

# 2008 General Liability Update

Spotting Issues That Affect Coverage, Investigation, Case Analysis,  
and Settlement

For

CNA Insurance Companies  
Reading, PA

April 9, 2008

Presented by

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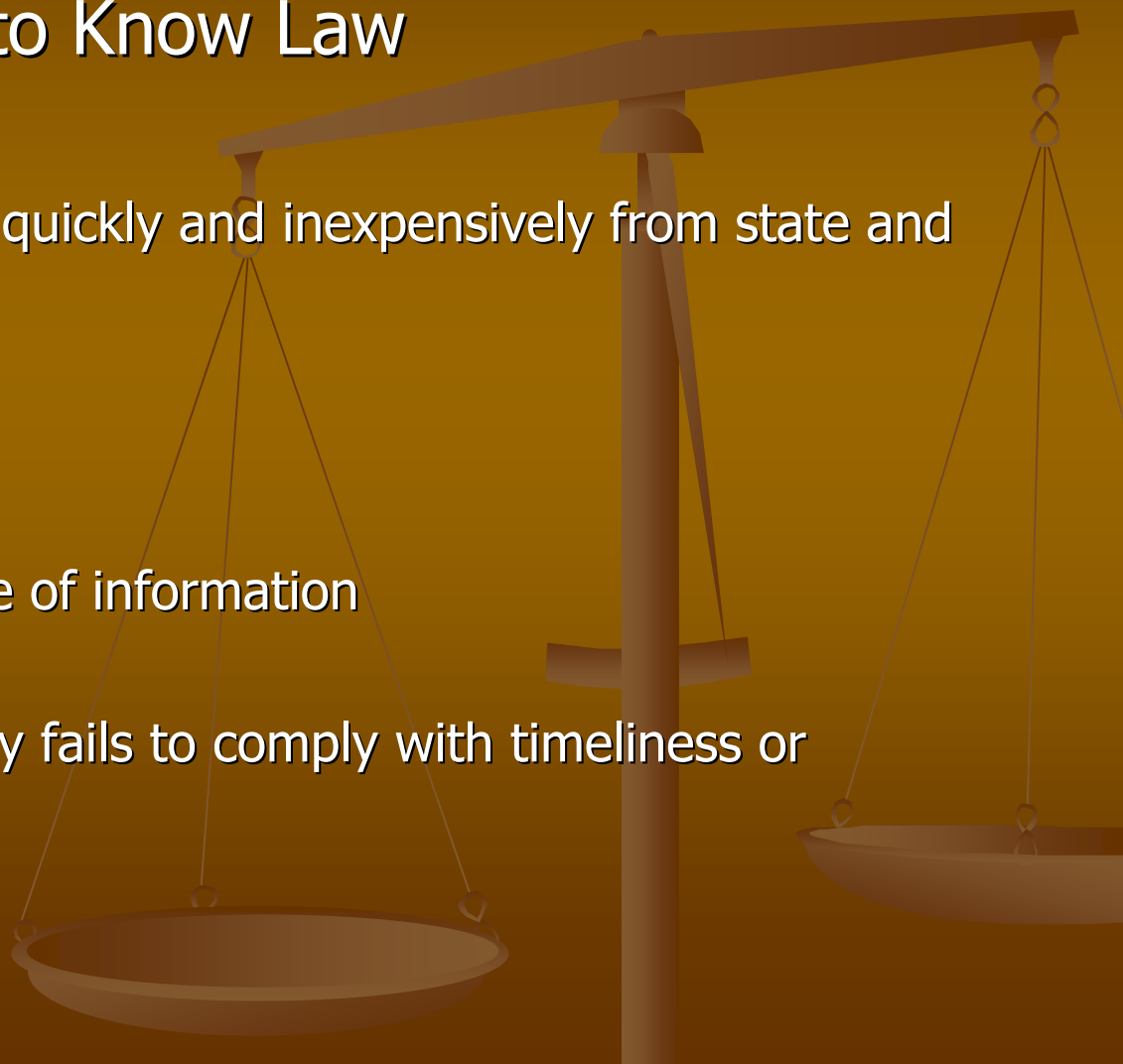
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# Investigation Issues

## ■ New Law – Right to Know Law

- Great way to get info quickly and inexpensively from state and local government
- 10 day turnaround
- nearly unlimited scope of information
- attorney fees if agency fails to comply with timeliness or production



# Investigation Issues

- Finding an Expert



# Investigation Issues

- Additional Insureds
  - Certificate Holders

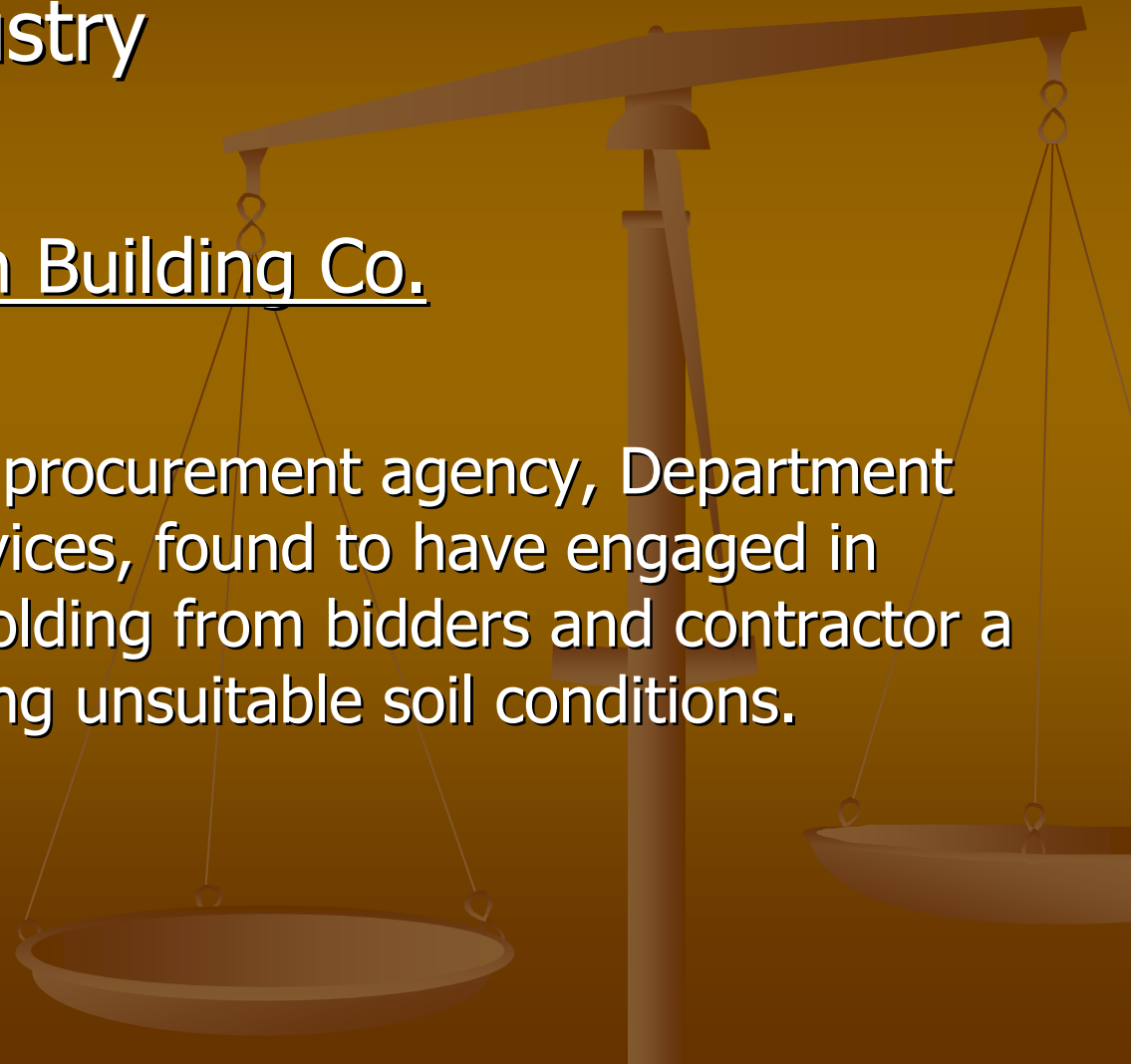


# Case Analysis Issues

## Construction Industry

### DGS v. Pittsburgh Building Co.

Commonwealth procurement agency, Department of General Services, found to have engaged in fraud by withholding from bidders and contractor a memo describing unsuitable soil conditions.

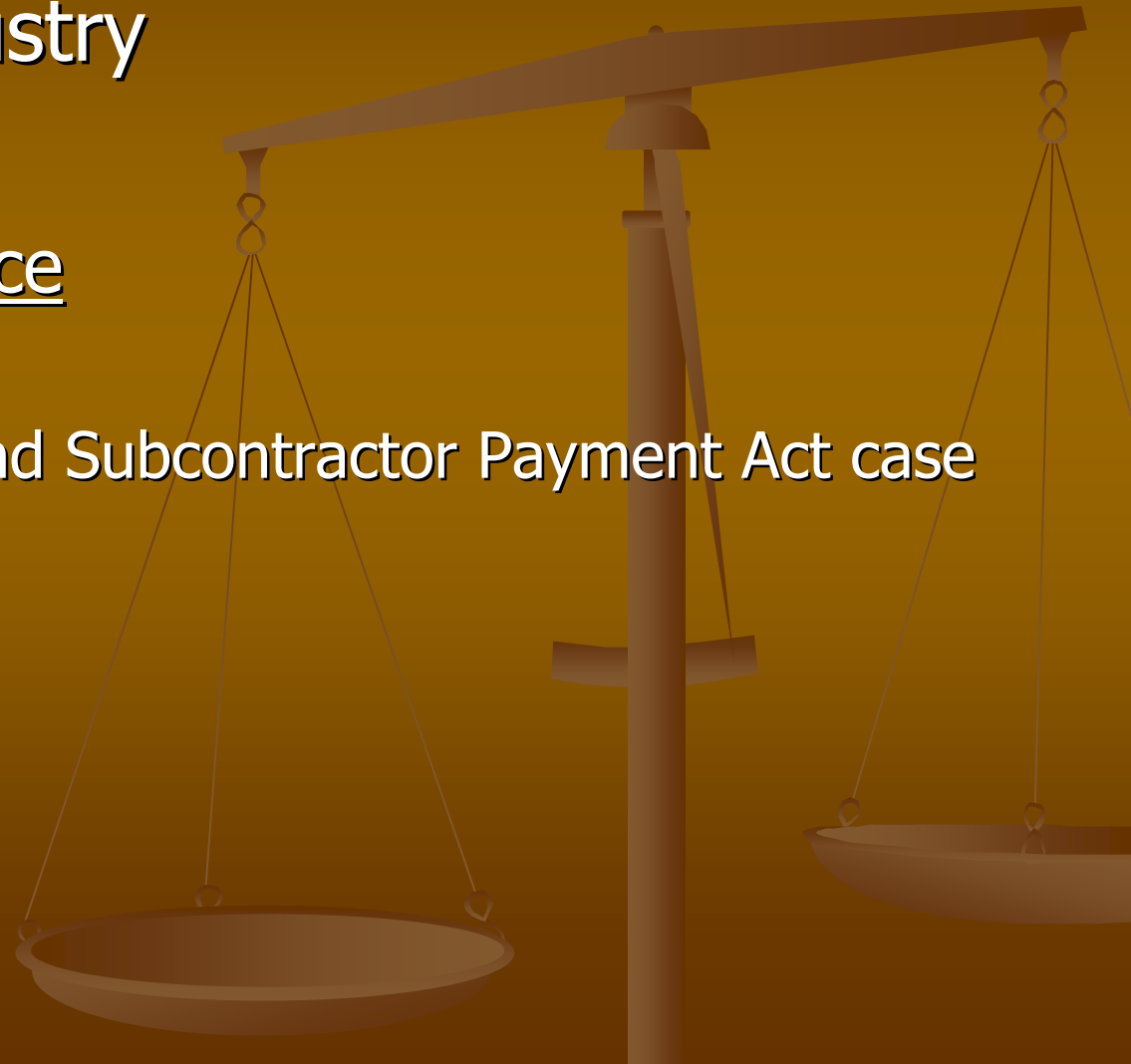


# Case Analysis Issues

## Construction Industry

### Northeast Fence

Contractor and Subcontractor Payment Act case

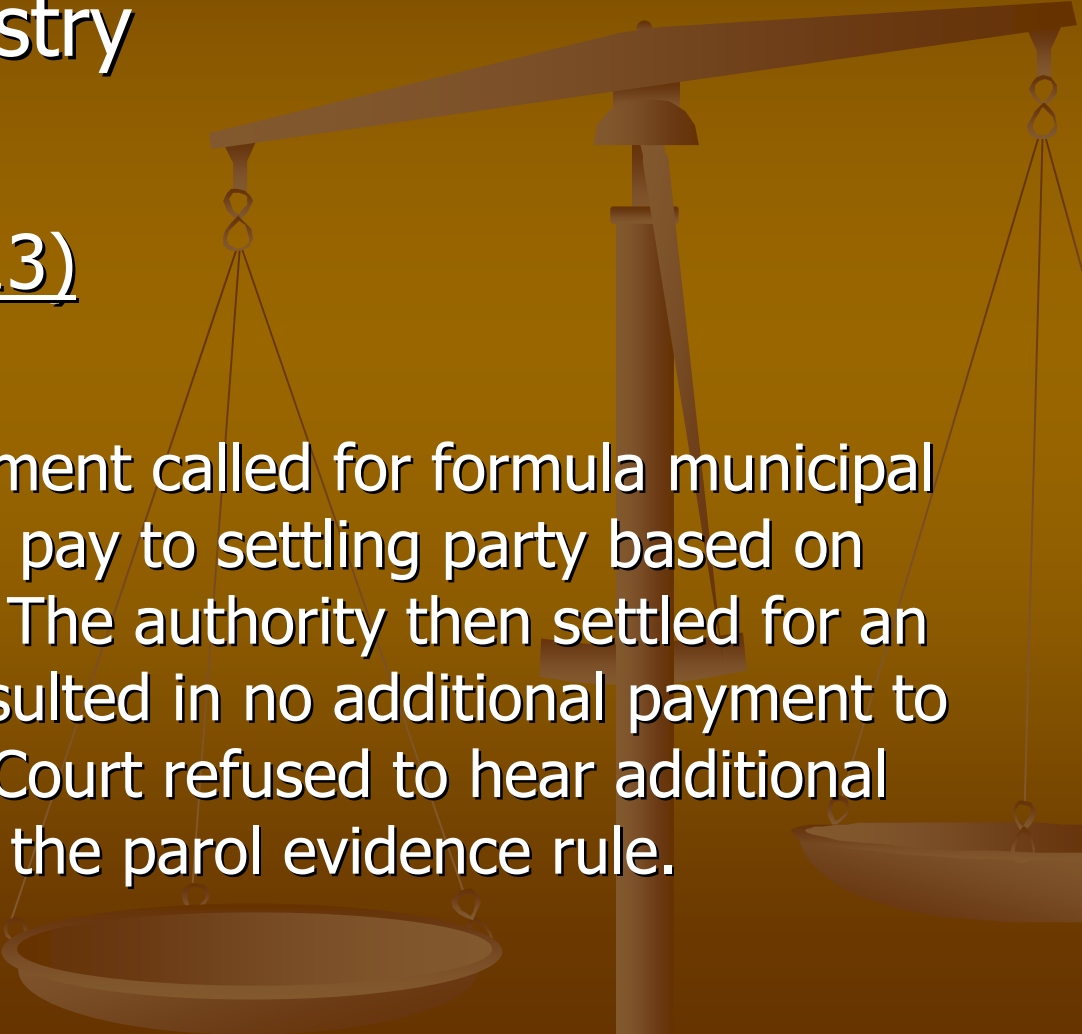


# Case Analysis Issues

## Construction Industry

### Ragnar Benson (13)

Side deal agreement called for formula municipal authority would pay to settling party based on case outcome. The authority then settled for an amount that resulted in no additional payment to settling party. Court refused to hear additional evidence under the parol evidence rule.

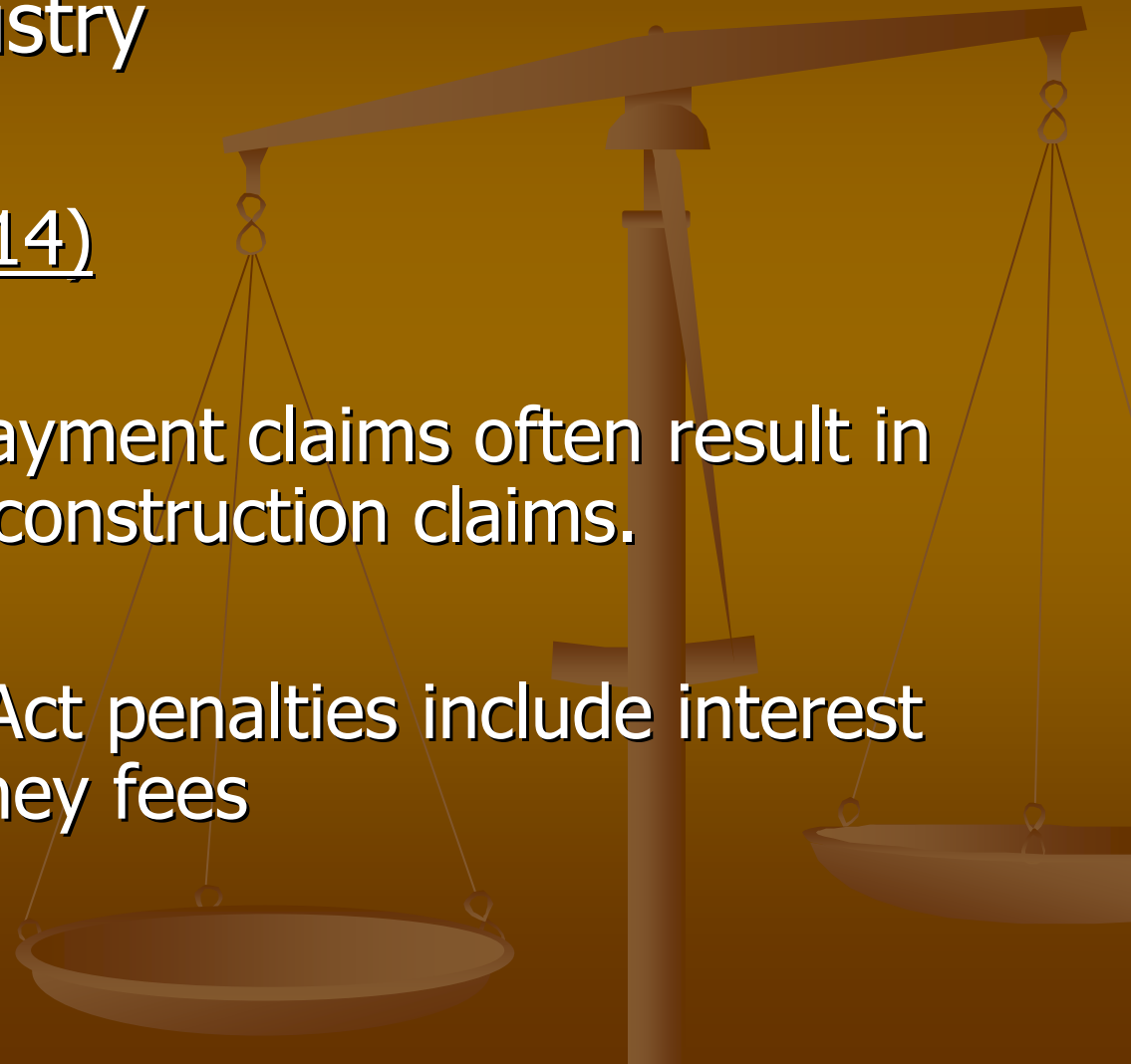


# Case Analysis Issues

## Construction Industry

### Ruthrauff (14)

- MOTS - Payment claims often result in defective construction claims.
- Payment Act penalties include interest and attorney fees



# Case Analysis Issues

## Construction Industry

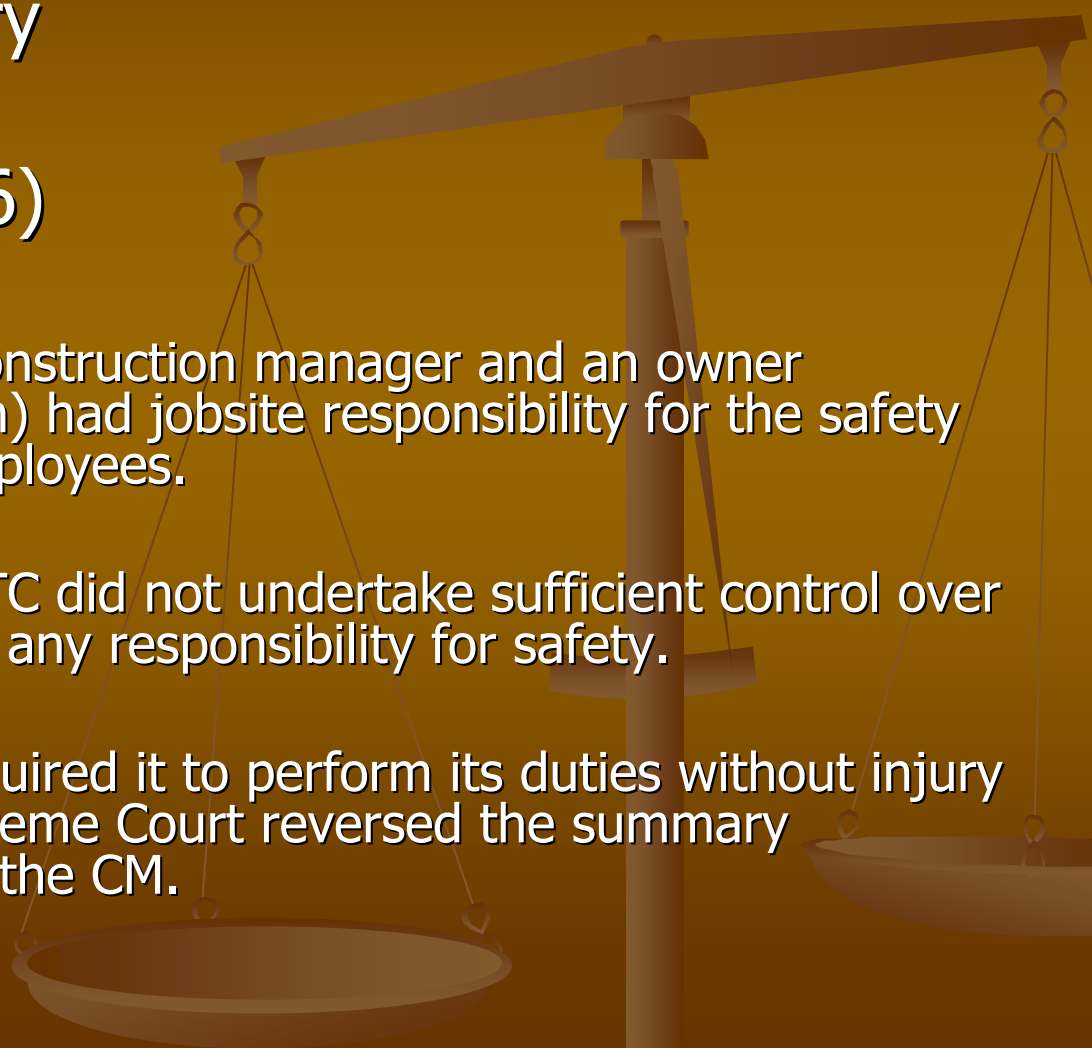
### Excavation Technologies(65)

- One Call Act requires utilities to mark lines within 48 hours of request
- Columbia Gas improperly marked its lines
- Water line contractor then damaged gas lines, impacting its project
- Court ruled purely economic losses (delay, profits, etc.) are not recoverable against utility

