

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH FEBRUARY 28, 2018

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Procedural Law

A. Appeals – Interlocutory Orders

☐ [Shearer v. Hafer, 93 MAP 2016 \(Pa. Jan. 18, 2018\)](#)

- **Holding:** Under Pa.R.A.P. 313, for an appellate court to have jurisdiction of an appeal from an interlocutory discovery order, the Order must be “(1) separable from and collateral to the main cause of action, (2) the right involved must be too important to be denied review and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.” Justice Wecht filed a [concurring opinion](#). Just Mundy 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 - Compulsory

☐ [Blucas v. Agiovlasis, 2018 PA Super 25 \(Pa. Super. Feb. 9, 2018\)](#)

- **Holding:** A trial court may not revisit issues raised in compulsory arbitration under 42 Pa.C.S. 7361(a) unless a party files a timely appeal for a trial *de novo*.

C. Arbitration - Uniform Arbitration Act

☐ [Civan v. Windermere Farms, Inc., 2018 PA Super 42 \(Pa. Super. Feb. 27, 2018\)](#)

- **Holding:** A court may order the parties to proceed to arbitration provided there is a valid written agreement to arbitrate. Absent an agreement, an arbitration panel does not have jurisdiction over the claims at issue.

D. Limitations on Actions - Instruments Under Seal

☐ [Wells Fargo Bank, N.A. v. Joseph, 2018 PA Super 27 \(Pa. Super. Feb. 13, 2018\)](#)

- **Holding:** The 20 year statute of limitations applies to “an instrument in writing under seal” pursuant to 42 Pa.C.S. 5529(b)(1), *i.e.*, an instrument that defines the rights, duties, entitlements, and liabilities of the parties involved.

E. Petitions to Strike and/or Open Judgment

☐ [Driscoll v. Arena, 2018 PA Super 26 \(Pa. Super. Feb. 12, 2018\)](#)

- **Holding:** A trial court properly entered an order striking a confessed judgment, even if the petition was filed more than 30 days from the date the judgment was entered, because the complaint seeking confession of the judgment was filed after the statute of limitations and was therefore void.

□ [*Gur v. Nadav*, 2018 PA Super 10 \(Pa. Super. Jan. 22, 2018\)](#)

- **Holding:** A high or even excessive interest rate on a business is not a meritorious defense for purposes of striking or opening a judgment by confession. Courts assume that when the owner of an established business knowingly and intelligently enters into an agreement for a business loan, he agreed to the interest rate in the agreement.

F. *Summary Judgment - Nanty-Glo Rule*

□ [*Wells Fargo Bank, N.A. v. Joseph*, 2018 PA Super 27 \(Pa. Super. Feb. 13, 2018\)](#)

- **Holding:** When a moving party supports its Motion for Summary Judgment with admissions of the opposing party, the *Nanty-Glo* rule, which bars the grant of summary judgment based solely on testimonial evidence from the moving party, does not apply.

G. *Trial - Continuance - Expert Witness*

□ [*Rutyna v. Schweers*, 2018 PA Super 2 \(Pa. Super. Jan. 4, 2018\)](#)

- **Holding:** A trial court abuses its discretion in denying a motion for continuance of a trial when, through no fault of the party seeking the continuance, the expert was prevented from testifying. In this case, plaintiffs discovered that their expert was unable to testify less than three weeks before trial, and were unable to secure a competent expert to replace the witness.

H. *Trial - Nonsuit*

□ [*Tong-Summerford v. Abington Memorial Hospital*, 2018 PA Super 16 \(Pa. Super. Jan. 30, 2018\)](#)

- **Holding:** When a defendant presents evidence following the denial of a motion for nonsuit, the correctness of the trial court's denial is rendered moot and unappealable.

I. *Venue*

□ [*Moody v. Lehigh Valley Hospital-Cedar Crest*, 2018 PA Super 6 \(Pa. Super. Jan. 18, 2018\)](#)

- **Holding:** A trial court abuses its discretion by transferring a medical malpractice action based on forum non conveniens when (1) the decedent was treated in the county where the action was filed, (2) the Complaint pleads claims against a defendant in the county, and (3) a substantial portion of the care occurred in the county. The inconvenience of a defendant's witnesses is insufficient to establish that the chosen forum is oppressive and vexatious.

II. **Substantive Law**

A. *Pharmaceuticals - Learned Intermediary Doctrine & Punitive Damages*

□ [*Stange v. Janssen Pharmaceuticals, Inc.*, 2018 PA Super 4 \(Pa. Super. Jan. 8, 2018\)](#)

- **Holdings:** (1) Expert causation testimony based on a differential diagnosis can establish liability in a pharmaceutical failure to warn claim. Consequently, the trial court properly instructed the jury on the learned intermediary doctrine and proximate causation. (2) The court erred, however, in dismissing punitive damages claims without considering if there were true conflicts of law under *Restatement (Second) of Conflict of Laws* 145, between: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered."

B. *Premises Liability - Hills & Ridges Doctrine*

- [*Collins v. Philadelphia Suburban Development Corp.*, 2018 PA Super 17 \(Jan. 31, 2018\)](#)
 - **Holding:** A landowner has no duty to correct or take reasonable measures with regard to snow-created snowy or icy conditions until a reasonable time after a winter storm has ceased. Thus, a landowner also has no duty to treat or remove snow during or immediately after an active storm.

