

# PITTSBURGH LEGAL JOURNAL

## OPINIONS

### ALLEGHENY COUNTY COURT OF COMMON PLEAS

- Penn Development Services, LP v. Chevy Chase Construction, et al., Wettick, Jr., J.** .....Page 139  
*Requirement of Certificate of Merit—Pa. R.C.P. 1042.6(c)—Professional Liability Claims—Third Party Not Patient or Client*
- Lance Gray v. Allegheny County Housing Authority, Friedman, J.** .....Page 140  
*Hearing Officer's Discretion to Consider Circumstances of Judgment—Lack of Serious or Repeated Violations of Lease*
- In re: The November 3, 2009 Election for Council of the Borough of Bellevue Ward One, James, J.** .....Page 141  
*Election Code-Absentee Ballot—Error of Election Official*
- Katie L. Waters v. Young's Tavern, Inc., et al., James, J.** ....Page 142  
*Negligence—Breach of Duty—Workers' Compensation—Choice of Remedies—Spoilation of Evidence*
- Stacey Rae Kelly v. Allegheny County, James, J.** .....Page 143  
*Political Subdivision Tort Claims Act—Real Estate Exception*
- Judith T. Espy v. Michael T. Espy, et al. v. Liberty Life Assurance Company of Boston, Friedman, J.** ..Page 145  
*Effect of Divorce on Designation of Beneficiaries—Life Insurance*
- Candace Hicks v. Lilly Baptist Church, McCarthy, J.** .....Page 146  
*Allegheny County Local Rule 1304—Pa. R.C.P. 227.1—Pa. R.C.P. 1303*

# PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

## OPINIONS

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, [www.acba.org](http://www.acba.org).

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**Penn Development Services, LP v.  
Chevy Chase Construction, et al.**

*Requirement of Certificate of Merit—Pa. R.C.P. 1042.6(c)—Professional Liability Claims—Third Party Not Patient or Client*

A certificate of merit is not required to accompany the complaint in the same manner required by Pa.R.C.P. 1042.6(c) when the third party who is allegedly injured as a result of a licensed professional's deviation from acceptable professional standards is not a patient or client of the professional. Such third parties do not have the same access to relevant information that patients or clients do and are likely to need significant discovery before they can obtain an expert opinion.

(Lynn E. MacBeth)

*William D. Clifford* for the Plaintiff.

*George E. Yokitis, Walter P. DeForest and Mindy J. Shreve* for Chevy Chase Construction, Inc., ASC Development, Inc., Antoine Chammas, Kilbuck Properties, LP, and Kilbuck Properties, LLC.

*Francis X. McTiernan* for Lennon Smith Souleret Engineering, Inc.

*James W. Kraus and Peter S. Wolf* for Senex Explosives, Inc.

*Ronald W. Crouch, Alyssa C. Barillari, and James W. Pfeifer* for Wal-Mart Stores, Inc. and Wal-Mart Real Estate Business Trust.

*Matthew Chabal, III* for Geo-Sci, Inc.

*John M. Smith, Christopher W. Rogers, and Jennifer S. Williams* for ACA Engineering, Inc.

No. GD 07-027560. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION AND ORDER OF COURT**

Wettick, Jr., J., March 1, 2010—The motions of plaintiff (“Penn Development”), filed pursuant to Pa. R.C.P. No. 1042.6(c) seeking determinations by this court as to the necessity of filing a certificate of merit, is the subject of this Opinion and Order of Court.

This litigation arises out of a landslide which occurred during the construction of a Wal-Mart Superstore. Kilbuck Properties, LP, was the developer.

Kilbuck entered into a general construction contract with Chevy Chase Construction, Inc., wherein Chevy Chase agreed to perform the construction work for the project. Chevy Chase entered into a subcontract with Penn Development wherein Penn Development agreed to perform certain aspects of the site work.

Kilbuck also entered into two other contracts that are relevant to the issues before this court. It hired Geo-Sci, Incorporated to perform a geotechnical investigation and to prepare design criteria. It hired ACA Engineering, Inc., to oversee and inspect the work for the project and to furnish information to others working on the job. Penn Development relied on the information which Geo-Sci and ACA Engineering furnished to Kilbuck and others working on the project, including Penn Development. Penn Development alleges that this information was inaccurate and its reliance on this inaccurate information was a cause of the landslide.

In Count 28 of Plaintiff's First Amended Complaint, plaintiff has brought a negligence action against Geo-Sci based on allegations that Geo-Sci failed to exercise the ability, skill, and care customarily used by engineers on projects such as the instant project in supplying the information contained in its geotechnical investigation and geotechnical design; and that Penn Development relied upon the inaccurate information contained in its geotechnical investigation and geotechnical design. Penn Development's reliance upon this inaccurate information was a cause of the landslide.

Count 29 of Plaintiff's First Amended Complaint is a negligence action against ACA Engineering. Plaintiff alleges that ACA Engineering failed to exercise the ability, skill, and care customarily used by consulting engineers on such projects in supplying the information relating to its oversight and inspections. Penn Development relied on this information supplied by ACA Engineering in performing its work and its reliance on this inaccurate information contributed to the landslide.

