

The Pennsylvania Appellate Case Review

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REPORTING DECISIONS THROUGH JANUARY 17, 2020

PENNSYLVANIA APPEALS COURT OPINIONS

I. Civil Litigation

A. *Amendment of Judgments and Captions*

- [Thom v. CDM Auto Sales, 2019 PA Super 315 \(Pa. Super. Oct. 18, 2019\)](#)

- **Holding:** Under Pa.R.Civ.P. 1033, a party has the right to amend the case caption and underlying judgment to identify the proper corporate entity when no new party was added, the affected party was not prejudiced or surprised, and the Motion to Amend was made within 90 days of applicable statute of limitations.

B. *Attorney Client Privilege-Waiver*

- [Corey v. Wilkes Barre Hospital Co., 2019 PA Super 288 \(Pa. Super. Sept. 23, 2019\)](#)

- **Holding:** The attorney-client privilege, 42 Pa.C.S.A. § 5928, does not *per se* protect communications between a divorcing spouse and her attorney. Thus, when a party has asserted a claim for loss of consortium, the party may be compelled to produce communications with his or her divorce attorney.

C. *Automobile Insurance - Independent Medical Examinations*

- [Sayles v. Allstate Insurance Co., No. 58 MAP 2018 \(Pa. Nov. 20, 2019\)](#)

- **Holding:** The provision of an automobile insurance policy, which requires an insured seeking first party medical benefits to submit to an independent medical examination whenever the insurer requires conflicts with 75 Pa.C.S. § 1796(a) and is void as against public policy because it impact the insureds' "significant privacy interests" and contain no limits. Justice Baer filed a [concurring opinion](#). Justice Wecht filed a [dissenting opinion](#).

D. *Automobile Insurance - Psychological Injuries*

- [Evans v. Travelers Insurance Co., 2019 PA Super 353 \(Pa. Super. Dec. 4, 2019\)](#)

- **Holding:** A person seeking coverage under a motor vehicle insurance policy for psychological injuries is entitled to benefits if the evidence establishes that the injuries were caused by the bodily harm sustained in the accident.

E. *Automobile Insurance - Stacking and Household Vehicle Exclusion*

- [*Kline v. Travelers Personal Security Ins. Co.*, 2019 PA Super 343 \(Pa. Super. Nov. 18, 2019\)](#)
 - **Holding 1:** An insurer's failure to provide an insured with an updated stacking waiver form after acquiring an additional vehicle, as required by Section 1738 of the MVFRL, 75 Pa.C.S., entitles the insured to uninsured and underinsured motorist benefits with coverage limits equal to the liability limits of the policy.
 - **Holding 2:** A household vehicle exclusion is unenforceable when the insured purchases stacked coverage, and a resident relative seeks stacked UIM benefits under the policy.

F. *Automobile Insurance - Underinsured Motorist Coverage*

- [*Barnard v. Travelers Home and Marine Insurance Co.*, No. 42 EAP 2018 \(Pa. Sept. 26, 2019\)](#)
 - **Holding:** A request to increase the limits of underinsured motorist (UIM) coverage for multiple vehicles insured under an existing policy constitutes a "purchase" for purposes of Subsection 1738(c) of the MVFRL, 75 Pa.C.S., triggering an insurance company's statutory obligation to offer an insured the opportunity to waive stacking of the new, aggregate amount of UIM coverage. Chief Justice Saylor filed a [dissenting opinion](#).

G. *Cross-Claims after Plaintiff's Discontinuance*

- [*Bollard & Associates, Inc. v. PA Associates*, 2019 PA Super 345 \(Pa. Super. Nov. 19, 2019\)](#)
 - **Holding:** Because a defendant may have a right to recover an amount paid in settlement, a trial court errs by dismissing defendants' cross-claims for indemnity and contribution following plaintiffs' settlement and discontinuance of its claims against all defendants.

