



A Summary of Recent Appellate & Trial Court Decisions & Rules Changes

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Sponsored by

Law Offices of
Daniel J. Siegel, LLC
66 West Eagle Road
Suite 1
Havertown, PA 19083
(610) 446-3457
Fax (610) 471-0570
www.danieljsiegel.com

and

Integrated Technology
Services, LLC
66 West Eagle Road
Suite 1
Havertown, PA 19083
(610) 446-3467
Fax (610) 471-0570
www.itsllconline.com

Contact Us

palegal@danieljsiegel.com

Announcing the Law Offices of Daniel J. Siegel, LLC

I am pleased to announce the opening of the Law Offices of Daniel J. Siegel, LLC. Located at 66 West Eagle Road in “downtown” Havertown, this is a full-service general practice law firm devoted to providing a complete range of legal services to families and small businesses.

I will also continue to work with other attorneys and their clients on matters they do not handle, such as *workers' compensation claims, drafting wills and living wills, buying and selling homes and condominiums, Social Security Disability claims, creating small businesses and elder law*. I am available to meet with clients in Philadelphia and other locations.

As I have done for more than 21 years, I will protect my referral attorneys' relationships with their clients, and promptly pay referral fees. If any client you referred contacts me about a different/unrelated matter, I will have the client you to handle that matter.

I welcome the opportunity to work with you and your clients.

Also Announcing Integrated Technology Services, LLC

I am also pleased to announce the opening of Integrated Technology Services, LLC, a consulting firm for law firms and small businesses. Unlike most consulting firms, ITS works with attorneys to them more efficient – in the office and at trial – at a reasonable cost. ITS will conduct a “needs analysis” and, if necessary, recommend solutions tailored for your practice. ITS also offers training and, when appropriate, partners with other companies to design a plan to make your practice easier and more efficient. Please give me a call at (610) 446-3467 or e-mail me at dan@itsllconline.com.

A Summary of Recent Appellate & Trial Court Decisions & Rules Changes

By Daniel J. Siegel, Esquire

LAW OFFICES OF DANIEL J. SIEGEL, LLC

66 W. Eagle Road, Suite 1, Havertown, PA 19083

(610) 446-3457 • Fax (610) 471-0570 • E-mail dan@danieljsiegel.com

REPORTING DECISIONS THROUGH SEPTEMBER 30, 2005

PENNSYLVANIA STATE & FEDERAL DECISIONS

1. CIVIL LITIGATION & PROCEDURE

1.1. APPELLATE PRACTICE

▶ Commonwealth Court of Pennsylvania

- ◆ [Deal v. Unemployment Compensation Board of Review](#)

No. 32 C.D. 2005 (June 22, 2005)

Holding: Pursuant to Pa.R.A.P.

1513(a), a Petition for Review must contain a “general statement of the objections to the order or other

determination” and must state its objections with “sufficient specificity to permit the conversion of an appellate document to an original jurisdiction pleading and vice versa should such action be necessary to assure proper judicial disposition.” If a petition for review does not contain such a statement, an appellate court may decline to consider issues addressed in the claimant’s brief.

Most 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. ARBITRATION CLAUSES –ENFORCEABILITY

▶ Superior Court of Pennsylvania

- ◆ [Quiles v. Financial Exchange Co.](#)
2005 PA Super 250 (July 6, 2005)

Holding: An employee is not bound by the arbitration provisions contained in an Employee Handbook when the employee was never given a copy of the handbook containing the arbitration provisions and, under suspect circumstances, signed an acknowledgment form stating that the employee had received the handbook.

1.3. CAUSES OF ACTION – AMERICANS WITH DISABILITIES ACT & REHABILITATION ACT

▶ U.S. Court of Appeals, 3rd Circuit

- ◆ [Morris v. Rumsfeld](#)
No. 04-1808 (August 2, 2005)

Holding: When a federal employee challenges, in whole or in part, the administrative disposition of his or her discrimination claim under the Rehabilitation Act,

29 U.S.C. § 791(g), the court must consider those claims *de novo*, and is not bound by the results of the administrative process, whether that process culminated in one administrative decision, or in two or more decisions.

► Commonwealth Court of Pennsylvania

- ◆ [*Kramer v. Port Authority of Allegheny*](#)
No. 2031 C.D. 2004 (June 7, 2005)

Holding: The Americans with Disabilities Act (42 U.S.C. §§ 12131-12165) and Section 504 of the Rehabilitation Act (29 U.S.C. § 794) prohibit public entities from excluding, denying access to or otherwise discriminating against any person because of a disability. As a result, public transit agencies must maintain features necessary to make vehicles readily accessible to and usable by persons with disabilities. To prove a claim under Title II of the ADA, a plaintiff must show that (1) he or she is a person with a qualified disability; (2) he or she was either excluded from or otherwise denied the benefit of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) the exclusion, denial of benefits or discrimination was because of plaintiff's disability.

1.4. CAUSES OF ACTION – ASBESTOS

► Superior Court of Pennsylvania

- ◆ [*Summers v. Certainteed Corp.*](#)
2005 PA Super 302 (August 25, 2005)

Holding: A trial court acts within its discretion by granting summary judgment when a plaintiff suffers from multiple medical conditions, such as lung diseases from smoking and other causes, which make it impossible to causally connect the condition to any particular asbestos-related condition.

1.5. CAUSES OF ACTION – CRIMINAL HISTORY RECORDS INFORMATION ACT

► Superior Court of Pennsylvania

- ◆ [*Schmidt v. Deutsch Larrimore Farnish & Anderson, LLP*](#)
2005 PA Super 212 (June 6, 2005)

Holding: Section 9183 of the Criminal History Records Information Act, 18 Pa.C.S.A. §§ 9101-83, permits civil actions against criminal and non-criminal agencies, as well as individuals, for violations of the Act. A lawsuit under the CHRIA must allege that the defendant violated one or more provisions of the Act. There is no cause of action, however, for violation of privacy based upon an individual's arrest, which is by definition not a private fact.

