

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH OCTOBER 23, 2020

PENNSYLVANIA APPEALS COURT OPINIONS

I. Appellate Procedure

A. *Appealable Judgments*

- [*Adams v. Erie Insurance Co.*, 2020 PA Super 196 \(Pa. Super., Aug. 14, 2020\)](#)

➤ **Holding:** Absent a final, appealable judgment, an appeal must be quashed.

B. *Waiver*

- [*Garwood v. Ameriprise Financial, Inc.*, 2020 PA Super 230 \(Pa. Super., Sept. 21, 2020\)](#)

➤ **Holding:** Issues not raised in the lower court are waived for appeal.

II. Civil Litigation

A. *Personal Jurisdiction Jurisprudence*

- [*Hammons v. Ethicon, Inc.*, No. 7 EAP 2019 \(Pa., October 21, 2020\)](#)

➤ **Holding:** Personal jurisdiction is proper under the Pennsylvania long-arm statute, 42 Pa.C.S. § 5322, over New Jersey corporate defendants in a case filed by an Indiana resident for injuries allegedly caused by a pelvic mesh medical device implanted in Indiana because the design, testing, and manufacturing of the pelvic mesh took place in Pennsylvania under close supervision by Ethicon. Justice Donohue authored a [concurring opinion](#); Chief Justice Saylor filed a [dissenting opinion](#).

B. *Legal Malpractice and Lis Pendens*

- [*Khalil v. Cole*, 2020 PA Super 242 \(Pa. Super., Oct. 2, 2020\)](#)

➤ **Holding:** When a party raises *lis pendens* (a formal notice of a pending legal action) in preliminary objections, it places the parties on notice as to *res judicata* should the pending prior matter conclude while preliminary objections are still being considered.

C. *Protection of Lawful Commerce in Arms Act (PLCAA) of 2005*

- [*Gustafson v. Springfield, Inc.*, 2020 PA Super 239 \(Pa. Super., Sept. 28, 2020\)](#)

➤ **Holding:** The Protection of Lawful Commerce in Arms Act (PLCAA) of 2005, 15 U.S.C. §§ 7901-7903, is unconstitutional and therefore without the force or effect of law. Congress violated the Tenth Amendment when it enacted the law because the Act infringes on powers reserved to the States. The Federal Government's claim that Congress properly enacted the Act under their Commerce Clause powers is incorrect because it did not rationally link the Act to any burden upon interstate commerce that the Constitution recognizes.

D. *Equitable Tolling - Minors - PHRA*

☐ [*Nicole B. v. School District of Philadelphia*, No. 16 EAP 2019 \(Pa., Sept. 16, 2020\)](#)

- **Holding:** The Pennsylvania Human Relations Act's (PHRA, 43 P.S. § 962(e)) equitable tolling provision applies to a minor whose parent fails to satisfy the applicable statute of limitations for filing an administrative complaint before the minor reaches the age of majority. Justice Wecht filed a [dissenting opinion](#) in which Chief Justice Saylor and Justice Donohue joined.

E. *Replacement Cost Coverage Policies*

☐ [*Kurach v. Truck Insurance Exchange*, No. 12 EAP 2019 \(Pa., Aug. 18, 2020\)](#)

- **Holding:** Under the terms of a "replacement cost coverage" policy, an insurer was permitted to withhold from any actual cash value payment a general contractor's overhead and profit expenses, unless and until the insured undertook repairs of the damaged property, even though the services of a general contractor were reasonably likely to be needed to complete the repairs. Justice Wecht filed a [concurring and dissenting opinion](#). Justice Mundy filed a [concurring and dissenting opinion](#) in which Justice Dougherty joined.

F. *Underinsured Motorist Coverage Waivers*

☐ [*Franks v. State Farm Mutual Automobile Insurance Co.*, 2020 PA Super 181 \(Pa. Super., July 31, 2020\)](#)

- **Holding:** Because the removal of a vehicle from an existing multi-vehicle policy changes the stacked amount of UIM coverage, a new stacking waiver was required under Section 1738(c) of the Motor Vehicle Financial Responsibility Law (MVFL), 75 Pa.C.S.

III. Workers' Compensation

A. *Attorney's Fees*

☐ [*Gabriel v. WCAB \(Procter and Gamble Products Co.\)*, No. 1499 C.D. 2019 \(Pa. Cmwlt., Sept. 11, 2020\)](#)

- **Holding:** Because Employer was on notice of Claimant's injury and did not timely issue a Notice of Compensation Payable, claimant was entitled to an award of counsel fees under Sections 435 and 440(a) of the Workers' Compensation Act.

B. *Act 111 - Retroactive Application*

C. *IREs (pre- and post-Protz)*

☐ [*Rose Corp. v. WCAB \(Espada\)*, No. 661 C.D. 2019 \(Pa. Cmwlt., Aug. 17, 2020\)](#)

- **Holding:** Because Act 111 was a substantive change in the law, it cannot be applied retroactively.

☐ [*White v. WCAB \(City of Philadelphia\)*, No. 1463 C.D. 2019 \(Pa. Cmwlt., Aug. 17, 2020\)](#)

- **Holding:** When benefits are modified from total to partial disability because of an unconstitutional IRE under *Protz*, the Claimant is entitled to reinstatement of benefits as of the date of the filing of a reinstatement petition, not the effective date of the change in disability status from total to partial.

IV. Attorney Discipline

A. *Misappropriation of Pa.R.P.C. 1.15 (IOLTA) Funds*

- [Office of Disciplinary Counsel v. Bernard, No. 8 DB 2020 \(Pa., Sept. 8, 2020\)](#)
 - [One year and one day suspension on consent](#) for violating Pa.R.P.C. 1.15 and failing to hold IOLTA funds separate from his own property, and depositing his own funds in a trust account.
- [Office of Disciplinary Counsel v. Greenstein, No. 93 DB 2018 \(Pa., Aug. 17, 2020\)](#)
 - [Five year suspension on consent](#) for misappropriating funds, in violation of Pa.R.P.C. 1.15.
- [Office of Disciplinary Counsel v. Parr, No. 193 DB 2019 \(Pa., Aug. 10, 2020\)](#)
 - [One year and one day suspension](#) for failing to hold all Pa.R.P.C. 1.15 funds separate from his own property, failing to maintain IOLTA records, failing to deliver promptly to clients funds or property they were entitled to receive, and depositing his own funds in a Trust Account.

B. *Failure to Report a Criminal Conviction*

- [Office of Disciplinary Counsel v. Bradley, No. 74 DB 2019 \(Pa., Aug. 10, 2020\)](#)
 - [One year suspension](#) for criminal conviction for harassment and failing to report his conviction to Office of Disciplinary Counsel.

C. *Intentional Misrepresentations to Clients*

- [Office of Disciplinary Counsel v. McWhirk, No. 28 DB 2016 \(Pa., July 31, 2020\)](#)
 - [Four-year suspension on consent](#) for: (1) intentionally misrepresenting the status of matters to clients, purporting to have filed complaints, petitions, and other filings, when in fact he had not; and (2) using personal funds to pay the clients, whom he had misled into believing that the funds were settlement funds, awards, or proceeds due to them from their various legal claims.