H. *Expert Testimony - Qualifications*

- [*McFeeley v. Shah*, 2020 PA Super 3 \(Pa. Super. Jan. 8, 2020\)](#)
 - **Holding:** A trial court does not abuse its discretion by permitting a board-certified gastrointestinal radiologist to offer an expert opinion as to causation because he demonstrated that he had a reasonable pretension to specialized knowledge on the subject matter in question, pursuant to Section 1303.512 of the MCARE Act, 40 P.S.

I. *Forum Non Conveniens*

- [*McConnell v. B. Braun Medical Inc.*, 2019 PA Super 310 \(Pa. Super. Oct. 16, 2019\)](#)
 - **Holding:** A trial court abuses its discretion by dismissing an action based upon *forum non conveniens* by failing to properly consider the public and private interest factors, including the office locations of two corporate defendants, availability of employee witnesses, location of medical experts, controlling state law, and Pennsylvania's interests in the distribution of potentially harmful devices throughout the state.

J. *Negligence - Athletic Events/Stadiums*

- [*Pearson v. Philadelphia Eagles, LLC*, 2019 PA Super 304 \(Pa. Super. Oct. 11, 2019\)](#)
 - **Holding:** A plaintiff does not establish liability against the owner and operator of a stadium when the evidence establishes that (1) security operations were conducted with reasonable care, and (2) defendants were not on notice of regular assaults taking place in the stadium restrooms.

K. *New Trial - General Verdict Rule*

- [*Shiflett v. Lehigh Valley Health Network, Inc.*, No. 43 MAP 2018 \(Pa. Sept. 26, 2019\)](#)
 - **Holding:** A party waives its entitlement to a new trial on damages by failing to request a special interrogatory on the verdict sheet that would have permitted the jury to allocate the damages awarded on each claim. Chief Justice Saylor filed a [dissenting opinion](#).

L. *Pharmaceutical Claims - Learned Intermediary Doctrine*

- [*A.Y. v. Janssen Pharmaceuticals Inc.*, 2019 PA Super 348 \(Pa. Super. Nov. 26, 2019\)](#)
 - **Holding:** The learned intermediary doctrine does not bar a claim in which the evidence did not demonstrate that the drug manufacturer adequately warned of the risks of the side effect.

M. *Service of Process - Failure to Serve a Complaint within the Statute of Limitations*

- [*Frick v. Li*, 2019 PA Super 367 \(Pa. Super. Dec. 23, 2019\)](#)
 - **Holding:** A plaintiff makes reasonable effort to serve a Complaint within the statute of limitations, despite failing to effectuate service, by filing a Writ of Summons and a Complaint, attempting service five times, and filing a Motion for Alternative Service.

N. *Service of Process - Proof of Service*

- [*Sawyers v. Davis*, 2019 PA Super 319 \(Pa. Super. Oct. 22, 2019\)](#)
 - **Holding:** Failure to provide a certified mail return receipt card will not defeat proof of service on a defendant if sufficient evidence exists that (1) counsel served the Complaint by certified mail return receipt requested, (2) the defendant had notice of the lawsuit, and (3) the defendant never asserted that she did not receive the Complaint. ***The Law Offices of Daniel J. Siegel, LLC served as appellate counsel for plaintiffs in this matter.***

O. *Statute of Limitations - Medical Malpractice Claims - MCARE Act - Statute of Repose*

- [*Yanakos, v. UPMC*, No. 10 WAP 2018 \(Pa. Oct. 31, 2019\)](#)
 - **Holding:** The statute of repose in the MCARE Act, 40 P.S. § 1303.513(a), which limits the tolling of the statute of limitations to seven years for most medical malpractice claims, is unconstitutional. Justice Donohue filed a [concurring and dissenting opinion](#). Justice Wecht filed a [dissenting opinion](#).

