Appealing Entertainment:
Pennsylvania Appellate Courts Round-Up 2021

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Overview

- In 2021, Pa. appellate courts issued decisions on a host of topics affecting citizens across the Commonwealth, including:
  - Consumer protection
  - Free speech
  - Products liability
  - Schools
  - Statutes of limitation
  - Tort reform

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Spencer v. Johnson (Pa. Super.)

The Beginning Of The End For Tort Reform?: The Case That Blew A Hole In The Fair Share Act

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Spencer v. Johnson

- Fair Share Act
  - Major piece of tort reform signed in 2011
  - Act abolished joint and several liability in most negligence and strict liability cases
  - In its place, Act adopted a proportionate liability model that permits a jury to award damages based on a percentage of fault
- Pre-2021
  - Consensus was that the Act eliminated joint and several liability for multi-defendant cases, unless the defendant has been held liable for 60% or more of the total liability apportioned to all parties, or one of the other four exceptions applied

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Spencer v. Johnson

- Decision
  - Trial court erred by failing to grant pedestrian's motion to mold the verdict pursuant to the Fair Share Act
    - Jury's general verdict warranted a finding that the employer was vicariously liable for the employee's negligence and their combined liability exceeded 60%
    - Even assuming the verdict did not demonstrate vicarious liability, the trial court still erred because the pedestrian was never alleged or found to have contributed to the accident
      - Plaintiff's negligence must be at issue (*i.e.*, comparative negligence) for Act to apply

Spencer v. Johnson

- Impact
  - By limiting the Act for the first time solely to instances of comparative negligence, the ruling "blows a hole" in the Fair Share Act
    - Restores the antiquated rule of joint and several liability in all non-comparative negligence cases—which is the vast majority of negligence cases
  - One bad decision or sign of more trouble to come?

Gregg v. Ameriprise Financial (Pa.)

Consumer Protection Law Ruling Could Spell Big Trouble for Pennsylvania Businesses

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Gregg v. Ameriprise Financial

- Unfair Trade Practices and Consumer Protection Law (UTPCPL)
  - Purpose
  - Scope
  - Enforcement
    - Public v. private
  - Actionable conduct
    - Lists 20 specific practices that constitute “unfair methods of competition” or “unfair or deceptive acts or practices”
    - Also contains a “catch-all” provision
  - Penalties

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Gregg v. Ameriprise Financial

- Evolution of catch-all provision
  - Pre-amendment
    - Unlawful to engage in "any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding"
  - Post-amendment
    - Unlawful to engage in "fraudulent or deceptive conduct that creates a likelihood of confusion or misunderstanding"
  - Courts held that "deceptive conduct" was synonymous with negligent deception—*e.g.*, negligent misrepresentations
    - Some state of mind required for liability under catch-all provision

Gregg v. Ameriprise Financial

- Decision
  - Defendant's statement of mind is irrelevant for a consumer to sustain a private cause of action under the catch-all provision
    - Inquiry is whether the conduct has a "capacity to deceive" which creates a likelihood of confusion and misunderstanding
  - Without a state of mind requirement, the catch-all provision "fairly may be characterized as a strict liability offense"

Gregg v. Ameriprise Financial

- Impact
  - Erodes distinction between public enforcement actions and private actions
  - Effectively renders fraudulent conduct language meaningless
  - Floodgates
  - Provides a cause of action for buyer's remorse
  - Catch-22
- Call to action!

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Corman v. Acting Secretary of Pa. DOH (Pa.) (appeal pending)

Who's the Boss? In Continuing Power Struggle Between Pa. Executive and Legislative Branches of Government, Pa. Supreme Court Will Hear Appeal of Order Striking Down Department of Health's School Mask Mandate

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Corman v. Acting Secretary of Pa. DOH

- COVID Pandemic provided the backdrop for the escalating war between the Legislative and Executive Branches of our state government over the scope of the authority of the Governor and executive branch agencies to take action under the Emergency Management Services Code
- The battle has now reached the Pennsylvania Supreme Court, framed up by the non-delegation doctrine and the requirements of the Regulatory Review Act
- A couple of concepts in that last statement warrant brief explanation:

Corman v. Acting Secretary of Pa. DOH

- Non-delegation doctrine
  - Constitutional doctrine that precludes the delegation of legislative authority—the authority to enact laws—to another branch of government
  - Once enacted by the Legislature, the authority to impose rules and regulations necessary to effectuate the intent of a statute falls to the executive agencies authorized by statute to do so

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Corman v. Acting Secretary of Pa. DOH

