



A Summary of Recent Appellate Decisions From Pennsylvania & New Jersey State Courts & the U.S. Supreme Court

April 2007 Edition

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- Pa. Supreme Court affirms set-offs in auto insurance policies (see page 3)

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Fewer Decisions, Greater Importance

At least in civil cases, it appears that the number of decisions issued by Pennsylvania's appellate courts has decreased a bit this year. Despite issuing fewer opinions, the Courts have not avoided addressing some broad-ranging issues –those opinions are highlighted (and hyperlinked) in this Newsletter.

Busy, Busy, Busy

I have been very busy with both my law office and Integrated Technology Services, my legal technology consulting firm. The law practice continues to grow – and I thank the attorneys, friends and clients who continue to demonstrate confidence in me – and also look forward to working with each of you. In case you didn't know, *I have a general practice, including real estate matters, wills, civil, personal injury and commercial litigation, and, of course, workers' compensation matters – and I pay referral fees.* It is very gratifying to work with my colleagues to address their clients' needs.

On the technology side, I have been traveling and obtaining additional certifications. It is almost a job just to keep up with all of the products I sell and support; here are the most popular:

- **Legal Files** Case Management Software
- **Time Matters** Case Management Software (I'm a Certified Independent Consultant – CIC)
- **Live Note** (Deposition Software)
- **Case Map** (Case Analysis Software)
- **Summation** (Document & Evidence Review Software)
- **Sanction** (Trial Presentation Software)

Managing Partner Development Institute

Finally, I am proud to announce the creation of the Managing Partner Development Institute, a two day program on June 1-2 at Normandy Farm in Blue Bell. Designed to train managing partners and attorneys who seek to become managing partners, the Institute is the brainchild of Ellen Freedman, the Pa. Bar's Law Practice Management Consultant. Working with Ellen, Attorney David Sorin and PR consultant Mary Beth Pratt, I have been impressed with their expertise and believe our inaugural Conference will be one of many great events and offerings. For more information, give me a call or visit www.managingpartnerinstitute.org. I hope you will join us.

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By Daniel J. Siegel, Esquire

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REPORTING DECISIONS THROUGH MARCH 31, 2007

PENNSYLVANIA APPELLATE COURT DECISIONS

1. CIVIL LITIGATION & PROCEDURE

1.1. APPELLATE PROCEDURE

1.1.1. Filing Notice of Appeal

► Superior Court of Pennsylvania

- ◆ [*In re: Estate of Patricia Karschner*](#)
2007 PA Super 52 (February 28, 2007)

Holding: A Notice of Appeal may not be filed by fax.

1.2. DAMAGES

1.2.1. Punitive Damages

► Superior Court of Pennsylvania

- ◆ [*Vance v. 46 and 2, Inc.*](#)
2007 PA Super 71 (March 13, 2007)

Holding: Evidence of a tortfeasor's finances or wealth is not a necessary prerequisite to the imposition of punitive damages.

1.3. Medical Malpractice

1.3.1. Certificates of Merit

► Superior Court of Pennsylvania

- ◆ [*Shon v. Karason*](#)
2007 PA Super 86 (March 27, 2007)

Holding: This case addresses multiple issues relating to Certificates of Merit. In affirming a judgment of non pros, the Superior Court holds:

- A Certificate of Merit must be filed in any case that sets forth a claim of professional negligence – even if it includes a claim of lack of informed consent or other negligent conduct “independent of a professional duty.”
- A party *may* be excused from filing a Certificate of Merit by substantially complying with the Rules of Civil Procedure by delivering appropriate expert reports to the defendants before the filing of a judgment of non pros (*See, Harris v. Neuberger*, 877 A. 2d 1275 (Pa. Super. 2005)), although it appears that the Pennsylvania Supreme Court may rule that a Certificate of Merit is still required, even in that circumstance.

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.

- A Certificate of Merit must be filed even if the defendant healthcare provider was not properly licensed or otherwise approved to operate in Pennsylvania.
- A Certificate of Merit filed after a Praecipe for Judgment of Non Pros is filed, but before the Praecipe is docketed, is untimely.

◆ [Pollock v. Feinstein](#)

2007 PA Super 42 (February 13, 2007)

Holding: A medical malpractice plaintiff must file a Certificate of Merit even if the Complaint does not allege a deviation from the professional standard of care.

