

THE PENNSYLVANIA APPELLATE CASE REVIEW

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REPORTING STATE & FEDERAL COURT DECISIONS THROUGH AUGUST 27, 2021

PENNSYLVANIA APPEALS COURT OPINIONS

I. Civil Litigation

A. "Hours Worked" Under the Pennsylvania Minimum Wage Act (PMWA)

☐ [In re: Amazon.com, Inc. v. Amazon.com, Inc., No. 43 EAP 2019 \(Pa., July 21, 2021\)](#)

- **Holding:** Time spent on an employer's premises waiting to undergo, and undergoing, mandatory security screening constitutes "hours worked" under the Pennsylvania Minimum Wage Act, 43 P.S. §§ 333.101-333.105. There exist no *de minimis non curat lex* ("The law does not concern itself with trifles," a/k/a courts disregard trivial matters that serve merely to exhaust the court's time) exceptions to the PMWA. Justice Saylor filed a [dissenting opinion](#). Just Mundy filed a [dissenting opinion](#) in which Justice Saylor joined.

B. Attorney-Client Privilege and Work-Product Doctrine

☐ [Perelman v. Raymond G. Perelman Revocable Trust, 2021 PA Super 145 \(July 16, 2021\)](#)

- **Holding:** The self-defense exception to confidentiality under Pa.R.P.C. 1.6(c)(4) permits an attorney to disclose limited confidential client information in defense of certain disputes.

C. Breach of Contract - Credit Card Agreement

☐ [Discover Bank v. Booker, 2021 PA Super 139 \(July 7, 2021\)](#)

- **Holding:** A cardholder's use of a credit card for approximately 15 years evidences the cardholder's agreement to the terms and conditions of the card.

D. Exculpatory Releases - Tort Claims Act

☐ [Degliomini v. ESM Productions, Inc., No. 5 EAP 2020 \(Pa., June 22, 2021\)](#)

- **Holding:** An exculpatory clause that releases the City of Philadelphia from its essential duty of public service, including maintaining public streets in a reasonably safe condition for their reasonably foreseeable uses, violates public policy. Thus, the City may not contractually immunize itself against the consequences of breaching its duty, even when the use of the street is for a non-essential, voluntary, recreational function. Chief Justice Baer filed a [dissenting opinion](#) in which Justices Saylor and Todd joined.

E. *Medical Malpractice - Discovery of Peer Review & Related Information*

- [*Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, No. 19 WAP 2020 \(Pa. August 17, 2021\)](#)
 - **Holding:** A committee that performs a peer-review function, although not specifically entitled a "peer review committee," is a review committee whose proceedings and records are protected under Section 4 of the Peer Review Protection Act, 63 P.S. § 425.4. In addition, the federal Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, protects from disclosure responses given by the National Practitioner Data Bank to queries submitted to it, regardless of any contrary aspect of state law. Justice Wecht filed a [concurring opinion](#).

F. *Medical Marijuana Act - Wrongful Discharge*

- [*Palmiter v. Commonwealth Health Systems, Inc.*, 2021 PA Super 159 \(August 10, 2021\) and *Scranton Quincy Clinic Co. v. Palmiter*, 2021 PA Super 155 \(August 5, 2021\)](#)
 - **Holding:** The Medical Marijuana Act, 35 P.S. §§ 10231.101-10231.2110, creates a private cause of action, including a wrongful discharge claim.

G. *Motor Vehicle Insurance - Stacking of UIM Benefits*

- [*Erie Insurance Exchange v. Mione*, 2021 PA Super 91 \(May 10, 2021\)](#)
 - **Holding:** When an insured properly rejects UIM benefits on a motorcycle policy, he is precluded from recovering UIM benefits under separate policies in the household, because there is no underlying policy on which to "stack" benefits.

H. *Motor Vehicle Insurance - Forum Selection Clause*

- [*Van Divner v. Sweger*, 2021 PA Super 129 \(June 24, 2021\)](#)
 - **Holding:** A forum selection clause requiring suit to be filed where the insured resides is enforceable if it is clear and unambiguous.