- Regulatory Review Act
  - Governs the requirements for the exercise of rulemaking vested in the executive agencies
  - Chief among those requirements are notice of the intent to promulgate rules under a statute, publication of proposed rules, and the opportunity for interested parties to comment on the proposed rules

Corman v. Acting Secretary of Pa. DOH

- In March 2020, Gov. Wolf issued Proclamation of Disaster Emergency and then issued numerous Orders aimed at stopping the spread of COVID, closing businesses, limiting in-person gatherings, etc.
- Legislature responded by putting two constitutional amendments on the primary ballot in May 2021, to limit the Governor's authority under the Emergency Code, which the voters approved

Corman v. Acting Secretary of Pa. DOH

- One amendment allowed the Legislature to extend or terminate a Gubernatorial disaster emergency declaration
- The other amendment limited the duration of gubernatorial disaster emergency declarations to 21 days absent concurrent resolution of the General Assembly

Corman v. Acting Secretary of Pa. DOH

- After voters adopted the amendments, General Assembly terminated the Governor's Emergency Declaration
  - Governor did not subsequently issue a new disaster emergency
- Instead, with the start of the new school year approaching, the Acting Secretary of the Department of Health—an executive agency—issued a school masking order on 8/31/21
  - Cited another statute (the Disease Control Law) as authority for order

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Corman v. Acting Secretary of Pa. DOH

- DOH masking mandate requires all teaches, students, staff, and visitors in Pa. schools to wear masks regardless of vaccination status (with exceptions)
- The mandate applies to all schools—public or private—across the Commonwealth

Corman v. Acting Secretary of Pa. DOH

- Group of parents, private schools, and public school districts challenge the mandate in Commonwealth Court
  - Lead petitioner in this challenge is Senator Jake Corman, the President Pro Tempore of the Senate
  - He is named in the suit in his individual capacity and as a parent of two minor school children

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Corman v. Acting Secretary of Pa. DOH

- Petitioners argued:
  - Mask mandate is void *ab initio* because the Acting Secretary did not comply with rulemaking procedures
  - Masking order is a rule or regulation requiring Acting Secretary to follow procedures of the Regulatory Review Act
  - Masking order impermissibly delegated legislative authority

Corman v. Acting Secretary of Pa. DOH

- Commonwealth Court struck down mandate
  - Held that the masking order is a regulation, and without a new Declaration of Disaster Emergency, executive agencies must comply with rulemaking procedures of the Regulatory Review Act but failed to do so
  - 4 of 9 Commissioned judges did not participate in the decision
  - 1 of 5 participating judges dissented

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Corman v. Acting Secretary of Pa. DOH

- Supreme Court will consider whether DOH has the power to issue the mandate, one question will be whether the school mask mandate constituted rulemaking
  - If so, it is highly likely that the Commonwealth Court's decision will be upheld for the failure of the executive agency to follow the dictates of the Regulatory Review Act
- The other question will be whether the Disease Control Law did, in fact, grant authority to the DOH to issue the mandate—and if so, whether that grant of power violated the non-delegation doctrine

Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC (Pa.)

In a Case of First Impression for the Pa. Supreme Court, No-Hire Provision Between Two Businesses is Held a No-Go

Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- No-hire (no-poaching) provision between contracting businesses—one of several types of restraint of trade provisions that appear in contracts and affect employment opportunities and mobility
  - Non-competition and non-solicitation provisions are commonly found in employment contracts and in sale of business agreements, where employees of the company being sold
  - These provisions are regarded as restraint of trade, but are enforceable under Pennsylvania law, subject to reasonableness requirement in terms of scope—time, geography and subject matter

Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- No-hire provisions are different
  - Agreements are made between two businesses, rather than between employee and employer
  - Unlike employment and sale of business agreements, the employees affected by no-hire agreements typically have no knowledge of—and get no consideration—for the restriction on their future employment opportunities

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Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- Although PLS argued for a different standard of reasonableness for no-hire provisions between two businesses engaged in a contractual engagement, the Pa. Supreme Court applies same balancing test generally used to determine the enforceability of any restraint of trade provision
  - Must be ancillary to principal purpose of contract
  - Reasonableness is determined in light of:
    - Parties' interests that the restraint aims to protect
    - Harm to other contractual parties and public
    - Reasonableness of restraint's geographical scope and duration of time

Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- Unreasonable if:
  - Restraint is greater than needed to protect the restraining party's legitimate interest
  - Restraining party's need is outweighed by hardship to promisor, or likely injury to public

