LYCOMING LAW ASSOCIATION

ANNUAL UPDATE OF THE LAW

November 15, 2017

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ARBITRATION
NON-PERSONAL INJURY

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DIRECTV, Inc. v. Imburgia

136 S.Ct. 463 (2015)

Breyer, J.

- FAA states that a "written provision" in a contract providing for "settle[ment] by arbitration" of "a controversy…arising out of" that "contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."... California refused to enforce an arbitration provision in a contract.
- In our view, that decision does not rest "upon such grounds as exist...for the revocation of any contract," and we consequently set that judgment aside.
- Judgment was reversed and the case remanded for further proceedings.

LAW

ARBITRATION NURSING HOME

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Kindred Nursing Ctrs. P'ship, et al. v. Clark

2017 U.S. LEXIS 2948 (May 15, 2017)

Kagan, J.

- Respondent-Plaintiff filed suit for substandard care by Petitioner-Defendant causing the deaths of two family members whom they were POA's for.
- Upon entering Kindred Nursing Centers, Respondent-Plaintiff signed arbitration agreements on the relative's behalf stating any claims would be resolved through binding arbitration.
- Petitioner-Defendant moved to dismiss claim stating the arbitration agreements prohibited disputes in court.
- Trial court denied Petitioner-Defendant's motion and the suit went forward.

Kindred Nursing Ctrs. P’ship, et al. v. Clark

2017 U.S. LEXIS 2948 (May 15, 2017)

Kagan, J.

- Kentucky Supreme Court held that a general grant of POA does not permit a legal representative to enter into an arbitration agreement for someone else.
- Supreme Court held that the court’s clear-statement rule violates the Federal Arbitration Act by singling out arbitration agreement for disfavored treatment.
- Blew aside 7th Amendment.
- Found FAA preempted state law and 7th Amendment.

Taylor v. Extendicare Health Facilities

147 A.3d 490 (Pa. 2016)

Wecht, J.

- Defendant executed an arbitration agreement was decedent requiring the arbitration of claims arising from decedent's care at the facility.
- Plaintiffs' brought claim on behalf of themselves as wrongful death beneficiaries.
- Trial court relied upon Rule 213(e) to deny defendant's motion to bifurcate and Supreme Court affirmed.
- It was concluded that FAA preempts Rule 213(e) requiring arbitration.
- State's only exception in enforcing an arbitration agreement is provided by the savings clause permitting the application of generally applicable state contract law defenses.

Taylor v. Extendicare Health Facilities

147 A.3d 490 (Pa. 2016)

Wecht, J.

- Rule 213(e) does not fall within the savings clause
- Declining to bifurcate the actions taken against Defendant would nullify the ADR Agreement.
- Trial Court held the parties will have the opportunity to litigate whether there is a valid and enforceable contract in accord with generally applicable contract defenses and the FAA's savings clause.

Wert v. Manor Care Carlisle, PA, LLC

124 A.3d 1248 (Pa. 2015)

Saylor, C.J.

- This case involved mandatory arbitration of a nursing home dispute.
- Previous ruling shows that NAF Designation voided an identical arbitration agreement.
- Post –consent decree, Section 5 of the FAA, cannot preserve NAF-incorporated arbitration agreements unless the parties made the NAF's availability nonessential.
- NAF must administer its code unless the parties agree to the contrary.
- Underlying FAA policy, as interpreted by the Supreme Court in Marmet, does not mandate a different result because our conclusion is based on settled PA contract law principles that stand independent of arbitration.

Washburn v. Northern Health Facilities

121 A.3d 1008 (Pa. Super. 2015)

Bowes, J.

- Mrs. Washburn, having no POA for her husband, signed a stand-alone ADR between her husband and the nursing home.
- Mr. Washburn did not sign the ADR.
- No facts to show Mr. Washburn authorized her to sign.
- Issue: whether a valid agreement to arbitrate existed.
- Equitable estoppel does not assist the nursing home.
- No evidence or merit to the argument that Mr. Washburn was an intended third-party beneficiary of the arbitration agreement signed by his wife.
- Appealed from an order overruling preliminary objections in the nature of a petition to compel arbitration. The Superior Court affirmed.

Wisler v. Manor Care of Lancaster, PA, LLC

124 A.3d 317 (Pa. Super. 2015)

Stabile, J.

- Manor Care contends that the trial court erred in refusing to compel arbitration of executor's claims arising out of Decedent's stay at a Manor Care Nursing Home.
- Trial Court found the arbitration agreement invalid. The POA for Decedent lacked the authority to enter into such agreement.
- Express authority exists where the principal deliberately and specifically grants authority to the agent as to certain matters. That did not happen.
- Decision should encourage parties seeking an agreement to arbitrate to ascertain the source of an agent's authority before allowing the agent to sign and arbitration agreement on a principal's behalf.

Tuomi v. Extendicare, Inc.

119 A.3d 1030 (Pa. Super. 2015)

Bowes, J.

- Decedent’s husband brought negligence actions for wrongful death, and survival actions premised on negligence and negligence per se against assisted living facility and nursing home.
- A Voluntary Arbitration Agreement had been signed by the Administrator upon the patient’s admission to Extendicare.
- PA Rule of Procedure 213(e) requires the consolidation of wrongful death and survival actions and the lower court concluded the actions would remain together in court.
- There were multiple defendants, one of whom did not have a predispute arbitration clause signed by the Administrator.
- Administrator alleged both contributed to the injuries and death of decedent.
- Superior Court held that FAA did not preempt state law mandating consolidation of wrongful death and survival actions, and was not required to bifurcate action to compel arbitration of survival claim.

Bair v. Manor Care of Elizabethtown, PA

108 A.3d 94 (Pa. Super. 2015)

Bowes, J.

- Plaintiff filed a wrongful death and survival action claiming that Manor Care was neglectful and abused her mother during her stay in the facility which ultimately caused her death.
- Manor Care sought to have the case referred to arbitration. The court permitted discovery and an interlocutory appeal followed.
- Burden is on Manor Care to demonstrate that a valid agreement to arbitrate existed between the parties and that the dispute was within the scope of the agreement.
- Trial Court determined that there was no agreement to arbitrate because Manor Care failed to affix its signature for consent.

NURSING HOME NEGLIGENCE - SOL

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Dubose v. Quinlan

125 A.3d 1231 (Pa. Super. 2015)

Ford Elliot, P.J.E.

- Mrs. Dubose, suffering from severe brain damage, developed a pressure wound while in a nursing home and ultimately passed away.
- Nursing home used a licensed practical nurse to provide advanced wound care, in violation of the Nurse Practices Act, for Mrs. Dubose's 10 pressure ulcers and systemic infection.
- Evidence showed that decedent was malnourished, dehydrated and suffered conscious pain from numerous bed sores.
- Mcare Act provides that wrongful death and survival actions may be brought within two (2) years from the date of death.
- Argument was made that the SOL began to run when Mrs. Dubose developed a pressure wound. The Court clearly rejected that.

Dubose v. Quinlan

125 A.3d 1231 (Pa. Super. 2015)

Ford Elliot, P.J.E.

- Defendant argued wrongful death actions are strictly limited to pecuniary damages. The Court rejected that.
- Rejected was the claim that wrongful death does not encompass damages for emotional loss or mental pain and suffering. Evidence was sufficient to prove punitive damages.
- Wrongful death verdict was $125,000, and the Survival Act verdict was $1 million.
- Fact that Mrs. Dubose suffered permanent, debilitating brain injury does not mean that she was physiologically incapable of feeling pain.
- Verdict should not be discounted because of decreased mental functioning and poor prognosis.
- Nursing home cannot show that it was prejudiced by the jury’s punitive damage award since it was less than the compensatory damages.
- There was no requirement to bifurcate the punitive damage phase of the trial.

NEGLIGENCE
NON-PERSONAL INJURY

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Gongloff Contracting v. L. Robert Kimball

119 A.3d 1070 (Pa. Super. 2015)

Shogan, J.

- Steel subcontractor brought action against architect for negligent misrepresentation, alleging it incurred numerous problems on construction project due to improper roof design.
- Architect filed joinder complaint to join general contractor, steel contractor and professional engineer.
- Architect filed motion for judgment on the pleadings based on the SOL and the economic loss doctrine.
- PA law bars claims brought in negligence that result solely in economic loss, but that limitation does not apply to § 552 of the Restatement (Second) of torts.

Gongloff Contracting v. L. Robert Kimball

119 A.3d 1070 (Pa. Super. 2015)

Shogan, J.

- Gongloff alleged that Kimball was working on the project in order to provide guidance.
- Feasibility of construction of the roof in accordance with Kimball's design was called into question.
- Not enough under § 552 of the Restatement (Second) of torts.
- Section 552 states:
    1. A misrepresentation of a material fact;
    2. Made under circumstances in which that misrepresenter ought to have known its falsity;
    3. With an intent to induce another to act on it; and
    4. Which results in injury to a party acting in justifiable reliance on the misrepresentation.

