

# A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH AUGUST 31, 2014

## PENNSYLVANIA APPELLATE COURT DECISIONS

### Pennsylvania Supreme Affirms Two Cases

#### In Which the Law Offices of Daniel J. Siegel Served as Appellate Counsel

In August, the Pennsylvania Supreme Court declined to entertain appeals in two matters in which the Law Offices of Daniel J. Siegel served as appellate counsel, thereby affirming decisions of the Superior Court and the Commonwealth Court.

In [\*Ferguson v. Morton\*, 2013 PA Super 329 \(Pa. Super., December 26, 2013\)](#), the Superior Court reversed the trial court and reinstated a \$575,000 verdict, ruling that a party is not automatically entitled to a new trial based upon counsel's prejudicial remarks in his closing argument. Rather, a trial court's curative instructions, admonitions of counsel in the presence of the jury, and the jury charge, may be sufficient to ameliorate any risk of undue harm to the defendant's interests, particularly when the jury's verdict signaled that no such unfairness actually resulted from counsel's behavior.

In [\*Verizon Pennsylvania Inc. v. Workers' Compensation Appeal Board \(Ketterer\)\*](#), No. 1188 C.D. 2013 (Pa.Cmwlt. March 12, 2014), the Commonwealth Court ruled that a physician must have an active clinical practice, *i.e.*, the physician must provide preventive care and the evaluation, treatment and management of medical conditions, at least 20 hours per week, in order to be qualified to perform Impairment Rating Evaluation under Section 306(a.2)(1) of the Workers' Compensation Act, 77 P.S. § 551.2(1)

## Pennsylvania Appellate Court Decisions

### I. Civil Litigation and Procedure

#### A. *Amendment of Pleadings*

- [\*Morrison Informatics, Inc. v. Members 1st Federal Credit Union\*, 2014 PA Super 166 \(Pa.Super., August 12, 2014\)](#)

➤ **Holding:** A trial court errs by denying a plaintiff leave to amend a Complaint to substitute bankruptcy estate of the bankrupt plaintiff as a party plaintiff.

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. Evidence - Privilege/Work Product**

- [\*Saint Luke's Hospital of Bethlehem v. Vivian\*, 2014 PA Super 171 \(Pa. Super., August 18, 2014\)](#)

- **Holding:** The attorney-client privilege and the work product doctrine do not apply to a hospital's legal invoices when the nature of the hospital's claim requests damages in the form of attorney's fees.

**C. Judgment Notwithstanding the Verdict**

- [\*Nertavich v. PPL Electric Utilities\*, 2014 PA Super 184 \(Pa. Super., August 27, 2014\)](#)

- **Holding:** A property owner who hires an independent contractor may retain a certain degree of authority over the safety of the project, without retaining sufficient control to be deemed liable under the "retained control" exception outlined in Section 414 of the *Restatement (Second) of Torts*.

**D. Post-Trial Motions**

- [\*Agostinelli v. Edwards\*, 2014 PA Super 180 \(Pa. Super., August 20, 2014\)](#)

- **Holding:** A party is not required to file post-trial motions under Pa.R.C.P. 227.1 when a matter is remanded to a trial court for further proceedings "consistent with this decision ...," in order to preserve issues for appeal where the trial court relied on both the record existing prior to appeal and new evidence to reach its decision. **Caution:** *This case involves very narrow facts, which the Court terms "a gray area," and counsel should carefully analyze any case before proceeding without filing a post-trial motion.*

**E. Privacy**

- [\*Dougherty v. Heller\*, 2014 PA Super 170 \(Pa. Super., August 14, 2014\)](#)

- **Holding:** A party's privacy interest in pretrial discovery is an appropriate collateral matter for the court's review, but does not warrant a protective order without a showing of good cause.

**II. Substantive Law**

**A. Duty of Care - Foreseeability**

- [\*Charlie v. Erie Insurance Exc.\*, 2014 PA Super 188 \(Pa. Super., August 29, 2014\)](#)

- **Holding:** A party's recognition of a general risk does not create a duty unless it is reasonably foreseeable that the conduct in question creates an unreasonable risk. In this case, the Superior Court affirmed a trial court's grant of summary judgment, holding that the plaintiff did not meet its duty of establishing that the defendant/laundromat had an affirmative duty, as did all laundromat customers, to prevent greasy rags in its dryer from spontaneously combusting.

**B. *Pennsylvania Whistleblower Law - Jury Trial***

- [\*Bensinger v. University of Pittsburgh Medical Center\*, 2014 PA Super 174 \(Pa. Super., August 19, 2014\)](#)
  - **Holding:** There is no statutory or common law right to a jury trial under the Pennsylvania Whistleblower Law, 43 P.S. § 1421, *et seq.*

**C. *Residential Real Estate - Implied Warranty of Habitability***

- [\*Conway v. The Cutler Group, Inc.\*, No. 80 MAP 2013 \(Pa., August 18, 2014\)](#)
  - **Holding:** A builder's implied warranty of habitability, which protects purchasers of newly-constructed homes from latent defects, may not be invoked by subsequent purchasers. Instead, subsequent purchasers must seek relief through the Real Estate Seller Disclosure Law, 68 Pa. C. S. §§ 7301-7315.