1.6. CAUSES OF ACTION – INSURANCE POLICIES

► Supreme Court of Pennsylvania

- ◆ [*401 Fourth Street, Inc. v. Investors Insurance Group*](#)
270 MAP 2003 (July 20, 2005)

Holding: An insurance policy providing coverage for "loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or

any part of a building caused by . . . Hidden decay” provides the insured with coverage for damages caused by the collapse or imminent collapse of a building or part thereof and does not limit itself to damages from the actual collapse of a building. Justice Saylor filed a [dissenting opinion](#).

► Superior Court of Pennsylvania

- ◆ [Universal Teleservices Arizona, LLC v. Zurich American Insurance Co.](#)
2005 PA Super 234 (June 27, 2005)

Holding: The proper focus regarding issues of coverage in an insurance contract is the reasonable expectation of the insured. To determine the reasonable expectation of the insured, a court must examine the totality of the insurance transaction involved. Insureds may not complain, however, that their reasonable expectations were frustrated by policy limitations that are clear and unambiguous.

1.7. CAUSES OF ACTION – MOTOR VEHICLE CODE

► Superior Court of Pennsylvania

- ◆ [Hospodar v. Schick](#)
2005 PA Super 319 (September 14, 2005)

Holding: The Motor Vehicle Code, 75 Pa.C.S.A., requires physicians to provide medical information about the conditions of certain licensed drivers to the Commonwealth in order for the Commonwealth to determine if their operating privileges should be revoked. The Motor Vehicle Code does not permit a private cause of action based upon a physician’s failure to report a driver’s condition to PennDOT.

1.8. CAUSES OF ACTION – PRODUCTS LIABILITY – ASSUMPTION OF THE RISK

► Superior Court of Pennsylvania

- ◆ [Hadar v. Avco Corp.](#)
2005 PA Super 326 (September 21, 2005)

Holding: Assumption of the risk, an affirmative defense in a products liability action, is defined as an apprehension of a specific danger, followed by a conscious decision to tempt fate and accept what fate may bring, which then occasions injury. Assumption of the risk is a complete bar to recovery, and courts are reluctant to find assumption of the risk applicable unless it is clear that the specific risk occasioning the injury was both fully appreciated and voluntarily accepted. The appreciation of a general risk is an insufficient basis to grant summary judgment.

1.9. CAUSES OF ACTION – PRODUCTS LIABILITY – BREACH OF WARRANTY

► Supreme Court of Pennsylvania

- ◆ [Phillips v. Cricket Lighters](#)
No. 35 WAP 2004 (September 28, 2005)

Holding: Implied breach of warranty protections under 13 Pa.C.S. § 2318 do not apply to all members of the buyer’s household – without any

limitation on whether the person who had used the product was the intended user. Rather, these breach of warranty protections apply only to intended users. Justice Newman filed a [concurring opinion](#) disagreeing with the majority's conclusion that plaintiff had presented sufficient evidence to allow the jury to consider the negligence claim.

1.10. CAUSES OF ACTION – UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW

► Superior Court of Pennsylvania

- ◆ [Agliori v. Metropolitan Life Insurance Co.](#)
2005 PA Super 253 (July 8, 2005)

Holdings:

1. A consumer who entered into a contract based upon misrepresentation suffers an ascertainable loss under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 *et seq.*, and Courts must construe the Act liberally in determining the damages to be assessed.
2. Attorneys' fees may only be awarded under the UTPCPL for legal work done after February 2, 1997, the effective date of the UTPCPL amendment that specifically allowed attorneys' fees.

- ◆ *See, also, Drelles v. The Manufacturers Life Insurance Co.*, 2005 PA Super 249 (July 5, 2005), in which the Court reversed a trial court's grant of summary judgment in similar lawsuits. Although *Drelles* primarily focuses upon statute of limitations issues in claims alleging misrepresentation in the sale of vanishing premium life insurance policies, it also addresses – albeit briefly – plaintiff's claims under the UTPCPL.

1.11. CAUSES OF ACTION – WRONGFUL TERMINATION

► Supreme Court of Pennsylvania

- ◆ [Rothrock v. Rothrock Motor Sales, Inc.](#)
No. 244 MAP 2003 (September 28, 2005)

Holding: Public policy, which prohibits terminating an employee for seeking workers' compensation benefits, also prohibits termination for declining to compel a subordinate employee to not seek compensation. If an employer seeks to have a supervisory employee dissuade a subordinate employee from seeking workers' compensation benefits, the supervisory employee shall have a cause of action for wrongful discharge from employment. Chief Justice Cappy filed a [concurring opinion](#) joined by Justices Castille and Nigro, asserting that such a claim falls within the limited exception to the at will doctrine.

1.12. DEFENSES – CONSTITUTIONALITY

► Commonwealth Court of Pennsylvania

- ◆ [DeWeese v. Weaver](#)
No. 567 M.D. 2002 (July 26, 2005)

Holding: The enactment of Act 57 – providing for the apportionment of joint and several liability and damages – violated Article 3, Sections 2, 3 and 4 of the

Pennsylvania Constitution and is therefore unconstitutional. Thus, the Commonwealth Court had declared that the Act is void.

1.13. DISCOVERY – STATUTORILY PROTECTED MATERIALS

► Supreme Court of Pennsylvania

- ◆ *In re Estate of Wagner*
Nos. 192 & 193 MAP 2002 (August 17, 2005)

Holding: A statutorily defined Department of Welfare performance audit, 23 Pa.C.S. § 6343(b), is beyond the scope of discovery by the administrators of the estate of the deceased. Rather, child death reviews are intergovernmental performance audits, not reports pursuant to 23 Pa.C.S. § 6339, and are available only to those authorized by § 6343(b). Justice Nigro filed a [dissenting opinion](#).

1.14. ETHICS & SANCTIONS

► U.S. District Court, Eastern District of Pennsylvania

- ◆ *Equal Employment Opportunity Commission v. Hora, Inc.*
No. 03-cv-1429 (June 8, 2005)

Holding: A court may disqualify counsel, despite a client's objection, when counsel's pre-litigation tactics far overstepped ethical boundaries and principles and, consequently, counsel is likely to be called as a witness for the defendants for the purpose of undercutting the validity of plaintiff's claims.

