

# The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH APRIL 30, 2022

## Pennsylvania Appellate Court Decisions

### I. Civil Litigation

#### A. Attorney Disqualification

- [\*Darrow v. PPL Electric Utilities Corp.\*, 2021 PA Super 245 \(Pa. Super. December 14, 2021\)](#)

- **Holding:** To disqualify a firm as counsel, a Court should consider (1) the substantiality of the relationship between the attorney and the former client, (2) the time lapse between the matters in dispute, (3) the size of the firm and the number of disqualified attorneys, (4) the nature of the disqualified attorney's involvement, and (5) the timing of the wall, which are the factors enumerated in *Dworkin v. General Motors Corp.*, 906 F. Supp. 273 (E.D. Pa. 1995). The Court applied the same analysis in [\*Rudalavage v. PPL Electric Utilities Corp.\*, 2022 PA Super 3 \(Pa. Super. January 4, 2022\)](#).

#### B. Delay Damages During Pandemic

- [\*Getting v. Mark Sales & Leasing, Inc.\*, 2022 PA Super 58 \(Pa. Super. April 7, 2022\)](#)

- **Holding:** A plaintiff is entitled to delay damages under Pa.R.Civ.P. 238 for the period during the pandemic because the Pennsylvania Supreme Court did not suspend the right to collect delay damages during the 2020 judicial emergency.

#### C. Dram Shop Act Claims - Licensees

- [\*Klar v. Dairy Farmers of America, Inc.\*, 2021 PA Super 252 \(Pa. Super. December 17, 2021\)](#)

- **Holding:** An entity that is not a licensee under the Liquor Code, 47 P.S. § 4493(1), is not subject to liability, including a Dram Shop Act claim, for violating the Liquor Code.

#### D. Duty of Care - Affirmative Conduct

- [\*Baumbach v. Lafayette College\*, 2022 PA Super 40 \(Pa. Super. March 4, 2022\)](#)

- **Holding:** A person may, through affirmative conduct, assume a duty to exercise reasonable care in the performance of the conduct. In this case, the college undertook a duty to the Crew Team members to provide safe and accessible parking to attend practice and, by failing to do so, violated its duty.

#### E. Exculpatory Clauses

- [\*Milshiteyn v. Fitness International, LLC\*, 2022 PA Super 30 \(Pa. Super. February 18, 2022\)](#)

- **Holding:** A Membership Agreement is not a contract of adhesion or unconscionable when a person voluntarily signed the agreement and was under no compulsion to complete the agreement for a non-essential service.

## F. *In Pari Delicto*

### □ [Albert v. Sheeley's Drug Store, No. 5 MAP 2021 \(Pa. December 22, 2021\)](#)

- **Holding:** The doctrine of *in pari delicto* precluded decedent's father's negligence claims where decedent actively participated in the scheme with his defendant-friend to illegally obtain his friend's mother's prescription drugs from defendant-pharmacy, which resulted in his death. Justice Dougherty filed a [dissenting opinion](#) in which Justice Donohue joined in the result.

## G. *Mental Health Records*

### □ [Tavella-Zirilli v. Ratner Companies, L.C., 2021 PA Super 240 \(Pa. Super. Dec. 8, 2021\)](#)

- **Holding:** Mental health records are privileged and protected from disclosure by the Mental Health Procedures Act, 50 P.S. §§ 7103-7503 and/or by the psychiatrist/psychologist-patient privilege, codified at 42 Pa.C.S.A. § 5944, when the treatment was voluntary outpatient treatment, not involuntary or inpatient treatment. The psychiatrist/psychologist-patient privilege protects records of the opinion, observations, diagnoses or treatment alternatives of the treatment provider that reports the communications.

## H. *New Trial*

### □ [Steltz v. Meyers, No. 10 EAP 2021 \(Pa. December 22, 2021\)](#)

- **Holding:** A new trial is not warranted where Defendants' counsel asked a question highlighting that Plaintiff had not presented a radiology expert, but the (1) trial court gave a curative instruction following the question, (2) the trial court permitted Plaintiff to present rebuttal evidence, (3) Plaintiff did not object to Defendants' closing arguments on the same subject, and (4) the trial court charged the jury that evidence is not what the lawyers say. Justice Wecht filed a [dissenting opinion](#) in which Chief Justice Baer and Justice Donohue joined.

