

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(s): 181202689

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

OPINION BY LANE, J.:

FILED OCTOBER 28, 2026

Independence Construction Corporation ("ICC") appeals from the judgment imposed, following a jury trial, in favor of Jesse Hernandez ("Hernandez") in this catastrophic workplace injury matter. After careful review, we affirm.

I. Facts & Procedural History

The trial court summarized the underlying facts as follows:

On March 12, 2018, Plaintiff . . . Hernandez was hit by a South Eastern Pennsylvania Transportation Authority ("SEPTA") train while in the scope of his employment with Minority Services, Inc. ("MSI"), a subcontractor of [Defendant ICC], and survived. [Steven Hare ("Hare") owned both ICC and MSI.]

ICC had long standing contracts with SEPTA to perform janitorial services and maintenance work. Since 2012, ICC contracted with SEPTA to perform construction projects that involved trenching to lay conduit pipe for electrical lines[. ICC]

subcontracted all contracts that involved trenching to MSI. The controlling contract between ICC and SEPTA and subsequently between ICC and MSI when [Hernandez] was injured involved trenching for the purpose of installing underground conduit pipe for electrical lines along [a SEPTA] train line[. Hernandez] worked for MSI for about two years prior to the accident.

Trial Court Opinion, 12/19/23, at 1 (footnote omitted and paragraph break added).

It is undisputed in this case that “trenching” was a process of digging long and narrow ditches in the soil below the surface of the ground. The trenching also encompassed the refilling of the ditches with soil after laying electrical conduit piping in them. The contract between SEPTA and ICC required the ditches to be dug by hand.

Furthermore, the contract with SEPTA required ICC to implement certain safety measures, such as posting qualified watchpersons and protective barriers parallel to the ditches. ICC engaged MSI to perform these “watchperson duties.” Trial Exhibit P-1, Contract for Technical Services, 3/8/18, at 11 (unnecessary capitalization omitted). Watchpersons were to be stationed around the jobsite and were to timely alert workers of any oncoming SEPTA trains. At the time, SEPTA trains were not required to come to a complete stop as they approached the digging and conduit laying operations. The trenching and watchperson services provided by ICC were exclusively carried out by MSI and its employees, although some employees were previously employed by ICC.

As stated above, Hernandez was working as an MSI employee, performing trenching work within approximately four feet of SEPTA's train tracks, when he was struck by a train. Hernandez survived, but "suffered significant injuries [and] was put into a medically induced coma[. He] suffered a traumatic brain injury, hearing loss, injuries to the ligaments in his cervical spine, and additional fractures to his sternum, nose, cheeks, and skull." Trial Court Opinion, 12/19/23, at 2.

Hernandez filed the instant suit against, *inter alia*, SEPTA and ICC, asserting claims of negligence.¹ He alleged: SEPTA's trains were not safely operated near the work site; the contractually required safety measures meant to protect him were inadequate; and he was unreasonably placed in danger by those conditions.

ICC filed a motion for summary judgment, asserting that it was the statutory employer of Hernandez under the Pennsylvania Workers' Compensation Act² ("WCA"), and thus immune from tort liability.³ The trial

¹ Hernandez also named National Railroad Passenger Corporation d/b/a AMTRAK as a defendant, but that party was dismissed prior to trial.

² **See** 77 P.S. §§ 1-2710.

³ As we discuss *infra*:

Under the [WCA,] a general contractor that hires a subcontractor to perform work on a jobsite is deemed an "employer" that is secondarily liable to the injured employee of the subcontractor for the payment of compensation under the [WCA], provided that the subcontractor — the one primarily liable — fails to make payment. Section 302(b) of the Act, 77 P.S. § 462. In exchange for this

court denied the motion without a hearing; the order stated only that “issues of material fact remain[ed] in dispute.” Order, 12/13/22.⁴

This matter proceeded to a ten-day jury trial. We surmise from the record that SEPTA settled with Hernandez, but remained a party and was included on the jury’s verdict slip for allocation of fault.

At trial, Hernandez argued that SEPTA and ICC were liable for his injuries because they: were responsible for directing the movement of trains along the lines where he worked; and controlled the work site. According to Hernandez, it was the duty of both SEPTA and ICC to ensure that his workplace was safe.

Pertinently, the trial court made several evidentiary rulings, concerning the extent to which witnesses could comment, or be subject to questioning, about ICC’s compliance with provisions in its contract with SEPTA. Additionally, ICC sought to preclude evidence of remedial measures implemented by SEPTA after Hernandez’s accident, namely, “Rule 135,” which required trains to come to a full stop before work areas near railings and

imposition of secondary liability, the [WCA’s] statutory employer provision in Section 203 of the Act, 77 P.S. § 52,2 extends to a general contractor the same tort immunity afforded to the subcontractor of the injured worker.

Yoder v. McCarthy Construction, Inc., 345 A.3d 668, 672-73 (Pa. 2025) (footnote omitted).

⁴ The certified record contains two near-identical orders denying ICC’s motion for summary judgment. Both copies bear a “filed” stamp with an August 22, 2026 filing date. However, the text of the order refers to December 6, 2022, and the corresponding trial docket entry is dated December 13, 2022. We employ the docket entry date for citation purposes.

trenches. **See** N.T. Trial, 2/7/23 A.M., at 44-48. We discuss these issues as they arise *infra*.

At the close of Hernandez's case, on the sixth day of trial, ICC moved for compulsory nonsuit and/or a directed verdict, asserting that it was the statutory employer of Hernandez under both sections 302(a)(1) and 302(b) of the WCA, and thus immune from this negligence action. Relevantly, the parties argued whether MSI performed "excavation" under section 302(a), and addressed the five section 302(b) **McDonald**⁵ factors (discussed *infra*) for determining whether a general contractor is a statutory employer. The trial court denied ICC's motion, and trial proceeded to ICC's presentation of its case.

Ultimately, the jury found ICC, SEPTA, and Hernandez were all negligent, and all of their negligence was a factual cause of harm to Hernandez. The jury apportioned liability as follows: (1) ICC — seventy percent liable; (2) SEPTA — twenty-nine percent liable; and (3) Hernandez — one percent liable. The jury awarded Hernandez judgment in the amount of \$7,297,700.86.

ICC filed a post-trial motion, seeking judgment notwithstanding the verdict ("JNOV"). ICC: again asserted statutory employer immunity under the WCA; and requested, alternatively, a new trial on the grounds the trial court erred in admitting certain evidence. The trial court conducted a hearing and

⁵ **See McDonald v. Levinson**, 153 A. 424 (Pa. 1930).

denied ICC's post-trial motion. ICC filed a timely notice of appeal, and both it and the trial court have complied with Pa.R.A.P. 1925.

In a substituted brief submitted for *en banc* review,⁶ ICC presents fourteen issues:

1. Whether the trial court erred in not rendering findings of fact and conclusions of law on ICC's statutory employer immunity defense prior to the jury's verdict?
2. Whether the trial court erred in holding that ICC was not a statutory employer under Section 302(a)(1)(i) of the [WCA] when it concluded that ICC was not engaged in excavation activity within the meaning of the WCA?
3. Whether the trial court erred in denying ICC's motion for [JNOV] in holding that the evidence of record did not establish that ICC contracted for the performance of excavation work and, therefore, concluded that ICC was not a statutory employer immune from suit under Section 302(a)(1)(i) of the WCA?
4. Whether the trial court erred in holding that ICC was not a statutory employer under Section 302(a)(2) of the WCA where it conflated the requirements of Section 302(a)(2) with those of Section 302(a)(1)(i) by finding that Section 302(a)(2) applies only to contracts for the excavation of natural minerals or similar activities?
5. Whether the trial court erred in holding that ICC was not a statutory employer under Section 302(a)(2) of the WCA where[] ICC had subcontracted to [Hernandez's] employer to perform trenching operations which was a regular and recurrent part of ICC's business?
6. Whether the trial court erred in holding that ICC was not a statutory employer under Section 302(b) of the WCA where the evidence at trial established control of the worksite and all the **McDonald** factors?

