

THE PENNSYLVANIA APPELLATE CASE REVIEW

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REPORTING STATE COURT DECISIONS THROUGH OCTOBER 29, 2021

PENNSYLVANIA APPEALS COURT OPINIONS

I. Civil Litigation

A. *Non-Suit - Removal*

- [*Munoz v. The Children's Hospital of Philadelphia*, 2021 PA Super 217 \(October 27, 2021\)](#)
 - **Holding:** Entry of a nonsuit is only appropriate if, giving the plaintiff the benefit of every reasonable inference, and resolving all evidentiary conflicts in plaintiff's favor, the absence of liability is so clear that there is no room for fair and reasonable disagreement.

B. *Motor Vehicle Insurance - Regular Use Exclusion*

- [*Rush v. Erie Insurance Exchange*, 2021 PA Super 215 \(Pa.Super., October 22, 2021\)](#)
 - **Holding:** The "regular use" exclusion in a motor vehicle insurance policy is unenforceable because it violates and conflicts with the Motor Vehicle Financial Responsibility Law. The regular use exclusion, which is a common provision of many policies that bar uninsured (UM) and underinsured motorist claims (UIM) when the insured is (1) using a non-owned motor vehicle, (2) which is regularly used by the insured, and (3) the non-owned motor vehicle is not insured for UM or UIM coverage under the policy.

C. *Dead Man's Rule*

- [*Frazer v. McEntire*, 2021 PA Super 211 \(Pa.Super., October 20, 2021\)](#)
 - **Holding:** Under the Dead Man's Act, 42 Pa.C.S. § 5930, one whose interest is adverse to the interest of a decedent is not a competent witness to any matter which occurred before the decedent's death.
 - Three conditions must be present before the surviving witness is disqualified: "(1) the deceased must have had an actual right or interest in the matter at issue, i.e. an interest in the immediate result of the suit; (2) the interest of the witness-not simply the testimony-must be adverse; (3) a right of the deceased must have passed to a party of record who represents the deceased's interest."
 - The *devisavit vel non* exception further provides that "witnesses are competent to testify in disputes arising over the passage of property, through will or intestacy, although their testimony might otherwise be rendered incompetent through operation of the general rule." "This exception applies to disputes involving the transfer of a decedent's estate both by operation of law or by will and renders competent all witnesses claiming decedent's property by reason of [his] death."

D. *Medical Malpractice - Certificates of Merit & Competent Representation*

- [*Green v. The Trustees of the University of Pennsylvania*, 2021 PA Super 209 \(Pa.Super., October 19, 2021\)](#)
 - Note: The Opinion begins with the following statement by Superior Court: *"The following is a cautionary tale for attorneys who venture outside their area of expertise into unfamiliar specialized areas of litigation without educating themselves on the applicable rules and law."*
 - The remainder of the Opinion relates to Certificates of Merit, the failure to produce one, and sanctions. The focus of the Opinion was whether sanctions were appropriate against an attorney who "dabbled."

E. *Negligence - Contractor & Landowner Liability*

- [*Brown v. City of Oil City*, No. 337 C.D. \(Pa.Cmwlt., September 1, 2021\)](#)
 - **Holding:** Section 385 of the *Restatement of Torts 2d* extends a contractor's liability to third persons who are injured by an artificial condition of the land created by the contractor after the possessor has accepted the completed work.

F. *Collateral Orders - Appealability*

- [*Brooks v. Ewing Cole, Inc.*, No. 4 EAP 2021 \(Pa., September 22, 2011\)](#)
 - **Holding:** A trial court order denying summary judgment on sovereign immunity is a collateral order appealable as of right under Pa.R.A.P. 313.

II. Pennsylvania Rules Amendments

A. *Pennsylvania Rules of Appellate Procedure - Effective April 1, 2022*

- [*Amending Pa. Rules of Appellate Procedure 5124, 551, 905, 909, 1111, 1301, 1613, 1732, 2171, 2187, 2189 and 2541*](#)
 - The Supreme Court has amended numerous Rules relating to the format of filings, the number of copies to be filed, and other similar aspects of appeals. Every lawyer handling appeals should be familiar with the amendments.
 - *We continue to see many appeals filed that do not comply with the Rules and it is a risk to file non-compliant documents.*

III. Allocatur Petition Granted

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

- [*Commonwealth v. Brown*, No. 183 EAL 2021 \(Pa., September 13, 2021\)](#)
 - Did the Superior Court err as a matter of law when it affirmed the trial court's grant of the Commonwealth's motion *in limine* to preclude the admission of expert testimony regarding blood alcohol content and its effect upon memory and perception on the grounds that it was an impermissible assessment of witness credibility?
 - *This decision may have implications for civil matters as well.*

New Jersey Ethical Guidance From the Supreme Court

I. Supreme Court of New Jersey Committee on Attorney Advertising

A. *Advertising That Compares Lawyer's Services*

□ [Notice to the Bar \(N.J., May 5, 2021\)](#)

- "[A] lawyer who seeks to advertise the receipt of an award, honor, or accolade that compares the lawyer's services to other lawyers' services must first ascertain whether the organization conferring the award has made 'inquiry into the attorney's fitness.' Official Comment to Rule of Professional Conduct 7.1. 'The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion.' *In re Opinion 39*, 197 N.J. 66, 76 (2008); *see also* Committee on Attorney Advertising Opinion 42 (December 2010). This inquiry into the lawyer's fitness must be more rigorous than a survey or a simple tally of the lawyer's years of practice and lack of disciplinary history. Pursuant to Rule of Professional Conduct 7.1(a)(3)(ii), the basis for the comparison must be substantiated, bona fide, and verifiable."

For example, when using the badge below, there should either be the information about the criteria or a link to <https://www.bestlawyers.com/methodology> so that anyone interested can determine how the award, etc., was determined.