C. *Products Liability Claims - Tincher-Related Jury Instructions*

- [*Tincher v. Omega Flex, Inc.*, 2018 PA Super 33 \(Pa. Super. Feb. 16, 2018\)](#)
 - **Holding:** Because the trial court's jury charge was erroneous in light of the Supreme Court's ruling in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), a new trial is required. Under *Tincher*, the test for proving whether a product is in a defective condition, under Section 402A of the *Restatement (Second) of Torts*, is by showing "either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014) (overruling "unreasonably dangerous" wording previously adopted by the Supreme Court in *Azzarello v. Black Bros.*, 391 A.2d 1020 (Pa. 1978))

D. *Sovereign Immunity - Real Estate Exception (Guardrails)*

- [*Cagey v. Commonwealth of Pennsylvania, Dept. of Transportation*, 35 WAP 2016 \(Pa. Feb. 21, 2018\)](#)
 - **Holding:** Under the Real Estate Exception (Section 8522(b)(4)) under the Sovereign Immunity Act, 42 Pa.C.S. §§ 8521-8528, when a government agency installs a guardrail, sovereign immunity is waived if the agency's negligent installation and design creates a dangerous condition. Chief Justice Saylor filed a [concurring opinion](#). Justice Wecht filed a [concurring opinion](#).

E. *Unfair Trade Practices Act Claims*

- [*Danganan v. Guardian Protection Services*, 36 WAP 2017 \(Pa. Feb. 21, 2018\)](#)
 - **Holding:** Under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. 202-1 to 201-9.3, a non-Pennsylvania resident may bring a cause of action against a Pennsylvania-headquartered business based upon out-of-state transactions.

III. *Workers' Compensation Law*

A. *Fatal Claim Petition - Dependency*

- [*Grimm v. Workers' Compensation Appeal Board \(Federal Express Corp.\)*, 1982 C.D. 2016 \(Pa. Cmwlth. Jan. 4, 2018\)](#)
 - **Holding:** Although the term "living with" in Section 307(7) of the Workers' Compensating Act, 77 P.S. § 561, must be liberally construed, the presumption of actual dependency does not apply when: (1) the decedent instituted a court action for divorce prior to her death, and (2) Claimant left the marital property and rented a separate townhouse.

B. *Modification of Benefits Based Upon Labor Market Survey*

- [*Smith v. Workers' Compensation Appeal Board \(Supervalu Holdings PA, LLC\)*, 796 C.D. 2016 \(Pa. Cmwlth. Jan. 5, 2018\)](#)

- **Holding:** An employer is entitled to a modification of benefits based on proof of earning power associated with specific positions provided there is proof that the jobs identified by an employer's expert witness remained open until claimant had a reasonable opportunity to apply for them. A claimant must be given the opportunity to submit evidence about his or her experience in pursuing the jobs identified in the labor market survey.

C. *Reinstatement of Benefits - Res Judicata*

- [*Dorvilus v. Workers' Compensation Appeal Board \(Cardone Industries\)*, 397 C.D. 2017 \(Pa. Cmwlth. Jan. 5, 2018\)](#)

- **Holding:** A claimant is not entitled to reinstatement when a WCJ has previously ruled that the injury did not result in the loss of earning power.

D. *Unreasonable Contest Counsel Fees*

- [*Sarmiento-Hernandez v. Workers' Compensation Appeal Board \(Ace American Insurance Co.\)*, 1799 C.D. 2016 \(Pa. Cmwlth. Feb. 13, 2018\)](#)

- **Holding:** An employer presents a reasonable contest under Section 440 of the Workers' Compensation Act, 77 P.S. § 996 when, in support of a termination petition, it presents competent medical evidence that Claimant has recovered from an accepted work injury, even though the WCJ ultimately rejected this evidence as not credible.

E. *Unreasonable Contest Counsel Fees - Disgorgement*

- [*County of Allegheny v. Workers' Compensation Appeal Board \(Parker\)*, 28 WAP 2017 & 29 WAP 2017 \(Pa. Jan. 18, 2018\)](#)

- **Holding:** An employer may not recoup already paid unreasonable contest attorney's fees under Section 440 of the Workers' Compensation Act, 77 P.S. § 996, from a claimant's counsel because the Act does contain any mechanism by which employers may recoup erroneously-awarded counsel fees, once paid.

F. *Utilization Review*

- [*Allison v. Workers' Compensation Appeal Board \(Fisher Auto Parts, Inc.\)*, 704 C.D. 2017 \(Pa. Cmwlth. Jan. 12, 2018\)](#)

- **Holding:** A WCJ lacks jurisdiction to review a utilization review determination when a provider fails to produce medical records to the URO.

G. *Work-Related Injury*

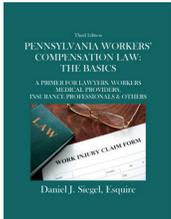
- [*US Airways, Inc. v. Workers' Compensation Appeal Board \(Bockelman\)*, 612 C.D. 2017 \(Pa. Cmwlth. Feb. 22, 2018\)](#)

- **Holding:** An injury while an employee is riding a shuttle bus from the employee parking lot to the job location is compensable. Although the claimant was not furthering the employer's affairs, (a) the claimant was on the employer's premises or (b) the claimant's presence was required by the nature of the employment, and (c) the injury was caused by the condition of the premises or operation of employer's business thereon.

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