

JESSE HERNANDEZ	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
INDEPENDENCE CONSTRUCTION	:	
CORPORATION, SOUTHEASTERN	:	
PENNSYLVANIA TRANSPORTATION	:	No. 1911 EDA 2023
AUTHORITY, NATIONAL RAILROAD	:	
PASSENGER CORPORATION D/B/A	:	
AMTRAK	:	

Appeal from the Judgment Entered July 14, 2023
In the Court of Common Pleas of Philadelphia County
Civil Division at No: 181202689

BEFORE: LAZARUS, P.J., PANELLA, P.J.E., STABILE, J., DUBOW, J.,
KUNSELMAN, J., McLAUGHLIN, J., KING, J., SULLIVAN, J., and
LANE, J.

CONCURRING/DISSENTING OPINION BY STABILE, J.:

FILED OCTOBER 28, 2026

Introduction

I concur with the Majority’s general premise that a party’s status as a “statutory employer” under the Workers’ Compensation Act (WCA) implicates this Court’s subject matter jurisdiction. Where I differ from the Majority on this point concerns our Supreme Court’s decision in ***Yoder v. McCarthy Constr., Inc.***, 345 A.3d 668 (Pa. 2025). In my reading of that opinion, it is not, as the Majority suggests, always necessary for the issue to be decided at the pre-trial stage of a case, as subject matter jurisdiction is a non-waivable issue that may be raised at any time.

As to the evidentiary claims of Independence Construction Corporation (ICC), Issues 7, 8, and 9, I respectfully dissent from the Majority's holding that these claims were waived. I believe that the record reflects that the claims were thoroughly preserved for review as a matter of law and fact. Indeed, the Majority has, in my understanding, applied the rules for preservation in such a strict and hyper-technical fashion that its holding contradicts not only our decisional law, but also the mandate of the Pennsylvania Constitution to liberally construe the right to an appeal.¹

Finally, as to the disputed definition of "excavation," I agree with the Majority's conclusion, but would treat the issue as a pure question of law, thereby construing "excavation" narrowly and in its technical sense, as that term is commonly used in the construction industry. In all other respects, I concur with the Majority's decision.

I. Jurisdiction Under the Yoder Decision

The Majority correctly notes that whether a party is a "statutory employer" – entitling the party to immunity under the WCA – is a matter of subject matter jurisdiction. I write simply to express my view that, to the extent the Majority interprets **Yoder** to require this issue to be decided pre-trial, I believe that interpretation to be incorrect. Certainly, for a host of

¹ Pennsylvania Rule of Appellate Procedure 105(a) provides that "[t]hese rules shall be liberally applied to secure the just, speedy, and inexpensive determination of every matter to which they are applicable." Pa.R.A.P. 105(a). The right to an appeal is guaranteed by Article 5, section 9 of the Pennsylvania Constitution. **See** Pa. Const. art. 5, § 9.

reasons, the least of which is the conservation of judicial resources, it is preferable to address this question as early in a case as possible. The issue of subject matter jurisdiction, however, may be raised *at any time*, even for the first time on appeal, and is never waived. **See *Commonwealth v. Harris***, 230 A.3d 1124, 1126 (Pa. Super. 2020) (citing ***Commonwealth v. Little***, 314 A.2d 270, 272 (Pa. 1974)).

In ***Yoder***, the defendant first raised the statutory employer defense in a motion for summary judgment, “which the trial court denied without any explanation.” ***Yoder***, 345 A.3d at 689. Additionally, the trial court had entered a pre-trial order that precluded the defendant “from raising the statutory employer defense at trial in any manner whatsoever.” **See *id.***, at 689 (internal quotations and citation omitted). These orders prevented the parties from developing a factual record, depriving a reviewing court of any trial record against which a claim of statutory employer immunity could be assessed. **See *id.***, at 688-90. Yet, this Court nevertheless reviewed the trial record on appeal to determine whether the defendant satisfied the ***McDonald***² criteria for a statutory employer. **See *id.***

The Supreme Court held that it was an abuse of discretion for this Court to exceed “its scope of review when it scoured the entire record for evidence to support its determinations with respect” to the elements of the ***McDonald*** test. ***Id.***, at 689. It concluded that once the trial court's jurisdiction was

² ***McDonald v. Levinson Steel Co.***, 153 A. 424, 426 (Pa. 1930).

placed into dispute – by way of a motion *limine*, **see id.**, at 674 – the defendant should have been afforded the opportunity to develop a record and obtain a ruling before the start of the jury trial. **See id.**, at 689. This Court’s opinion was then reversed, and the case remanded back to the trial court to reconsider whether the defendant had satisfied the disputed **McDonald** criteria, and to the extent necessary, conduct an evidentiary hearing. **See id.**, at 690.

In so holding, the **Yoder** Court did not mandate that this jurisdictional issue must *always* be decided pre-trial. **See id.** To the contrary, I believe the Court was merely applying established precedent in saying that when the question is first raised (which may be at any time), the parties should be given a chance to lay a factual record and obtain a prompt ruling. **See id.**, at 689-90; **see also id.** (citing **Bisher v. Lehigh Valley Health Network, Inc.**, 265 A.3d 383, 400 (Pa. 2021) (“A court’s sua sponte ability to raise subject-matter defects on its own ensures that a court, at any time, can make certain that the courts are adjudicating only those classes of cases which the law allows us to hear.”)); **Harris**, 230 A.3d at 1126; **Little**, 314 A.2d at 272. Thus, the holding of **Yoder** should be read narrowly as directing pre-trial record development on issues of statutory immunity under the WCA when the parties have attempted to litigate the issue at that stage of the case.

