



# A Summary of Recent Appellate Decisions & Rules Changes

April 2006

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Daniel J. Siegel, LLC  
66 West Eagle Road  
Suite 1  
Havertown, PA 19083  
(610) 446-3457  
Fax (610) 471-0570  
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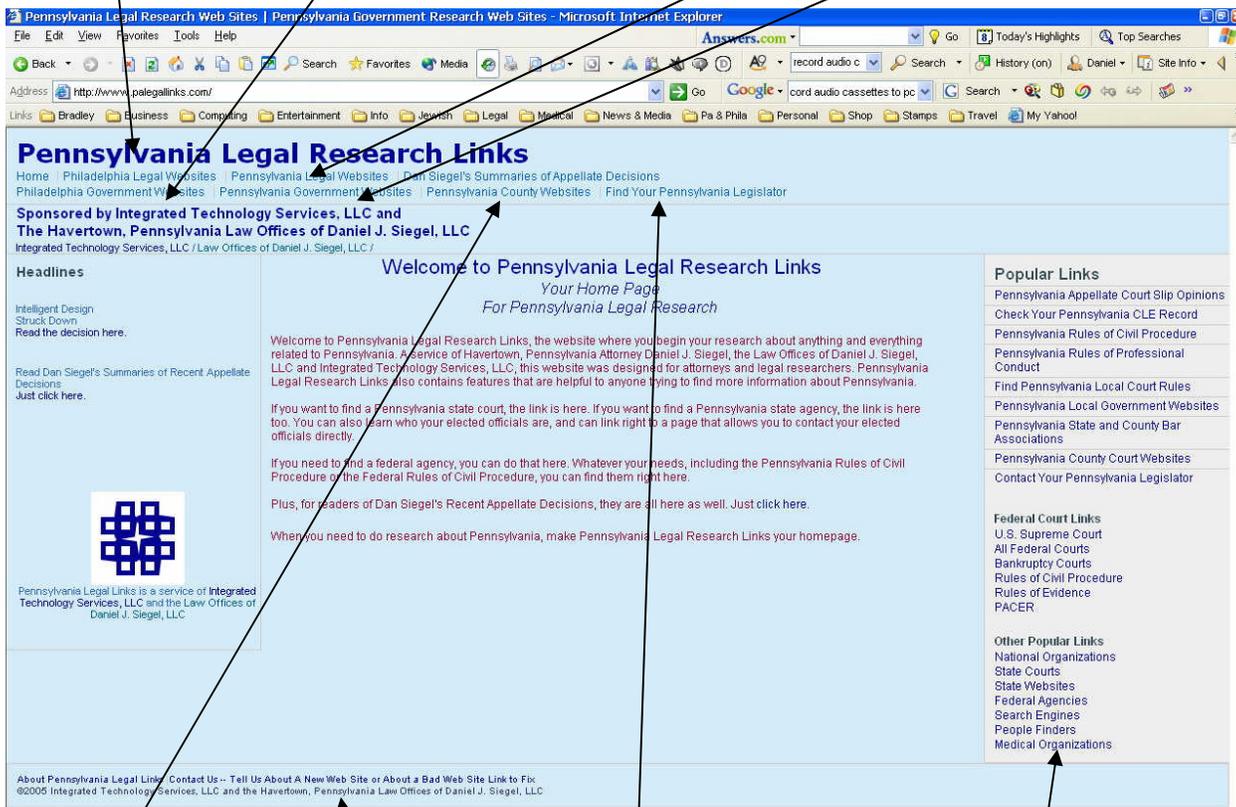
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# A Summary of Recent State & Federal Appellate & Trial Court Decisions

By Daniel J. Siegel, Esquire

LAW OFFICES OF DANIEL J. SIEGEL, LLC • HTTP://WWW.DANIELJSIEGEL.COM  
66 W. Eagle Road • Suite 1 • Havertown, PA 19083-1425  
(610) 446-3457 • Fax (610) 471-0570 • E-mail dan@danieljsiegel.com

REPORTING DECISIONS THROUGH MARCH 31, 2006

## PENNSYLVANIA STATE COURT DECISIONS

### 1. CIVIL LITIGATION

#### 1.1. Causes of Action – Learned Intermediary

##### ► Superior Court of Pennsylvania

- ◆ [Lineberger v. Wyeth](#)  
2006 PA Super 35 (February 23, 2006)

**Holding:** In a pharmaceutical liability claim against a drug manufacturer, in order to avoid having the claim barred by the learned intermediary doctrine, the plaintiff must prove that the prescribing physician would not have prescribed the drug had the manufacturer provided a different.