⁶ Our citations to both parties' briefs are to the substituted briefs filed for *en banc* review.

7. Whether the trial court abused its discretion in allowing cross-examination on non-compliance with SEPTA contractual requirements governing Disadvantaged Business Enterprises [(“DBEs”)] and Contractor Integrity policies which was not probative to the negligence claim, was highly inflammatory and prejudicial to ICC[,], and by denying ICC’s motion for a new trial?
8. Whether the trial court abused its discretion and committed legal error by allowing cross-examination on purported noncompliance with contractual requirements as character evidence where such evidence was not admissible under Pa.R.E. 608(a) or (b)[,], and by denying ICC’s motion for a new trial?
9. Whether the trial court abused its discretion and committed legal error by mischaracterizing evidence of non-compliance with contractual requirements as impeachment evidence as to credibility and by failing to engage in a balancing test of the prejudicial impact to ICC as required by Pa.R.E. 403[,], and by denying ICC’s motion for a new trial?
10. Whether [ICC] preserved for appeal objections to the admission of testimony on cross-examination regarding noncompliance with contractual requirements as non-probative and prejudicial?
11. Whether the trial court abused its discretion in admitting non-probative evidence of ICC’s alleged breach of contract through testimony of [Hernandez’s] engineering expert[,], and by denying ICC’s motion for a new trial?
12. Whether the trial court abused its discretion in admitting nonprobative evidence of subsequent remedial measures, where the prejudice to ICC exceeded its probative value; and by denying ICC’s motion for new trial?
13. Whether the trial court erred in declining to charge the jury that subsequent remedial action was not relevant to the claims against ICC and by denying ICC’s motion for new trial?

14. Whether the trial court erred in denying ICC's motion for new trial or [JNOV] where there was an insufficiency of evidence to sustain the verdict?

ICC's Brief at 2-4 (issues reordered for ease of disposition).⁷

II. Jurisdiction Under the *Yoder* Decision

In its first issue, ICC raises a jurisdictional question, citing the recent Pennsylvania Supreme Court decision, *Yoder*, issued while this *en banc* review was pending.⁸ For ease of discussion, we first review in detail the pertinent procedural history of *Yoder*. The injured employee ("Yoder") of a subcontractor filed a complaint in negligence against the general contractor (the "defendant"). *See Yoder*, 345 A.3d at 674. The defendant filed a pre-trial motion *in limine*: (1) arguing it "was Yoder's statutory employer and, therefore, entitled to immunity from civil liability under the" WCA; and thus (2) seeking preclusion of any evidence on liability. *Id.* The *Yoder* trial court

⁷ Although ICC presents fourteen issues in its statement of questions involved, its argument section sets forth ten main headings in a different order. We remind counsel that "the argument shall be divided into as many parts as there are questions to be argued." Pa.R.A.P. 2119(a) (unnecessary capitalization omitted). We note, especially relevant in an appeal with numerous claims, that "the Rules of Appellate Procedure were adopted to insure the orderly and efficient administration of justice at the appellate level." *Stout v. Universal Underwriters Ins. Co.*, 421 A.2d 1047, 1049 (Pa. 1980) (unnecessary capitalization omitted).

⁸ Initially, a three-judge panel of this Court issued a memorandum decision based on the briefs then filed by the parties. On October 23, 2025, the Supreme Court issued *Yoder*, and eight days later, this Court granted *en banc* review of this appeal. ICC then sought leave to address the applicability of *Yoder*, which this Court granted. The parties' arguments concerning *Yoder* are therefore properly before this *en banc* panel for review.

heard oral argument but denied the defendant's motion *in limine* "without any explanation," although its post-trial Rule 1925(a) opinion addressed the fifth **McDonald** factor. **Id.** at 674, 675, 689. Subsequently at trial, the jury returned a verdict for Yoder in the amount of \$5 million. **See id.** at 674.

The defendant appealed. Pertinently, this Court reviewed all five of the **McDonald** factors and determined that the defendant satisfied each one and thus was a statutory employer, immune from tort liability. **See id.** at 676. This Court vacated the judgment entered in favor of Yoder and remanded for the court to enter judgment in favor of the defendant. **See id.** at 674.

The Pennsylvania Supreme Court granted Yoder's petition for allowance of appeal.⁹ Relevantly, it considered whether the Superior Court erred in

⁹ The **Yoder** Court considered two claims in addition to the above-discussed issue. First, the Court upheld, against a *stare decisis* challenge, decisional authority that the WCA "'deprives the common pleas courts of jurisdiction of common law actions in tort for negligence against employers' and '[t]he lack of jurisdiction of the subject matter may be raised at any time and may be raised by the court *sua sponte* if necessary.'" **Yoder**, 345 A.3d at 686 (*citing, inter alia, LeFlar v. Gulf Creek Industrial Park #2*, 515 A.2d 875 (Pa. 1986)).

The Supreme Court then considered a second *stare decisis* challenge. Yoder requested the Court to overrule our caselaw concerning statutory employer immunity, and instead

allow an injured employee of a subcontractor to recover for his workplace injury **both** under the [WCA] against his direct employer **and** civilly in a court of law against the general contractor for its negligence **if** the general contractor's secondary liability does not transform into primary liability — *i.e.*, because the subcontractor made payment under the Act. . . .

determining the defendant established all the factors under **McDonald**. *See id.* at 686-87. The Supreme Court recalled the trial court had issued a pre-trial order, precluding the defendant “from raising the statutory employer defense at trial in any manner whatsoever.” *Id.* at 688. The Court thus reasoned “there was no record on which the Superior Court could have assessed whether [the defendant] satisfied the first, second, and fourth elements of the **McDonald** test.” *Id.* at 688. The Court further explained:

[W]here a general contractor establishes that it is the statutory employer of an injured employee of a subcontractor, then the court of common pleas lacks jurisdiction to consider the employee’s claim that the general contractor was negligent.

In that vein, whether the general contractor is the statutory employer of the injured employee of the subcontractor is a question of law that **a court must first decide** before addressing the merits of the employee’s negligence claim.

Here, [the defendant] first raised the statutory employer defense in a motion for summary judgment, which the trial court denied without any explanation. At that point, however, once the trial court’s jurisdiction was placed into question, [the defendant] should have been afforded the opportunity to develop a record and obtain a ruling thereon **before** the start of the jury trial. . . .

Yoder, 345 A.3d at 689 (some emphasis in original and some added, paragraph breaks added, and citations omitted).

On appeal, ICC relies on the above passage and argues that the trial court failed to rule on its WCA statutory employer defense **before** trial. ICC’s

Yoder, 345 A.3d at 673 (emphases in original). The Court rejected Yoder’s argument. *See id.* at 680-84.

Brief at 49. ICC asserts that **Yoder** decreed that the question, of whether a contractor is a statutory employer, implicates the trial court's jurisdiction to consider an employee's claim of negligence. **See** ICC's Reply Brief at 11.

