

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH AUGUST 7, 2020

PENNSYLVANIA APPEALS COURT OPINIONS

I. Appellate Procedure

A. *Waiver of Issue for Appellate Review*

- [Trigg v. Children's Hospital of Pittsburgh of UPMC, No. 3 WAP 2019 \(Pa., April 22, 2020\)](#)
 - **Holding:** Pursuant to Pa.R.A.P. 302(a), issues not raised in the lower courts are waived for purposes of appellate review, and cannot be raised for the first time on appeal. Justice Donohue filed a [concurring opinion](#), joined by Justices Baer, Dougherty, Wecht, and Mundy. Justice Wecht filed a [concurring opinion](#), joined by Justice Dougherty.

II. Civil Litigation

A. *Attorney-Client Privilege*

- [Ford-Bey v. Professional Anesthesia Services of North America, 2020 PA Super 42 \(Pa., Super. Feb. 20, 2020\)](#)
 - **Holding:** The attorney-client privilege, 42 Pa.C.S. § 5928, does not protect notes on a medical record without evidence that the notes are "confidential communications between attorney and client," and the notes do not contain an attorney's mental impressions.

B. *Defamation - Absolutely Privileged Statements*

- [Forbes v. King Shooters Supply, 2020 PA Super 70 \(Pa.Super., March 25, 2020\)](#)
 - **Holding:** Pennsylvania's judicial privilege doctrine provides absolute immunity for material communications made in the regular course of judicial proceedings, includes statements by a party, a witness, an attorney, or a judge, and applies to statements made to either police or the district attorney, thereby barring a defamation claim arising from the statements.

C. *Fair Share Act*

- [Roverano v. John Crane, Inc., No. 26 EAP 2018 \(Pa., Feb. 19, 2020\)](#)
 - **Holding:** The Fair Share Act, 42 Pa. C.S. § 7102, requires a factfinder to apportion liability on a per capita basis in strict liability asbestos actions, but does not specifically preempt Pennsylvania common law favoring per capita apportionment. Further, upon appropriate requests and proofs, bankruptcy trusts that are either joined as third-party defendants or that have entered into a release with the plaintiff may be included on the verdict sheet for liability purposes only. Justice Wecht filed a [concurring opinion](#). Chief Justice Saylor filed a [concurring and dissenting opinion](#).

D. *Forum Non Conveniens*

- [*Powers v. Verizon Pennsylvania, LLC*, 2020 PA Super 58 \(Pa.Super., March 11, 2020\)](#)
 - **Holding:** Transfer of a case based *Forum Non Conveniens* is appropriate if the opposing party fails to dispute the averments with particularity and the petitioner establishes that the new venue would provide easier access to the sources of proof, especially the witnesses.

E. *Government Employees - Termination - Social Media Posts*

- [*Carr v. Commonwealth, Dept. of Transportation*, No. 3 MAP 2019 \(Pa., May 19, 2020\)](#)
 - **Holding:** A government employer may terminate an employee for messages posted on a social networking site if the speech touches on a matter of public concern and the government can demonstrate that an adverse effect could be reasonably foreseen. A Court must evaluate: (1) Whether, because of the speech, the government agency is prevented from efficiently carrying out its responsibilities, (2) Whether the speech impairs the employee's ability to carry out their own responsibilities, (3) Whether the speech interferes with essential and close working relationships, and (4) The manner, time, and place in which the speech occurs. Justice Wecht filed a [concurring opinion](#), joined by Justice Dougherty.

F. *Hospital Credentialing Records*

- [*Leadbitter v. Keystone Anesthesia Consultants*, 2020 PA Super 36 \(Pa. Super., Feb. 12, 2020\)](#)
 - **Holding:** A hospital credentialing committee is a review organization under the Peer Review Protection Act, 63 P.S. § 425.1, and therefore the PRPA privilege does not apply to documents the credentialing committee reviewed when considering a physician's application for hospital privileges. The Healthcare Quality Improvement Act, 42 U.S.C. § 11101, also does not shield the documents from production.

G. *Insurer's Duty to Defend*

- [*Erie Insurance Exchange v. Moore*, No. 20 WAP 2018 \(Pa., April 22, 2020\)](#)
 - **Holding:** An insurer's duty to defend is triggered if factual allegations against an insured encompass an injury actually or potentially within the scope of the insurance policy. Justice Mundy filed a [dissenting opinion](#) in which Chief Justice Saylor and Justice Todd joined.

H. *Legal Malpractice - Elements of Cause of Action*

- [*Bowman v. Rand Spear & Associates, P.C.*, 2020 PA Super 155 \(Pa.Super., July 6, 2020\)](#)
 - **Holding:** In a claim for legal malpractice in which plaintiff alleges that the defendant attorney failed to name a proper party as a defendant before expiration of the statute of limitations, plaintiff must establish that the unnamed defendant was liable for any injuries claimed.