► Superior Court of Pennsylvania

- ◆ *Tomalonis v. Levant*
2005 WL 1677555 (Pa.Super., May 10, 2005) (*Unreported Decision*)

Holding: The trial court erred by denying a motion for sanctions under Pa.R.C.P. 1023.1, which provides, in relevant part:

(c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(d) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (c) has been violated, the court may, subject to the conditions stated in Rules 1023.2 through 1023.4, impose an appropriate sanction upon any attorneys, law firms and parties that have violated subdivision (c) or are responsible for the violation.

Although not a “published” or precedential opinion, the “intensity” of the Superior Court’s ruling is worth reading.

1.15. EVIDENCE – COLLATERAL SOURCES

► Supreme Court of Pennsylvania

- ◆ [*Gallagher v. Pennsylvania Liquor Control Board*](#)
No. 49 EAP 2004 (September 28, 2005)

Holding: Although evidence of a plaintiff’s recovery from collateral sources is generally inadmissible, and improper references may warrant a mistrial, an exception exists if the evidence of the recovery is related to a material issue in the case. In this case, payment of workers’ compensation benefits was a potentially relevant consideration in determining the identity of plaintiff’s employer, and the trial court properly admitted such evidence and properly refused to bifurcate the trial. Justice Baer filed a [dissenting opinion](#).

1.16. EVIDENCE - GENERALLY

► Supreme Court of Pennsylvania

- ◆ [*City of Philadelphia v. Civil Service Commission*](#)
No. 37 EAP 2004 (June 20, 2005)

Holding: The Civil Service Commission may rely upon hearsay in the form of unsworn medical records in deciding a claim for injured-on-duty benefits. Justice Saylor filed a [dissenting opinion](#).

► Superior Court of Pennsylvania

- ◆ [*Harris v. Toys “R” Us-Penn, Inc.*](#)
2005 PA Super 281 (August 3, 2005)

Holding: The proponent of an admission by a party-opponent under Pa.R.E. 803(25)(D) must establish that the declarant was an employee of the principal at the time the statement was made, and that the statement concerned a matter within the scope of the declarant’s employment. Under Pa.R.E. 802, an “excited utterance” is a spontaneous declaration (1) by a person whose mind is affected by overpowering emotion caused by some unexpected occurrence, (2) which that person had just participated in or had closely

witnessed, and (3) is made so near the occurrence in both time and place as to exclude the likelihood that the statement is a product, in whole or in part, of the person's reflective faculties.

1.17. EVIDENCE – JOINT & SEVERAL LIABILITY

► Superior Court of Pennsylvania

- ◆ [Neal v. Bavarian Motors, Inc.](#)
2005 PA Super 305 (September 2, 2005)

Holdings:

1. If the tortious conduct of two or more persons is a legal cause of harm that cannot be apportioned, each person is subject to liability for the entire harm, regardless whether their conduct is concurring or consecutive.
2. Under the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 P.S. § 201-9.2(a), a court awarding attorney’s fees must link the attorney’s fee award to the amount of damages plaintiff sustained under the Act, and eliminate the efforts of counsel on non-UTPCPL theories.

1.18. EVIDENCE – MOTOR VEHICLE CLAIMS – SPECIAL DAMAGES

► Superior Court of Pennsylvania

- ◆ [Ricks v. Nationwide Insurance Co.](#)
2005 PA Super 229 (June 22, 2005)

Holding: An injured motorist is not precluded under the Motor Vehicle Financial Responsibility Law from pleading, proving and recovering the amount of benefits received from his or her workers’ compensation carrier in a subsequent arbitration in which he or she seeks to recover additional benefits under a personal uninsured motorist policy.

1.19. EVIDENCE – PRODUCTS LIABILITY

U.S. Court of Appeals, 3rd Circuit

- ◆ [Forrest v. Beloti Corp.](#)
No. 04-2184 (September 16, 2005)

Holding: The admissibility of evidence of the lack of prior accidents in a products liability action is governed by the Federal Rules of Evidence, and its admissibility requires a balancing of the evidence’s probative value versus its prejudicial effect. The admissibility of this evidence turns on the facts and circumstances of each case. Testimony concerning an alleged absence of prior accidents will usually satisfy the relevance threshold established by Fed.R.Evid. 402 but, by its very nature, raises significant concerns regarding unfair prejudice to the plaintiff. District courts are therefore required under Fed.R.Evid. 403 to balance the probative value of such evidence against its likely prejudicial effect, but the evidence may not be excluded unless the unfair prejudice created by admitting the evidence would substantially outweigh its probative value. A defendant seeking to admit such evidence

must lay a proper foundation that, in most cases, involves three elements: (a) similarity, i.e., the defendant must show that the proffered testimony relates to substantially identical products used in similar circumstances; (b) breadth, i.e., the defendant must provide the court with information concerning the number of prior units sold and the extent of prior use; and (c) awareness, i.e., the defendant must show that it would likely have known of prior accidents had they occurred.

1.20. EVIDENCE – SPOILIATION

▶ Court of Common Pleas, Northampton County

- ◆ *Creazzo v. Sun*
No. CV-2001-008832 (June 2005)

Holding: Plaintiff's loss/failure to preserve the product upon which a manufacturing defect claim is based mandates dismissal of the action.

1.21. INSURANCE GUARANTY ASSOCIATION CLAIMS

▶ Superior Court of Pennsylvania

- ◆ [*Universal Health Services, Inc. v. Pa. Property & Casualty Insurance Guaranty Assoc.*](#)
2005 PA Super 330 (September 26, 2005)

Holding: Claims under a “reporting tail” endorsement to a claims-made policy, first reported more than 30 days after an insurer's insolvency, are obligations of the Pennsylvania Property and Casualty Insurance Guaranty Association (“PPCIGA”) under the Pennsylvania Property and Casualty Insurance Guaranty Association Act, 40 P.S. §§ 9912.1801-991.1820.

1.22. PLEADINGS & PRE-TRIAL PROCEDURE

▶ Superior Court of Pennsylvania

- ◆ [*Racicot v. Erie Insurance Exchange*](#)
2005 PA Super 286 (August 9, 2005)

Holding: In determining which state's law to apply, the Court must analyze the policies and interests underlying the particular issue before the Court. For this conflict of laws/choice of law analysis, the weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale. Thus, in the context of determining whether money paid by a first party Pennsylvania automobile insurance insurer should be offset when a Pennsylvania insured/resident is making a claim against a Pennsylvania underinsured motorist policy, the “policies and interests” underlying the case warrant application of Pennsylvania law.

