

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH JANUARY 29, 2021

PENNSYLVANIA, NEW JERSEY & FEDERAL APPEALS COURT OPINIONS

I. Civil Litigation

A. Arbitration Clause - Waiver

☐ [*DiDonato v. Ski Shawnee, Inc.*, 2020 PA Super 259 \(Oct. 27, 2020\)](#)

- **Holding:** By failing to raise the issue of arbitration in Preliminary Objections under Pa.R.C.P. 128(a), and by litigating the matter for approximately one year before seeking to compel arbitration, the defendant waived its claim that plaintiff was required to submit the matter to arbitration.

B. Assumption of Duty

☐ [*Matthews v. Prospect Crozer, LLC.*, 2020 PA Super 274 \(Nov. 23, 2020\)](#)

- **Holding:** To establish that a party has undertaken to render certain services to another, the plaintiff must present evidence that the party undertook or agreed to assume the obligation. Plaintiff based his claim upon Section 324A of the *Restatement (Second) of Torts*, which imposes a duty by examining whether the defendant actually assumed the undertaking.

C. Bankruptcy - Impact of Defendant Doctor Bankruptcy

☐ [*Adams v. Rising Sun Medical Center*, 2020 PA Super 290 \(Dec. 29, 2020\)](#)

- **Holding:** A trial court must comply with a Bankruptcy Court Order requiring that the party be dismissed from the lawsuit. However, if the evidence at a new trial would be legally sufficient to support liability against the defendant, his name may appear on the verdict slip only for purposes of apportioning negligence.

D. Damages - No Award for Non-Economic Damages

☐ [*McMichael v. Estate of McMichael*, No. 50 WAP 2019 \(Pa., Nov. 18, 2020\)](#)

- **Holding:** A trial court abuses its discretion by denying a motion for new trial following a jury award of no non-economic damages in a wrongful death action. Justice Mundy filed a [concurring and dissenting opinion](#), and Justice Dougherty filed a [dissenting opinion](#).

E. Damages - Relitigation

□ [**Mader v. Duquesne Light Co., No. 33 WAP 2019 \(Pa., Nov. 18, 2020\)**](#)

- **Holding:** There is *no per se* rule with respect to the types of damages to be considered at a new trial, a trial court is not required to award a new damages trial on all damages, and a jury's award of certain types of damages may be distinct and independent of the award of other types of damages so that it is within the discretion of the trial court to award a new trial on all or only certain damages. Justice Mundy filed a [**dissenting opinion**](#).

F. Discovery - Attorneys' Eyes Only (AEO) Orders

□ [**Cabot Oil and Gas Corp. v. Speer, 2020 PA Super 258 \(Oct. 26, 2020\)**](#)

- **Holding:** An "Attorneys' Eyes Only" (AEO) Order requiring defendants to produce their tax returns and other financial documents to counsel for Appellees, and prohibiting disclosure to plaintiffs themselves is appropriate because it properly balanced defendants' privacy interests with plaintiffs' right to obtain financial information for the purpose of seeking punitive damages.

G. First Amendment Implications of Gag Orders

□ [**S.B. v. S.S., No. 39 WAP 2019 \(Pa., Dec. 22, 2020\)**](#)

- **Holding:** A judicial gag order that (1) restricts only the manner of speech and not the content, (2) is justified by the important governmental interest of protecting the psychological and emotional well-being of a child and the child's privacy, and (3) is narrowly tailored to serve those interests, does not violate the First Amendment to the United States Constitution. Chief Justice Saylor filed a [**concurring opinion**](#) in which Justice Dougherty joined. Justice Wecht filed a [**dissenting opinion**](#) in which Justice Donohue joined.

H. Forum Non Conveniens

□ [**Ficarra v. Consolidated Rail Corp., 2020 PA Super 260 \(Oct. 27, 2020\)**](#)

- **Holding:** "Weighty reasons" exist to support dismissal of actions based upon *forum non conveniens* when (1) all of Plaintiffs' former co-workers, supervisors, and diagnosing and treating physicians reside outside Pennsylvania, (2) the work sites are outside Pennsylvania, (3) the only connection to Pennsylvania relevant to Plaintiffs' claims is that four individuals who used to work in Philadelphia were allegedly involved in the drafting and implementation of procedures that led to Plaintiffs' injuries, (4) only one of those witnesses indisputably resides in Pennsylvania currently, and (5) Plaintiffs largely failed to explain the relevance of the former employees' testimony.

