

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH JANUARY 1, 2011

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

A. *Breach of Employment Contract*

- [*Gillard v. Martin*, 2010 PA Super 238, \(December 20, 2010\)](#)

- **Holding 1:** Plaintiff may rely on pre-lawsuit conduct to prove a total breach of an employment contract because (1) he did not elect another remedy, (2) as soon as he detected a breach he confronted the defendant in order to obtain a promise to cure the breach, and (3) when it became apparent that the breach was going to continue, he promptly acted and declared a breach.
- **Holding 2:** In a breach of contract claim, a plaintiff is entitled to damages for the loss of future wages because the Complaint clearly sought the sums to which the plaintiff would have been entitled had the defendant not breached the agreement.

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 up the decision for you to read in its entirety. Try it and see!

B. *Causation - Negligence*

- [*Eckroth v. Pennsylvania Electric, Inc.*, 2010 PA Super 235 \(December 17, 2010\)](#)

- **Holding:** Section 433 of the *Restatement of Torts 2d*, which outlines a method of determining whether negligent conduct is a substantial factor in producing an injury, does not apply unless the defendant’s conduct has created a “continuous and active force” up to the time of the harm. In this case, the Court declined to impose liability based upon a claim for negligent termination of electric power for a house fire that occurred 48 hours after the termination of the electric power and was caused by the open flame of a candle that was left unattended overnight in a precarious location within the home.

C. *Damages Calculations*

- [*Helpin v. Trustees of the University of Pennsylvania*, Nos. 36, 37, 48 and 49 EAP 2009 \(Pa., December 21, 2010\)](#)

- **Holding:** When calculating damages for lost future income, a court or jury should not discount the award to present value, consistent with *Kaczkowski v. Bolubasz*, 421 A.2d 1027 (Pa. 1980). Under the “total offset” method, a court does not discount the award to present value but assumes that the effect of the future inflation rate will completely offset the interest rate, thereby eliminating any need to discount the award to its present value. Justice Saylor filed a [dissenting opinion](#) arguing against expanding the rule of *Kaczkowski* to encompass future lost earnings in this case.

D. *Delay Damages*

- [*Marlette v. State Farm Mutual Automobile Insurance Co.*, 2010 PA Super 227 \(December 10, 2010\)](#)
 - **Holding:** Delay damages under Pa.R.C.P. 238 should be calculated based upon the jury's award of compensatory damages, not on the molded verdict that reflects the insurance policy liability limits.

E. *Forum Selection Clauses*

- [*Autochoice Unlimited, Inc. v. Avangard Auto Finance, Inc.*, 2010 PA Super 221 \(December 1, 2010\)](#)
 - **Holding:** A forum selection clause in a contract will be enforced if the claims asserted (1) arise out of the contractual relation, (2) implicate the contract's terms, and (3) are not tort claims.

F. *Sovereign Immunity*

- [*Hatfield v. Penn Township*, No. 885 C.D. 2010 \(Pa.Cmwth., December 16, 2010\)](#)
 - **Holding:** The Recreational Use of Land and Water Act (RULWA), 68 P.S. §§ 477-1 - 477-8, does not protect a defendant from immunity for negligence when the land had been improved, thereby requiring the defendant to regularly maintain the property in a manner safe for public use. In this case, the plaintiff fell in a hole in a grass and dirt area between two softball fields.
- [*Royal v. SEPTA*, No. 2499 C.D. 2009 \(Pa.Cmwth., December 10, 2010\)](#)
 - **Holding:** The failure to kneel (lower) a stopped SEPTA bus does not constitute operation of the bus for purposes of the motor vehicle exception in Section 8522(b)(1) of the Sovereign Immunity Act, 42 Pa.C.S.A. In order to meet the motor vehicle exception, the injuries must be caused by the operation of the vehicle, or part of the vehicle, *i.e.*, the vehicle must be in operation/motion.