- ◆ [*Stauffer v. Hevener*](#)
2005 PA Super 287 (August 9, 2005)

Holding: Pursuant to Pa.R.C.P. 237.3(b), a trial court must grant a petition for relief from a judgment or non pros or default if (1) the petition is filed within ten (10) days after the entry of the judgment on the docket, and (2) the proposed complaint or answer states a meritorious cause of action or defense.

- ◆ [*Alwine v. Sugar Creek Rest, Inc.*](#)
2005 PA Super 291 (August 10, 2005)

Holding: When an amended complaint is filed after an answer has already been filed in response to the initial complaint, and the amended complaint contains no additional averments requiring a response, no further responsive pleading is required, and the original answer will serve as an answer to the amended complaint. When new averments requiring a response are contained in the amended complaint, the answering party is only required to respond to those new averments to which a response is required.

► Commonwealth Court of Pennsylvania

- ◆ [*Hooker v. State Farm Fire and Casualty Co.*](#)
No. 477 C.D. 2005 (August 4, 2005)

Holding: Pursuant to Pa.R.C.P. 1019(f), averments of time, place and items of special damages must be specifically stated. Failure to plead special damages (“those that are not the usual and ordinary consequences of the wrong done but which depend on special circumstances”) precludes a recovery of those items.

1.23. POST-TRIAL PRACTICE -- ENFORCEMENT OF SETTLEMENT

► Superior Court of Pennsylvania

- ◆ [*Estate of Eigen v. Textron Lycoming Reciprocating Engine Div.*](#)
2005 PA Super 141 (April 20, 2005)

Holding: A victim of fraud, including fraudulent inducement to settle, may either (1) rescind the contract, or (2) affirm the contract and sue for damages. When the complaining party presents sufficient allegations of fraud to justify relief, a trial court errs by failing to hold an evidentiary hearing to develop the claim. Moreover, the complaining party must show the intent to mislead, justifiable reliance, and that the fraud proximately caused economic harm. There is no requirement, however, that a claim be raised in a separate action.

1.24. POST-TRIAL PRACTICE -- NEW TRIAL

► Superior Court of Pennsylvania

- ◆ [*Angelopoulos v. Lazarus Pa., Inc.*](#)
2005 PA Super 304 (August 26, 2005)

Holding: A trial court does not abuse its discretion by granting a new trial where the verdict is against the weight of the evidence.

1.25. POST-TRIAL PRACTICE – DAMAGES & WAIVER

► Superior Court of Pennsylvania

- ◆ [*Womack v. Crowley*](#)
2005 PA Super 230 (June 22, 2005)

Holdings: 1. A “weight of the evidence” challenge to a jury verdict need not be proffered before discharge of the jury in order to preserve the challenge to the verdict for post-verdict and appellate review.

2. When the defendant's negligence was a substantial factor in causing plaintiff's injuries, the damages awarded equal the exact amount of the future surgery, and the jury awards no amount for pain and suffering, the jury's award therefore bears no relationship to the injuries suffered, warranting a new trial on damages.

1.26. POST-TRIAL PRACTICE -- WAIVER

► Supreme Court of Pennsylvania

- ◆ [*Straub v. Cherne Industries*](#)
Nos. 57 & 58 EAP 2004 (April 12, 2005)

Holding: Pa.R.C.P. 227.1 provides that a basis for post-trial relief, including a judgment n.o.v., must be raised in pre-trial proceedings or at trial, or it is deemed waived. In addition, error that could have been corrected by timely objection in the trial court may not constitute a ground for judgment n.o.v. Thus, the defendant's failure to object to the verdict sheets and the trial court's accompanying instructions, constitute a waiver of those issues.

1.27. PROFESSIONAL LIABILITY ACTIONS – CERTIFICATE OF MERIT

► Superior Court of Pennsylvania

- ◆ [*Harris v. Neuberger*](#)
2005 PA Super 228 (June 22, 2005)

Holding: A trial court does not abuse its discretion by opening a judgment of non pros entered for failing to file a Certificate of Merit when plaintiff's counsel submitted expert reports to the defendants before suit was filed.

- ◆ [*Yee v. Roberts*](#)
2005 PA Super 240 (June 29, 2005)

Holding: The period within which a Certificate of Merit or request for extension of time must be filed runs from the date of filing of the *original* complaint. Thus, the failure to timely file a Certificate of Merit, together with the failure to timely request an extension to do so pursuant to Pa.R.C.P. 1042.3(d) puts forth no basis to open a judgment of non pros even when, as here, the judgment of non pros was entered one day after the Certificate of Merit was due to be filed, and plaintiff filed the Certificate of Merit hours later on the same day the non pros was entered.

- ◆ [*Krauss v. Claar*](#)
2005 PA Super 255 (July 8, 2005)

Holding: A plaintiff is not required to file a Certificate of Merit in an action against an attorney when the claims asserted do not address the attorney's duties as a licensed professional attorney. Thus, claims of negligent misrepresentation, intentional misrepresentation, promissory estoppel, equitable estoppel or tortious interference with a contractual relationship, which do not assert that "a licensed professional deviated from an acceptable professional standard," do not require the filing of a Certificate of Merit.

◆ *Almes v. Burket*

2005 PA Super 289 (August 9, 2005)

Facts & Holding: On December 18, 2003, plaintiff's counsel received a statement from his expert (the basis for a Certificate of Merit), and mailed it to defense counsel, incorrectly believing he had complied with Pa.R.C.P. 1042.3. That same day, plaintiff's counsel learned his mother-in-law was ill, and traveled to her residence; she died and was buried on December 22, 2003. On December 22, 2003, defense counsel entered a judgment of non pros as the result of the failure to file a Certificate of Merit with the Court. Counsel filed a petition for relief from the non pros on December 31, 2003, which the trial court denied. On appeal, the Superior Court reversed, holding that counsel had a reasonable explanation for failing to file the Rule 1042.3 certificate.