II. ICC Preserved its Meritorious Evidentiary Claims

The present case is a negligence action wherein Jesse Hernandez alleged safety violations by ICC that caused him harm. Over ICC's objections, Hernandez was permitted to attack the character of ICC's owner, Steven Hare, by asking him about ICC's supposed breaches of the Business Integrity and Disadvantaged Business Enterprise (DBE) requirements of its SEPTA contract. This questioning related to completely irrelevant and prejudicial matters that had nothing to do with establishing negligence, but rather, prevented ICC from receiving a fair trial. It is fully apparent from a record review that the only purpose served by the introduction of this irrelevant testimony was to besmirch ICC's character in the eyes of the jury.

Accordingly, I dissent in part for three principal reasons. *First*, contrary to the Majority's finding of waiver as to Issues 7, 8, and 9 (which it has raised *sua sponte*), the trial record shows that ICC fully litigated these claims for purposes of appellate review. **See** Maj. Op., at 7 (enumerating claims). It was clear from context that ICC preserved these issues at trial by objecting to the content of the disputed evidence, as well as its form, which would directly implicate the rules cited by ICC on appeal – Pa.R.E. 401, Pa.R.E. 403, and Pa.R.E. 608(b)(1) – as implicitly recognized by the trial court and Hernandez. *Second*, even assuming that ICC's arguments below were strictly limited to relevance, this would have been sufficient to preserve a claim under Rule

608(b)(1),³ which merely codified a long line of cases holding that specific instances of collateral misconduct are not probative of a witness's character for truthfulness. *Third*, ICC's preservation of these evidentiary claims requires this Court to consider their merits, and in light of the obvious prejudicial effect of the irrelevant evidence, ICC should receive a new trial.

A. The Claims Were Preserved

Generally, in order to preserve an issue for purposes of appellate review, a party must make a timely, contemporaneous objection at a point when the trial court may correct the asserted error. **See** Pa.R.E. 103. The party must also state the "specific ground" of the objection, "unless it was apparent from the context[.]" **Id.** "Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Pa.R.E. 103(b).

"Even a general objection is adequate to preserve a challenge to an evidentiary ruling where the evidence is inadmissible for any purpose[.]" ***Commonwealth v. Vucich***, 194 A.3d 1103, 1107 (Pa. Super. 2018) (quoting ***Cominsky v. Donovan***, 846 A.2d 1256, 1258 n.2 (Pa. Super. 2004)). The Rules of Appellate Procedure, including those governing the preservation of issues for appeal, must be liberally construed. **See** Pa.R.A.P. 105(a).

³ The rule provides that "the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct[.]" Pa.R.E. 608(b)(1).

Consistent with that liberal approach, “[e]ach error identified in [a Rule 1925(b)] Statement will be deemed to include every subsidiary issue that was raised in the trial court[.]” Pa.R.A.P. 1925(b)(4)(v).

The Majority has raised the issue of waiver *sua sponte* in this case. **See *In re Estate of Anderson***, 317 A.3d 997, 1003 (Pa. Super. 2024). Crucially, though, when this Court raises an issue *sua sponte* to affirm a trial court’s evidentiary ruling for a reason other than those given by the trial court, the basis of that holding should be “apparent from the record.” ***Commonwealth v. Edwards***, 903 A.2d 1139, 1157 n.19 (Pa. 2006); **see also *Lynn v. Nationwide Ins. Co.***, 70 A.3d 814 (Pa. Super. 2013) (same).

The Majority’s stated reason for finding waiver as to Issues 7, 8, and 9 is that ICC only objected on relevance grounds (relating to Pa.R.E. 401), without specifically referencing any of the other rules relied upon in its appellate brief, namely Pa.R.E. 403 and Pa.R.E. 608(b)(1). **See** Maj. Op., at 29-33. However, the record shows that the substance of all those rules was fleshed out below in ICC’s arguments, fully apprising the trial court of the same issues now being raised on appeal. As discussed above, so long as the basis for an objection is understood, issue preservation does not require the numerical nomenclature of an evidentiary rule to be explicitly stated. **See** Pa.R.E. 103(a)(1)(B).

Prior to trial, ICC moved to preclude Hernandez’s expert, Gustavo Da Silva, from discussing ICC’s performance of its SEPTA contract. As is evident from the pretrial disclosure of Da Silva’s expert reports, Hernandez had

planned to have him opine on whether ICC breached contractually required safety protocols. ICC argued in its motion *limine* that the subject was not relevant to any of Hernandez's *negligence* claims, or to any of the issues to be resolved by the jury. **See** ICC's Motion *In Limine* Seeking Preclusion of Testimony by Gustavo Da Silva on Issues of Contract and/or Breach of Contract Between Defendants, 1/19/2023, at paras. 31-37. ICC contended in its motion that any testimony regarding the contractual relationship of the defendants would be inadmissible due to its complete irrelevance, as well as the potential for such evidence to confuse the jury about the nature of the proceedings. **See id.** (citing Pa.R.E. 401, 403).

