

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH JUNE 30, 2019

PENNSYLVANIA APPEALS COURT OPINIONS

I. Civil Litigation

A. *Assumption of the Risk/Exculpatory Agreements - Post-Death Enforcement*

- [Valentino v. Philadelphia Triathlon, LLC, No. 17 EAP 2017 \(Pa., June 18, 2019\)](#)

- **Holding/Opinion in Support of Affirmance:** An exculpatory agreement, in which a party assumes all risks inherent in a dangerous activity, binds the heirs of the person signing the agreement, *i.e.*, the heirs may not possess more rights than those possessed by the decedent while alive. Justice Donohue filed an [Opinion in Support of Reversal](#); Justice Dougherty also filed an [Opinion in Support of Reversal](#).

B. *Attorney-Client Privilege/Attorney Work Product - Waiver*

- [Bousamra v. Excela Health, No. 5 WAP 2018 \(Pa., June 18, 2019\)](#)

- **Holding:** The mere showing of a voluntary disclosure to a third person will generally suffice to waive the attorney-client privilege. The work product doctrine is waived, however, when the work product is disclosed to an adversary or in a manner that significantly increases the likelihood that an adversary or anticipated adversary will obtain the work. Justice Donohue filed a [concurring opinion](#). Justice Wecht also filed a [concurring opinion](#).

C. *Attorney Client Privilege*

- [Newsuan v. Republic Service Inc., 2019 PA Super 196 \(Pa.Super., June 20, 2019\)](#)

- **Holding:** Statements obtained by counsel from a client's current and former employees for the singular purpose of providing legal advice to the client about the pending litigation falls within the scope of the attorney-client privilege. The privilege only protects disclosure of communications, not disclosure of the underlying facts by those who communicated with the attorney. The other party may seek *ex parte* interviews with the witnesses - to the extent they are not represented by counsel - regarding their factual observations.

D. *Medical Malpractice - Evidence of Risks & Complications*

- [Mitchell v. Shikora, No. 55 WAP 2017 \(Pa., June 18, 2019\)](#)

- **Holding:** Although evidence is irrelevant in a medical malpractice case that a patient agreed to proceed with an operation despite being informed of the risks, evidence of risks and complications may be admissible in medical malpractice trials. Justice Wecht filed a [concurring opinion](#). Justice Donohue filed a [concurring and dissenting opinion](#) in which Justice Dougherty joined.

E. *Sovereign Immunity - Course & Scope of Employment*

☐ [*Justice v. Pennsylvania State Police, No. 17 EAP 2018 \(Pa., May 31, 2019\)*](#)

- **Holding:** Commonwealth employees are not immune from liability under the Sovereign Immunity Act, 42 Pa.C.S. §§ 8521-8522, when it is determined that the employee is not acting within the scope of his or her employment. In this case, the Court concluded that a Pennsylvania State Trooper was not acting within the course and scope of employment when, during a routine traffic stop, he initiated a physical encounter with the plaintiff and forcibly handcuffed her. Justice Dougherty filed a [concurring opinion](#); Justice Mundy filed a [dissenting opinion](#). *Attorneys handling cases under the Sovereign Immunity Act and the Political Subdivision Tort Claims Act should review the facts carefully because the Decision broadens the scope of conduct that is not within the protection of the Act.*

II. Civil Procedural Matters

A. *Spoliation - Adverse Inference Instruction*

☐ [*Marshall v. Brown's IA, LLC, 2019 PA Super 191 \(Pa.Super., June 19, 2019\)*](#)

- **Holding:** A party that unilaterally decides not to preserve arguably relevant evidence is subject to sanctions for spoliation. Thus, because the defendant unilaterally decided not to preserve arguably relevant evidence, the trial court should have given the jury an adverse inference instruction.

B. *Suggestion of Death - Substitution of Personal Representative*

☐ [*Brown v. Quest Diagnostics Clinical Lab, Inc., 2019 PA Super 142 \(Pa. Super., May 1, 2019\)*](#)

- **Holding:** Pursuant to 20 Pa.C.S.A. § 3375, a party must raise an estate, letters of administration must be issued, and a personal representative must be appointed within one year after the filing of a Suggestion of Death. Section 3375 does not govern the timing of the substitution of the personal representative in the underlying action.

III. Workers' Compensation

A. *Calculation of Average Weekly Wage - Expected Wages*

☐ [*Sadler v. WCAB \(Philadelphia Coca-Cola\), No. 328 C.D. 2018 \(Pa.Cmwlt., May 22, 2019\)*](#)

- **Holding:** Under Section 309(d.2) of the Workers' Compensation Act, 77 P.S. § 582(d.2), the average weekly wage of a claimant who has worked fewer than 13 calendar weeks is based upon the number of hours the employee was expected to work per week, including overtime.

B. *Suspension of Benefits - Incarceration*

☐ [*Sadler v. WCAB \(Philadelphia Coca-Cola\), No. 328 C.D. 2018 \(Pa.Cmwlt., May 22, 2019\)*](#)

- **Holding:** Under Section 306(a.1) of the Workers' Compensation Act, 77 P.S. § 511.1, an employer may only suspend a Claimant's indemnity benefits when Claimant is incarcerated after a conviction, and may not suspend benefits for a pre-conviction incarceration.