NEGLIGENCE

RELEASE

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McDonald v. Whitewater Challengers, Inc.

116 A.3d 99 (Pa. Super. 2015)

Fitzgerald, J.

- Rafting trip participant, a teacher who was chaperoning students on rafting trip, brought negligence action against rafting trip operator, alleging injury from participant's raft striking a rock.
- Participant signed an exculpatory release with Defendant.
- The activity is considered an inherently dangerous sports activity and there is no public policy against a release in these circumstances.
- Exculpatory clause addressing negligence does not contravene PA's public policy.

NEGLIGENCE
DRAM SHOP ACT

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Juszczyszyn v. Taiwo

113 A.2d 853 (Pa. Super. 2015)

Shogan, J.

- Police officer filed complaint against bar owners, alleging negligence and liability under the Dram Shop Act.
- Duty of the possessor of the land is to use reasonable care to protect his or her invitees from unknown or non-obvious dangers.
- In this case the police officer was responding to a disturbance at the bar and encountered an intoxicated person and physically confronted that person creating a known risk.
- Court concluded that the police officer was not within the class of individuals that the Dram Shop Act was designed to protect.

NEGLIGENCE ELECTRICAL LINES

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Greely v. West Penn Power Co.

2017 Pa. Super. LEXIS 86 (Feb. 13, 2017)

Stabile, J.

- Plaintiff was installing telecommunications cables across a line of utility poles owned by defendant when cable bounced and created an electrical arc electrocuting plaintiff.
- Suit filed claiming defendant failed to de-energize power lines, failed to ensure cables were sufficient distance from power lines, providing adequate space on poles and to take safe measures providing a safe workplace for Plaintiff.
- Trial Court concluded plaintiff's own conduct caused cable to bounce close to electrical line.
- Appeal filed challenging grant of summary judgment for Defendant.
- Court reversed and remanded stating trial court erred in its determination concerning duty of care owed by failing to view evidence in light most favorable to Appellant.

NEGLIGENCE
VALET

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Moranko v. Downs Racing LP

118 A.3d 1111 (Pa. Super. 2015)

Panella, J.

- Administratrix of driver's estate brought wrongful death and survival action against casino, alleging casino's valet parking service was negligent in returning car to visibly intoxicated driver who was later involved in a car accident and died.
- Court held that the casino's valet parking service did not have a duty to withhold driver's vehicle.
- Under PA law, a mutual bailment is created where a valet service accepts possession of a patron's keys and parks the vehicle as a service to those gambling on the casino premises and the vehicle must be returned.

NEGLIGENCE FALL DOWN

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Reinoso v. Heritage Warminster SPE LLC

108 A.3d 80 (Pa. Super. 2015)

Stabile, J.

- Sixty year old woman and five year old grandaughter tripped and fell on a raised section of sidewalk at the Warminster Towne Center.
- Difference in sidewalk height was 5/8th of an inch in the middle of the walk where the Plaintiffs' in question were walking.
- Surrounding circumstances not only included a height difference between the sidewalk panels but also a recognized heightened duty to an individual as an invitee.
- Expert testimony indicated height differential exceeded safety standards and testimony from owner of the company charged with maintenance of the sidewalk that he considered the defect a tripping hazard and reported it to the landowner as such.

Stephens v. Clash

796 F.3d 281 (3rd Cir. 2015)

Smith, C.J.

- Sixteen year old victim of illegal sexual activity brought action against an adult for injuries resulting from adult's violation of federal and state laws regarding sex with a minor.
- Victim was aware for more then two years of the infliction of the injury and the person who did it.
- Victim did not bring suit until after the 6 year SOL had expired and more then 3 years after the victim became an adult.
- Appeal was taken from dismissal of sexual battery claim.
- Discovery rule tolled the SOL for federal claims and PA's longer SOL for childhood sexual abuse should have applied to the sexual battery claim.
- Structure and text of § 2255 supports recognition of the discovery rule for the claims under Pennsylvania statute for child exploitation.

MEDICAL MALPRACTICE DISCOVERY

LAW

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Lattacker v. Magee Women's Hosp.

PICS Case No. 16-0891 (C.P. Allegheny July 5, 2016)

Wettick, J.

- Failure to timely perform a C-section resulting in neurological and developmental injuries to minor.
- Defendant indicated under questioning that he could indicate a point on a fetal heart tracing where his decision was influenced during treatment.
- Defendant's counsel refused to allow him to answer any further questions citing *McLane v. Valley Medical Facilities*.
- Defendant's misunderstanding of *McLane* led them to believe that treating physician was excused from looking at fetal heart tracing after stating he was not offering expert testimony at trial.

Lattacker v. Magee Women's Hosp.

PICS Case No. 16-0891 (C.P. Allegheny July 5, 2016)

Wettick, J.

- *McLane* holds that the use of such aids for the purpose of discovery is allowed.
- A treating physician would be required to "provide any facts, conclusions, and opinions that are based on information gained as a treating physician. But the physician who will not be offering testimony justifying the care that she provided" did not have to opine on quality of treatment and care.

Karim v. Reedy, MD

No. 11 CV 4598 (C.P. Lackawanna January 11, 2016)

Nealon, J.

- Malpractice action asserting obstetrical and nursing negligence in the management of plaintiff's labor and delivery that resulted in hypoxic brain damage to her child.
- Plaintiff seeks to compel the Defendant-Obstetrician and the Defendant-Hospital's labor and delivery nurse to answer certain questions that their counsel instructed them not to answer during depositions.
- Under PA Rules of Civil Procedure and the controlling decisional precedent, malpractice plaintiffs may discover the past and present opinions of a defendant and defendant's agent concerning the health care treatment at issue.

Karim v. Reedy, MD

No. 11 CV 4598 (C.P. Lackawanna January 11, 2016)

Nealon, J.

- No PA appellate statue, rule or appellate authority grants a party the right to withhold from discovery that party's relevant opinions, nor does it provide a malpractice defendant with the ability to prevent the discovery of those opinions, including opinions addressing the standard of care, by agreeing not to disclose those opinions at trial.
- OB and nurse will be directed to submit to second depositions to answer the questions that their counsel instructed them not to answer.

Venosh v. Henzes

321 A.3d 1026 (Pa. Super. 2015)

Bowes, J.

- Blue Cross appealed from a discovery order requiring Blue Cross to produce information concerning the quality-of-care review.
- Blue Cross was deciding whether to keep Dr. Henzes and Ms. Anderson as contract health care service providers.
- None of these purposes were present in it's quality-of-care review
- A corporation that provides health care insurance and not medical care is not a professional health care provider.
- Trial Court rejected Blue Cross's invocation of the privilege established by the PA Peer Review Protection Act. The Superior Court affirmed.

Yocabet v. UPMC Presbyterian

119 A.3d 1012 (Pa. Super. 2015)

Bowes, J.

- Transplant donor and recipient filed actions against hospital and physicians, alleging medical malpractice after transplanting a Hep. C infected kidney.
- Hospital was required to produce materials it asserted were confidential under Peer Review Protection Act and attorney-client privilege.
- Confidentiality provisions of the Peer Review Act do not apply to the CMS/DOH investigation. The DOH is not a professional health care provider and did not conduct peer review.
- UPMC's assertion that a record or document automatically is covered by the peer review privilege because it was forwarded to a peer review committee, was rejected.

Yocabet v. UPMC Presbyterian

119 A.3d 1012 (Pa. Super. 2015)

Bowes, J.

- Argument that a corporate entity can obtain legal advice only when one of it's high-ranking officials meets privately with counsel for advice on behalf of the corporation was rejected as well.
- Party invoking a privilege must initially set forth facts showing that the privilege has been properly invoked before the burden shifts to the party asking for discovery to set forth facts showing that the disclosure will not violate the attorney-client privilege.

LAW

MEDICAL MALPRACTICE INFORMED CONSENT

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Shinal v. Toms

2017 Pa. LEXIS 1385 (Pa. June 20, 2017)

Wecht, J.

- Plaintiff alleges that defendant failed to obtain informed consent for an open craniotomy total resection of a brain tumor.
- Plaintiff's moved to strike all potential jurors who were either employed or insured by Geisinger.
- Court granted in part and denied in part directing that prospective jurors who were employed by named defendant, or who had family in the same house that were employed, would be stricken for cause.
- Indirect employment relationship with employer that has ownership interest in defendant, standing alone, does not warrant presumption of prejudice.
- Plaintiff invoked *Cordes v. Assocs. Of Internal Med.,* 2014 Pa. Super. 52, 87 A.3d 829, 843-45 moving for disqualification for cause of any juror employed by any Geisinger entity.
- Trial court denied motion.