I. Interlocutory Appeals

□ [**Schmitt v. State Farm Mut. Auto. Ins. Co., 2021 PA Super 5 \(Jan. 11, 2021\)**](#)

- **Holding:** An appeal is interlocutory and not reviewable when the lower court decision does not address all claims and leaves unresolved certain damages claims.

J. *Judicial Immunity*

□ [*Chasan v. Platt, No. 47 C.D. 2020 \(Pa. Cmwlth., Dec. 14, 2020\)*](#)

- **Holding:** Because a judicial Opinion constitutes a judicial act within the Judges' jurisdiction under Section 742 of the Judicial Code, 42 Pa.C.S.A., judges are immune from liability for statements in the Opinion.

K. *Jury Instructions - Preserving a Challenge*

□ [*Kirksey v. Children's Hosp. of Pbggh., No. 18 WAP 2020 \(Pa., Dec. 10, 2020\)*](#)

- **Concurring Statement by Justice Wecht dismissing appeal as improvidently granted:** An appellate court may only consider matters in the certified record; a party must preserve a challenge to a trial court's refusal to give a requested jury instruction by making a timely, specific objection on the record.

L. *Legal Malpractice - Claims Relating to Settlements/Muhammad*

□ [*Khalil v. Williams, 2021 PA Super 3 \(Pa. Super., Jan. 5, 2021\)*](#)

- **Holding:** Pursuant to *Muhammad*, 587 A.2d 1346 (Pa. 1991), a legal malpractice claim relating to a settlement to which plaintiff agreed is barred unless plaintiff can show he was fraudulently induced to settle the original action. Collateral estoppel does not bar a claim when the issue was not actually litigated in a prior action.

M. *Legal Malpractice – Limitations – Continuous Representation Rule*

□ [*Clark v. Stover, No. 2 MAP 2020 \(Pa., Dec. 22, 2020\)*](#)

- **Holding:** Claims for legal malpractice are governed by the "occurrence rule," under which the statutory period for filing suit commences upon the happening of the alleged breach of duty, *i.e.*, within two years for a negligence claim, and within four years for a breach of contract action. The Court specifically declined to adopt the "continuous representation rule," under which the statute of limitations begins to run on the date on which the attorney's representation was terminated.

N. *Medical Diagnosis Hearsay Exception*

□ [*Adams v. Rising Sun Medical Center, 2020 PA Super 290 \(Dec. 29, 2020\)*](#)

- **Holding:** The medical diagnosis hearsay exception under Pa. R.E. 803(4) permits a trial court to admit evidence by a third-party observer who was not personally being treated or diagnosed at the time.

O. *Motor Vehicle Accidents - Sudden Emergency Doctrine*

□ [*Graham v. Check, No. 42 WAP 2019 \(Pa., Dec. 22, 2020\)*](#)

- **Holding:** Under the sudden emergency doctrine, a defendant driver must establish by a preponderance of the evidence that (1) he faced a sudden emergency requiring immediate responsive action, (2) he did not create the sudden emergency, and (3) his response to the sudden emergency was reasonable under the circumstances. The defense does not apply to drivers when it is reasonably foreseeable that a pedestrian will cross their path, particularly at intersections. Justice Dougherty filed a [dissenting opinion](#) in which Justice Baer joined.

P. Motor Vehicle Insurance - Inter-Policy Stacking of UIM Coverage

□ [**Erie Insurance Exchange v. Petrie, 2020 PA Super 268 \(Nov. 18, 2020\)**](#)

- **Holding:** The household exclusion may not be used to avoid the express requirement in Section 1738 of the MVFRL, 75 Pa.C.S.A., that an insurer must receive a written acknowledgment that an insured knowingly waive stacked coverage, consistent with *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131 (Pa. 2019) and *Craley v. State Farm Fire & Cas. Co.*, 895 A.2d 530 (Pa. 2006).

Q. Pharmaceutical Claims - Dear Health Care Provider Letter

□ [**Zitney v. Wyeth LLC., 2020 PA Super 278 \(Dec. 1, 2020\)**](#)

- **Holding:** Pennsylvania law does not impose a duty on drug manufacturers to convey safety warnings in any manner other than by including them in a product's package insert shipped with the product.

