

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH MAY 2, 2014

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION & PROCEDURE

A. *Discovery of Expert Communications*

- [*Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, No. 76 MAP 2012 \(Pa. April 29, 2014\)](#)
- [*This Divided Pa. Supreme Court Decision Results in Affirmance of the Superior Court*](#)

- **Order in Support of Affirmance:** Communications between counsel and an expert are privileged material pursuant to Pa.R.C.P. 4003.3 and 4003.5. In so ruling, the three Justices noted that “Rule 4003.3 balances the general rule of expansive discovery with the deep-rooted protection of attorney work product, and that “attempting to extricate the work product [provided to an expert] from the related facts will add unnecessary difficulty and delay into the discovery process.”
- **Order in Support of Reversal:** “This Court’s procedural rules do not establish a categorical prohibition against discovery of all correspondence between an attorney and an expert.” Consequently, “purely factual or other information -- such as evidence and scientific doctrines that an expert may consider when forming an opinion -- that does not represent core attorney work product, although contained within communications between counsel and an expert witness, does not fall within Rule 4003.3’s protective scope ... therefore, we would hold that it may be discovery -- so long as the mandates of Rule 4003.5 [concerning discovery related to expert testimony] are satisfied.”

B. *Judgment by Default – Basis for Opening*

- [*Stabley v. The Great Atlantic & Pacific Tea Co.*, 2014 PA Super 72 \(Pa.Super. April 10, 2014\)](#)
 - **Holding:** A party seeking to open a default judgment must aver, *inter alia*, a reasonable excuse for the delay in filing an Answer. In this case, the Court declined to open the default judgment because (1) the defendant failed to file a timely response to the Complaint, (2) the defendant failed to file a response within the 30 day extension granted by plaintiff’s counsel, (3) despite plaintiff’s counsel’s grant of additional time to file an answer, the defendant failed to do so, and (4) plaintiff’s counsel sent a Notice of Intention of Intent to Seek a Default Judgment, and then waited 15 days, rather than the requisite 10 days, to enter the default judgment.

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!

- *Of note is the Court's further comment about defense counsel's lament that plaintiff's counsel was not sufficiently courteous:*

“There is a measure of irony in Appellants’ somewhat opaque reference to [plaintiff’s] counsel’s “professional courtesies . . . previously extended” to Appellants’ counsel. By our lights, these repeated courtesies, both solicited and unsolicited, serve only to underscore the dilatory nature of Appellants’ continued failure to respond, especially inasmuch as they responded promptly upon learning of the entry of a default judgment. This evinced their ability to mobilize quickly when it suited them to do so. For these reasons, Appellants’ other proffered excuses also are inadequate to establish a reasonable basis for their delay in the face of [plaintiff’s] counsel’s repeated formal and informal reminders of their delinquency.”

C. *MCare Act - Statute of Repose*

- ☐ [*Bulebosh v. Flannery*, 2014 PA Super 79 \(Pa.Super. April 22, 2014\)](#)

- **Holding:** Claims resulting from a tort that occurs before the effective date of Medical Care Availability and Reduction of Error (MCare) Act, 40 P.S. § 1303.531, may be subject to the Act’s statute of repose if the cause of action resulting from the tort did not arise until after the effective date of the Act. When, as here, the injury, *i.e.*, the physical manifestation of the harm, occurred before the effective date of the MCare Act (before 2002), the statute of repose does not bar the action.

D. *Mechanics Liens*

- ☐ [*Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott’s Development Co.*, No. 36 WAP 2012 \(Pa. April 17, 2014\)](#)

- **Holding:** The Mechanics’ Lien Law of 1963 does not authorize a union’s employee benefits trust fund to file a mechanics’ lien claim on behalf of union members who performed work for a construction contractor.

E. *Motor Vehicle Financial Responsibility Law - Peer Reviews*

- ☐ [*Doctor’s Choice Physical Medicine & Rehabilitation Center, P.C. v. Travelers Personal Insurance Co.*, 2014 PA Super 92 \(Pa.Super. May 2, 2014\)](#)

- **Holding:** Under Section 1704(b)(4) of the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa.C.S.A., a medical provider is entitled to an award of attorney’s fees when it challenges an insurer’s denial of payment for medical care based on insurer’s failure to obtain a valid completed peer review. The Court considered the language of the Act, *i.e.*, “challenged before a PRO [peer review organization]” and held that a determination by a PRO based on anything other than a peer review as specifically set forth in 31 Pa. Code § 69.53(e) is not a challenge before a PRO, which is a specific type of review based on objective professional norms under Section 1797(b)(4) of the MVFRL.

F. *Venue*

- ☐ [*Scarlett v. Mason*, 2014 PA Super 76 \(Pa.Super. April 14, 2014\)](#)

- **Holding:** In the absence of an agreement to the contrary, venue is proper in a breach of contract action in the county where payment was due.