Hernandez replies that a pre-trial ruling was **not** required in this case because, "unlike in **Yoder**, there was a significant factual record developed . . . on these statutory employer issues" and the trial court denied ICC's statutory defense based on "this well-developed record." Hernandez's Brief at 51. Hernandez asserts that in any event, the trial court did rule on ICC's statutory employer claim, when it denied its "fully briefed" motion for summary judgment. **Id.**

First, we determine the pre-trial denial of ICC's motion for summary judgment is akin to the **Yoder** trial court's denial of the defendant's motion *in limine*, where the Supreme Court found the trial court had not in fact ruled on the defendant's **McDonald** arguments. **See Yoder**, 345 A.3d at 674, 689 (noting the trial court heard oral argument but denied the motion *in limine* "without any explanation" and concluding that the defendant "should have been afforded the opportunity to develop a record and obtain a ruling thereon **before** the start of the jury trial"). Here, although the trial court denied ICC's motion for summary judgment, notwithstanding any accompanying briefs filed, it provided no reasoning beyond the statement that "issues of material fact remain in dispute." Order, 12/13/22. Significantly, mid-trial, when ICC made the oral motion for a directed verdict, the trial court made no reference

to the earlier pre-trial ruling, and instead heard and participated in extensive argument over ICC's statutory employer argument.¹⁰ **See** N.T., 2/14/23, at 158-86. The court then denied relief. **See id.** at 186. Accordingly, similarly to **Yoder**, the trial court did not "first decide" ICC's statutory employer claim "**before** the start of trial." **Yoder**, 345 A.3d at 689.

Next, we consider whether the **Yoder** Court's disposition — of vacating the judgment and remanding to the trial court to determine, in the first instance, of whether the defendant satisfied the **McDonald** test — is required here. We determine that the procedural history and record developed in the instant matter are distinguishable from those in **Yoder**. As stated above, the **Yoder** trial court denied the pre-trial motion *in limine* without "any explanation," and its Rule 1925(a) opinion, issued after the post-trial proceedings, addressed only the fifth **McDonald** factor. **See id.** at 675, 689. Here, in contrast, both parties extensively debated the statutory employer defense during the trial proceedings — first under section 302(b) with discussion of all five **McDonald** factors, and then separately under section 302(a)(1). The parties also referred to the trial evidence and arguments already presented at trial. **See** N.T., 2/14/23, at 158-86. The trial court engaged in the discussion, stating its observations and questioning counsel.

¹⁰ We note the Honorable Anne Butchart ruled on the motion for summary judgment, while the Honorable Angelo Foglietta presided over trial and post-trial proceedings.

Thus, unlike the procedural posture in **Yoder**, where the defendant had no “opportunity to develop a record,” here, both parties had the opportunity to present argument, based on evidence presented at trial, as to ICC’s statutory employer defense. A remand by this Court would merely direct the trial court to revisit an issue already raised, developed, argued, and decided on the merits, albeit **during** trial rather than **prior to** trial. Such a ruling would not only waste judicial resources, but would provide ICC a second bite of the apple on this issue.

Meanwhile, we also consider that, in considering ICC’s mid-trial oral motion for directed verdict in February 2023, the trial court properly followed the law as it was in effect at the time. The Pennsylvania Supreme Court did not issue **Yoder** announcing the above principles until October 2025, more than two and one-half years later, and just before this Court granted *en banc* review.

Finally, we emphasize that ICC has not claimed any prejudice regarding the manner and time frame in which the trial court ruled on its statutory employer defense. Instead, ICC simply quotes in isolation the **Yoder** passage, set forth above, without any discussion of the procedural history that informed the Court’s decision, nor acknowledgement that here, it had the opportunity to fully present its statutory employer defense and the trial court ruled on its merits.

For the foregoing reasons, we determine that vacating the underlying judgment and remanding for a second review of ICC's defense is not appropriate here. Accordingly, no relief is due on ICC's first issue.

III. WCA Statutory Employer Claims

In its next five issues, ICC avers the trial court erred in finding it was not a statutory employer under sections 302(a) and (b) of the WCA. We reiterate that ICC asserted it was a statutory employer in motions for a directed verdict and JNOV, and the trial court denied them.¹¹ We consider the applicable standards of review:

[W]e must consider the evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner. Our standard of review when considering motions for a directed verdict and judgment notwithstanding the verdict are identical. We will reverse a trial court's grant or denial of a [JNOV] only when we find an abuse of discretion or an error of law that controlled the outcome of the case. Further, the standard of review for an appellate court is the same as that for a trial court.

There are two bases upon which a [JNOV] can be entered[:] one, the movant is entitled to judgment as a

¹¹ On appeal, Hernandez argues ICC has waived its WCA immunity claims because it did not raise them until the close of his case. **See** Hernandez's Brief at 14. However, immunity under the WCA implicates the court's subject matter jurisdiction and thus is not waivable and "may be raised at time." **Yoder**, 345 A.3d at 686.

Additionally, ICC challenges the trial court's denial of its motion for a compulsory nonsuit. However, this Court has explained that once a defense is presented at trial, a trial court's refusal to grant a nonsuit becomes moot. **See Whitaker v. Frankford Hosp.**, 984 A.2d 512, 517 (Pa. Super. 2009). We therefore limit our review of ICC's first five issues to the trial court's denial of a directed verdict and JNOV.

matter of law[;] and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that, even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in his favor. Whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Determinations of credibility [and conflicts in evidence] are for the fact finder.

Janis v. AMP, Inc., 856 A.2d 140, 143-44 (Pa. Super. 2004) (citations omitted).

With respect to the WCA, this Court has explained:

By way of background, under the WCA, employers must pay workers' compensation benefits, regardless of negligence, to employees who sustain injuries in the course of their employment. **See** 77 P.S. § 431. In exchange for receiving these benefits without having to prove negligence, employees may not sue their employers in tort for injuries they incurred in the course of their employment. **See** 77 P.S. § 481(a). In other words, with respect to work-related injuries, the employers have immunity from tort liability.

. . . [P]ursuant to Section 302(a) of the WCA, codified at 77 P.S. § 461, certain contractors who meet a specialized definition take on secondary liability for the payment of workers' compensation benefits to the injured employees of their subcontractors. **See** 77 P.S. § 461; **see also Six L's Packing Co. v. W.C.A.B. (Williamson)**, . . . 44 A.3d 1148, 1157 (Pa. 2012). Thus, in the event the subcontractor-employers cannot or will not pay workers' compensation benefits to their subcontractor-employees, these contractors assume workers' compensation liability. 77 P.S. § 461. As such, despite not being the actual employers of the subcontractor-employees, these contractors are considered "statutory employers" of the subcontractor-employees due to their treatment under the WCA. Like the treatment of actual employers under the WCA, in return

for assuming secondary liability for the payment of workers' compensation benefits, statutory employers enjoy immunity in tort for injuries the subcontractor-employees receive during the course of their employment. **See** 77 P.S. § 481(a); **Doman v. Atlas America, Inc.**, . . . 150 A.3d 103 (Pa. Super. 2016). The contractors enjoy this immunity "by virtue of statutory-employer status alone, such that it is accorded even where the statutory employer has not been required to make any actual benefit payment."

Dobransky v. EQT Production Co., 273 A.3d 1133, 1134-35 (Pa. Super. 2022) (*en banc*) (some citations omitted).