All decisions are “hyperlinked” to the slip opinion. All you have to do is “click” (or “ctrl + click”) on the title of the case, and if connected to the Internet, your browser will open up the decision for you to read in its entirety. Try it and see!

#### 1.2. Evidence – Intoxication

##### ► Commonwealth Court of Pennsylvania

- ◆ [Lock v. City of Philadelphia](#)  
No. 1637 C.D. 2005 (March 27, 2006)

**Holding:** When recklessness or carelessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is inadmissible as unfairly prejudicial, unless it reasonably establishes intoxication. Blood alcohol content alone may not be admitted for the purpose of proving intoxication; there must be other evidence showing that the actor’s conduct suggests intoxication. Although this case does not change existing law, it does provide an excellent summary of the law and related issues.

#### 1.3. Medical Malpractice – MCare Fund

##### ► Commonwealth Court of Pennsylvania

- ◆ [Bender v. Pennsylvania Insurance Dept.](#)  
No. 912 C.D. 2005 (February 15, 2006)

**Holding:** Under the MCare Act, 40 P.S. § 1303.101 *et seq.*, a doctor is not entitled to first dollar indemnity and cost of defense coverage in an indemnification action separate from the underlying malpractice action, to which the doctors were not a party.

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#### 1.4. Motor Vehicles Claims – Limited Tort Threshold

▶ Superior Court of Pennsylvania

- ◆ *Long v. Mejia*  
2006 PA Super 69 (March 30, 2006)

**Holding:** Affirming the long-standing rule that a defendant takes a plaintiff as he finds him, the Court rules that the determination of whether a particular injury rises to the level of a serious bodily injury under the Motor Vehicle Financial Responsibility Law requires an examination of how a particular injury effects the specific person injured. Thus, a broken pinky may not be a serious bodily injury to most people, but would be to a violinist or neurosurgeon who requires fine motor skills to retain employment.

#### 1.5. Motor Vehicle Insurance – UM/UIM Coverage Elections

▶ Superior Court of Pennsylvania

- ◆ *Blood v. Old Guard Insurance Co.*  
2006 PA Super 44 (March 2, 2006)

**Holding:** When a motor vehicle insurance coverage form contains an explicit option for selecting lower underinsured motorist benefits, and the selection was not made, nor was it crossed off or otherwise rendered inoperable, the statutory presumption of UIM policy limits equivalent to the bodily injury liability limits applies.

#### 1.6. Negligence -- Restaurants

▶ Superior Court of Pennsylvania

- ◆ *Campbell v Eitak, Inc.*  
2006 PA Super 26 (February 10, 2006)

**Holding:** The prompt summoning of medical assistance satisfies a restaurant's duty to a patron who is choking, and restaurant employees are under no legal duty to administer the Heimlich maneuver or take similar action.

#### 1.7. Unfair Trade Practices and Consumer Protection Law

▶ Superior Court of Pennsylvania

- ◆ *Lesoon v. Metropolitan Life Insurance Co.*  
2006 PA Super 67 (March 28, 2006)

**Holdings:** (1) The UTPCPL is governed by a six-year statute of limitations. If the injured party is reasonably unaware of its right to sue, the statute of limitations is tolled by the discovery rule.

(2) Compensatory damages under the UTPCPL should be calculated in relation to the terms of the underlying transaction that gave rise to the UTPCPL violation.

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## 2. WORKERS' COMPENSATION

### 2.1. Average Weekly Wage Calculations

#### ▶ Commonwealth Court of Pennsylvania

- ◆ *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*  
No. 1627 C.D. 2005 (March 15, 2006)

**Holding:** Under Section 601 of the Workers' Compensation Act, a volunteer emergency medical technician who suffers a work-related injury is entitled to an irrebuttable presumption that his or her wages shall be at least equal to the statewide average weekly wage.