Penn Development filed its motions seeking a determination as to the necessity for filing a certificate of merit in response to notices of intent to enter a judgment of *non pros* for failure to file a certificate of merit filed by Geo-Sci and ACA Engineering. The procedure governing the entry of a judgment of *non pros* for failure to file a certificate of merit is set forth in Rule 1042.6. This Rule provides that a defendant seeking to enter a judgment of *non pros* for failure to file a certificate of merit may file a written notice of intent to seek a judgment of *non pros* no sooner than the thirty-first day after the filing of the complaint. The notice of intent advises the plaintiff that the defendant intends to enter a judgment of *non pros* against the plaintiff unless a certificate of merit is filed within thirty days of the date of the filing of the notice of intent to enter judgment of *non pros*.

Where a plaintiff believes that it is not required to file a certificate of merit, the plaintiff may within this thirty-day period file a motion seeking a determination by the court as to the necessity of filing a certificate of merit. The filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules on the motion.

In the present case, both Geo-Sci and ACA Engineering filed notices of intention to enter judgments of *non pros* against Penn Development for failure to file certificates of merit. Penn Development responded to the notices by filing its motions seeking determinations as to the necessity of filing certificates of merit. As to both defendants, Penn Development contends that it is not obligated to file a certificate of merit because Penn Development's claims are outside the scope of the rules mandating the filing of certificates of merit.

Under Pa. R.C.P. No. 1042.3, a plaintiff must file a certificate of merit in any action based upon an allegation that a licensed professional deviated from an acceptable professional standard. However, Pa. R.C.P. No. 1042.1(a) (emphasis added) provides: “The rules of this chapter govern a civil action in which a professional liability claim is asserted *by or on behalf of a patient or client of the licensed professional.*” While this is a lawsuit against *licensed professionals* as defined in Rule 1042.1(c), the claims raised by Penn Development against Geo-Sci and ACA Engineering are not claims asserted by or on behalf of a patient or a client of the licensed professional.

The services of Geo-Sci and ACA Engineering were furnished pursuant to contracts between Kilbuck and these defendants. Consequently, in both instances, Kilbuck is the client.

Both Geo-Sci and ACA Engineering contend that the Pennsylvania Supreme Court could not have intended to allow persons who are not patients or clients to bring professional negligence claims, for which expert testimony is required, against professionals listed in Rule 1042.1(c) without filing certificates of merit because there is no reasonable explanation for limiting the rules requiring the filing of certificates of merit in this fashion.

I disagree. A third party who is allegedly injured as a result of a licensed professional's deviation from acceptable profession-

al standards (i.e., a party who is not a patient or a client) does not have the same involvement with the licensed professional and does not have the same access to relevant information. Thus, third parties are likely to need significant discovery before they can obtain an expert opinion as to whether the licensed professional deviated from an acceptable standard of care.

Consider the following example: A building is destroyed apparently as the result of an explosion. The owner immediately retains an expert who visits the site after reviewing records of the owner regarding the construction of the building, repair and inspection records, and the like. The expert concludes that the cause is an accumulation of gas in a small airtight room containing the furnace, and the architect is at fault for the choice of the furnace and the decision to place the furnace in an airtight room. The owner is, therefore, in a position to file a certificate of merit at the time it institutes its lawsuit.

Suppose the explosion also seriously injures a person who is walking on the sidewalk in front of the building at the time of the explosion. Neither the injured party nor counsel retained by the injured party is in a position to furnish any information to an expert during the early stages of litigation.

Also, defendants' contention that the Pennsylvania Supreme Court did not intend to restrict rules governing certificates of merit in this manner is inconsistent with the Explanatory Comment 2008 which follows Rule 1042.6 and which includes as one of the "highlights of the amendments," the following statement: "First, subdivision (a) was revised to make it clear that Rule 1042.1 *et seq.* (1) applies to claims by or on behalf of patients or clients against licensed professionals."

For these reasons, I enter the following Order of Court:

#### ORDER OF COURT

On this 1st day of March, 2010, upon consideration of the motions filed by Penn Development Services, LP, seeking determinations as to the necessity of filing a certificate of merit, it is ORDERED that plaintiff need not file a certificate of merit in support of its causes of action at Count 28 of its First Amended Complaint against Geo-Sci, Incorporated, and Count 29 of its First Amended Complaint against ACA Engineering, Inc.

BY THE COURT:  
/s/Wettick, J.

### Lance Gray v. Allegheny County Housing Authority

*Hearing Officer's Discretion to Consider Circumstances of Judgment—Lack of Serious or Repeated Violations of Lease*

Where there is no evidence of repeated violations of the lease, the tenant's benefits will be reinstated. The Hearing Officer incorrectly concluded that a judgment for rent ended the matter, assuming he could not consider the underlying circumstances.

(Lynn E. MacBeth)

Mary Ellen Droll for Appellant.

Renee L. Mielnicki for Appellee.

No. SA 09-744. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

#### INTRODUCTION

Friedman, J., February 9, 2010—The Allegheny County Housing Authority ("ACHA") has appealed the Order of this Court which granted the appeal of Lance Gray and ordered that his Section 8 benefits be reinstated. ACHA has raised two matters on appeal in its Statement of Matters Complained of on Appeal, fully quoted below:

1. Whether the lower court erred by holding that failure to pay rent in this case was not a serious lease violation pursuant to 24 CFR §982.551(e).
2. Whether the lower court made an error of law and abused its discretion when it overturned the hearing officer's decision on the grounds that he made a scrivener's error by stating that an eviction constituted a serious lease violation.