I. *Motor Vehicle Insurance - Inter-Policy Stacking*

- [*Donovan v. State Farm Mutual Insurance Co.*, No. 17 EAP 2020 \(Pa., August 17, 2021\)](#)
 - **Holding:** An insured's signature on the waiver form mandated by 75 Pa.C.S. § 1738(d) does not constitute the waiver of inter-policy stacking of underinsured motorist coverage when the relevant policy insures multiple vehicles. Because the inter-policy stacking waiver was invalid, the Court concluded that (1) the policy's household vehicle exclusion was invalid, and (2) the policy's coordination of benefits provision for UIM coverage does not apply. Justice Wecht filed a [concurring opinion](#) and Justice Saylor filed a [dissenting opinion](#).

J. *Negligence - Piercing the Corporate Veil*

☐ [*Mortimer v. McCool*, Nos. 37 & 38 MAP 2020 \(Pa., July 21, 2021\)](#)

- **Holding:** To impose "enterprise liability" and pierce the corporate veil, affiliates that the enterprise comprises must have common owners and/or an administrative nexus above the sister corporations. Thus, enterprise liability must run up from the debtor corporation to the common owner, and from there down to the targeted sister corporation(s). Conversely, in a reverse-piercing scenario, a claimant against the owner must establish misuse of the corporate form to protect the owner's personal assets against some debt. Justice Donahue filed a [concurring opinion](#) in which Chief Justice Baer joined.

☐ [*Brown v. The End Zone, Inc.*, 2021 PA Super 135 \(June 29, 2021\)](#)

- **Holding:** To pierce the corporate veil, a party must show that the parent company exercised domination and control over the subsidiary and that injustice would result if corporate form is maintained.

K. *Uniform Enforcement of Foreign Judgments Act (UEFJA)*

☐ [*Domus, Inc. v. Signature Building Systems of PA, LLC*, No. 54 MAP 2020 \(Pa., June 22, 2021\)](#)

- **Holding:** The failure to authenticate a foreign judgment under the Uniform Enforcement of Foreign Judgments Act, 42 Pa.C.S. § 4306, does not deprive a court of common pleas of subject matter jurisdiction because the Pennsylvania Constitution gives those courts unlimited original jurisdiction over all actions, except where otherwise provided by law.

II. Workers' Compensation

A. *Course and Scope of Employment- Coming and Going Rule*

☐ [*Stewart v. WCAB \(Bravo Group Services, Inc.\)*, No. 812 CD 2020 \(Pa.Cmwlt., July 2, 2021\)](#)

- **Holding:** The coming and going rule does not bar a claimant from receiving workers' compensation benefits when he sustained the injury upon his arrival to begin his shift, was required by the nature of his employment to be present in the area where he was injured, and was entering the workplace a reasonable time before his shift.

B. *Determination Whether Claimant Was an Employee or Independent Contractor*

☐ [*Berkebile Towing and Recovery v. WCAB \(Harr, State Workers' Insurance Fund\)*, No. 220 CD 2020 \(Pa.Cmwlt., May 10, 2021\)](#)

- **Holding:** When the facts are more indicative of an employer-employee relationship, an employee is entitled to workers' compensation benefits even if he was required to sign an independent contractor agreement.

C. *Exclusive Remedy*

□ [*Mercer v. Newell*, 2021 PA Super 94 \(May 13, 2021\)](#)

- **Holding:** The "exclusive remedy" provision under Section 303 of the Workers' Compensation Act, 77 P.S. § 481(a), does not bar a common law action against an employer when the employee's injury arose from and was related to the employer's alleged fraudulent concealment from plaintiff of information relating to exposure to lead during employment.