R. UIM Waiver - Venue/Forum Selection Clause

□ [**Matthews v. Erie Insurance Group, 2021 PA Super 6 \(Jan. 12, 2021\)**](#)

- **Holding:** When a party rejects UIM benefits, and a challenge is later filed seeking UIM benefits, the policy must be deemed to have been amended to include the forum selection/venue clause in the UIM provision at issue.

S. Unemployment Comp.– Medical Marijuana & Workplace Drug Policy

□ [**Pbgh. Water & Sewer Auth. v. UCBR, No. 228 C.D. 2020 \(Pa. Cmwlth., Nov. 18, 2020\)**](#)

- **Holding:** To justify a termination based upon an employee's failure to submit and pass a drug test pursuant to an employer's established drug abuse policy, an employer must prove that the Claimant knowingly or intentionally violated its drug policy. Because (1) Claimant's use of medical marijuana was legal under Pennsylvania law, (2) he complied with Employer's directive to forward the valid medical prescription after his drug test, and (3) he was unaware he would be discharged for using lawfully prescribed medical marijuana, Claimant was entitled to unemployment compensation benefits.

II. Workers' Compensation

A. Benefits Suspended After Conviction

□ [**Sadler v. WCAB, No. 6 EAP 2020 \(Pa., Jan. 27, 2021\)**](#)

- **Holding:** Under Section 306(a.1) of the Workers' Compensation Act, 77 P.S. § 511.1, an employer is not required to pay wage loss benefits for any period during which an employee is "incarcerated after a conviction." Thus, an employer must pay benefits for periods when an employee is incarcerated before a conviction, even if the period of pre-conviction incarceration is applied to the length of post-conviction incarceration.

B. Penalties for Failing to Pay Medical Bills

□ [**DTE Energy Co., Inc. v. WCAB \(Weatherby\), No. 418 C.D. 2029 \(Pa. Cmwlth. January 28, 2021\)**](#)

- **Holding:** Once an employer's liability for a work injury has been established, it may not unilaterally stop making benefit payments, including payment of medical bills. By failing to make such payments, an employer may be subject to penalties under Section 435 (d)(i) of the Workers' Compensation Act, 77 P.S. § 991(d)(i).

C. Pharmaceuticals - Calculation of Average Wholesale Price

□ [**Indemnity Ins. Co. of North Am. v. Bur. of Workers' Compensation FRHO \(Insight Pharmacy\), No. 696 C.D. 2018 \(Pa. Cmwlth., January 5, 2021\)**](#)

- **Holding:** An employer must pay for pharmaceuticals based upon the Average Wholesale Price (AWP) under Section 306(f.1)(3)(vi)(A) of the Workers' Compensation Act, 77 P.S. § 531. In particular, the Bureau properly determined that AWP shall be calculated pursuant to the *Red Book*, and not the average retail price or actual wholesale price.
- [**The Law Offices of Daniel J. Siegel, LLC \(Dan Siegel and Christa Frank High\) represented the pharmacy in this matter.**](#)

D. Specific Loss Benefits Placed in Trust

□ [**Kinzler v. WCAB \(Assoc. for Vascular Access and Twin City Fire Insurance Co.\), No. 165 C.D. 2020 \(Pa. Cmwlth., Jan. 6, 2021\)**](#)

- **Holding:** Specific loss benefits payable to a claimant, which became part of her estate after her death from non-work-related causes, are subject to the employer's subrogation lien upon the proceeds of the third-party settlement for Claimant's work-related injuries.

III. Allocatur Petitions

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

□ [**Estate of Grix v. Progressive Specialty Ins. Co., No. 76 MAL 2020 \(Pa., Nov. 3, 2020\)**](#)

- Did the Superior Court err as a matter of law in finding that the Decedent was not a resident of her parents' household at the time of her death even though she was listed as a "household driver" on the household insurance policy, a premium was charged, and the facts overwhelmingly establish she was also a "resident" of the household at the time of her death?
- Did the Superior Court err as a matter of law in finding that the Decedent was not a "designated insured" entitled to stacking even though the Decedent was listed on her parents' policy as a "driver and household resident" and premiums were charged up through and until the time of her tragic death?

☐ **[Brooks v. Ewing Cole, Inc., No. 267 EAL 2020 \(Pa., Jan. 11, 2021\)](#)**

- Should this Court review the Commonwealth Court's conclusion that an order denying a summary judgment motion based on sovereign immunity does not satisfy the collateral order doctrine of Pennsylvania Rule of Appellate Procedure 313, which conflicts with statutory law and case law that this immunity is "immunity from suit" and presents a matter of first impression for this Court on a substantial legal and policy issue involving absolute immunities?

