure Law

☐ [Milliken v. Jacono, 2012 PA Super 284 \(December 26, 2012\)](#)

- **Holding:** The occurrence of a murder/suicide on a property does not constitute a material defect to real estate such that a seller must disclose the fact under the Real Estate Seller Disclosure Law, 68 Pa.C.S.A. § 7102.

O. Streetlights – Duty to Maintain – Reasonable Care

☐ [Wilson v. Peco Energy Co., 2012 PA Super 279 \(December 20, 2012\)](#)

- **Holding:** A genuine issue of material fact exists upon which a jury could conclude that a defendant failed in its duty to maintain a streetlight with a reasonable duty of care when: (1) the defendant acknowledged that it had a duty to properly maintain the streetlight, (2) the streetlight was an antiquated and old, regular type light that was installed when the roadway was much narrower, and (3) the company had failed to update the light fixture for more than three decades despite converting other lights in most nearby intersections except the intersection in question.

P. Judgments by Confession – Reasonableness of Attorney's Fees

☐ [Graystone Bank v. Grove Estates, 2012 Pa. Super 274 \(Pa. Super. December 13, 2012\)](#)

- **Holding:** When a judgment by confession includes attorney's fees, the judgment must undergo a "reasonableness test" to determine if the fees are excessive on their face, thus requiring the court, if necessary, to open and/or modify the confessed judgment to make the fee amount reasonable.

Q. Removal of a Juror

☐ [Bruckshaw v. The Frankford Hospital of the City of Philadelphia, No. 47 EAP 2011 \(Pa. December 18, 2012\)](#)

- **Holding:** Removal of a juror can only be done by a trial court, on the record, with notice to the parties, for cause. Thus, when a juror is replaced by a court officer with an alternate juror after the jury retires to deliberate, without notice to the parties or the trial court, and no record has ever been developed concerning the incident, a new trial is warranted without the need to show prejudice. Chief Justice Castille filed a [concurring opinion](#), and Justice Eakin filed a [concurring and dissenting opinion](#).

R. Septa – Sovereign Immunity

☐ [Goldman v. Southeastern Pennsylvania Transportation Authority, No. 65 EAP 2010 \(Pa. December 19, 2012\)](#)

- **Holding:** The Southeastern Pennsylvania Transportation Authority (Septa) may not be considered an "arm" of the Commonwealth of Pennsylvania and, therefore, cannot be conferred sovereign immunity under the Eleventh Amendment from lawsuits brought by injured employees of its Regional Rail Division under the Federal Employees Liability Act, 45 U.S.C. §§ 51-60.

S. *Slip & Fall Claims – Summary Judgment*

□ [*Alexander v. City of Meadville*, 2012 PA Super. 266 \(December 7, 2012\)](#)

- **Holding:** A trial court does not abuse its discretion by entering summary judgment against a plaintiff who slipped and fell on an icy sidewalk when the plaintiff failed to offer any evidence suggesting it was foreseeable that the condition of the sidewalk would dangerously accumulate snow and ice and cause the type of injury from which plaintiff suffered. Moreover, consistent with Section 342 of the *Restatement (Second) of Torts*, the notice requirement is not met when the accident occurred well outside business hours on a weekend at a time when the defendant would not have had notice of the accumulation of ice and snow and did not know of the condition of the sidewalk. Finally, liability attaches under the "hills and ridges doctrine" only when the snow and ice has accumulated into unnavigable lumps and mounds, not when a patch of ice is smooth.

II. UNEMPLOYMENT COMPENSATION

A. *Voluntary Layoff Option Proviso*

□ [*Diehl v. Unemployment Compensation Board of Review \(ESAB Group, Inc.\)*, No. 51 MAP 2011 \(Pa. December 28, 2012\)](#)

- **Holding:** Section 402(b) of the Unemployment Compensation Law, 43 P.S. § 802(b), does not preclude the application of the voluntary layoff option proviso to early retirement plans offered pursuant to employer-initiated workforce reductions. Justice Saylor filed a [concurring opinion](#), and Justice Eakin filed a [dissenting opinion](#) in which Justice Todd joined.

III. WORKERS' COMPENSATION

A. *Effect of a Settlement Upon Unemployment Compensation Claims*

□ [*Bosch v. Unemployment Compensation Board of Review*, 639 C.D. 2012 \(Pa. Cmwlth. November 7, 2012\)](#)

- **Holding:** When an individual settles a workers' compensation claim without establishing that he suffered an injury compensable under the Workers' Compensation Act, and signs a Compromise and Release Agreement stating that the employer was not liable for the injury, the individual may not rely on Section 204(b) of the Workers' Compensation Act, 77 P.S. § 71(b), which permits an injured worker who suffers a compensable work-related injury to have his base year (for purposes of receiving unemployment compensation benefits) consist of the four complete calendar years immediately preceding the date of the work-related injury.