Shinal v. Toms

2017 Pa. LEXIS 1385 (Pa. June 20, 2017)

Wecht, J.

- Court granted motion for partial summary judgment in favor of Geisinger stating the duty to obtain plaintiff's informed consent belonged solely to Dr. Toms and not his physician's assistant.
- Without direct dialogue and two-way exchange between physician and patient, physician cannot be confident that patient comprehends the risks, benefits, likelihood of success and alternatives.
- Court held that a physician may not delegate to others his or her obligation to provide sufficient information in order to obtain patient's informed consent.
- Superior Court's order affirmed trial court's denial of Plaintiff's motion for post-trial relief remanding for new trial.

Mitchell v. Shikora

2017 Pa. Super. 134 (May 5, 2017)

Musmanno, J.

- Plaintiff suffered bowel perforation during hysterectomy.
- Jury returned a verdict in favor of defendant.
- Plaintiff filed Motion for Post –Trial Relief for new trial excluding the risk/complications evidence. Motion was denied.
- Plaintiff appealed claiming trial court erred allowing defendants to admit evidence of "known risks and complications" of a surgical procedure in a case that did not involve informed consent-related claims.

Mitchell v. Shikora

2017 Pa. Super. 134 (May 5, 2017)

Musmanno, J.

- Evidence must be probative of whether defendants' treatment of plaintiff fell below standard of care.
- Fact that risk and complication of laparoscopic hysterectomy, i.e., perforation of bowel, was the injury suffered, does not make it more or less probable that defendant conformed to proper standard of care and was negligent.
- Judgment was reversed and a new trial without admission of risks/complications evidence is required.

Crew v. Penn Presbyterian Med. Ctr.

2017 Phila. Ct. Com. Pl. LEXIS 188 (June 30, 2017)

Lachman, J.

- Decedent was admitted to Park Pleasant Health Care Facility for nursing care and therapy. With skin "intact," she developed gastric and pressure ulcers. She was released in fair condition.
- Decedent passed away in Penn Hospice care a month later due to lack of nutrition and hydration.
- Jury found that Penn Hospice was not negligent and did not answer causation or damage questions on verdict slip.
- Plaintiff filed a post-trial motion contending that it was error to permit defendants to introduce the "Consent for Hospice Care" form signed by Plaintiff authorizing admission to Penn Hospice.

Crew v. Penn Presbyterian Med. Ctr.

2017 Phila. Ct. Com. Pl. LEXIS 188 (June 30, 2017)

Lachman, J.

- Plaintiff argued this was an "informed consent" form which is barred in non-informed-consent cases by *Brady v. Urbas, 631 Pa. 329, 111 A.3d 1155 (2015)*.
- The "Consent to Hospice Care" form has no relation to "informed consent" since it does not identify the risks of a proposed surgical procedure. The care was only "palliative" in nature.
- Plaintiff's attorney opened the door to the introduction of the Consent to Hospice Care form by saying in his opening statement that Ms. Crew's family "wanted their mother to live. That was their intention. They were not taking her to Penn to pass away." There was no error.
- No error in allowing hospice opportunity to cross-examine decedent's expert regarding all opinions expressed in expert report for impeachment purposes including liability of settlement of nursing home defendants.

Brady v. Urbas

111 A.3d 1155 (Pa. 2015)

Saylor, C.J.

- Negligence count against podiatrist who performed surgeries on patient's toe which failed to resolve her medical problem. The Court entered judgment on jury verdict finding that podiatrist was not negligent and denied patient's post-trial motions. Patient and her husband appealed.
- The Superior Court vacated, reversed, and remanded, and podiatrist appealed.
- The Supreme Court affirmed and held that evidence that a patient affirmatively consented to treatment after being informed of the risks of that treatment is generally irrelevant to a cause of action sounding in medical negligence.

Brady v. Urbas

111 A.3d 1155 (Pa. 2015)

Saylor, C.J.

- Evidence that a patient affirmatively consented to treatment after being informed of the risks of that treatment is generally irrelevant to a cause of action sounding in medical negligence.
- Where a malpractice complaint only asserts negligence, and not lack of informed consent, evidence that a patient agreed to go forward with the operation, in spite of the risks of which she was informed, is irrelevant and should be excluded.
- Evidence about the risks of surgical procedures, in the form of either testimony or a list of such risks as they appear on an informed-consent sheet, may be relevant in establishing the standard of care in malpractice action.
- Fact that a patient may have agreed to a procedure in light of the known risks does not make it more or less probable that the physician was negligent in either considering the patient an appropriate candidate for the operation or in performing it in the post-consent timeframe.

MEDICAL MALPRACTICE
CHILD ABUSE

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K.H. ex rel. H.S. v. Kumar

122 A.3d 1080 (Pa. Super. 2015)

Wecht, J.

- Child and parents brought negligence action against physicians and health care providers, alleging that they collectively failed to recognize, treat and report child abuse that resulted in permanent injury.
- Issue: Whether the lack of an express statutory civil remedy under the Child Protective Services Law, 23 Pa. C.S. § 6301, *et seq*., implicitly precludes a common-law remedy in tort for harm sustained due to child abuse when the physician has failed to report reasonable suspicions that a child is a victim of abuse to the government authorities designated by the CPSL.
- Parents have a *prima facie* case of medical malpractice.
- Issue of material fact regarding whether the doctors breached the governing standard of care.
- Trial Court erred in entering summary judgment.

MEDICAL MALPRACTICE EXPERTS

LAW

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Vaccaro v. Scranton Quincy Hosp. Co. LLC

No. 14-CV-7675 (C.P. Lackawanna Oct. 27, 2016)

Nealon, J.

- Defendants filed motion in limine seeking to preclude testimony by plaintiff's experts regarding stem cell therapy stating it involves novel scientific evidence that has not gained general acceptance.
- Literature submitted for review supports plaintiffs' assertion to the contrary. *Frye* hearing is not warranted under Rule 207.1.
- Challenges to an expert's opinion rather than methodology or underlying scientific principles does not provide proper basis for exclusion of expert testimony under *Frye*.

Vaccaro v. Scranton Quincy Hosp. Co. LLC

No. 14-CV-7675 (C.P. Lackawanna Oct. 27, 2016)

Nealon, J.

- Medical expert opinion is sufficient to establish causation even if expert opines that other naturally occurring conditions combined with medical negligence to produce harm.
- Institution itself may be corporately liable for failing to enforce policies and oversee the practice of medicine if the health care professionals providing treatment within do not follow policies and procedures due to lack of education or training.
- Defendants’ objection to NIED is denied.
- A relative’s observance of lack of medical care is adequate to sustain a claim for NIED.

MEDICAL MALPRACTICE VICARIOUS LIABILITY

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Walters v. UPMC Presbyterian Shadyside

144 A.3d 104 (Pa. Super. 2016)

Bowes, J.

- Plaintiffs claim decedent died from hepatitis C infection contracted through use of contaminated needles at hospital from a drug addicted radiologic technician who tested positive for hepatitis C.
- Defendant fired the employee but failed to report him to criminal authorities.
- There was a special relationship between defendants and employee imposing a responsibility on defendant to report to criminal authorities.

Walters v. UPMC Presbyterian Shadyside

144 A.3d 104 (Pa. Super. 2016)

Bowes, J.

- Plaintiff pled sufficient facts that could support an imposition of common-law duty of care on defendants to report employee for prosecution.
- Superior Court agreed with trial court that there was no indication that reporting requirement in the law was intended to protect a particular group to which plaintiffs belonged, so no negligence per se.

Astleford v. Delta Medix

No. 15-CV-5134 (C.P. Lacka. Co. 2016)

Gibbons, J.

- Plaintiff underwent 11 radiation therapy treatments on the wrong side of her neck.
- Doctor offered plaintiff free treatments to the correct side of her neck and advised her against seeking treatment elsewhere due to increased risk of harm.
- Plaintiff sued Astleford for negligence, vicarious liability, lack of informed consent, intentional infliction of emotional distress and punitive damages.

Astleford v. Delta Medix

No. 15-CV-5134 (C.P. Lacka. Co. 2016)

Gibbons, J.

- The argument that corporate liability only applies to hospitals or health management organizations was rejected.
- Court cited *Scampone*, "Categorical exemptions from liability exist…only where the General Assembly has acted to create explicit policy-based immunites…"
- The private practice may be held liable for alleged negligence.
- Court granted preliminary objections that under *Scampone*, the corporate negligence claims should survive against the medical practice group.

Green v. Pennsylvania Hospital

123 A.3d 310 (Pa. 2015)

Todd, J.

- Decedent was admitted to the ICU with short breath, rapid breathing and wheezing and was put on a ventilator.
- Medical staff attempted to force air through an improperly placed trach causing the trachea to collapse.
- A plaintiff may pursue a negligence action on a direct liability or vicarious liability theory.
- The MCARE Act codifies vicarious liability of hospitals under the doctrine of ostensible agency.
- Lower court found that the doctor had not been proven to be an ostensible agent of the hospital.