I. *Legal Malpractice - Res Judicata*

- [*Garman v. Angino*, 2020 PA Super 75 \(Pa.Super., March 30, 2020\)](#)
 - **Holding:** In a legal malpractice action, Plaintiff must establish he or she would have recovered a judgment in the underlying case. However, the doctrines of *res judicata*, collateral estoppel, and the one satisfaction rule will not preclude a recovery when the claimed injuries were discovered after prior litigation had concluded.

J. *Mental Health Procedures Act - Qualified Immunity*

☐ [*Dean v. Bowling Green-Brandywine*, No. 26 MAP 2019 \(Pa., Feb. 19, 2020\)](#)

- **Holding:** Qualified immunity under Section 114 of the Mental Health Procedures Act, 50 P.S. § 7101-7503, does not apply when "(1) the patient was admitted for and primarily received drug detoxification treatment, and (2) the patient did not receive treatment to facilitate recovery from a mental illness."

K. *New Trial*

☐ [*Adkins v. Johnson & Johnson*, 2020 PA Super 95 \(Pa.Super., April 15, 2020\)](#)

- **Holding:** When a new trial is granted on the issue of damages, the new trial is not limited to damages, and must include re-litigation on liability.

L. *New Trial - Nonsuit as to Fewer Than All Parties*

☐ [*Rolon v. Davies*, 2020 PA Super 106 \(Pa.Super., April 28, 2020\)](#)

- **Holding:** In a medical malpractice case in which a nonsuit is granted as to separate defendants against whom the Plaintiff raised distinct claims, a Plaintiff is entitled to a new trial against only the remaining defendants.

M. *Psychotherapist-Patient Privilege & Pennsylvania Mental Health Procedures Act*

☐ [*Pasquini v. Fairmount Behavioral Health System*, 2020 PA Super 71 \(Pa.Super., March 25, 2020\)](#)

- **Holding:** Under the Pennsylvania Mental Health Procedures Act (MHPA), 50 P.S. § 7111, the psychiatrist-patient privilege protects only confidential communications and information relayed by a patient to his psychiatrist or psychologist in the course of his treatment. Thus, Requests for Admission that seek to determine whether a person had knowledge of an undisputed and publicly available fact are appropriate.

N. *Successor Attorneys - Claims for Attorney's Fees*

☐ [*Spector Gadon & Rosen, P.C. v. Rudinski, Orso & Lynch*, 2020 PA Super 91 \(Pa.Super., April 7, 2020\)](#)

- **Holding:** An attorney who initially represented a client and is dismissed may not assert a conversion claim against the attorney who ultimately settles the case. Rather, the discharged attorney is responsible for adequately protecting its right to compensation from the client.

O. *Tortious Interference with Inheritance*

☐ [*Fiedler v. Spencer*, 2020 PA Super 83 \(Pa.Super., April 2, 2020\)](#)

- **Holding:** Although the Pennsylvania Supreme Court has recognized claims for interference with an expected inheritance, it has not expanded the doctrine to include *inter vivos* transfers.

III. Workers' Compensation

A. *Borrowed Servant Doctrine - Longshore and Harbor Workers' Compensation Act*

- [*Sardina-Garcia v. Brownsville Marine Products, LLC*, 2020 PA Super 60 \(Pa.Super., March 13, 2020\)](#)

- **Holding:** Under the Longshore and Harbor Workers' Compensation Act, an injured employee, who is deemed a borrowed servant, may not assert a common law negligence claim against his employer. The borrowed servant doctrine bars claims when (1) the borrowing employer is responsible for the borrowed employee's working conditions, and (2) the employment is of such duration that the borrowed employee could be presumed to have acquiesced in the risks of his new employment.

B. *Counsel Fees on Medical Bills*

- [*Neves v. WCAB \(American Airlines\)*, No. 1431 C.D. 2018 \(Pa.Cmwlt., May 14, 2020\)](#)

- **Holding:** Section 442 of the Workers' Compensation Act, 77 P.S. § 998, requires a Workers' Compensation Judge to approve a counsel fee of 20 percent of a medical compensation award.

C. *Impairment Rating Evaluations - Retroactive Application*

- [*Dana Holding Corp. v. WCAB \(Smuck\)*, No. 44 MAP 2019 \(Pa., June 16, 2020\)](#)

- **Holding:** Injured workers who have asserted during appellate review that they are entitled to reinstatement or modification of benefits based upon an unconstitutional impairment rating evaluation (IRE) pursuant to *Protz v. WCAB (Derry Area School District)*, 161 A.3d 827 (Pa. June 16, 2020) are entitled to retroactive application of the *Protz* decision. This is a very narrow decision relating to the retroactivity of *Protz*, with the Court leaving numerous other scenarios for decision at another time. Justice Dougherty filed a [concurring opinion](#).

