

# A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH JULY 31, 2014

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## PENNSYLVANIA APPELLATE COURT DECISIONS

### I. Arbitration Agreements

#### A. *Arbitration Agreements-Enforceability*

- [MacPherson v. Magee Memorial Hospital for Convalescence, 2014 PA Super 143 \(Pa.Super., July 10, 2014\)](#)

- **Holding:** A nursing home's Arbitration Agreement is enforceable unless (1) there is evidence of mental incapacity to enter into the agreement, and (2) the agreement is substantively or procedurally unconscionable. The Court affirmed, however, that while wrongful death actions are derivative of a decedent's injuries, they are not derivative of a decedent's rights, and therefore belong to a decedent's beneficiaries as opposed to the deceased individual.

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!

## II. Civil Litigation and Procedure

### A. *Civil Procedure-Class Certification*

- [\*In Re: Sheriff's Excess Proceeds Lit., No. 1246 C.D. 2013 \(Pa.Cmwlt., July 31, 2014\)\*](#)
  - **Holding 1:** A trial court's order denying class certification is an immediately appealable collateral order if it meets the separability, importance, and urgency requirements under Pa.R.C.P. 313.
  - **Holding 2:** Under Pa.R.C.P. Nos. 1702, 1708, and 1709, a trial court may deny a plaintiff's class certification motion if the plaintiff fails to satisfy even one of the requirements for class certification (numerosity, typicality, representation adequacy, and fair and efficient adjudication method).

### B. *Home Improvement Consumer Protection Act - Quantum Meruit*

- [\*Shafer Electric & Construction v. Mantia, No. 28 WAP 2013 \(Pa., July 21, 2014\)\*](#)
  - **Holding:** A contractor may pursue a claim for *quantum meruit* recovery under Section 517.7(g) of the Home Improvement Consumer Protection Act, 73 P.S. §§ 517.1-517.18, despite the contractor's failure to enter into a valid and enforceable home improvement contract pursuant to Section 517.7 of the Act.

### C. *Immunity - Judicial and Quasi-Judicial*

- [\*Pollina v. Dishong, 2014 PA Super 153 \(Pa.Super., July 22, 2014\)\*](#)
  - **Holding:** Neither judicial immunity nor quasi-judicial immunity bars a claim of professional negligence against an individual who is accused of being negligent in conducting an investigation and forming opinions for a government agency.

### D. *Immunity - Respondeat Superior*

- [\*Spitsin v. WGM Transportation, Inc., 2014 PA Super 162 \(Pa.Super., July 29, 2014\)\*](#)
  - **Holding:** The doctrine of *respondeat superior* does not create vicarious liability for an employer when, to carry out his job duties, an employee uses force that is so violent and excessive that an employer would not reasonably foresee its use.

### E. *Immunity - Governmental*

- [\*Dorsey v. Redman, No. 13 WAP 2012 \(Pa., July 21, 2014\)\*](#)
  - **Holding 1:** A Register of Wills is not immune from liability under the governmental immunity provision of the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§ 8541-8542, when it is alleged that the Register of Wills granted Letters of Administration without security as prohibited by Section 3172 of the Probate, Estates and Fiduciaries Code, 20 Pa. C.S.A. § 3172.
  - **Holding 2:** When an employee of a local agency wishes to assert the defense of official immunity pursuant to 42 Pa. C.S.A. §8546(2), the court must first determine whether the official's conduct was authorized or required by law, or if the official in good faith reasonably believed his conduct was required by the court's order.

F. *Medical Malpractice-Res Ipsa Loquitor*

- [\*Fessenden v. Robert Packer Hospital\*, 2014 PA Super 154 \(Pa.Super., July 23, 2014\)](#)
  - **Holding:** The doctrine of *res ipsa loquitor* applies when a doctor leaves a sponge inside a patient, who is entitled to an inference of negligence and causation sufficient to present the case to a jury.

G. *Nunc Pro Tunc Appeal*

- [\*Arena Beverage Corp. v. Pennsylvania Liquor Control Board\*, No. 1960 C.D. 2013 \(Pa.Cmwlt., July 30, 2014\)](#)
  - **Holding:** To grant an appeal *nunc pro tunc*, a trial court must consider whether extraordinary circumstances involving fraud or its equivalent, duress, or coercion caused the delay in filing an appeal. A trial court abuses its discretion when it grants a *nunc pro tunc* appeal without considering or applying the mandatory factors that must be present for that type of relief.