# Case Analysis Issues

## Construction Industry

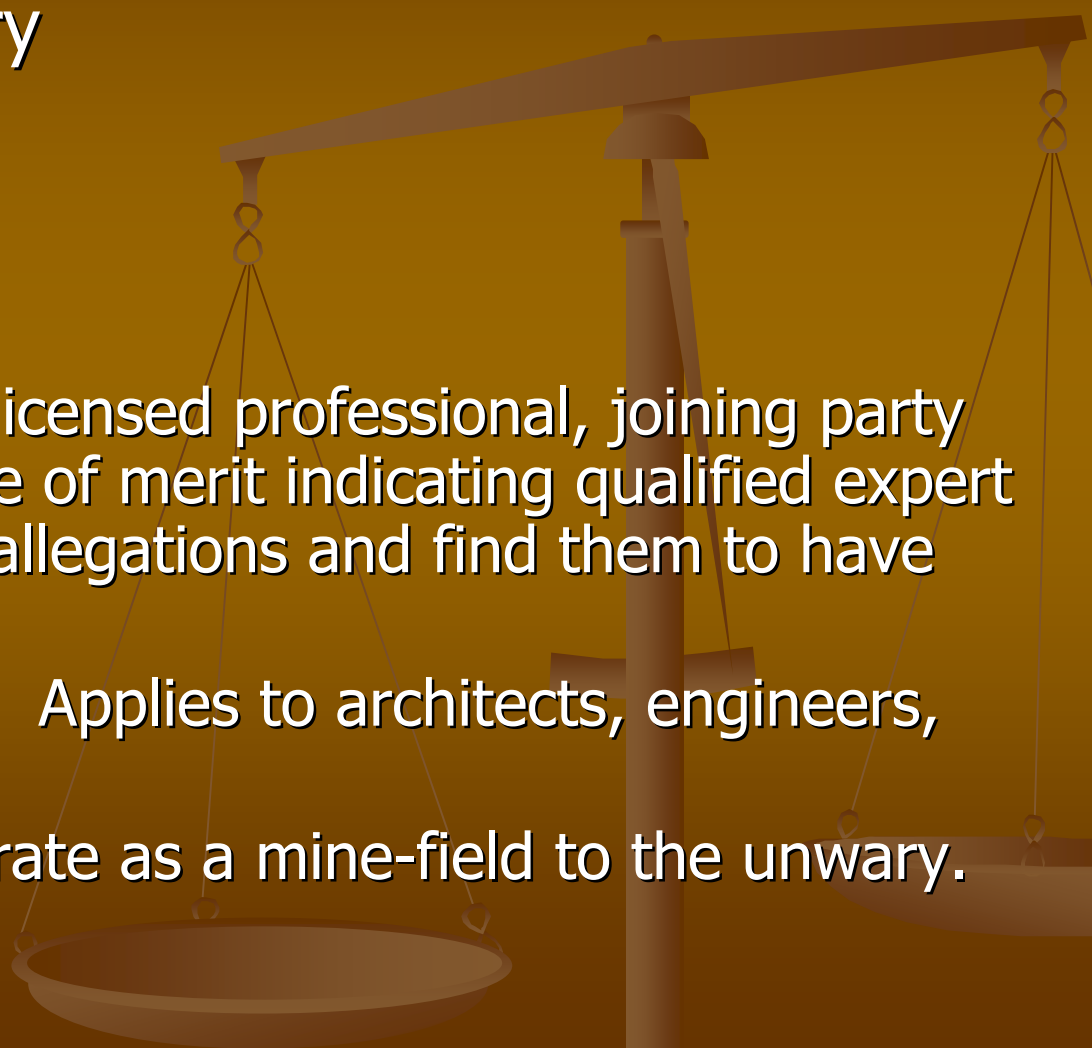
### Farabaugh (65-66)

- Issue is whether a construction manager and an owner (Turnpike Commission) had jobsite responsibility for the safety of subcontractor's employees.
  - The facts indicated PTC did not undertake sufficient control over the jobsite to assume any responsibility for safety.
  - The CM's contract required it to perform its duties without injury to others, so the Supreme Court reversed the summary judgment order as to the CM.
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# Case Analysis Issues

## Construction Industry

### Certificate of Merit

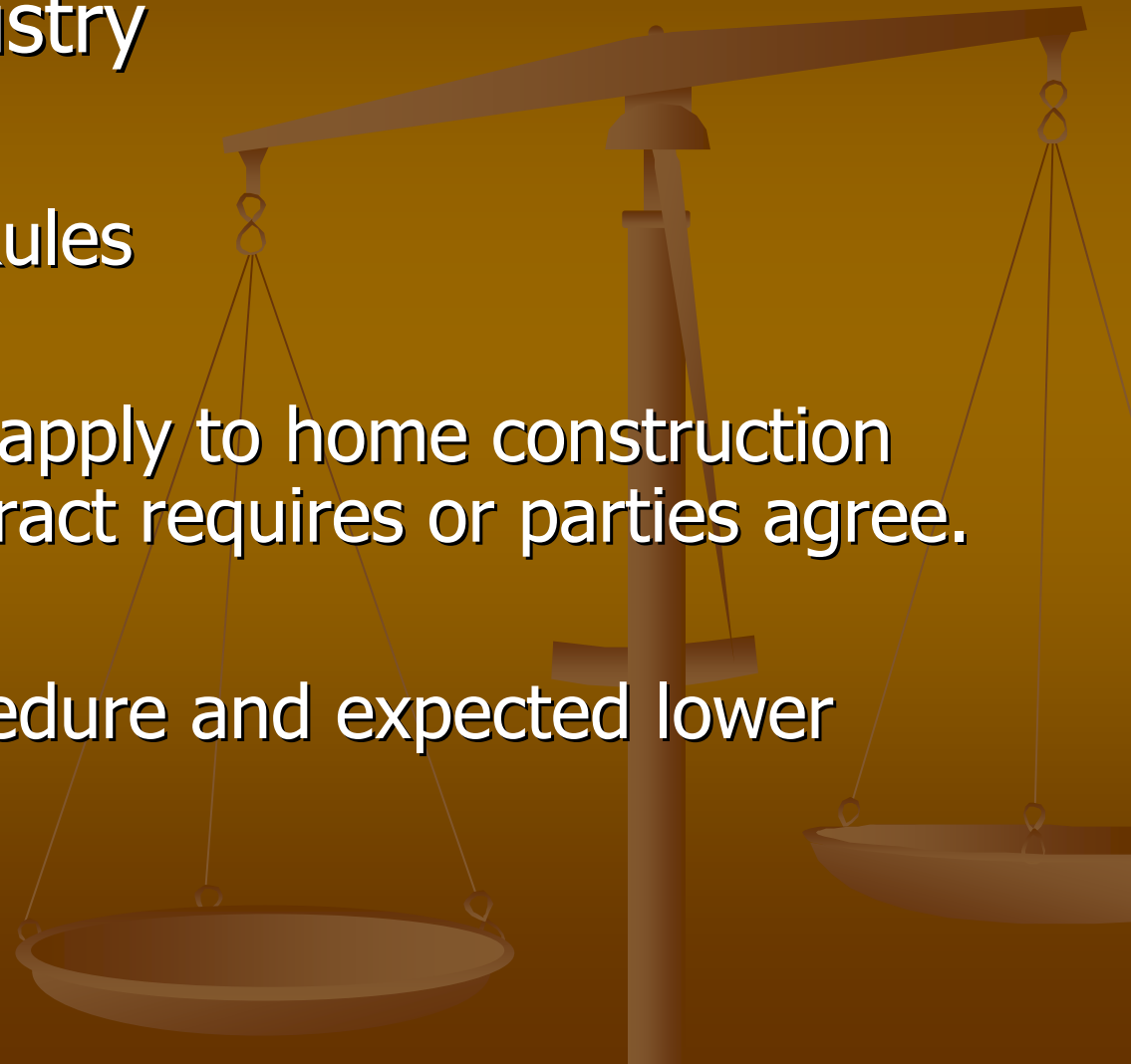
- In order to join a licensed professional, joining party must file certificate of merit indicating qualified expert has reviewed the allegations and find them to have merit.
  - Pa. R.C.P. 1042.1. Applies to architects, engineers, surveyors, etc.
  - This Rule can operate as a mine-field to the unwary.
- 

# Case Analysis Issue

## Construction Industry

### AAA Arbitration Rules

- New Rules can apply to home construction disputes if contract requires or parties agree.
- Expedited procedure and expected lower litigation costs.

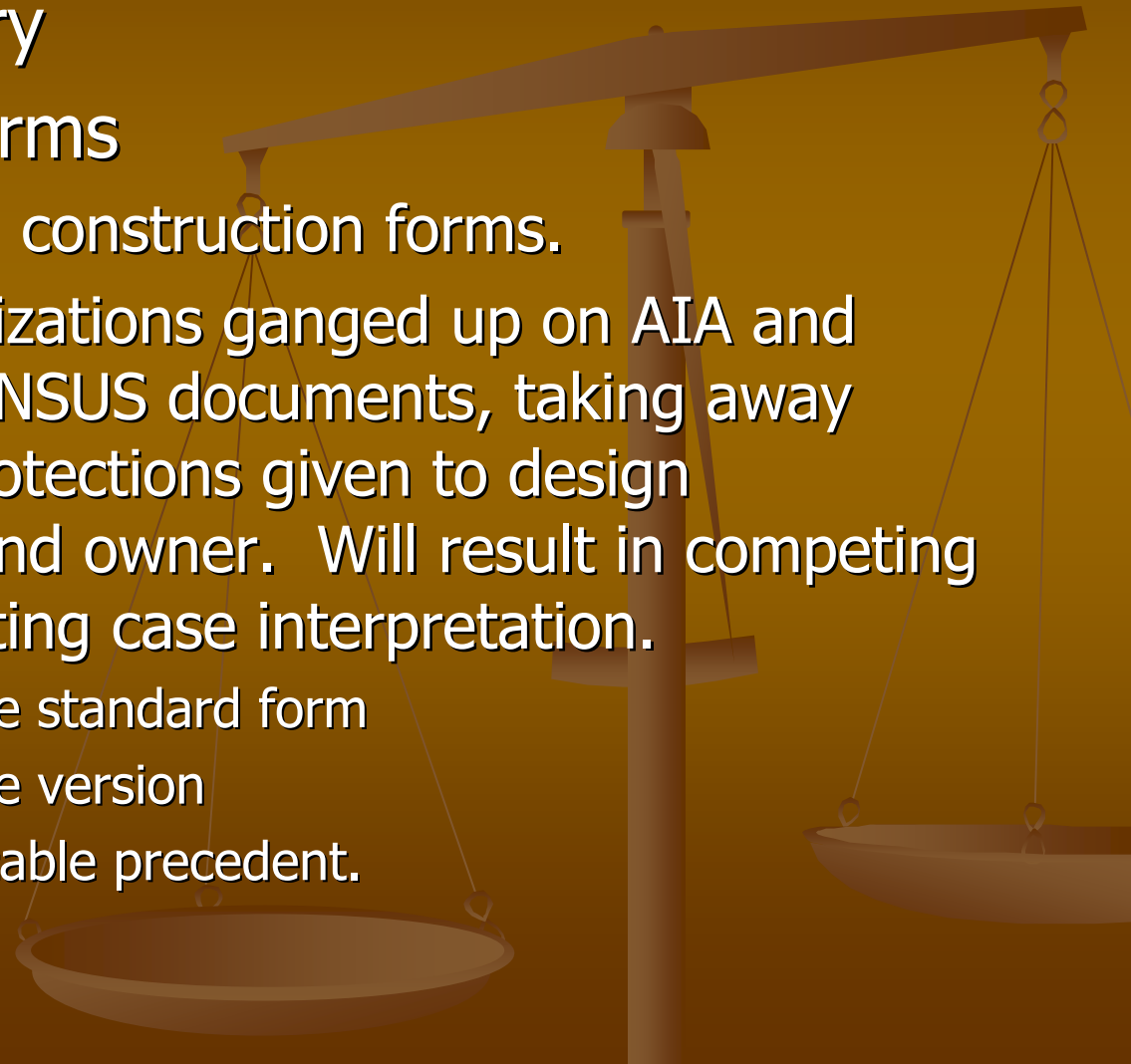


# Case Analysis Issues

## Construction Industry

### New Standard Forms

- AIA is leader in construction forms.
- All other organizations ganged up on AIA and formed CONSENSUS documents, taking away some of the protections given to design professionals and owner. Will result in competing or even conflicting case interpretation.
  - 1. Identify the standard form
  - 2. Identify the version
  - 3. Find applicable precedent.



# Case Analysis Issues

## Damages

### CGB Occupational Therapy (16)

- Punitive damages must bear relationship to compensatory damages
- \$30M excessive
- Result: compensatory \$109,000; punitives \$750,000.00

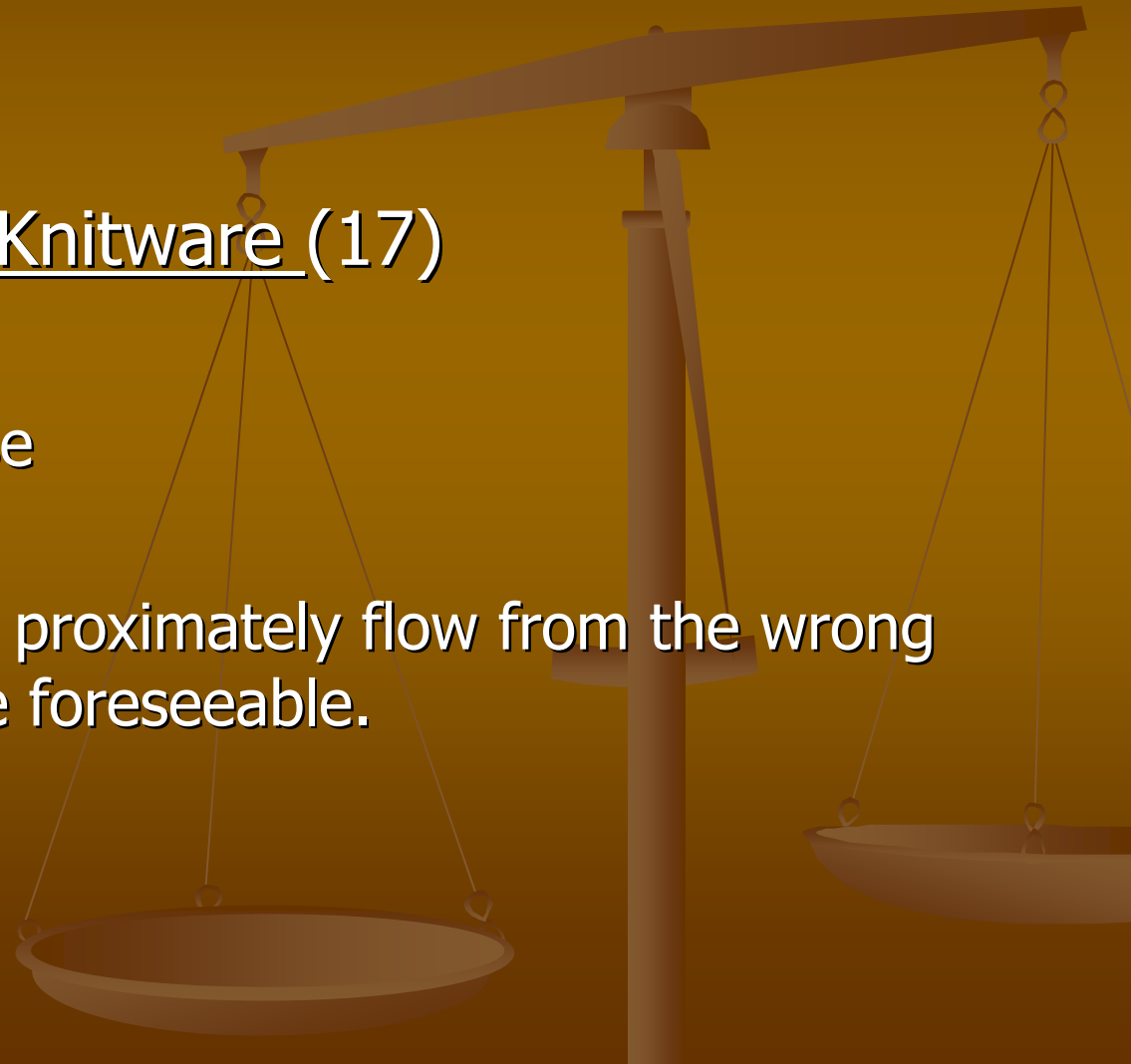


# Case Analysis Issues

## Damages

### Company Image Knitware (17)

- Lost profits case
- Damages must proximately flow from the wrong conduct and be foreseeable.

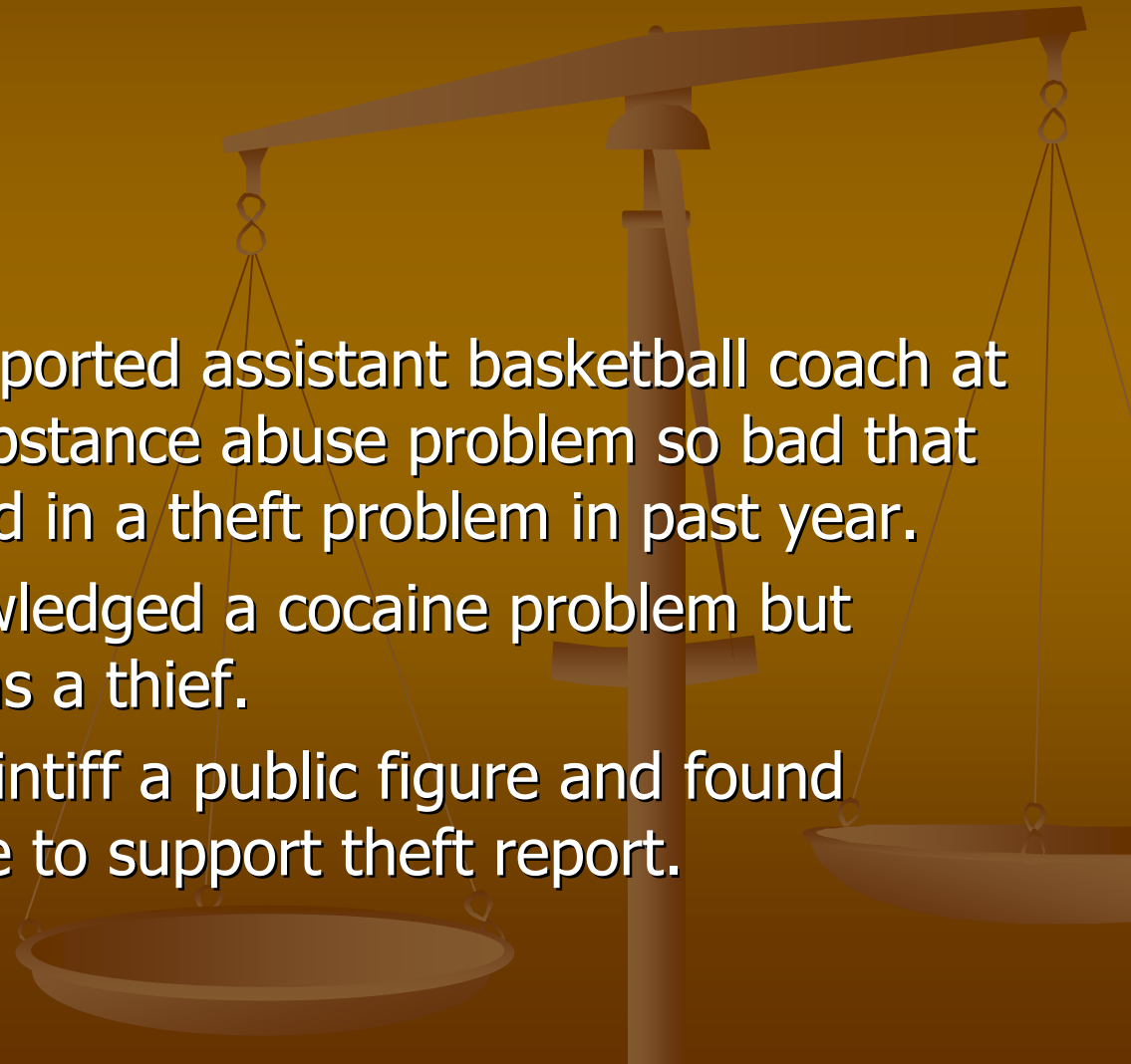


# Case Analysis Issues

## Defamation

### Blackwell (19)

- Sportscaster reported assistant basketball coach at Temple has substance abuse problem so bad that he was involved in a theft problem in past year.
- Plaintiff acknowledged a cocaine problem but disputed he was a thief.
- Court ruled plaintiff a public figure and found ample evidence to support theft report.

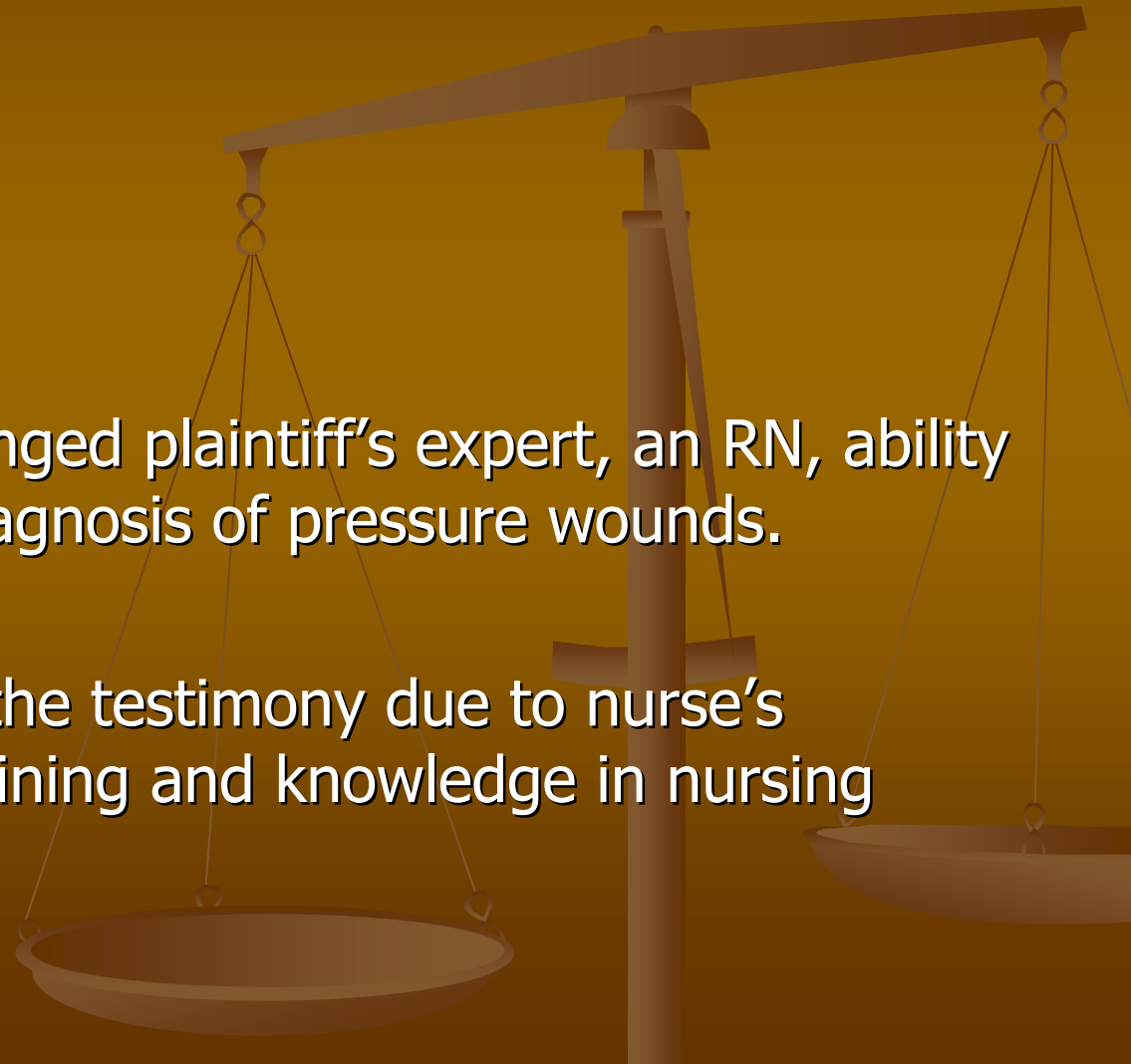


# Case Analysis Issues

## Experts

### Freed (23)

- Defense challenged plaintiff's expert, an RN, ability to testify on diagnosis of pressure wounds.
- Court allowed the testimony due to nurse's experience, training and knowledge in nursing field.