► Commonwealth Court of Pennsylvania

◆ *Dobos v. Pennsbury Manor*

No. 222 C.D. 2005 (July 7, 2005)

Holding: An extended care medical facility licensed by the Department of Health is a "health care provider" under the MCARE Act, 40 P.S. § 1303.503. A party must file a Certificate of Merit when a Complaint alleges the facility violated regulations/licensing requirements for long-term nursing care facilities.

1.28. STATUTES OF LIMITATION – DISCOVERY RULE

► Commonwealth Court of Pennsylvania

◆ *Pennock v. Lenzi*

No. 1788 C.D. 2004 (September 15, 2005)

Holding: The discovery rule does not apply to a wrongful death action under 42 Pa.C.S. §§ 5524(2) and 5502(a). In a survival action, the statute of limitations begins to run when the decedent, not his or her representatives, could have discovered the injury and its cause through the exercise of reasonable diligence. Thus, for survival actions, the cause of action accrues and the two year statute of limitations begins to run, at the latest, at death.

► Superior Court of Pennsylvania

◆ *Baselice v. Franciscan Friars Assumption BVM Province, Inc.*

2005 PA Super 246 (July 1, 2005)

Holding: The discovery rule does not apply to child abuse claims because the injury is known. In this case, the fraudulent concealment exception was inapplicable because there was no allegation of an affirmative act of concealment by the defendants that caused plaintiff to forgo pursuit of the cause of action.

1.29. SUBROGATION

► U.S. District Court, Eastern District of Pennsylvania

◆ *Benefit Concepts v. Macera*

No. 04-183 (June 6, 2005)

Holding: ERISA preempts Section 1797(a) of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A., to the extent that the MVFRL provision

attempts to regulate a self-funded employee benefit plan. Thus, an ERISA plan is entitled to subrogation from the proceeds of a third party action for benefits paid under the Plan.

1.30. VENUE

► Superior Court of Pennsylvania

- ◆ [Raymond v. Park Terrace Apartments, Inc.](#),
2005 PA Super 298 (August 22, 2005)

Holding: To prevail on a petition to transfer venue on the basis of *forum non conveniens*, the defendant must meet its burden of demonstrating, with detailed information on the record, that plaintiff's chosen forum is oppressive or vexatious to the defendant. The Superior Court notes that, since the Supreme Court decision in *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156 (Pa. 1997), the Court has been reluctant to transfer cases from Philadelphia to the surrounding counties based on *forum non conveniens* because "traveling from Delaware, Bucks, Montgomery or Chester County to Philadelphia is not particularly onerous" and that "court congestion is not a proper consideration in a *forum non conveniens* determination."

2. AUTOMOBILE INSURANCE

2.1. COVERAGE

► Superior Court of Pennsylvania

- ◆ [Generette v. Donegal Mutual Insurance Co.](#),
2005 PA Super 314 (September 9, 2005)

Holding: Section 1738 of the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa.C.S.A. § 1701, *et seq.*, permits both inter-policy and intra-policy stacking. An insured is permitted, however, to waive inter-policy stacking on a single-vehicle policy. Justice Ford Elliott dissented.

► Superior Court of Pennsylvania

- ◆ [Sackett v. Nationwide Mutual Insurance Co.](#),
2005 PA Super 262 (July 14, 2005)

Holding: A rejection of uninsured/underinsured motorist coverage (or a rejection of stacked UM/UIM coverage) carries forward for the lifetime of a policy unless affirmatively changed, and is not altered by a change in liability limits, under Section 1738 of MVFRL. Therefore, a carrier is not required to obtain a rejection for stacked coverage when a new vehicle is added to a policy.

2.2. FIRST PARTY BENEFITS

► Supreme Court of Pennsylvania

- ◆ [Swords v. Harleysville Insurance Cos.](#),
No. 107 MAP 2004 (September 29, 2005)

Holding: The owner of a registered but uninsured vehicle is ineligible to recover first party benefits when the vehicle owner is injured in an accident that does not involve the owner's uninsured vehicle, pursuant Section 1714 of the MVFRL.

2.3. TORT ELECTIONS

► Supreme Court of Pennsylvania

- ◆ [Holland v. Marcy](#)
No. 28 WAP 2003 (September 28, 2005)

Holding: Children of the owner of a registered but uninsured vehicle are permitted to pursue full tort remedies under Section 1705 of the MVFRL, despite the fact that their parent is deemed to have chosen the limited tort option. Justice Newman filed a [concurring opinion](#) (joined by Justice Nigro), noting that the decision confers greater benefits on children of parents who have not maintained financial responsibility than on those children with fiscally responsible parents. Justice Eakin filed a [dissenting opinion](#) (joined by Justice Castille).

3. UNEMPLOYMENT COMPENSATION

3.1. ENTITLEMENT TO BENEFITS

► Commonwealth Court of Pennsylvania

- ◆ [Petrill v. Unemployment Compensation Board of Review](#)
No. 1002 C.D. 2005 (September 20, 2005)

Holding: A worker who voluntarily retires based upon the *potential* curtailment of medical benefits does not meet the necessitous and compelling standard for entitlement to unemployment benefits pursuant to Section 402(b) of the Unemployment Compensation Law, 43 P.S. § 802(b).

- ◆ [Collier Stone Co. v. Unemployment Compensation Board of Review](#)
No. 2587 C.D. 2004 (June 7, 2005)

Holding: Ongoing reported incidents of harassment by several different co-workers, which made it difficult for a worker to carry out his or her job duties, constitutes a necessitous and compelling reason to quit employment, entitling the claimant to unemployment compensation benefits.