B. *Physical/Mental Injuries*

□ [*New Enterprise Stone & Lime Co. v. Workers' Compensation Appeal Board \(Kalmanowicz\)*, No. 1492 C.D. 2012 \(Pa. Cmwlth. December 6, 2012\)](#)

- **Holding:** In a physical/mental claim, a claimant must prove that a physical stimulus resulted in a mental disability, not that (1) he or she suffered a physical disability that caused a mental disability, or (2) the physical injury continues during the life of the psychic disability. Thus, an accident in which a claimant was involved in a head-on collision causing the death of the other driver before claimant's eyes, and disabling his loaded tractor-trailer causing it to descend an embankment, was sufficient to trigger the physical/mental standard.

C. ***Supersedeas Fund Reimbursement***

- **[Department of Labor and Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board \(Excelsior Insurance\), No. 46 MAP 2011 \(Pa. November 21, 2012\)](#)**
 - **Holding:** Pursuant to Section 443 of the Workers' Compensation Act, 77 P.S. § 999(a), payments made by a workers' compensation employer's insurance carrier constituted payments of compensation, and the employer's insurance carrier should therefore be reimbursed from the Supersedeas Fund for specific payments made to a claimant prior to the ultimate grant of supersedeas. The fact that the amounts of the payments were calculated to compensate the claimant for the costs of recovering a third party settlement does not, under either Section 443 or Section 319 of the Act, transform the relevant payments into something other than compensation. Justice Eakin filed a **[dissenting opinion](#)**, in which Chief Justice Castille joined.

IV. ALLOCATUR GRANTED

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

- **[Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co., No. 59 WAL 2012 \(November 28, 2012\)](#)**
 - Whether the Superior Court erred in concluding the Mechanics' Lien Law should be liberally construed?
 - Whether the Superior Court erred in *sua sponte* finding that purported contracts implied in fact control the parties' rights under the Mechanics' Lien Law, not the express contract which fails 49 P.S. [§] 1201 (5)?
 - Whether even liberal construction of the Mechanics' Lien Law would permit an employee of a contractor to assert a claim as a "subcontractor"?
- **[Susan Octave on Behalf of James Octave v. Walker, Nos. 115 & 116 WAL 2012 \(December 27, 2012\)](#)**
 - Given the [petitioners] do not explicitly waive the protections of 50 P.S. § 7111, given the [petitioners'] Amended Complaint does not allege injuries to mental health, given the [respondents] raise the question of mental health and seek the [petitioner's] pre-collision mental health records, and given the [respondents'] claim of mental health relies exclusively on the conclusions of a third party, did the [petitioners] put mental health at issue and impliedly waive the protections of 50 P.S. § 7111 though the act of filing the within lawsuit?
- **[Vanderhoff v. Harleysville Insurance Co., No. 375 MAL 2012 \(November 14, 2012\)](#)**
 - What constitutes "actual prejudice" to relieve an insurance company of its obligation to pay insurance benefits to an insured?
 - Should "actual prejudice" involve proof by an insurance carrier that it suffered a real material impairment of its ability to investigate and defend an uninsured claim?
 - What constitutes a reasonable basis for a trial court finding that prejudice exists in a late report of a phantom vehicle?

NEW JERSEY ADVISORY ETHICS OPINION

I. NEW JERSEY PRACTICE BY LAWYERS LICENSED IN STATES *OTHER* THAN NEW JERSEY

A. *Multijurisdictional or Crossborder Practice*

□ Supreme Court of New Jersey, Committee on the Unauthorized Practice of Law, Opinion 49: Multijurisdictional or Crossborder Practice Under Rule of Professional Conduct 5.5(b)(3)

- **Conclusion:** Pursuant to Rule of Professional Conduct 5.5(b)(3), an out-of-state lawyer representing an out-of-state client may engage in limited practice of New Jersey law provided all criteria in the pertinent “safe harbor” subparagraph are met. Furthermore, lawyers who engage in the practice of New Jersey law as multijurisdictional or crossborder practitioners must first register with the Clerk of the Supreme Court and pay the annual assessment pursuant to Rule 5.5(c)(3) and (6).