## I. *Personal Jurisdiction*

### □ [Bean Sprouts LLC v. Lifecycle Construction Services LLC, 2022 PA Super 28 \(Pa. Super. February 17, 2022\)](#)

- **Holding:** Personal jurisdiction over Defendant under the long-arm statute, 42 Pa.C.S.A. § 5322, does not exist where the Defendant's only contacts with Pennsylvania pursuant to the contracts with Plaintiff were based on where Plaintiff chose to locate its office, not because Defendant sought to further its business in Pennsylvania or create continuous and substantial consequences in Pennsylvania.

### □ [Mallory v. Norfolk Southern Railway Co., No. 3 EAP 2021 \(Pa. December 22, 2021\)](#)

- **Holding:** Pennsylvania's statutory scheme (15 Pa.C.S. § 411(a) and 42 Pa.C.S. § 5301(a)(2)(i)) violates due process to the extent it allows for general jurisdiction over foreign corporations, absent affiliations within the state that are so continuous and systematic as to make the foreign corporation essentially at home in Pennsylvania. Compliance with Pennsylvania's mandatory registration requirement does not constitute voluntary consent to general personal jurisdiction. Justice Mundy filed a [concurring opinion](#).

J. *Res Ipsa Loquitor in Medical Malpractice Cases*

□ [Lageman v. Zepp, No. 21 MAP 2021 \(Pa. December 22, 2021\)](#)

- **Holding:** In medical malpractice cases, a plaintiff may present both direct and circumstantial evidence of negligence. Thus, when a plaintiff has made a prima facie showing of the factors for a *res ipsa loquitor* claim under Section 328D of the Restatement (Second) of Torts, a court should provide a *res ipsa loquitor* jury instruction, regardless of whether plaintiff also has presented direct evidence of negligence. Chief Justice Baer filed a [concurring and dissenting opinion](#). Justice Saylor filed a [dissenting opinion](#).

K. *Service of Process*

□ [Bellan v. Penn Presbyterian Medical Center, 2022 PA Super 32 \(Pa. Super. February 22, 2022\)](#)

- **Holding:** A party does not make a good faith attempt to serve process when it makes one attempt to serve a Complaint, does not file an affidavit of no-service, and did not reinstate the complaint or take any other action. Consequently, the trial court properly granted preliminary objections and dismissed the Complaint.

L. *Sovereign Immunity Act - Venue*

□ [Kim v. Commonwealth Dept. of Transportation, No. 7 C.D. 2020 \(Cmwlth.Ct. February 9, 2022\)](#)

- **Holding:** Non-Commonwealth Defendants may file preliminary objections asserting improper venue under the Sovereign Immunity Act, 42 Pa.C.S. § 8523(a), even if the Commonwealth has waived its own objection to venue. The right to object to venue under Section 8523(a) is not a unilateral right held by the Commonwealth.

M. *Unauthorized Practice of Law*

□ [Bisher v. Lehigh Valley Health Network, Inc., No. 22 MAP 2021 \(Pa. December 22, 2021\)](#)

- **Holding:** Because neither the unauthorized practice of law nor the lack of a verification to the Complaint implicates subject matter jurisdiction, a court may not raise those matters *sua sponte*.

N. *Unconstitutional Statute is Void Ab Initio*

□ [McLinko v. Commonwealth Dept. of State, No. 244 M.D. 2021 \(Cmwlth.Ct. January 28, 2022\)](#)

- **Holding:** An unconstitutional statute is void *ab initio*.

O. *Venue - Libel and Defamation Cases with Internet-based Publication*

□ [Fox v. Smith, No. 39 EAP 2019 \(Pa. November 17, 2021\)](#)

- **Holding:** A cause of action arises where publication of defamatory statements occur, and publication occurs where a third-party recipient understands the statement as being defamatory. When a person is defamed by a medium with worldwide accessibility, a plaintiff may select a single venue in a defamation action in any location in which publication and concomitant injury has occurred, albeit that publication and harm may have ensued in multiple counties.

## P. *Venue - Regularly Conducts Business*

### □ [Hausmann v. Bernd, 2022 PA Super 27 \(Pa. Super. February 17, 2022\)](#)

- **Holding:** When determining whether a corporation regularly conducts business in a county for purposes of establishing venue under Pa.R.Civ.P. 1006(a)(a), a trial court must consider the percentage of revenue generated in the county in the context of the business at issue in the case.