P. *Statute of Limitations - Pharmaceutical Claims*

- [*In re: Risperdal Litigation v. Janssen Pharm., Inc.*, No. 22 EAP 2018 \(Pa. Nov. 20, 2019\)](#)
 - **Holding:** A trial court should not grant summary judgment when genuine issues of material fact remain regarding the statute of limitations, including (1) plaintiffs' knowledge of their physical condition versus knowledge of an injury that would trigger a duty to investigate and (2) whether Plaintiffs were on notice based on publicity. In addition, a pharmaceutical company's change to a medication label does not start the statute of limitations absent evidence Plaintiffs were aware of or would have understood the change. Justice Baer filed a [concurring opinion](#) in which Justice Donohue joined. Chief Justice Saylor also filed a [dissenting opinion](#).

Q. *Summary Judgment - Evidence from a Deceased Party*

□ [*Kardos v. Armstrong Pumps, Inc.*, 2019 PA Super 324 \(Pa. Super. Oct. 28, 2019\)](#)

- **Holding:** A properly-signed affidavit of a deceased party may be used to oppose summary judgment pursuant to Pa.R.Civ.P. 1035.1-1035.4. Further, a decedent's deposition testimony meets the hearsay exception under Pa.R.Civ.P. 4020(a)(3)(a) and Pa.R.E. 804(b)(1)(B), and may be used in support of summary judgment when opposing parties were given sufficient opportunity to cross-examine decedent, and the non-moving party provided a plausible avenue of the admission of the deposition testimony at trial.

R. *Verdicts - Pain and Suffering*

□ [*Avery v. Cercone*, 2019 PA Super 366 \(Pa. Super. Dec. 23, 2019\)](#)

- **Holding:** A verdict is not inconsistent when it is clear and unambiguous on its face. A verdict is against the weight of the evidence, however, when it shocks the conscience of the trial court.

II. Discovery of Electronic Evidence

A. *Compelled Disclosure of an Encrypted Computer*

□ [*Commonwealth v. Davis*, No. 56 MAP 2018 \(Pa. Nov. 20, 2019\)](#)

- **Holding:** A defendant may not be compelled to disclose a password to allow the Commonwealth access to the defendant's lawfully-seized, but encrypted, computer, because such disclosure violates the Fifth Amendment of the United States' Constitution's prohibition against self-incrimination. Justice Baer filed a [dissenting opinion](#) in which Justices Dougherty and Mundy joined.

III. Workers' Compensation

A. *Citizenship - Ability to Work*

□ [*Bryn Mawr Landscaping Co. v. WCAB \(Cruz-Tenorio\)*, No. 1268 C.D. 2018 \(Pa.Cmwlt. Oct. 18, 2019\)](#)

- **Holding:** A claimant's citizenship or ability to work lawfully in the United States is irrelevant to determining whether he or she is entitled to benefits under the Workers' Compensation Act.

B. *Conflict with Vocational Expert Testimony*

□ [*U.S. Airways, Inc. v. WCAB \(Bockelman\)*, No. 35 WAP 2018 \(Pa. Nov. 20, 2019\)](#)

- **Holding:** To determine whether an injury is compensable under the Workers' Compensation Act, the critical factor is whether the employer caused the area to be used by its employees in performance of their assigned tasks, and not whether the employer had title to or control over the area where the injury occurred. Justice Baer filed a [concurring \(in part\) opinion](#) in which Justice Mundy joined. Justice Dougherty filed a [concurring opinion](#).
- **Attorney Dan Siegel of the Law Offices of Daniel J. Siegel, LLC authored the amicus curiae brief for the Pennsylvania Association for Justice.**

C. *Fee Review Petitions - Defenses*

- [*Workers' First Pharmacy Services, LLC v. Bureau of Workers' Compensation Fee Review Hearing Office \(Gallagher Bassett Services\)*, No. 901 C.D. 2018 \(Pa.Cmwlt. Jan. 16, 2020\)](#)
 - **Holding:** An insurer/employer that challenges a medical provider's bill because the underlying care or services was allegedly not causally-related to the accepted work injury must seek Utilization Review and may not raise the defense for the first time during the Fee Review process.
 - ***The Law Offices of Daniel J. Siegel, LLC served as counsel for the pharmacy/provider in this matter.***