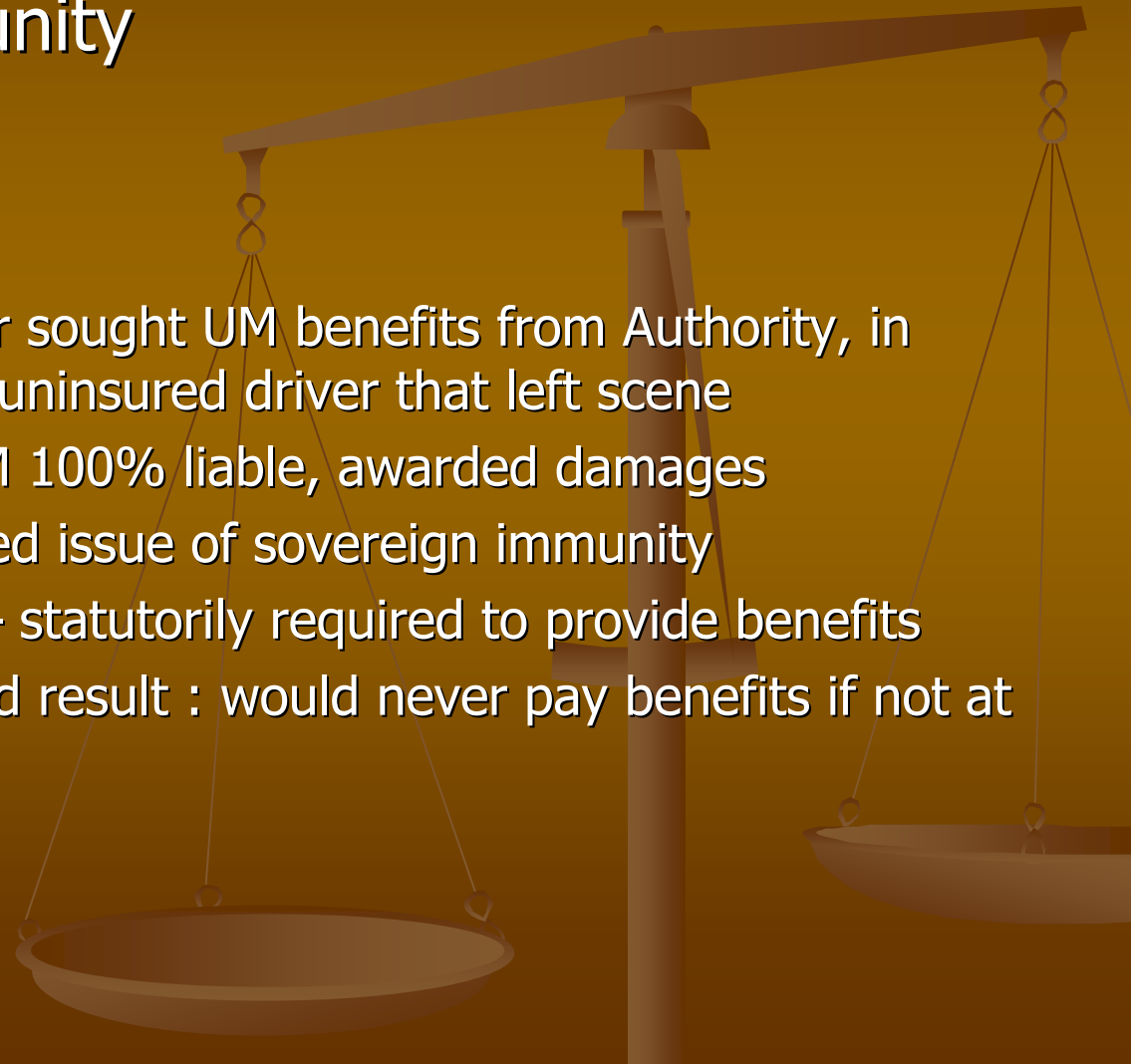


# Case Analysis Issues

## Governmental Immunity

### Paravati (26-27)

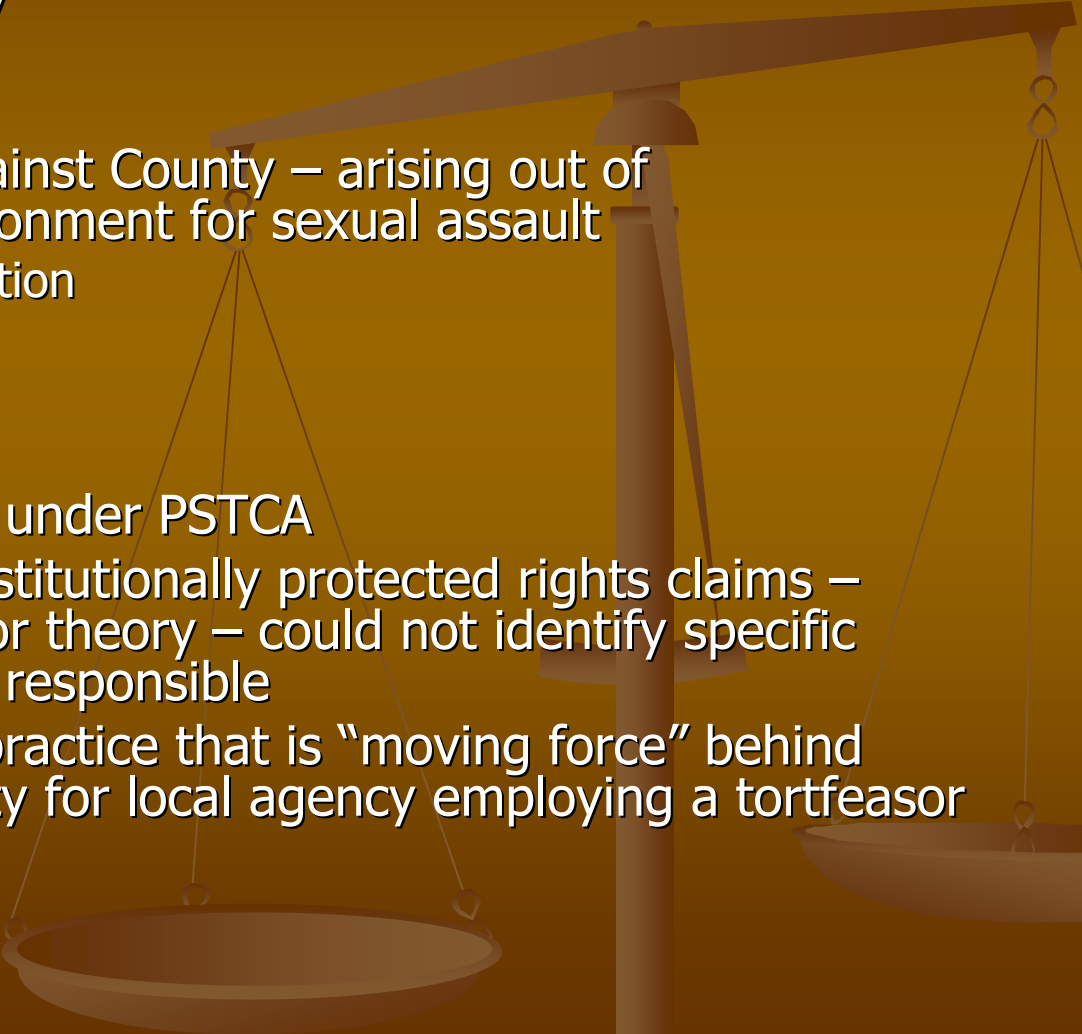
- Bus passenger sought UM benefits from Authority, in accident with uninsured driver that left scene
- Jury found UM 100% liable, awarded damages
- Authority raised issue of sovereign immunity
- Not immune – statutorily required to provide benefits
- If not – absurd result : would never pay benefits if not at fault



# Case Analysis Issues

## Governmental Immunity

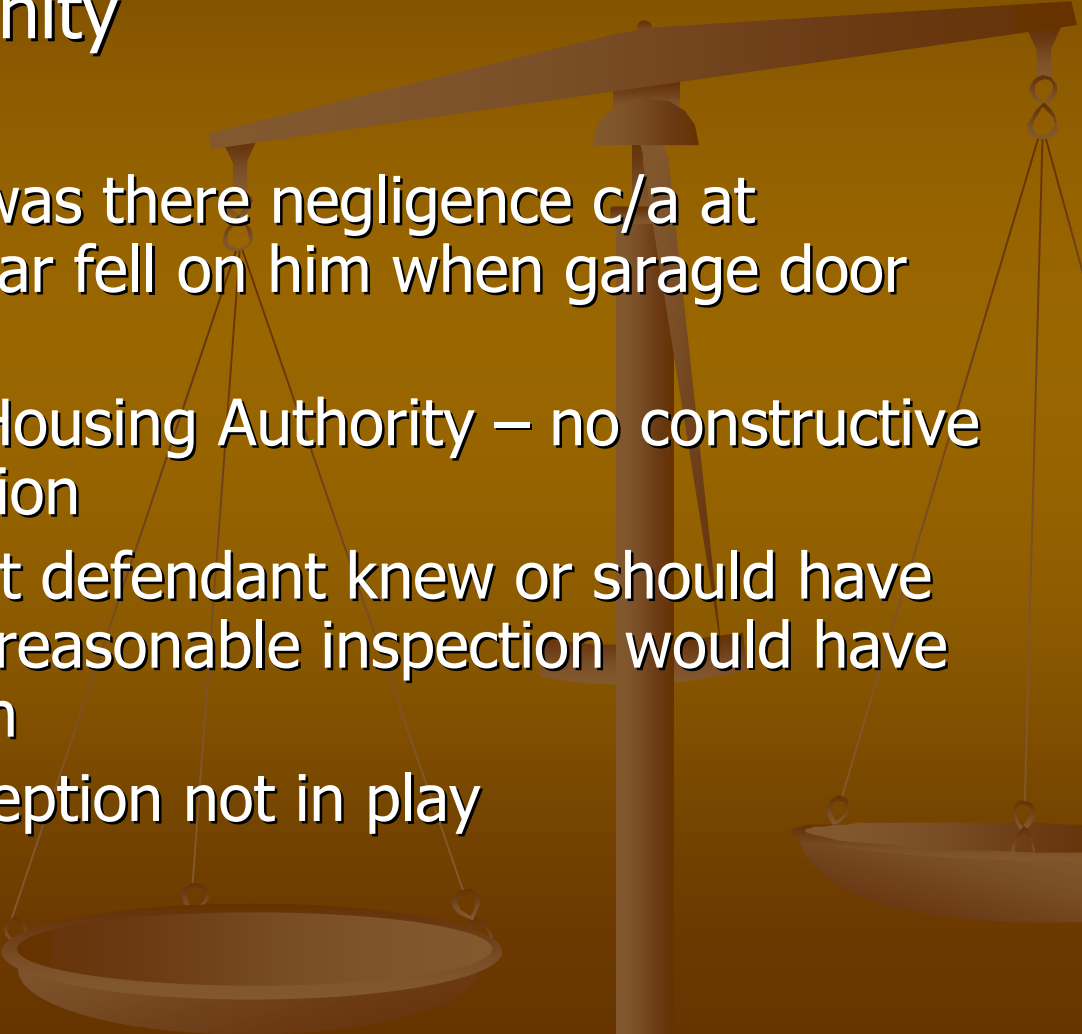
### Weaver (27)

- Inmate lawsuit against County – arising out of prosecution/imprisonment for sexual assault
    - Intentional infliction
    - conspiracy,
    - Negligence
    - libel
  - Tort claims barred under PSTCA
  - Deprivation of constitutionally protected rights claims – respondeat superior theory – could not identify specific persons who were responsible
  - With no policy or practice that is “moving force” behind violation, no liability for local agency employing a tortfeasor
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# Case Analysis Issues

## Governmental Immunity

### Gurnari (61)

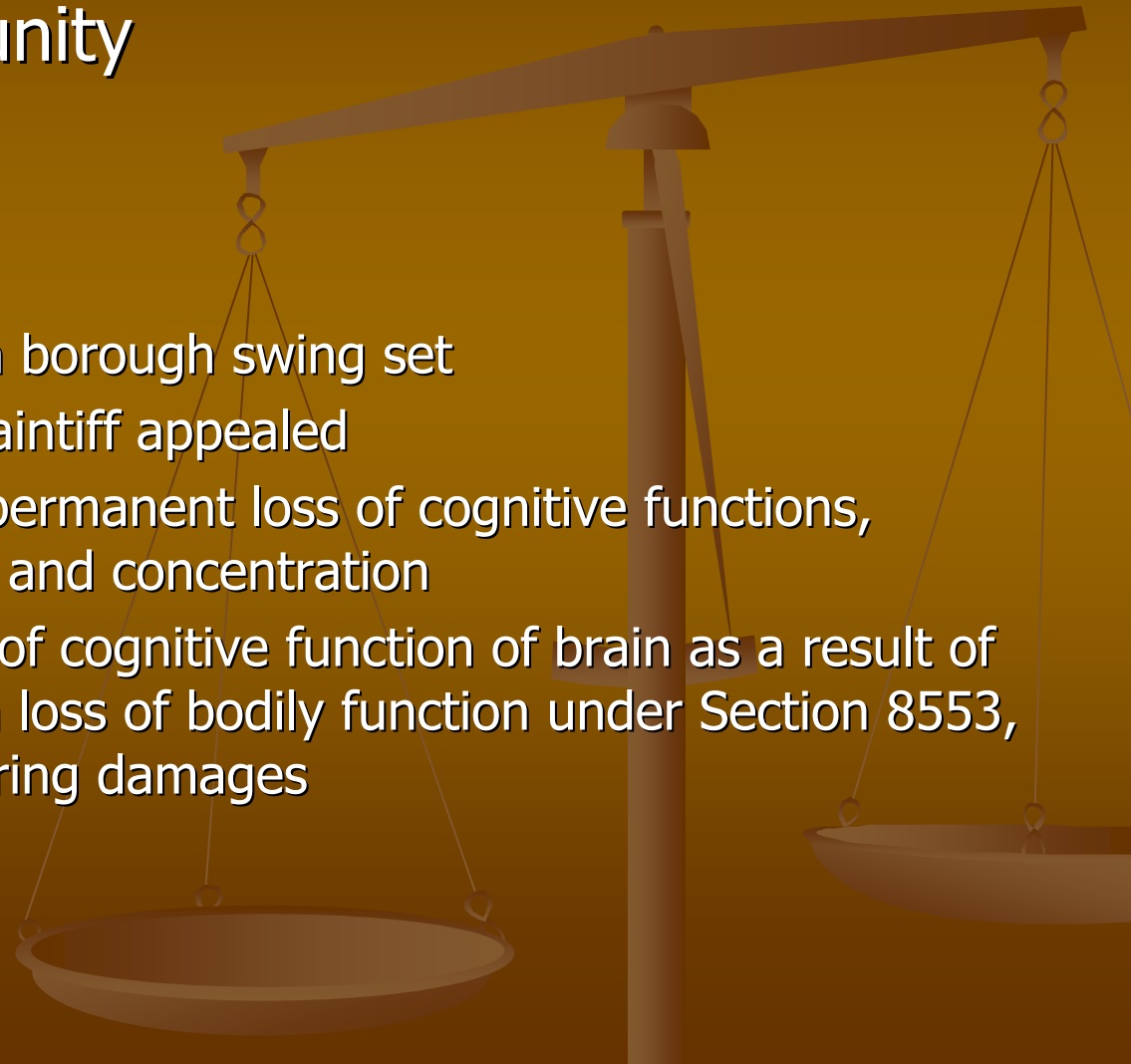
- EMT injured – was there negligence c/a at common law (bar fell on him when garage door opened)
  - No liability for Housing Authority – no constructive notice of condition
  - No showing that defendant knew or should have known, or that reasonable inspection would have shown condition
  - Real estate exception not in play
- 

# Case Analysis Issues

## Governmental Immunity

### Sider (63)

- Plaintiff injured on borough swing set
- Jury verdict for plaintiff appealed
- Plaintiff asserted permanent loss of cognitive functions, including memory and concentration
- Com. Court: loss of cognitive function of brain as a result of injury to brain is a loss of bodily function under Section 8553, for pain and suffering damages

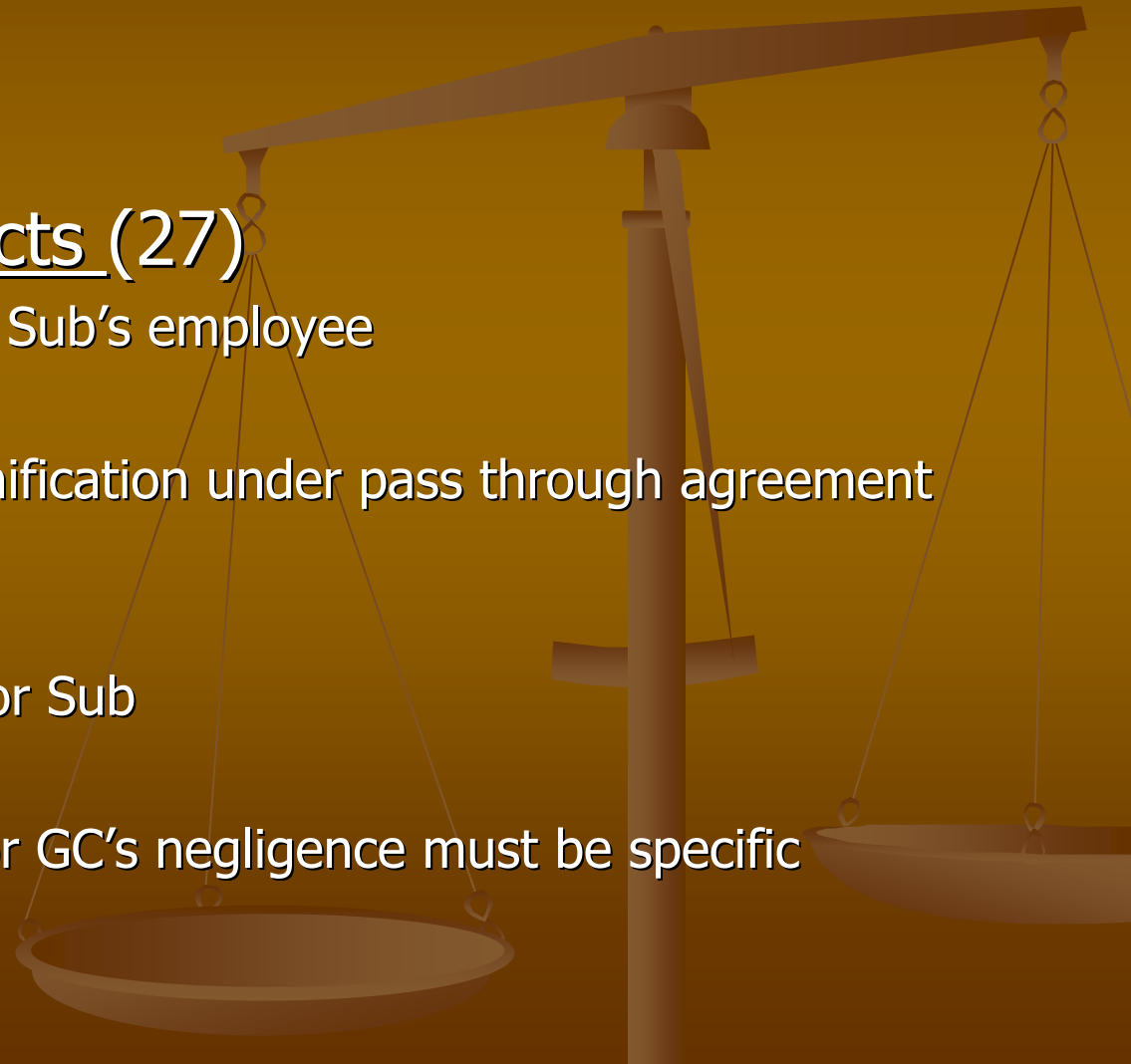


# Case Analysis Issue

## Indemnification

### Integrated Products (27)

- Worksite injury to Sub's employee
- GC sought indemnification under pass through agreement with Sub
- Trial court ruled for Sub
- Indemnification for GC's negligence must be specific