## II. Workers' Compensation

### A. *Course and Scope of Employment*

#### □ [Bark v. Sooner Steel, LLC \(WCAB\), No. 540 C.D. 2021 \(CmwltH.Ct. March 21, 2022\)](#)

- **Holding:** A claim is compensable under the employment contract exception to the “coming and going rule” under the Workers’ Compensation Act when Claimant had worked as a seasonal employee for four years, Employer paid him extra compensation for the travel to the job site, Employer directed another employee to pick up Claimant and drive him to the job site, and he was traveling in an employer-owned vehicle when the motor vehicle accident occurred,.

#### □ [Henderson v. WP Ventures, Inc. \(WCAB\), 392 C.D. 2021 \(CmwltH.Ct. January 14, 2022\)](#)

- **Holding:** A worker is within the course and scope of his employment and entitled to benefits under the Workers’ Compensation Act pursuant to the “personal comfort doctrine” if he or she leaves the work premises for a short time to attend to personal needs that will help the employee better perform his or her job. Thus, a Claimant who left his employment premises during a lapse in his work duties to smoke a cigarette and buy a sandwich was entitled to benefits under the Act.

### B. *Impairment Rating Evaluations Under Act 111*

#### □ [Lynch v. Commonwealth of Pennsylvania \(WCAB\), No. 1202 C.D. 2021 \(CmwltH.Ct. April 29, 2022\)](#)

- **Holding:** An employer may modify from total to partial disability status the benefits of an employee who receives Act 534 benefits (applicable to employees of state penal and correctional institutions) following an Impairment Rating Evaluation conducted pursuant to Act 111 of 2018.

### C. *Intervention in Third Party Actions*

#### □ [Loftus v. Decker, 2022 PA Super 44 \(Pa. Super. March 10, 2022\)](#)

- **Holding:** An insurer is not permitted to intervene in a third-party action to protect its workers’ compensation subrogation lien when Plaintiff had only filed a Writ of Summons. Even if Plaintiff had filed a Complaint, the carrier could not intervene because an insurer has no right to seek a recovery and cannot force an employee to seek recovery to satisfy a workers’ compensation statutory lien.

#### D. *Presumption for Occupational Diseases*

- [DiLaqua v. City of Philadelphia Fire Dept. \(WCAB\), No. 1262 C.D. 2020 \(Cmwlth.Ct. December 23, 2021\)](#)
  - **Holding:** A claimant is not required to prove disability to receive benefits for an occupation disease under Section 301(e) of the Workers' Compensation Act, 77 P.S. § 413. The presumption under this section also applies to medical-only claims.

#### E. *Sexual Assault - WCJ Jurisdiction*

- [Commonwealth of Pa., Dept. of Corrections-SCI Chester v. Faison \(WCAB\), No. 150 C.D. 2021 \(Cmwlth.Ct. November 10, 2021\)](#)
  - **Holding:** A Workers' Compensation Judge has jurisdiction to determine if a Claimant was subject to nonconsensual sexual intercourse and sustained a psychological injury, thereby entitling her to benefits under the Act. The WCJ's finding is not a determination of criminal liability.

#### F. *Social Security Offset*

- [Sadler v. Philadelphia Coca-Cola \(WCAB\), No. 1294 C.D. 2020 \(Cmwlth.Ct. January 7, 2022\)](#)
  - **Holding:** The Social Security Disability offset provision of Section 204(a) of the Workers' Compensation Act, 77 P.S. § 71(a), does not violate the Equal Protection Clause of the U.S. and Pennsylvania Constitutions because there is a rational basis for the provision.

#### G. *Statutory Employer - Immunity in Third Party Actions*

- [Dobransky v. EQT Production Co., 2022 PA Super 61 \(Pa. Super. April 11, 2022\)](#)
  - **Holding:** Under Section 302(a)(1)(1) of the Workers' Compensation Act, 77 P.S. § 431, a contractor is secondarily liable for payment of workers' compensation benefits if a subcontractor/employer cannot or will not pay the benefits, and is entitled to statutory immunity in a third party action. Under Section 302(a), "a person who contracts with another (1) to have work performed consisting of (i) the removal, excavation or drilling of soil, rock or minerals, or (ii) the cutting or removal of timber from lands, or (2) to have work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person shall be deemed a contractor, and such other person a subcontractor."