**III. Workers' Compensation**

**A. *Course & Scope of Employment***

- [\*Holler v. Worker's Compensation Appeal Board \(Tri Wire Engineering Solutions, Inc.\)\*, No. 2209 C.D. 2013 \(Pa.Cmwlt., August 22, 2014\)](#)
  - **Holding:** A claimant classified as a traveling employee is entitled to the presumption that he was working during the drive from his house to the employer's facility and is entitled to workers' compensation benefits under the exception to the "coming and going rule" for workers with no fixed place of work.
- [\*Marazas v. Workers' Compensation Appeal Board \(Vitas Healthcare Corporation\)\*, No. 337 C.D. 2014 \(Pa.Cmwlt., August 11, 2014\)](#)
  - **Holding:** Under Section 301(c) of the Workers' Compensation Act, 77 P.S. § 411(c), a claimant who quits his job is still within the course and scope of his employment if he is injured (1) on the employer's premises and, (2) furthering the employer's interests when he is injured. In this case, the claimant was injured while performing the required task of cleaning out his truck when he was injured.

**IV. Social Media & Related Issues**

**A. *Facebook Postings***

- [\*Warnick v. All Saints Episcopal Church\*, No. 01539 \(C.P. Philadelphia, April 15, 2014\)](#)
  - **Discussion:** This case appears in this newsletter not because of its holding but because it again highlights the issues social media postings can create. In this case, the plaintiff was a priest who sued his church challenging the revocation of his license and alleging that the defendants made defamatory remarks that interfered with his ability to find work or to work with other parishes. There were various

defenses raised, one of which centered upon the contents of the priest's Facebook postings, which were available to approximately 300 people, including some associated with his church. In the posting, which the priest eventually removed, were his posted answers to a "sexual position" quiz. Thus, attorneys who do not address social media postings with clients are likely not providing appropriate representation. Conversely, parties to litigation should be aware of the impact social media postings may have on their clients' claims and defenses.

## V. Federal Court Opinions

### A. *Attorney Advertising/Websites -- First Amendment*

□ [\*Dwyer v. Cappell\*, 2014 U.S. App. LEXIS 15361 \(3d Cir. N.J., Aug. 11, 2014\)](#)

- **Holding:** An attorney may include accurate quotes from judicial opinions on his website, and is not required to reprint the entire opinion in full. This case is based upon an attorney's claim that New Jersey Supreme Court Guideline 3, which required attorneys to include the entire opinion, and not simply an excerpt, violated the First Amendment.

### B. *Clarity of Pleading & Argument*

□ [\*Fayviard v. UGI Storage Company\*, No. 4:13-cv-02400 \(M.D. Pa., June 6, 2014\)](#)

- **Holding:** Parties must remain mindful of the need for clarity in presenting their arguments. The Court here chastised counsel, noting that "neither party in this case has done much to persuade the Court. The parties' briefs are, to put it lightly, not exemplary, and certainly do not meet the complexity of the issues involved. This is unfortunate because, generally, thoughtful and amply-supported briefs from the parties, especially when fairly discrete areas of the law ... are involved." The Court also highlighted the fact that plaintiff's counsel "admittedly 'did not extensively research the law' before composing his briefs," and "when counsel roused himself to 'further research the law,' his arguments to the Court clearly implicated binding precedent contrary to his position."

### C. *Family Medical Leave Act (FMLA)*

□ [\*Budhun v. Reading Hospital and Medical Center\*, No. 11-4625 \(3d Cir., August 27, 2014\)](#)

- **Holding:** An employer's obligations under the Family Medical Leave Act, 29 U.S.C. §§ 2691, *et seq.*, arise when the employee invokes his or her rights under the law, not when an employer determines that the FMLA applies. Further, an employer's duty to reinstate a worker is triggered when the workers seek to avail himself or herself of the right to return, regardless of whether the employer had considered the worker to be on FMLA leave.

D. *Mailbox Rule*

□ [\*Lupyan v. Corinthian Colleges Inc., No 13-1843 \(3rd Cir., August 5, 2014\)\*](#)

- **Holding:** It is unfair to automatically presume that the Plaintiff received a letter simply based on “self-serving” affidavits from the Defendants’ employees. In this FMLA action, the Court also commented on the relatively easy alternatives now available through the post office and other mailing companies that would have provided the Defendants with actual proof that the letter was sent and received. This decision may weaken the common law “mailbox rule,” which created a presumption that a letter was presumed to be received once the sender deposited it into a mailbox. This is a welcome practical decision, particularly now that it is possible to track the progress and delivery of every letter and every package.

E. *Medicare as Secondary Payer Act (MSP)*

□ [\*Taransky v. Secretary of the United States Department of Health and Human Services, No. 13-3483 \(3d Cir., July 29, 2014\)\*](#)

- **Holding:** The New Jersey Collateral Source Statute, N.J. Stat. Ann. § 2A:15-97, does not prevent Medicare from seeking reimbursement under the Medicare as a Secondary Payer Act, 42 U.S.C. § 1395y(b)(2), for conditional medical payments it made to a tort victim who settled a personal injury claim, even if the trial court ruled that none of the settlement funds represented payments of medical expenses.

F. *Spoliation of Evidence -- Sanctions*

□ [\*The Regulatory Fundamentals Group, LLC v. Governance Risk Management Compliance, LLC, 13 Civ. 2493 \(KBF\) \(SDNY, August 5, 2014\)\*](#)

- **Holding:** A court may sanction a party for spoliation of evidence, including judgment in favor of the opposing party, for the willful destruction of relevant evidence, including email, despite adequate notice of a duty to preserve such evidence. In this case, the defendant not only deleted evidence, but it also attempted to create a false record of “mere negligence” after the plaintiff discovered the conduct.

PENNSYLVANIA WORKERS'  
COMPENSATION LAW:  
THE BASICS

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DANIEL J. SIEGEL, ESQUIRE &  
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