D. *Impairment Rating Evaluations (IREs)*

- [*Pennsylvania AFL-CIO v. Commonwealth*, No. 62 M.D. 2019 \(Pa.Cmwlt. Oct. 11, 2019\)](#)
 - **Holding:** The General Assembly's enactment of Section 306(a.3) of the Workers' Compensation Act, 77 Pa.C.S. § 511.3, which created a new IRE provision under the Act, was proper because it adopted existing standards (the AMA's *Guides to the Evaluation of Permanent Impairment*, 6th Edition) and did not delegate that authority to another entity.

E. *Joinder Petitions - Timeliness*

- [*Sota Construction Services, Inc., v. WCAB \(Czarnecki, Zawilla d/b/a Gorilla Construction and UEGF\)*, No. 87 C.D. 2019 \(Pa.Cmwlt. Dec. 20, 2019\)](#)
 - **Holding:** A Joinder Petition will be deemed to be timely-filed if filed within the time limits under the Act, even if the Joinder Petition is filed after the expiration of the three year statute of limitations.

F. *Occupational Disease Claims - Firefighters*

- [*Deloatch v. WCAB \(City of Philadelphia\)*, No. 1684 C.D. 2018 \(Pa.Cmwlt. Jan. 3, 2020\)](#)
 - **Holding:** A claimant is entitled to a statutory presumption under Section 306(f) of the Workers' Compensation Act, 77 P.S. § 414, that his lung cancer/occupational disease was caused by his occupation as a firefighter if he shows that the type of cancer is one "caused by exposure to a known carcinogen which is recognized as a Group I carcinogen." 77 P.S. § 27.1(r). An employer may rebut that presumption by presenting "substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting." 77 P.S. § 414.

G. *Seasonal Employees - Professional Athletes*

- [*Pittsburgh Steelers Sports, Inc. v. WCAB \(Trucks\)*, No. 1257 C.D. 2018 \(Pa.Cmwlt. Jan. 3, 2020\)](#)
 - **Holding:** Whether a professional football player is a seasonal employee depends upon his contractual obligations. Because Claimant was paid a yearly contractually-based salary, and his obligations were not for a fixed or defined period of time, Claimant's average weekly wage should be calculated pursuant to Section 309(c) of the Act, 77 P.S. § 5829(c).

H. *Utilization Reviews - Notice to All Impacted Providers*

- [*Keystone Rx LLC v. Bureau of Workers' Compensation Fee Review Hearing Office \(CompserVICES Inc./AmeriHealth\)*, No. 1369 CD 2018 \(Pa.Cmwlth. Dec. 12, 2019\)](#)
 - **Holding:** The Commonwealth Court has ruled that any entity impacted by a Utilization Review that has been precluded by the Bureau of Workers' Compensation must be given notice and an opportunity to intervene in the UR proceeding. Further, if a fee review (seeking payment for medical care and services) is requested, and no UR has been filed, then the insurer may not assert that the treatment was not reasonable or necessary.
 - ***The Law Offices of Daniel J. Siegel, LLC served as counsel for the pharmacy/provider in this matter.***

