

THE PENNSYLVANIA APPELLATE CASE REVIEW

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REPORTING STATE COURT DECISIONS THROUGH OCTOBER 14, 2022

PENNSYLVANIA APPEALS COURT OPINIONS

I. Civil Litigation

A. *Medical Malpractice - Discovery Rule*

- [*Didomizio v. Jefferson Pulmonary Associates*, 2022 PA Super 126 \(Pa.Super. August 2, 2022\)](#)
 - **Holding:** The time when a party should reasonably be aware that he has suffered an injury is a factual issue best determined by the collective judgment, wisdom and experience of jurors.

B. *Premises Liability - Duty to Invitees*

- [*Massaro v. McDonald's Corp.*, 2022 PA Super 127 \(Pa. Super. August 2, 2022\)](#)
 - **Holding:** Pursuant to Section 344 of the *Restatement of Torts (Second)*, a premises owner has an affirmative obligation to protect invitees from the intentional acts of third parties.

C. *Ex Parte Communications - Treating Physician*

- [*Mertis v. Oh*, 2022 PA Super 128 \(Pa. Super. August 2, 2022\)](#)
 - **Holding:** Pa.R.Civ.P. 4003.6(1) prohibits ex parte communications between opposing counsel and a party's treating physician. The Rule does not permit an attorney representing a treating physician to obtain such information when another attorney at his firm represents a different party in the matter.

D. *Attorney Malpractice*

- [*Khalil v. Williams*, No. 24 EAP 2021 \(Pa. July 20, 2022\)](#)
 - **Holding:** When a legal malpractice claim does not challenge the amount of a legal settlement, but instead is based on the attorney's alleged failure to properly advise client of the consequences of signing a contract, the claim is not barred by *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991). Additionally, if a legal malpractice claim is based on fraud, then it is not barred by *Muhammad*. Justice Wecht filed a [concurring opinion](#). Justice Mundy filed a [concurring opinion](#).

E. *UIM Coverage - Rejection*

- [*Koch v. Progressive Direct Insurance Co.*, 2022 PA Super 121 \(Pa.Super. August 4, 2022\)](#)
 - **Holding:** Under Section 1731 of the Motor Vehicle Code, 75 Pa.C.S.A., an insured's election to waive underinsured motorist coverage remains in effect throughout the lifetime of that policy until affirmatively changed by the insured.

F. *Waiver - General Verdict Rule*

☐ [*Cowher v. Kodali*, No. 77 MAP 2021 \(Pa. September 29, 2022\)](#)

- **Holding:** When the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal. In other words, when a defendant fails to request an itemized verdict slip and failed to object to a general verdict slip given to the jury, the party has waived its right to a new trial on the issues subsumed by the general verdict slip. Justice Mundy filed a [concurring and dissenting opinion](#).

G. *Discovery - Peer Review Privilege*

☐ [*Williams v. The Geo Group, Inc.*, 2022 PA Super 148 \(Pa.Super. August 24, 2022\)](#)

- **Holding:** Under the Peer Review Protection Act, 63 P.S. §425.2, peer review privilege does not extend to evidence resulting from an entity's routine internal policy.

H. *Statute of Limitations - Residential Construction*

☐ [*Venema v. Moser Builders, Inc.*, 2022 PA Super 171 \(Pa.Super. October 4, 2022\)](#)

- **Holding:** In a claim asserting defective construction of a residence, pursuant to 42 Pa.C.S. § 5536, the 12 year statute of repose begins tolling on the date the Certificate of Occupancy is issued, and is not extended if subsequent repairs are made to the residence.

I. *Arbitration Agreement - Internet Terms of Service*

☐ [*Chilutti v. Uber Technologies, Inc.*, 2022 PA Super 172 \(Pa.Super. October 12, 2022\)](#)

- **Holding:** To establish that a party has consented to arbitration through an online agreement, the party seeking to enforce the agreement must establish that (1) the registration website and application must explicitly state that the consumer is waiving a right to a jury trial when the consumer agrees to the "Terms and Conditions," and (2) the waiver should appear at the top of the first page of the agreement in bold, capitalized text. Judge Stabile filed a [dissenting opinion](#).

II. Workers' Compensation

A. *Compromise and Release Agreements - Setting Aside*

☐ [*Hymms v. Commonwealth \(WCAB\)*, No. 909 C.D. 2021 \(Pa.Cmwlt. August 11, 2022\)](#)

- **Holding:** To set aside a Compromise and Release Agreement under Section 449 of the Worker's Compensation Act, 77 P.S. §1000.5, a claimant must establish fraud, duress, deception or similar conduct. To preserve a claim that a C&R should be set aside because of a mutual mistake, the issue must be preserved before the WCAB.

B. *Suspension - Voluntary Withdrawal From the Workforce*

☐ [*Hi Tech Flooring, Inc. v. Santucci \(WCAB\)*, No 12 C.D. 2020 \(Pa.Cmwlt. August 9, 2022\)](#)

- **Holding:** Acceptance of a pension and the failure to seek new employment do not, without other evidence, establish a claimant's voluntary withdrawal from the workforce.

C. *Duty of Employer - Home Modifications*

- [*Ralph Martin Construction v. Castaneda-Escobar \(WCAB\), No 341 C.D. 2021 \(Pa.Cmwlt. August 1, 2022\)*](#)

- **Holding:** Section 306(f.1)(1)(ii) of the Worker's Compensation Act, 77 P.S. §531(1)(ii), does not require an employer to pay for home modifications that were never done, or to contribute to the purchase of a new home.

D. *Subrogation Rights - Jurisdiction of a WCJ*

- [*Jo Jo Pizza v. Larry Pitt and Assocs., P.C., No 1162 C.D. 2021 \(Pa.Cmwlt. August 5, 2022\)*](#)

- **Holding:** A Workers' Compensation Judge has jurisdiction to issue subpoenas relating to an employer's subrogation rights under Section 319 of the Worker's Compensation Act, 77 P.S. §671.

E. *Employer Credit - Pandemic Unemployment Benefits*

- [*Giles J. Cannon, Inc., v. Walker \(WCAB\), No. 1108 C.D. 2021 \(Pa.Cmwlt. July 18, 2022\)*](#)

- **Holding:** An employer is not entitled to a credit for Federal Pandemic Unemployment Compensation received under the Coronavirus Aid, Relief, and Economic Security Act (CARES).