4. WORKERS' COMPENSATION

4.1. CALCULATION OF BENEFITS

► Supreme Court of Pennsylvania

- ◆ [Reifsnyder v. Workers' Compensation Appeal Board \(Dana Corp.\)](#)
Nos. 4, 5 & 6 EAP 2004 (September 28, 2005)

Holding: Section 309(d) of the Workers' Compensation Act governs the calculation of a claimant's average weekly wage for purposes of computing a workers' compensation benefit in a situation in which an injured employee was subject to work-related layoffs for business/economic reasons in the relevant look-back period. Section 309(d) governs employees who have been employed for at least four consecutive periods of thirteen calendar weeks. Subsections (d.1) and (d.2) address progressively shorter relationships. In particular, subsection (d.1) governs employees employed for at least one, but less than

three consecutive periods of thirteen calendar weeks, while subsection (d.2) addresses cases of recent hires, *i.e.*, employees who worked less than a single complete period of thirteen calendar weeks at the time they suffered a work injury. Justice Bair filed a [concurring opinion](#) in which he “distanced himself” from the majority’s conclusion that unemployment compensation benefits should not be included in the computation of the average weekly wage under Section 309(d) where an employee’s relationship with an employer involves periodic layoffs. Finally, Justices Saylor filed a [dissenting opinion](#), arguing “that the Commonwealth Court’s more consistent treatment of the distinct statutory terms involved is the better [approach].”

4.2. COMPROMISE & RELEASE AGREEMENTS

▶ Commonwealth Court of Pennsylvania

- ◆ [Facchine v. Workers’ Compensation Appeal Board \(Pure Carbon Co & PMA Group\)](#)
No. 1022 C.D. 2005 (September 23, 2005)

Holding: A Compromise & Release Agreement may not be approved unless the statutory requirements for approval of the C&R were met. Thus, it was improper to approve a C&R based upon an oral settlement agreement when the injured worker died before the agreement was written, signed and approved.

4.3. ENTITLEMENT TO BENEFITS

▶ Supreme Court of Pennsylvania

- ◆ [Westinghouse Electric Corp./CBS v. Workers’ Compensation Appeal Board \(Korach\)](#)
No. 73 WAP 2003 (September 29, 2005)

Holding: When an employer has not accepted an initial work-related injury, a claim petition must be filed within three years of the date of injury pursuant to 77 P.S. § 602. This claim petition forms the basis for all injury claims that arise from the work incident, whether there was a material misstatement at the time that the Notice of Compensation Payable was issued or whether a subsequent emotional or physical condition flows from the original injury pursuant to 77 P.S. § 411. When a claimant sustains additional injuries that result from the original harm, a timely petition must be filed to add the injuries to those for which the employer is already responsible, and the Workers’ Compensation Judge must treat the respective burdens of the parties as if the review petition were an original claim petition under 77 P.S. § 773. Justice Eakin filed a [concurring opinion](#) and Justices Saylor, Nigro and Baer joined in a [dissent](#).

▶ Commonwealth Court of Pennsylvania

- ◆ [Mooney v. Workers’ Compensation Appeal Board \(County of Schuylkill\)](#)
No. 844 C.D. 2005 (September 2, 2005)

Holding: An individual who performs court-ordered community service is not an employee of the County in which he or she was sentenced and is not entitled to benefits under the Workers’ Compensation Act.

4.4. DEATH BENEFITS – FATAL CLAIMS

▶ Commonwealth Court of Pennsylvania

- ◆ [*Johns v. Workers' Compensation Appeal Board \(Balmer Brothers Concrete Works\)*](#)
No. 2717 C.D. 2004 (June 14, 2005)

Holding: Section 307 of the Workers' Compensation Act provides that a child, including stepchildren, adopted children and children to whom the decedent stood *in loco parentis*, is eligible for death benefits if the child is under eighteen (18) and a member of the decedent's household at the time of his or her death. A court must evaluate the facts of each case to determine whether a decedent stood *in loco parentis* to a child.

4.5. EVIDENCE

▶ Commonwealth Court of Pennsylvania

- ◆ [*Joy Global, Inc. v. Workers' Compensation Appeal Board \(Hogue\)*](#)
No. 78 C.D. 2005 (June 21, 2005)

Holding: In a claim in which medical reports are admissible under Section 422(c) of the Act, the reports of other "health care providers," as well as medical office notes, are admissible and can stand as sufficient evidence upon which a Workers' Compensation Judge may base findings.

- ◆ [*Northwest Medical Center v. Workers' Compensation Appeal Board \(Cornmesser\)*](#)
No. 409 C.D. 2005 (August 12, 2005)

Holding: In cases in which the causal connection is obvious, medical evidence of causation is not necessary. A causal connection is obvious where an individual is doing an act that requires force or strain, and the individual immediately experiences pain at the point of the force or strain.

4.6. LIABILITY GENERALLY

▶ Commonwealth Court of Pennsylvania

- ◆ [*American Rock Mechanics, Inc. v. Workers' Compensation Appeal Board \(Bik and Lehigh Concrete Technologies\)*](#)
No. 518 C.D. 2005 (August 19, 2005)

Holding: There are seven principles to determine whether a claimant is a "borrowed employee:" (1) One in the general employ of one employer may be transferred to the services of another in a manner that he becomes an employee of the second employer; (2) the determination of who the employer is depends on whether the first employer passes not only the right to control the employee's work, but also the manner of performing it, to the second employer; (3) the relationship may be established if the employer has the right to control the employee's manner of performing work, regardless whether that right is ever exercised; (4) when one is in the business of renting trucks and furnishing a driver as part of hiring the truck, there is a presumption that the driver remains in the employ of the original employer until evidence is produced that the second employer assumed control of the

employee's manner of performing work; (5) facts that indicate that an employee remains in the employ of the original employer include the right to select the employee to be loaned and to discharge the employee at any time and send another in the employee's place, the loaned employee's possession of a skill or special training required by the second employer's work, and employment at a daily or hourly rate for no specific period; (6) that the second employer designates the work to be performed and where it is done does not militate against the first employer-employee relationship; and (7) when the facts are undisputed, determination of who is the employer is one of law, and when the facts are disputed, the determination is one of fact.

4.7. OFFSETS – SEVERANCE PAYMENTS

▶ Supreme Court of Pennsylvania

- ◆ [*Kramer v. Workers' Compensation Appeal Board \(Rite Aid Corp.\)*](#)
Nos. 51 & 52 MAP 2003 (September 28, 2005)

Holding: In appropriate cases, an employer may seek an offset of severance payments against workers' compensation benefits under Section 204(a) of the Workers' Compensation Act, regardless whether the employer is self-insured or privately insured. Such a severance does not violate equal protection. Justices Saylor and Eakin filed concurring opinions.

