

THE PENNSYLVANIA APPELLATE CASE REVIEW

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REPORTING DECISIONS THROUGH APRIL 30, 2021

PENNSYLVANIA APPEALS COURT & OTHER OPINIONS

I. Civil Litigation

A. Appellate Procedure - Separate Notices of Appeal

- [*Always Busy Consulting, LLC. v. Babford & Co., Inc.*, No. 11 WAP 2020 \(Pa., March 25, 2021\)](#)

- **Holding:** Generally, Pa.R.A.P. 341(a) requires filing separate notices of appeal when a single order resolves issues arising on more than one docket. However, because *Commonwealth v. Walker* (185 A.3d 969, (Pa. 2018)) did not require a party to file separate notices of appeal at separate docket numbers, *Walker* does not apply and the appeal may proceed. Justice Mundy filed a [concurring opinion](#). Justice Donohue filed a [concurring and dissenting opinion](#).

B. Auto Insurance - Stacking Waiver and Household Exclusion

- [*Erie Insurance Exchange v. King*, 2021 PA Super 15 \(Pa.Super., Feb. 5, 2021\)](#)

- **Holding:** Appellant's execution of a "stacking waiver" precludes "inter-policy" stacking.

C. Discovery - Production of Investigative Reports

- [*Virnelson v. Johnson Matthey Inc.*, 2021 PA Super 20 \(Feb. 17, 2021\)](#)

- **Holding:** An report by an investigator not retained in anticipation of litigation, but retained as a matter of business protocol to investigate the causes of an accident and to enable implementation of operational changes to prevent such accidents in the future, is discoverable.

D. Expert Testimony

- [*Mazzie v. Lehigh Valley Hospital*, 2021 PA Super 73 \(Pa.Super., April 16, 2021\)](#)

- **Holding:** An expert is not required to testify to a "reasonable degree of medical certainty" if the totality of the expert's testimony establishes that the expert testimony was rendered to that degree of certainty.

E. *Forum Non Conveniens*

- [***Failor v. FedEx Ground Package System, Inc., 2021 PA Super 45 \(Pa.Super., March 17, 2021\)***](#)
 - **Holding:** Determining whether to dismiss a matter because of *forum non conveniens* requires a trial court to consider the relative convenience of Pennsylvania and Maryland, not only Philadelphia and Hagerstown.

F. *Legal Malpractice - Post-Judgment Interest*

- [***Young v. Lippl, 2021 PA Super 56 \(Pa.Super., March 31, 2021\)***](#)
 - **Holding:** In the context of a "case within a case" legal malpractice action, the aggrieved client is entitled to interest calculated on the specific amount awarded in the legal malpractice case from the date of the verdict in the legal malpractice action, and not the prospective date of a verdict in the underlying cause of action.

G. *Medical Malpractice - Exclusion of Expert Testimony*

- [***Pourzenich v. Ripepi, 2021 PA Super 46 \(Pa.Super., March 19, 2021\)***](#)
 - **Holding:** Under Pa.R.E. 702, an expert may testify if their scientific, technical or other knowledge is beyond that possessed by a layperson and the testimony will help the trier of fact to understand the evidence or to determine a fact in issue. The trial court therefore erred by precluding a life care planner from testifying simply because she had not personally cared for a kidney transplant patient.

H. *Unfair Trade Practices and Consumer Protection Law (UTPCPL)*

- [***Commonwealth v. Chesapeake Energy Corp., No. 81 MAP 3029 \(Pa., March 24, 2021\)***](#)
 - **Holding:** The Office of Attorney General (OAG) may not bring claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1 - 201-9.3, UTPCPL on behalf of private landowners against a natural gas leasing company because the company was not conducting "trade or commerce" under the plain meaning of Section 2(3) of the UTPCPL. Justice Dougherty filed a [**dissenting opinion**](#).
- [***Gregg v. Ameriprise Financial, Inc., No. 29 WAP 2019 \(Pa., Feb. 17, 2021\)***](#)
 - **Holding:** Deceptive conduct under Section 201-2(4) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1 - 201-9.3, is not dependent in any respect upon proof of the actor's state of mind. The test for deceptive conduct is simply whether it has the tendency or capacity to deceive. Justice Todd filed a [**dissenting opinion**](#) in which Chief Justice Saylor and Justice Baer joined.

