

In Summation:

**An Overview of Pennsylvania Appellate Court
Civil Decisions and Voters Guide for the 2017
Appellate Court Elections**

Prepared by

**The Pennsylvania Coalition for Civil Justice
Reform**

Why Are Judicial Elections Important?

This year Pennsylvanians will be electing judges to our appellate courts. The appellate courts consist of the Pennsylvania Supreme, Superior and Commonwealth Courts. Those sitting on the bench of these courts have a tremendous responsibility. They are charged with interpreting statutes as well as prior precedent setting case law, and making determinations as to whether lower courts applied the law correctly. In some cases, appellate courts even establish policy and new law. These rulings impact every citizen of the commonwealth and impact the economy, healthcare, schools, businesses, local government, the environment and numerous other areas of policy.

Pennsylvania's Litigation Climate: Why Is This Important?

A [recent survey](#) conducted for the U.S. Chamber Institute for Legal Reform revealed that 85% of the businesses responding said that a state's litigation environment is likely to impact where they will do business. This percentage is up from 75% in 2015 and 70% in 2012. The same survey found Pennsylvania mired at 38th in the nation for its litigation climate. In fact the City of Philadelphia made the list of Cities or Counties with the Least Favorable Litigation Environment! Pennsylvania also scored low for its "Quality of Appellate Review," coming in 34th. The U.S. Chamber Institute for Legal Reform estimates that Pennsylvania could raise its [employment rate by 1.5%](#) if meaningful litigation reform is enacted.

As sobering as those figures are, the American Tort Reform Association (ATRA) has placed Pennsylvania on its infamous "[Judicial Hellholes Watch List!](#)" ATRA lists the Pennsylvania Supreme Court, and the Philadelphia and Pittsburgh Court of Common Pleas as areas of concern in civil litigation.

Small businesses are hit particularly hard by lawsuits. In 2008, small businesses across the country expended [\\$105.4 billion on civil litigation](#) and paid \$35.6 billion of those costs out of pocket as opposed to through insurance. Medical liability costs for doctors in small groups and small medical labs [cost \\$28 billion](#) during the same year.

Our appellate courts play an important role in determining how doctors, small businesses, and other employers are treated in the legal system. Their decisions directly impact the liability climate and therefore our economy. Job creators, just like Pennsylvania voters, have to decide whether to elect judicial candidates supportive of growth and economic opportunity, or those who prefer Pennsylvania being a predatory environment to job creation due to abusive litigation.

What Makes a Good Judicial Candidate?

The Pennsylvania Coalition for Civil Justice Reform (PCCJR) considers several factors when reviewing the records of judicial candidates. Above all, our members want a judiciary that is fair, reasonable, and balanced. Job creators and Pennsylvania's economy are damaged by judicial opinions that are unrestrained and expand concepts of liability in ways that are unwarranted and unexpected. Predictability in following established law sets the right climate for job growth and opportunity in Pennsylvania. Our doctors, hospitals and other health care providers have long been threatened by

runaway medical liability awards and costs. Courts that show proper judicial restraint and adherence to the constitutional and statutory law as written, as opposed to creating new law from the bench, offer the stability needed to protect job opportunities and access to healthcare for Pennsylvanians. We believe a candidate who values common sense and personal responsibility will make a good jurist.

Candidate Questionnaire Responses

The PCCJR sent candidate questionnaires to all candidates running in competitive elections for the Pennsylvania Supreme, Superior and Commonwealth Courts. Voters will be electing one justice to the Pennsylvania Supreme Court, four judges to the Superior Court and two judges to the Commonwealth Court. The unedited survey responses from the candidates who chose to respond are found in links below.

Voters will also be asked if they want to retain certain members of the appellate courts for another ten-year term. Voters will be asked to vote “Yes” or “No” to retain **Chief Justice Thomas G. Saylor** and **Justice Debra M. Todd** to the Supreme Court, and whether **Judge Jacqueline O. Shogan** should be retained to the Superior Court. Questionnaires were not sent to those standing for retention since they do not face opponents.