Here, ICC claims status as a statutory employer, and hence immunity from tort liability, under sections 302(a) and (b) of the WCA, which appear at 77 P.S. §§ 461 and 462, respectively. We address each subsection in turn.

A. Section 302(a)

Section 302(a) of the WCA deems a contractor the employer of a subcontractor's employee, and thus entitled to immunity from tort liability, under the following circumstances:

A contractor who subcontracts all or any part of a contract and his insurer shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured its payment as provided for in this act. Any contractor or his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses from the subcontractor primarily liable therefor.

For purposes of this subsection, a person who contracts with another (1) to have work performed consisting of (i) **the removal, excavation or drilling of soil, rock or minerals**, or (ii) the cutting or removal of timber from lands, or (2) to have work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person shall be deemed a contractor, and such other person a subcontractor.

This subsection shall not apply, however, to an owner or lessee of land principally used for agriculture who is not a covered employer under this act and who contracts for the removal of timber from such land.

77 P.S. § 461 (emphasis added).

In issues involving statutory construction, “this Court’s standard of review is plenary and non-deferential.” ***Martin v. DOT, Bureau of Driver Licensing***, 905 A.2d 438, 443 (Pa. 2006). “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S.A. § 1921(a). A “statute’s plain language generally offers the best indication of legislative intent.” ***Martin***, 905 A.2d at 443.

ICC’s second through fourth questions presented concern the definition of “excavation,” as it appears in section 302(a). The WCA does not define this term. **See** 77 P.S. §§ 21-29 (“Definitions”). We review the parties’ arguments before the trial court, as well as the court’s ruling. At trial, in its oral motion for a directed verdict, ICC argued that the “trenching” work performed here met the statute’s requirement for “the removal the excavating of the soil into a new location.” N.T., 2/14/23, at 183. The trial court responded: “I’m not sure if [section 302(a)] stands for the proposition that simply by . . . digging a trench, no other test being applied . . . the contractor is the statutory employer.” ***Id.*** at 186. The court thus denied relief.

After the jury’s verdict, at the hearing on post-trial motions, ICC reraised this claim. ICC contended that “the principal objective of the

contract” was trenching and excavation: “Workers are digging.” N.T., 6/7/23, at 25-26. ICC argued that: “the plain meaning of excavation is to dig cavities;” there was “nothing in the statute that would suggest . . . excavating materials to use for some other useful purpose;” and “it’s not important . . . whether the soil was to be used for some other reason.” **Id.** at 34.

Hernandez responded that: section 302(a) addressed “the removal, excavation or drilling of soil, rock or minerals;” this section “very clearly speaks to . . . the extraction of materials so that those materials could be harnessed and used for some other purpose,” and the statute did not contemplate the mere “digging [of] a hole and replacing it.” **Id.** at 27-28. Hernandez reasoned that here, “the trenching was ancillary to the . . . job [of] lay[ing] conduit for the track and . . . the trains,” and the digging was temporary, as the workers refilled the hole once they laid the wires. **Id.** at 28. Hernandez compared this work to installing a fence: “[A] fence installer has to dig a hole . . . to install the fence [post,] but no one would say [he] was an excavator or hired for excavation.” **Id.** at 24, 28. Hernandez claimed that if the trial court adopted ICC’s broad interpretation, all general contractors would have statutory employer immunity because “virtually every construction” project in Pennsylvania involved work “below the ground.” **Id.** at 29.

The trial court ultimately denied ICC relief. In its opinion, the court explained that it rejected ICC’s interpretation of the term, “excavation,” to

include trenching. Trial Court Opinion, 12/19/23, at 14. The court considered that if it were to adopt this interpretation, then “nearly every single construction contract would extend statutory employer immunity to a general contractor,” as all construction contracts “require some degree of earth moving[.] Trenching is necessary for laying pipes, sewage lines, telephone wires, and electrical cables — all common household necessities[.]” **Id.** at 14-15. Instead, the trial court found section “302(a) is triggered where the excavation is for purpose of extracting minerals as opposed to a momentary displacement of soil, as in trenching, within a construction project.” **Id.** at 15. The trial court distinguished excavation, which “requires the removal of soil,” from trenching, which “requires that the soil be removed for a purpose and replaced.” **Id.**

Additionally, the trial court reasoned “there is no case law [providing section] 302(a) protections to a construction accident.” **Id.** Instead, Pennsylvania courts have applied section 302(a) “in a very limited universe of cases:”

Dobrasky, 273 A.3d at . . . 1139-44 (. . . analyzing the application of section 302(a)(1)(i) in the context of an accident . . . at a **natural gas well site**); **Doman** 150 A.3d at 104 (. . . analyzing the application of section 302(a)(1)(i) in a case involving an accident . . . at an **oil and gas drilling site**); [**Delich v. Workmen’s Compensation Appeal Bd.**, 661 A.2d 936, 936-37 (Pa. Cmwlth. 1995)] (. . . analyzing 302(a)(1)(i) in the context of an accident . . . during **timber harvesting operations**); **Coleman v. Chief Oil & Gas, LLC**, 2022 WL 821167 (M.D.Pa. . . . 2022) (applying section 302(a)(1) to a case involving an accident . . . during **natural gas well drilling operations**).

Trial Court Opinion, 12/19/23, at 16 (unnecessary capitalization omitted). The trial court summarized: "Routine construction tasks such as laying electrical conduit are not contemplated by section 302(a)." **Id.** at 16 (unnecessary capitalization omitted).

On appeal, ICC contends that the trial court erred in restricting the term "excavation" to the extraction of minerals, and in distinguishing "the temporary removal of soil for a particular purpose." ICC's Brief at 36. ICC cites Webster's Dictionary definition of "to excavate," which is "to form a cavity or hole in[,] to form by hollowing[, or] to dig out and remove." **Id.** at 35 (*quoting* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985)). ICC reasons that the plain language of section 302(a) refers to the "removal, excavation or drilling of soil, rock **or** minerals," and thus "reasonably encompasses all activities necessary to the creation of the cavity which includes trenching." **Id.** at 36. Accordingly, ICC claims, "the reason for the trenching operation is immaterial," and the "court erred in concluding that MSI was not excavating simply because of the intended purpose of laying conduit in the trench." **Id.** at 36-37. ICC further claims that section 302(a) "evinces no intent to carve out construction site accidents." **Id.** at 37. ICC challenges the court's "overbreadth argument — that all construction projects involve some degree of earth movement." **Id.** at 38. In support, it reasons:

Earth movement, such as grading or importing and dumping fill material, is simply not excavation under a plain and ordinary sense, nor is digging a hole to sink a post or fence. . . . Rather, it applies to the injured employees of a subcontractor that has

contracted to perform work consisting of excavation for the prime [sic] contractor.

Id. ICC maintains “the WCA is remedial in nature” and “the legislative intent was to broaden liability for the payment of worker’s compensation benefits to statutory employers to protect against the risk of non-payment by the injured worker’s direct employer.” **Id.** at 39 (unnecessary capitalization omitted).

Hernandez counters that Pennsylvania courts have applied section 302(a) only to an “extremely narrow type[] of cases . . . involving oil, gas, and mineral extractions and timber harvesting[,]” and have “**never**” applied it “to a construction project accident.” Hernandez’s Brief at 18 (emphasis in original). Hernandez’s Brief at 18 (emphasis in original). Hernandez reasons that ICC’s interpretation of “excavation” would “dramatically expand statutory immunity . . . to any project that involves any movement of soil, even if is merely a temporary disturbance of the soil,” or to any work involving “the use of shovels.” **Id.** at 18-19. Such a result would be “absurd,” and would grant immunity to general contractors “in **all** cases involving construction site work.” **Id.** at 19 (emphasis in original). Additionally, Hernandez argues “excavation” must be the “principal purpose” of a contract in order for section 302(a) to apply. **Id.** at 13.