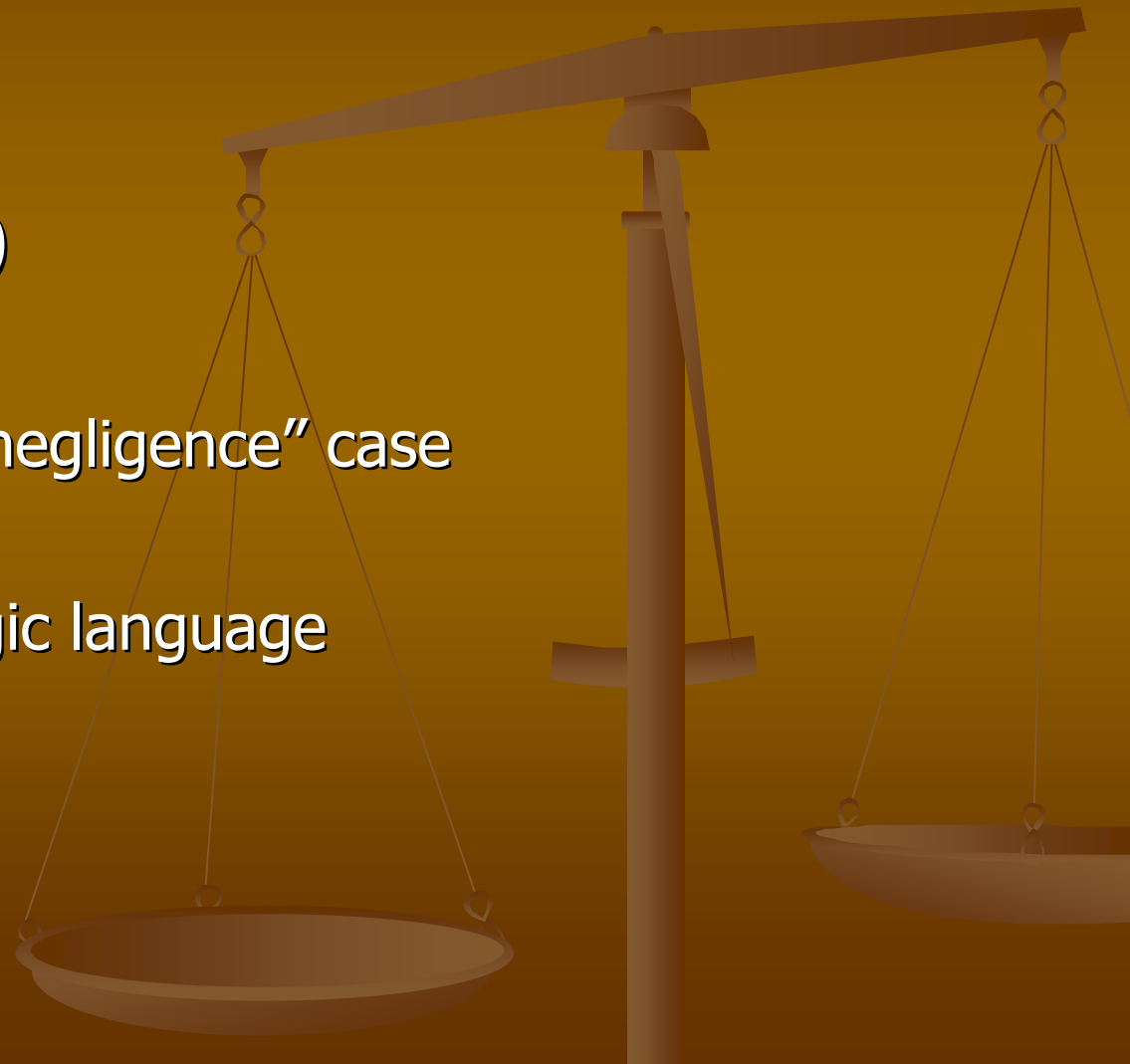


# Case Analysis Issues

## Indemnification

### Ocean Spray (28)

- Another “own negligence” case
- Must have magic language

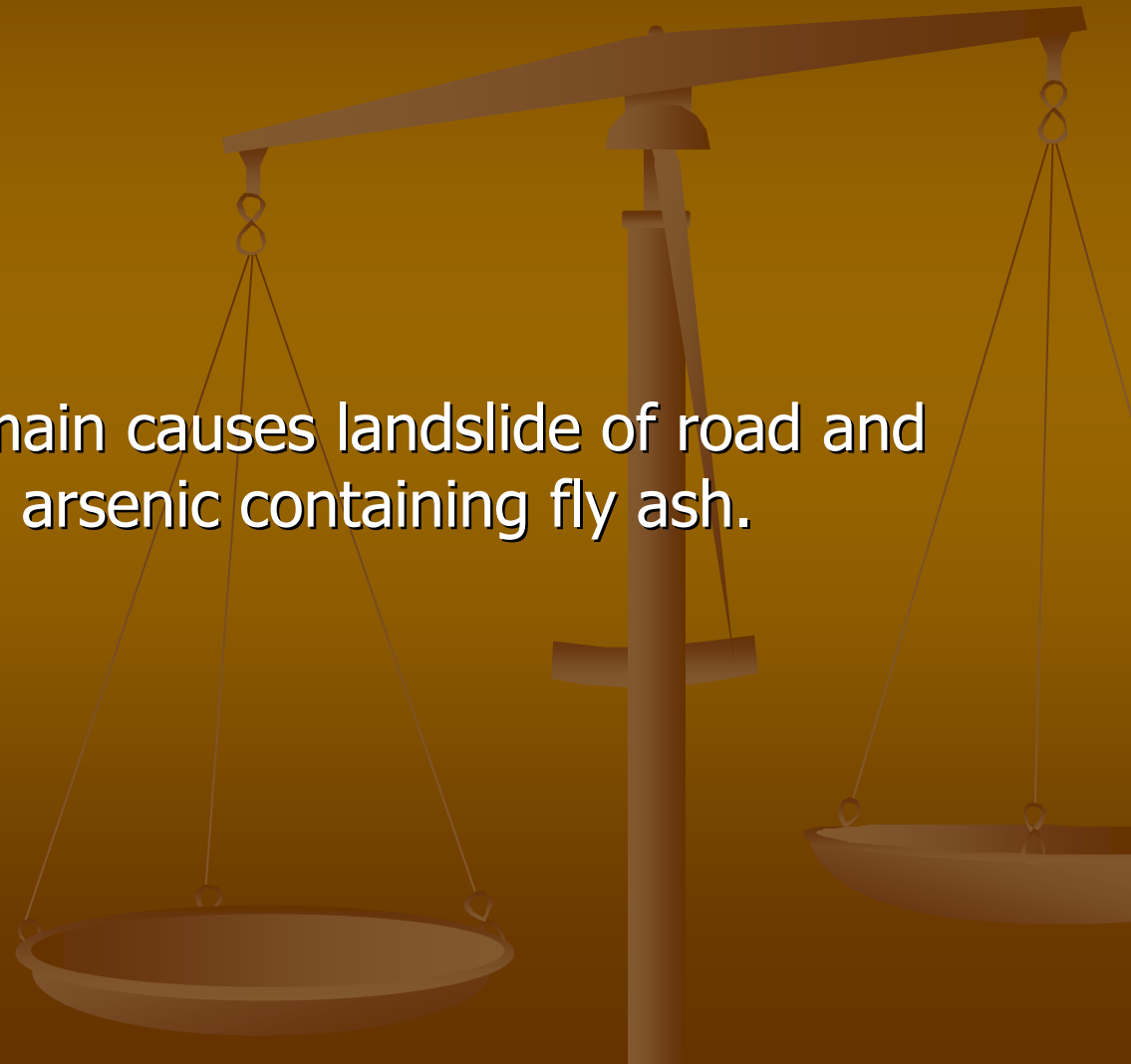


# Case Analysis Issues

## Nuisance

### Diess (70)

- Broken water main causes landslide of road and slope built with arsenic containing fly ash.

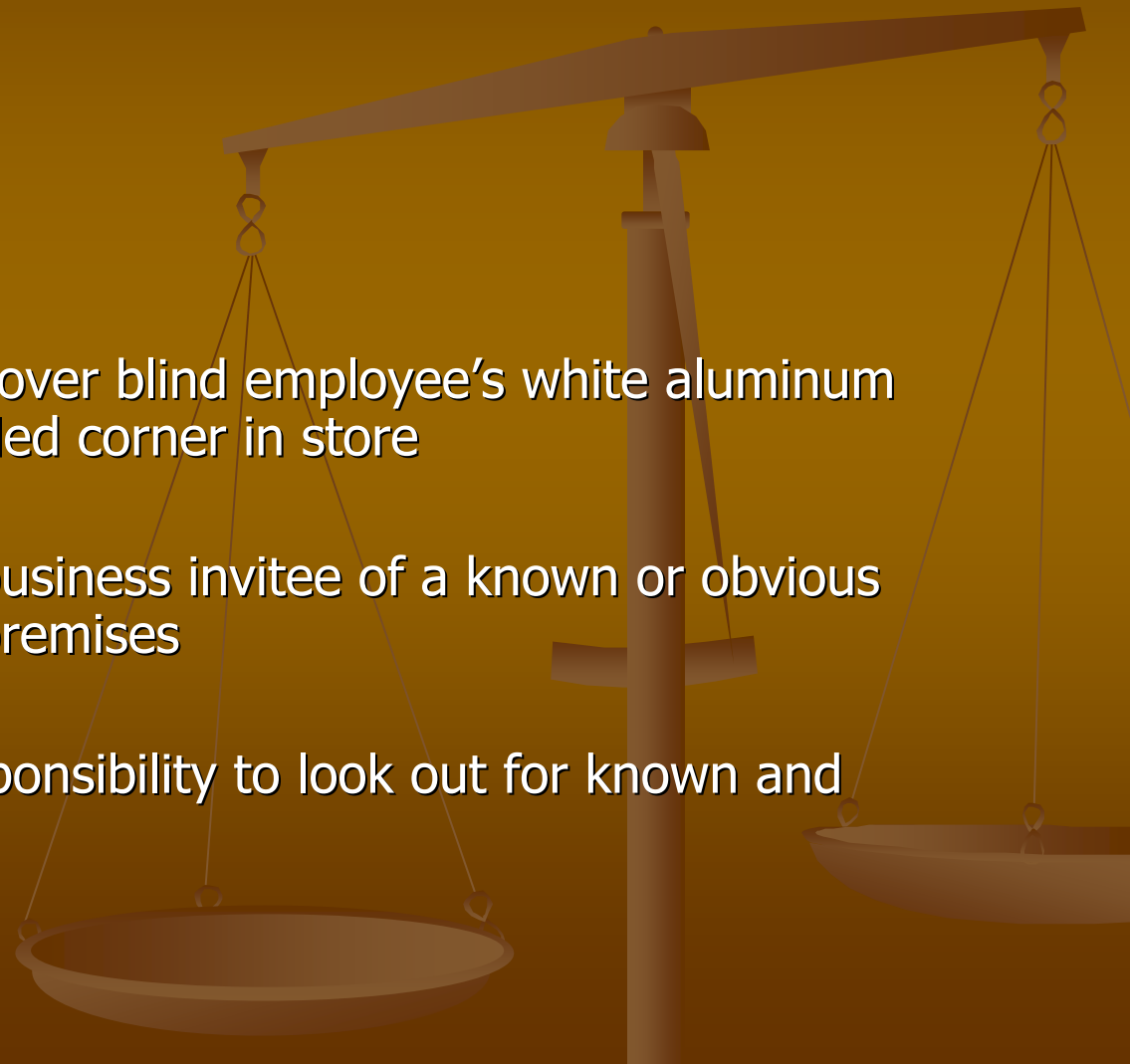


# Case Analysis Issues

## Premises Liability

### Campisi

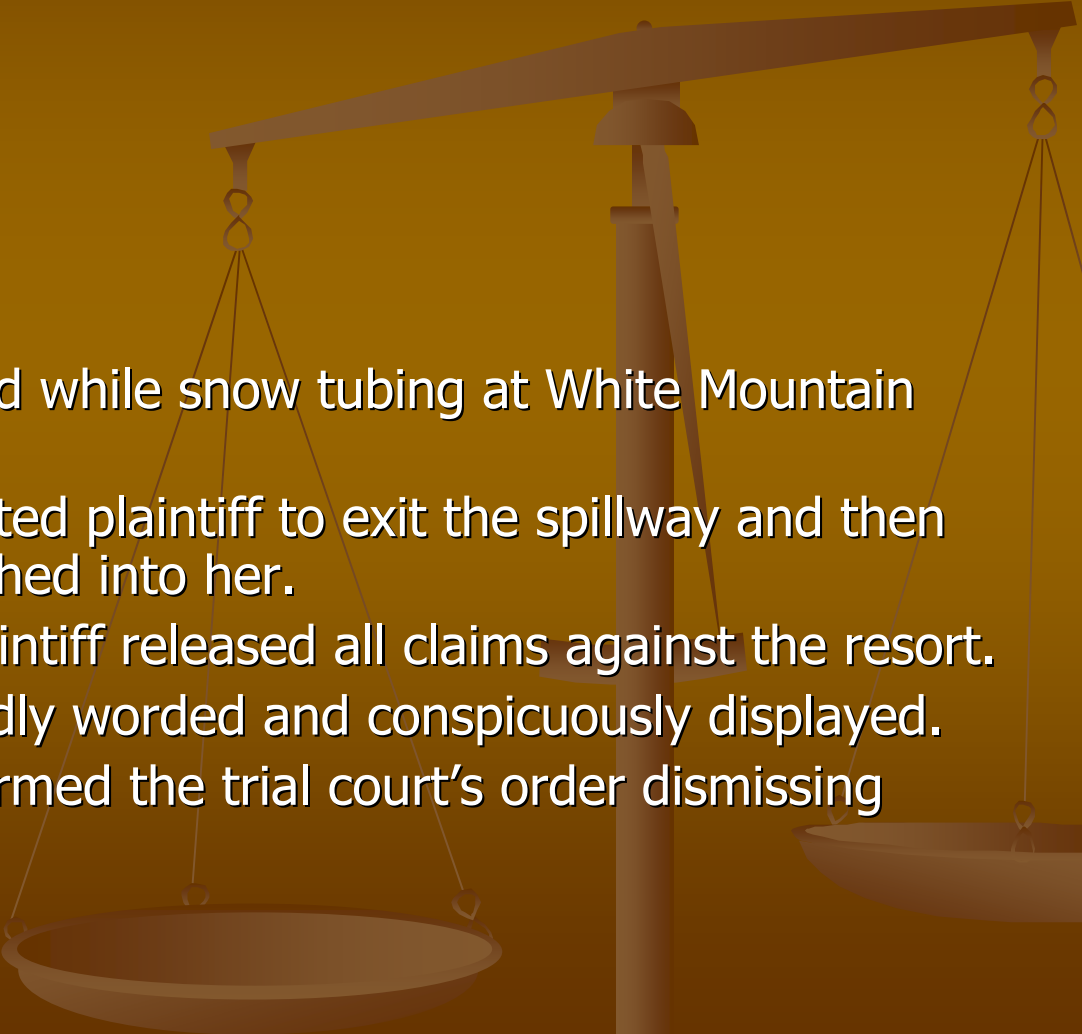
- Customer tripped over blind employee's white aluminum cane as she rounded corner in store
- No duty to warn business invitee of a known or obvious condition on the premises
- Customer has responsibility to look out for known and obvious dangers



# Case Analysis Issues

## Premises Liability

### Wang

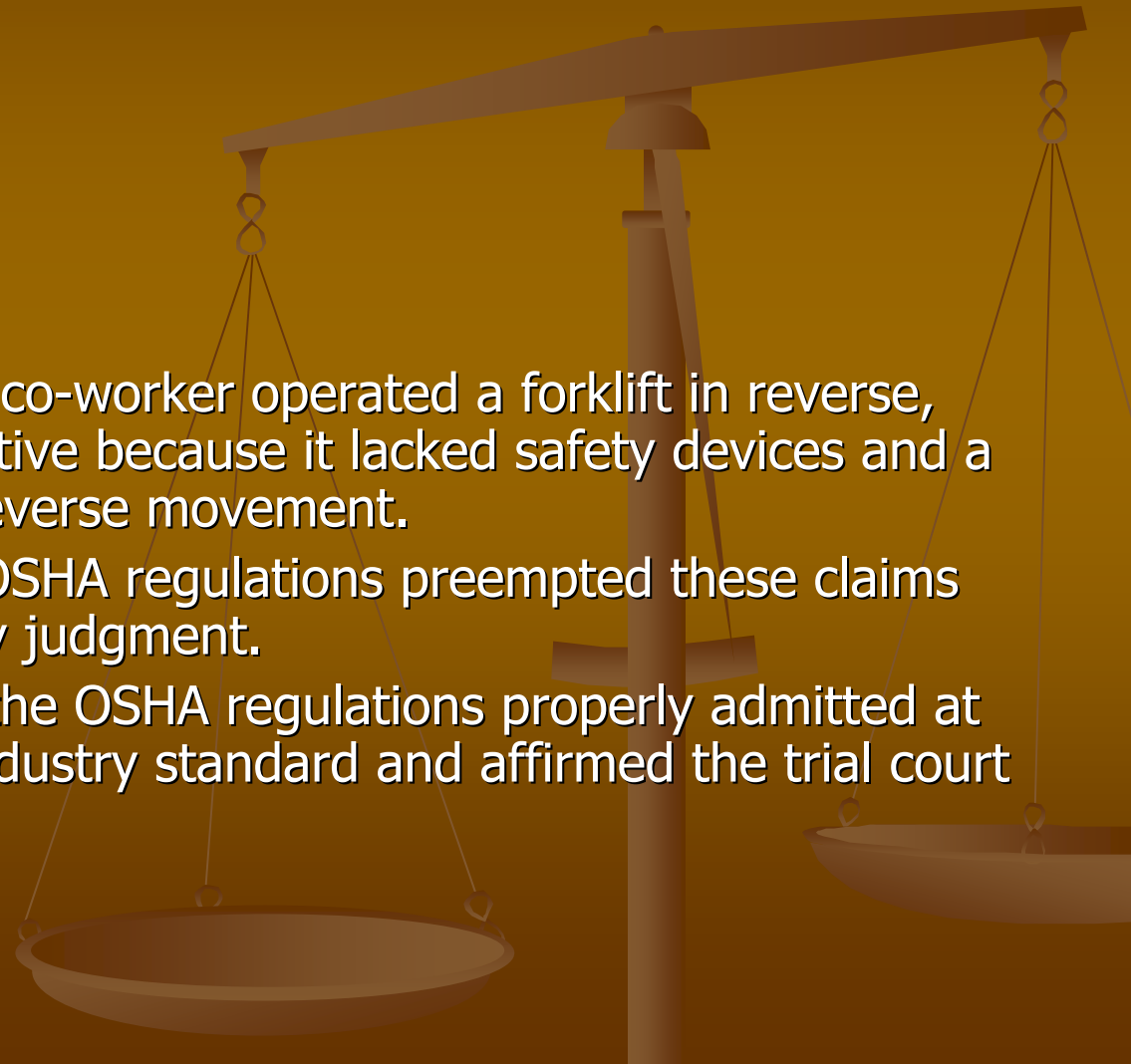
- Plaintiff was injured while snow tubing at White Mountain Resort.
  - An employee directed plaintiff to exit the spillway and then another tuber crashed into her.
  - Resort pleaded plaintiff released all claims against the resort.
  - Release was broadly worded and conspicuously displayed.
  - Superior Court affirmed the trial court's order dismissing plaintiff's claims.
- 

# Case Analysis Issues

## Products Liability

### Arnoldy

- Plaintiff injured while co-worker operated a forklift in reverse, claiming forklift defective because it lacked safety devices and a warning system for reverse movement.
- The trial court ruled OSHA regulations preempted these claims and granted summary judgment.
- Superior Court ruled the OSHA regulations properly admitted at trial as evidence of industry standard and affirmed the trial court

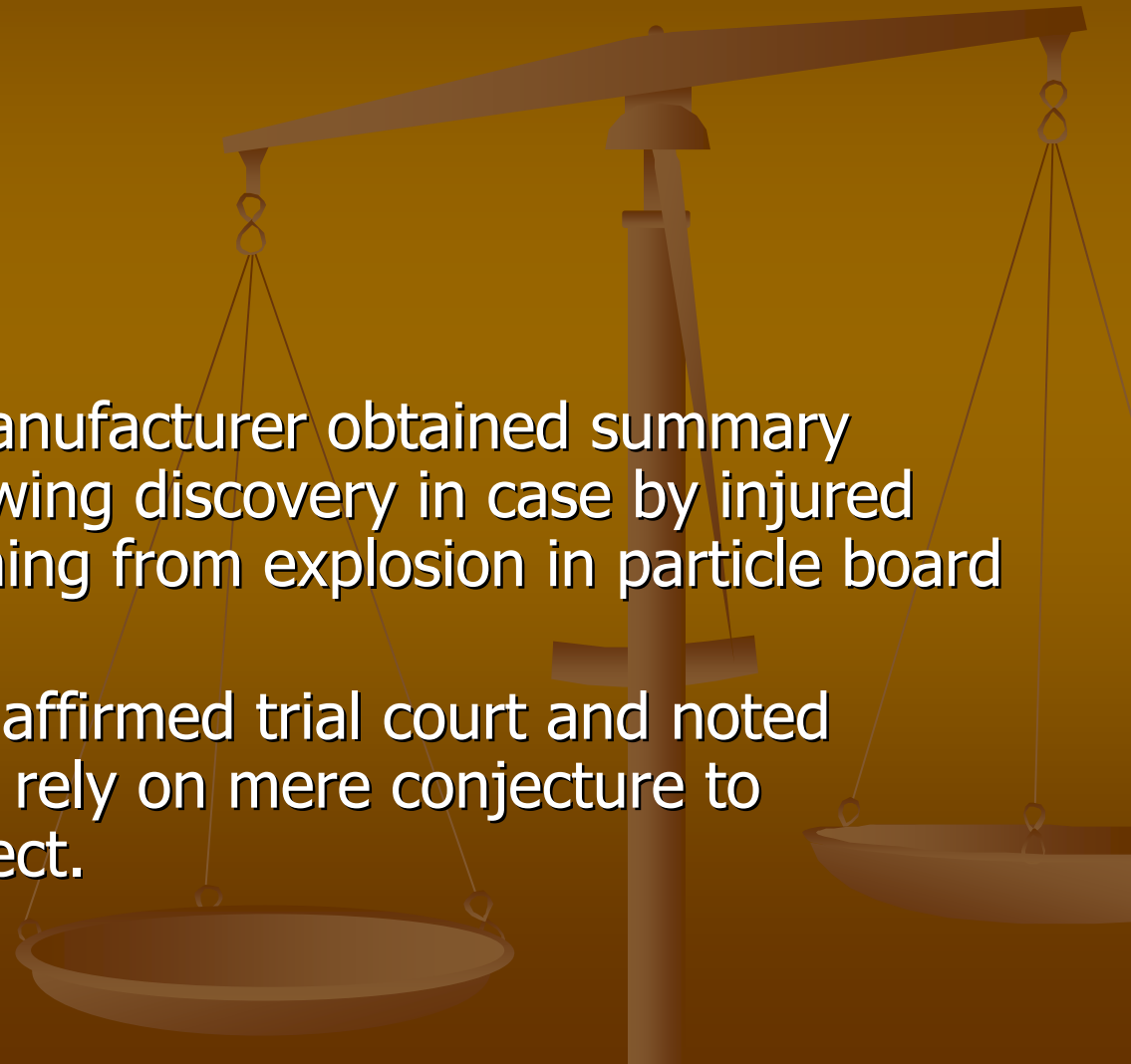


# Case Analysis Issues

## Products Liability

### Barnish (70)

- Heat sensor manufacturer obtained summary judgment following discovery in case by injured workers stemming from explosion in particle board facility.
- Superior Court affirmed trial court and noted plaintiff cannot rely on mere conjecture to establish a defect.

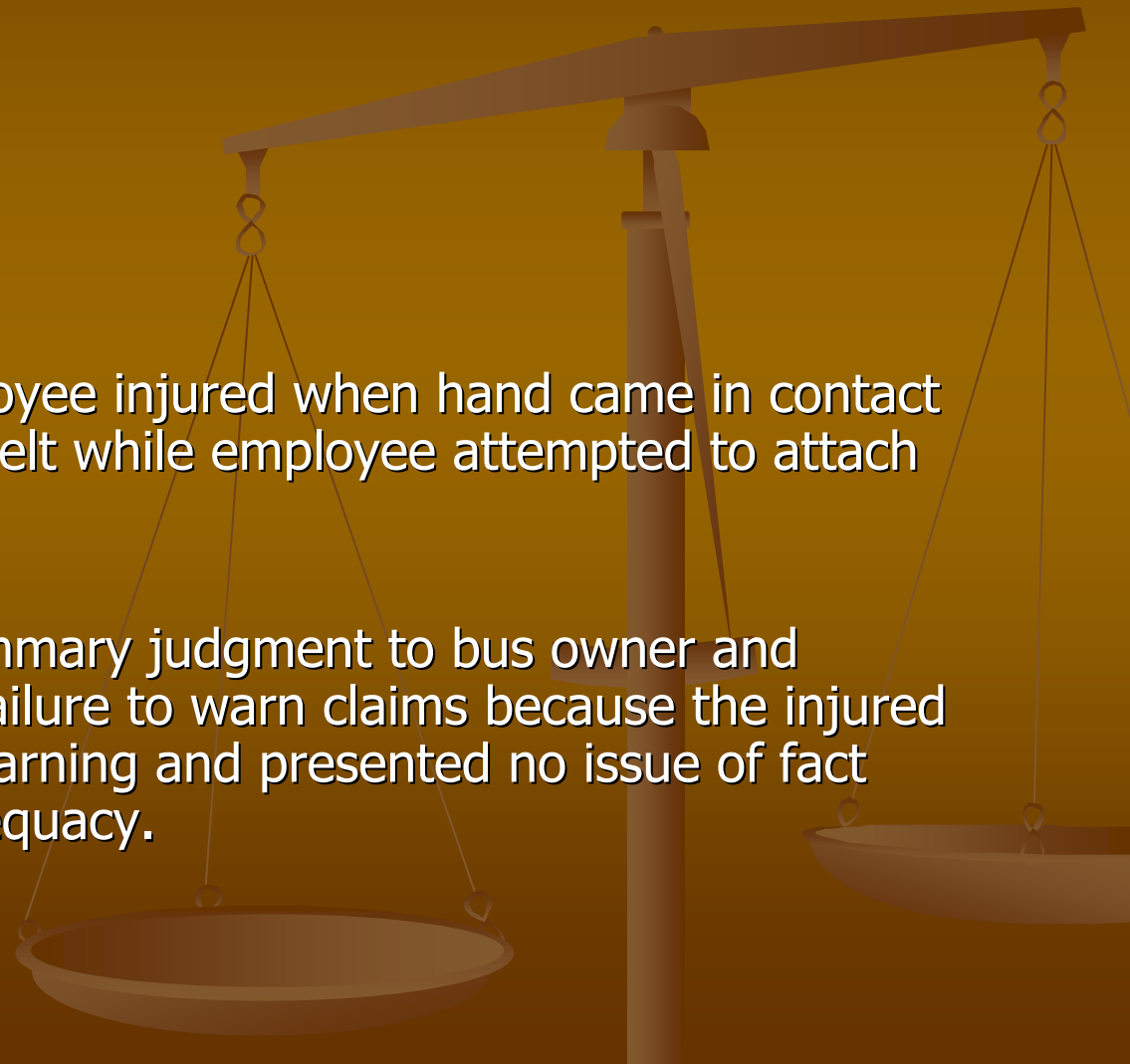


# Case Analysis Issues

## Products Liability

### Blake (71)

- Contractor's employee injured when hand came in contact with moving fan belt while employee attempted to attach adjacent hose.
- Court granted summary judgment to bus owner and manufacturer in failure to warn claims because the injured worker saw the warning and presented no issue of fact concerning its adequacy.