#### DISCUSSION

The Record reflects that Mr. Gray's landlord obtained a judgment against him in a very small amount for reasons that are not clear. Mr. Gray was then locked out of his apartment and was unable to get his possessions. Hearing Transcript ("HT") p. 4. At some time before the hearing, he paid the judgment.

The Record reflects that the hearing officer concluded, incorrectly, that the fact of eviction ended the matter. The hearing officer did not make a "scrivener's error" as is asserted on appeal. His decision clearly reflects that he accepted the opinion of the housing counselor that the "problem [was] that [Mr. Gray] was evicted too." HT p. 2, ll. 10-22.

The hearing officer apparently believed he had no discretion to consider all the circumstances, in particular those of Mr. Gray and his ability to understand that he could pay a judgment even though the landlord was insisting he move out. The decision contains an express finding that "Tenant [Mr. Gray] has mental impairments which limits his ability to understand." Hearing officer's Finding of Fact ("FOF") No. 4. There is also an express finding that, "While counsel makes a compelling argument that the money judgment and subsequent satisfaction of that judgment does *not* constitute a serious violation of the lease, unfortunately, the *eviction* does." FOF No. 7. The hearing officer apparently believed that he could never inquire further into the reasons behind a judgment, when the correct view is that *most of the time* he cannot inquire.

Here, however, an impaired individual was locked out of his residence by a landlord who is said to have declined to demand payment of the judgment. Here a real question of material fact was raised by the evidence – was the landlord simply trying to get rid of a somewhat handicapped individual or had Mr. Gray been so delinquent in his duties as a tenant that he was undeserving of continued Section 8 benefits. The Record indicates that the hearing officer seemed to believe Mr. Gray's version of events, but that

he concluded that the law required him, nevertheless, to uphold the termination of his Section 8 benefits.

The hearing officer perceived the dispute as involving two regulations of the Section 8 program, which he described as follows:

- 1) "Section 982.551(E) serious or repeated violations of the lease, and
- 2) "Section 928.552(2) family evicted from housing due to violation of the lease."

There is no evidence that there were "repeated violations" of the lease. The tenor of the decision does not suggest at all that the hearing officer found that the existence of the judgment for rent indicated that there was a "serious" violation of *the lease*. In any case, there is no evidence to support a finding that the judgment at issue resulted from a "serious" violation of the lease.

#### CONCLUSION

There is insufficient evidence to show that there was either "serious" or "repeated" violations by Mr. Gray of his lease. There is nothing of record to warrant the extreme sanction of termination of Section 8 benefits. There was no need to remand the matter (and no one had asked us to do so), because the Record is complete, even though the evidence is insufficient. We properly directed ACHA to reinstate his benefits.

BY THE COURT:  
/s/Friedman, J.

Dated: February 9, 2010

## In re: The November 3, 2009 Election for Council of the Borough of Bellevue Ward One

### *Election Code-Absentee Ballot—Error of Election Official*

The court refused to strike an absentee ballot which was inadvertently left in the trunk of an election official's car and not counted until several days after the close of the election. Noting that "the right to vote is the most treasured prerogative of citizenship" and absent evidence of fraud or tampering with the ballot, the court held that the elector should not be disenfranchised due to an error by an election official.

(Mary Long)

Matthew D. Racunas, Patricia L. McGrail, and James R. Burn, Jr. for Petitioner.

No. GD 09-21837. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

James, J., December 9, 2009—This matter is before the Court on a Petition to Strike an Absentee Ballot cast in the November 3, 2009 General Election. Petitioner Jane Braunlich was the Democrat candidate for the office of council person for Ward One in the Borough of Bellevue, Allegheny County, Pennsylvania. After the polls closed the local election board reported the Petitioner received 210 votes and that her closest challenger, David Piet the Republican candidate, had received 209 votes. All of these votes were cast electronically and no absentee ballots were counted.

At the hearing on November 30, 2009, the following facts were established. After the results were returned to the Allegheny County Division of Elections, election employees became aware that an absentee ballot had been sent to District One, Ward One of Bellevue Borough. The employees began a search of the returned envelopes and papers from that District. The missing ballot was not found. Calls were made to the Judge of Elections who went to the polling place to search for the missing ballot, to no avail.

Finally, the Election Division official asked the Judge of Elections to search her car to see if the envelope containing the absentee ballot could be found. The Judge of Elections' uncontroverted testimony was that she discovered the still sealed envelope (marked by the letter "P") in the trunk of her car. The Judge of Elections called the Election Division for instructions. She was advised to deliver the unopened "P" envelope to the Election Division. Her husband brought the envelope to the Election Division and handed it to an employee of the Elections Division.

Mr. David Voyer, Manager of Balloting and Return Sections for the Elections Division, testified that he received the ballot on November 9, 2009. After consulting with an Assistant County Solicitor, Mr. Voyer opened the still sealed envelope and counted the ballot. The absentee ballot changed the vote count and resulted in the two top candidates receiving 210 votes. Because of the tie, the candidates were advised that they were required to cast lots to determine the winner.

The Petitioner has asked the Court to strike the absentee ballot because of mandatory language set forth in the Election Code 25 P.S. 3146.8(a) and 3146.8(e). The pertinent language cited is as follows:

Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election in each election district. The results of the canvass of the absentee ballot shall then be included in and returned to the county board with the returns of that district.