The trial court agreed, and granted ICC's motion. The parties conducted no other discovery pertaining to the contractual obligations between ICC and SEPTA, and Hernandez gave no indication that he would seek to elicit such evidence at trial through the testimony of another witness.⁴

Later, during Hare's cross-examination, Hernandez broached the subject of ICC's compliance with the DBE requirements of its SEPTA contract. These contractual terms prohibited ICC from subcontracting its work to an entity owned by ICC (Hare); the contract also required ICC to subcontract at

⁴ It is specious to suggest that ICC's motion *in limine* to preclude testimony about its contract with SEPTA was limited to Da Silva and did not cover Hare. **See** Maj. Op., at 32-33. ICC's pre-trial arguments chiefly had to do with the content of the evidence testimony, not the identity of the witness who was testifying. ICC was compelled to refer specifically to Da Silva's testimony in its motion because he was the only witness whom Hernandez had originally planned to question about ICC's contract with SEPTA.

least 14% of the total value of the contract to a DBE. It was insinuated by Hernandez's counsel that Hare had purchased the company, MSI (Minority Services, Inc.), and not changed its name, as a ploy to qualify the company as a DBE. **See** N.T. Trial, 2/14/2023 (p.m. session), at 79 ("Sir, is the reason you kept the name Minority Services, Inc. because you wanted to imply to SEPTA that you actually operated a DBE when it was, in fact, a company owned by you?").⁵

Echoing its motion *in limine*, ICC objected that such matters were irrelevant and collateral to the negligence claims asserted in Hernandez's complaint. Hernandez countered that if Hare, as ICC's owner, breached those parts of the SEPTA contract, it would be relevant to his truthfulness and credibility. **See** N.T. Trial, 2/14/2023 (p.m. session), at 32-34.

In a sidebar, the trial court responded that since ICC's potential non-compliance with the SEPTA contract could bear on Hare's credibility, such matters were necessarily relevant and admissible at trial. **Id.**, at 34-35. ICC disputed that notion, arguing that ICC's performance of terms in its SEPTA

⁵ In his testimony, Hare admitted that since he is a Caucasian man, MSI did not fit the definition of a DBE, which requires the entity to be owned by a woman or a member of a racial minority. Hare explained that he had purchased MSI from a Black woman, and he feared that changing the name would complicate the entity's existing contracts with other parties. As to the DBE requirements, Hare claimed that he satisfied those terms by retaining administrative support from the DBE entity, Rhoads Business Services. He claimed further that SEPTA knew of his ownership of MSI, as well as his race and gender. Hare's explanations were neither corroborated nor refuted, as there had been no pretrial discovery about these collateral issues.

contract had no relevance to its alleged liability for the injuries sustained by Hernandez. ***See id.***

The trial court and ICC's counsel then went beyond the discrete issue of relevance to discuss the proper means by which the credibility or character of a witness could be attacked. ICC's counsel began developing the point that a witness could not be questioned about a collateral instance of misconduct and then confronted with evidence inconsistent with the witness's answers. ***Id.***, at 35-36. Before ICC's counsel could complete the argument, the trial court cut short the discussion and definitively overruled ICC's objection:

ICC Counsel: Again, Your Honor, so, you know, we could go through all sorts of provisions of the contract that maybe he didn't have, you know, abide by or things of that nature, but what does that have to do with the accident in question? And, again, this is a negligence –

Trial Court: Credibility is always an issue when a witness is testifying. If you could show that a witness was not being truthful or was not credible when he did certain things in relation to the overall case, that's relevant as to his whether or not the jury is going to believe other things that he said.

ICC Counsel: Yeah, but it has to be relevant to what we are talking about. This is not a breach of contract case.

Trial Court: No, no, credibility is always an issue in a case when a witness is testifying. Right?

ICC Counsel: I mean --

Trial Court: I mean, just, for example, if -- and this is not the case and I'm not trying to say it is the case. But if this individual had committed a crime that would involve *crimen falsi*, and he was sentenced to more than a year or pled guilty or whatever like that, even though it's not relevant to the case, it goes to his credibility, that's why it's allowed.

ICC Counsel: And there is a specific rule on that.

Trial Court: The reason it is, because when a witness testifies the jury has to believe what he's saying. And if they could show that he was not credible at a certain point, then that will go to his credibility. And I'm going to allow the question.

ICC Counsel: **Here's another scenario, Your Honor. Ask the question, did you ever get a speeding ticket, sorry, did you ever get a speeding ticket and the answer --**

Trial Court: That doesn't involve honesty, it's got to be a *crimen falsi*.

ICC Counsel: Then he answers no --

Trial Court: If it did, I would be the most dishonest person --

ICC Counsel: **But then he answers no and they pull up a speeding ticket that he got. So that's where we're going. We're going way afar with this credibility issue, which is --**

Trial Court: **No, it's not way afar, it's in the contract. I'm going to allow it. The objection is overruled.**

Id., at 34-36 (emphasis added).

Later in Hare's cross-examination, when Hernandez's counsel questioned him as to whether ICC had subcontracted to a DBE, and paid it the "set aside portion" of the contract's total value, as required by the SEPTA contract, ICC's counsel again objected:

ICC Counsel: And that's my problem when we had the last [sidebar] session in here. We are now getting into a contract dispute that has nothing to do with this case. Nothing at all, Your Honor. **And to try to interject the price of this contract into this case is so prejudicial, has no probative value whatsoever.**

* * * *

[W]e are going -- we are so far away from a train accident at this point in time, the jury is going to go: What are we doing? Are we doing a breach of contract trial or are we doing a negligence trial?