IV. Attorney Discipline

A. Criminal Act - Insurance Fraud

☐ **[Office of Disc. Counsel v. Breen, No. 134 DB 2020 \(Pa., Nov. 9, 2020\)](#)**

- **ONE YEAR AND ONE DAY SUSPENSION** for violating Pa.R.P.C. 8.4(b)-(c) by committing a criminal act, *i.e.*, insurance fraud, when he made a false report to his automobile insurer and a criminal complaint was filed against him.

B. Criminal Conviction & Failure to Report Criminal Conviction

☐ **[Office of Disc. Counsel v. Sculli, No. 102 DB 2020 \(Pa., Dec. 9, 2020\)](#)**

- **TWO YEAR SUSPENSION** for violating Pa.R.P.C. 8.4(b) and Pa.R.D.E. 203(b)(1) and 214(a). Respondent (1) committed a criminal act (DUI and drug arrests) that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer, and (2) did not report his criminal conviction to the Office of Disciplinary Counsel within 20 days as required by the Rules.

C. Mismanaging IOLTA Accounts & Excessive Fees

☐ **[Office of Disc. Counsel v. Sardella, No. 132 DB 2019 \(Pa., Dec. 1, 2020\)](#)**

- **TWO YEAR SUSPENSION** for (1) violations of Pa.R.P.C. 1.15, including depositing funds into an escrow account, rather than an IOLTA account, (2) retaining himself and his son to represent an estate without a basis for doing so, and (3) charging the estate excessive commission and attorney's fees in violation of Pa.R.P.C. 1.5.

D. Mismanaging and Misusing IOLTA Accounts

☐ **[Office of Disc. Counsel v. Gallagher, No. 65 DB 2019 \(Pa., Jan. 22, 2021\)](#)**

- **ONE YEAR AND ONE DAY SUSPENSION** for misusing and failing to maintain required IOTLA records.

E. Negligence, Failure to Communicate, and Misrepresentations

☐ **[Office of Disc. Counsel v. Lowenberg, No. 93 DB 2020 \(Pa., Dec. 16, 2020\)](#)**

- **THREE YEAR SUSPENSION** for engaging in misconduct involving neglect, failure to communicate, and misrepresentations to a client to conceal the neglect, as well as failing to answer the DB-7/Petition for Discipline and other required conduct.

F. Reinstatement Following Disbarment for Wire Fraud Conviction

- [**In the Matter of Cory Adam Leshner, No. 159 DB 2013 \(Pa., Dec. 16, 2020\)**](#)
 - **PETITION FOR REINSTATEMENT GRANTED.** Reinstatement from disbarment on consent based on a guilty plea to one count of conspiracy to commit wire fraud because (1) the misconduct for which the attorney was disbarred was not so egregious as to preclude consideration of reinstatement, (2) the attorney proved that sufficient time had passed since the misconduct, during which he engaged in qualitative rehabilitation, (3) the attorney proved that he has the moral qualifications, competency and learning in the law required for admission to practice law in Pennsylvania, and (4) his resumption of the practice of law in Pennsylvania will be neither detrimental to the integrity and standing of the bar or the administration of justice.

V. Ethics and Professional Responsibility – Pennsylvania

A. Constitutionality of Amendments to Pa. Rule of Professional Conduct 8.4

- [**Greenberg v. Haggerty, No. 20-3822 \(E.D. Pa., Dec. 7, 2020\)**](#)
 - **Holding:** The Amendments to Pa.R.P.C. 8.4(g), which make it professional misconduct for a lawyer to knowingly manifest bias or prejudice, or engage in harassment or discrimination, violate the First Amendment because they constitute viewpoint discrimination.

VI. Ethics and Professional Responsibility – New Jersey

A. Marijuana Counseling

- [**Counseling Clients on Marijuana Laws; Amendments to NJ R.P.C. 1.2\(d\)**](#)
 - Consistent with the Constitutional amendment legalizing recreational use of marijuana, NJ R.P.C. 1.2(d) permits attorneys to counsel clients on all New Jersey marijuana laws, not just those laws relating to medical marijuana. Attorneys may also counsel clients about marijuana laws of other states if the attorney is licensed in the other state and meets the requirement of the other state.