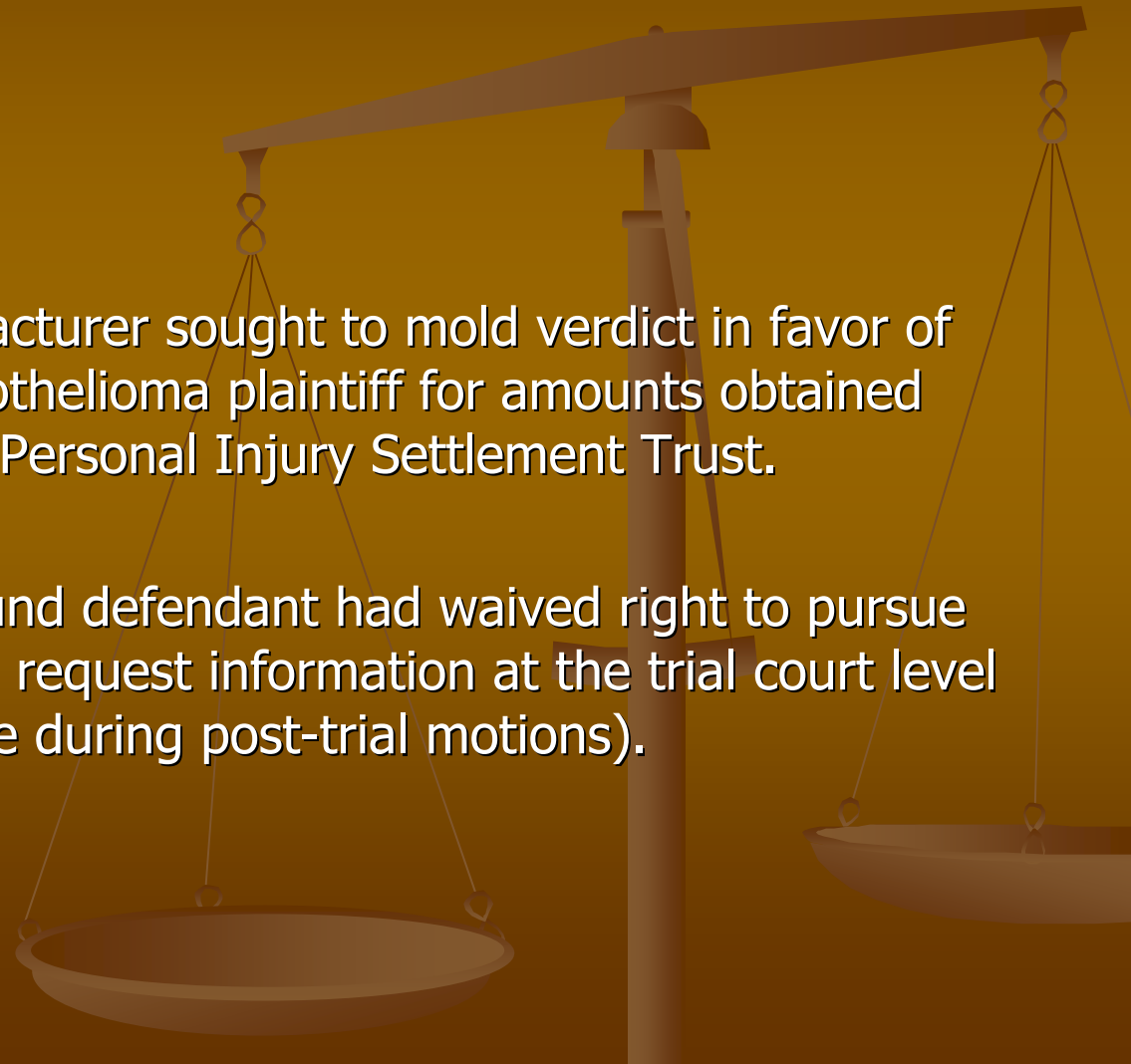


# Case Analysis Issues

## Products Liability

### Bugosh (72)

- Defendant manufacturer sought to mold verdict in favor of occupational mesothelioma plaintiff for amounts obtained from the Manville Personal Injury Settlement Trust.
- Superior Court found defendant had waived right to pursue offset by failing to request information at the trial court level (first request came during post-trial motions).



# Case Analysis Issues

## Products Liability

### Donoghue (73)

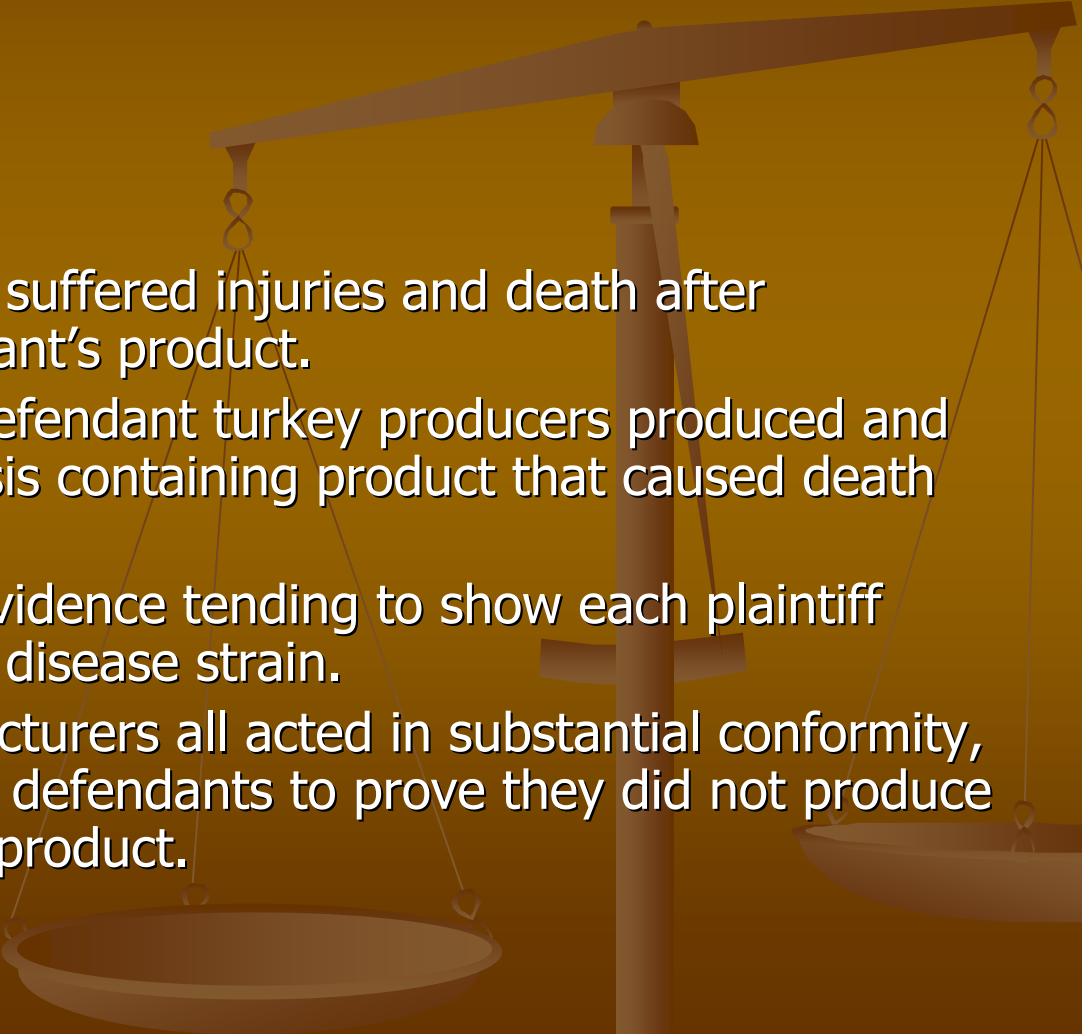
- Court explained proper allocation of settlement when funds obtained from Manville Trust.



# Case Analysis Issues

## Products Liability

### Drayton (74)

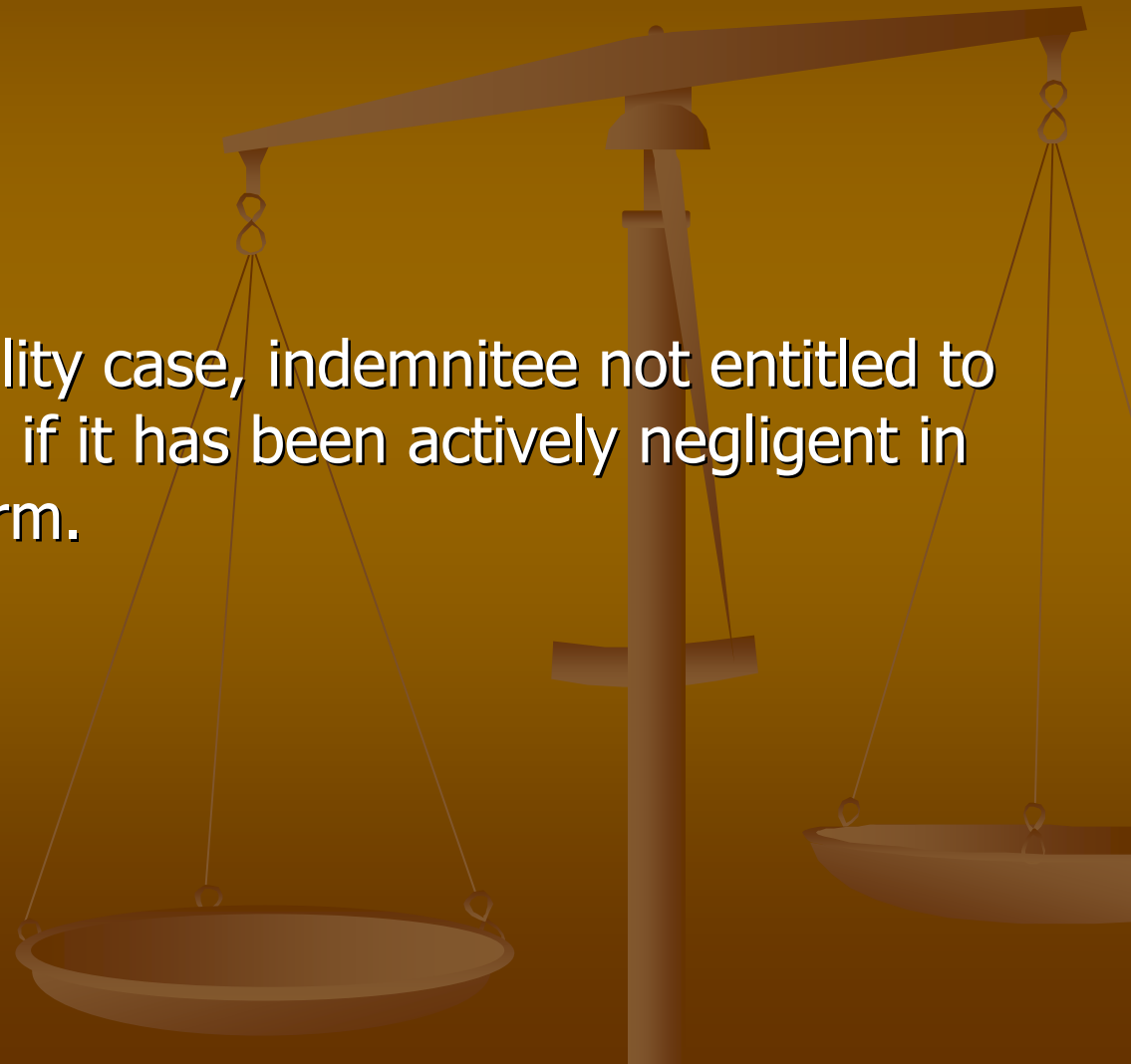
- Turkey consumers suffered injuries and death after consuming defendant's product.
  - CDC determined defendant turkey producers produced and distributed listeriosis containing product that caused death and injury.
  - Plaintiffs offered evidence tending to show each plaintiff contracted precise disease strain.
  - Defendant manufacturers all acted in substantial conformity, and court required defendants to prove they did not produce the injury causing product.
- 

# Case Analysis Issues

## Products Liability

### Meadows (74)

- In product liability case, indemnitee not entitled to indemnification if it has been actively negligent in causing the harm.

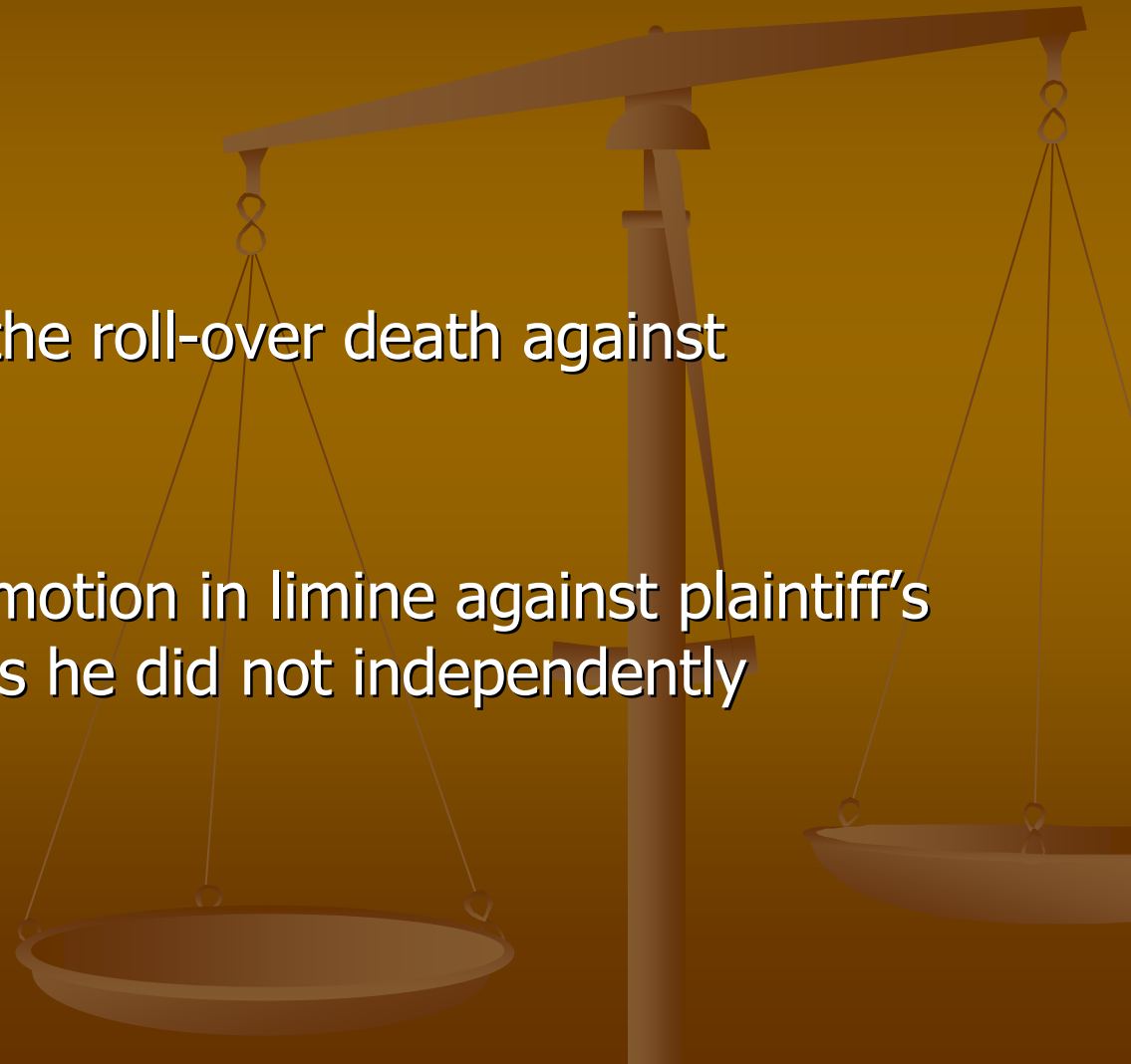


# Case Analysis Issues

## Products Liability

### Montgomery (75)

- Case involved the roll-over death against Mitsubishi.
- Court granted motion in limine against plaintiff's expert on topics he did not independently investigate.

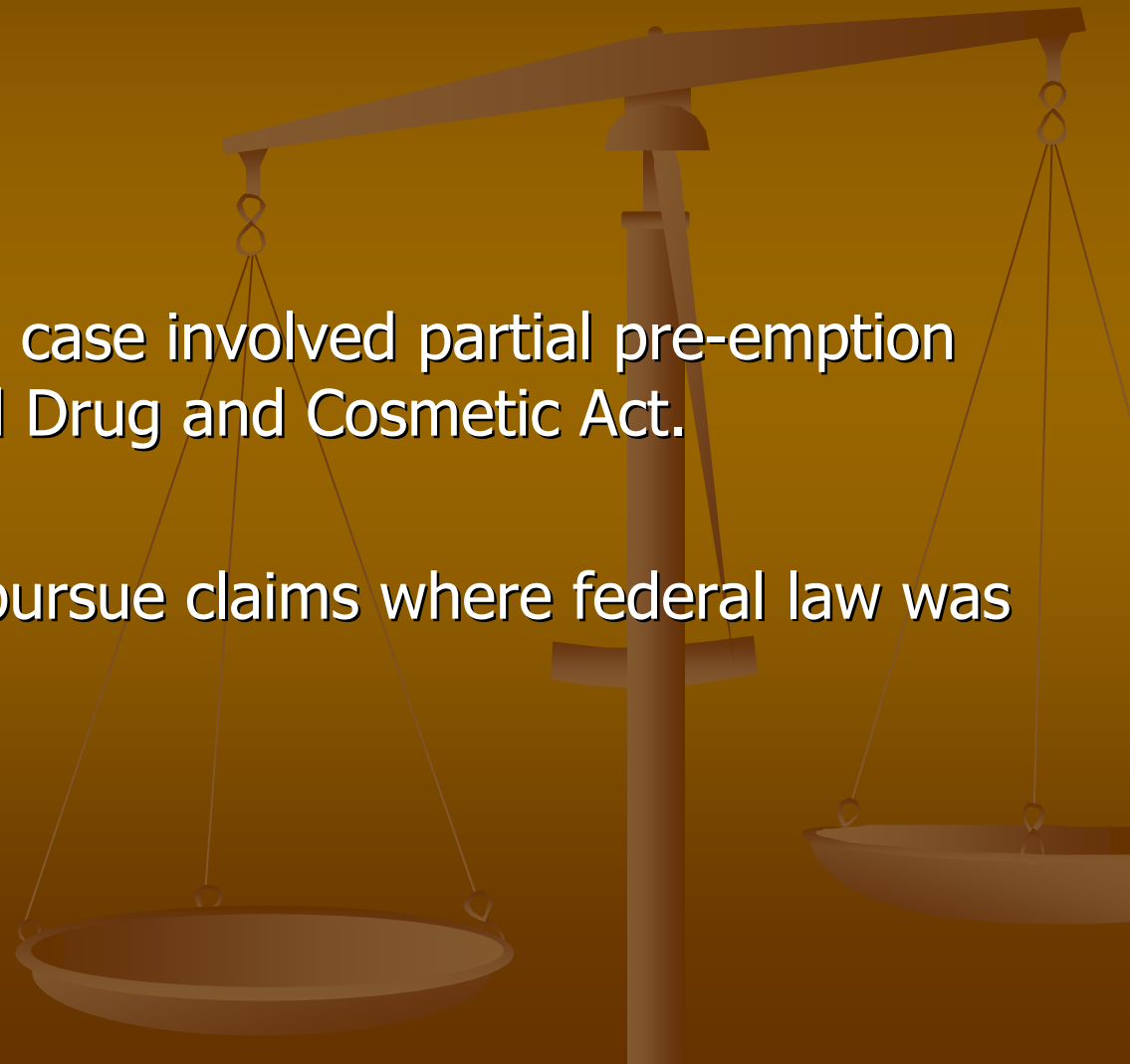


# Case Analysis Issues

## Products Liability

### Perry (75)

- Pharmaceutical case involved partial pre-emption under the Food Drug and Cosmetic Act.
- Plaintiff could pursue claims where federal law was silent.

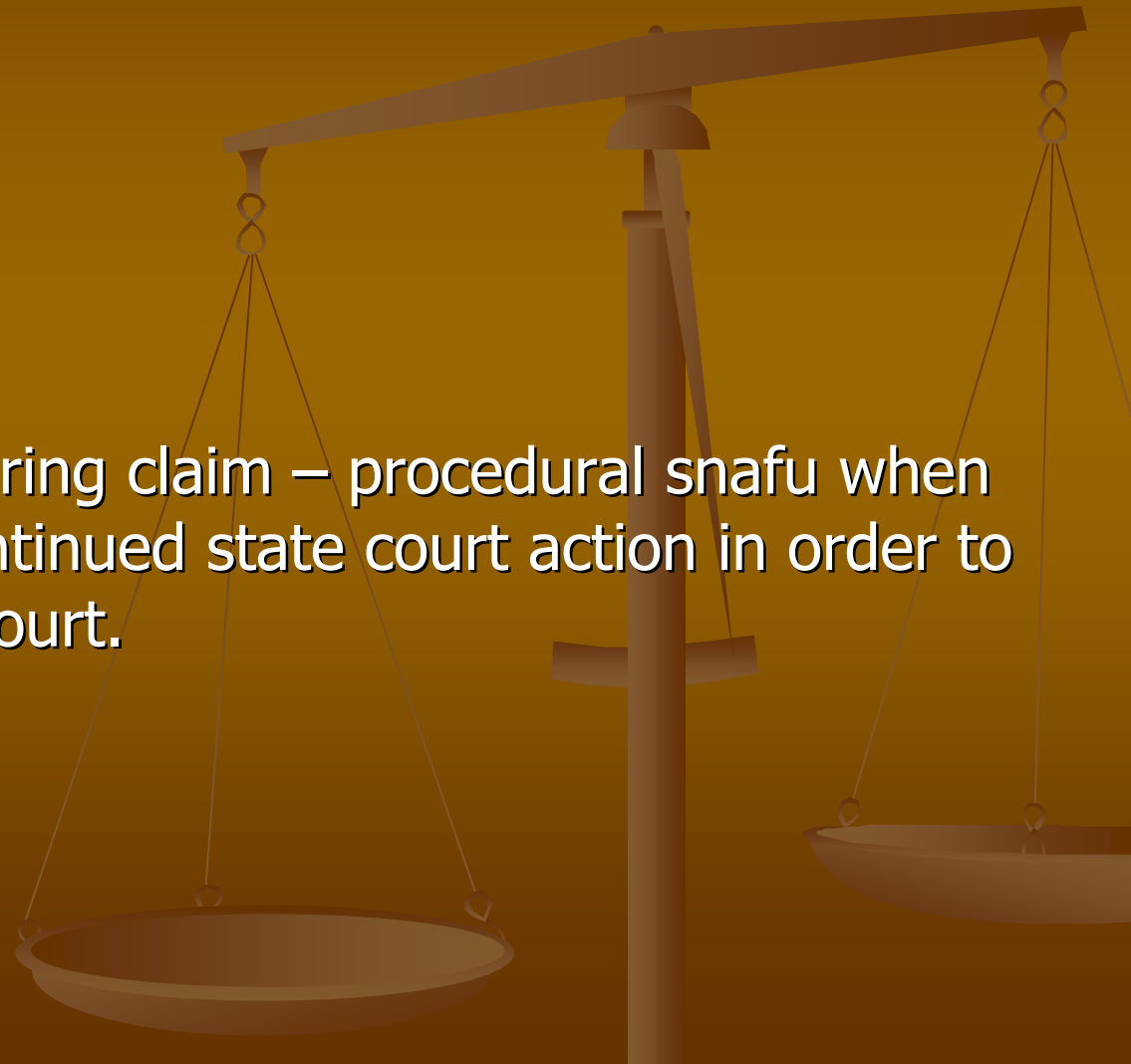


# Case Analysis Issues

## Products Liability

### Pohl (75)

- Medical monitoring claim – procedural snafu when plaintiffs discontinued state court action in order to file in federal court.