Candidate Questionnaire Responses

Supreme Court: (Vote for One)

Dwayne Woodruff – D

No Response Received

Sallie U. Mundy – R

(Link to Response)

Superior Court: (Vote for Four)

Maria McLaughlin – D

No Response Received

Carolyn Nichols – D

No Response Received

Deborah Kunselman – D

No Response Received

Geoffrey Moulton – D

No Response Received

Craig Stedman – R

(Link to Response)

Mary Murray – R

(Link to Response)

Wade Kagarise – R

(Link to Response)

Emil Giordano – R

(Link to Response)

Commonwealth Court: (Vote for Two)

Irene Clark – D

No Response Received

Ellen Ceisler – D

No Response Received

Christine Cannon Fizzano – R

[\(Link to Response\)](#)

Paul Lalley – R

[\(Link to Response\)](#)

Judges, their legal opinions and rulings, matter to all of Pennsylvania

The Pennsylvania Coalition for Civil Justice Reform (PCCJR) has conducted extensive research into the judicial opinions issued by the Pennsylvania Appellate courts. The following is a summary of recent cases that have impacted diverse economic sectors and access to jobs across Pennsylvania.

Workers Compensation

The Pennsylvania Supreme Court recently struck down the statute that allowed employers to require physicians to determine whether an employee can continue to receive workers' compensation benefits or whether he or she has recovered and can return to work.¹ This decision is very problematic for an employer's ability to track the recovery of injured employees. As a result, some employees might delay returning to work as there is no way for an employer to track a worker's recovery. Law firms are advising clients that this decision may reinstate workers' compensation benefits that had already expired and are urging those who at one time received benefits to seek legal guidance. The Compensation Rating Bureau has already filed for a 6% rate increase as a direct result of this decision. This will amount to a tax increase on every employer.

The Supreme Court also held that the manifestation of a worker's occupational disease outside of the 300-week period set forth in the Pennsylvania Workers' Compensation Act removes the claim from the Act's purview and allows the worker to bring a claim against his or her employer.² This decision creates another hardship for employers as the predictability and ease of the worker's compensation system gives way to the uncertainties and expense of courtroom litigation.

Medical Liability

The Supreme Court has ruled that a plaintiff can present expert opinion testimony by a nurse regarding causation in a medical-malpractice action.³ This ruling weakens the standard for expert testimony in medical liability cases. Recently the Supreme Court ruled that a physician cannot rely on qualified staff to fulfill the physician's duty to obtain a patient's informed consent to a medical procedure.⁴ This decision denies the realities of modern medicine, creates more administrative paperwork for doctors and takes time away from administering patient care.

Products Liability

In 2014, the Supreme Court, in a lengthy decision, swept away decades of onerous Pennsylvania precedent and introduced concepts of negligence into strict product liability cases.⁵ Under the new standard, the court may now consider whether a product was "unreasonably dangerous." For a product

to be defective, it must be proven that a product was in a “defective condition” at the time it left the seller’s control. A product is in a defective condition if it presents dangers that are unknowable and unacceptable to an average or ordinary consumer or if a reasonable person would conclude that the probability and severity of harm outweighs the burden or cost of taking precautions.

While this decision represents progress in restoring fairness to product liability cases, many questions were left unanswered by the court and this area of the law will need to be scrutinized closely as it develops.

Asbestos

In the past, a majority of the Pennsylvania Supreme Court repeatedly rejected testimony by plaintiff experts that “any exposure” to asbestos causes injury, calling the theory a “fiction” and requiring experts to prove a causative dose.⁶ The Supreme court has now, however, permitted a plaintiff’s expert’s cumulative-exposure testimony in an asbestos case.⁷ More recently, the Superior Court overturned a Philadelphia County verdict on the ground that the trial court judge improperly admitted expert testimony which asserted that each and every exposure to asbestos, no matter how minimal, must be considered a cause of the plaintiff’s mesothelioma. In June 2017, the Supreme Court refused to hear the appeal.⁸ Since the election of several new justices to the Supreme Court in 2015, it appears the law on causation in asbestos cases is in flux.

Lawsuit Abuse

The Supreme Court upheld a Pennsylvania statute that protects litigants from the wrongful use of civil proceedings.⁹ The court found that the “Dragonetti Act” did not violate the judiciary’s exclusive power to regulate the practice of law under the Pennsylvania Constitution. The Dragonetti Act, passed by the General Assembly and signed into law in 1980, gives civil defendants who prevail at trial a statutory cause of action to sue the attorneys who targeted them frivolously. The decision continues to provide victims of lawsuit abuse with the ability to seek damages when they are sued for no legitimate reason.