With respect to the question of whether ICC qualified as a statutory employer, we reiterate that pursuant to **Yoder**, we review the record developed before the trial court. **See Yoder**, 345 A.3d at 689. After careful review of the record, we reject, as did the trial court, ICC’s interpretation of

the term “excavation,” within section 302(a), to include the trenching work performed here. We reiterate that section 302 addresses “a person who contracts with another (1) to have ***work performed consisting of . . . the removal, excavation or drilling of soil***, rock or minerals, . . . or (2) to have work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person.” 77 P.S. § 461 (emphasis added). Webster’s Dictionary defines the term, “consisting of,” to mean “to be formed or made up of (specified things or people).” ***Id.*** WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1985). The dictionary also defines “excavation” to mean “the action of process of excavating.” ***Id.*** As ICC points out, Webster’s Dictionary, in turn, defines “to excavate” as: “to form a cavity or hole in;” “to form by hollowing out;” “to dig out and remove;” or “to expose to view by or as if by digging away a covering.” ***Id.***

While MSI’s trenching work included the digging and removal of soil, such digging was incidental to the primary purpose of the work, which was to lay conduit pipe. MSI was not employed merely to remove or excavate soil, but instead to lay conduit pipe. We disagree with ICC’s arguments that “the reason for the trenching operation is immaterial,” and that “all excavations in an industrial or construction setting are for some intended purpose.” ICC’s Brief at 36. Such a broad interpretation ignores the phrase, “consisting of,” which immediately precedes “the removal, excavation or drilling of soil.” 77 P.S. § 461. Reading these terms together, we construe section 302(a) as

contemplating the contracting with another to have work, which is “made up of” — and not merely incidentally including — the removal or excavation of soil. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1985).

Additionally, ICC has cited no caselaw, and we have found none, granting a general contractor statutory employer immunity under section 302(a) where an injured employee of a subcontractor had moved soil, rock, or minerals in the manner that Hernandez did at MSI’s direction. Instead, as the trial court aptly pointed out, Pennsylvania Courts have only considered the application of section 302(a) with respect to accidents occurring at: a natural gas well site, **see Dobransky**, 273 A.3d at 1139-44; an oil and gas drilling site, **see Doman**, 150 A.3d at 104; during natural gas well drilling operations, **Coleman**, 2022 WL 821167 at *3; and during timber harvesting operations, **see Delich**, 661 A.2d at 936-37.¹² We decline to extend section 302(a) statutory employer immunity to the particular work performed in this matter — digging trenches and laying conduit pipe.

For the foregoing reasons, we determine that the plain language of section 302(a) did not evince a legislative intent to include the type of work performed here as “excavation.” 77 P.S. § 461; **see also** 1 Pa.C.S.A. § 1921(a); **see also Martin**, 905 A.2d at 443. Accordingly, we conclude that

¹² While the decisions of the Commonwealth Court and federal district courts are not binding on this Court, they provide persuasive authority, and we may review them for guidance when appropriate. **See Ruff v. York Hosp.**, 257 A.3d 43, 60 n.7 (Pa. Super. 2021); **see also 9795 Perry Highway Mgmt., LLC v. Bernard**, 273 A.3d 1098, 1106 n.6 (Pa. Super. 2022).

ICC was not entitled to statutory employer immunity under section 302(a). Thus, no relief is due on ICC's second, third, and fourth questions presented.

In ICC's fifth issue, it claims the trial court erred in finding that it did not qualify for immunity under the third category of contracted work identified under section 302(a) of the WCA: "work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person[.]" 77 P.S. § 461.

At trial, it was undisputed that MSI was contracted by ICC to provide trenching and watchperson services. It was MSI, not ICC, which performed the trenching and related safety measures for workers engaged in the refitting of electrical conduit lines running alongside SEPTA's train tracks and rights of way. There was no evidence that such work was a regular or recurrent part of **ICC's** business, occupation, profession or trade.

Hare, the owner of ICC, testified at trial to all of the following. ICC: has existed for forty-two years; has performed jobs for SEPTA for about thirty years; and first began contracting to provide trenching and watchperson services on SEPTA projects in 2012. Prior to that point, ICC had only contracted to provide SEPTA with services consisting of "tree work, landscaping, janitorial work[,], and snow removal." N.T. Trial, 2/14/23 P.M., at 105. When ICC first agreed to provide trenching and watchperson services to SEPTA in 2012, ICC had the role of "general contractor," with the duty to "supply the crew number that was requested, [and the] number of people that

were requested to do the trenching[.]” ***Id.*** at 111. This work was ***always*** subcontracted to MSI, and the workers for trenching services were considered MSI employees. ***See*** N.T. Trial, 2/6/23 P.M., at 33-34 (“The contract for SEPTA is with [MSI], that we work for [MSI] when we trench.”). ICC presented no evidence that an ICC employee had ever provided trenching services to SEPTA or to any other party.

The record instead supports the trial court’s finding that “ICC was in [the] business [of] providing janitorial and landscaping services to SEPTA and for the company’s history was in the janitorial and landscaping service.” Trial Court Opinion, 12/19/23, at 19. With respect to trenching and watchperson services, the record established that ICC operated as a project manager which always subcontracted such work to MSI; ICC never performed those services itself. ***See id.*** Because the performance of trenching and watchperson services were only a regular and recurrent part of ***MSI’s*** business, occupation, profession, or trade, ICC could not show it was entitled it to tort immunity under section 302(a)(2) of the WCA. We thus conclude the trial court did not err in finding this subsection was inapplicable to ICC.

B. Section 302(b)

ICC’s sixth issue, and final statutory employer claim, is whether the trial court erred in ruling it failed to qualify as a statutory employer under section 302(b) of the WCA, which appears at 77 P.S. § 462.¹³ This subsection is the

¹³ Section 302(b) of the WCA provides:

more commonly invoked test for a statutory employer, and it applies when a contractor can establish all five of the following elements:

(1) An employer who is under contract with an owner or one in the position of an owner. (2) Premises occupied by or under the control of such employer. (3) A subcontract made by such employer. (4) Part of the employer's regular business entrusted to such subcontractor. (5) An employee of such subcontractor.

McDonald, 153 A. at 426. "In determining whether a party is a statutory employer, courts should construe the elements of the **McDonald** test strictly and find statutory employer status only when the facts clearly warrant it."

Peck v. Del. Cty. Bd. of Prison Inspectors, 814 A.2d 185, 189 (Pa. 2002).

Finally, we reiterate that a directed verdict and JNOV are only proper where "the movant is entitled to judgment as a matter of law [and/or] the evidence is such that no two reasonable minds could disagree that the

Any employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of such employer's regular business entrusted to that employe or contractor, shall be liable for the payment of compensation to such laborer or assistant unless such hiring employe or contractor, if primarily liable for the payment of such compensation, has secured the payment thereof as provided for in this act. Any employer or his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses from another person if the latter is primarily liable therefor. For purposes of this subsection (b), the term "contractor" shall have the meaning ascribed in section 105 of this act.

77 P.S. § 462.

outcome should have been rendered in favor of the movant.” **Janis**, 856 A.2d at 143.