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Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- Supreme Court reasoned that:
  - This no-hire provision is a restraint on trade, where two businesses agreed to limit competition in labor market by restricting mobility of PLS employees
  - Legitimate interest in preventing contracting partner from poaching employees
  - But no-hire provision was greater than needed to protect PLS' interests

Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- Overbroad in prohibiting Beemac from hiring PLS employees during term of contract and two years after term, even if PLS employees had never worked with Beemac during term of contract
- Harm to public because it impairs employment opportunities and mobility for PLS employees who are not parties to the contract between the two businesses, without the employees knowledge or consent and without consideration
- Undermines free competition in industry at issue, which likely harms public

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Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC

- Not clear that the decision will apply across the board to no-hire provisions
  - Shorter duration acceptable—just during term of contract?
  - Still, without disclosure and consideration to employees, likely not enforceable

Rice v. Diocese of Altoona-Johnstown (Pa.)

Pa. Supreme Court Declines to Adopt New Standard for Discovery Rule . . . For Now

Rice v. Diocese of Altoona-Johnstown

- Statute of limitations (SOL)
  - Rules that set time limits for brining legal claims
  - Time to file begins running from the time the cause of action accrued
    - Normally, a claim accrues when an injury is inflicted
- Exceptions
  - Discovery rule
  - Fraudulent concealment doctrine

Rice v. Diocese of Altoona-Johnstown

- Discovery rule
  - Tolls SOL when an injury or cause is not reasonably knowable
  - Most often associated with professional negligence cases
  - Two competing approaches
    - Inquiry notice standard
    - Legal injury standard

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Rice v. Diocese of Altoona-Johnstown

- Fraudulent concealment doctrine
  - Rooted in defendant's obstructionist conduct
  - Cannot invoke SOL if, through fraud or concealment, cause plaintiff to relax his/her vigilance or deviate from his/her right of inquiry into facts

Rice v. Diocese of Altoona-Johnstown

- Decision
  - Reaffirmed commitment to "inquiry notice" approach to the discovery rule and held that discovery rule did not apply
    - Because injury and cause were immediately known to plaintiff, SOL began to run when she was last allegedly assaulted
  - Rejected "parishioner-plus theory" exception to fraudulent concealment exception to SOL
  - Also rejected standalone tolling doctrine for civil conspiracy cases without reference to the timeliness of underlying tort

Rice v. Diocese of Altoona-Johnstown

- Impact
  - Ruling extends far beyond the context of clergy abuse
    - Discovery rule applies to all causes of action
    - Ditto with fraudulent concealment doctrine
  - However, ruling could be short-lived
    - Legislature considering adopting "window" legislation
    - Separate effort is underway to pass an amendment to the PA Constitution
    - 3 of 7 Justices signaled willingness to adopt legal injury approach to the discovery rule

Central Dauphin School District v. Hawkins (Pa.) *(appeal pending)*

Pa. Supreme Court Grants Review in Appeal Concerning Media Access to Student Records

Central Dauphin School District v. Hawkins

- Right-to-Know Law (RTKL)
  - Requires state and local government agencies to provide access to "public records" upon request, subject to certain exceptions
  - Includes a provision mandating redaction of exemption information
    - However, only applies to those records that are public records in the first instance
  - Disclaimer: "Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree"

Central Dauphin School District v. Hawkins

- Federal Family Education and Privacy Act (FERPA)
  - Enacted to ensure parents and students have access to student education records, while also protecting student and parent privacy rights by prohibiting disclosure of student records without their consent
  - Prohibits the release of "education records" of students without the consent of their parents

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Central Dauphin School District v. Hawkins

- Decision
  - School bus video constituted an "education record" for purposes of FERPA
  - Nonetheless, video subject to disclosure under the RKTL
  - Redaction of students' images removes any argument that the video is a public record and exempt from Federal law or regulation
  - Such redaction required even though: (a) school district lacked the software or technological capability to redact the video; and (b) trial court never reviewed the video *in camera* to determine if it was feasible to redact all personally identifiable information of students

Central Dauphin School District v. Hawkins

- Impact
  - Makes all videos—and every other kind of school record—accessible by any requester under the RTKL, under the guise of redaction
  - Prioritizes news media access at the expense of informational privacy rights of public school students and their parents
  - Places an extraordinary administrative burden on public schools re: redaction
- Eckert to the rescue?