25 P.S. §3146.8(a)

...the local election judge shall announce the name of the elector and shall give any watcher present an opportunity to challenge any absentee elector upon the ground or grounds (1) that the absentee elector is not a qualified elector; (2) that the absentee elector was within the municipality of his residence on the day of the primary or election during the period the polls were open, except where he was in military service or except in the case where his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability; or (3) that the absentee elector was able to appear personally at the polling place on the day of the primary or election...

25 P.S. §3146.8(e)

Petitioner contends that the mandatory language of §3146.8(a) and (e) precludes the counting of the absentee ballot in this case. She cites *Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004) for the proposition that where the election code states "shall" that word carries an imperative or mandatory meaning. This Court is well aware of that

imperative. It was this Court's decision to count those absentee ballots, affirmed by Commonwealth Court at 839 A.2d 459 (Pa.Cmwlth. 2003) and reversed by our Supreme Court at 843A.2d 1223 (Pa. 2004). However, that case dealt with the means of delivery of absentee ballots to the Election Board that was not authorized by the Election Code. The Supreme Court found that the mandatory language setting forth the means of delivery of completed absentee ballots precluded any other means of delivery. In the case before this Court, the ballot could not be canvassed in compliance with the mandatory language of the code because it was misplaced and not at the polling place to be canvassed and tabulated on the day of the election.

A review of the testimony indicates that the misplacement of the ballot was inadvertent, there is no evidence of fraud or tampering with the ballot and that the voter's intent was quite clear and unambiguous. Petitioner argues that because the absentee ballot was not canvassed immediately after the close of the polls, no one was able to challenge the absentee ballot pursuant to §3146.8(e). In open Court, counsel for Petitioner was advised of the name of the elector who had requested the absentee ballot because of military duty and the registered address of the elector. This Court offered to continue the hearing to allow the Petitioner to conduct an investigation to determine if there was any evidence that would allow a challenge to the ballot pursuant to §3146.8(a). Through counsel she declined that offer.

The right to vote is the most treasured prerogative of citizenship in this Nation and this Commonwealth. *In Re Recount of Ballots Cast in General Election*, 325 A.2d 303, 308 (Pa. 1974). No voter is to be disenfranchised except for compelling reasons. *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945). Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning. *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954). The power to throw out a ballot thus should be only used sparingly. *Weiskerger Appeal*, 290 A.2d 108, 109 (Pa. 1972). Our goal must be to enfranchise and not to disenfranchise. *Id.* at 109.

The absentee ballot in question has been cast in accordance with the dictates of the Election code. The record indicates that the ballot was canvassed as soon as it was discovered and that there is no evidence of fraud or tampering of the ballot. The only issue before the Court was whether an error by an election official should disenfranchise an elector who has cast an absentee ballot in accordance with the mandatory requirements of the Election Code. This Court declines to throw out the ballot under these circumstances.

## Katie L. Waters v. Young's Tavern, Inc., et al.

*Negligence—Breach of Duty—Workers' Compensation—Choice of Remedies—Spoilation of Evidence*

1. The court granted the defendants' motion for summary judgment in a negligence action because the plaintiff, who was injured by a broken glass while working for the defendants as a bartender, had already made a claim and received benefits under the Workers' Compensation Act. Section 305 of the Act precludes an additional action at law against an employer.

2. The court also granted the defendant-glass manufacturer's motion for summary judgment because the glass which the plaintiff alleged to be defective had been discarded and therefore the cause of the accident was speculative.

(Mary Long)

Robert B. Woomer for Plaintiff.

Richard F. Andracki and Raymond H. Conoway for Young's Tavern Inc. d/b/a Young's Tavern; Panagiota Folino a/k/a Penny Folino; Anthony Folino, Toms' Southside Diner, Inc.

Susan D. Garrard for ARC International North America.

Nos. GD 08-008968, GD 07-022526. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### OPINION

James, J., December 21, 2009—On September 19, 2006, Plaintiff, Katie L. Walters, was working as a bartender at Young's Tavern, Inc., d/b/a Young's Tavern, when she sustained a significant injury to her left hand while preparing a drink. She was putting ice in a glass when it broke and severed a tendon in her left middle finger. Arc International North America, Inc., is the alleged manufacturer of the glass in question. Plaintiff filed a Complaint against Defendants Young's Tavern, Panagiota Folino a/k/a Penny Folino, Anthony Folino, Tom's South Side Diner, Inc., and Arc International North America, Inc., seeking to recover damages for Defendants' alleged breach of duty.

Defendants Young's Tavern, Panagiota Folino a/k/a Penny Folino, Anthony Folino, Tom's South Side Diner, Inc. and Defendant Arc International North America, Inc., filed separate Motions for Summary Judgment.

Defendants Young's Tavern, Panagiota Folino a/k/a Penny Folino, Anthony Folino and Tom's South Side Diner, Inc., argue that they are entitled to summary judgment based upon Plaintiff's failure to establish a prima facie case of negligence. They also claim that because Plaintiff has accepted Workers' Compensation benefits as compensation for her injuries, she is barred from further recovery.

As to the negligence issue, Plaintiff claims that as a business invitee, Defendants owed her a duty to exercise reasonable care by inspecting the premises to eliminate dangers that the Plaintiff would not realize on her own. She points to Mrs. Folino's testimony where she admitted that no policy to inspect glassware for defects was in place at Young's Tavern. However, "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. *Restatement (Second) of Torts*, Section 343.