Negligence

The Superior Court reversed a trial-court grant of summary judgment in favor of a business where a minivan struck the plaintiff on a sidewalk outside of a business. The trial court concluded as a matter of law that the business’s duty of reasonable care did not include protecting against curb-jumping cars.¹⁰ On appeal, the Superior Court rejected the view that the risk of a vehicle encroaching on a sidewalk is unforeseeable as a matter of law. A decision like this creates great uncertainty for business owners. Is a business owner now supposed to construct concrete barriers to prevent cars from jumping curbs? How is a business owner or shop keeper supposed to know where their duty begins and ends?

Insurance

The Superior Court handed down an opinion that invalidated an insurer's Uninsured Motorist rejection form on the basis that it included additional language that failed to comply with statutory requirements of Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL).¹¹ The insurer's form included one additional sentence, which the court acknowledged was "not directly related to rejection of UIM coverage," but determined that allowing the form's imperfect compliance would "thwart the legislative intent" behind the MVFRL. Even though the rejection form complied with all other aspects of the law, the court allowed the policyholder's suit against its insurer to proceed based on this minor technicality.

The Superior Court recently found that a homeowners' insurance policy exclusion for losses caused by "water or sewage which backs up through sewers and drains" was ambiguous where water and raw sewage from a local sewer system caused property damage to the homeowners' basement. The insurer argued the provision unambiguously precluded coverage for the homeowners' losses. The Superior court disagreed, finding that because there may be more than one reasonable interpretation of what "backs up" meant under the exclusion, the provision was ambiguous.¹² This raises serious concerns about whether long used and understood contract language can be relied on by the parties.

Consumer Protection

The Pennsylvania Unfair Trade Practices and Consumer Protection Law is particularly attractive to plaintiffs' lawyers because it provides for minimum statutory damages (\$100), allows courts to award treble (triple) damages, and authorizes the court to award a plaintiff's attorneys' fees. As interpreted by the courts, Pennsylvania also has among the longest statute of limitations (six years) for state consumer protection claims, which allows for larger class actions. These claims are typically filed in, or removed to, federal court under the Class Action Fairness Act (CAFA).

Arbitration

Binding pre-dispute arbitration allows cases to be decided without a costly court trial. It is therefore problematic that the Superior Court rejected a nursing home's argument that a resident's contractual agreement with the facility to arbitrate all claims did not require non-signing wrongful death claimants to arbitrate.¹³ The court determined the wrongful death claimants had a right to a jury trial. This is a set-back for efforts to resolve claims in alternative forums at a lower cost.

Cases Cited:

1. [Protz v. Workers' Compensation Appeal Board](#), 2017 WL 2644474 (Pa. June 20, 2017)
2. [Tooey v. AK Steel Corp.](#), 81 A.3d 851 (Pa. 2013)
3. [Freed v. Geisinger Medical Center](#), 5 A.3d 212 (Pa. 2010)
4. [Shinal v. Toms](#), 2017 WL 2655387 (Pa. June 20, 2017)
5. [Tincher v. Omega Flex](#), 628 Pa. 296, 104 A.3d 328 (2014)
6. [Betz v. Pneumo Abex LLC](#), 44 A.3d 27 (Pa 2012)

7. [Rost v. Ford Motor Company](#), 151 A.3d 1032 (Pa. 2016)
 8. [Nelson v. Airco Welders Supply](#), No. 52 EAL 2015 (Pa. June 21, 2017)
 9. [Villani v. Seibert](#), (Pa. April 26, 2017)
 10. [Truax v. Roulhac](#), 126 A.3d 991 (Pa. Super. Ct. 2015)
 11. [Jones v. Unitron Auto and Home Insurance](#), 40 A.3d 125 (Pa. Super. Ct. 2012)
 12. [Windows v. Erie Insurance Exchange](#), 161 A.3d 953 (Pa. Super. Ct. May 1, 2017)
 13. [Pisano v. Extencicare Homes, Inc.](#), 77 A.3d 651 (Pa. Super. Ct. 2013)
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