I. *Products Liability - Industry Standards Evidence*

☐ [*Sullivan v. Werner Co., 2021 PA Super 66 \(Pa.Super., April 15, 2021\)*](#)

- **Holding:** In light of the Supreme Court's ruling in *Tincher*, 104 A.3d 328 (Pa. 2014), which neither explicitly nor implicitly overrules the exclusion of industry standards in a products liability case, the trial court did not err by excluding evidence of industry standards.

J. *Service of Process*

☐ [*Gussom v. Teagle, No. 12 EAP 2020 \(Pa., March 15, 2021\)*](#)

- **Holding:** A trial court has the discretion to dismiss a complaint when a plaintiff (1) fails to offer proof of diligent attempts to serve process on a defendant in a timely manner, and (2) offers no evidence that the defendant had actual notice of the commencement of the action in the relevant time frame, regardless of whether the plaintiff acted or failed to act intentionally. Justice Wecht filed a [*dissenting opinion*](#) in which Justices Donohue and Mundy joined.

K. *Sovereign Immunity - Real Estate Exception*

☐ [*Wise v. Huntingdon County Housing Development Corp., No. 97 MAP 2019 \(Pa. April 28, 2021\)*](#)

- **Holding:** Insufficient light of Commonwealth property, occurring because of the location on the property of a pole light and a tree blocking the light emitting from the pole light, constitutes a "dangerous condition" of the property for purposes of the real estate exception to sovereign immunity, 42 Pa.C.S. § 8522(b)(4). Justice Donohue filed a [*concurring opinion*](#) in which Justice Wecht joined. Justice Wecht filed a [*concurring opinion*](#) in which Justice Donohue joined.

L. *Statute of Limitations - Failure to Toll*

☐ [*Sayers v. Heritage Valley Medical Group, Inc., 2021 PA Super 42 \(Pa.Super., March 15, 2021\)*](#)

- **Holding:** By failing to make a good faith effort to effectuate notice of the commencement of the action by Writ of Summons. By failing to take any action to serve the Writ, the trial court properly dismissed the action, despite the fact that service is generally not an issue for Preliminary Objections.

M. *Subrogating Against Future Medical Benefits - Whitmoyer*

☐ [*Beaver Valley Slag, Inc. v. Marchionda \(WCAB\), No. 867 C.D. 2020 \(Pa.Cmwlt., March 10, 2021\)*](#)

- **Holding:** Pursuant to *Whitmoyer*, 186 A.3d 947, (Pa. 2018), Section 319 of the WC Act precludes employers from subrogating against future medical benefits after a third-party settlement is executed. Because claimant preserved the issue of *Whitmoyer's* retroactive application, the decision applies retroactively to the date *Whitmoyer* was decided.

N. Venue – Minimum Corporate Contacts

□ [***Hangey v. Husqvarna Professional Products, Inc., 2021 PA Super 37 \(Pa.Super., March 8, 2021\)***](#)

- **Holding:** In determining whether venue is proper under Pa.R.C.P. 2179, courts employ a "quality-quantity analysis," *i.e.*, the quality of the defendant business' acts must be directly, furthering, or essential to the corporate objects, and the quantity must be sufficiently continuous so as to be considered habitual.

O. Wiretapping and Electronic Surveillance Act

□ [***Commonwealth v. Mason, No. 69 MAP 2019 \(Pa., March 25, 2021\)***](#)

- **Holding:** This Opinion may be of relevance in certain civil matters. The Wiretapping and Electronic Surveillance Act, 18 Pa.C.S. §§ 5701-5782 does not preclude the Commonwealth from introducing recordings of a nanny in the home of the family that employed her because the nanny failed to demonstrate that she possessed a justifiable expectation that her oral communications would not be subject to interception by a recording device located in the children's bedrooms while she worked as a nanny in the home. Justice Dougherty filed a **concurring opinion**. Justices Donohue filed a [**dissenting opinion**](#) and Justice Wecht filed a [**dissenting opinion**](#).

II. United States District Court - E.D. Pa.

A. Federal Question Jurisdiction - COVID Claims

□ [***Benjamin v. JBS S.A., No. 20-2594 \(E.D. PA., Jan. 29, 2021\)***](#)

- **Holding:** Under *Grable*, 545 U.S. 308, a court has federal question jurisdiction over a state law claim if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Merely because a Complaint refers to OSHA and CDC COVID-19 guidelines is insufficient to "necessarily raise" a federal issue.