IV. Federal Court Opinion

A. *Products Liability*

☐ [*Oberdorf v. Amazon.com, Inc., No. 18-1041 \(3rd Cir., July 3, 2019\)*](#)

- **Holding:** Under Section 402A of the *Restatement of Torts (Second)*, an online seller may be subject to liability under Pennsylvania strict products liability law if the following factors

apply: (1) Whether the actor is the “only member of the marketing chain available to the injured plaintiff for redress”; (2) Whether “imposition of strict liability upon the [actor] serves as an incentive to safety”; (3) Whether the actor is “in a better position than the consumer to prevent the circulation of defective products”; and (4) Whether “[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, *i.e.*, by adjustment of the rental terms.”

V. Allocatur Petitions

A. *The Pa. Supreme Court has granted appeals in the following matters based upon the issues stated:*

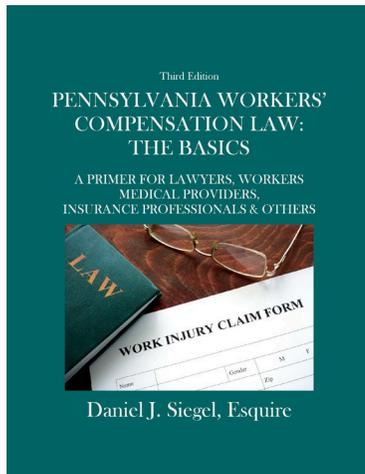
- [*Renner v. Court of Common Pleas of Lehigh County*, No. 851 MAL 2018 \(Pa., July 2, 2019\)](#)
 - Did the legislature intend for the United States Judicial System to be within the definition of “employer” under the Pa. Human Regulations Law, and therefore abrogated its sovereign immunity as stated in the *en banc* decision in *County of Allegheny v. Wilcox*, 465 A.2d 47 (Pa.Cmwlth. 1983)?
 - Does the application of the Pennsylvania Human Relations Act to the Unified Judicial System violate separation of powers so long as the Human Relations Commission neither investigates nor adjudicates the complaint of discrimination, as this Court held in *Ct. of Com. Pleas of Erie County (6th Jud. Dist.)*, *Juv. Probation Dept. v. Pennsylvania Human Rel. Commn.*, 683 A.2d 1246 (Pa. 1996) and *First Jud. Dist. of Pennsylvania v. Pennsylvania Human Rel. Comm’n.*, 727 A.2d 1110 (Pa. 1999)?
- [*Nicole B. v. School District of Philadelphia*, No. 13 EAL 2019 \(Pa., June 25, 2019\)](#)
 - The Pennsylvania Human Relations Act provides 180 days to file a complaint with the Pennsylvania Humans Relations Commission (PHRC) Pennsylvania’s minority tolling statute guarantees minors the “same time for commencing action” as adults after attaining the age of eighteen. *See* 42 Pa. C.S. § 5533(b)(i). Without minority tolling, children whose parents fail to timely file with PHRC will not have the same amount of time as adults to file a civil action because they will be time-barred from pursuing the claim. Does the minority tolling statute apply to PHRC complaints?
 - Section 962(e) of the PHRA provides for equitable tolling when a person “through no fault of his own,” is unable to timely pursue his PHRA claims. Minors in Pennsylvania lack the legal capacity to bring their own claims, so they, through no fault of their own, are unable to timely pursue their PHRA claims. Does § 962(e) toll a minor’s complaints?
- [*Bourgeois v. Show Time Inc.*, No. 768 MAL 2018 \(Pa., June 25, 2019\)](#)
 - Did the majority panel opinion conflict with existing law by failing to address the trial court’s disregard of Petitioner’s expert reports when granting summary judgment?
 - Did the majority panel opinion conflict with the existing law requiring it to review experts reports in the light most favorable to the non-moving party by, *inter alia*, (a) improperly requiring Petitioners’ experts to establish the legal duty that Respondents breached, (b) dismissing their opinions as conclusory, and (c) overlooking numerous opinions throughout their reports which supported Petitioners’ *prima facie* case against Respondents.
 - Did the majority panel opinion conflict with existing law when it held that Petitioners did not establish the duties Respondents owed to Petitioners, when the duty of a snow tubing facility to protect patrons form unreasonable risks of harm has already been established by the Supreme Court in *Tayar v. Camelback* [47 A.3d 1190 (Pa. 2012)]?
 - Did the majority panel opinion conflict with existing law by requiring that a violation of industry standards be demonstrated for Petitioners to sustain recklessness or gross negligence cause of action against Respondents?

REVISED THIRD EDITION:

The Only Desk Reference with the Entire Workers' Compensation Act and the Most Current Regulations

The Pennsylvania Workers' Compensation Book

By Daniel J. Siegel, Esquire



The only resource of its kind, *Pennsylvania Workers' Compensation Law: The Basics: A Primer for Lawyers, Workers, Medical Providers, Insurance Professionals & Others*, is an up-to-date and easy-to-understand guide to Pennsylvania workers' compensation law, practice and procedure. Designed as a desk reference for attorneys, paralegals, injured workers, employers, claims adjusters, self-insured employers and vocational rehabilitation workers, the book includes:

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