

The Pennsylvania Appellate Case Review

By Daniel J. Siegel, Esquire

LAW OFFICES OF DANIEL J. SIEGEL, LLC

66 West Eagle Road • Suite 1 • Havertown, PA 19083-1425

(610) 446-3457 • Fax (484) 636-3993

E-mail DSiegel@DanielJSiegel.com

REPORTING DECISIONS THROUGH JANUARY 31, 2019

PENNSYLVANIA APPEALS COURT OPINIONS

I. Substantive Law

A. *Dragonetti Act*

- ☐ [Brown v. Halpern, 2019 PA Super 5 \(Pa.Super., January 4, 2019\)](#)

➤ **Holding:** Under the Dragonetti Act, 42 Pa.C.S.A. §§ 8351-8355, a court will uphold a verdict if the trier of fact could reasonably conclude that the Defendant initiated the underlying lawsuit without probable cause.

B. *Heart and Lung Act - Jurisdiction*

- ☐ [Breyan v. Department of Conservation and Natural Resources, No. 34 C.D. 2018 \(Pa.Cmwlt., January 8, 2019\)](#)

➤ **Holding:** An agency's refusal to grant a hearing to contest its refusal to provide benefits under the Heart and Lung Act, 53 P.S. §§ 637-638, is not an appealable adjudication because the claimant did not have a personal or property right because his position was not among the enumerated class of employees eligible for benefits.

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C. *Motor Vehicle Financial Responsibility Law - Household Vehicle Exception*

□ [*Gallagher v. Geico Indemnity Co.*, No. 35 WAP 2017 \(Pa., January 23, 2019\)](#)

- **Holding:** A “household vehicle exclusion” in a motor vehicle insurance policy violates Section 1738 of Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. § 1738 because the exclusion acts as a *de facto* waiver of stacked uninsured and underinsured motorist coverages. Justice Wecht filed a [dissenting opinion](#). Chief Justice Saylor noted his dissent.

D. *Sovereign Immunity*

□ [*Brewington v. City of Philadelphia*, No. 23 EAP 2017 \(Pa., December 28, 2018\)](#)

- **Holding:** The absence of padding on a gym wall, into which a student ran during gym class, causing injury, falls within the real estate exception to sovereign immunity under Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8542. Justice Wecht filed a [concurring opinion](#). This Pennsylvania Supreme Court decision effectively reverses numerous cases interpreting the real estate exception to sovereign immunity.

II. Workers’ Compensation

A. *Entitlement to Ongoing Benefits*

□ [*Kurpiewski v. WCAB \(Caretta, Inc.\)*, No. 194 C.D. 2018 \(Pa.Cmwlt., January 18, 2019\)](#)

- **Holding:** A claimant may be considered disabled by a work-related injury despite resolution of symptoms if there is evidence that the symptoms are likely to recur when claimant returns to work.

B. *Multistate Jurisdiction*

□ [*Kreschollek v. WCAB \(Commodore Maintenance Corp.\)*, No. 297 C.D. 2018 \(Pa.Cmwlt., January 7, 2019\)](#)

- **Holding:** An injury on the New Jersey side of the Benjamin Franklin Bridge is not subject to jurisdiction under the Pennsylvania Workers’ Compensation Act despite the fact that (1) the Act applies to injuries occurring in the Commonwealth, and (2) the Compact creating the Delaware River Bridge Joint Commission states that all land owned by the Commission is property of both New Jersey and Pennsylvania.

C. *Temporary Compensation - Calculation of 90-Day Period*

□ [*Valley Stairs and Rails v. WCAB \(Parsons\)*, No. 1100 C.D. 2017 \(Pa.Cmwlt., January 24, 2019\)](#)

- **Holding:** The triggering date for determining when a claimant’s wages become payable under Section 406.1(d)(6) of the Workers’ Compensation Act, 77 P.S. § 717.1(d)(6), *i.e.*, when the 90-day period of temporary compensation payable commences, is the first date that a claimant is out of work for which compensation is payable.