* * * *

And, again, Your Honor, we are getting far afield of anything -- credibility must be relevant to the case at hand. **You just can't ask him again, you know, questions about, you know, isn't it true you beat your wife? I mean that's where we're going on this.**

Id., at 45-48 (emphasis added).

By this point of the trial, neither Hernandez, nor the trial court, had cited Pa.R.E. 608 as authority allowing the proposed cross-examination of Hare. The trial court referred to Pa.R.E. 608 explicitly for the first time in its 1925(a) opinion, in a token attempt to clarify its reasons for permitting Hare to be questioned about ICC's alleged breaches of the SEPTA contract. **See** Trial Court 1925(a) Opinion, 12/19/2023, at 19-21. By doing so, the trial court itself implicitly recognized that ICC had previously identified issues associated with that rule when lodging its objections which were contemporaneous with Hare's testimony. **See *id.***

Further, prior to these *en banc* proceedings, when the case was before a three-judge appellate panel, neither the trial court, nor Hernandez, asserted, as the Majority does on appeal, *sua sponte*, that ICC waived the subject

evidentiary claims in its brief.⁶ This only further establishes that ICC's purported waiver is not apparent from the record, and that its preservation of the subject claims was entirely clear from context. **See e.g., Cominsky v. Donovan**, 846 A.2d 1256, 1258 n.2 (Pa. Super. 2004) ("[T]he trial judge decided the issue on its merits, raising no question in his opinion that it had not been preserved or that he did not understand the basis for the objection. In addition, appellee does not argue to this Court that the issue was waived. Under these circumstances, the general objection was sufficient to preserve the issue for our review."); **see also Commonwealth v. Wolfel**, 233 A.3d 784, 789-90 (Pa. 2020) (holding that Commonwealth had waived its waiver

⁶ Prior to these *en banc* proceedings, neither the trial court, nor Hernandez, had ever asserted that ICC waived its evidentiary claims on the grounds stated by the Majority here. Hernandez had only argued that ICC waived the right to challenge his right to impeach Hare based on purported violations of the SEPTA contract because ICC did not object when the DBE and business integrity provisions were admitted into evidence as exhibits. This separate waiver argument is unpersuasive. ICC timely objected when Hernandez sought to discredit Hare based on whether ICC violated those provisions. ICC in no way agreed to have Hare questioned about the contents of the exhibits, and the alleged breaches of the SEPTA contract, simply by opting not to challenge the exhibits' admissibility. Hare's alleged breaches of the contractual terms were not relevant to any trial issues, and ICC had no way of knowing that Hernandez had planned to use the exhibits to impeach Hare or attack his credibility.

Hernandez only disputed ICC's preservation of its claims in Issues 7, 8, and 9 in the manner raised by the *en banc* Majority *after* that ground for affirmance was included in the three-judge panel majority's memorandum. The fact that Hernandez has now belatedly echoed that rationale does not detract from the point that ICC's preservation of these issues had not been in doubt until this Court called it into question for the first time.

argument against defendant at trial and on appeal, precluding Superior Court from raising waiver *sua sponte* to avoid review of the appeal's merits).

On appeal, ICC then reiterated its contention that the trial court erred in allowing Hernandez to question Hare about the Business Integrity and DBE provisions of the SEPTA contract. ICC summarized the trial court's error in its 1925(b) statement, noting that "[t]he examination bore no probative value to any material fact in dispute." Appellant's 1925(b) Statement, 8/4/2023, at para. 10. This identified error must be "deemed to include every subsidiary issue that was raised in the trial court," **see** Pa.R.A.P. 1925(b)(4)(v), namely that relevance is a threshold requirement for attacking the credibility of a witness on cross-examination with specific instances of the witness' conduct.

In its brief, ICC has argued that the admission of evidence that it breached the Business Integrity and DBE provisions of the SEPTA contract was irrelevant, inflammatory, and prejudicial due to the likelihood that the jury could have been confused or misled about the nature of the issues it was tasked with resolving. **See** Appellant's Brief, 12/23/2025, at 20-26. Moreover, ICC has argued that, insofar as the trial court found ICC's performance of the subject contract terms to be "character evidence" under Pa.R.E. 608, and therefore "always" admissible, the trial court misapplied the law. **See id.**, at 25-26.

That is, the cross-examination on these topics did not constitute "reputation" evidence under Pa.R.E. 608(a) as the trial court stated in its

1925(a) opinion, and specific instances of misconduct could not be used to impeach a witness on cross-examination under Pa.R.E. 608(b)(1). **See id.** ICC cited several cases which held that the admissibility of character evidence under Pa.R.E. 607 and Pa.R.E. 608 is subject to the threshold relevance requirements of Pa.R.E. 401, as well as the balancing test of Pa.R.E. 403. **See id.**, at 23-26.⁷

As shown in the above excerpts of the notes of testimony, there is no question that ICC's counsel thoroughly argued to the trial court that Hare's purported breaches of its SEPTA contract were irrelevant and inadmissible, and that the admission of such evidence was prejudicial due to its potential to mislead or confuse the jury (implicating Pa.R.E. 401 and Pa.R.E. 403). Further, it is readily apparent that ICC's counsel and the trial court were debating whether Hare could be confronted with specific instances of prior