J.S. v. Manheim Township School District

Pa. Supreme Court Addresses Standard for Determining Whether Student Speech is Protected by the First Amendment

J.S. v. Manheim Township School District

- Proliferation of school shootings across the U.S. in the past 20 years or so presents a dilemma for public school officials across the country, including the 501 school districts within Pennsylvania
  - Requires courts to balance the First Amendment rights of students to free speech against the interest—in fact, the duty—of Pennsylvania's public schools to maintain a safe and efficient educational environment

J.S. v. Manheim Township School District

- A few highlights of the development of the law related to free speech rights will aid our understanding of the Pa. Supreme Court's decision on this issue
  - First Amendment provides that the government has no power to restrict expression based on content, ideas, or subject matter
  - It applies to the states through the Fourteenth Amendment
  - Despite the First Amendment's protections, SCOTUS recognized long ago that federal and state officials may regulate certain types of speech, where any value in the speech is outweighed by interests in social order

J.S. v. Manheim Township School District

- Examples of expression not protected by the First Amendment include, for example, incitements to violence, child pornography, and what is known as "true threats"
  - It is the "true threat" exception to First Amendment protection that the Pa. Supreme Court addressed in *J.S. v. Manheim School District* case

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J.S. v. Manheim Township School District

- In 1969, SCOTUS recognized the true threat doctrine, in the context of a young man opposed to the draft during the Vietnam War
  - His comment that if he were made to carry a gun, his first target would be President Lyndon Johnson led to his arrest, and the question of First Amendment protection was framed in terms of whether is statement was political hyperbole or a true threat
  - SCOTUS said it was not a true threat; the context—the statement made during a political debate, and the non-fearful reaction of listeners (objective observations)—led the Supreme Court to deem it not to be a true threat

J.S. v. Manheim Township School District

- Also in 1969, SCOTUS held that a school could punish a school student's speech if it contained a true threat or if it caused or could reasonably be expected to cause a substantial disruption of the school's educational environment

J.S. v. Manheim Township School District

- Move forward to 2002, where the Pa. Supreme Court applied an objective "reasonable person" analysis to determine whether the First Amendment protected the expression on a website created by an 8th grade Bethlehem Area School District Student, which contained highly profane comments about a teacher, as well as a page explaining "why she should die"
  - The Bethlehem School District Court first determined that the speech was on-campus speech, because the student accessed the website on school computers and aimed the expression at other students

J.S. v. Manheim Township School District

- However, Supreme Court found that the speech was not a true threat, considering the context in which they were made, were not directed to the teacher, and the reaction of listeners
  - Taken as a whole, statements did not reflect a serious expression of intent to inflict harm—thus inserting a bit of a subjective approach into the objective analysis
- But Bethlehem School District Court determined that the expression on the website was not protected because it did create a substantial disruption in the school environment
  - Teacher's anxiety caused her to take medical leave of absence, and students expressed anxiety and low morale

J.S. v. Manheim Township School District

- In 2018, Pa. Supreme Court addressed the "true threat" concept in *Knox*
  - Criminal case involving a defendant who, when stopped and arrested by the police, wrote, recorded, and uploaded to You Tube a profane song that included lyrics about killing the police and the names of the arresting officers
  - Applying more recent SCOTUS precedent, Pa. Supreme Court held that courts must consider the subjective intent of the speaker to determine whether speech constitutes a true threat
  - For Mr. Knox, it did.

J.S. v. Manheim Township School District

- Case involved private communications between two students that were briefly posted to Snapchat
  - J.S. and Student One privately ridiculing Student Two for looking like a school shooter
  - J.S. created photo and video meme depicting Student Two singing about shooting up school and cannibalism
- Communications and memes outside of school property and after school hours
- Student One suspended for making terroristic threats and cyberbullying

J.S. v. Manheim Township School District

- Definitions of "terroristic threats" and "bullying" in school policies were considered
  - Both contained requirement of intent
- School district scheduled hearing on suspension and refused to bring Student One in for hearing (asserting lack of subpoena power), but considered testimony of school district's attorney that Student One claimed he was terrorized by the memes
- J.S. ultimately expelled based on memes

J.S. v. Manheim Township School District

- Trial court and Commonwealth Court found that J.S.'s Due Process and First Amendment rights were violated
- Pa. Supreme Court granted allocatur on both issues, but reached only the First Amendment issue and declined to go on to address the Due Process issue—decision that did not sit well with a concurring and dissenting justice
- Supreme Court took this opportunity to adopt an approach to be used in determining whether student speech constitutes a true threat, and thus, does not enjoy First Amendment protection