ICC argues the record evidence established the **McDonald** factors above. It maintains:

ICC served as the general contractor[;] it was regularly on site, supplied the watchman, controlled the assignment of workers to the projects, supplied the tools and equipment for the performance of the work, coordinated with the project owner, SEPTA[,], and was charged with the authority for the manner in which the work was to be done and safety on the job site[.]

The trial court relied on evidence that a SEPTA employee determined the location and dimensions of the trench; yet control need not be exclusive and ample evidence existed as to ICC’s control and responsibility for the project apart from the physical location and dimensions of the trench.

ICC’s Brief at 48-49 (paragraph break added).

The trial court cited ample record evidence to deny JNOV, much of it presented by ICC, showing that SEPTA exercised actual control over the worksite on which Hernandez was injured, and that ICC did not continuously occupy the premises. The court thus concluded the second **McDonald** element — that the premises were “occupied by or under the control of” the employer — was not met. **See McDonald**, 153 A. at 426. Indeed, ICC’s position at trial was that it could not be liable because SEPTA: was ultimately responsible for training MSI’s employees on how their work was to be done; provided daily briefings to MSI’s employees at the job site regarding work and safety operations; determined trench depth and distance from SEPTA’s lines; and enforced SEPTA’s safety rules.

The trial court further considered that it was “indisputable that ICC did not have a trailer on site.” Trial Court Opinion, 12/19/23, at 11. Hare himself testified: he was not at the worksite every day; on the days when he did appear, it was for a limited period; and he was absent on the day that Hernandez was injured. **See id.** Additionally, “it was not established that ICC had only employees on site whenever . . . Hare was not present.” **Id.**

Strictly construing this element of the **McDonald** test, we conclude ICC did not indisputably establish it was entitled to judgment pursuant to section 302(b) of the WCA. Even assuming that ICC could, or did, present some evidence that it sufficiently controlled the worksite, there remained a dispute of fact as to the extent to which it occupied or exercised actual control over the premises on which Hernandez was injured. Viewing the facts in the light most favorable to Hernandez as the verdict winner, the trial court did not abuse its discretion or commit an error of law in denying ICC’s motion for JNOV or directed verdict. **See Janis**, 856 A.2d at 143-44; **see also** Trial Court Opinion, 12/19/23, at 8-13. For the foregoing reasons, we conclude no relief is due on ICC’s sixth claim, invoking statutory employer status under section 302(b).

IV. Evidentiary Claims

A. Cross-Examination of Hare About ICC’s Alleged Violation of Provisions of the SEPTA Contract

In its seventh through tenth issues, ICC generally challenges the trial court’s evidentiary rulings, which permitted the cross-examination of Hare as

to the company's alleged violations of certain provisions of its contract with SEPTA. By way of background, we summarize the following. A "Contractor Integrity Provision," in the SEPTA contract, prohibited ICC from having a financial interest in a subcontractor. Additionally, ICC was required to allocate at least fourteen percent of the total value of the contract with SEPTA¹⁴ to one or more DBEs, owned by a woman or a person of a minority group.¹⁵

At trial, Hernandez sought to cross-examine Hare regarding these provisions, and to elicit, specifically, testimony that: (1) Hare was also the owner of MSI, the subcontractor; (2) MSI was the designated DBE subcontractor; but MSI was not in fact a minority-owned business because Hare is a Caucasian man.¹⁶ ICC objected, arguing such evidence was not relevant to Hernandez's negligence claims at issue.¹⁷ **See** N.T., 2/14/23 P.M., at 33 (ICC's counsel arguing, "**Relevance**. We're talking about a train accident here. . . . [T]he business integrity [provision] has nothing to do with this case. And I don't understand why it's being shown.") (emphasis added).

¹⁴ The total amount of the contract between ICC and SEPTA was \$2,943,000. **See** N.T., 2/10/23 A.M., at 4.

¹⁵ This provision applied only if ICC opted to engage any subcontractors; it did not apply if ICC did not hire any subcontractors. **See** N.T., 2/14/23 P.M., at 58.

¹⁶ We reiterate that "MSI" stands for Minority Services, Inc.

¹⁷ Generally, evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 403(a)-(b).

Over a lengthy sidebar discussion, Hernandez responded that evidence — that Hare signed the SEPTA contract representing he would abide by certain provisions, but he ultimately did not — would go directly to his truthfulness. N.T., 2/14/23 P.M., at 33-34. The trial court agreed, stating, at separate times: (1) “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 to whether . . . the jury [will] believe other things that he said;” and (2) “[W]hen 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.” *Id.* at 34, 35 (emphases added). ICC did not dispute these points, but instead continued to argue the evidence was not relevant. *See id.* at 34 (ICC’s counsel responding to the trial court, “[B]ut what does that have to do with the accident in question?,” and “Yeah, but it has to be relevant to what we are talking about. This is not a breach of contract case”).

The trial court ruled that Hernandez could ask the questions of Hare: “[T]hese questions were meant to demonstrate to the jury, subject to your questioning of this witness, that [Hare] **was less than truthful at various points in this contract**. Whether or not it had anything to do with the actual accident, to me . . . is not the crux of the question.” *Id.* at 47.

On appeal, ICC avers the trial court erred in permitting Hernandez to cross-examine Hare about ICC’s alleged breach of specific provisions of the

contract with SEPTA. In support, ICC asserts that Pa.R.E. 608(b)¹⁸ prohibits the introduction of specific instances of a witness' conduct to attack that witness' character or truthfulness. **See** ICC's Amended Brief at 42. Additionally, ICC alleges the trial court failed to perform the Pa.R.E. 403 balancing test of probative value and prejudice.¹⁹ **See id.** at 43-44. To this end, ICC maintains that Hernandez's evidence improperly "suggest[ed] to the jury that ICC manipulated government set aside rules for DBEs and did not adhere to 'business integrity' requirements of the contract, to lead the jury to conclude that ICC was a bad actor." **Id.** at 45 (emphasis omitted).

¹⁸ Rule 608 provides, in pertinent part:

(a) Reputation Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. . . .

(b) Specific Instances of Conduct. Except as provided in Rule 609 (relating to evidence of conviction of crime),

(1) 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(a)-(b)(1).

¹⁹ Rule 403 states: "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403.

We determine ICC has waived these discrete evidentiary theories, as it did not raise them before the trial court, and instead presents them for the first time on appeal. “Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a).

[I]n order to preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings before the trial court. Failure to timely object to a basic and fundamental error . . . will result in waiver of that issue. On appeal, the Superior Court will not consider a claim which was not called to the trial court’s attention at a time when any error committed could have been corrected By specifically objecting to any obvious error, the trial court can quickly and easily correct the problem and prevent the need for a new trial. Additionally, the appellate court should not be required to waste judicial resources correcting a problem that the trial court could have easily corrected if it had been given the opportunity to avoid the necessity of granting a new trial.

Tong-Summerford v. Abington Mem’l Hosp. & Radiology Grp. of Abington, 190 A.3d 631, 645 (Pa. Super. 2018) (citations omitted). A claim is “waived when the appellant’s argument on appeal advanced a different legal theory than that offered at trial and post-trial.” ***Ruff***, 257 A.3d at 52 (citation omitted).

Preliminarily, we note that although both parties filed motions *in limine* and the trial court conducted extensive hearings on them, neither party raised the scope of cross-examination of ***Hare*** about his or ICC’s compliance with the SEPTA contract provisions. ***See*** N.T., 2/2/23, at 3-45.