⁷ In its brief, ICC cites several cases which stand for the proposition that when evidence is not relevant to bias but instead merely truthfulness, it is collateral and not provable by extrinsic evidence. **See** Appellant's Brief, at 27-28 (citing **Commonwealth v. Kiger**, No. 343 MDA 2019 *8 (Pa. Super. filed December 2, 2019) (unpublished memorandum)). Further, a party "may not impeach a witness on collateral matters or matters that have no relationship to the case at trial." **Id.** (quoting **Commonwealth v. Guilford**, 861 A.2d 365, 369 (Pa. Super. 2004)). This is exactly what ICC argued to the trial court. **See** N.T. Trial, 2/14/2023 (p.m. session), at 32-48.

conduct that were collateral to the issues involved in the trial (implicating Pa.R.E. 608(b)(1)). **See** N.T. Trial, 2/14/2023 (p.m. session), at 32-48.⁸

The trial court disregarded the points made by ICC's counsel, presuming that Hare's responses to Hernandez's questions about ICC's performance of the SEPTA contract would be proper merely because they could be used to discredit Hare. ICC's counsel tried to alert the trial court to an error in that rationale by giving hypothetical examples of improper character attacks on a witness with collateral matters. Those examples illustrated exactly what Pa.R.E. 608(b)(1) prohibits, apprising the trial court of the content of the rule, even if it was not identified by name. **See id.** Apart from expressly citing Pa.R.E. 608(b)(1), which ICC was not required to do for preservation purposes, ICC could not have done anything more to apprise the trial court of the basis for its objections.

B. ICC's Objections Directly Implicated Rule 608(b)(1)

⁸ The Majority suggests that ICC's prejudice argument was limited to Hernandez's cross-examination of *Hare* about the value of the ICC-SEPTA contract, and not about violations of the business integrity and DBE provisions. **See** Maj. Op., at 33 n.20. This is incorrect. Hernandez sought to elicit the total value of the contract so that he could establish ICC's breach of the requirement to pay a subcontracted DBE business at least 14% of that value. ICC's prejudice argument as to the contract amount went directly to the *entire* line of questioning about alleged breaches of the DBE provisions. Additionally, it is not even necessary for a party to argue prejudice as a basis for excluding evidence when the threshold test of relevance has not been met. **See Commonwealth v. Story**, 383 A.2d 155, 160 (Pa. 1978).

Finally, even if the Majority is correct that ICC's objections to Hare's cross-examination were strictly based on relevance, our decisional law would *still* compel merits consideration of the issues under Pa.R.E. 608(b)(1).

This Court has recognized that the promulgation of Rule 608(b) (effective on October 1, 1998) did not implement a new evidentiary test for admissibility. ***See Eighth N.-Val, Inc. v. William L. Parkinson, D.D.S., P.C., Pension Tr.***, 773 A.2d 1248, 1252 (Pa. Super. 2001) (commenting that Rule 608 "codifies what has long been the law regarding the use of specific instances of misconduct to attack a witness's character for truthfulness: specific instances of misconduct are not admissible."). Subsection 608(b)(1) of the rule was simply intended to codify decades of Pennsylvania's decisional law which prohibited – on ***relevance*** grounds – the cross-examination of a witness with specific instances of collateral conduct. ***See generally Downey v. Weston***, 301 A.2d 635, 639 (Pa. 1973).

A quarter century before Rule 608 went into effect, in ***Downey***, our Supreme Court considered the restriction on a plaintiff's intended line of questioning for a defendant's expert causation witness, a physician. ***See id.*** The plaintiff was injured in a car accident, and he alleged that the other drivers involved, the defendants, had caused his injuries due to their negligence. The plaintiff sought to cross-examine a defendant's causation expert about his purported violations of the Hippocratic Oath and the Principles of Medical Ethics of the American Medical Association. ***See id.***, at 638. On review of the

order precluding those questions, the Court held that evidence of the ethical breaches was inadmissible because it did not “bear[] directly on the witness’ character for truth” or otherwise have any probative value in the case:

It is true that evidence of Some misconduct or Some past events throwing light on human character is admissible on cross-examination, but this is restricted to evidence which bears directly on the witness’ ‘character for truth’. 3A Wigmore, Evidence s 922, at 726 (Chadbourn rev. 1970). **Thus we have held inadmissible as being irrelevant** to establishing a witness’ credibility the fact that he operated an illegal bar and quarreled with his spouse, ***Commonwealth v. Gates***, 392 Pa. 557, 141 A.2d 219 (1958); the fact that he drove an auto recklessly, ***Gregg v. Fisher***, 377 Pa. 445, 105 A.2d 105 (1954); the fact that he had been convicted of assault and battery, ***Commonwealth v. Kostan***, 349 Pa. 560, 37 A.2d 606 (1944); the fact that he had once been a panderer, ***McIntosh v. Pittsburgh Railways Co.***, 432 Pa. 123, 247 A.2d 467 (1968). **Similarly, the connection between an alleged breach of a canon of medical ethics and the credibility of the physician on the witness stand is tenuous at most. Its further pursuit here would have been to engage in a collateral inquiry of dubious relevance.** We are satisfied that the trial court committed neither abuse of discretion nor error of law in closing this line of inquiry.

Downey, 301 A.2d at 639 (emphasis added).