Section 305 of the Pennsylvania Workers' Compensation Act ("Act") provides that when an employer fails to have insurance for the payment of workers' compensation benefits, the injured employee "may proceed either under this act or in a suit for damages at law..." As to the workers' compensation issue, Plaintiff argues that Section 305 only applies to the lawsuits against uninsured employers. Therefore, because she was only employed by Defendant Young's Tavern, her workers' compensation award was

against them alone. Plaintiff argues that she is entitled to maintain this civil action for damages because she has only partially recovered the benefits she is entitled to under the Act. However, because Plaintiff litigated her claim before the Bureau of Workers' Compensation to a final decision and did not appeal, she is bound by that decision.

Defendant Arc International North America, Inc., argues that Plaintiff failed to prove that the glass in question was defective and, therefore, the cause of the accident is speculation. They also maintain that because the glass has been discarded, there has been a spoliation of evidence and causation can not be established.

Plaintiff argues that whether the glass was defective is a question for the jury. She also contends that the glass itself is not necessary because she may proceed with circumstantial evidence to prove her case. Plaintiff also alleges that the spoliation of evidence doctrine is not warranted in this case because she is not required to produce the glass or expert testimony. She relies on *Dansak v. Cameron Coca-Cola Bottling Company, Inc.*, 703 A.2d 489 (Pa.Super. 1997). In *Dansak*, a convenience store worker was injured when stocking a refrigerator with glass bottles. While reaching into a box to pick up a bottle, she cut her hand on an adjacent broken bottle. Even though the store manager threw away the box which contained the broken bottle, the case proceeded because the defect was proven through circumstantial evidence. The *Dansak* case is distinguishable from the instant case. In the case at hand, the evidence fails to establish for certain whether Defendant Arc International even manufactured the glass in question. Questions also exist as to where and when the glasses were purchased.

Summary Judgment is appropriate when there are no genuine issues of material fact as to any necessary element of the cause of action. Pa. R.C.P. 1035.2.A Motion for Summary Judgment may be granted if the pleadings, depositions, answers to interrogatories and admissions on file, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Myszkowski v. Penn Stroud Hotel, Inc.*, 634 A.2d 622, 625 (Pa.Super. 1993). In ruling on a motion for summary judgment, the facts must be viewed in light most favorable to the non-moving party. *Ertel v. Patriot News, Co.*, 674 A.2d 1038 (Pa. 1996).

In the case at hand, Summary Judgment is appropriate as to Defendant Young's Tavern claim because under Section 305, Plaintiff had the option to pursue either a workers' compensation claim or an action at law. Since she chose to litigate her claim before the Bureau of Workers' Compensation to a final decision and did not appeal it, she is bound by that decision and may not pursue this claim. Summary Judgment is also appropriate as to Defendants Panagiota Folino a/k/a Penny Folino, Anthony Folino and Tom's South Side Diner, Inc., because they were not Plaintiff's employer at the time of the accident. In her workers' compensation claim, she filed her claim petition against Young's Tavern. Tom's Diner is a separate entity and owed no duty to Plaintiff. Finally, Summary Judgment is also appropriate as to Defendants Arc International because Plaintiff failed to prove that the glass in question was defective. Therefore, the cause of the accident is speculation. Also because the glass has been discarded, there has been a spoliation of evidence and causation can not be established.

#### ORDER OF COURT

AND NOW, this 21st day of December, 2009, it is Ordered that Summary Judgment is granted and shall be entered in favor of Defendants Young's Tavern, Panagiota Folino a/k/a Penny Folino, Anthony Folino and Tom's South Side Diner, Inc., and Arc International North America, Inc., and against Plaintiff.

BY THE COURT:  
/s/James, J.

### Stacey Rae Kelly v. Allegheny County

#### *Political Subdivision Tort Claims Act—Real Estate Exception*

In a challenge to a non-jury verdict in favor of the plaintiff who was injured while sled riding at a county park, the court held that the county was properly held liable for negligence. The court relied on the Supreme Court's decision in *Grieff v. Reisinger*, 693 A.2d 195 (Pa. 1997) which held that the real estate exception to the Political Subdivision Tort Claims Act applied when the cause of the injury involves the care, custody and control of real estate. The court concluded that the county's failure to inspect and maintain a hay bale barrier at the base of the sledding hill constituted negligence.

(Mary Long)

J. Kerrington Lewis for Plaintiff.

Robert G. Borgoyne for Defendant.

No. GD 08-005121. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

James, J., November 23, 2009—Plaintiff, Stacey Rae Kelly, commenced this civil action against Defendant, Allegheny County, based upon a sled riding accident which occurred on February 11, 2007. The following facts were stipulated to by the parties. Defendant owns Boyce Park and Center Road, which abuts the Boyce Park sled riding hill. Plaintiff was lawfully upon Defendant's property.

Pursuant to Allegheny County Park Rules and Regulations Article II, Section 1 Recreational Activities:

- a. Picnicking, swimming, tennis, golf, skating, bicycling, skiing, sledding, baseball, softball, basketball, soccer, football, boating, fishing, horseback riding, horseshoe pitching, model powered aircraft flying, rollerblading, skate boarding and related and similar forms of recreation are permitted only in areas designed for such use and in no case shall such use be permitted in areas where park facilities or areas may be damaged.