Green v. Pennsylvania Hospital

123 A.3d 310 (Pa. 2015)

Todd, J.

- "In this Court's view, when a hospital patient experiences an acute medical emergency, such as that experienced by Decedent in the instant case, and an attending nurse or other medical staff issues an emergency request or page for additional help, it is more than reasonable for the patient, who is in the throes of medical distress, to believe that such emergency care is being rendered by the hospital or its agents."
- Trial Court determined that allowing the nurse to offer causation testimony as to another nurse, might confuse the jury.
- Based on the expert report, the proffered expert causation testimony of the nurse was based on a course of conduct by nurses and physicians and therefore had the potential to confuse the jury.

Estate of Denmark Ex. Rel. v. Williams

117 A.3d 300 (Pa. Super. 2015)

Donohue, J.

- Administrator of patient's estate brought action against physicians, hospital, and health system for negligence and wrongful death.
- References in complaint by administrator of patient's estate to nursing staff, attending physicians and other attending personnel and agents, servants, or employees were not lacking in sufficient specificity and did not fail to plead a cause of action against the hospital and health system for vicarious liability, although administrator did not identify the nurses or physicians allegedly responsible, where the names of those who performed services in connection with patient's care were either known to the hospital and health system or could have been ascertained during discovery.
- The lower court also erred in dismissing the corporate counts. The claims addressed death from septic shock as a result of negligence which occurred at the hospital. These facts successfully allege violations of duties owed by the hospital to the patient under a corporate theory. The Mercy entities had actual constructive knowledge of the defect as well.

PHARMACEUTICAL

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Czimmer v. Janssen Pharmaceuticals, Inc.

122 A.3d 1043 (Pa. Super. 2015)

Mundy, J.

- Verdict in favor of a minor born with a cleft palate whose mother was prescribed Topamax during her pregnancy.
- Janssen claimed that before conception, it attempted to assert a warning of genital birth defects in the Topamax label but the FDA precluded it.
- Warnings were given in respect to genitalia malformation but not this specific warning. Preemption claim failed.
- Evidence allowed the jury to conclude that the doctor would not have prescribed Topamax if Janssen adequately warned the doctor that Topamax carried a risk of cleft palate.
- Court concluded the minor has an independent right to recover medical expenses incurred before turning 18.

Gurley v. Janssen Pharmaceuticals, Inc.

113 A.3d 283 (Pa. Super. 2015)

Platt, J.

- Consumer brought products liability action against drug manufacturer after her child suffered birth defects allegedly caused by manufacturer's prescription anti-seizure drug, Topamax.
- Manufacturer claimed preemption based on the argument that the patient was attempting to change the pregnancy category from C to D controlled by the FDA.
- Trial Court order specifically prohibiting patient from presenting any argument or evidence that the manufacturer could have unilaterally changed the Topamax Pregnancy Category without FDA approval.
- Defendant failed to establish federal preemption of the failure to warn claim under decision in Wyeth v. Levine, 129 S.Ct. 1187 (2009).

Gurley v. Janssen Pharmaceuticals, Inc.

113 A.3d 283 (Pa. Super. 2015)

Platt, J.

- Defendant argued that because the mother ingested Topamax using her mother's prescription instead of her own in the month before her pregnancy, she severed the link between the learned intermediary and herself as the patient.
- This does not permit defendant from evading liability for the child's injuries.

LAW

SUBROGATION

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Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan

577 U.S. ____ (2016)

- When a third party injures a participant in an employee benefits plan under the Employee Retirement Income Security Act of 1974 (ERISA) 88 Sat. 829, as amended, 29 U.S.C. § 1001 et seq. Plan pays covered medical expenses.
- Terms of these plans include a subrogation clause requiring a participant to reimburse the plan if the participant later recovers money from the third party for his injuries.
- Under ERISA, plan fiduciaries can file civil suits "to obtain… appropiate equitable relief... to enforce… the terms of the plan."

Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan

577 U.S. ____ (2016)

- What happens when a participant obtains a settlement fund from a third party, but spends the whole settlement on nontraceable items?
- When a participant dissipates the whole settlement on nontraceable items, the fiduciary cannot bring a suit to attach the participant's general assets under § 502(a)(3).
- Suit is not one for "appropriate equitable relief."
- It is unclear whether the participant dissipated all of his settlement in this matter, so we remand for further proceedings.

SUBROGATION WORKERS COMP

LAW

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Kalmanowicz v. Workers' Compensation Appeal Board

2017 Pa. Commw. LEXIS 433 (July 7, 2017)

Brobson, J.

- Plaintiff was injured in a car accident while employed as a truck driver suffering severe injuries.
- Plaintiff entered into settlement with a third-party involved in the accident.
- Claim petition for injuries was granted and ordered Employer to pay Plaintiff's medical expenses.
- Employer filed petition to modify claiming Plaintiff had failed to reimburse Employer subrogation lien.
- Employer appealed to the Board Judgment was reversed. Employer had a right to subrogation which could not be abrogated by consent.

Kalmanowicz v. Workers' Compensation Appeal Board

2017 Pa. Commw. LEXIS 433 (July 7, 2017)

Brobson, J.

- Plaintiff appealed arguing Employer was not entitled to subrogation because Employer was contesting claim petition at the time third-party benefits were distributed.
- Court affirmed order stating no evidence could support a conclusion that Employer acted in bad faith or failed to exercise due diligence in enforcing subrogation rights.

Serrano v. Workers' Compensation Appeal Board Ametek

2017 Pa. Cmwlth. LEXIS 23

Roth, C.J.

- Plaintiff filed suit against Aramark after collecting workers' comp from sever burns he sustained at work through his Aramark coveralls.
- Aramark settled. Employer asserted lien for payment of medical and disability.
- Employer failed to present evidence that burns to Plaintiff's body not covered by coveralls were caused by Aramark.
- WCJ concluded that employer was entitled to recover all wage lost benefits paid to plaintiff and only medical expenses for burns to body covered by coveralls.
- Both parties appealed.

Serrano v. Workers' Compensation Appeal Board Ametek

2017 Pa. Cmwlth. LEXIS 23

Roth, C.J.

- Plaintiff argued WCJ erred in finding employer was entitled to 100% wage loss and medical benefits paid.
- Employer argued WCJ erred in denying subrogation for injuries Plaintiff sustained to other body parts.
- Board reversed WCJ decision under § 319 of the Act which states employer is entitled to recover expenses when third party causes work injury "in whole or in part".
- WCJ issued remand on reimbursement amounts to employer.
- Plaintiff again appealed regarding employers subrogation rights.
- Board did not address appeal and case remanded by court.

C.A.B. (Derry Area School Dist.)

2016 WL 56261, ___A.3d___(2016)

Pellegrini, J.

- Claimant petitioned for review of an order of the WC Appeal Board affirming decision with rewarding claimant subrogation of a third party medical malpractice award with respect to medical treatment received after a workplace injury.
- Under § 319 of the Act, the right of subrogation is automatic and absolute.
- Section 508 of the MCARE Act expressly eliminated subrogation rights with respect to past medical bills and past earnings.
- This prevents Claimant from a double recovery for the same injury and furthers the goal of ensuring that the employer and insurer are not compelled to compensate Claimant for injured caused by a negligent third party.
- Affirmed Board's order awarding Employer and Insurer subrogation with respect to award for future medical expenses and wage lost.

Liberty Mutual Insurance Company v. Domtar Paper Company

113 A.3d 1230 (Pa. 2015)

Baer, J.

- Worker's Comp carrier brought negligence action against alleged third-party tortfeasors arising from claimant's fall in alleged torfeasors' parking lot, seeking to recover the amount that carrier paid out as benefits to claimant.
- Section 319 of the Workers' Compensation Act does not permit an employer or their insurance company to commence an action directly against a third-party tortfeasor.
- Section 671 of the Act confers on employers or their worker's compensation insurers a right to pursue a subrogation claim but not directly against a third-party tortfeasor.
- Compensated employee has taken no action against the tortfeasor and the insurance company cannot take action on their own.

SOVEREIGN IMMUNITY

LAW

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Manning v. Commonwealth Department of Transportation

144 A.3d 252 (Pa. Cmwlth. 2016)

Brobson, J.

- Motorist brought action against DOT to recover for severe injuries when he swerved his vehicle off roadway to avoid a deer and struck drainage culvert.
- Common Pleas denied DOT's motion for summary judgment and it filed interlocutory appeal.
- Commonwealth Court held that DOT had no duty to maintain clear zone surrounding paved portion of highway or to erect guardrails or other protective barriers.

Ward v. Potteiger

142 A.3d 139 (Pa. Cmwlth. 2016)

Covey, J.