By the same token, numerous controlling decisions have limited the ability of a party to attack a witness’ character for truthfulness by making the admissibility of specific instances of conduct contingent on whether they directly related to a trial issue. **See e.g., *Commonwealth v. Checca***, 491 A.2d 1358, 1365 (Pa. 1985) (“A witness’ credibility cannot be attacked on the basis of prior conduct which is ***unrelated to the issues at the present trial.***”) (Emphasis added); ***Brinich v. Jencka***, 757 A.2d 388, 396 (Pa. Super. 2000) (“Brinich’s use of his uncle’s credit information and other alleged

unspecified ***acts of past business misconduct, even if true, are not relevant to*** [trial issue of] whether Brinich intended to finish construction on the Jencka home.”); ***Walley v. Iraca***, 520 A.2d 886, 890 (Pa. Super. 1987) (citing ***McGoldrick v. Penn. R. Co.***, 241 A.2d 90, 92 (Pa. 1968)) (“This, of course, does not permit the impeachment of a witness on collateral matters; the grounds for contradicting a witness ***must be germane to the issues at trial.***”) (Emphasis added); ***Commonwealth v. McGuire***, 448 A.2d 609, 612 (Pa. Super. 1982) (quoting ***Commonwealth v. Morrison***, 43 A.2d 400, 401 (Pa. Super. 1945)) (“[T]he credibility of a witness may not be assailed by questions which develop instances of misconduct ***unrelated to the issue on trial.***”) (Emphasis added).

In sum, Rule 608 is merely a formal adoption of court holdings which prohibit the use of specific instances of misconduct to attack a witness’s character for truthfulness on cross-examination. ***See Eighth N.-Val, Inc.***, 773 A.2d at 1252. This judicial prohibition always was rooted in the legal theory of relevance. ***See e.g., Downey***, 301 A.2d at 639; ***McGoldrick***, 241 A.2d at 92. The fact that those holdings were codified in a rule does not, as the Majority seems to suggest, require a party to specifically cite the rule in order for those decisions, or the rule, to have controlling effect.

When ICC’s counsel repeatedly stressed to the trial court that any cross-examination of Hare had to be germane to, or be probative of, a trial issue, that legal theory was in lockstep with the above line of cases, which are in

turn the reason why Rule 608(b)(1) exists in the first place. The Majority's finding of waiver cannot be squared with the record; nor is the Majority's understanding of Rule 608(b)(1) consistent with decades of caselaw in which specific instances of collateral conduct were held to be inadmissible on relevance grounds. The Majority therefore has split with those controlling authorities, and further review by our Supreme Court may be warranted so that this new and significant conflict in our decisional law can be reconciled.

C. The Improper Cross-Examination of Hare Prejudiced ICC

Turning to the merits of ICC's claims, I agree with ICC that the trial court erred in allowing Hernandez to attack Hare's character for truthfulness on cross-examination with specific instances of alleged breaches of contract.

Only relevant evidence is admissible at trial. **See** Pa.R.E. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence[.]" **See** Pa.R.E. 401. But even relevant evidence must be excluded "if its probative value is outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. Where the evidence in question has no relevance to a trial issue, it is "unnecessary for the trial court to determine whether the probativeness outweighed the prejudice." ***Commonwealth v. Story***, 383 A.2d 155, 160 (Pa. 1978).

The credibility of a witness may be “impeached by any evidence relevant to that issue, except as otherwise provided by statute or [the Rules of Evidence,]” such as Rules 403, 608, 609, and 610. Pa.R.E. 607(b). As discussed above, Rule 608(b)(1) is essentially a rule of relevance, having codified decisional law which relied upon relevance principles to limit attacks on “the character of a witness for truthfulness[.]” Pa.R.E. 608(b)(1). Under that rule, as well as the numerous cases it was predicated on, a witness’ character for truthfulness may not be attacked “by cross-examination or extrinsic evidence concerning specific instances of the witness’ conduct” when such collateral conduct has no probative value. ***Id.*; see also Downey**, 301 A.2d at 639.

Here, whether ICC breached the business integrity and DBE provisions of its contract with SEPTA was not at all probative of any of the claims or defenses asserted by the parties. It is also highly dubious whether the alleged contractual breaches were relevant to Hare’s character for truthfulness. ***See e.g., Downey***, 301 A.2d at 639. If Hare, through ICC, indeed breached contractual duties owed to SEPTA, such conduct would have no discernable bearing on whether ICC, SEPTA, or another party was negligent in maintaining the worksite where Hernandez was injured. The irrelevance of the ICC-SEPTA contract makes it unnecessary to consider, for admissibility purposes, whether evidence of ICC’s non-compliance was outweighed by its prejudicial effect

under Rule 403. Thus, the trial court erred in allowing Hernandez to cross-examine Hare on ICC's performance of its SEPTA contracts.

"Questions regarding the admission or exclusion of evidence are subject to an abuse of discretion standard of review." **Braun v. Target Corp.**, 983 A.2d 752, 760 (Pa. Super. 2009). A new trial is necessary to remedy the erroneous admission of evidence when it has caused a party prejudice. **See id.** Prejudice has been described in this context as having "a tendency to suggest a [jury] decision on an improper basis." **Id.** (quoting **Whyte v. Robinson**, 617 A.2d 380, 382 (Pa. Super. 1992)).