II. WORKERS' COMPENSATION

A. *Commuting/Ridesharing/Course & Scope of Employment*

□ [*National Casualty Co. v. Kinney*, 2014 PA Super 84 \(Pa.Super. April 25, 2014\)](#)

- **Holding:** An employee is not within the course and scope of his or her employment when commuting to work while participating in a ridesharing arrangement in which (1) the employee selects a van or van company of his or her choosing, (2) participating employees deal directly with van companies to maximize the value of their vouchers, (3) the employer does not require employees to participate in the arrangement, and (4) participating employees can opt-out at any time. In permitting plaintiff to proceed with his third party action, the Court affirmed that the third party claim was not barred by the Workers' Compensation Act; the opinion also offers an excellent overview of the relationship between the Workers' Compensation Act and the Ridesharing Act, 55 P.S. § 695.1, *et seq.*

B. *De Facto NCP & Burden of Proof*

□ [*Furnari v. Workers' Compensation Appeal Board \(Temple Island\)*, No. 1171 C.D. 2013 \(Pa.Cmwlth. April 10, 2014\)](#)

- **Holding 1:** Payment of an injured worker's salary and medical expenses in lieu of compensation constitutes a *de facto* Notice of Compensation Payable.
- **Holding 2:** When there is both a documented work-related injury, either by adjudication or acceptance such as a Notice of Compensation Payable, and that injury gives rise to a disability, *i.e.*, loss of earning power, the proper burden of proof is that of a reinstatement petition. In the absence of both or either of these prongs, the burden of proof is that of a claim petition.
- **Holding 3:** Because strictness of pleadings is not required in workers' compensation cases, and in the interest of judicial economy, a Workers' Compensation Judge is empowered to take appropriate action based on the evidence presented. Thus, in this case, in which a claimant sought reinstatement of suspended benefits, even though it was alleged that the suspension was improper, the employer was not required to file a suspension petition in order to obtain that relief. Rather, by filing an Answer denying the obligation to pay wage losses, the WCJ could grant a suspension.
- **Note:** In this case, the WCJ's decision suspended benefits that had been previously unilaterally suspended. Thus, the question remains whether the Court will countenance the same result if benefits were ongoing.

(Continued on next page)

C. *Joinder - Timeliness*

- [*Pennsylvania Uninsured Employers Guaranty Fund v. Workers' Compensation Appeal Board \(Dudkiewicz\), No. 1540 C.D. 2013 \(Pa.Cmwlt. April 7, 2014\)*](#)

- **Holding:** Absent a request for an extension, a party must file a petition for joinder under 34 Pa. Code § 131.36 within twenty days of the date when evidence is presented *regarding* the reason for which joinder is sought, and not twenty days from the date on which evidence is presented *establishing* a reason for requesting joinder. This case is also remarkable because the Court (1) emphasized that the UEGF is the equivalent of an insurer, and (2) UEGF must comply with all applicable Rules of Practice and the language of the Workers' Compensation Act and may not disregard these policies and procedures.

D. *Pension Offset - Waiver*

- [*City of Pittsburgh v. Workers' Compensation Appeal Board \(Wright\), No. 329 C.D. 2013 \(Pa.Cmwlt. May 1, 2014\)*](#)

- **Holding:** An employer must send/issue the Form LIBC-756 ("Employee's Report of Benefits for Offsets") before seeking an offset for pension benefits under Section 204(a) of the Act, 77 P.S. § 71(a) and 34 Pa. Code absent a request for an extension. Because the claimant failed to raise the issue of the proper issuance of the form, the issue was raised and the employer was entitled to an offset and to recoup any overpayment from the claimant. Further, a recoupment of an overpayment that occurred for six months or less eliminates the need for a WCJ to address whether recoupment creates a hardship.

III. ALLOCATUR GRANTED

The Pennsylvania Supreme Court has agreed to decide the following case based upon the issue stated:

A. *Bad Faith – Assignment of Claims*

- [*Allstate Property and Casualty Insurance Co. v. Wolfe, No. 23 MM 2014 \(Pa. April 24, 2014\)*](#)

- Under Pennsylvania law, can an insured tortfeasor assign his or her bad faith claim against an insurer, under 42 Pa.C.S. § 8371, to an injured third party?

IV. RULES CHANGES

A. *Pennsylvania Rules of Civil Procedure*

- [*Pa.R.Civ.P. 230.2*](#)

- By Order dated April 23, 2014, the Pennsylvania Supreme Court suspended the application of Pa.R.Civ.P. 230.2, which permitted a trial court to initiate proceedings to terminate a case in which there has been no activity of record for two years or more by serving a notice of proposed dismissal upon the parties. The Order notes that the issues related to this Rule are under review.

(Continued on next page)

B. *Pennsylvania Rules of Appellate Procedure*

□ [*Pa.R.A.P. 2119*](#)

- By Order dated April 14, 2014, the Pennsylvania Supreme Court eliminated the requirement that briefs include parallel citations to the state court cites. From now on, you only need to cite to the National Reporter System. This means you only need to cite to A.2d or A.3d Reporters, and not to Pa. or Pa. Super. Ct. as in the past.

V. ETHICS OPINIONS

A. *Lawyer Review of Jurors' Internet Presence*

□ [*American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466*](#)

- Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.
- A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).
- The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).
- In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

PENNSYLVANIA WORKERS'
COMPENSATION LAW:
THE BASICS

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