- Plaintiff injured when struck by probationer's vehicle after probation officer was told by probationer that he was under the influence of heroin but still allowed to drive home. Probationer was convicted of DUI and aggravated assault.
- Defendant filed PO's asserting immunity under Sovereign Immunity Act. Court of Common Pleas sustained and Plaintiff appealed.
- Case was thrown out on basis that Defendant did not operate vehicle as a matter of law and vehicle liability exception did not apply.

SOVEREIGN IMMUNITY
JERK OR JOLT

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Bost-Pearson v. Southeastern PA Transportation Authority

118 A.3d 472 (Pa. Cmwlth. 2015)

Leadbetter, J.

- Passenger on transit authority bus brought negligence action, alleging that, suddenly and without warning, the bus driver negligently, carelessly operated its motor vehicle in such a manner so as to suddenly jerk and jolt, quickly accelerating, causing her to fall and to be thrown.
- Passenger failed to overcome the “jerk and jolt” doctrine.
- No indication that other passengers, seated or unseated, were affected.
- Doctor’s report that the passenger’s injuries were directly and casually related to the bus incident were insufficient to find negligence.

LAW

SOVERIEGN IMMUNITY REAL PROPERTY

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Gillingham v. County of Delaware

No. 2532 C.C. 2015 (February 14, 2017)

Brobson, J.

- Plaintiff claimed Defendant was negligent by its failure to inspect and maintain floor safety or remove the computer cables from floor after her foot became entangled in them and she fell.
- Defendant filed motion for summary judgment arguing it was immune under Torts Claims Act.
- Trial Court granted motion and dismissed complaint.
- Court affirmed order stating if an injury is caused by personalty that is on the real property, Torts Claim Act grants immunity.

SOVEREIGN IMMUNITY DAMAGES

LAW

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Ewing, et al. v. Potkul, et al.

No. 1471 CD 2016 (Pa. Cmwlth. September 27, 2017)

Leavitt, P.J.

- Commonwealth Court ruled that decedent's mother and daughters could not seek "non-pecuniary" damages but could seek "pecuniary damages" under the Wrongful Death Act for loss of Decedent's future services and financial contributions.
- Damages sought in a survival action or wrongful death claim against the Commonwealth must be authorized by both the Survival Act and the Sovereign Immunity Act.
- Damages for loss of the value of decedent's services and financial contributions are not damages authorized in § 8528(c)(1).

LAW

SOVEREIGN IMMUNITY CONTRACT

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Cornell Narberth, LLC v. Borough of Narberth

2017 Pa. Commw. LEXIS 488 (July 14, 2017)

Leavitt, P.J.

- Plaintiff brought a breach of contract and promissory estoppel claim when Defendant incurred extra costs to Plaintiff regarding sprinkler system.
- Court stated that no claim existed because of Sovereign Immunity Act and that building permits do not create a contractual relationship.
- Plaintiff appealed.
- Commonwealth affirmed stating that a promise to perform an obligation that the promisor is already legally bound to do cannot be considered.
- Building inspector acted as an "employee" of the borough for purposes of Political Subdivision Tort Claims Act in order to determine whether the next phase of construction could occur.
- A municipality cannot be held liable in a 1983 action in absence of a predicate arbitrary or conscience shocking actions.

LAND

OIL & GAS

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Seneca Resources Corp. v. S & T Bank

122 A.3d 374 (Pa. Super. 2015)

Musmanno, J.

- Lessee filed suit against lessor for declaration that it had not breached oil and gas lease and that lessors had breached lease.
- Lessors filed counter claims, including request for declaration that lessee had forfeited right to develop deep gas horizons.
- Court concluded that the lease for gas drilling forecloses a finding of a breach of implied covenant to develop and produce oil and gas on the unoperated acreage.
- An implied covenant to develop the underground resources appropriately exists where the only compensation to the landowner contemplated in the lease is royalty payments resulting from the extraction of that underground source.

INSURANCE

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Yenchi v. Ameriprise Financial, Inc.

2017 Pa. LEXIS 1405 (S. Ct. June 20, 2017)

Donohue, J.

- Life insurance was sold with various promises that were untrue.
- Where the offer to sell an insurance product as premised upon the results of an allegedly independent financial analysis, a question of fact may arise regarding whether the financial analyst/insurance salesperson incurs a fiduciary duty.
- It is significant that the salesperson cultivated a relationship with the insureds first as a financial advisor, not an insurance salesperson.
- A plaintiff may establish a confidential relationship by demonstrating "weakness, dependence or trust, justifiably reposed."
- Court reversed the grant of summary judgment in favor of the insurance company regarding the breach of fiduciary duty claim stating the Plaintiffs' continue to make their own investment decisions.

Yenchi v. Ameriprise Financial, Inc.

2017 Pa. LEXIS 1405 (S. Ct. June 20, 2017)

Donohue, J.

- Plaintiffs' appealed dismissal of fiduciary duty claim.
- Court must decide if fiduciary duty can arise in a customer transaction for purchase of whole life insurance policy based upon advice from financial advisor where consumer purchasing policy doe not cede decision-making control over purchase to financial advisor.
- Court concluded no fiduciary duty arises in this situation and Superior Court's decision is reversed.

INSURANCE HOMEOWNERS

LAW

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Windows v. Erie Ins. Exch.

2017 Pa. Super. LEXIS 309 (May, 1, 2017)

Moulton, J.

- Plaintiff's filed suit after Defendant denied claim following an infiltration of raw sewage into Plaintiff's home.
- Defendant filed motion for summary judgment arguing that water damage exclusion unambiguously precluded coverage for Plaintiffs' losses.
- Jury verdict in favor of plaintiffs'. Defendant appealed.
- Water-damage exclusion in plaintiffs' insurance policy provides losses caused by "water or sewage which backs up through sewers and drains" are excluded from coverage. Policy does not define "backs up".
- Water-damage exclusion is subject to more than one reasonable interpretation. Provision is ambiguous. Defendant failed to meet burden.
- Judgment reversed. Case remanded. Erie failed to meet burden proving Homeowners' loss was necessarily excluded.

INSURANCE
BAD FAITH COVERAGE

LAW

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Wolfe v. Allstate Property and Casualty Insurance Company

790 F.3d 487 (3rd Cir. 2015)

Rendell, C.J.

- Insurance dispute between Wolfe and Allstate.
- It is PA's public policy that insurers cannot insure against punitive damages and we therefore predict that the PA Supreme Court will answer that question in the negative.
- Punitive damages cannot be recovered in a bad faith lawsuit, notwithstanding the underlying result that the insurance company was guilty of bad faith damages.

LAW

INSURANCE
UIM

fppt.com

Rourke v. Pennsylvania National Mutual Casualty Insurance

116 A.3d 87 (Pa. Super. 2015)

Mundy, J.

- Nineteen year old passenger was severely injured in a vehicle driven by his friend.
- Passenger was a foster child of the Rourkes' and was on the Rourkes policy.
- A claim was made for UIM coverage and Penn National denied the claim.
- Lower court erred when it held that passenger was not a ward of the Rourkes' on the reasonable expectation of coverage issue.
- Reasonable expectations doctrine exits in part to protect insureds from both deception and non-apparent terms.

Byoung Suk An v. Victoria Fire & Cas. Co.

113 A.3d 1283 (Pa. Super. 2015)

Shogan, J.

- Passenger brought action against driver and owner of vehicle for claims based on accident, and brought action against automobile insurer for declaration that insurer had duty to defend driver and owner.
- Vehicle owner had an insurance policy that excluded from coverage anybody other the the named driver.
- Passenger asserted that the named driver exclusion in the policy is in violation of the Financial Responsibility Law, § 1718(c) and is void as against public policy.
- The “named driver only” policy is not contemplated by § 1718(c). Therefore the law is not applicable and the provision is not void as against public policy.

INSURANCE
LIFE

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Dixon v. Northwestern Mutual

146 A.3d 780 (Pa. Super. 2016)

Olson, J.

- Plaintiff for trust containing life insurance policy brought action against Defendant claiming breach of fiduciary duty, bad faith insurance and violation of UTPCPL.
- Common Pleas sustained Defendant's PO and plaintiff appealed.
- Northwestern did not undertake any independent duty.
- Plaintiff's UTPCPL claim based on post-2006 billing statements is not barred by the gist of the action doctrine or the economic loss doctrine.
- Trial Court's order sustaining PO's as to fiduciary duty claim are affirmed and trial court's order sustaining PO's to UTPCPL claim is vacated.

INSURANCE TITLE

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Michael v. Stock

2017 Pa. Super. LEXIS 245 (April 11, 2017)

Solano, J.