#### H. *Workers' Compensation - Exclusive Remedy*

- [Liberty Mutual Group, Inc. v. 700 Pharmacy, LLC, 2022 Pa. Super. 19 \(Pa. Super. February 1, 2022\)](#)
  - **Holding:** A trial court does not have jurisdiction to review the reasonableness and or necessity of the treatment provided to patients who suffered work-related injuries under the Pennsylvania Workers' Compensation Act. Such claims must be presented under the Act.
  - [The Law Offices of Daniel J. Siegel, LLC represented 31 of the 41 defendants in this lawsuit.](#)

### III. Allocatur Petitions

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

- [\*Brown v. City of Oil City\*, No. 292 WAL 2021 \(Pa., February 22, 2022\)](#)
  - Whether an out-of-possession contractor cannot be subject to liability under Section 385 of the Restatement of Torts for injuries to third-parties where the dangerous condition of the structure erected by the contractor is well-known to the possessor of land?
- [\*Franczyk v. The Home Depot, Inc.\*, No. 315 WAL 2021 \(Pa., March 16, 2022\)](#)
  - Where an employee suffers a workplace injury fairly attributable to a non-employer third party, is the employee precluded by 77 P.S. § 481's exclusive remedy provision from bringing a tort claim against the employer for affirmative conduct that impedes the employee's ability to seek relief against the third-party?
  - Does the Superior Court's decision in this case conflict with its decision in *Kalik v. Mash*, 982 A.2d 85 (Pa. Super. 2009)?
- [\*Franks v. State Farm Mutual Automobile Insurance Co.\*, No. 563 MAL 2021 \(Pa., March 23, 2022\)](#)
  - Did the en banc panel of the Superior Court err in ruling that Respondent was not required to obtain a new uninsured/underinsured stacking waiver from Petitioners pursuant to 75 Pa.C.S. § 1738(c) of the Pennsylvania Motor Vehicle Financial Responsibility Law when Petitioners deleted an automobile from their automobile insurance policy, and necessarily holding therefore that Petitioners are **not** entitled to a total of \$200,000 in stacked underinsured motorist coverage?
- [\*McGuire v. City of Pittsburgh\*, No. 177 WAL 2021 \(Pa., November 16, 2021\)](#)
  - Is a federal jury's finding that a police officer acted "under color of state law" a "judicial determination" that the officer acted within the "scope of his office or duties" for purposes of indemnification where the defense that the officer acted as a private citizen was rejected by the jury's verdict and where the municipality participated in the officer's defense and did not assert that the officer's use of force was "outrageous" or rose to the level of willful misconduct?
  - Must the criteria for indemnification under the [Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541-8542,] be judicially determined in the damages action brought against the employee?
  - In a declaratory judgment action brought by an employee, is the issue of whether the criteria for indemnification under the [Political Subdivision Tort Claims Act] were "judicially determined" in the underlying action for damages a question of law for the court to decide?

## IV. Pennsylvania Rules Amendments

### A. *Rules of Appellate Procedure*

□ [Pa.R.A.P. 1115 and Pa.R.A.P. 1116 \(Effective April 1, 2022\)](#)

- Rule 1115. Content of the Petition for Allowance of Appeal.
  - ◆ Rule 1115(a)(3) added: “Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the petition shall contain a statement of place of raising or preservation of issues, as required in Pa.R.A.P. 2117(c).”
- Rule 1116. Answer to the Petition for Allowance of Appeal.
  - ◆ New comment: “Parties are strongly encouraged to raise any waiver-based or procedural objection to a petition for allowance of appeal in an answer to the petition. In addition, parties are reminded that they may raise waiver-based, procedural, and jurisdictional objections after the grant of a petition for allowance of appeal, but before merits briefing, through a dispositive motion filed under Pa.R.A.P. 1972.”

### B. *Rules of Civil Procedure*

□ [Pa.R.Civ.P. 400 \(Effective April 1, 2022\)](#)

- Rule 400. Person to Make Service
  - ◆ Rule 400(b)(4) now permits service by a competent adult in “(4) a civil action in which there is a complete diversity of citizenship between all plaintiffs and all defendants, and at least one defendant is a citizen of Pennsylvania.”