J.S. v. Manheim Township School District

- Court noted the disagreement over whether a true threat should be viewed from subjective perspective of speaker v. objective perspective of reasonable listener
- Held that a reviewing court must consider the totality of the circumstances
  - But, within that totality, primary focus must be on subjective intent of speaker (*i.e.*, whether the speaker intended to communicate a serious expression of intent to inflict harm to recipient)
- Rejected school district's view that strictly objective standard governs; subjective set forth in *Knox* (criminal law) applies in school setting

J.S. v. Manheim Township School District

- Court set forth a two-part inquiry:
  - First, examine the content of the speech and assess relevant contextual factors
    - Language of the speaker
    - Whether the statement is political hyperbole, jest, or satire
    - Whether speech is of the type that often involves an inexact abusive language
    - Whether the threat was conditional
    - Whether it was communicated directly to victim
    - Whether victim had reason to believe the speaker had a propensity to engage in violence
    - How listener reacted to language

J.S. v. Manheim Township School District

- Second, even if not a true threat, school may regulate speech that causes, or foreseeably could cause, a substantial disruption to school environment
  - Reviewing court must analyze the when, where, and how of the communication
    - Is there a nexus to the school in terms of location?
  - Consider whether the communication materially or substantially interfered with the rights of others
    - *E.g.*, school missed by students or teachers; classes or instructional interrupted; operational of school compromised, incident imposed administrative burdens

J.S. v. Manheim Township School District

- Here, Pa. Supreme Court held that evidence weighed against a finding that speaker intended a serious expression of intent to inflict harm on a recipient of communication
  - Recipient (Student One) had not reported any fear about the communication contemporaneously and, in fact, had laughed at communication
  - J.S. did not publicize the communication to others (Student One did) and J.S. asked him to take it down from Snapchat
- Court did not find that there was substantial disruption of school environment

Sullivan v. Werner Company (Pa. Super.) (*appeal pending*)

Products Liability: Will The Pa. Supreme Court Again Revisit Admissibility of Compliance With Industry Standards In Strict Liability Cases?

Sullivan v. Werner Company

- In April 2021, Pa. Superior Court held that trial courts may preclude evidence from defendants about industry standards in strict liability products cases
  - Nearly every other state and D.C. admit compliance with industry standards in strict liability products cases
  - Trial court rulings on the issue vary across the state
  - Defense and products liability interest groups calling for the Pa. Supreme Court to address the issue

Sullivan v. Werner Company

- Case involved a construction worker who claimed that a scaffolding platform rotated off the deck pins securing the platform to the frame and collapsed, injuring him
  - Plaintiff asserted negligence and strict liability claims against scaffold manufacture based on design defect and failure to warn
  - Plaintiff withdrew negligence claims at trial and proceeded only on strict liability claims

Sullivan v. Werner Company

- Plaintiff 's expert opined that the scaffold was defective and caused the accident
  - Defect theory was that scaffold deck pins could inadvertently rotate off the platform, there were other safer alternative designs in use that protected against this hazard

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Sullivan v. Werner Company

- Manufacturer's expert said it was not foreseeable that a user would unknowingly rotate the pins off the deck, said the pins used in manufacturer's product are prevalent in industry, and that the scaffold complied with ANSI and OSHA standards
  - Attributed the collapse of the platform to plaintiff misuse, failure to follow assembly instructions

Sullivan v. Werner Company

- Plaintiff moved to exclude evidence of government or industry standards at trial, arguing:
  - Pa. courts generally bar such evidence in strict liability cases
  - Pa. Supreme Court's 2014 decision in *Tincher v. Omega Flex*—which eased the distinctions between negligence and strict liability cases—did not remove the bar against industry standards in strict liability cases

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Sullivan v. Werner Company

- Trial court agreed with plaintiff and precluded manufacturer from introducing evidence of standards or other scaffolds that used similar deck pins
  - Trial court precluded manufacturer from arguing plaintiff's contributory negligence
- Jury awarded $2.5 million to plaintiff

Sullivan v. Werner Company

- On appeal, Superior Court agreed with trial court decision to preclude industry standards
  - Rejected the argument that *Tincher* decision removed prohibition against industry standards

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Sullivan v. Werner Company

- While the formerly leading decision for strict liability cases, *Azzarello v. Black*—which prohibited introducing any concepts of negligence in strict liability cases—was overruled, the prohibition against industry standards remains; it goes to the reasonableness of the manufacturer's conduct, which is the essence of a negligence claim
  - *Tincher* Court declined to adopt Third Restatement position on providing a product is defective

Finale

- Of the 8 cases discussed today, Eckert is representing or represented a party or *amicus curiae* in 5 of them (62.5%)
  - Will increase to 75% if allocatur granted in *Sullivan*

Thank you.

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