

# A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH DECEMBER 31, 2013

## PENNSYLVANIA APPELLATE COURT DECISIONS

### I. CIVIL LITIGATION

#### A. *Admissibility of Expert Testimony*

- [\*Polett v. Public Communications, Inc.\*, 2013 PA Super 320 \(Pa. Super., December 20, 2013\)](#)

- **Holding 1:** A new trial is required when the trial court shifts the burden of proving negligence to the defendants.
- **Holding 2:** Because a treating physician, who is also testifying as an expert, does not offer expert opinions until litigation arises, the physician is not shielded from discovery under Rule 400.3.5.

- [\*Snizavich v. Rohm and Haas Co.\*, 2013 PA Super 315 \(Pa. Super., December 6, 2013\)](#)

- **Holding:** Expert testimony is inadmissible under *Frye* when the proposed testimony fails to rely upon or cite scientific authority, such as facts, empirical studies or the expert's own research, that the expert has applied to the facts and which support the expert's ultimate conclusion.

#### B. *Contracts - Conflicts of Law*

- [\*Synthes USA Sales, LLC v. Harrison\*, 2013 PA Super 324 \(Pa. Super., December 24, 2013\)](#)

- **Holding:** A court may not ignore a "choice of law" provision in a contract.

#### C. *Motions for Summary Judgment - Admissions*

- [\*Evans v. Thomas Jefferson University\*, No. 2278 C.D. 2012 \(Pa. Cmwlth., December 4, 2013\)](#)

- **Holding:** The failure to comply with the applicable Rules for responding to a Motion for Summary Judgment may constitute a basis for concluding that there is no genuine dispute as to any material facts sufficient to grant summary judgment as to the non-compliant party. However, the failure to admit or deny facts alleged in response to the Motion is not a sufficient basis, in and of itself, for granting the Motion.

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!

**D. *Statutes of Limitation - Amendments to Name Deceased Parties***

☐ [\*\*McLean v. Djerassi, 2013 PA Super 330 \(Pa. Super., December 27, 2013\)\*\*](#)

- **Holding:** 20 Pa.C.S. § 3383, which extends the statute of limitations if a defendant is deceased, applies only to the filing of an initial Complaint, not to a Motion to Amend a Complaint. Thus, if the estate is not properly named as a defendant within the appropriate statute of limitations, an amendment will not extend the statute of limitations. Moreover, if the original Complaint names only the deceased as a defendant, the Complaint itself is a "nullity," and a party must file a new Complaint rather than seek to amend the original "void" Complaint.

**E. *Sunshine Act***

☐ [\*\*Smith v. Township of Richmond, No. 34 MAP 2013 \(Pa., December 16, 2013\)\*\*](#)

- **Holding:** Because a meeting between a governmental body and parties to litigation is solely for the purpose of fact finding, the meeting does not constitute "deliberations" under the Sunshine Act, 65 Pa.C.S. § 701, *et seq.*, and therefore the public is not entitled to access.

**F. *Trial - Error/New Trial***

☐ [\*\*Ferguson v. Morton, 2013 PA Super 329 \(Pa. Super., December 26, 2013\)\*\*](#)

- **Holding:** A party is not automatically entitled to a new trial based upon counsel's prejudicial remarks in 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.

**The Law Offices of Daniel J. Siegel, LLC served as appellate counsel in this matter.**

**II. Pennsylvania Rules of Civil Procedure**

**A. [Rule 1033 -- Amendments](#)**

- ☐ Effective January 23, 2014, Pa.R.C.P. 1033 has been amended to permit a party, either by consent of the adverse party, or by leave of court, to "add a person as a party" or otherwise amend a pleading. Obviously, the Rule change does not extend the applicable statute of limitations.

**III. Pennsylvania Trial Court Opinions**

**A. *Distracted Driving - Punitive Damages***

☐ [\*\*Rockwell v. Knott, No. 12 CV 1114 \(Lackawanna Cty., August 13, 2013\)\*\*](#)

- **Holding:** The use of a GPS device while driving may create a triable issue of fact depending on where the device is positioned, how distracted the driver becomes, and how far the vehicle travels while the driver is distracted. However, in order to permit the issue to go to a jury, a plaintiff must present evidence to support the allegations and may not merely rely upon the averments of the Complaint.

#### IV. WORKERS' COMPENSATION

##### A. *Calculation of Attorney's Fees Awarded for Unreasonable Contest and Employer's Counsel's Right to Ex Parte Communications with Claimant's Physician*

- [\*Pennsylvania State University v. Workers' Compensation Appeal Board \(Sox\)\*, No. 454 C.D. 2013 \(Pa. Cmwlth., December 19, 2013\)](#)
  - **Holding 1:** The amount of attorney's fees assessed against an employer for unreasonable contest must be based upon the time expended upon the particular issue being contested, and not the entire claim.
  - **Holding 2:** Counsel for an employer is not permitted to have *ex parte* communications with a claimant's treating physician. Rather, *ex parte* communications are only permissible to the extent approved by the Workers' Compensation Judge.

##### B. *Calculation of Fatal Claim Benefits*

- [\*Wilson v. Travelers Casualty and Surety Co.\*, Nos. 863 & 864 C.D. 2013 \(Pa. Cmwlth., December 3, 2013\)](#)
  - **Holding:** When the surviving spouse, who is receiving fatal claim benefits, dies, any remaining dependents of the original deceased are entitled to continued benefits in the amount they would have received had the widow not survived the deceased.

##### C. *Fee Review*

- [\*Selective Insurance Co. v. Bureau of Workers' Compensation Fee Review Hearing Office \(The Physical Therapy Institute\)\*, No. 613 C.D. 2013 \(Pa. Cmwlth., December 6, 2013\)](#)
  - **Holding:** The Bureau of Workers' Compensation Fee Review Hearing Office lacks jurisdiction over an insurer's challenge as to whether a billing agency is a medical provider.

##### D. *Jurisdiction*

- [\*Leventakos v. Workers' Compensation Appeal Board \(Spyros Painting\)\*, No. 2156 C.D. 2012 \(Pa. Cmwlth., December 5, 2013\)](#)
  - **Holding:** An oral account of a claimant's medical treatment does not constitute a "record" for purposes of rendering a utilization review determination. Thus, because the provider did not provide any written documentation, the WCJ lacked jurisdiction over an appeal of a UR determination.

##### E. *Setting Aside Final Receipts and Suspension Notifications.*

- [\*Kraeuter v. Workers' Compensation Appeal Board \(Ajax Enters., Inc.\)\*, No. 457 C.D. 2013 \(Pa. Cmwlth., December 19, 2013\)](#)
  - **Holding:** An insurance company has an affirmative duty to ensure the requirements for a Final Receipt (or Notice of Suspension) have been met before preparing and presenting a Final Receipt or other document to a claimant.

PENNSYLVANIA WORKERS'  
COMPENSATION LAW:  
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