- ◆ *Burkhart Refractory Installation v. Workers' Compensation Appeal Board (Christ)*  
No. 2275 C.D. 2005 (March 28, 2006)

**Holding:** When an application of Section 309(d.2) does not permit a determination of an employee's average weekly wage that reflects economic reality, the WCJ may use an alternative method of calculation the AWW. In this case, because claimant had worked less than 13 weeks at the time of the injury, did not have an expected number of weekly hours to work, only worked 12 of the 16 weeks during which he was employed, calculating the AWW by dividing claimant's gross wages by 12 was permissible.

### 2.2. Injuries and Diseases

#### ▶ Commonwealth Court of Pennsylvania

- ◆ *City of Philadelphia v. Workers' Compensation Appeal Board (Cospelich)*  
No. 1003 C.D. 2005 (February 15, 2006)

**Holding:** Hepatitis C, found to be contracted while working as a fireman, constitutes an occupational disease under both Section 108(m), before its amendment, and subsection (m.1) of the Act (the 2001 amendment to the Act).

### 2.3. Penalties

#### ▶ Supreme Court of Pennsylvania *en banc*

- ◆ *Snizaski v. Workers' Compensation Appeal Board (Rox Coal Co.)*  
No. 36 WAP 2004 (February 22, 2006)

**Holding:** When an employer files a timely request for supersedeas pursuant to the Appeal Board's regulations, it cannot be subject to a penalty award for failing to pay the underlying benefit during the pendency of the supersedeas petition. Fund reimbursement may be made for all payments actually made after supersedeas denial, including payment of benefits awarded retroactively for earlier periods of disability. Justice Newman filed a [dissenting opinion](#).

### 2.4. Statutes of Limitation

#### ▶ Commonwealth Court of Pennsylvania

- ◆ *Budd Baer, Inc. v. Workers' Compensation Appeal Board (Butcher)*  
No. 1770 C.D. 2005 (February 9, 2006)

**Holding:** The three-year statute of limitations applies to petitions filed more than three years after approval of a commutation.

## 2.5. Supersedeas Fund Reimbursement

### ▶ Commonwealth Court of Pennsylvania *en banc*

- ◆ *Mark v. Workers' Compensation Appeal Board (McCurdy)*  
No. 2753 C.D. 2005 (March 10, 2006)

**Holding:** Supersedeas fund reimbursement may be made for all payments actually made after supersedeas denial, including payment of benefits awarded retroactively for earlier periods of disability.

## 2.6. Vocational Interviews

### ▶ Commonwealth Court of Pennsylvania

- ◆ *Linton v. Workers' Compensation Appeal Board (Amcast Industrial Corp.)*  
No. 1915 C.D. 2005 (March 28, 2006)

**Holding:** An employer is not limited to and may request that an employee undergo more than one interview by a vocational expert. The Court added that the determination to grant or deny a request for a vocational examination is within the sound discretion of the Workers' Compensation Judge, and will not be reversed absent an abuse of discretion.

## NEW JERSEY DECISIONS OF INTEREST

### 1. CAUSES OF ACTION

#### 1.1. Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692-1692o

##### ▶ Superior Court, Appellate Division

- ◆ *Hodges v. Lumberman's Feinstein, Raiss, Kelin & Booker, LLC*  
No. A-5903-04T3 (March 8, 2006)

**Holding:** A law firm representing a landlord in a summary dispossess action is a "debt collector" subject to the Fair Debt Collection Practices Act, *if* the firm regularly engages in a practice prosecuting summary dispossess actions.

#### 1.2. Products Liability/Pharmaceutical Claims

##### ▶ Superior Court, Appellate Division

- ◆ *Rowe v. Hoffman-LaRoche, Inc.*  
No. A-4522-03T3 (February 28, 2006)

**Holding:** New Jersey is the proper venue, and New Jersey products liability law applies, to claims alleging that a pharmaceutical product manufactured in the state was unsafe; therefore, the domicile of plaintiff and/or the location where the injury occurred are merely fortuitous.

*Special thanks to Steve Lacheen, Esquire for suggesting the style changes for this month's newsletter, especially the links from the cover page to selected decisions.*