The area where Plaintiff was sled riding was regularly used for that activity as admitted in Defendant's Answer to Plaintiff's Interrogatory #44. Defendant permitted sled riding on the hill where Plaintiff was injured. Defendant maintained care, custody and control over the hill where Plaintiff was sledding. Boyce Park was used for sled riding for decades. Defendant cared for its real estate by placing a hay bale barrier in an area for sled riding. Defendant annually placed hay bale barriers on the slope of

the hill. Defendant placed the hay bale barrier on the slope of the hill as means to avoid collisions between sledders and vehicles on the country road. Defendant placed the hay bale barrier on the slope of the hill as a means to protect motorists using Defendant's roadway abutting its real estate and prevent hazardous conditions on said roadway. The Manager of Boyce Park, and/or employees at his direction, placed the hay bale barrier, stating that, "we do it every year." The Manager of Boyce Park was contacted by the Allegheny County Police Department and warned about sled riders entering the traffic lanes at the bottom of the hill where Plaintiff was injured. The hay bale barrier was placed in the fall and removed in the spring. The bales of hay measured 2.5 feet by 4 feet and weighs 35-45 pounds per bale. The hay bale barriers measured in length approximately 100 yards. The lay out and/or design of the hay bale barrier wall was created by Defendant. The hay bale barrier was placed on the slope of the hill where Plaintiff was injured near the abutting road. Boyce Park was the only park in Allegheny County where a hay bale barrier was placed in preparation for the winter season/sled riding. The practice of placing a hay bale barrier on the slope of the hill predated the employment of Clarence Hopson, Phil Chiorazzo and Andrew Baechle. If and when placed, the hay bale barrier was placed in generally the same location on the hill where Plaintiff was injured. The hay bales formed a long barrier on the slope of the hill which was intended to stop sled riders from proceeding into a County road which abutted the hillside. The hay bale barrier stays intact the way it was placed for the whole season. The bales of hay were placed in their specific location to "make the road safe" by protecting motorists from hazards entering the lanes of traffic, however, the hay bale barrier was also to protect the sled riders from injury on the road. The Defendant took an affirmative action to care for the property by placing the hay bale barrier. Defendant did not make any physical inspections of the hay bale barrier as admitted in Defendant's Answer to Plaintiff's Interrogatory #38. Defendant's Deputy Director of the Allegheny County Parks never inspected the hay bale barrier, and, furthermore, has never even heard of there being any safety inspection pertaining to sled riding in the County parks. The Manager of Boyce Park never inspected the hay bale barrier, and specifically never inspected for frozen hay. The Manager of Boyce Park did not know that hay could absorb water, freeze and become a hazard. The Director of County Parks, who is responsible for safety of the parks, did not realize that hay could absorb water, freeze and become a hazard. The Director of County Parks never inspected the hill where Plaintiff was injured, specifically regarding the safety conditions for sled riding. Defendant agrees that it would not be unexpected for sled riders to impact the hay bale barrier. Defendant did not conduct studies regarding the safety of the hay bale barrier used on its property as admitted in Defendant's Answer to Plaintiff's Request for Admission #10. Defendant did not consult an expert regarding the safety of the hay bale barrier used on its property as admitted in Defendant's Answer to Plaintiff's Request for Admission #11. Defendant does not have or maintain any manual regarding inspection or review of the parks for safety concerning the sled riding areas. Defendant did not post signs warning that the bales of hay may become frozen. Defendant did not post signs warning sled riders of any potential hazards. Defendant did not post signs warning automobiles of potential sled riders entering the lanes of traffic. Defendant admitted that it could not keep the hill safe for sled riding. Defendant was aware of safety hazards associated with the hill where Plaintiff was injured, namely the dangerous condition created when sled riders entered into the roadway abutting said hill. Defendant specifically cared for the permitted sled riding use of the real estate by laying a hay bale barrier to maintain the safety of the road and sledders. Plaintiff's Exhibit "8(a)" is an accurate photograph depicting the Boyce Park sled riding hill subject to this Action. Plaintiff's Exhibit "8(b)" is an accurate photograph depicting the Boyce Park sled riding hill with hay bale barrier erected on the slope of the hill. Plaintiff's Exhibit "8(c)" is an accurate photograph depicting the hay bale barrier. Plaintiff's Exhibit "8(d)" is an accurate photograph depicting the hay bale barrier. Plaintiff's Exhibit "8(e)" is an accurate photograph depicting the hay bale barrier and the abutting country road. Plaintiff's Exhibit "8(f)" is an accurate photograph depicting Boyce Park sled riding hill and the abutting country road subject to this Action. Plaintiff's Exhibit "8(g)" is an accurate photograph depicting the country road.

The parties stipulated that the Plaintiff sustained a fractured back, legs and ankles when she rode her sled down the hill and impacted the frozen hay bales. They further stipulated that her damages exceeded \$500,000.00.

This case was tried on September 14, 2009, and this Court awarded Plaintiff \$500,000.00. On September 28, 2009, Defendant filed a Motion for Post-Trial Relief challenging this court's non-jury verdict. Defendant claims that this court failed to appropriately interpret the Political Subdivision Tort Claims Act when it found that the real estate exception applied and imposed liability on the Defendant.

Local government agencies are generally immune from tort liability under the Political Subdivision Tort Claims Act. 42 Pa. C.S.A. §8541. However, there are limited exceptions to this immunity if: (1) damages would be otherwise recoverable under common law or statute, (2) injury was caused by the negligent act of the local agency or employee acting within the scope of his official duties and (3) the negligent act of the local agency falls within one of eight enumerated categories. *Repko v. Chinchester School District*, 904 A.2d 1036, 1040 (Pa.Cmwlth. 2006).

