

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH APRIL 30, 2018

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Procedural Law

A. *Trial - Jury Instructions - Waiver*

- ☐ [Corvin v. Tihansky, 2018 PA Super 91 \(Pa. Super. April 20, 2018\)](#)

➤ **Holding:** To preserve a right to request judgment notwithstanding verdict based on an erroneous jury instruction following a jury trial, the party must preserve the objection in post-trial motions; otherwise, the issue is waived on appeal.

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. *Affirmative Defenses - Pleading*

- ☐ [Mazur v. Cuthbert, 2018 C.D. 2017 \(Pa. Cmwlth. April 16, 2018\)](#)

➤ **Holding:** Sovereign immunity may be asserted either in new matter or as an affirmative defense pursuant to Pa.R.C.P. 1030(a); where the defense is clearly applicable on the face of the Complaint, it may also be raised by preliminary objection.

II. Substantive Law

A. *Pre-Injury/Exculpatory Releases - Skiing*

- ☐ [Kibler v. Blue Knob Recreation, Inc., 2018 PA Super 89 \(Pa. Super. April 19, 2018\)](#)

➤ **Holding:** Because wheel ruts in the terrain are an inherent risk of downhill skiing, skiers voluntarily assume the risk of injury pursuant to the Pennsylvania Skier's Responsibility Act, 42 Pa.C.S. 7102(c).

B. *Attorney's Fees*

- ☐ [Carmen Enterprises, Inc. v. Murpenter, LLC, 2018 PA Super 97 \(Pa. Super. April 25, 2018\)](#)

➤ **Holding:** A trial court does not err or abuse its discretion by reducing the hourly billing rate of an attorney who sought over five times the underlying award in a "rather straightforward collection case." To justify an award of attorney's fees, the attorney has the burden of proving that the services provided were reasonable and necessary taking certain facts and factors into consideration.

III. Workers' Compensation Act

A. *Subrogation*

- [*Commonwealth v. Workers' Compensation Appeal Board \(Piree\)*, 995 C.D. 2017 \(Pa. Cmwlth. April 12, 2018\)](#)

- **Holding:** An employer is not entitled to subrogation against a claimant's third party settlement for benefits received when the claimant was entitled to both Heart and Lung Act and workers' compensation benefits.

B. *Medical Cost Containment*

- [*Sedgwick Claims Management Services, Inc. v. Bureau of Workers' Compensation, Fee Review Hearing Office \(Pizel and Bucks County Pain Center\)*, 1033 C.D. 2017 \(Pa. Cmwlth. April 11, 2018\)](#)

- **Holding:** To determine whether a medical provider seeking payment for services rendered under the Workers' Compensation Act is entitled to payment for both an office visit and treatment rendered, a hearing officer may consider: (a) whether the office visit charges in question were for routine examinations involving no new medical condition, (b) any change in medical condition, (c) other circumstances that required an examination and assessment "above and beyond the usual examination," and (d) the evaluation of treatment performed. See 34 Pa. Code 127.105(e).

C. *Statutes of Repose*

- [*Caffey v. Workers' Compensation Appeal Board \(City of Philadelphia\)*, 1268 C.D. 2017 \(Pa. Cmwlth. April 12, 2018\)](#)

- **Holding:** To receive benefits under Section 301(c) of the Workers' Compensation Act, 77 P.S. 411(2), there must be "some significant, objective manifestation of the occupational disease within 300 weeks of the last date of exposure at work." However, Act 46 created a different time limitation, which only applies to firefighter cancer claims, which permits occupational disease claims within 600 weeks after the last date of exposure to hazards of the disease. See 77 P.S. 27.1(r). If a firefighter files his claim within 300 weeks of his last date of workplace exposure, Section 301(f) provides a presumption that his workplace exposure to carcinogens caused his cancer. See 77 P.S. 414.

IV. Allocatur Petitions

A. The Pennsylvania Supreme Court has granted appeal in the following matters for the issues stated:

- [*Bousamra v. Excelsa Health*, 318 WAL 2017 \(Pa. Jan. 30, 2018\)](#)

- Did the Superior Court commit an error of law when holding that a client waives the work-product protection of its counsel's pre-litigation e-mail by forwarding the e-mail to its public relations consultant?
- Did the Superior Court commit an error of law when holding that, to qualify as a privileged person within the attorney-client privilege, a third party must provide legal advice and have the lawyer or client control its work?

- [*Yanakos v. UPMC, University of Pittsburgh Physicians*, 330 WAL 2017 \(Pa. Mar. 28, 2018\)](#)
 - Does the MCARE Statute of Repose violate the Open Courts guarantees of the Pennsylvania Constitution, Article I, §11, where it arbitrarily and capriciously deprives some patients of any access to courts, but permits actions by similarly situated patients?

V. Rules of Professional Rules of Responsibility - Amendments

A. [Amendment to Rule 1.1. Competence - Comment \[8\] \(effective date July 1, 2018\)](#)

- **Maintaining Competence (as amended, changes in bold)**
 - [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. **To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.**

B. [Amendment to Rule 1.6. Confidentiality - Comment \[25\] \(effective date July 1, 2018\)](#)

- **Acting Competently to Preserve Confidentiality (as amended, changes in bold)**
 - [25] Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

C. [Amendment to Rule 1.15. Safekeeping of Property \(effective date July 30, 2018\)](#)

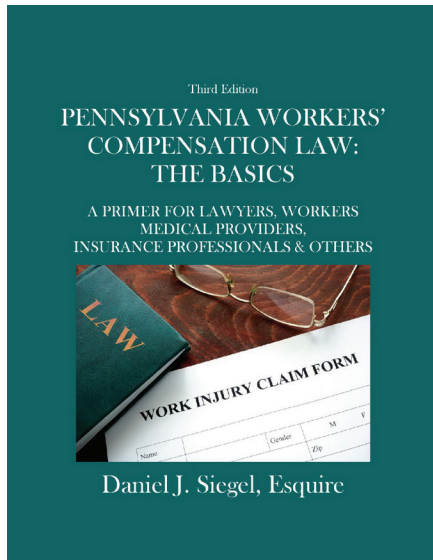
- The Supreme Court added subsection (v) to the Rule creating procedures for the disposition of "Unclaimed or Unidentifiable IOLTA Funds" for which the owner cannot be located for a minimum of two years.

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By Daniel J. Siegel, Esquire



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