- Appeal from failed real estate transaction after a title issue arose when Defendant sold two properties to Plaintiff but unknowingly only held title to one of those properties.
- Third-party complaint was filed against title insurance company for services.
- Defendant appealed after trial court denied motion for partial summary judgment.
- Descriptions of property in insurance policy must be construed with reference to insured’s reasonable expectations with respect to coverage being purchased.
- Court was aware of no grounds upon which results should differ from fire and casualty polices.
- Court reversed grant of summary judgment and sent case back to trial on bad faith claim.

FRL

STACKING

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Pergolese v. The Standard Fire Insurance Company

2017 Pa. Super. 96 (April, 11, 2017)

Stabile, J.

- Plaintiff possessed a multi and single-vehicle policy under which stacking waivers were executed for uninsured and underinsured coverage.
- Issue is whether Defendant was required to secure new stacking waiver from plaintiff when another vehicle was added to multi-vehicle policy by amending policy's dec. page at time of ownership.
- Trial Court granted summary judgment in favor of Plaintiff.
- Vehicles were placed under continuous after-acquired vehicle provision of standard fire policy and not through purchase of new insurance.
- Insured's addition of vehicle to policy constituted a new "purchase" of UM/UIM coverage under § 1738 of the Financial Responsibility Law and required execution of new UM/UIM stacking waiver.

FRL
LIMITED TORT

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Vetter and Jones v. Miller

2017 Pa. Super. 64 (March 10, 2017)

Ransom, J.

- Plaintiffs filed complaint for damages arising out of a hit and run involving road rage and drinking while intoxicated.
- Plaintiff alleged that an inability to sleep impaired an important body function so the jury should have been allowed to determine impairment of a body function as she was able to perform her profession and other activities.
- Summary judgment not reversed on limited tort issues.

Kitchen v. Kruman

2017 Pa. Dist. & Cnty. Dec. LEXIS 2154 (May 18, 2017)

Finley, P.J.

- Twelve year old Plaintiff suffered a knee injury after a car accident while he was a passenger in his mother's vehicle.
- At the age of 20, Plaintiff was still complaining of knee pain and limitations due to the injury.
- Court granted Defendant's summary judgment stating that Plaintiff is bound by his mother's limited tort option in pursuing a noneconomic loss.
- Plaintiff appealed claiming the court erred in finding his injuries not sufficiently serious enough to create an issue.
- Appeal without merit. Plaintiff failed to show evidence of serious impairment due to his injury.

LAW

FTCA

fppt.com

U.S. v. Kwai Fun Wong

135 S.Ct. 1625 (2015)

Kagan, J.

- Foreign religious leader and organization brought Federal Tort Claims Act claims against Immigration and Naturalization Service alleging negligence in connection with conditions of leader's detention.
- In another action, minor's conservator brought FTCA claims against Federal Highway Administration seeking to recover damages for wrongful death in relation to a car accident that killed minor's father.
- U.S. Supreme Court held that the FTCA two-year limitation period can be tolled.
- Lower court will decide whether the requirements for equitable tolling exist, since it will be accepted under the FTCA.
- FTCA goes further than the typical statute waiving sovereign immunity to indicate that its time bar allows a court to hear late claims.

WORKERS' COMP IMMUNITY

LAW

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Neidert v. Charlie

143 A.3d 384 (Pa. Super. 2016)

Mundy, J.

- Appellant was injured while using a door in the floor of the Pub where he worked.
- Appellant received workers' comp. but sued for damages under dual capacity doctrine.
- Nearly impossible to separate owner/employer's involvement as co-employee-boss of Appellant from role as building owner.
- Court held that Appellant could not meet dual capacity exception based upon the rationale in decision.
- Nonsuit properly granted.

CIVIL RIGHTS IMMUNITY

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Sauers v. Homanko

2017 U.S. Dist. LEXIS 20260 (M.D.P.A. February 14, 2017)

Munley, J.

- Plaintiff claimed a violation of rights after a police cruiser lost control and collided with plaintiff's vehicle causing severe injury to himself and his wife who died from her injuries.
- Defendant moved to dismiss for Plaintiff's failure to state claim upon which relief can be granted.
- Court denied Motion to Dismiss stating any reasonable officer pursuing a potential traffic offender in excess of 100 mph would have known under these circumstances gives rise to state-created danger claim.
- Qualified immunity fails to shield defendant from individual liability.

L.R. v. School District of Philadelphia

836 F.3d 235 (3rd Cir. 2016)

Fuentes, C.J.

- Teacher claimed immunity when he was sued after allowing his kindergarten student to leave the classroom with an unidentified adult. Student was later sexually assaulted by the adult.
- Defendants' motion to dismiss on immunity claim was denied and appealed.
- Court held that teacher made affirmative use of authority increasing danger to student, risk of harm presented due to deliberate indifference and student's right to a safe environment was violated.
- District Court's denial of qualified immunity is affirmed.

LAW

CIVIL RIGHTS
CRIMINAL CHARGE

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Black v. Montgomery County

835 F.3d 358 (3rd Cir. 2016)

Chagares, C.J.

- Plaintiff alleged that various police and fire officials violated her constitutional rights in connection with criminal proceedings against her.
- District Court granted Defendant's motion to dismiss.
- First issue on appeal is whether District Court erred in determining that plaintiff was not "seized" as required in Fourth Amendment claim.
- Second issue is whether Plaintiff's Fourteenth Amendment due process claim for fabricated evidence required she be convicted at trial since she was acquitted.

Black v. Montgomery County

835 F.3d 358 (3rd Cir. 2016)

Chagares, C.J.

- Court held that an acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is reasonable likelihood that Defendant would not have been criminally charged.
- Evidence that is incorrect or simply disputed should not be treated as fabricated.
- Court vacated order and remanded for further proceedings.

Curry v. Yachera

835 F.3d 358 (3rd Cir. 2016)

Chagares, C.J.

- Plaintiff was arrested and charged with theft by deception and conspiracy and was unable to afford bail.
- After pleading *nolo contendere* to the charges he was released and filed suit claiming malicious prosecution, false arrest and imprisonment asserting the Fourteenth Amendment.
- District Court granted defendants motion to dismiss claims stating plaintiff was never “seized” and declined to exercise supplemental jurisdiction over remaining state law claims.
- Plaintiff appealed.

Curry v. Yachera

835 F.3d 358 (3rd Cir. 2016)

Chagares, C.J.

- Fourth Amendment malicious prosecution claim must show defendant initiated criminal proceeding ending favorably, they were initiated without probably cause, defendant acted maliciously and plaintiff suffered deprivation of liberty consistent with seizure as a consequence of a legal proceeding.
- District Court’s order of dismissal was affirmed.
- Malicious prosecution claim modified to dismiss claims without prejudice.

CIVIL RIGHTS
1ST AMENDMENT

LAW

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Fields v. City of Philadelphia

No. 1650, No. 1651 (3d Cir. July 7, 2017)

Ambro, C.J.

- Plaintiffs' claim retaliation after attempting to record police officers carrying out official duties in public.
- Defendant claimed individual officers were entitled to qualified immunity and the City could not be vicariously liable for their acts.
- District Court granted Defendant's summary judgment on First Amendment claiming the act of recording was not sufficiently expressive. Plaintiff appealed.
- Every Circuit Court of Appeals has held there is a First Amendment right to record police activity in public protecting the right of photographing, filming, or recording police officers in the act of public duty.
- Reversed and remanded.

LAW

CIVIL RIGHTS
DUE PROCESS

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Otto v. Williams

2017 U.S. App. LEXIS 13594 (July 27, 2017)

Greenberg, C.J.

- Case arises out of police officers' terminations following indictment by federal grand jury on corruption charges that were acquitted at a jury trial.
- Claim left on appeal is "stigma-plus" due process claim under Fourteenth Amendment pursuant to 42 U.S.C. § 1983.
- Plaintiffs' were acquitted of corruption charges at criminal trial and successfully sought reinstatement to their positions with back pay.
- Court of Appeals affirmed dismissal of claims stating criminal trial was sufficient name-clearing hearing that provided them with complete remedy for reputational harm.

CIVIL RIGHTS
BIVENS

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Ziglar v. Abbasi

2017 U.S. LEXIS 3874, 582 U.S. __ (June 19, 2017)

Kennedy, J.

- After 9-11 attacks, illegal aliens filed suits with claims of being held in harsh conditions and physical and verbal abuse by prison guards, causing severe injuries and insulting religion.
- Respondents sought damages under implied cause of action theory adopted in *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388* as well as under 42 U.S.C. § 1985(3) forbidding certain conspiracies to violate equal protection rights.
- Motions to dismiss Fourth Amendment complaint were denied defendants and granted as to others creating interlocutory appeals.
- Court of Appeals ruled complaint sufficient for action to proceed against Plaintiff.
- Plaintiff appealed.

Ziglar v. Abbasi

2017 U.S. LEXIS 3874, 582 U.S. __ (June 19, 2017)

Kennedy, J.