4.8. OFFSETS – SOCIAL SECURITY BENEFITS

▶ Commonwealth Court of Pennsylvania

- ◆ [*Pittsburgh Board of Education v. Workers' Compensation Appeal Board \(Davis\)*](#)
No. 2371 C.D. 2004 (June 30, 2005)

Holding: An employer may not take an offset for Social Security old age benefits under Section 204(a) of the Workers' Compensation Act when the claimant applies for and becomes entitled to receive the benefits before the work-related injury, but actually receives the first benefits check after the work-related injury.

4.9. PENALTIES/UNREASONABLE CONTEST/ATTORNEY'S FEES

▶ Commonwealth Court of Pennsylvania

- ◆ [*Bates v. Workers' Compensation Appeal Board \(Titan Construction Staffing, LLC\)*](#)
No. 934 C.D. 2005 (June 29, 2005)

Holding: A contest of a penalty petition is not *per se* unreasonable as a matter of law when a Workers' Compensation Judge concludes that the employer has violated the Act. Rather, each case must be decided on its own facts.

- ◆ [*Luvine v. Workers' Compensation Appeal Board \(Erisco Industries\)*](#)
No. 681 C.D. 2005 (August 23, 2005)

Holding: The Pennsylvania Workers' Compensation Security Fund, like the Subsequent Injury Fund, is not an "insurer" as defined by the Workers' Compensation Act, and is not subject to penalties for violations of the Act.

4.10. REINSTATEMENT OF BENEFITS

► Commonwealth Court of Pennsylvania

- ◆ [*Taylor v. Workers' Compensation Appeal Board \(Servistar Corp.\)*](#)
No. 753 C.D. 2005 (September 8, 2005)

Holding: A claimant, whose benefits have been terminated, may seek reinstatement provided claimant establishes that the disability has increased or recurred since the prior decision and that claimant's physical condition has changed in some manner. Collateral estoppel also did not apply here because the prior decision terminating benefits addressed claimant's condition in July 2000, and this case focused on whether the condition recurred in April 2003.

- ◆ [*City of Harrisburg v. Workers' Compensation Appeal Board \(Palmer\)*](#)
No. 332 C.D. 2005 (June 20, 2005)

Holding: A Workers' Compensation Judge may treat a Claim Petition as a Petition to Review and/or Petition to Reinstate Benefits. The review petition is limited to a determination whether to modify a Notice of Compensation Payable or Supplemental Agreement because the document is in material respect incorrect; in a reinstatement petition, claimant must prove that (1) through no fault of his or her own, claimant's disability/earning power is again adversely affected by the work injury, and (2) the disability arising from the original claim continues. Finally, a claimant's testimony alone, if found credible, is sufficient to support a reinstatement of suspended benefits.

4.11. SUSPENSION OF BENEFITS

► Commonwealth Court of Pennsylvania

- ◆ [*Allegis Group \(Onsite\) and ITT Hartford v. Workers' Compensation Appeal Board \(Henry\)*](#)
No. 2231 C.D. 2004 (May 16, 2005; published by Order dated September 6, 2005)

Holding: An employer is not entitled to a suspension of benefits based on a light duty job offer when it fails to issue a "Notice of Ability to Return to Work" under Section 306(b)(3) of the Workers' Compensation Act. Issuance of the notice is a statutory prerequisite to a suspension of benefits.

4.12. SUBROGATION

► Commonwealth Court of Pennsylvania

- ◆ [*Superior Lawn Care v. Workers' Compensation Appeal Board \(Hoffer\)*](#)
No. 93 C.D. 2005 (June 17, 2005)

Holding: An employer's right to subrogation under the Workers' Compensation Act is absolute and automatic in the absence of deliberate, bad faith conduct on the part of the employer.

4.13. UTILIZATION REVIEW

► Commonwealth Court of Pennsylvania

- ◆ [*County of Allegheny v. Workers' Compensation Appeal Board \(Geisler\)*](#)
No. 1886 C.D. 2005 (June 6, 2005)

Holding: When a medical provider fails to provide its medical records to a Utilization Review Organization (URO), the URO must issue a determination that the

challenged care is neither reasonable nor necessary, 34 Pa. Code § 127.464. When no records are produced, the URO is not required to issue a report and, consequently, a Workers' Compensation Judge may not review the merits of that determination.

PENNSYLVANIA RULES CHANGES & OTHER MATTERS

1. PENNSYLVANIA RULES OF CIVIL PROCEDURE

▶ GENERALLY

◆ Title and Citation of Rules

On July 8, 2005, the Pennsylvania Supreme Court issued an Order making minor amendments to [Pa.R.C.P. 51](#). Of note, the Rule affirmed that:

1. The "Pennsylvania Rules of Civil Procedure . . . may be cited as 'Pa.R.C.P. No. ___;' and,
2. The "rules of civil procedure are not applicable in the magisterial district courts. Civil actions and proceedings in magisterial district courts are governed by the Rules of Civil Procedure for Magisterial District Judges, Pa.R.C.P.M.D.J. 201 et seq." *See*, Note to Pa.R.C.P. 51.

▶ JUROR NOTE TAKING

On July 8, 2005, the Pennsylvania Supreme Court rescinded the sunset provision of [Pa.R.C.P. 223.2](#) ("Conduct of the Jury Trial. Juror Note Taking), concluding that, because "the rule has found overwhelming favor with the bench and bar, the sunset provision of subdivision (e) has been rescinded and the rule made permanent."

2. FILING FEES

▶ MAGISTERIAL DISTRICT JUSTICES

◆ Filing Fees

On August 29, 2005, the Pennsylvania Supreme Court issued an Order setting [forth the costs and other fees](#) to be charged and/or assessed by Magisterial District Justices, Philadelphia Municipal Court and Philadelphia Traffic Court. *See*, 42 Pa.C.S. § 1725.1.

3. ELECTRONIC FILING

▶ ORPHAN'S COURT, PHILADELPHIA COUNTY

Effective July 1, 2005, the Orphans' Court Electronic Filing System became mandatory, and legal papers must be submitted in pdf format. The Clerk of Orphans' Court will charge \$1.00 per page for all documents not filed in pdf format, and an additional \$15.00 fee to process all hard-copy filings sent by mail.