II. *Unemployment Compensation*

A. *Drug Possession and Unemployment Eligibility*

- [*Maskerines v. Unemployment Compensation Board of Review*, No. 891 C.D. 2010 \(Pa.Cmwth., January 3, 2011\)](#)
 - **Holding:** When an employee is discharged for off-the-job conduct that violates a work rule, and a last chance agreement, Section 402(e) of the Unemployment Compensation Law, 43 P.S., does not require the employer to show that the off-the-job conduct directly affected the claimant's job performance in order to deny him benefits.

B. *Waiver*

- [*Pitt Chemical and Sanitary Supply Co., Inc. v. Unemployment Compensation Board of Review*, No. 936 C.D. 2010 \(Pa.Cmwth., December 3, 2010\)](#)
 - **Holding:** The provisions of any contract in which an employee waives his or her right to unemployment compensation is unenforceable under Section 701 of the Unemployment Compensation Law, 43 P.S. § 861.

III. Workers' Compensation

A. Impairment Rating Evaluations (IREs)

- [*Stanish v. Workers' Compensation Appeal Board \(James J. Anderson Construction Co.\)*, No. 1870 C.D. 2009 \(Pa.Cmwlt., December 7, 2010\)](#)

- **Holding:** Under Section 306(a.2) of the Workers' Compensation Act, 77 P.S. § 511.2, an impairment rating evaluation must be based upon "the most recent edition of the *American Medical Association 'Guides to the Evaluation of Permanent Impairment.'*" Thus, when the 6th Edition of the *Guides* was published, all IREs were required (1) to be based upon this volume, and (2) to be performed by physicians trained in evaluations under the latest edition. Any Bureau regulations to the contrary are invalid.

B. Partial Disability - Economic Factors

- [*Trevdan Building Supply v. Workers' Compensation Appeal Board \(Pope\)*, No. 1522 C.D. 2010 \(Pa.Cmwlt., December 13, 2010\)](#)

- **Holding:** A claimant seeking partial disability benefits must establish that the work injury caused a decrease in earning power. When the employer establishes that the loss of earning power is caused by economic circumstances that reduced time for all workers, and not by the disability from the work injury, Claimant is not entitled to partial disability benefits.

C. Termination of Benefits

- [*City of Philadelphia v. Workers' Compensation Appeal Board \(Butler\)*, No. 1245 C.D. 2009 \(Pa.Cmwlt., December 16, 2010\)](#)

- **Holding:** An employer may terminate benefits based upon a date that predates the issuance of a Notice of Compensation Payable under the Workers' Compensation Act. The contents, not the date, of the NCP are outcome determinative.

IV. ALLOCATUR PETITION GRANTED

The Pennsylvania Supreme Court has granted allocatur in the following matter on the issues stated:

A. *Federal Employees' Liability Act/Sovereign Immunity*

- [*Goldman v. SEPTA*, Nos. 529 & 530 EAL 2009 \(December 20, 2010\)](#)

- **Issue 1:** Whether the Commonwealth Court in a case of first impression – for the first time in SEPTA's 46 years existence – incorrectly held, because the court failed to follow the United States Supreme Court's mandated "arm of the state" jurisprudence, that SEPTA is not obligated to comply with federal laws, stripping SEPTA employees of the rights and protections railroad employees have enjoyed for a century under the Federal Employers' Liability Act.

- **Issue 2:** Whether the Commonwealth Court's decision should be reversed because the decision (a) ignores the United States Supreme Court's mandate in *Lake County* and *Hess* that sovereign immunity must be determined based upon a detailed analysis of several specific factors against which to determine an entity's nature and structure and (b) was only based on the state legislature's label of SEPTA as a "Commonwealth Agency and Instrumentality," and the Commonwealth's partial voluntary funding of SEPTA.

- **Issue 3:** Whether the Commonwealth Court improperly held, in a case of first impression, that all claims brought under the Federal Employees' Liability Act (FELA), 45 U.S.C. §§ 51-60, were completely barred by the Pennsylvania Sovereign Immunity Act, 42 Pa.C.S. § 8522(B), rather than leaving it to the trial courts to decide each FELA accident on a case by case basis as is done in all other personal injury actions.