In this case, ICC was prejudiced severely by the admission of the subject evidence. The cross-examination of Hare became an impromptu mini-trial on a subject entirely collateral to the allegations of ICC's negligence. The apparent strategy of Hernandez's counsel had little to do with impeaching Hare with inconsistent statements or the like; it was more an attempt to equate allegedly unethical business practices with unrelated negligent conduct.

Hernandez's counsel drove the point home in closing by arguing that ICC should be found liable because it (through its owner, Hare) had a propensity to break "promises after promise." **See** N.T. Trial, 2/21/2023, (a.m. session), at 39-40. That is, ICC was more likely to be negligent in keeping its worksites safe because Hare had demonstrated through his dealings with SEPTA that he was an unscrupulous person:

Mr. Hare made all of these promises. [ICC] made all of these promises. SEPTA made a promise to pay them. They did that. Mr.

Hare never said, you shouldn't pay us, we're not actually doing this. He took and said-what he did do, he actually subbed it out to his company, [MSI] which violated the contract, because he wasn't allowed to sub it to people that he actually had a financial interest in. They broke promise after promise.

* * * *

They failed to have a single ICC worker on site. Remember, he subbed it all out to his own company that he owned. They improperly subbed it to [MSI].

Id., at 41-46.

As a result, the jury could easily have confused Hare's questionable business practices with the issue of ICC's liability for negligence. The evidence of Hare's alleged failure to meet his contractual obligations under the DBE provisions of the SEPTA contract, and Hare's ownership of MSI, also potentially influenced the jury to base the verdict on its animus toward Hare rather than on the evidence of ICC's liability in tort for the injuries that Hernandez sustained.

Thus, for the reasons stated above, I must respectfully dissent from the Majority's decision as to Issues 7, 8, and 9. I would find that ICC preserved these issues for appellate review and conclude that the erroneous admission of the disputed evidence caused ICC prejudice which can only be remedied by a new trial.

III. "Excavation" Should be Construed in Line with Industry Usage

Although I concur with the Majority's conclusion that the "trenching" performed by Hernandez is not a form of "excavation," I do not believe construction of that term is a fact question dependent on the trial record.

Rather, the meaning of the term under section 302(a) of the WCA is a legal question of statutory construction. Since the term has acquired a unique meaning within ICC's industry, it is that meaning which should now be applied.

The Majority states that, "[w]ith respect to the question of whether ICC qualified as a statutory employer, we reiterate that pursuant to **Yoder**, we review the record." **See** Maj. Op., at 21-22. Respectfully, the Majority may have misread **Yoder's** holding and misapplied it in the present matter.

On the one hand, in **Yoder**, the issue was whether the appellant was a statutory employer under section 302(b) under the five-part **McDonald** test. It was therefore necessary for a court to adjudicate that issue by examining the record facts and determining whether each of the disputed **McDonald** criteria had been met.⁹

Here, on the other hand, the parties *agree* on the material record facts. We are only tasked with interpreting the single statutory term, "excavation," as used in section 302(a). The parties' dispute over the meaning of the term is a pure legal issue of statutory construction, subject to a *de novo* standard of review and a scope of review which is plenary. **See 700 Pharm. v. Bur.**

⁹ As summarized above, the problem in **Yoder** was that the trial court denied summary judgment pre-trial on the question of whether the appellant was a section 302(b) statutory employer despite the lack of any record development. Our Supreme Court held that we abused our discretion by going beyond the scope of the trial record, as an error correcting court, to make the necessary findings. Accordingly, the matter was returned to the trial court so that it could resolve that issue with the benefit of a developed record.

of Workers' Comp. Fee Rev. Hr'g. Off., 358 A.3d 593 (Pa. 2026). As such, the issue is a pure question of law, **see id.**, and once the term is defined, we may then apply that definition to the record facts to see if the work performed by Hernandez fits that definition.

Again, there is no dispute here concerning the nature of the work performed by Hernandez at the time of his injury. The question posed by the parties is instead a legal one – whether the work that Hernandez did falls under the WCA's definition of "excavation," and the parties have offered competing ways in which that term must be construed. This is not a situation (as in **Yoder**) where this Court is barred from going beyond the factual record to "support its determinations [as to the denial of JNOV] with respect to the . . . elements of the **McDonald** test." **Yoder**, 345 A.3d at 688-89. The factual record is already established, and our legislature's intended scope of "excavation," a technical term, must be discerned as a matter of law.

Accordingly, in addition to the Majority's articulation of our standard of review, I would add that the "general rule" of construction is that "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]" 1 Pa.C.S.A. § 1903(a). Yet, when a *technical* word or phrase has "acquired a peculiar and appropriate meaning or [is] defined in this part, [it] shall be construed according to such peculiar and appropriate meaning or definition." **Id.**

This Court may apply the rules of construction to discern legislative intent when the words of the statute are ambiguous or not explicit. **See** 1 Pa.C.S.A. § 1921(b)-(c). A statute is ambiguous when there are at least two reasonable interpretations of the text. **See A.S. v. Penn. State Pol.**, 143 A.3d 896, 906 (Pa. 2016) (citing cases). “Courts may consult dictionary definitions to illuminate the common and approved meaning of a word or phrase.” **Commonwealth v. Clayborne**, 356 A.3d 187, 200 (Pa. 2026). When a common meaning of a term has been replaced with a technical definition within a certain industry, a court may rely upon authorities outside of the record to ascertain that “peculiar and appropriate meaning or definition.” **See Kilmer v. Elexco Land Services, Inc.**, 990 A.2d 1147, 1157 (Pa. 2010) (quoting 1 Pa.C.S.A. § 1903) (relying upon industry manuals and treatises to construe “royalty,” as a technical term).