III. Ethics & Professional Responsibility

A. *Attorney-Client Privilege - Derivative Litigation*

- [*Pittsburgh History and Landmarks Foundation v. Ziegler*, No. 53 WAP 2017 \(Pa., January 23, 2019\)](#)

➤ **Holding:** A derivative plaintiff, who believes that current management is acting against the interests of the corporation, should present the corporation with a “demand” that it pursue litigation or other action for the benefit of the corporation. In response, the corporation, through its current management, may form an independent commission to investigate the claims and determine whether to pursue the demanded action. If it declines to take action and the derivative plaintiff pursues its own derivative action, the corporation may file a Motion to Dismiss based upon the committee’s determination.

A reviewing court will give deference to the committee decision subject to the deference rule pursuant to the business judgment rule. Thus, pursuant to Section 7.13(e) of the *American Law Institute Principles of Corporate Governance Analysis and Recommendations (1994)*, plaintiff’s counsel should be furnished a copy of related legal opinions subject to the requirement that oral and written communications between the board and its counsel do not forfeit their privileged character and do not become subject to discovery. Justice Todd filed a [concurring and dissenting opinion](#). Justice Mundy filed a [concurring and dissenting opinion](#) in which Justice Todd joins.

IV. Pennsylvania Rules of Civil Procedure

A. [*Amendments to Rules 1007, 1018, 1033, 2005 and 2252 \(effective date April 1, 2019\)*](#)

- The Rules have been amended to permit a plaintiff to name John/Jane Doe defendants in a Complaint. The new Rule *does not* authorize the filing of a Praecipe for Writ of Summons if an unknown defendant is identified by a Doe designation.

V. Allocatur Petitions

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

- [*Carr v. Commonwealth of Pennsylvania Department of Transportation*, No. 460 MAL 2018 \(January 8, 2019\)](#)

➤ Is the Commonwealth Court’s decision in conflict with the U.S. Supreme Court’s rulings in *Pickering*, which allow a government employer to terminate an employee on the basis of their speech, even when it touches upon a matter of public concern, so long as the employer can demonstrate that an adverse effect could be reasonably foreseen?

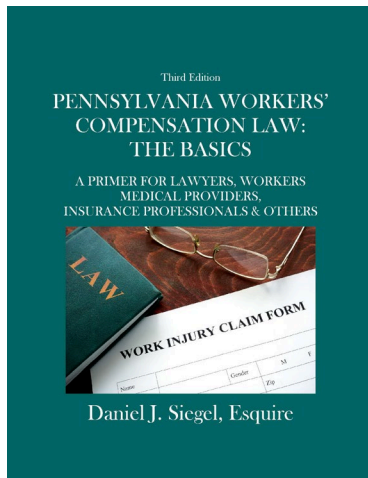
- Did the Commonwealth Court err by failing to give sufficient weight to the public importance of Carr’s Facebook comments as required by *Pickering*?
- Did the Commonwealth Court err by failing to give sufficient weight to the public importance of Carr’s Facebook comments as required by the Pa. Supreme Court in *Sacks*?
- [*Trigg v. Children’s Hospital of Pittsburgh of UPMC*, No. 307 WAL 2018 \(January 23, 2019\)](#)
 - Whether the Superior Court’s decision conflicted with Pennsylvania jurisprudence by failing to apply the palpable error abuse of discretion standard of review and properly defer to the trial court?
 - Whether the Superior Court’s holding directly conflicts with *Shinal v. Toms*, 162 A.3d 429 (Pa. 2017), which requires the denial of a strike for cause of a prospective juror when the prospective juror is willing and able to eliminate influences and render a verdict according to the evidence?
 - Whether the Superior Court improperly considered arguments regarding juror demeanor when those arguments were waived?
 - Whether the Superior Court erred by determining that Respondents were prejudiced by the trial court by requiring Respondents to use a peremptory challenge for Juror 29?

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