1.4. STATUTES OF LIMITATION

1.4.1. Unjust Enrichment

▶ Supreme Court of Pennsylvania

◆ [Sevast v. Kakouras](#)

No. J-40-2005 (February 20, 2007)

Holding: A claim for unjust enrichment under Section 374 of the *Restatement (Second) of Contracts*, must be filed within four (4) years of the date when the contract between the defaulting vendee and the vendor was terminated.

1.5. VENUE

1.5.1. Regularly Conducting Business

▶ Superior Court of Pennsylvania

◆ [In re: Estate of Patricia Karschner](#)

2007 PA Super 60 (March 8, 2007)

Holding: Venue is proper in a county where the record establishes that the defendants regularly conduct business. In this case, the defendant law firm derived three to five percent of its gross revenue representing individuals in Philadelphia.

1.5.2. Series of Transactions or Occurrences

▶ Superior Court of Pennsylvania

◆ [Kalker v. Moyer](#)

2007 PA Super 60 (March 8, 2007)

Holding: Two accidents occurring months apart in different counties are not part of a series of occurrences or transactions that should be joined and tried in one county.

1.6. AUTOMOBILE INSURANCE

1.6.1. SET-OFFS

▶ Supreme Court of Pennsylvania

◆ [Pennsylvania National Mutual Casualty Co. v. Black](#)

No. J-62-2006 (February 21, 2007)

Holding: A set-off provision in an automobile insurance policy, which prohibits duplicate payments (*e.g.*, liability and UM coverage) for one loss, is valid and enforceable. In this case, Eric Black was killed while riding as a passenger in a car driven by John Myers, which collided with a vehicle driven by Todd Jamison. Black's estate

sought a liability recovery from both vehicles. Because Black was a class two insured, his estate also sought UM coverage from Myers' policy, which defined an "uninsured motor vehicle" to exclude "vehicles for which liability coverage is provided ... under this policy." The policy also contained the duplicate payment provision. The carriers for both vehicles tendered their liability coverage, but Myers' carrier refused to pay UM benefits and instead filed this declaratory judgment action. The trial court entered judgment for the carrier. The Superior Court affirmed in part and reversed in part in an unpublished opinion. The Supreme reversed and entered judgment for the insurer. The Court concluded that the set-off provision was not ambiguous and did not violate public policy. Consequently, because the set-off provision did not conflict with the terms of either policy, it was enforceable. Chief Justice Cappy authored a [dissenting opinion](#), concluding that, when the result here is "measured against the objective the General Assembly intended to advance in Pennsylvania by incorporating UIM coverage into the MVFRL, the test for declaring a contract void as against public policy is met."

1.6.2. UNDERINSURED MOTORIST COVERAGE

1.6.2.1. Notice

► Superior Court of Pennsylvania

- ◆ [*American States Insurance Co. v. Estate of Braheem*](#)
2007 PA Super 23 (January 23, 2007)

Holding: A carrier may not deny a claim for underinsured motorist coverage based upon a claimant's alleged failure to provide timely notice of the claim without a hearing or other evidence of record to establish that claimant's delay resulted in prejudice.

2. WORKERS' COMPENSATION

2.1. LIMITATIONS OF ACTIONS

► Commonwealth Court of Pennsylvania

- ◆ [*Kelley v. Workers' Compensation Appeal Board \(Standard Steel\)*](#)
No. 1434 C.D. 2006 (March 6, 2007)

Holding: A claim seeking benefits for a permanent disfiguration must be filed within three (3) years from the date on which the scar became permanent. The limitations period is governed by Section 413(a) of the Act, which governs review petitions.

2.2. MARRIAGE – COMMON LAW

► Commonwealth Court of Pennsylvania

- ◆ [*Costello v. Workers' Compensation Appeal Board \(Kinsley Construction, Inc.\)*](#)
No. 831 C.D. 2006 (February 13, 2007)

Holding: A common law marriage entered into after September 17, 2003, but before January 1, 2005, is valid, thereby entitling the widow to death benefits under the Workers' Compensation Act. This decision is the "sequel" to the Court's September 1, 2003 decision in *PNC Bank v. Workers' Compensation Appeal Board (Stamos)*, 831 A.2d 1269 (Pa.Cmwlt. 2003), in which the Court abolished common law marriage. The legislature then amended the Pennsylvania Marriage

Law to provide that no common law marriage contracted after January 1, 2005 would be valid and that the law did not render invalid any common law marriage entered into on or before January 1, 2005.

