

**LAW OFFICE OF
CYNTHIA G. BEAM**

Employees of Nationwide Mutual Insurance Company®
Not a Partnership

CYNTHIA G. BEAM
KELLY A. COSTELLO
CAROL ANTOFF
SEAN A. DOLAN
MIRANDA D. CLIFTON
ROBERT DEARY

131 CONTINENTAL DRIVE
SUITE 407 - CHRISTIANA EXECUTIVE CAMPUS
NEWARK, DELAWARE 19713-4301
(302) 292-6660
FAX (302) 292-6668

MEMORANDUM

To: Delaware Claims Association
From: Sean A. Dolan, Esquire
Date: March 3, 2009
Re: Case Law Update

**SUPERIOR COURT DISCUSSES
MULTIPLE LEGAL ISSUES IN THE
CONTEXT OF CRASH OF SMALL
AIRPLANE**

**Roberts v. Delmarva Power and Light
Company, et al.**, Del. Super., C.A. No.
05C-09-015 (January 30, 2009)

This is a consolidated action stemming from the crash of a small airplane on October 12, 2003. The pilot was flying with his daughter from Hazelton, Pennsylvania to Cheswold, Delaware. Approaching a runway at the Delaware Airpark, the plane was flying lower than normal and apparently hit a tree. As the plane continued toward the runway, the pilot noticed an electrical pole. He attempted to increase his altitude, but the plane struck the unlit pole, which was located outside of the airpark's property. On impact the right wing of the plane separated from the fuselage and the plane crashed. The pilot died about two and a half hours later, while his daughter sustained serious physical injuries, and also claimed post traumatic stress disorder.

Two separate lawsuits were filed, one by the wife of the pilot, along with the injured daughter, and the second action by a separate daughter for the wrongful death of her father, which was consolidated with the first matter.

The Superior Court, in the context of summary judgment motions, went through exhaustive discussions of federal preemption of state law claims, the availability of punitive damages and the necessary predicate therefore, as well as the necessary elements of a claim for post traumatic stress disorder. Finally, the Court discussed the applicability of state tort immunity doctrine as it applied to one of the defendants, the Delaware River and Bay Authority.

**SUPERIOR COURT REVIEWS BASIS
FOR AMENDMENT TO PRE TRIAL
ORDER**

Ness v. Graybeal, et al., Del. Super., C.A.
No. 05C-02-130 (January 16, 2009)

This case arises out of a claim for medical malpractice. The matter has been tried twice before, with both trials ending in a hung jury. The matter is scheduled to be tried again in June, 2009, and this decision arises out of an attempt by the plaintiff to change the Pre Trial Order to add a witness.

The plaintiff fell from a ladder in 2003 and came under the care of the defendant. He alleges that the defendant failed to properly diagnose his cervical injury, resulting in quadriplegia. One of the issues concerned whether the defendant was aware that the plaintiff was complaining of neck pain. The plaintiff alleges that he related this complaint to the doctor, while the doctor denied it. The proposed new witness is the plaintiff's grandson, who would apparently corroborate the plaintiff's testimony that he was complaining of pain specifically in his neck after the accident, and during the course of his treatment. The defendant

objected to this new witness since it would be outside of the Pre Trial Order.

The Court examined the factors that the Court is to consider in deciding whether to allow testimony outside of the Pre Trial Order. In addition to those factors, the Court also noted that the significance of the testimony itself should also be considered. Here, since there is ample time for the defense to explore the new testimony, by way of deposition or otherwise, the amendment was allowed.

**MEDICAL EXPERT TESTIMONY
NECESSARY TO ESTABLISH
CAUSATION**

Cann v. Dunner, Del. Super., C. A. No. 07C-02-15 (November 13, 2008)

This case stems from a motor vehicle accident in which the plaintiff claims to have sustained soft tissue injuries. The Court issued a Scheduling Order, and the plaintiff did not identify a medical expert by the Court's deadline. Thereafter, he initially identified the treating physician as a witness for purposes of trial, but at the pre trial conference, advised that this treating physician would not be called to testify. Thereafter the defendant moved for summary judgment on the question of damages.

The Superior Court granted the defendant's Motion for Summary Judgment, holding that expert testimony would be necessary to establish causation and therefore damages. The plaintiff argued that the plaintiff's proposed testimony would be something within the purview of the jury to understand without the need of an expert, but he Court disagreed, and dismissed the case.

**SUPERIOR COURT DISCUSSES
ENFORCEABILITY OF LIABILITY
WAIVER EXECUTED BY PLAINTIFF**

Slowe v. Pike Creek Court Club, Inc., Del. Super., C.A. No. 08C-08-029 (December 4, 2008).

The plaintiff in this case was injured after he allegedly fell on a set of removable pool steps at a health club owned by the defendant. He claimed that the steps were negligently maintained and that the defendant failed to warn of the hazard they presented. The defendant filed a Motion to Dismiss, arguing that the claim was barred by a liability waiver signed by the plaintiff before receiving his pass to use the health club facility.

Here the Court denied the defendant's Motion to Dismiss. The Court determined that the liability waiver would not bar the plaintiff's claim. First the waiver would not release the defendant from claims based upon the defendant's own negligence. In addition, by signing the waiver, the plaintiff did not assume the risk of injuries resulting from negligent maintenance of the premises. Finally, the Court concluded that enforcement of the waiver could undermine statutory standards set forth in Delaware's public pool regulations.

**SUPERIOR COURT DENIES REQUEST
TO POSTPONE TRIAL BY ALL PARTIES**

**Todd v. Delmarva Power and Light
Company, et al.**, Del. Super., C. A. No.
06C-10-304 (January 9, 2009)

This written decision arose out of a joint application by all of the parties to continue a trial date. The Court denied the request, even though it was agreed to by all of the parties. In this case the Court reviewed the time frame for the filing of the lawsuit, the conduct of discovery, and the timing of the parties request to postpone the trial. Based on these factors, the Court denied the request and ordered that the trial should go forward as scheduled in April, 2009.