III. Allocatur Petitions

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

□ [***Lorino v. WCAB \(Commonwealth of Pennsylvania\), No. 427 EAL 2020 \(Pa., Feb. 23 2021\)***](#)

- Whether Commonwealth Court's decision on this question of first impression should be reversed for violating the separation of powers doctrine, since it improperly exercised legislative power by replacing the word "may" with the word "shall" in Section 440 of the Workers' Compensation Act; its [o]pinion even states, "...despite the General Assembly's use of the word 'may,' this [c]ourt has always..." required an unreasonable contest before assessing attorney's fees against an insurer?

- [**Lageman v. Zepp, No. 578 MAL 2020 \(Pa., March 31, 2021\)**](#)
 - Did the Superior Court's majority opinion conflict with this Court's holdings in *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061 (Pa. 2006), and *Toogood v. Rogal*, 824 A.2d 1140 (Pa. 2003) (plurality), and the Superior Court's *en banc* opinion in *MacNutt v. Temple Univ. Hosp.*, 932 A.2d 980 (Pa.Super., 2007) (*en banc*), when the Superior Court found an abuse of discretion and reversible error in the trial court's refusal to give a jury instruction on *res ipsa loquitur* where the underlying case was medically complex and the plaintiff had otherwise established a *prima facie* case of medical professional negligence by direct expert testimony offered to a reasonable degree of medical certainty?
- [**Bisher v. Lehigh Valley Health Network, Inc., No. 543 MAL 2020 \(Pa., March 31, 2021\)**](#)
 - Did the Superior Court err in quashing Petitioner's appeal based upon the Superior Court's finding that it lacked jurisdiction to hear the appeal as it relates to the Estate of Cory Allen Bisher because the Estate's Complaint was void *ab initio*, where the trial court permitted a non-attorney to represent the Estate until the statute of limitations had expired?
 - Did the Superior Court err in quashing Petitioner's appeal based upon the Superior Court's holding that it lacked jurisdiction to hear the appeal as it relates to *pro se* litigants Carla Bisher and Brenton Bisher because of an improper verification, an issue raised *sua sponte* by the Superior Court?
 - Did the Superior Court err in ruling that the Certificates of Merit at issue in the instant case were deficient where the Certificates of Merit met the legal requirements of Pa.R.C.P. 1042.3 and the MCARE Act?

IV. Attorney Discipline

A. Negligence, Failure to Communicate, and Misrepresentations

- [**Office of Disciplinary Counsel v. Marshall, No. 136 DB 2019 \(Pa., Feb. 12, 2021\)**](#)
 - **THIRTY MONTHS SUSPENSION** for engaging in repeated professional misconduct, including neglecting three matters, failing to communicate with clients and failing to inform them of the status of their matters, and engaging in misrepresentation and deceit. Respondent's record of discipline constitutes an aggravating factor.

B. Misconduct in Immigration Matters

- [Office of Disciplinary Counsel v. Mella, No. 96 DB 2019 \(Pa., Feb. 12, 2021\)](#)
 - **ONE YEAR AND ONE DAY SUSPENSION** for misconduct relating to eight clients in six immigration matters, including filing Applications for Asylum with false statements, knowing they contained untrue statements, filing applications *pro se* that had in actuality been filled out by his office staff, failing to perform thorough investigations, submitting frivolous filings, and charging excessive fees.

C. Misconduct in Three Client Matters

- [Office of Disciplinary Counsel v. Young, No. 115 DB 2019 \(Pa., March 16, 2021\)](#)
 - **ONE YEAR AND ONE DAY SUSPENSION** for misconduct in three client matters, involving lack of diligence, failing to communicate, failing to provide a written fee agreement, failing to hold a fee separate from his own funds, and failing to deposit a fee into an IOLTA account until earned.

D. Multiple Criminal Convictions & Presenting False Testimony

- [Office of Disciplinary Counsel v. Hurda, No. 56 DB 2020 \(Pa., March 16, 2021\)](#)
 - **FOUR YEAR SUSPENSION ON CONSENT** for convictions in five separate criminal cases, offering false testimony in one criminal matter, failing to report several convictions as required by the Rules of Disciplinary Enforcement, and neglecting several client matters.