

# LLA Annual Update

Presenter

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# Gorman v. Costello

(Pa. Super. 2007)

- First case to approve standard jury instruction 3.25 on factual cause. If the jury asks for it 3.25 must be re-read in its entirety. “While we recognize that the SSJI are not binding on the trial courts, the SSJI are nevertheless instructive.”
- The jury is entitled to a complete factual cause instruction.
- The trial court had omitted the definition from its instruction.

# Simmons v. Cobb

(Pa. Super. 2006)


- Defendant would not be permitted to put in evidence of receipt of Social Security SSD benefits because it violates the collateral source rule.
- Plaintiff should nonetheless have been permitted to put in the evidence. (Court's reasons here.)
- Error was harmless since expert reliance on plaintiff's SSD was negligible and cross-examination was sufficient.

# DeJesus v. Dep't of Veterans Affairs

(3<sup>rd</sup> Cir. 2007)



Did the V.A. have a duty under Pennsylvania law to protect third parties who were killed when ex-naval officer was discharged as a mental patient?

Three items that the Court of Appeals said constituted gross negligence:

- Nobody at V.A. was fully familiar with patient's medical condition.
- V.A. decided to discharge patient when he "was distressed and irrational, displaying poor control of his violent urges by brandishing a knife in his place of employment" and making comments "that his Primary Therapist believed were potentially suicidal."
- Failure to detain or commit for suicide or psychiatric evaluation upon discharge, esp. as the V.A. staff was unclear about its own commitment procedures.
- Under 28 USCA § 2674, U.S. liability governed by local law; 3<sup>rd</sup> Circ. applied 50 P.S. § 7114. Immunity from civil and criminal liability 

# Reardon v. Allegheny College

(Pa. Super. 2007)

- The relationship between a privately funded college and the student has traditionally been defined in this Commonwealth as strictly contractual in nature.
- The origin of the gist of the Action Doctrine  discussed.
- Burden of Proof  in defamation-opinion of speaker.

# Galli v. New Jersey Meadowlands


## Commission

(3<sup>rd</sup> Cir. 2007)

- The First Amendment right to freedom of speech and association protect government employees who lack a political affiliation from political patronage discrimination.

# Ditch v. Waynesboro Hosp.

(Pa. Super. 2007)

- Certificate of merit required  where patient fell from hospital bed and hit her head while being transported from emergency room to a hospital room.
- Sounded in med-mal because hiring, supervising, etc. of employees is integral to providing professional services.

# Gondek v. Bio-Medical Applications, Inc.

(Pa. Super. 2007)

- Certificate of merit required where there was a claim of failure to properly train and supervise non-professional employees as well as vicarious liability for the actions of those employees in context of guest passenger claiming the driver received negligent dialysis because driver was not warned of the dangers of eating or drinking after receiving dialysis.



# Womer v. Hilliker

(Pa. 2006)

- “Substantial performance” of certificate of merit requirement is not met where plaintiff provided opposing counsel with expert report in discovery.
- All together now: when in doubt, file a Certificate of Merit.

# Smith v. Friends Hospital

(Pa. Super. 2007)

- No certificate of merit required where injuries are sustained during a hospitalization where sexual assault occurred.

# Kennedy v. Butler Memorial

(Pa. Super. 2006)

- Claims based solely upon vicarious liability do not require a Certificate of Merit.

# Merlini v. Gallitzin Water Authority

(Pa. Super. 2007)

- Deals with an engineering firm and court said COM not required because it is not a professional action.

# Shon v. Karason

(Pa. Super. 2007)

- A corporation or professional partnership can be a healthcare provider for purposes of Mcare, even if it is not licensed by the Commonwealth to provide healthcare or professional services.
- The purpose of the corporation, engaging the practice of podiatric medicine, would clearly fall within healthcare or professional medical services for purposes of Mcare's definition of healthcare provider.

# Quinby v. Plumsteadville Family Practice

(Pa. 2006)

- Quadriplegic fell from examination table while unattended and unrestrained, resulting in injuries alleged to have lead to death, and under those circumstances res ipsa loquitur instruction regarding negligence should have been given. However, causation between injuries thus sustained, and death, was not resolved.

# MacNutt v. Temple University Hospital, Inc.

(Pa. Super. 2007)

- *Res ipsa loquitur* instruction should not be given concerning Betadine pooling during surgery which caused burn.
- Quinby distinguished.
- Problem with skin eruption of herpes zoster, not a Betadine burn.

# Wexler v. Hecht

(Pa. 2007)

- Under the Medical Care Availability and Reduction of Error Act, a podiatrist is not competent to testify as an expert witness concerning the applicable standard of care in a medical malpractice action advanced against an orthopedic surgeon.




# **Gbru v. Golio, M.D.**

(Pa. Super. 2007)

- Radiation oncologist could testify on standard of care against board certified urologist in connection with elevated PSA under 512.


# Freed v. Geisinger Medical Center

(Pa. Super. 2006)

- In case involving pressure wounds, trial court erred by precluding nursing expert witness from testifying since she was qualified to provide expert testimony as to causal relationship between  breach and standard of care in patient's pressure wounds.
- Other examples of non-doctor experts [here](#).