# Case Analysis Issues

## Products Liability

### Taylor (77)

- Manufacturer obtained summary judgment when it was shown its product installed more than 10 years prior to the airplane crash.

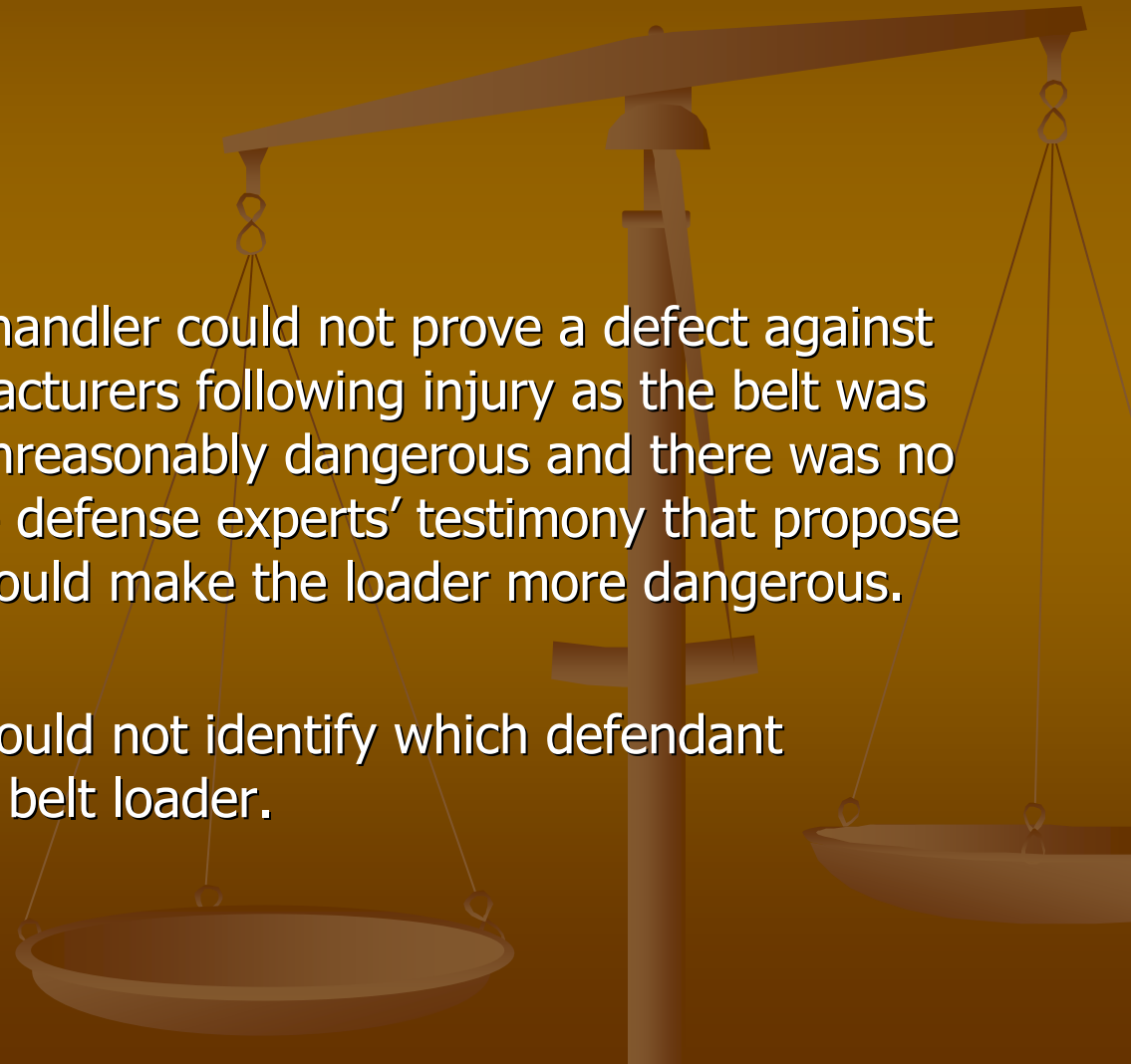


# Case Analysis Issues

## Products Liability

### Warnick (77)

- Plaintiff baggage handler could not prove a defect against belt loader manufacturers following injury as the belt was not found to be unreasonably dangerous and there was no evidence to refute defense experts' testimony that propose design changes would make the loader more dangerous.
- Further, plaintiff could not identify which defendant manufactured the belt loader.

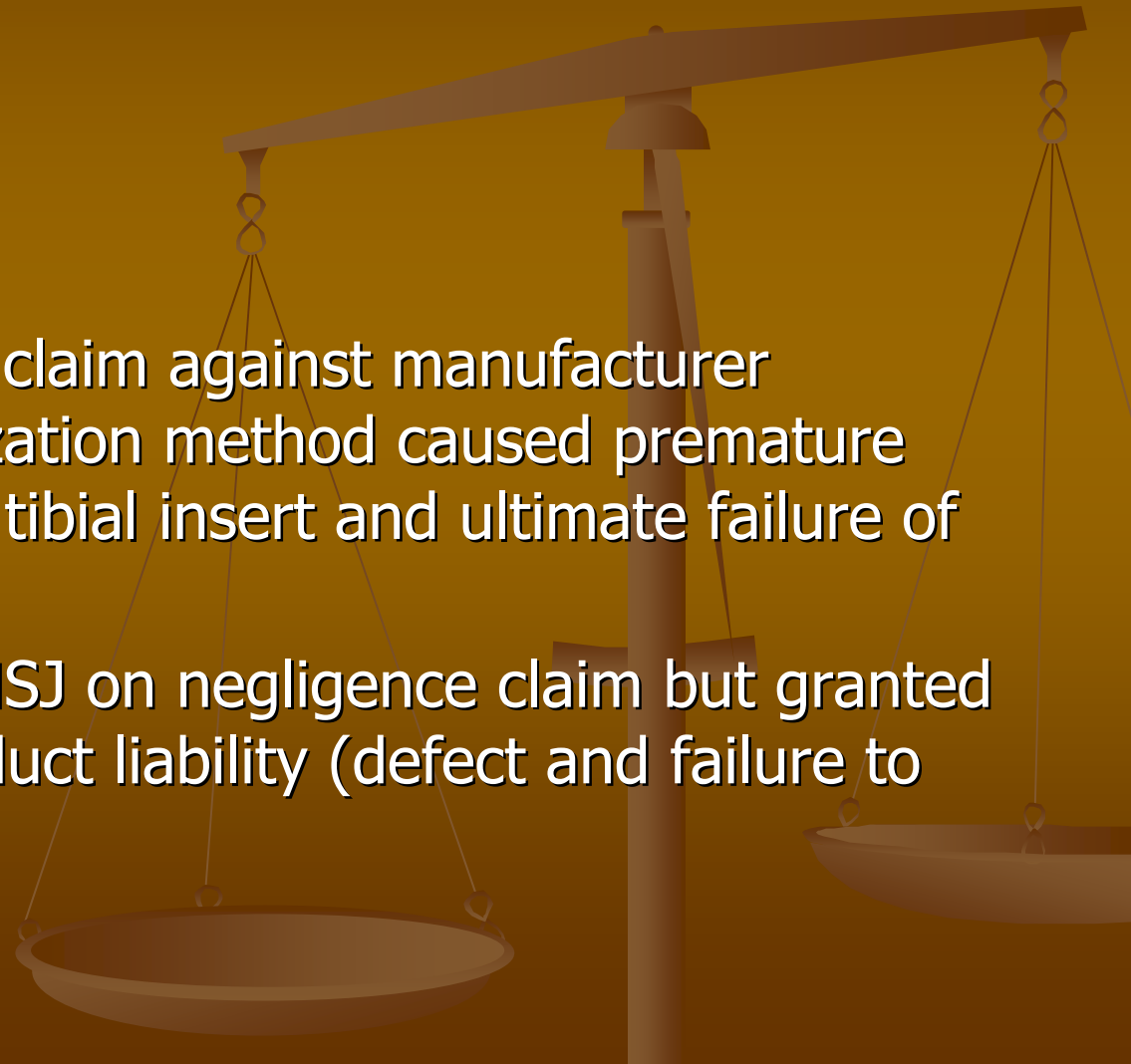


# Case Analysis Issues

## Products Liability

### Zimmer (76)

- Medical device claim against manufacturer claiming sterilization method caused premature degradation of tibial insert and ultimate failure of the device.
- Court denied MSJ on negligence claim but granted motion on product liability (defect and failure to warn) claims.



# Case Analysis Issues

## Res Ipsa Loquitor

### MacNutt (68)

- Plaintiff attempted to rely on RIL to prove negligent conduct of defendant surgeon.
- Plaintiff could not prove the injury could not have occurred without negligence.

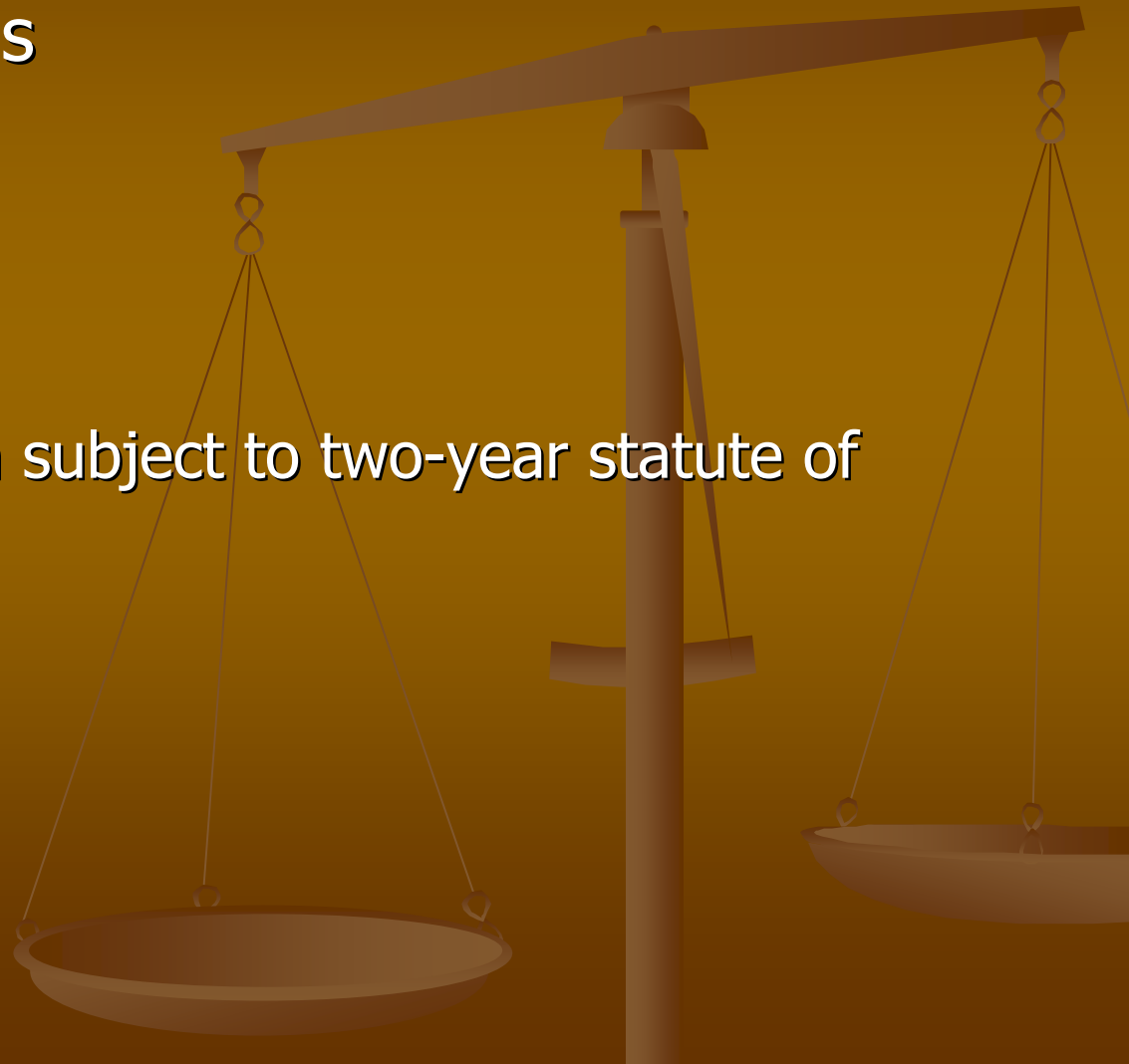


# Case Analysis Issues

## Statute of Limitations

Ash (84)

- Bad Faith claim subject to two-year statute of limitation.

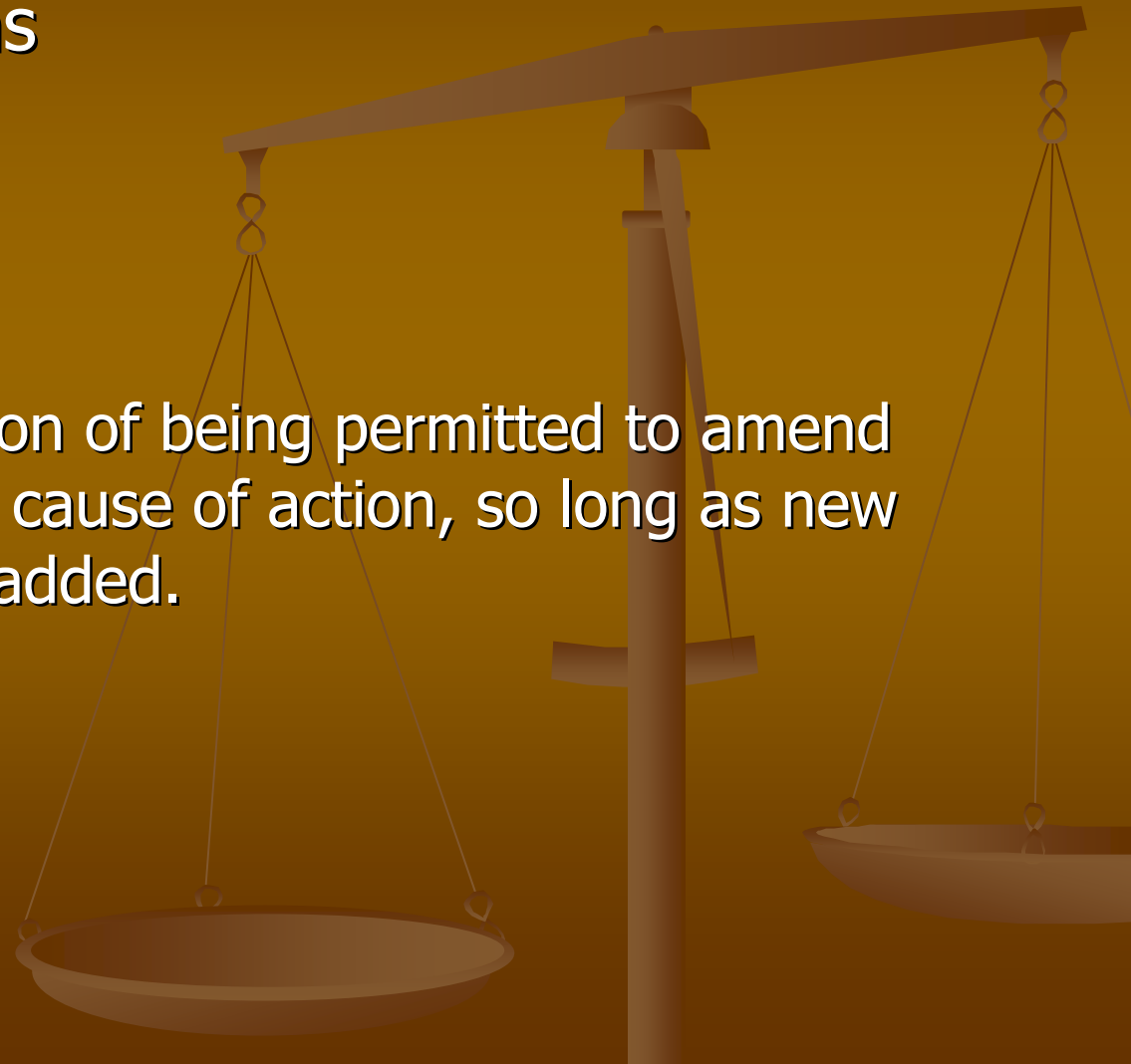


# Case Analysis Issues

## Statute of Limitations

### Chaney (85)

- Good explanation of being permitted to amend pleadings after cause of action, so long as new claims are not added.

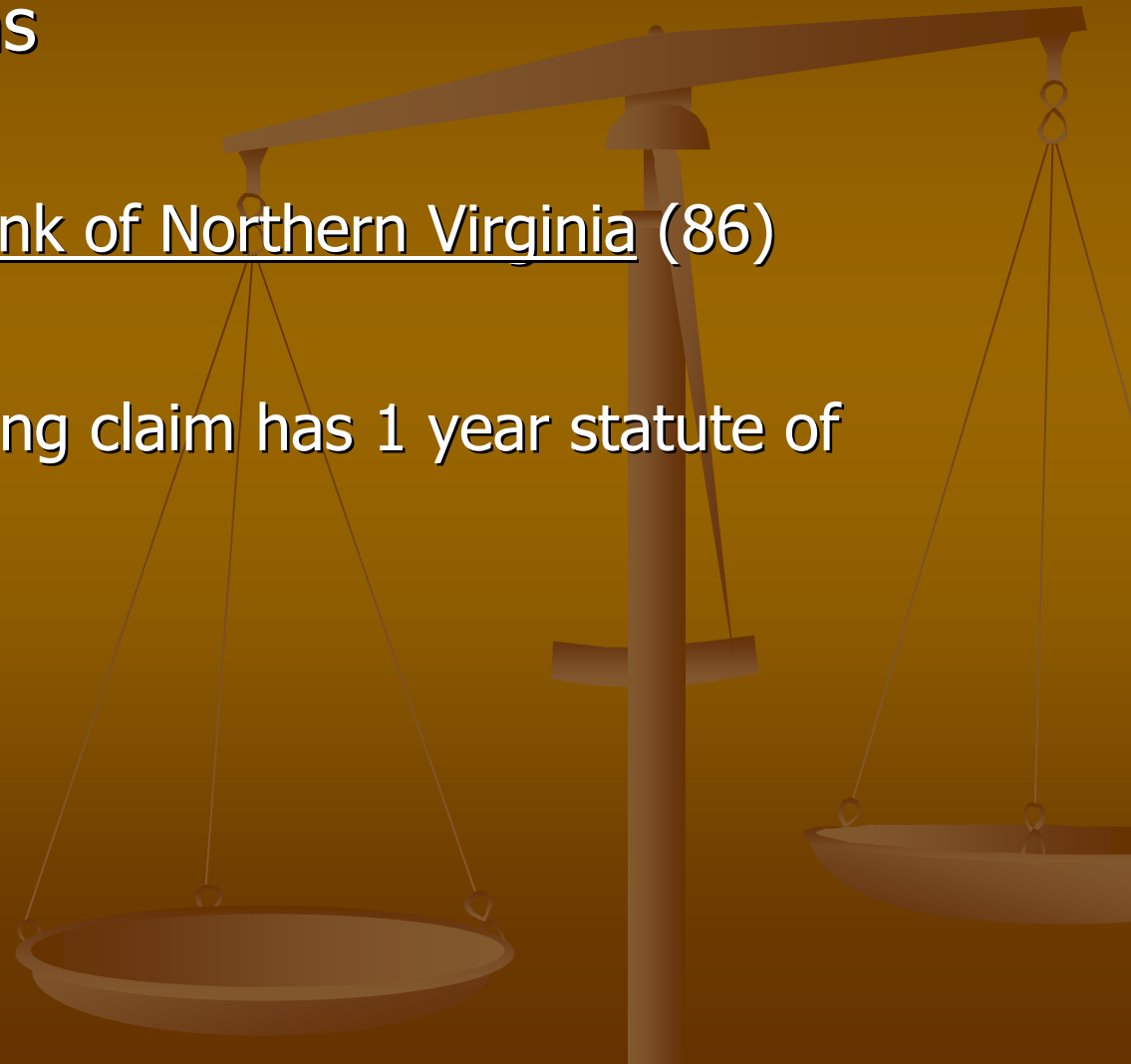


# Case Analysis Issues

## Statute of Limitations

### In re Community Bank of Northern Virginia (86)

- Predatory lending claim has 1 year statute of limitation.