D. *Fatal Claim Benefits- Post-Work Injury Suicide*

□ [*Southeastern Transportation Authority \(SEPTA\) v. WCAB \(Hansell\)*, No. 464 CD 2020 \(Pa.Cmwlt., May 24, 2021\)](#)

- **Holding:** A deceased employee's family is entitled to fatal claim benefits under Section 301(a) of the Workers' Compensation Act, 77 P.S. § 431, for an employee's suicide when (1) there was initially a work-related injury, (2) the injury directly caused the employee to become dominated by a disturbance of the mind of such severity as to override normal rational judgment, and (3) the disturbance resulted in the employee's suicide.

E. *Impairment Rating Examinations - Reinstatement Post-Protz*

□ [*Riley v. WCAB \(Commonwealth of Pa.\)*, No. 675 CD 2019 \(Pa.Cmwlt., Aug. 5, 2021\)](#)

- **Holding:** The three year statute of repose under the Workers' Compensation Act bars reinstatement of benefits that were modified based upon an unconstitutional IRE. The Court refused to address whether the need for "equitable balancing" applies in this situation despite the directive from the Supreme Court that the doctrine would apply in certain cases.

□ [*Hutchinson v. WCAB \(Annville Township\)*, Nos. 16 & 17 C.D. 2021 \(Pa.Cmwlt., August 9, 2021\)](#)

- **Holding:** An injured worker whose benefits were modified based upon an unconstitutional IRE is entitled to reinstatement of benefits as of the date the claimant filed the reinstatement petition, and not the date of the modification.
 - ◆ *The Law Offices of Daniel J. Siegel, LLC is monitoring post-Protz IRE cases carefully, and serves as counsel or amicus curiae counsel for the Pennsylvania Association for Justice on many matters where IRE-related issues are before the Courts.*

F. *Intervention by Workers' Compensation Insurer in Third Party Claim*

□ [*Gleason v. Alfred I. DuPont Hospital for Children*, 2021 PA Super 156 \(Aug. 5, 2021\)](#)

- **Holding:** A workers' compensation carrier may intervene in a third-party tort action to the extent of the workers' compensation benefits which it had paid to the employee. In this case, intervention permits the carrier to challenge the consortium apportionment contained in the unopposed settlement agreement.

G. *Specific Loss Benefits*

□ [*Kemps v. WCAB \(Streets\)*, No. 1099 CD 2020 \(Pa.Cmwlt., May 24, 2021\)](#)

- **Holding:** In a claim for specific loss benefits under Section 306(c)(3) of the Workers' Compensation Act, 77 P.S. § 513(3), the loss of use of the body part must be for all practical intents and purposes, and need not be total/100 percent.

H. *Temporary Compensation - Notices*

□ [*Raymour & Flanagan v. WCAB \(Obeid\)*, No. 371 C.D. 2020 \(Pa.Cmwlt., August 16, 2021\)](#)

- **Holding:** An employer is not required to file a Notice Stopping Temporary Compensation Payable and a Notice of Compensation Denial when it has issued only a Medical Only Notice of Compensation Payable.

III. Pennsylvania Rules Amendments

A. *Pennsylvania Rules of Civil Procedure*

□ [*Amending Pa. Rules of Civil Procedure 51 and 129 effective October 1, 2021*](#)

- **Rule 51. Title and Citation of Rules.**
 - ◆ Citations to the Pennsylvania Rules of Civil Procedure will now be stylized as "Pa.R.Civ.P. _." They will no longer be cited as "Pa.R.C.P. No."
 - ◆ New Comment: "The previous use of 'Pa.R.C.P. No.' to cite the Pennsylvania Rules of Civil Procedure may not serve as a basis to invalidate a reference to that authority."
- **Rule 129. Construction of Rules. Titles, Provisos, Exceptions and Headings. Use of Commentary.**
 - ◆ Subsection (e) amended to: "**Commentary** is not a part of the rule **text**, but may be used in construing the rule **text**."
 - ◆ New Comment: "Any statements contained in a publication or adoption report by the Civil Procedural Rules Committee and the Domestic Relations Procedural Rules Committee are for the benefit of those using the rules, but neither constitute part of the rule nor are adopted by the Supreme Court. See Pa.R.J.A. 103, Comment."