Additionally, at trial, ICC did not argue that Hernandez was prohibited from presenting specific instances of conduct in order to attack Hare’s

credibility or truthfulness. Meanwhile, both the trial court and Hernandez raised this issue. Hernandez argued he should be permitted to present evidence that Hare signed the contract but failed to comply with it, and this went “directly to his truthfulness.” N.T., 2/14/23 P.M., at 33-34. The trial court ruled, similarly, that a party could present evidence that a witness was not truthful “when he did certain things” or “was not credible at a certain point.” ***Id.*** at 34, 35. These statements went to a Rule 608(b) issue — whether Hernandez could present a specific instance of Hare’s conduct to show his truthfulness. However, ICC did not dispute this reasoning, and instead argued another evidentiary theory: relevance. Similarly, ICC failed to preserve a claim that the trial court failed to perform the Pa.R.E. 403 balancing test of probative value and prejudice, or that the evidence was prejudicial.²⁰

The Superior Court sits as an error-correcting court, and we reiterate that we may “not consider a claim which was not called to the trial court’s attention at a time when any error committed could have been corrected.” ***Tong-Summerford***, 190 A.3d at 645; ***see also Lineberger v. Wyeth***, 894 A.2d 141, 147 (Pa. Super. 2006) (citation omitted). Accordingly, ICC has waived all of these issues for our review. ***See*** Pa.R.A.P. 302(a); ***see also Tong-Summerford***, 190 A.3d at 645.

²⁰ We note that at trial, ICC raised a prejudice argument concerning the admission of other evidence — the total value of the ICC-SEPTA contract. ***See*** N.T., 2/14/23 P.M., at 47-48. However, ICC did not argue prejudice with respect to the cross-examination of Hare regarding violations of the integrity and DBE contractual provisions.

For the foregoing reasons, no relief is due on ICC's seventh through tenth issues.

B. Testimony by Hernandez's Expert, DaSilva, Regarding ICC's Compliance with the SEPTA Contract

ICC's eleventh claim is that the trial court abused its discretion in admitting the testimony of Hernandez's expert witness, Gustavo DaSilva ("DaSilva"), about the content of ICC's contract with SEPTA and the incorporation of specifications for the methods by which the trenching project was to be carried out.

"It is well-settled that '[e]videntiary rulings are committed to the sound discretion of the trial court, and will not be overruled absent an abuse of discretion or error of law.'" *Tillery v. Children's Hosp. of Phila.*, 156 A.3d 1233, 1243 (Pa. Super. 2017) (citation omitted). Generally, "[a]ll relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. Evidence is relevant if it tends "to make a fact more or less probable" and "the fact is of consequence in determining the action." Pa.R.E. 401(a)-(b). Nevertheless, a trial "court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. "Importantly, if a party presents evidence about a certain issue, then they open the door to rebuttal evidence that may not otherwise have been admissible." *Tillery*, 156 A.3d at 1243.

For ease of review, we review the relevant procedural history. ICC filed a motion *in limine* to preclude DaSilva from testifying as to whether ICC breached its contractual obligations to SEPTA. ICC argued such matters were irrelevant, collateral to the negligence claims that would go before the jury, and outside the witness' expertise. After a hearing, the trial court **granted** this motion. **See** N.T. 2/3/23, at 25-26; Trial Court Order, 2/3/23.

However, at trial, ICC asked DaSilva on cross-examination whether he knew if ICC had fulfilled the technical requirements of its earlier SEPTA contracts "back in 2008, 2011." N.T. Trial, 2/9/23 P.M., at 131. DaSilva did not answer, responding only that he failed to understand the question. **See id.** The trial court then permitted Hernandez to ask DaSilva about ICC's performance of its SEPTA contracts, finding that ICC had opened the door. The following exchange occurred:

[Trial Court]: My [pretrial] ruling was — and [Hernandez and ICC] argued very strenuously and I granted your motions — that [DaSilva] is not to mention the contract, nor is he to mention terms of a contract or breach of a contract.

But [ICC was] the first one to bring up the fact that there was a contract between ICC and SEPTA. When you did it, I had proverbial jaw-drop, but you did it. And now I'm going to permit [Hernandez] to ask the questions about the contract.

* * * *

Not to interpret the legalese of the contract, as [Hernandez's counsel] indicated, but the fact that there was an obligation under a contract to apply the —

* * * *

— specifications that are attached [to the contract.²¹]

[ICC]: Your Honor, asking the witness as to when the contract was executed doesn't open the door, in my opinion . . . respectfully, for a witness to go unbridled into the contract terms.

[Trial Court: Hernandez's counsel] just said he's not going unbridled. But he's simply going to ask [DaSilva] about the contract that you brought up.

[ICC]: What are the specifics is he going to be asking . . . DaSilva about this contract?

[Trial Court]: I don't know. You want an offer of proof?

[ICC]: Yes, Your Honor.

[Hernandez]: There was a contract entered into March 8, 2018, signed off [by] Hare. And it says, "Contractor shall perform those services and supply those products described in the specifications which are attached hereto, and made part of the contract, and hereinafter called 'the work.'" And then the followup question of: And, sir, were those specifications in fact attached to the contract?

[ICC]: Okay. If that's it, those two questions, I'm fine.

[Trial Court]: Okay. We're good.

[Hernandez]: Okay.

Id. at 171-73.

²¹ DaSilva testified that the contract between ICC and SEPTA, executed on March 8, 2018 and governing the trenching work that Hernandez performed, incorporated an attached section entitled, "Specifications." This section was a standalone document created on September 8, 2011, that was apparently incorporated on a regular basis into SEPTA's contracts for construction projects. The document outlined the specifications for trenching and support activities, including requirements for worker safety. DaSilva testified that these terms required ICC to object to the location of workers if it believed they were in danger. **See** N.T. Trial, 2/10/23 A.M., at 9-18.

On re-direct examination, Hernandez asked DaSilva to discuss specific provisions of the contract between ICC and SEPTA, which required the contractor for the trenching work to post watchpersons and protective barriers. **See** N.T., 2/10/23 A.M., at 14-20. DaSilva opined that watchperson services were not adequately carried out, and that the barriers required by the contract's "Specifications" provisions were not set up next to the trench where Hernandez was injured. **See id.** at 18-19.

After review of the record, we conclude the trial court did not abuse its discretion in finding ICC opened the door to DaSilva's testimony. **See Tillery**, 156 A.3d at 1243. When ICC asked DaSilva on cross-examination whether ICC had fulfilled the technical requirements of the SEPTA contract, this questioning opened the door for Hernandez to clarify for the jury what those requirements were. The fact that ICC's counsel questioned DaSilva about whether the requirements had been satisfied suggested to the jury that ICC's performance was relevant in the case. ICC could not have been prejudiced by Hernandez's counsel posing the same, or related, questions to the same witness. For the foregoing reasons, no relief is due on ICC's eleventh issue.

C. Remedial Measures

ICC's twelfth claim concerns the trial court's admission of evidence that remedial measures were put into effect after Hernandez's accident. By way of background, we summarize that at trial, Hernandez presented evidence of a measure implemented after his accident. It was called "Rule 135" and

required trains to come to a full stop before reaching work areas near railings and trenches. **See** N.T. Trial, 2/7/23 A.M., at 25-27. Rule 135 had been effectuated at other jobsites, and thus it was a precaution already known in SEPTA's industry. **See id.** ICC did not dispute the feasibility of Rule 135, but contended that the implementation of it could not be used to establish ICC's liability. **See** N.T. Trial, 2/3/23 A.M., at 45-46. The trial court admitted the evidence, reasoning the remedial measures were taken only by SEPTA, and not ICC. **See** Trial Court Opinion, 12/19/23, at 25-26.