# Case Analysis Issues

## Statute of Limitations

### Delaware County (87)

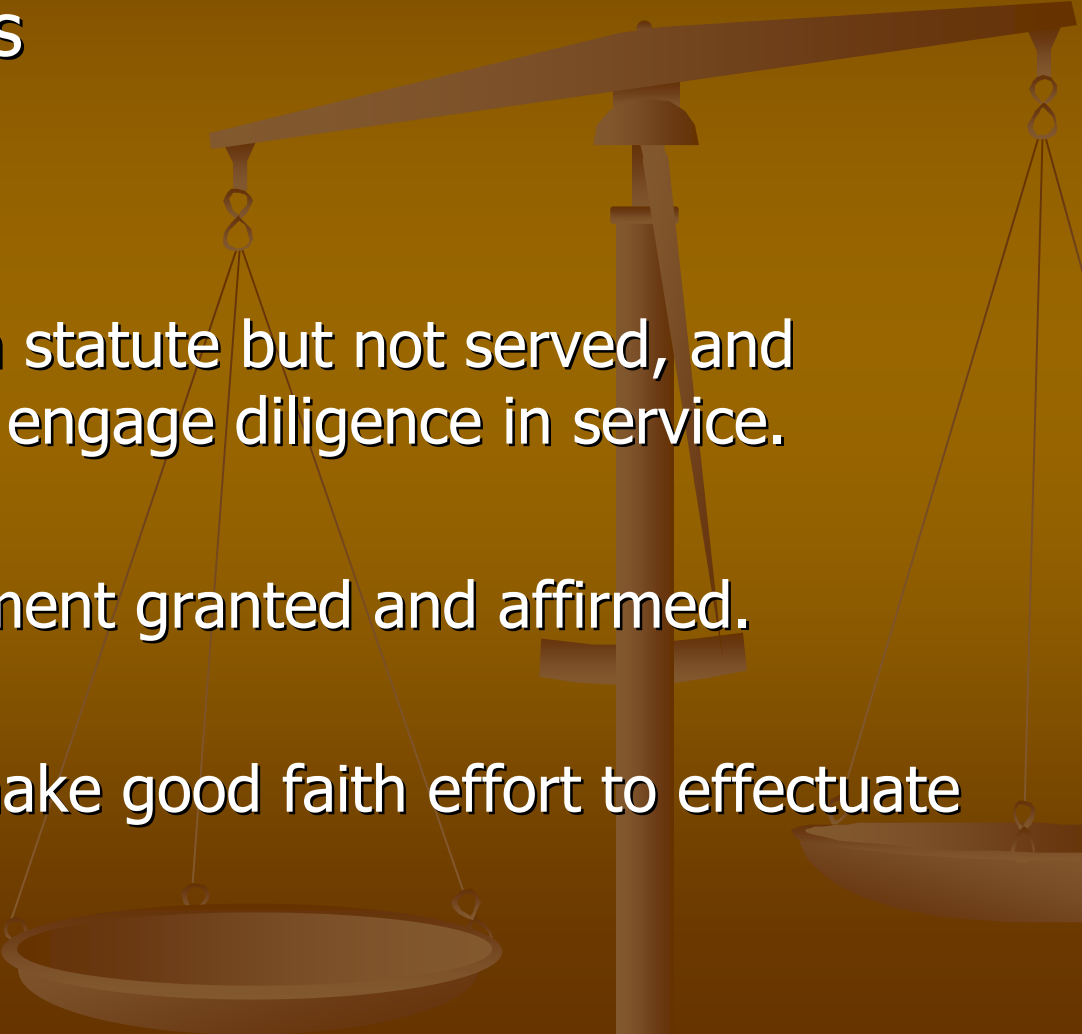
- Statute does not run against the government.
- *Nullum tempus occurit regit*



# Case Analysis Issues

## Statute of Limitations

### Englert (88)

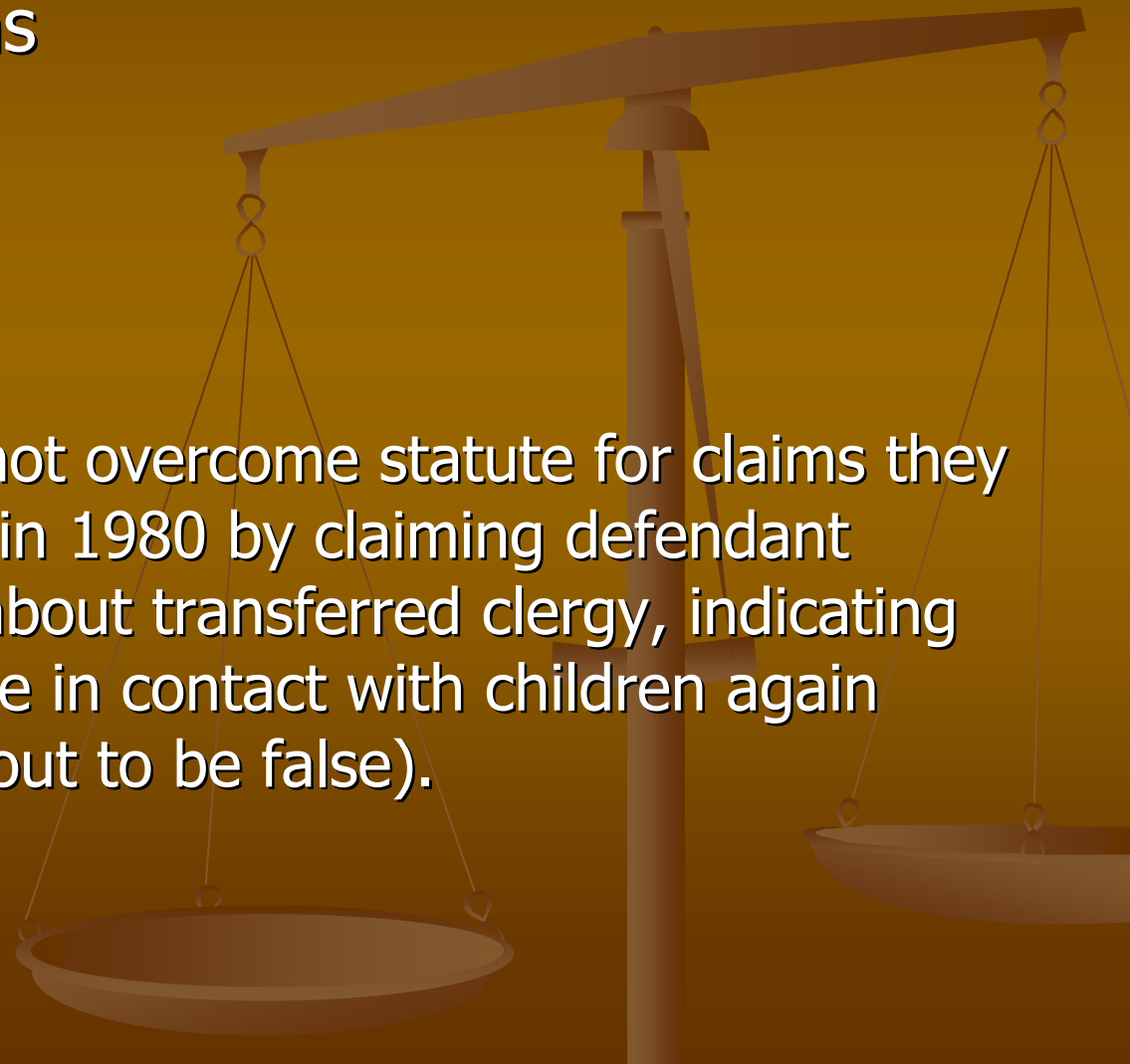
- Writ filed within statute but not served, and plaintiff did not engage diligence in service.
  - Summary judgment granted and affirmed.
  - Plaintiff must make good faith effort to effectuate service.
- 

# Case Analysis Issues

## Statute of Limitations

### Lazarski (88)

- Plaintiff could not overcome statute for claims they were aware of in 1980 by claiming defendant misled them about transferred clergy, indicating he would not be in contact with children again (which turned out to be false).



# Case Analysis Issues

## Statute of Limitations

### Vojtasek (90)

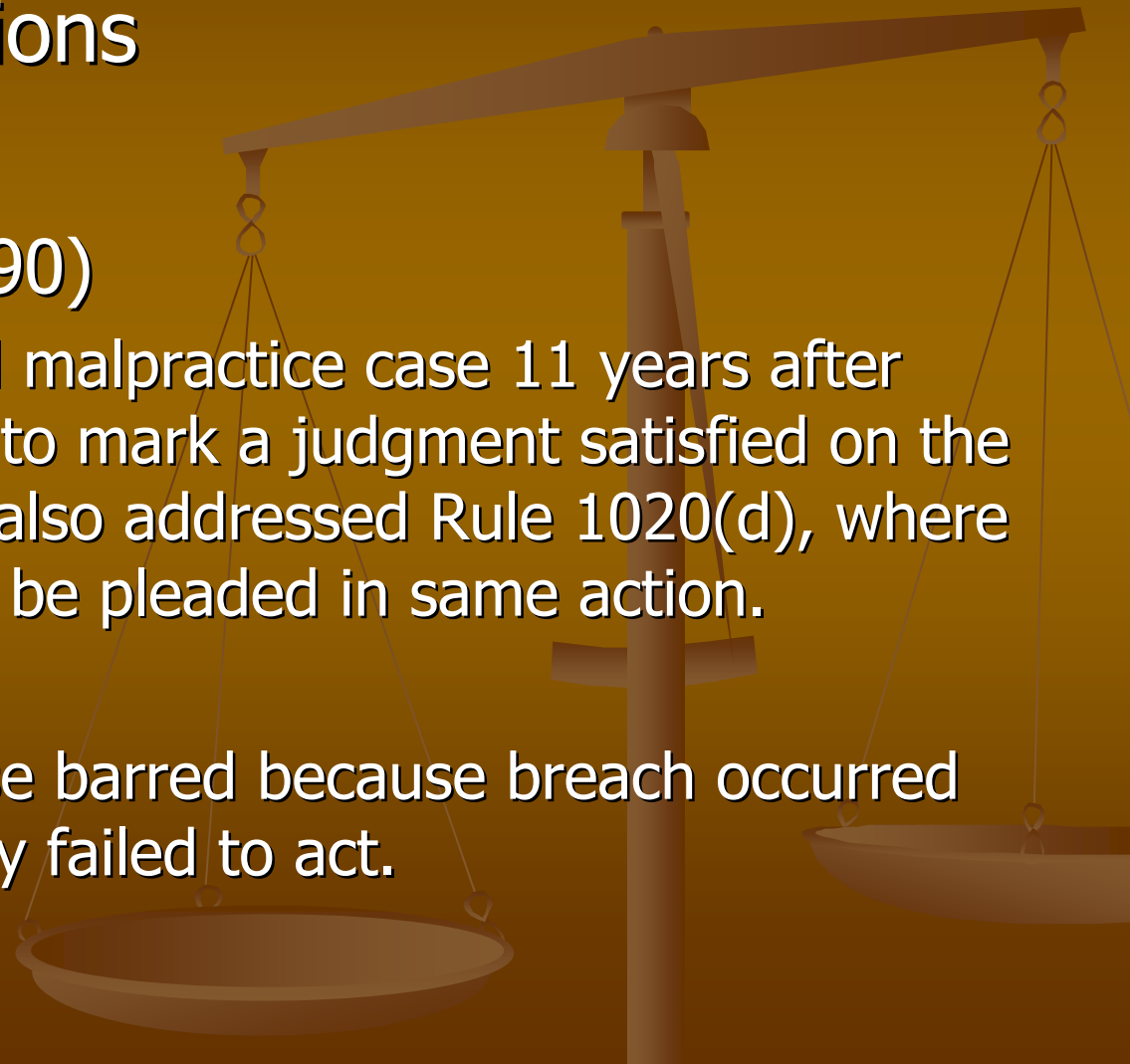
- In 1990, school learned of sexual relationship between teacher and student, and defendant reassigned to another location but never informed student's parents.
- Plaintiff-student commenced action in 2004.
- Court ruled the statute did not begin to run until abused minor reached age of majority, but ruled fraudulent concealment (tolling the statute) did not occur.

# Case Analysis Issues

## Statute of Limitations

### Wachovia Bank (90)

- Bank filed legal malpractice case 11 years after attorney failed to mark a judgment satisfied on the docket. Court also addressed Rule 1020(d), where all claims must be pleaded in same action.
- Court ruled case barred because breach occurred at time attorney failed to act.

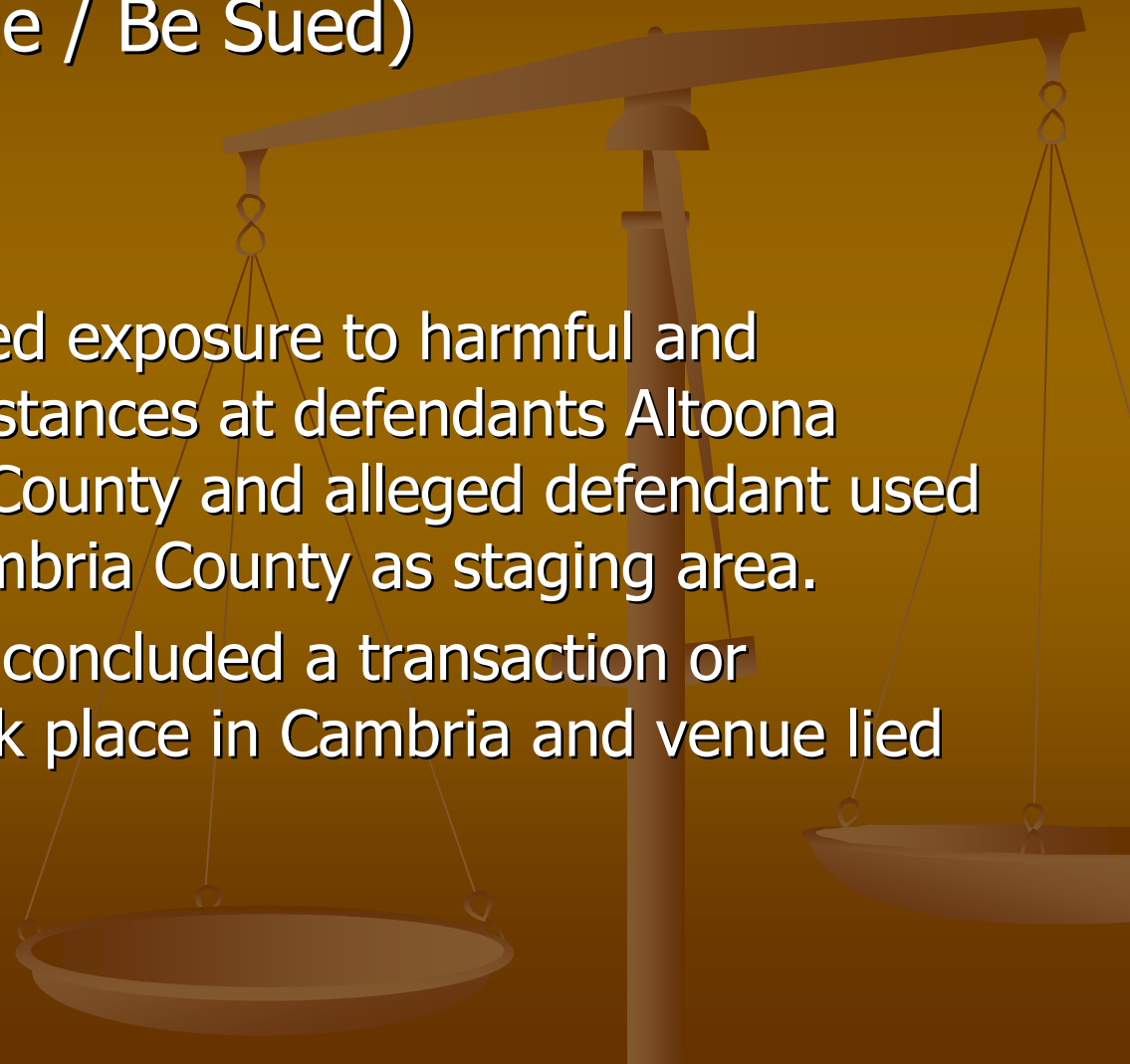


# Case Analysis Issues

## Venue (Where to Sue / Be Sued)

### Deyarmin (98)

- Plaintiffs claimed exposure to harmful and dangerous substances at defendants Altoona Works in Blair County and alleged defendant used property in Cambria County as staging area.
- Superior Court concluded a transaction or occurrence took place in Cambria and venue lied there.

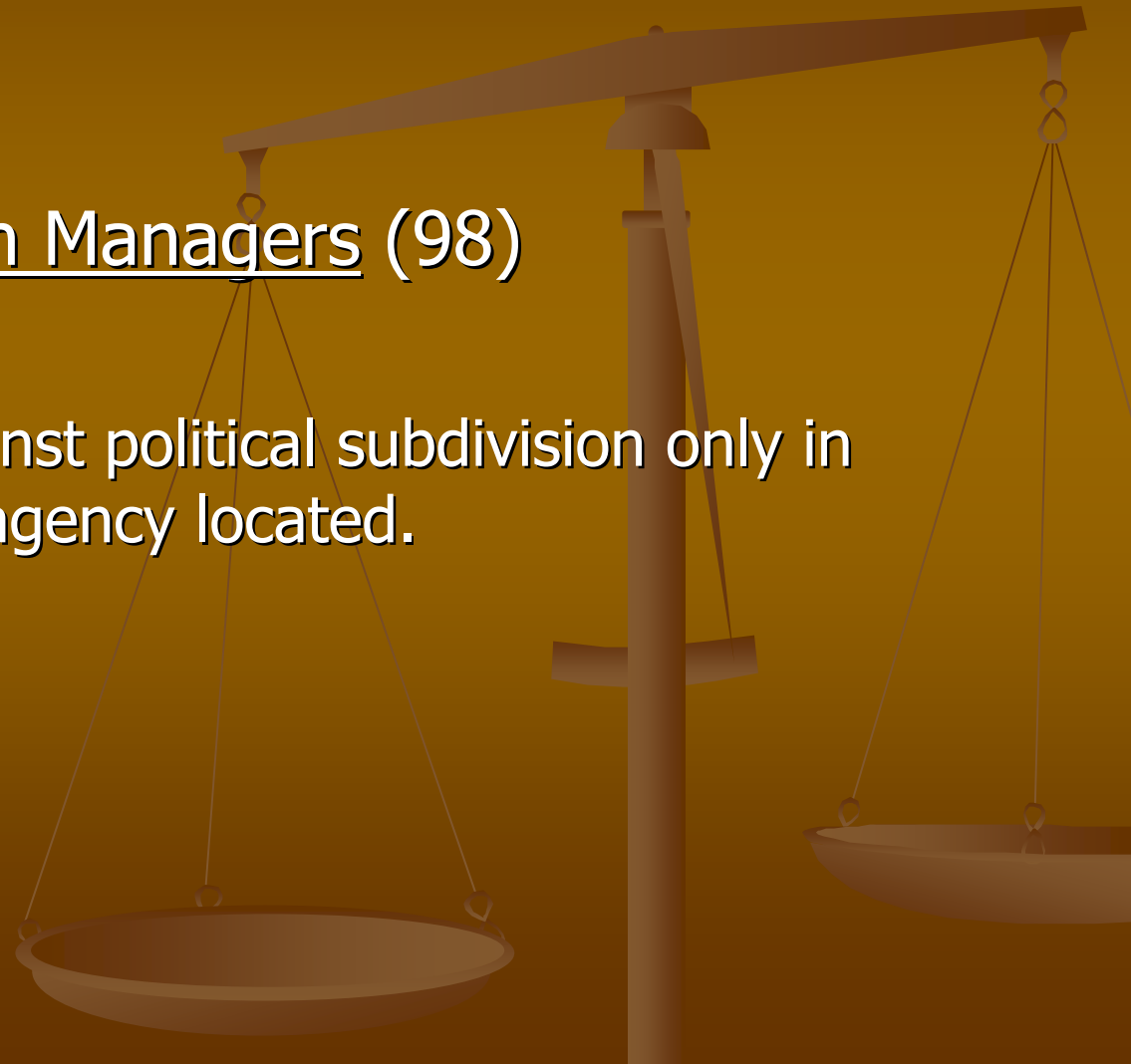


# Case Analysis Issues

## Venue

### Pace Construction Managers (98)

- Venue lies against political subdivision only in county where agency located.



# Case Analysis Issues

## Venue

### Zampana (99)

- Cases addresses proper venue as distinct from *forum non conveniens* – literally, inconvenient forum. Doctrine applies where venue proper but some or all of the parties, documents, witnesses, accident site, etc. are located in another place, making the chosen venue inconvenient to the defendant. Prevents forum shopping.

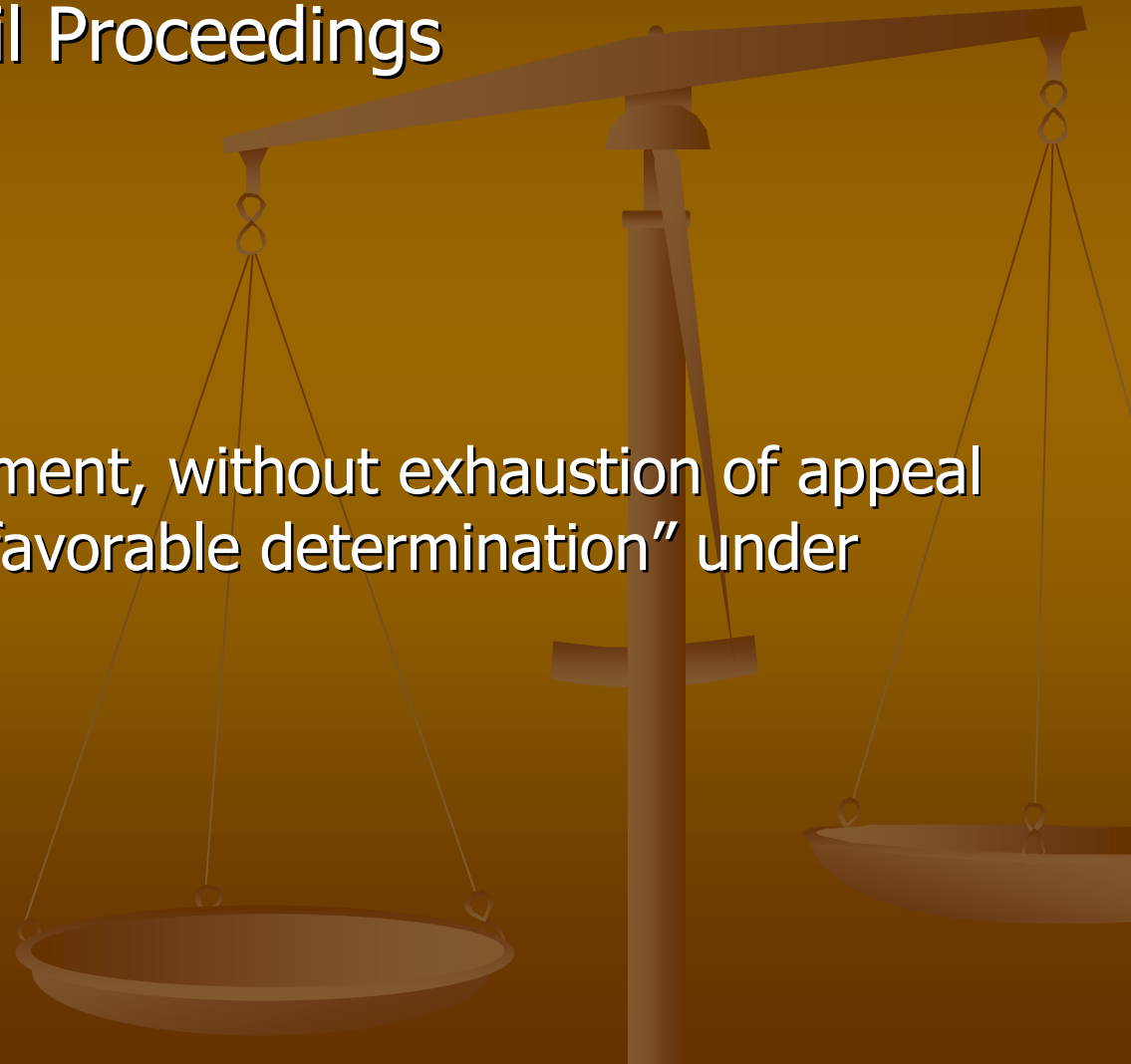


# Case Analysis Issues

## Wrongful Use of Civil Proceedings

### D'Elia

- Summary judgment, without exhaustion of appeal period, not a "favorable determination" under Dragonetti Act.

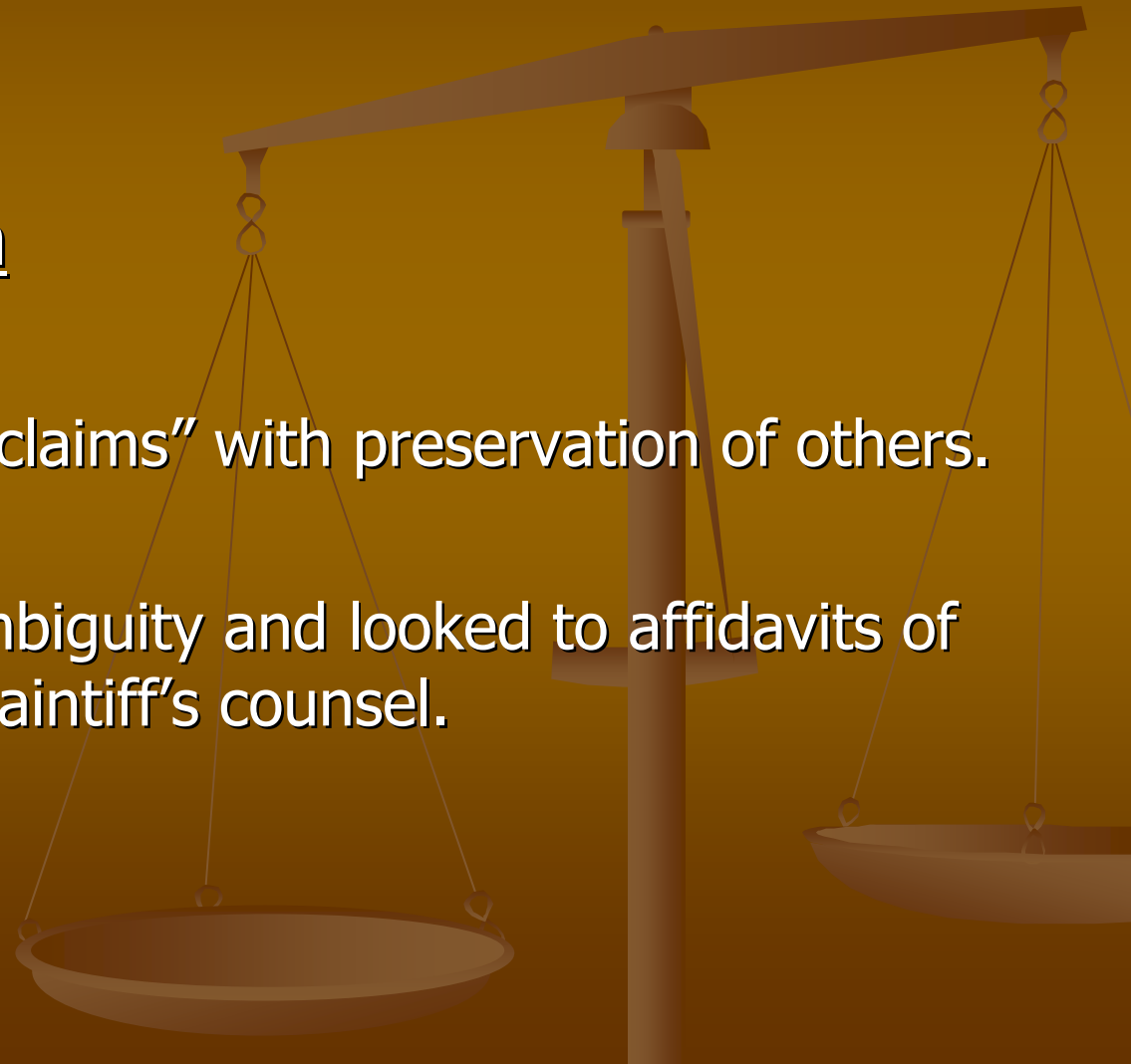


# Case Analysis Issues

## Settlement

### Blacks v. Jamison

- Release of “all claims” with preservation of others.
- Court found ambiguity and looked to affidavits of adjuster and plaintiff’s counsel.