B. *Pennsylvania Rules of Evidence*

□ [*Adopting Pa. Rule of Evidence 413 \(Evidence of Immigration Status\), effective Oct. 1, 2021*](#)

- This new Rule limits the circumstances under which evidence of a party's or witness' immigration is admissible. The Rule address criminal, delinquency and civil matters.

C. *Pennsylvania Rules of Professional Conduct*

□ [*Amending Pa. Rule of Professional Conduct 8.4\(g\) \(Misconduct\) effective August 25, 2021*](#)

- The Rule makes it misconduct for a lawyer to "in the practice of law, **knowingly engage in conduct constituting** harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status..." The Order also amends Explanatory Comments 3, 4 & 5.

IV. Attorney Discipline

A. *Aggravating Factors - Contempt of Court*

- [Office of Disciplinary Counsel v. Meehan, No. 53 DB 2021 \(Pa., June 4, 2021\)](#)
 - ***SIX MONTH SUSPENSION ON CONSENT*** and probation for a period of one year when Respondent's conduct in handling a client's criminal case was prejudicial to the administration of justice because it unnecessarily expended the court system's limited time and resources, and delayed the resolution of the client's criminal matter. Respondent's past (vacated) charge of contempt of court was included as an aggravating factor for sullyng the reputation of the Philadelphia Bar.

B. *Aggravating Factors- No Remorse & Prior Discipline*

- [Office of Disciplinary Counsel v. O'Brien, No. 15 DB 2020 \(Pa., July 27, 2021\)](#)
 - ***TWO YEAR SUSPENSION*** for misusing IOLTA funds, failure to maintain Rule 1.15 (IOLTA) Funds in a trust or IOLTA account, and failing to maintain required records. Respondent's lack of remorse and presence of prior discipline were aggravating factors.

C. *Failure to Maintain IOLTA Account*

- [Office of Disciplinary Counsel v. Agresti, No. 68 DB 2020 \(Pa., July 21, 2021\)](#)
 - ***THREE YEAR SUSPENSION*** followed by a one year period of probation with a practice monitor after reinstatement for failing to properly safeguard the property of three separate clients, which resulted in the misappropriation of approximately \$46,722.00. In aggravation, in one case, Respondent did not agree to refund any unearned portion of a \$50,000.00 retainer (where representation was terminated after five days) until after the ODC commenced its investigation, and Respondent failed to make full restitution until after the Pennsylvania Lawyers Fund for Client Security paid the client's claim.

D. *Failure to Supervise a Nonlawyer*

- [Office of Disciplinary Counsel v. Krzton, No. 86 DB 2020 \(Pa., August 6, 2021\)](#)
 - ***SIX MONTH SUSPENSION*** for (1) failing to supervise a nonlawyer, who stole from seven estates represented by Respondent, and (2) failing to communicate with a client and diligently handle a client's matter.

E. *Misappropriating Client Funds*

- [Office of Disciplinary Counsel v. Eddy, No. 143 DB 2019 \(Pa., June 4, 2021\)](#)
 - ***THREE YEAR SUSPENSION*** for misappropriating client funds in an IOLTA account. A mitigating circumstance is that Respondent suffered from depression, anxiety, and substance abuse, and established by clear and convincing evidence that his psychiatric disorder caused his misconduct.

V. Allocatur Petitions Granted

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

□ [*Khalil v. Williams*, No. 53 EAL 2021 \(Pa., August 3, 2021\)](#)

- Should the Court overturn *Muhammad v. Strasburger*, . . . 587 A.2d 1346 (Pa. 1981), which bars legal malpractice suites following the settlement of a lawsuit absent an allegation of fraud?
- Did the Superior Court misconstrue the averments in [P]etitioner's complaint and err as a matter of law when it held that [P]etitioner's legal malpractice claims were barred by *Muhammad v. Strasburger*?