- *Attorney Daniel J. Siegel co-authored the Amicus (Friend of the Court) brief for the Pennsylvania Association for Justice (PAJ). He is the only attorney who was counsel in both Protz and Dana Holdings.*

D. *Impairment Rating Examinations - Retroactivity of Unconstitutional IREs*

- [*Weidenhammer v. WCAB \(Albright College\)*, No. 546 C.D. 2019 \(Pa.Cmwlt., May 14, 2020\)](#)

- **Holding:** A claimant whose wage loss benefits were stopped pursuant to an unconstitutional Impairment Rating Evaluation (IRE) under Section 413(a) of the Act, 77 P.S. § 772, must file a Reinstatement Petition within three years of the date of the last payment of disability benefits.

E. *Notice of Temporary Compensation Payable - Conversion of NTCP to NCP*

- [*Communications Test Design v. WCAB \(Simpson\)*, No. 1196 C.D. 2019 \(Pa.Cmwlt., April 22, 2020\)](#)

- **Holding:** Section 406.1 of the Workers' Compensation Act, 77 P.S. § 717.1(d)(5) "does not sanction conversion of an NTCP to an NCP for failure to file an NSTC within five days of stopping payment." Moreover, there is no remedy under the Act for failing to comply with Section 406.1(d)(5)(i), which states that an employer "shall" send a notice to an employee no later than five days after the last payment of compensation under an NTCP.

F. *Personal Animus Exception to the Workers' Compensation Act*

- [*Grabowski v. Carelink Community Support Services, Inc.*, 2020 PA Super 56 \(Pa.Super., March 9, 2020\)](#)

- **Holding:** Under the personal animus exception under Section 301(c)(1) of the Workers' Compensation Act, 77 P.S. § 411(1), an employer is not liable for workers' compensation benefits, but is not immune from tort liability. Where, however, there is a final adjudication in a proceeding under the Workers' Compensation Act, the employee is estopped from claiming that the personal animus/third party attack exception applies.

G. *Removal From the Workforce*

- [*Philips Respironics v. WCAB \(Mika\)*, No. 1317 C.D. 2019 \(Pa.Cmwlt., May 22, 2020\)](#)

- **Holding:** To be entitled to wage loss benefits, a claimant must prove that his work injury forced him out of the entire labor market. Conversely, to establish that a claimant removed himself from the workforce, an employer must establish that claimant is willing to accept employment within his physical capacities.

H. *Termination of Benefits Without Termination Petition*

- [*Colagreco v. WCAB \(Vanguard Group, Inc.\)*, No. 788 C.D. 2019 \(Pa.Cmwlt., May 14, 2020\)](#)

- **Holding:** A Workers' Compensation Judge may terminate an injured worker's benefits even if the employer has not filed a termination petition, provided the employer presents credible expert evidence to support a termination of benefits.

I. *Utilization Review - Jurisdiction*

- [*Burgess v. WCAB \(Patterson-UTI Drilling\)*, No. 778 C.D. 2019 \(Pa.Cmwlt., May 1, 2020\)](#)

- **Holding:** Neither a Workers' Compensation Judge (WCJ) nor the Workers' Compensation Appeal Board (WCAB) has jurisdiction to determine whether medical treatment is reasonable and necessary unless and until a Utilization Review (UR) Determination is issued. Neither party may bypass the UR process, even by stipulation.

IV. Federal Court Opinions

A. *Copyright Protection - State Codes*

- [*Georgia v. Public Resource Org, Inc.*, No. 18-1150 \(U.S., April 27, 2020\)](#)

- **Holding:** Copyright assertions in a state's official code are ineligible for copyright protection. Thus, the annotations in the Official Code of Georgia annotated, produced by Matthew Bender & Co., Inc., are ineligible for copyright protection.

B. *Fair Labor Standards Act - Employee Status*

□ [*Razak v. Uber Technologies, Inc., No. 18-1944 \(3rd Cir., March 3, 2020\)*](#)

- **Holding:** To determine if individuals are employees or independent contractors under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, a Court must apply the following test: (1) The degree of the alleged employee's right to control the manner in which the work is performed, (2) The alleged employee's opportunity for profit or loss depending upon their managerial skill, (3) The alleged employee's investment in equipment or materials required for their task, or their employment of helpers, (4) Whether the service rendered required a special skill, (5) The degree of permanence of the working relationship, and (6) Whether the service rendered is an integral part of the alleged employer's business.