# Jacobs v. Chatwani

(Pa. Super. 2007)

- Urologist could testify to negligence of obstetrician/gynecologist when the issue involved his damage to ureters during gynecological surgery.


# Isaac v. Jameson Memorial Hospital

(Pa. Super. 2007)

- Medicaid regulations do not impose any legal standard relevant to patient's informed consent claim against doctor.

# Lindsey v. Caterpillar

(3<sup>rd</sup> Cir. 2007)

- In a side boom pipe layer claim, the fact that OSHA roll over structure requirements exempted pipe layers did not exclude state law tort claims based on product liability. OSHA only governs employer-employee relationship, and does not occupy the field between manufacturers and parties injured by their products.
- (Court discussion of preemption & 29 U.S.C. 667 here.)




**Pennsylvania Department of General Services v.**  
**U.S. Mineral Products Company**  
(Pa. 2006)

- Flammability of building materials.
- Was error for trial court to allow the jury to evaluate whether a fire is a reasonably foreseeable occurrence.
- Negligence should not have been part of case.
- Fire is not an intended use, and question of whether fires are foreseeable is not relevant. Permitting jury to consider foreseeability constituted reversible error.
- Verdict was improper.

# Salley v. Option One Mortg. Corp.

(Pa. 2007)

- An arbitration agreement, consummated in connection with a residential loan, which reserves judicial remedies related to foreclosure is not presumptively unconscionable.

# Reed v. Dupuis

(Pa. Super. 2007)

- Tenant set forth the cause of action in alleging that her landlord breached a duty to exercise reasonable care by failing to correct water infiltration problem.



# Fletcher v. Harlee Corp.

(Pa. Super. 2007)


Remanded for entry of judgment in favor of appellant corporation suing Szymanski.

Plenty of evidence to pierce the corporate veil.

- Undercapitalization
- Failure to adhere to corporate formalities
- Substantial intermingling of corporate and personal affairs
- Use of corporate form to perpetrate a fraud
- Equitable considerations

# Schappell v. Motorists Mutual Ins. Co.

(Pa. 2007)

- There is a private cause of action for statutorily prescribed interest in a case brought by chiropractors.
- Factors discussed 

# Wachovia Bank v. Ferretti

(Pa. Super. 2007)

- Statute of limitations in legal malpractice begins to run when the attorney breaches his or her duty and is tolled only when the client, despite the exercise of due diligence, discovers the injury or its cause.
- Statute of limitations is two years from the date when a person knew or, in the exercise of reasonable diligence, should have known they were harmed and not when the underlying claim is determined.
- Claim for legal malpractice can be in contract or tort.
- Trigger for accrual of legal malpractice is not realization of actual loss but occurrence of a breach of duty.
- Until client suffers applicable harm as a consequence of attorney's negligence, client cannot establish a cause of action for malpractice.
- We reject plaintiff's argument that the pendency or potential pendency of an appeal in the underlying case would toll the statute of limitations in legal malpractice.


# Rose v. Annabi

(Pa. Super. 2007)

- When settling defendant should be on verdict slip.
- Must be qualified witness to testify on the standard of care for the particular defendant whose name is sought to be put on the verdict slip.

# McNeil v. Jordan

(Pa. Super. 2007)

- Remand of McNeil  case from Supreme Court as to whether there is sufficient reason to permit pre-complaint discovery.
- Claim that someone told an heir they would be treated equally with siblings is not sufficient.


# Flood v. Silfies

(Pa. Cmwlth. 2007)

- Volunteer fire company is a local agency entitled to immunity under Political Subdivision Tort Claims Act.

# Wang v. Whitetail Mountain Resort

(Pa. Super. 2007)

- Assumption of risk release  in snow tubing case is permissible.
- Chepkevich v. hidden Valley Resort (Pa. Super. 2006) distinguished.

# Bowmaster v. Clair

(Pa. Super. 2007)

- Settlement funds do not go to DPW because parents did not receive recovery but rather funds were allotted to daughter.
- As parents did not seek recovery of medical expenses within applicable statute of limitations, and as Emily could not have sought recovery of those expenses in her own right, we conclude the trial court erred in conclusion to the contrary.
- On remand trial court must consider to what extent reimbursement ordered related to medical expenses incurred subsequent to Emily reaching the age of maturity so that proper reimbursement can be made to DPW.



# Ash v. Continental Insurance Company

(Pa. 2007)

- Statute of limitations under bad faith statute is two years.

# Paliometros v. Loyola

(Pa. Super. 2007)

- \$750,000 judgment against fraternity affirmed.
- Based upon Restatement Second of Torts 344. Business premises open to public: acts of third parties or animals.
- Innkeepers, knowing fraternity party was going to take place, undoubtedly there would be underage drinking, owed an affirmative duty to exercise reasonable care under the circumstances and take precautions by having some supervisory personnel physically present at the premises to monitor the premises and conduct.

# Rood v. Commonwealth Land Title Insurance Company

(Pa. Super. 2007)

- Title insurance policy is not invoked where value is affected by abandoned septic tank.