□ [*Arlet v. WCAB \(Commonwealth of Pennsylvania\)*, No. 262 WAL 2020 \(Pa., May 26, 2021\)](#)

- Did the Commonwealth Court of Pennsylvania err as a matter of law in its July 29, 2020 Opinion and Order when it affirmed the W[orkers' Compensation Appeal Board]'s finding that Acadia [Insurance Company] did not have a right of subrogation for benefits paid to [Petitioner] under a Jones Act policy of insurance, despite the Commonwealth Court's initial holding in this case that [Petitioner] was not a seaman and/or crew member entitled to the benefits which Acadia should not have paid him?

□ [*In re Estate of Jabbour*, No. 24 WAL 2021 \(Pa., June 25, 2021\)](#)

- Should [the decedent's spouse] have been permitted to revoke her spousal election against the will when she did not allege or demonstrate active fraud, when she acted with willful blindness and did not exercise due diligence in revoking her election, and when her petition was filed more than three (3) years after the deadline imposed by this Court in [*In re Daub's Estate*, 157 A. 908 (Pa. 1931)]?

□ [*Owens v. Ardmore Automotive*, No. 58 EAL 2021 \(Pa., July 28, 2021\)](#)

- Is Allowance of Appeal required because the order at issue conflicts with the Pennsylvania Workers' Compensation Act's exclusivity clause and this court's decision in *Tooley v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013), and will lead to additional improper litigation in the courts of claims that fall within the jurisdiction of the Workers' Compensation Act?

B. *U.S. Court of Appeals for the 3rd Cir - Petition for Certification of Questions of State Law*

□ [*Ebert v. C.R. Bard, Inc.*, No. 20-2139 \(3d. Cir., June 24, 2021\)](#) and [*Ebert v. C.R. Bard, Inc.*, No. 38 EM 2021 \(Pa., August 5, 2021\)](#)

- Under Pennsylvania law, must a plaintiff bringing a negligent design claim against prescription medical device manufacturers prove that the device was too harmful to be used by anyone, or may the plaintiff also prevail on other theories of liability where appropriate?
- Under Pennsylvania law, are prescription implantable medical devices categorically subject to strict liability, categorically immune from strict liability, or immune from strict liability on a case-by-case basis? If they are immune on a case-by-case basis, what test should a court apply to determine where a particular device is immune?

New Jersey Appellate Court Decision

I. Supreme Court of New Jersey

A. *Commercial Landowners - Ongoing Storm Rule*

□ [*Pareja v. Princeton International Properties, No. A-4-20, 084394 \(N.J., June 10, 2021\)*](#)

- **Holding:** Adopting the "ongoing storm rule," commercial landowners do not have a duty to remove accumulated snow and ice until a storm has concluded, unless unusual circumstances give rise to a duty before then. There are two exceptions to the rule: (1) if the owner's conduct increases the risk, or (2) the danger is pre-existing.

Notable Appellate Court Decisions

I. United States Court of Appeals for the Fifth Circuit

A. *Failure to Monitor Electronic Filing Notices*

□ [*Rollins v. Home Depot USA, Inc., No. 20-50736 \(5th Cir., August 9, 2021\)*](#)

- An attorney is obligated and in the best position to monitor electronic/email notifications from courts that utilize electronic service and notice. In this case, counsel for plaintiff had agreed to receive filings electronically. The court's notice of the filing of a Motion for Summary Judgment was erroneously filtered by counsel's email into the wrong folder. The District Court therefore granted the unopposed Motion, and declined to reconsider its Order. *As the appeals court noted, "This is a cautionary tale for every attorney who litigates in the era of e-filing."*

II. United States District Court for the Southern District of New York

A. *Sanctions Against Party & Counsel for Fabricating Evidence*

□ [*Rosbach v. Montefiore Medical Center, No. 19cv5758 \(S.D. N.Y. August 5, 2021\)*](#)

- **Holding:** A court may, under Fed.R.Civ.P. 11 and 28 U.S.C. § 1927, impose sanctions, including dismissal of an action and monetary sanctions, against a party and counsel for fabricating evidence produced during discovery.