- Proper test for determining a new *Bivens* context if case is different in a meaningful way from previous *Bivens* cases such as rank of officer, constitutional right at issue, extent of judicial guidance in confronting issue or presence of special factors.
- Challenged is the executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three Bivens claims the court has approved in the past; a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against the congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma.

LAW

CIVIL RIGHTS
8TH AMENDMENT

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Palakovic v. Wetzel

No. 16-2726 (3rd Cir. April 14, 2017)

Smith, C.J.

- Plaintiffs' brought civil action after mentally ill son committed suicide in prison after repeatedly being placed in solitary confinement.
- District Court dismissed 8th Amendment claims against prison officials and medical personnel for failure to state claim upon which relief can be granted.
- Court should have allowed claim to proceed to discovery after deliberate indifference shown by Defendant.
- Plaintiffs' properly pleaded claim under 8th Amendment in both original and amended complaints. District Court should permit Plaintiffs' to file 2nd amended complaint setting forth 8th amendment claims concerning conditions of confinement, inadequate mental healthcare, vulnerability to suicide and failure to train.

FRAUD/UTPCPL

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Dehart v. Homeq Servicing Corp.

No 15-1723 (3d Cir. Feb. 8, 2017)

Roth, C.J.

- Plaintiff obtained home loan from Parkway Mortgage secured by mortgage on property. Parkway assigned the interests to non-parties which in turn assigned their interests.
- Plaintiff stopped making payments after not receiving monthly bills. Foreclosure and bankruptcy followed.
- Trial Court threw out claim for violation of Unfair Trade Practices and Consumer Protection Law.
- No implied covenant of good faith and fair dealing. Reliance not proven. Third Circuit affirmed.

Adams v. Hellings Builders, Inc.

146 A.3d 795 (Pa. Super. 2016)

Olson, J.

- Plaintiffs brought action against Defendant alleging fraud and violation of UTPCPL.
- Common Pleas sustained Defendant's PO's. Plaintiffs' appealed.
- Technical privity is no longer required to assert cause of action for fraud or a violation of UTPCPL.
- Question is whether there was reliance on alleged misrepresentations, whether it was foreseeable.
- Defendant's own website stated it was a reputable builder touting its abilities although stucco system did not comply with proper standards.
- Superior Court reversed.

LAW

ATTORNEY MALPRACTICE

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Kilmer v. Sposito

146 A.3d 1275 (Pa. Super. 2016)

Stevens, P.J.E.

- Plaintiff filed action against former attorney for legal malpractice and breach of contract.
- Appellee negligently and carelessly advised appellant to file an election to take against her husband's will which effectively reduced her share of the estate from ½ to 1/3.
- Common Pleas sustained PO's in the nature of a demurrer filed by Defendant. Plaintiff appealed.
- At issue is the interpretation of *Muhammad v. Serassburger, 587 A.2d 1346 (1991)* which held that a dissatisfied plaintiff may not sue his or her attorney for malpractice following settlement with which plaintiff agreed.
- Court stated appellant had no real choice but to settle underlying action and reversed.

LAW

WORKERS' COMPENSATION IMPAIRMENT RATING

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Protz v. Workers' Comp. Appeal Board

2017 Pa. LEXIS 1401 (S. Ct. June 20, 2017)

Wecht, J.

- Plaintiff sustained work related injury and was paid total disability benefits. After undergoing an IRE, impairment rating listed her at partial disability status. Petition granted.
- Plaintiff appealed claiming General Assembly unconstitutionally delegated to AMA authority to establish criteria for evaluating permanent impairment.
- Court reversed Board's decision stating General Assembly alone has power to make laws and cannot constitutionally delegate power to another branch of gov't or organization.

LAW

ARBITRATION PERSONAL INJURY

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Fellerman v. Peco Energy Co.

2017 Pa. Super. LEXIS 209 (March 30, 2017)

Lazarus, J.

- Plaintiff filed suit after power pole fell over starting a fire and burning him.
- Plaintiff claimed pole was rotted when house was purchased.
- Parties entered into a valid agreement to arbitrate.
- Unconscionability argument rests on assertion that agreement was inconspicuous and difficult to read.
- Bodily injury claims are within the scope of the agreement.
- Tort claims are subject to arbitration clause in agreement.
- Superior Court reversed and sent back to Trial Court with instructions.

ARBITRATION
TORTS

LAW

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Saltzman v. Thomas Jefferson University Hospitals

2017 Pa. Super. 206, No. 2593 EDA 2015 (June 30, 2017)

Stevens, P.J.E.

- Plaintiff signed employment contract prior to hiring. Contract portion called "Physician Service Agreement" contained arbitration clause but Defendant was not a party to the "Physician Service Agreement" portion.
- Plaintiff filed complaint alleging claims for retaliation in violation of PA Whistleblower Law and wrongful termination.
- Trial Court overruled Defendant's PO's for reasons that the matter is of public interest, agreement favored Defendant and Plaintiff did not knowingly waive her right to sue.

Saltzman v. Thomas Jefferson University Hospitals

2017 Pa. Super. 206, No. 2593 EDA 2015 (June 30, 2017)

Stevens, P.J.E.

- Defendant appealed.
- Superior Court reversed and remanded.
- Arbitration provision applies to "any controversy or claim between the parties hereto arising under or related to this Agreement" and is broadly worded.
- No evidence demonstrating parties' intent to exclude tort claims arising from or related to Agreement.

PRODUCTS LIABILITY
TINCHER

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Renninger v. A&R Machine Shop

2017 Pa. Super. 98 (April 11, 2017)

Stabile, J.

- Plaintiff flied suit after a wheeled caster on a modular home assembly line ran over his foot claiming casters should have included toe guards.
- Jury did not find defendant negligent in producing defective product.
- Plaintiff appealed stating the court erred in its decision to admit evidence of industry standards, OSHA Safety standards and assumption of risk.
- Neither party offered any substantive argument for or against admission of evidence in Pennsylvania. After reviewing assertions following *Tincher*, judgment affirmed.

American Honda Motor Co. v. Martinez

No. 445 EDA 2015 (Pa. Super. April 19, 2017)

Dubow, J.

- Defendant brought suit against plaintiff stating his injuries after a car accident were due to a defectively designed seatbelt.
- Jury concluded Plaintiff was at fault for failure to warn and poor seatbelt design.
- Post-Trial motion by Plaintiff was pending when ***Tincher*** was decided.
- Trial Court heard argument addressing impact of Tincher and denied post-trial motion.
- Plaintiff appealed.

American Honda Motor Co. v. Martinez

No. 445 EDA 2015 (Pa. Super. April 19, 2017)

Dubow, J.

- In light of *Tincher*, Plaintiff raised issues challenging trial court's jury instructions, jury charges, design defect, failure to warn and entitlement to a new trial.
- Jury instructions appeal granted. *Tincher* states trial court has wide discretion charging a jury and charge is adequate unless jury instruction misled or omissions caused fundamental error.
- Plaintiff argues it was the judge and not the jury who determined seat belt restraint was "unreasonably dangerous".
- Court did not abuse discretion in denying new trial. Jury charge was adequate. Court made clear to jury that it was the arbiter of whether seat belt restraint system was "unreasonably dangerous" and absence of "risk utility" language from instruction did not amount to fundamental error.

Tincher v. Omega Flex, Inc.

104 A.3d 328 (Pa. 2014)

Castille, C.J.

- Homeowners brought action against manufacturer of stainless steel tubing that was used in transporting natural gas to a fireplace in their residence for strict liability, negligence and breach of warranty.
- PA Supreme Court retainedthe Restatement Second 402A.
- Plaintiff pursuing a cause of action upon the theory of strict liability in tort must prove that a product is in a defective condition usually submitted to the finder of fact.
- Court declined to adopt the Restatement (Third) of Torts.
- Testing the product's safety by the reasonableness of the manufacturer's action or omissions is rejected.
- Risk Utility Test
- Consumer Expectation Test
- Role of judge and jury demarcated.

S.O.L.

fppt.com

S.J. v. Gardner

2017 Pa. Super. LEXIS 511 (July 11, 2017)

Stevens, P.J.E.

- Defendant plead guilty to indecent assault of a minor under the age of 13 and was sentenced to 5 years' of probation.
- Plaintiff's parents filed civil complaint bringing claims of battery and intentional infliction of emotional distress from damages suffered sexual abuse.
- Defendant claimed the action was not within the 2 year statue.
- Plaintiff asserted it was filed properly under the Minority Tolling Statute.
- Trial Court granted Defendant's summary judgment concluding action was time-barred by 2 year statute.

S.J. v. Gardner

2017 Pa. Super. LEXIS 511 (July 11, 2017)

Stevens, P.J.E.