For more information, go to <http://courts.phila.gov/common-pleas/orphans/>

NEW JERSEY CASES

1. CIVIL PROCEDURE

1.1. CAUSES OF ACTION – DEFAMATION -- ABSOLUTE LITIGATION PRIVILEGE

▶ Appellate Division

- ◆ [Williams v. Kenney](#)
No. 4855-03T5A-4855-03T5 (July 8, 2005)

Holding: The “absolute litigation privilege” provides absolute immunity for defamatory statements in the course of judicial proceedings by litigants to achieve an object of the litigation that had some connection or logical relation to the litigation. In addition, communications occurring preliminary to or in preparation for proposed proceedings are privileged. Extra-judicial distribution of papers filed in court is not ordinarily deemed privileged, however, because such publication is made beyond the controls and inhibitions inherent in the judicial process, and communications made to newspapers and during press conferences are generally excluded from the protection of absolute privilege.

1.2. CAUSES OF ACTION – DEFAMATION – SINGLE PUBLICATION RULE

▶ Appellate Division

- ◆ [Churchill v. State of New Jersey](#)
No. A-48080-03T54808-03T5 (June 23, 2005)

Holding: The “single publication rule” applies to publication on the Internet; updates to a website do not constitute republications of the defamatory statement. Thus, lawsuits alleging defamation must be filed within one (1) year of the initial publication of the defamatory statement.

1.3. CAUSES OF ACTION – MOTOR VEHICLES – VERBAL THRESHOLD

▶ Supreme Court of New Jersey

- ◆ [DiProspero v. Penn](#)
No. A-66-03 (June 14, 2005)

Holding: The 1988 verbal threshold for recovery of noneconomic damages is significantly different from the language in the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1 to 39:6A-35. Because AICRA, N.J.S.A. 39:6A-8(a), eliminated the “serious life impact standard,” and neither the legislative history nor the Act’s policy objectives indicated an intent to adopt the “serious life impact standard,” this standard does not apply to claims under AICRA. Rather, AICRA’s “limitation on lawsuit” threshold restricts an accident victim from suing for noneconomic damages unless the victim suffers a bodily injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or, a permanent injury other than scarring or disfigurement.

► Appellate Division

- ◆ [Beltran v. Delima](#)
No. A-6056-03T2 (July 11, 2005)
- ◆ [Pungitore v. Brown](#)
No. A-5662-03T1 (July 11, 2005)

Holding: A claim that a plaintiff's injuries satisfy the "verbal threshold" must be proven by objective credible evidence, and a plaintiff must file a certification by a physician that the injury satisfies one of the statutory categories under N.J.S.A. 39:6A-8. When a plaintiff submits the requisite evidence to satisfy the verbal threshold, the claim for noneconomic damages may be presented to a jury.

1.4. CAUSES OF ACTION – ATHLETIC EVENT PATRONS

► Supreme Court of New Jersey

- ◆ [Maisonave v. The Newark Bears Professional Baseball Club, Inc.](#)
No. A-59/60-04 (September 13, 2005)

Holding: An owner or operator of a stadium, must provide protected seating to those who would seek it on an ordinary basis and provide screening in the most dangerous sections of the stands. In other areas, the proper standard of care is the business invitee rule, under which an owner or operator owes a duty of reasonable care to guard against any dangerous conditions on the property that the owner or operator knows about or should have discovered.

2. DEFENSES -- PREEMPTION

► Supreme Court of New Jersey

- ◆ [Gonzalez v. Ideal Tile Importing](#)
No. A-53-04 (July 27, 2005)

Holding: A state tort action involving a third party and a workplace injury may survive an Occupational Safety and Health Act (OSHA) conflict analysis. In this case, however, because the allegedly defective product was manufactured in compliance with federal standards, the claim is preempted.

OTHER NEW JERSEY NEWS YOU AND YOUR CLIENTS CAN USE

On August 26, 2005, the Acting Governor signed a series of bills that amended the provisions of N.J.S.A. 39:4-10.1 *et seq.* to require children under the age of 17 to wear a fitted and fastened helmet while riding a bicycle or using roller skates or skateboards. In addition, the helmet must meet the standards of the American National Standards Institute (ANSI Z90.4 bicycle helmet standard) or the Snell Memorial Foundation's 1990 Standard for Protective Headgear for Use in Bicycling.

FEDERAL CASES (NON-3RD CIRCUIT)

1. FAMILY & MEDICAL LEAVE ACT

1.1. RELEASES

▶ U.S. COURT OF APPEALS, 4TH CIRCUIT

- ◆ *Taylor v. Progress Energy, Inc.*
No. 04-1525 (July 20, 2005)

Holding: A retrospective or prospective waiver or release of an employee's FMLA rights, both substantive and proscriptive, violates 25 C.F.R. § 825.220(d) and is invalid. An employee may waive or settle FMLA claims under § 825.220(d) only with prior approval of the Department of Labor or a court.

2. CONFIDENTIALITY -- DISCOVERY

2.1. INFORMATION DISCLOSED BY CLIENTS AT A LAWYER'S WEBSITE

▶ U.S. COURT OF APPEALS, 9TH CIRCUIT

- ◆ *Barton v. U.S. District Court for the Southern District of California (GlaxoSmithKline)*
413 F.3d 1104 (June 9, 2005)

Holding: A law firm's questionnaire, which was completed and submitted to the law firm on the Internet, which was submitted in the course of an attorney-client relationship and the disclaimer at the bottom of the online questionnaire did not act as a waiver of confidentiality – even though the client acknowledged that the questionnaire did “not constitute a request for legal advice and that [the client was] not forming an attorney client relationship by submitting this information.” *This decision analyzes the information stated on the website very carefully, and firms that solicit on the Internet should read this opinion with care.*

COMING SOON – PALEGALLINKS.COM

Watch for the announcement of the unveiling of www.palegallinks.com, a conveniently organized website with links to hundreds of the websites Pennsylvania attorneys need most. Designed to put information just a click away, www.palegallinks.com will connect you with everything from courts to government agencies to bar associations to – virtually any website you are looking for. All for free, and all just a mouse click away.