III. Real Estate

A. *Disclosure of Material Defects*

- [\*Milliken v. Jacono\*, No. 48 MAP 2013 \(Pa., July 21, 2014\)](#)
  - **Holding:** Under the Real Estate Seller Disclosure Law, 68 Pa. C.S. §§ 7301-7315, a murder/suicide is not a material defect of the property and a seller is not required to disclose that information to a buyer. Justice Todd filed a [concurring opinion](#), in which Justice Stevens joined, emphasizing that "material defect" refers to physical or structural problems with a property, and does not include murder or suicide.

IV. Workers' Compensation

A. *Burden-Modification of Benefits*

- [\*Simmons v. Workers' Compensation Appeal Board \(Powertrack International\)\*, No. 2168 C.D. 2013 \(Pa.Cmwlt., July 24, 2014\)](#)
  - **Holding:** When an employer seeks to modify a claimant's benefits based on earning capacity under Section 413 of the Workers' Compensation Act, 77 P.S. § 772, the employer must demonstrate that the claimant's symptoms have improved sufficiently to re-enter the workforce. The employer does not need to prove that claimant's diagnoses have changed since the last proceeding.

B. *Reasoned Decision*

- [\*Cucchi v. Workers' Compensation Appeal Board \(Robert Cucchi Painting, Inc.\)\*, No. 108 C.D. 2014 \(Pa.Cmwlt., July 17, 2014\)](#)
  - **Holding:** Under Section 422(a) of the Workers' Compensation Act, 77 P.S. § 834, a Workers' Compensation Judge must issue a reasoned decision that explains, in detail, the objective bases for the WCJ's credibility findings regarding doctors or claimants. The WCJ may not simply state that testimony was "not convincing."

C. *Utilization Review ~ Service*

- [\*Marek v. Workers' Compensation Appeal Board \(Logistics Express, Inc.\)\*, No. 2128 C.D. 2013 \(Pa.Cmwlt., July 16, 2014\)](#)
  - **Holding:** Under Section 127.476 of the Workers' Compensation Act Medical Cost Containment Regulations, 34 Pa. Code § 127.476, an employer is not required to serve a Utilization Review determination on the claimant or claimant's counsel. Instead, the service requirement is imposed on the Utilization Review Organization. Thus, an employer does not violate the Workers' Compensation Act, 77 P.S. §§ 1-1041.4, 2501-2708, by failing to serve a UR determination on the claimant.

D. *Work Availability - Burden of Proof - Illegal Immigrant*

- [\*Cruz v. Workers' Compensation Appeal Board \(Kennet Square Specialties and PMA Management Corp.\)\*, No 69 MAP 2012 \(Pa., July 21, 2014\)](#)
  - **Holding:** An employer seeking to suspend an illegal worker's benefits has the burden to prove that the injured employee's loss of earning power was caused by the injured employee's lack of U.S. citizenship or other legal work authorization. Additionally, a claimant's invocation of his Fifth Amendment right against self-incrimination is insufficient evidence, on its own, to prove the alleged lack of legal authorization to be employed in the U.S. Justice Saylor filed a [concurring opinion](#), in which Chief Justice Castille and Justice McCaffrey joined. Justice Eakin filed a [concurring and dissenting opinion](#), in which Justice Stevens joined, arguing that a claimant should be required to prove he is legally entitled to work in the U.S. to obtain benefits.

V. *Rules of Civil Procedure Amended to Limit Expert Discovery*

A. *Pennsylvania Rules of Civil Procedure*

- [Pa.R.Civ.P. 4003.5](#)
  - By Order dated July 10, 2014, the Pa. Supreme Court amended Rule 4003.5 to prohibit discovery of communications between counsel and experts. [Click here to view the Order amending Rule 4003.5, the Comment to the amendment, and the Barrick Opinions.](#)
  - Under revised Rule 4003.5(a)(4), a “party may not discover the communications between another party’s attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communications, except in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law.” The Rule states that it “protects from discovery draft expert reports and any communications between another party’s attorney and experts relating to such drafts.” While Rule 4003.5(a)(2) continues to permit further discovery beyond interrogatories “upon cause shown,” the tone of the Rule and the comments to the Rule make it clear that such discovery is not favored.

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