In my view, the competing definitions offered by ICC and Hernandez are both reasonable on their face, demonstrating that there is ambiguity in the WCA’s term, “excavation.” However, I believe both of these competing positions miss the mark, as the term must be construed in accordance with its peculiar and appropriate meaning or definition, as used in the construction industry. **See** 1 Pa.C.S.A. § 1903(a).

In general, the WCA refers to “work” broadly. **See** 77 P.S. § 461. Section 302(a), however, specifies specialized types of work in identifying who is a “statutory employer” under the WCA. “Section 302(a) sets forth a

specialized definition of contractor, which . . . includes ‘a person who contracts with another to have work performed consisting of the removal, *excavation* or drilling of [soil, rock or] minerals[.]’” **Doman v. Atlas America, Inc.**, 150 A.3d 103, 107 (Pa. Super. 2016) (quoting 77 P.S. § 461) (emphasis added); **see also Six L's Packing Co. v. W.C.A.B.**, 44 A.3d 1148, 1159 n.12 (Pa. 2012) (stating that because the WCA “employ[s] differing conceptions of ‘contractor’ and ‘subcontractor,’ [s]ection 302(a) is best interpreted . . . according to its own terms”).

The above authorities establish that the WCA’s reference to “the removal, excavation or drilling of soil, rock or minerals,” means particular or specialized types of work, and that the legislature intended to employ these words in a *technical* sense. **See e.g., Kilmer**, 990 A.2d at 1157-58) (rejecting the common definition of the word “royalty,” in interpreting that term in the Guaranteed Minimum Royalty Act, and instead applying, consistent with our rules of statutory interpretation, “the definition it has acquired in the oil and gas industry”); **Sackett v. Nationwide Mutual Ins. Co.**, 940 A.2d 329, 333 (Pa. 2007) (holding that the term “purchase” of uninsured and underinsured motorist insurance coverage under 75 Pa.C.S.A. § 1738(c), of the Motor Vehicle Financial Responsibility Law, “was a term of art in the automobile insurance arena”); **see also Sternlicht v. Sternlicht**, 876 A.2d 904, 913 (Pa. 2005) (Cappy, J., concurring) (stating the term “gift,” under the

Pennsylvania Uniform Transfers to Minors Act, is a technical word that has acquired a peculiar and distinct meaning).

In the construction industry,¹⁰ there is a marked difference between “excavation” and “digging.”¹¹ While both activities involve the removal of soil, rock, or other materials, they fundamentally differ in scope, method, and purpose. “Digging” generally means the breaking and removing of earth with handheld tools, such as shovels, spades, or trowels. Digging can be a part of routine maintenance tasks, such as trenching for pipes or preparing a foundation for a small structure.

“Excavation” occurs on a more extensive, industrial scale. It often involves a mechanized process, employing heavy machinery such as excavators, bulldozers, and backhoes to remove significant volumes of material from the ground. Excavation is typically performed to prepare a site for construction, resulting in significant changes to the existing contour or height of land.

¹⁰ Neither ICC nor Hernandez have moored their competing definitions of “excavation” to how the term is used in construction contracts. Our canvassing of the industry, however, informs us that “excavation” is a technical term of art, the distinct meaning of which must guide this Court in construing the scope of section 302(a) of the WCA.

¹¹ **See e.g.**, <https://www.freedomconstructionanddesign.com/difference-between-digging-and-excavation/>; <https://shillingexcavation.com/difference-between-digging-and-excavation/>; <https://indepthex.com/is-excavation-and-a-dig-the-same-thing/> (last visited September 24, 2026).

Applying this distinction to the work ICC subcontracted to MSI, I would find that at the time of his injury, Hernandez's job was "digging," and not "excavation." At MSI's direction, Hernandez performed "trenching" services, which entailed the digging of long and narrow ditches in the soil below the surface of the ground so that electrical conduit piping could be laid in them. Hernandez refilled the ditches with soil after the piping process was complete. The contract between SEPTA and ICC required the ditches to be dug by hand, without mechanized or motor-powered excavation equipment. In industry parlance, then, Hernandez's work would not be considered "excavation." Because ICC did not subcontract MSI to perform "excavation," ICC was not, as it contends, entitled to statutory employer immunity under section 302(a) of the WCA. **See** 77 P.S. § 461.

I would note further that this interpretation of "excavation" is consistent with the overall purpose of the WCA. **See** 1 Pa.C.S.A. § 1921(a). Our Supreme Court has emphasized that the WCA "is remedial in nature and its purpose is to benefit the workers of this Commonwealth. Thus, the [WCA] is to be liberally construed to effectuate its humanitarian objectives, and borderline interpretations are to be construed in the injured party's favor." **Tooley v. AK Steel Corp.**, 81 A.3d 851, 858 (Pa. 2013).

Thus, for the foregoing reasons, while I concur with some aspects of the Majority's decision, albeit with some clarifications, I must respectfully dissent

from the Majority's holding, as I would grant ICC a new trial to remedy the prejudicial evidentiary error which ICC preserved for appellate review.

Judge Dubow and Judge King join the concurring and dissenting opinion.