Plaintiff argued that she may recover damages under the real property exception to governmental immunity. 42 Pa. C.S.A. §8542(b)(3) provides that a local agency shall be liable for damages on account of an injury to a person if such damages are caused by the care, custody or control of real property in the possession of the local agency. This exception requires negligence making the real property unsafe for the activities for which it is regularly used or intended to be used or reasonably foreseen to be used. *Martin, Jr. v. City of Philadelphia*, 696 A.2d 909, 911 (Pa.Cmwlth. 1997). Plaintiff relies on *Grieff v. Reisinger*, 693 A.2d 195 (Pa. 1997). In that case, Grieff, the Fire Association Chief, poured paint thinner on the floor of the fire station in the course of his efforts to remove paint from the floor. *Id.* at 196. The paint thinner, which had run across the floor, ignited when a refrigerator began running, setting Reisinger aflame. *Id.* The Pennsylvania Supreme Court held that the real estate exception applied, allowing Reisinger to recover from Grieff and the Fire Association for her injuries:

Here, Grieff's care of the Fire Association's property caused the fire that injured Reisinger. While he was removing the paint from the floor, therein caring for the real property, it ignited causing the resultant injuries to Reisinger. Under the real property exception's plain language, Grieff and the Fire Association are not immune from suit. *Id.* at 197.

The Supreme Court held that the real property exception applies when the cause of the injury involves the care, custody and control of the real property. Grieff's and the Fire Association's alleged negligent care of the property caused Reisinger's injury. *Id.* at 197. Similarly, in the instant case, Defendant's affirmative action in placing the hay bale barrier to make the real estate safe for sled riders caused Plaintiff's injuries.

In *Hanna v. West Shore School District*, 717 A.2d 626 (Pa.Cmwlth. 1998), a plaintiff sued a school district after she sustained

injuries from slipping on a puddle of water in a school corridor. The court imposed liability finding that the injuries were caused by the school district's negligent care of the real estate. They concluded that "it is no longer of any consequence that the injury does not result from a defect in, or a condition of the real property itself." *Id.* at 629.

A local agency may be liable for its employees' or its own negligence related to the care, custody or control of real property in its possession. *Grieff*, at 197. Once the County placed the bales of hay along the roadway to keep sledders from being injured by going into the roadway, they had an obligation to inspect, maintain and repair the hay barrier. The record indicates no effort was made to insure that the hay bales would not become frozen and cause Plaintiff's catastrophic injuries.

**Judith T. Espy v.  
Michael T. Espy, et al. v.  
Liberty Life Assurance Company of Boston**

*Effect of Divorce on Designation of Beneficiaries—Life Insurance*

Proceeds of a life insurance policy were awarded to the children of the deceased rather than to the former spouse of the deceased. Although the former spouse was named as the beneficiary, the court applied the principles of 20 Pa. C.S. § 6111.2, which permits the beneficiary designation to be set aside where the couple has divorced, and held that to award her benefits would constitute an unjust enrichment since she had been paid the full amount due to her under the divorce settlement agreement.

*(Mary Long)*

*Robert S. Shreve* for Plaintiff.

*David M. Moran* for Interpleaded Plaintiffs.

*James P. Hollihan* for Defendant.

No. GD 04-7142. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**DECISION**

Friedman, J., January 6, 2010—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

The captioned matter was submitted on stipulated facts. The dispute centers on what the insured decedent, Gilbert Espy, intended when he named his former wife the beneficiary of the policy of life insurance whose proceeds are at issue here. The Defendant insurer has paid those proceeds into Court. The instant dispute is between the decedent's former wife, Plaintiff Judith T. Espy (hereinafter, "Judith") and the Interpleaded Plaintiffs, his children from a different marriage (hereinafter, collectively "the Children").

The stipulated facts show that Judith was named a beneficiary so that Mr. Espy could comply with a settlement agreement that required him to pay her a certain sum over a period of time, and to secure that sum with a life insurance policy. To comply with that agreement, Mr. Espy chose to name Judith as the beneficiary of an existing policy, the one at issue, which was for \$35,000.

After Judith had been paid in full by Mr. Espy, a clerical error by the insurer caused him to be notified that the Children were listed as his beneficiaries. This was a mistake – the actual named beneficiary at the time was still Judith.

Since Mr. Espy is deceased, the parties have only the following evidence to support their respective positions: (1) canceled checks from Mr. Espy to Judith for the payments made to her; (2) documents from the insurer (which are incomplete) and (3) the records of our Family Division. Judith says she is entitled to the proceeds because she remained the named beneficiary. The Children say that she would be unjustly enriched and that the same public policy considerations that led the Legislature to pass 20 Pa. C.S.A. §6111.2 should apply here.

Section 6111.2 states the following:

§6111.2. Effect of divorce on designation of beneficiaries

If a person domiciled in this Commonwealth at the time of his death is divorced from the bonds of matrimony after designating his spouse as beneficiary of a life insurance policy, annuity contract, pension or profit-sharing plan or other contractual arrangement providing for payments to his spouse, any designation in favor of his former spouse which was revocable by him after the divorce shall become ineffective for all purposes and shall be construed as if such former spouse had predeceased him unless it appears from the wording of the designation, a court order or a written contract between the person and such former spouse that the designation was intended to survive the divorce. Unless restrained by court order, no insurance company, pension or profit-sharing plan trustee or other obligor shall be liable for making payments to a former spouse which would have been proper in the absence of this section. Any former spouse to whom payment is made shall be answerable to anyone prejudiced by the payment.