IV. Allocatur Petitions

A. *The Pa. Supreme Court granted appeals in the following matters on the issues stated:*

- [*Fox v. Smith*, No. 324 EAL 2019 \(Pa. Dec. 24, 2019\)](#)
 - Whether the Superior Court panel, in a matter of first impression, improperly developed a rule for determining proper venue in an internet-based defamation action that deems venue proper anywhere the purported defamation is accessed through the internet despite the lack of any other connection to the venue, a rule which abandons all of the protections accorded by the limiting characteristics of the venue rules and opens the door to unchecked forum shopping, calling for this Court to provide "decision and statutory guidance" as requested by the Opinion of the concurring panel member of the Pennsylvania Superior Court?
- [*Peters v. WCAB \(Cintas Corp.\)*, No. 467 MAL 2019 \(Pa. Jan. 8, 2020\)](#)
 - Attorney Dan Siegel was retained as appellate counsel and filed the Petition for Allowance of Appeal, which the Supreme Court granted.***
 - A traveling employee is entitled to a presumption that he is in the course and scope of employment when traveling to or from work unless his actions at the time of accident are so foreign and removed from his usual employment to constitute abandonment of employment. What constitutes an abandonment of employment such that a traveling employee is not entitled to benefits under the Pennsylvania Workers' Compensation Act?
 - A traveling employee is entitled to a presumption that he is in the course and scope of employment when traveling to or from work unless his actions at the time of the accident are so foreign and removed from his usual employment to constitute abandonment of employment. Consequently, is an injury compensable under the Pennsylvania Workers' Compensation Act when an employee is injured while returning home after attending a work-sponsored social event?

V. Attorney Discipline

A. *Conviction of a Crime*

- ❑ [ODC v. Robert Charles Cordaro, No. 2663 Disciplinary Docket No. 3 \(Pa. Nov. 1, 2019\)](#)
 - Respondent was **DISBARRED** on consent for conviction of various crimes, including wire fraud, and mail fraud/deprivation of right to honest services.
- ❑ [ODC v. James A. Hickey, No. 2449 Disciplinary Docket No. 3 \(Pa. Oct. 21, 2019\)](#)
 - Respondent was **SUSPENDED FOR FIVE YEARS** on consent for conviction of various crimes, including bribery, extortion, filing false tax returns, income tax evasion, money laundering, racketeering and conspiracy to defraud the United States.
- ❑ [ODC v. Patrick O'Hare Regan, No. 2430 Disciplinary Docket No. 4 \(Pa. Jan. 2, 2020\)](#)
 - Respondent was **SUSPENDED FOR TWO YEARS** for conviction of conspiracy to commit mail fraud and wire fraud,

B. *Making False Statements to a Court & Disciplinary Authorities*

- ❑ [ODC v. Craig B. Sokolow, No. 2652 Disciplinary Docket No. 3 \(Pa. Dec. 11, 2019\)](#)
 - Respondent was **SUSPENDED FOR TWO YEARS** for making false statements to a court and false statements to disciplinary authority. Of note, respondent had been disbarred in 1997 following a criminal conviction of 107 counts of mail fraud, and was reinstated in 2008.
- ❑ [ODC v. Robert J. Murphy, No. 2649 Disciplinary Docket No. 3 \(Pa. Dec. 19, 2019\)](#)
 - Respondent was **SUSPENDED FOR FIVE YEARS** for making false and frivolous accusations against multiple Workers' Compensation Judges and opposing counsel.

C. *Other Misconduct - Inappropriate Conduct at Bench-Bar Conference*

- ❑ [ODC v. Timothy J. McMahon, No. 159 DB 2019 \(Oct. 2, 2019\)](#)
 - Respondent was **PUBLICLY REPRIMANDED** for inappropriate conduct while inebriated at the Dauphin County Bench-Bar Conference, which resulted in guilty pleas to charges of harassment and disorderly conduct.

D. *Unauthorized Practice of Law While on Administrative Suspension*

- ❑ [ODC v. Jason Michael Purcell, No. 2651 Disciplinary Docket No. 3 \(Pa. Oct. 31, 2019\)](#)
 - Respondent was **DISBARRED** for engaging in the unauthorized practice of law while on administrative suspension, as well as falsely and outrageously misrepresenting his license status to a hearing officer and to the court in multiple matters.
- ❑ [ODC v. Stephanie Julia Brown, No. 2657 Disciplinary Docket No. 3 \(Pa. Oct. 21, 2019\)](#)
 - Respondent was **SUSPENDED FOR ONE YEAR AND ONE DAY** on consent for engaging in the unauthorized practice of law while on administrative suspension, as well as the conviction of a crime and other conduct.