- Plaintiff appealed.
- Limitations period for a minor's claim is measured from the time the minor turns 18, irrespective of the date the cause of action is filed by minor's guardians or by minor once he/she turns 18 pursuant to the Minority Tolling Statute.
- Superior Court rejected suggestion that Minority Tolling Statute should be interpreted to require Plaintiff to wait until the age of 18 to pursue claim.
- Reversed and remanded.

CONSTITUTIONAL LAW ENVIRONMENTAL

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Pennsylvania Environmental Defense Foundation v. Commonwealth

2017 Pa. Super. LEXIS 511 (July 11, 2017)

Stevens, P.J.E.

- Plaintiff filed declaratory judgment action challenging the constitutionality of statutory enactments related to funds generated from leasing of state forest and park lands for oil and gas exploration and extraction.
- Gas and minerals right in state parks and forests are part of public trust.
- Court finds that Defendant must manage them according to § 27 imposing fiduciary duties.
- Court found that constitutional language controls how Defendant may dispose of proceeds general from public natural resources.

Pennsylvania Environmental Defense Foundation v. Commonwealth

2017 Pa. Super. LEXIS 511 (July 11, 2017)

Stevens, P.J.E.

- Case reversed in part and vacated and remanded in part, Commonwealth Court's order granting summary relief to Defendant and denying Plaintiff's application for summary relief.
- Legislature violates § 27 when it diverts proceeds from oil and gas development to non-trust purpose without exercising its fiduciary duties as trustee.

RIGHT TO KNOW

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Pennsylvania State Police v. Grove

No. 25 MAP 2016 (Pa. June 20, 2017)

Dougherty, J.

- Defendant made request to Plaintiff pursuant to § 301 requesting copy of police report and all video/audio recordings taken by officers at scene of car accident.
- Plaintiff responded denying MVRs stating they were not for public disclosure under § 708(b)(18)(i) of the RTKL.
- Defendant appeal to Office of Open Records. Plaintiff supplemented the record that MVRs are criminal investigative records exempt from disclosure under § 708(b)(16) of RTKL.
- OOR directed Plaintiff to provide complete copies of MVRs to Defendant stating conclusory statements denying disclosure were insufficient.
- Court affirmed in part OOR's decision to provide MVRs to Defendant and reversed in part, remanding matter to OOR with instructions for redaction of audio portions of MVRs before disclosure.

Pennsylvania State Police v. Grove

No. 25 MAP 2016 (Pa. June 20, 2017)

Dougherty, J.

- Plaintiff appealed.
- Superior Court affirmed in part and reversed in part.
- Individuals at scene could have had no reasonable expectation of privacy or that their statements and images were not being captured on MVRs.
- Disclosure of MVRs pursuant to RTKL does not violate Wiretap Act.

PROCEDURE
VENUE

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Bristol-Myers Squibb Co. v. Superior Court

2017 U.S. LEXIS 3873 (June 19, 2017)

Alito, J.

- A group of plaintiffs sued Bristol-Myers in California Court claiming company's drug, Plavix damaged their health.
- Bristol-Myers did not develop, create marketing or manufacture Plavix in CA.
- CA Superior Court held that CA Courts have specific jurisdiction to entertain nonresidents' claims. Noting both resident and nonresident claims were based on same product and marketing.
- Supreme Court reversed.
- No adequate link between State and nonresidents' claims that would warrant specific jurisdiction over nonresidents' claims.

CONTRACT EDUCATION

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McCabe v. Marywood Univ.

2017 Pa. Super. LEXIS 534 (July 18, 2017)

Shogan, J.

- Plaintiff transferred to another nursing school after Defendant's accreditation status was change.
- Plaintiff filed suit claiming breach of contractual duty to provide fully accredited nursing education and damages, i.e., expensed incurred as a result of transfer, loss of income and employment opportunities due to delayed graduation.
- Court sustained Defendant's PO's and Plaintiff appealed.
- Plaintiff's claims based on alleged misrepresentation that the NLNAC/ACEN accreditation for nursing program was revoked forcing transfer to another school are sustained. Program never lost accreditation and Plaintiff voluntarily chose to transfer.
- Superior Court affirms order sustaining Defendant's preliminary objections and dismissing Plaintiff's complaint.

SUBROGATION
ERISA

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Rickard v. American National Property & Casualty Company
2017 Pa. Super LEXIS 858 (October 25, 2017)
Shogan, J.

- Whether a wrongful death beneficiary's recovery under Pennsylvania Wrongful Death Act is subject to subrogation claim for benefits paid on behalf of the decedent for medical treatment during the decedent's lifetime.
- Court rejects *U.S. Airways v. McCutchen*, 569 U.S. 88, 133 S.Ct. 1537, 185 L.Ed.2d 654 (2013).
- *McCutchen* involved a plan's right to recover from a living plan participant's bodily injury settlement.
- Funds at issue were obtained on behalf of statutorily enumerated beneficiaries pursuant to the Pennsylvania Wrongful Death Act.

PERSONAL INJURY FOOTBALL

LAW

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Feleccia v. Lackawanna College

No. 385 MDA 2016 (Pa. Super. February 24, 2017)

Shogan, J.

- Plaintiff filed claim after suffering injures while participating in a tackling drill during spring contact football practice. Waiver was signed.
- Plaintiff stated waiver could not be used as a shield against claims of negligence stating the college owed a duty of care in their capacity as intercollegiate athletes providing medical personnel at tryout incase of injury.
- Trial Court granted summary judgment and Plaintiff appealed.
- Superior Court reversed and remanded stating trial court erred in determining waiver was enforceable without considering college's conduct in failing go provide medical personnel.

LAW

PERSONAL INJURY PREEMPTION

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Okeke-Henry v. Southwest Airlines

2017 Pa. Super. LEXIS 250 (April 13, 2017)

Stabile, J.

- Plaintiff filed complaint alleging she was injured when struck in head by suitcase carried by another passenger while boarding causing injuries.
- Plaintiff filed motion for reconsideration contending FAA's preemption does not prohibit other remedies.
- Trial Court denied motion stating decision whether state cause of action is preempted by federal law is to be decided by the court. Judgment granted on pleadings in favor of Defendant.
- Plaintiff appealed.
- Court states no basis for concluding incident occurred in the course of operation of aircraft so as to come under Act's preemption umbrella.
- Vacated and remanded.

PERSONAL INJURY
NEGLIGENT SECURITY

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Wilson v. U.S. Security Associates

2017 Pa. Super. LEXIS 537 (July 18, 2017)

Platt, J.

- USSA provided security guard services under a contract at a bakery plant where Hiller, a suspended worker, shot and killed two co-workers, and seriously injured a third.
- Punitive damage award of $38.5M.
- Appellant claimed USSA liable for pre-shooting “fear and fright” damages.
- Claim for punitive damages, after it had been withdrawn previously, improperly added a new cause of action after that statute of limitations had run.
- Therefore, a second trial on punitive damages was in error and abuse of discretion. Punitive damages thrown out.
- Causation: negligent performance of escort service was not a legal cause of the murders. No causation there.

Wilson v. U.S. Security Associates

2017 Pa. Super. LEXIS 537 (July 18, 2017)

Platt, J.

- No evidence that an escort to Hiller's car would have prevented the shootings.
- It was reasonable for the jury to conclude that once guards had let her in, reasonable care under the circumstances required that the guards immediately notify Kraft management (not merely a serendipitous passerby) of the threatening emergency situation.
- Guard should have notified Kraft management by cell phone or some other system that they had let in a potentially dangerous person.
- Joint tortfeasor release did not let USAA off the hook, because of Kraft being released.
- USAA had no claim for contribution from Kraft by virtue of Hiller's continued employment. Court reversed trial court's denial of JNOV as to punitive damages. In all other respects, the judgment was affirmed.

LAW

PERSONAL INJURY
FALL DOWN

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Stuski v. Philadelphia Authority for Industrial Development
2017 Pa. Commw. LEXIS 277 (May, 25, 2017)
Covey, J.

- Plaintiff slipped and fell on snow and/or ice getting out of his car at work.
- Plaintiff asserted CBRE contracted with PAID providing snow removal services.
- Defendants argued that no duty of care was owed since under the Lease, it was City's responsibility to remove snow and ice.
- Trial Court dismissed the complaint stating that Defendant had no duty of care. The City and not Defendant was responsible for maintenance.
- Plaintiff appealed.
- Appellate Court affirmed stating no material facts are at issue and Defendant is entitled to judgment.

PERSONAL INJURY NEGLIGENCE IN WORKPLACE

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Kovacevich v. Regional Produce Cooperative Corp. 2017 Pa. Super. LEXIS 795 (October 13, 2017)

Solano, J.

- “TMK” was a tenant in market.
- TMK salesman as injured by forklift.
- Salesman injury occurred in a refrigerated portion of TMK’s leased premises, not in a common area for which RPCC was responsible.
- Restatement cannot assist the injured worker.
- OSHA “controlling employer” guidelines do not give rise to liability.