We conclude that the public policy set forth above would apply in this case. It is clear that Mr. Espy had no wish to benefit Judith and that he resented the payments to her under the Divorce Settlement Agreement. See Stipulation No. 11, that Mr. Espy wrote "LEECH payment" on the memo line "on a lot of the checks." It is undisputed that Judith was paid the full amount she was entitled to under the Divorce Settlement Agreement. It would be unjust in the circumstances to allow her a windfall because of her former husband's death. The only evidence of what he knew about who were his named beneficiaries is the information sent to him by the insurer.

We award the proceeds at issue to the Interpleaded Plaintiffs, Michael Espy, Michelle L. Espy and Cynthia M. Vetere.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT:  
/s/Friedman, J.

Dated: January 6, 2010

**Candace Hicks v.  
Lilly Baptist Church**

*Allegheny County Local Rule 1304—Pa. R.C.P. 227.1—Pa. R.C.P. 1303*

1. Defendant did not appear for arbitration hearing scheduled for October 6, 2009.
2. Based on Allegheny County Local Rule 1304, the matter was transferred immediately to the Court for an *ex parte* hearing on the merits and entry of a non-jury verdict.
3. Following a hearing and consideration of the evidence presented, the Court entered a non-jury verdict for the plaintiff.
4. Defendant has taken an appeal from the October 6, 2009 non-jury verdict.
5. Defendant did not file motions for post-trial relief under Pa. R.C.P. 227.1 within ten (10) days of the filing of the decision and did not seek leave to file *nunc pro tunc*.
6. Because Defendant did not raise any issues in a post-trial motion, they are waived for appeal purposes.

*(JoAnn F. Zidanic)*

Candace Hicks, *pro se*.

Lilly Baptist Church, *pro se*.

No. AR 09-3998. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

McCarthy, J., November 30, 2009—This matter involves an appeal from a non-jury verdict entered on October 6, 2009 by which this Court entered a verdict in favor of the plaintiff and against the defendant in an employment contract matter. The complaint had been entered upon the arbitration docket of the Allegheny Court of Common Pleas, and an arbitration hearing had been scheduled for October 6, 2009. On the scheduled date of hearing, defendant did not appear at the arbitration room and did not respond to the second call of the list. Allegheny County Local Rule 1304 provides that, in such an instance, upon consent of all parties who are present, the matter shall be transferred immediately to a Judge of the Court of Common Pleas for an *ex parte* hearing on the merits and entry of a non-jury verdict. That occurred in this case, the Court noting that the matter came to a hearing at 11:00 a.m. Following a hearing and consideration of the evidence presented, the Court entered a non-jury verdict for the plaintiff.

Defendant Lilly Baptist Church has taken an appeal from the October 6, 2009 non-jury verdict. Defendant did not, however, file motions for post-trial relief under Pa. R.Civ.P. 227.1 in advance of taking the appeal. In matters in which a decision is rendered in the case of a trial without a jury, post-trial motions must be filed within ten (10) days of the filing of the decision. Pa.R.Civ.P. 227.1(c)(2).<sup>1</sup> Defendant did not submit motions for post-trial relief within that permitted time frame, did not seek leave to file *nunc pro tunc*, and, it appears, elected simply to advance to an appeal, filing notice of appeal on November 2, 2009.

If an issue has not been raised in a post-trial motion, it is waived for appeal purposes. *See, L.B. Foster Company v. Lane Enterprises, Inc.*, 551 Pa. 307, 710 A.2d 55 (1998). The matter is more fully explained in *Benson v. Penn Central Transportation Company*, 463 Pa 37, 41-42; 342 A.2d 393 (1975):

We do not reach either of appellant's contentions because the railroad, by failing to file post-verdict motions, did not adequately preserve for appeal its claim of error. We have repeatedly held that where a claim of error is not properly preserved for review, an appellate court must not consider that claim on appeal. The Superior Court, by reversing appellant's judgment against the railroad on the basis of grounds not preserved for review, exceeded its proper appellate function. [footnotes omitted]

The Court has not been made aware of any non-waivable issues. Accordingly, it appearing only that the defendant failed to report for arbitration on the scheduled date and that the matter was properly transferred to this Court for an *ex parte* hearing on the merits, a hearing was conducted and a non-jury verdict was entered according to the evidence presented. That is the procedure contemplated by Pa.R.Civ.P. 1303 and that may be invoked by a litigant under local rules implemented consistent with Rule 1303. Where a party complies with the spirit of compulsory arbitration and appears on the date scheduled to present his evidence and arguments, having given due notice to an opposing party, but that opposing party fails to appear, Pa.R.Civ.P. 1303 provides the conscientious party with the means by which to avoid the frustrating process of presenting the matter at arbitration only to be exposed to the expense and delay occasioned by an appeal taken on behalf of the non-appearing party that results in a trial *de novo* on appeal.

BY THE COURT:  
/s/McCarthy, J.

Date: November 30, 2010.

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<sup>1</sup> Local Rules require post-trial motions to be filed with the arbitration office within ten (10) days of the verdict being sent. Such motions should explain the party's failure to appear and will be decided by the special motions judge.