V. Superior Court of New Jersey, Appellate Division

A. *Premises Liability During Ongoing-Storm*

□ [*Pareja v. Princeton International Properties, No. A-2111-18T3 \(N.J.Super., April 9, 2020\)*](#)

- **Holding:** A commercial landowner has an obligation to render its property safe when sleet or snow is falling. To the contrary, a commercial landowner has a duty to take reasonable steps to render a public walkway abutting its property - covered by either snow or ice - reasonably safe. This duty cannot be fulfilled by waiting to act until after a storm ends.
- ***The Law Offices of Daniel J. Siegel, LLC successfully raised this argument in a jury trial in Philadelphia County, and the Defendant chose not to appeal the verdict.***

VI. Allocatur Petitions

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

□ [*Gussom v. Teagle, No. 522 EAL 2019 \(Pa., March 31, 2020\)*](#)

- Did the Superior Court err in holding that the Plaintiff did not make a good faith effort to serve the Defendant, when the Superior Court's decision conflicts with holdings of the Pennsylvania Supreme Court on the same legal issue?

□ [*Always Busy Consulting, LLC v. Badford & Co., Inc., No. 436 WAL 2019 \(Pa., June 1, 2020\)*](#)

- Did the Superior Court err in quashing Petitioner's appeal pursuant to *Commonwealth v. Walker*, 185 A.3d 969 (Pa., 2018), on the basis that Petitioner failed to file a notice of appeal at a separate docket number in a consolidated case, when Petitioner filed separate notices of appeal at the consolidated docket number, as directed and required by the trial court?

□ [*Kirksey v. Children's Hospital of Pittsburgh of UPMC, No. 17 WAL 2020 \(Pa., June 23, 2020\)*](#)

- In an issue of first impression and of substantial public importance, whether the Superior Court's holding directly conflicts with this Honorable Court's holding in *Mitchell v. Shikora*, 209 A.3d 307 (Pa., 2019), which instructs that when evidence of general risks and complications is admitted in a medical negligence claim to establish the applicable standard of care a limiting instruction is warranted as was requested here but was denied by the trial court and glossed over by the Superior Court?

VII. Attorney Discipline

A. *Conflict of Interest*

- [Office of Disciplinary Counsel v. Baldwin, 151 DB 2017 \(Pa., Feb. 19, 2020\)](#)
 - Holding: **Public reprimand** for conflict of interest in representation during grand jury proceedings.

B. *Conviction of Crime*

- [Office of Disciplinary Counsel v. Sudfeld, 50 DB 2016 \(Pa., June 22, 2020\)](#)
 - Holding: **Four year suspension** for an attorney convicted of Insider Trading and Making False Statements to Authorities in violation of, *inter alia*, Pa. Rule of Disciplinary Enforcement 203(b)(1) (conviction of a crime shall be grounds for discipline).

C. *Failure to Disclose Lack of Malpractice Insurance & Other Violations*

- [Office of Disciplinary Counsel v. Abdul-Rahman, 57 DB 2020 \(Pa., April 23, 2020\)](#)
 - **Public Reprimand** for failing to inform a client in writing that he did not have professional insurance, failing to communicate with a client throughout the representation, and failing to respond promptly to client requests for status updates.

D. *Public Prosecutor - Subpoena of Counsel*

- [Office of Disciplinary Counsel v. Fina, 166 DB 2017 \(Pa., Feb. 19, 2020\)](#)
 - Holding: **Suspension for One Year and One Day** for subpoenaing an attorney for a party to appear before a grand jury to provide evidence concerning her clients without prior judicial approval.

E. *Release of Client Information Without Client's Informed Consent*

- [Office of Disciplinary Counsel v. Penglase, 77 DB 2020 \(Pa., June 5, 2020\)](#)
 - Holding: **Public Remand** for a tape of a client's confession to the media without the client's informed consent. In this case, the client later changed his mind about pleading guilty, and release of the confession impacted the client's assertion of innocence at trial.

F. *Sexual Relationship with Client*

- [Office of Disciplinary Counsel v. Altman, 158 DB 2017 \(Pa., April 22, 2020\)](#)
 - Holding: **Disbarment** for having a sexual relationship with a vulnerable client, failing to ensure the client's interests were properly protected during their business relationship, and abusing the legal system to pursue the client for expenses he could not properly document and for fees he was not entitled to.

VIII. Ethics and Professional Responsibility

A. *Ethics Opinion - Disposition of Original Signed Wills*

- [New York State Bar Association, Committee on Professional Ethics, Ethics Opinion 1182 \(Jan. 23, 2020\)](#)
 - A lawyer must safeguard wills, which are considered property, indefinitely unless the law offers the lawyer an avenue to file or otherwise dispose of the wills. A lawyer may not dispose of the wills even when the testator's locations and/or circumstances are unknown.