Pennsylvania Rule of Evidence 407 provides:

When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is **not** admissible against that party to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Pa.R.E. 407 (emphasis added). “[T]he common law of Pennsylvania, like that of most other jurisdictions, embodies the common law ‘subsequent repairs’ doctrine, which excludes evidence of subsequent remedial measures, at least when such evidence is offered to establish fault or culpable conduct.”

Duchess v. Langston Corp., 769 A.2d 1131, 1137 (Pa. 2001). Generally,

“the aim is to encourage measures that further necessary or added safety, or at least to avoid discouraging such measures, by removing the concern that they will be employed adversely in an action at law.” **Id.** Additionally, this Court has considered “Rule 407’s public policy rationale — that, in the modern marketplace, economic factors provide adequate motivation for mass producers to improve their defective products, such that the incentive provided by the exclusionary rule is unnecessary or irrelevant.” **Id.** at 1139 (footnote omitted).

Furthermore, the comment to Pa.R.E. 407 explains that Pennsylvania’s rule “has been modified [from its federal counterpart] to clarify that the **rule only protects the party that took the measures.**” Pa.R.E. 407, *comment* (emphasis added). The comment adds that even though the federal rule is silent on this point, federal “courts have generally held that the federal rule does not apply when one other than the alleged tortfeasor takes the action because the reason for the rule (to encourage remedial measures) is not then implicated.” **Id.** (citation omitted).

After review of the record, we conclude the trial court did not abuse its discretion in admitting the evidence of SEPTA’s subsequent remedial measures. **See Tillery**, 156 A.3d at 1243. ICC was not responsible for implementing the remedial measure; instead, it was SEPTA, a non-participant at trial. **See** Pa.R.E. 407, *comment*. Accordingly, Rule 407 affords ICC no relief, as the rule does not preclude the admission of subsequent remedial

measures against an individual **other** than the party who implemented them.

See id.

Furthermore, we deny relief on ICC's argument regarding relevance. **See** Pa.R.E. 401(a)-(b) (stating "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence to the action"). ICC contends the trial court should have excluded evidence of remedial measures because, having been implemented by SEPTA, they were not relevant to ICC's liability.

We observe that SEPTA appeared on the jury's verdict slip despite not participating in the trial, and the jury apportioned a share of the liability for Hernandez's injuries to SEPTA. It was therefore relevant to the jury's deliberation whether SEPTA's knowledge of Rule 135, and its decision not to implement it at Hernandez's worksite, unreasonably exposed Hernandez to danger.

Although it is arguable whether ICC had the authority to independently implement Rule 135, Hernandez argued in closing that ICC was negligent in part due to SEPTA's failure to adopt the safety measure at the time of the accident.²² Even assuming that the remedial measure was not relevant as to

²² Hare testified that ICC was obligated to confer with SEPTA about the safety measures needed to protect MSI's trench workers. This arguably implies that ICC had some degree of responsibility for determining, or helping SEPTA to determine, which safety measures to implement at the worksite where Hernandez was injured.

ICC, and that a cautionary instruction should have been given to that effect, we do not find that this entitles ICC to relief.

V. Jury Charge

ICC's thirteenth claim, in its statement of questions involved, is that the trial court erred in not giving the jury a cautionary instruction — that remedial measures were not relevant to the issue of whether ICC was liable for Hernandez's damages. **See** ICC's Brief at 4.

However, ICC has not included this claim in the argument section of its brief. It does not discuss why the trial court allegedly erred in denying a limiting instruction. Accordingly, ICC has waived this issue for our review. **See** Pa.R.A.P. 2119(a) (providing "the particular point [shall be] followed by such discussion and citation of authorities as are deemed pertinent"); **see also Trust Under Deed of Wallace F. Ott**, 271 A.3d 409, 421 (Pa. Super. 2021) (stating that "[w]e shall not develop an argument for an appellant, nor shall we scour the record to find evidence to support an argument," and "an appellant waives any issue he fails to develop sufficiently").

VI. Sufficiency of Standard of Care Evidence

In its final claim, ICC avers that Hernandez's expert witness, DaSilva, proffered no testimony on the applicable standard of care, including the standard of care governing "ICC in the performance of a trenching contract." ICC's Brief at 57. ICC asserts that DaSilva likewise offered no testimony as to "how that standard was breached." **Id.**

This Court has explained:

In order to hold a defendant liable for negligence, the plaintiff must prove the following four elements: (1) a legally recognized duty that the defendant conform to a standard of care; (2) the defendant breached that duty; (3) causation between the conduct and the resulting injury; and (4) actual damage to the plaintiff.

Nationwide Mutual Fire Ins. Co. v. Modern Gas, 143 A.3d 412, 415 (Pa. Super. 2016) (citation omitted). “The existence of a duty is a question of law.” ***Baumbach v. Lafayette College***, 272 A.3d 83, 89 (Pa. Super. 2022) (citations omitted and paragraph break added). “The mere fact that an accident occurred does not entitle the injured person to a verdict.” ***Rauch v. Mike-Mayer***, 783 A.2d 815, 824 n.8 (Pa. Super. 2001).

Here, the trial court found that Hernandez’s expert, DaSilva, gave competent expert testimony regarding the standard of care which ICC owed to Hernandez. **See** Trial Court Opinion, 12/19/23, at 26. DaSilva discussed his own qualifications, which included more than thirty years working in the railroad industry, and knowledge of the methods of protections afforded to workers. The trial court had ruled, without any objection, that he was qualified to testify as an expert on that subject. **See** N.T. Trial, 2/9/23 P.M., at 35-37.

DaSilva testified about ICC’s responsibilities for worker safety under prevailing industry standards. While DaSilva discussed ICC’s contractual responsibility to provide for the safety of workers by posting watchmen, he clearly indicated that ICC’s contract with SEPTA mirrored standard industry

practice. He did not, as ICC claims, simply conflate the contract with the applicable industry standards.

Further, DaSilva testified specifically that the industry standards and rules applicable to ICC's trenching project required the train tracks to be closed, and ICC to be responsible for the posting of watchpersons along the tracks. **See** N.T. Trial, 2/9/23 P.M., at 81. However, in DaSilva's opinion, ICC did not comply with its obligations under prevailing industry standards, because no ICC employees were onsite on the day of Hernandez's accident, and the tracks were not closed as trains approached the conduit trenches. **See id.** at 81-82. The trial court relied on this testimony in finding that the evidence of ICC's standard of care was legally sufficient, and we find no error in that ruling. **See** Trial Court Opinion, 12/19/23, at 26-27.

VII. Conclusion

In sum, we conclude that none of ICC's issues merits appellate relief. Accordingly, we affirm the judgment entered in favor of Hernandez.

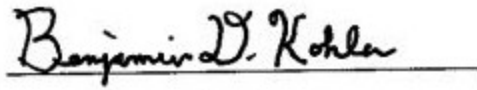
Judgment affirmed.

President Judge Lazarus, President Judge Emeritus Panella, Judge Kunselman, and Judge McLaughlin join.

Judge Sullivan concurs in the result.

Judge Stabile files a Concurring and Dissenting Opinion in which Judge Dubow and Judge King join.

Judgment Entered.

A handwritten signature in cursive script, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 10/28/2026