2.3. PENALTIES, REINSTATEMENT & UNREASONABLE CONTEST

▶ Commonwealth Court of Pennsylvania

- ◆ [*Jordan v. Workers' Compensation Appeal Board \(Philadelphia Newspapers, Inc.\)*](#)
No. 340 C.D. 2006 (March 28, 2007)

Holding: In this decision, the Commonwealth Court affirms that employers and employees must comply with the Workers' Compensation Act and not use "creative" means to avoid doing so. In particular, the Court held:

- A claimant must establish that his or her physical condition has changed such that reinstatement is warranted.
- Absent abuse of discretion, a Court will not overturn or modify a Workers' Compensation Judge's assessment of penalties. Thus, the Appeal Board erred by reducing an award from 50 percent to 20 percent.
- A contest is unreasonable when an employer is aware that an injury is work-related and fails to issue a Notice of Compensation Payable. In this case, the Court noted that the Notice of Compensation Denial stated that an injury had occurred.

2.4. UTILIZATION REVIEWS

▶ Commonwealth Court of Pennsylvania

- ◆ [*Bucks County Community College v. Workers' Compensation Appeal Board \(Nemes Jr.\)*](#)
No. 950 C.D. 2006 (February 12, 2007)

Holding: A Utilization Review request must be limited to one provider. In this case, the carrier filed a UR of Dr. Files "and all other providers under the same license and specialty." In accordance with the request, the reviewer considered treatment rendered by Dr. Files and by Dr. Mercora, another physician in the same office. The Commonwealth Court ruled that the review was improper because the Workers' Compensation Act requires that a separate UR request be filed for every physician whose care is being questioned.

NEW JERSEY APPELLATE COURT DECISION

1. CIVIL LITIGATION & PROCEDURE

1.1. CAUSES OF ACTION

1.1.1. Firefighters' Rule

▶ Supreme Court of New Jersey

- ◆ [*Ruiz v. Mero*](#)
No. A-28/29-06 (March 13, 2007)

Holding: The New Jersey Legislature abrogated the firefighters' rule when it enacted N.J.S.A. 2A:62A-21 in 1993. Accordingly, a first responder may recover damages

from a property owner for injuries sustained while confronting an emergency on the owner's premises.

1.2. VACCINATION CLAIMS

1.2.1. Jurisdiction & Venue

► Superior Court of New Jersey, Appellate Division

- ◆ [Rivard v. American Home Products, Inc.](#)
No. A-2478-05 (March 28, 2007)

Holding: A plaintiff may not sue a vaccine maker in state court without first proceeding in the federal Vaccine Court pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C.A. §§ 300aa-1 to 34.

UNITED STATES SUPREME COURT DECISION

1. FALSE CLAIMS ACT

- ◆ [Rockwell International Corp. v. U.S.](#)
No. 05-1272 (March 27, 2007)

Holding: In a *qui tam* action filed under the False Claims Act, which prohibits the submission of false or fraudulent claims to the United States, 31 U.S.C. § 3729(a), an “original source”/“relator” must have “direct and independent knowledge of the information on which the allegations are based.”

*Remember, visit [Pennsylvania Legal Research Links](http://www.palegallinks.com),
and make www.palegallinks.com your home page for Pennsylvania research.*

The screenshot shows a web browser window with the address bar displaying "http://www.palegallinks.com/". The page title is "Pennsylvania Legal Research Links". The main content area features a welcome message: "Welcome to Pennsylvania Legal Research Links Your Home Page For Pennsylvania Legal Research". Below this, there is a paragraph explaining the website's purpose and a list of links for various legal resources. On the right side, there is a "Popular Links" section with a list of links including "Pennsylvania Appellate Court Slip Opinions", "Check Your Pennsylvania CLE Record", "Pennsylvania Rules of Civil Procedure", "Pennsylvania Rules of Professional Conduct", "Find Pennsylvania Local Court Rules", "Pennsylvania Local Government Websites", "Pennsylvania State and County Bar Associations", "Pennsylvania County Court Websites", and "Contact Your Pennsylvania Legislator". At the bottom of the page, there is a footer with contact information and copyright details.