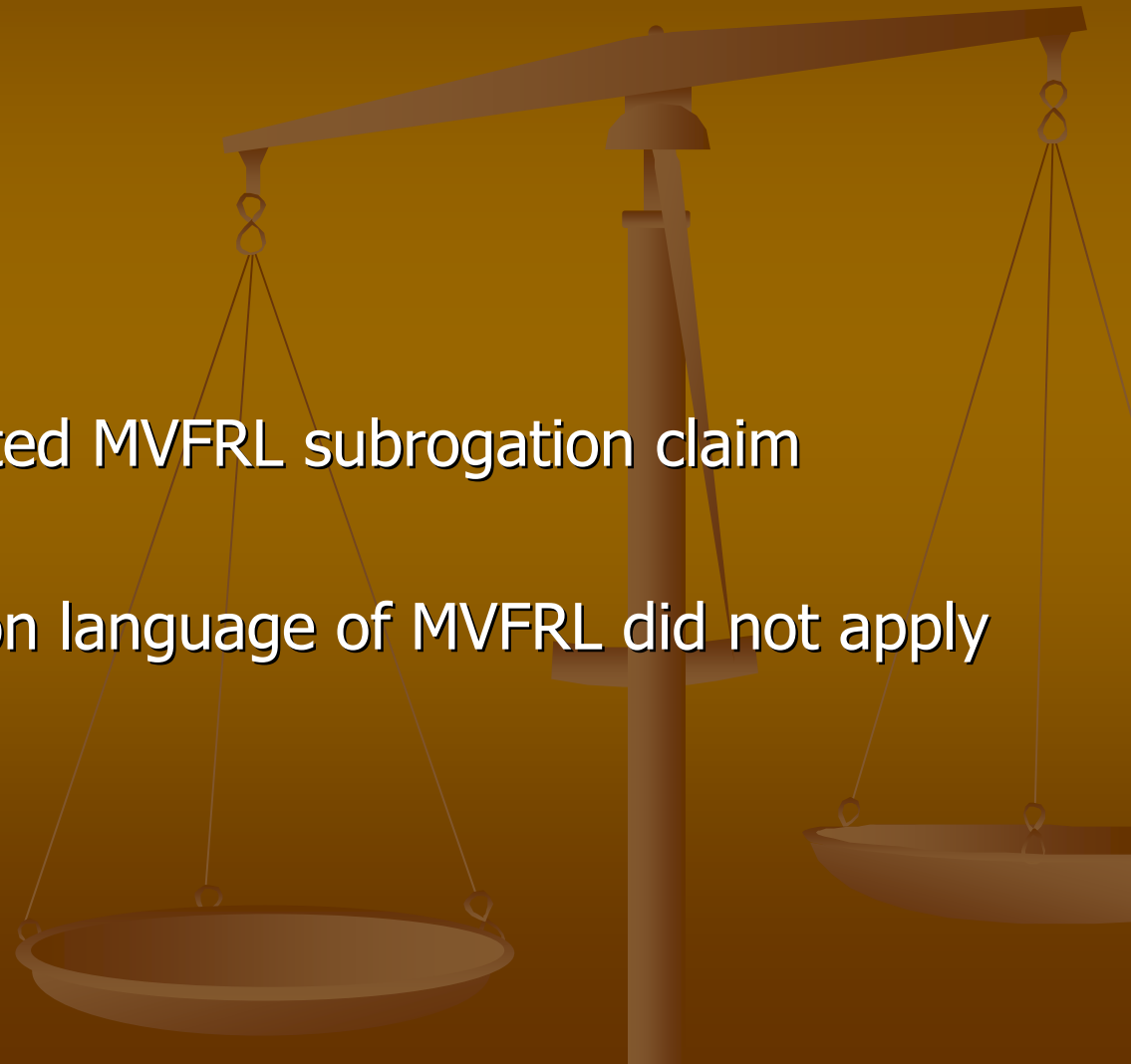


# Case Analysis Issues

## Settlement

### Wirth (22-23)

- ERISA preempted MVFRL subrogation claim
- Anti-subrogation language of MVFRL did not apply to HMO



# Case Analysis Issues

## Coverage

### Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286 (Pa. 2007)

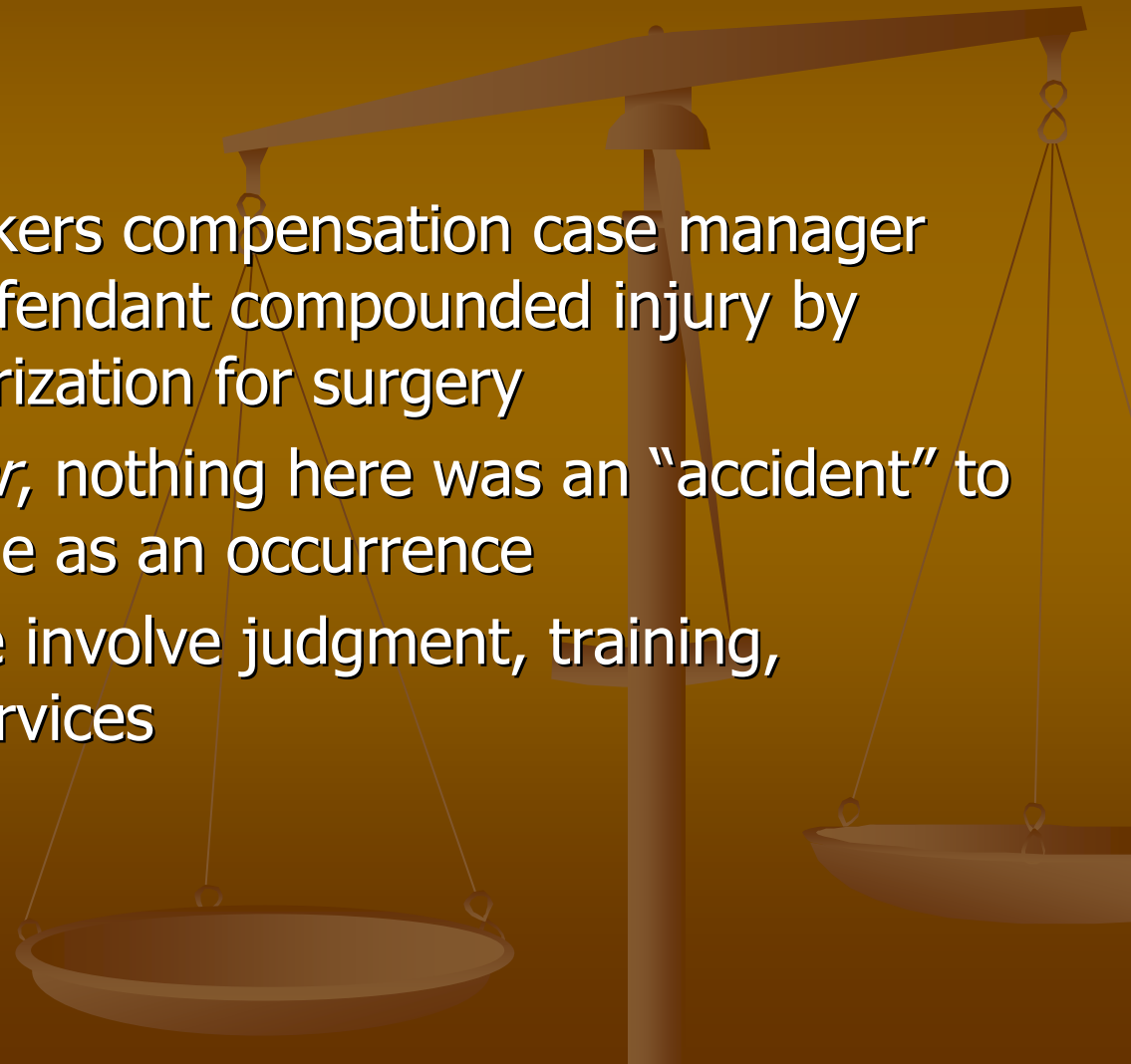
- Parents sued for failure to take hand gun, secure mental health treatment, advise police
- Is this “occurrence” and, if so, how many?
- “occurrence is from the viewpoint of the insured seeking coverage, not from that of the one committing act – this was accident and unexpected from parents viewpoint
- as to number – focus on conduct of insured – here, all injuries were from single set of negligent acts by parents

# Case Analysis Issues

## Coverage

### Gula (42)

- Claim that workers compensation case manager assigned by defendant compounded injury by delaying authorization for surgery
- Under *Kvaerner*, nothing here was an “accident” to trigger coverage as an occurrence
- All actions here involve judgment, training, professional services



# Case Analysis Issues

## Coverage

Greene v. United Serv. Auto. Ass'n, 936 A.2d 1178 (Pa. Super. 2007).

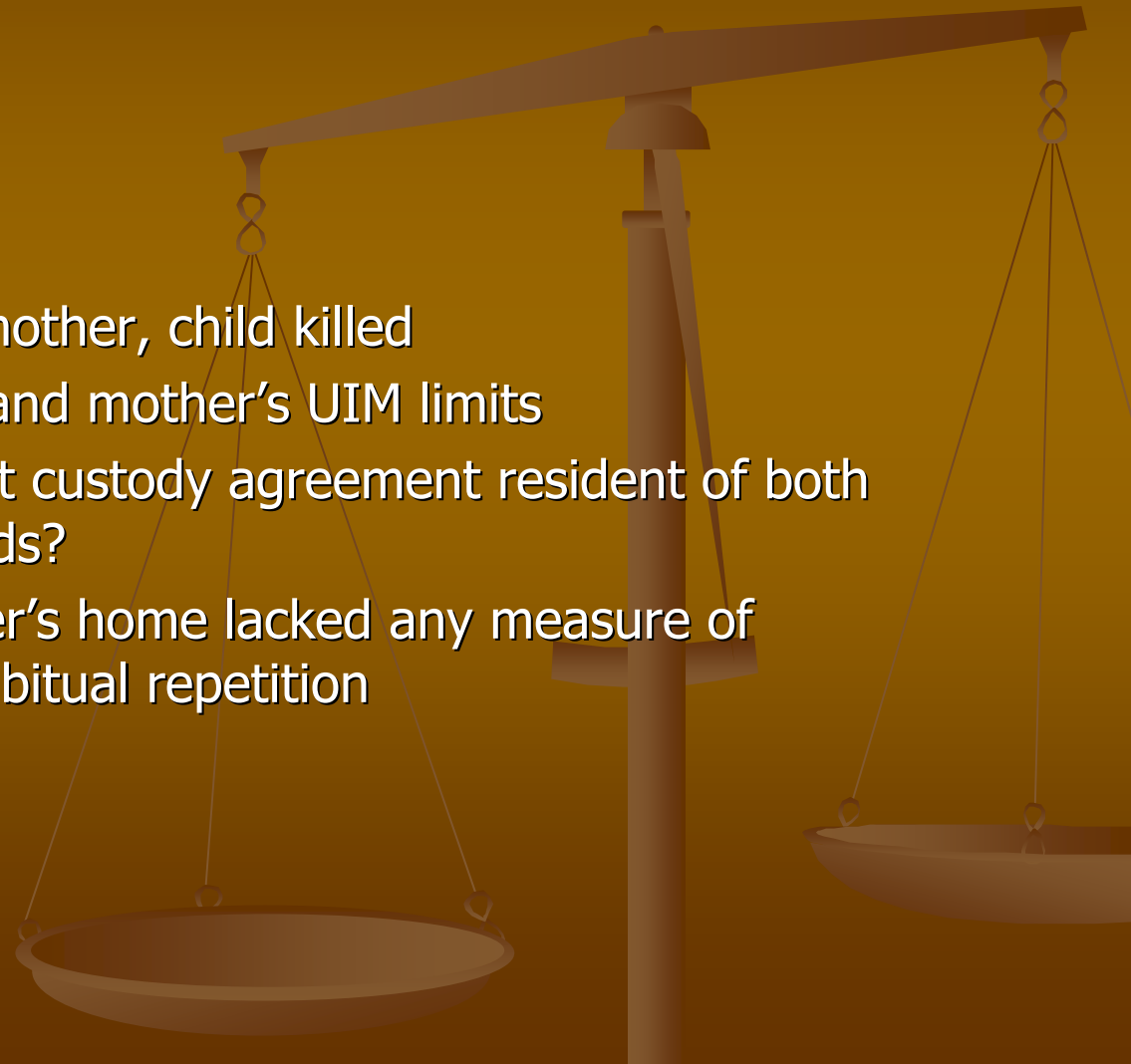
- Coverage issue in homeowners policy
- Damage to one slope of multi-sloped roof
- “part of the building damaged” was the one slope, not whole roof
- Policy required replacement of “like” construction, not identical

# Case Analysis Issues

## Coverage

### Weryha (31)

- while living with mother, child killed
- Collected liability and mother's UIM limits
- Is child under joint custody agreement resident of both parents' households?
- Contact with father's home lacked any measure of permanency or habitual repetition



# Case Analysis Issues

## Coverage

Wall Rose Mut. Ins. Co. v. Manross, 939 A.2d 958 (Pa.Super. 2007).

- Sued homeowner's grandson for personal injury
- Was he a "resident" under policy?
- No permanency / habitual repetition
  - Drifter
  - Occasional laundry, mail
  - no key, no rent
  - Kept most possessions elsewhere

# Case Analysis Issues

## Coverage

### SouthCentral Employment Corp. (40)

- Expends funds from state and federal authorities
- Audit required huge reimbursement to state
- Not a covered “loss” – funds were restitutionary and not recoverable
- Insured was never entitled to funds, so could not “lose” them

# Case Analysis Issues

## Bad Faith

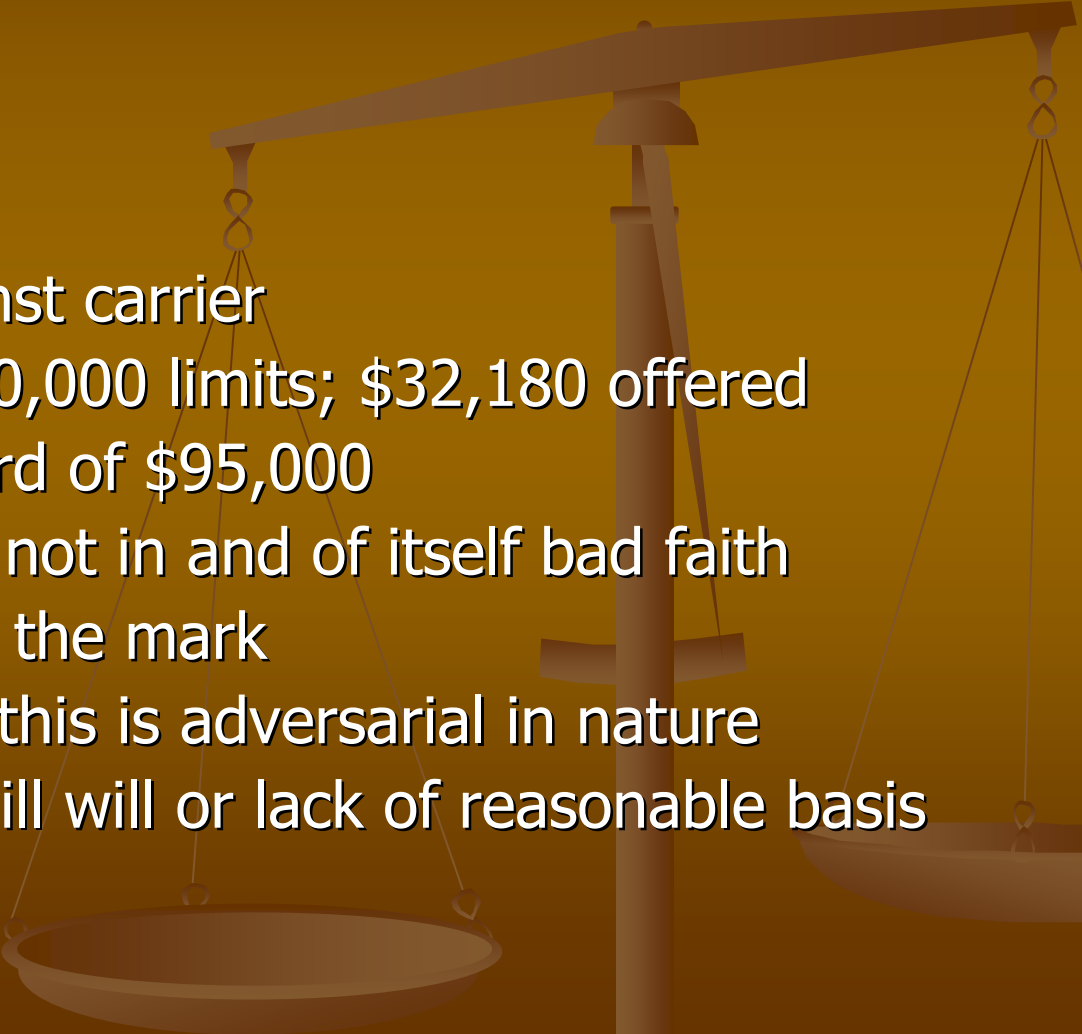
### Toy (41-42)

- Sale of life policy made to sound like investment
- Sued carrier for bad faith and under UTPCPL
- Bad faith statute did not apply to pre-contract representations
- Under UTPCPL, claims for fraud in execution of contract not precluded from showing justifiable reliance on oral misrepresentations

# Case Analysis Issues

## Bad Faith

### Zappile (36-37)

- UIM claim against carrier
  - Demanded \$150,000 limits; \$32,180 offered
  - Arbitration award of \$95,000
  - Undervaluation not in and of itself bad faith
  - Both parties off the mark
  - Recognize that this is adversarial in nature
  - No evidence of ill will or lack of reasonable basis
- 

# Case Analysis Issues

## UM/UIM

Sackett (I and II) – Sackett v. Nationwide Mut. Ins. Co.,  
919 A.2d 194 (Pa.2007); 940 A.2d 329 (Pa. 2007)

- 1998 – two vehicles with stacking waiver signed
- 2000 – new vehicle added, no new waiver
  - Sackett I – any new “purchase” requires new waiver
  - Sackett II
    - when adding vehicle, this is not a “purchase” if coverage automatically triggered for newly acquired vehicle (assuming timely reporting and payment)
    - if policy provides coverage only for a finite period, new waiver needed

# Case Analysis Issues

## UM/UIM

### Everhart v. PMA Ins. Group, 938 A.2d 301 (Pa. 2007)

- Officer of company killed while driving vehicle lease to employer
- Decedent listed in “broadened first party” endorsement and “drive other car” endorsement – not a named insured or additional named insured
- Fleet policy covered 33 vehicles – no option of purchasing or rejecting stacking was offered
- Supreme Court: MVFRL does not disturb law that UM/UIM stacking not required on commercial fleet policies

# Case Analysis Update

## UM/UIM

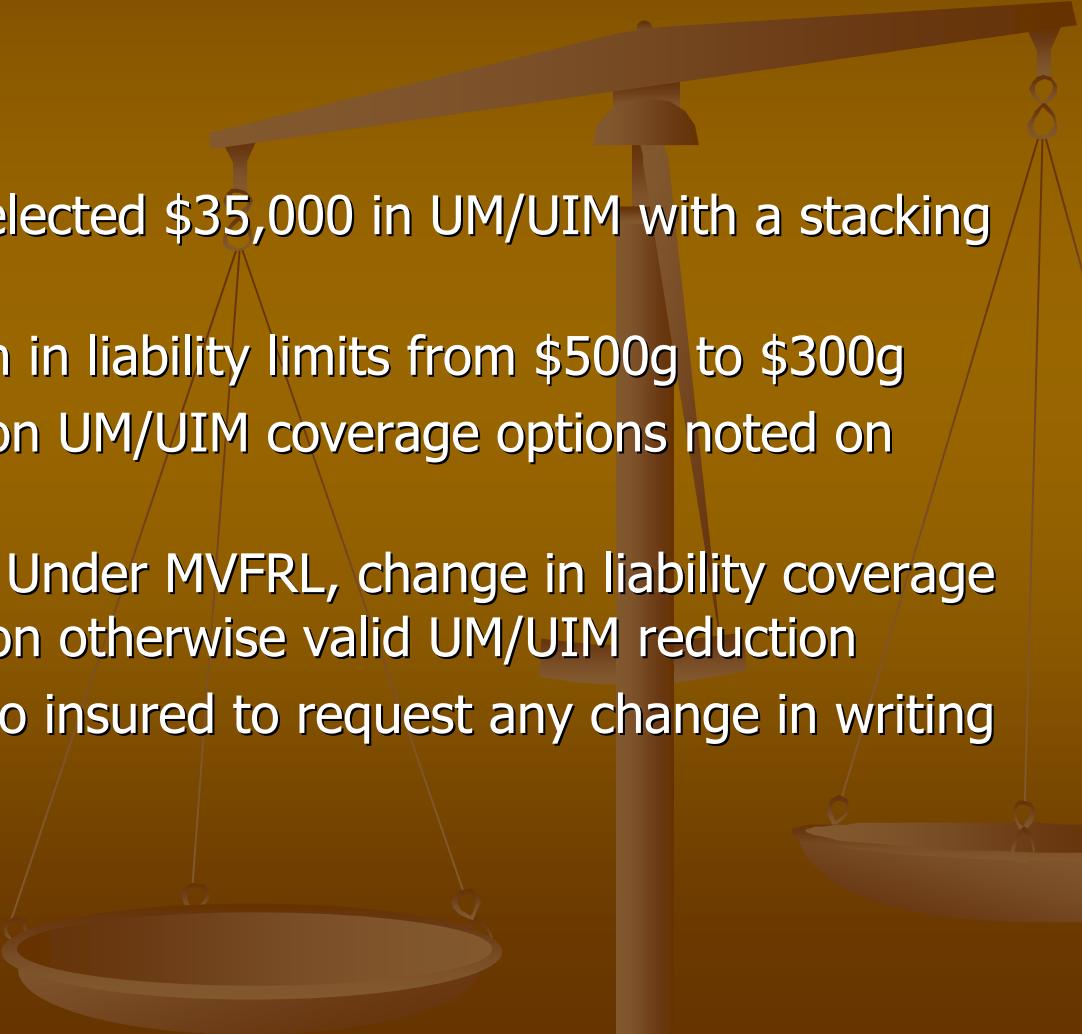
Tannenbaum v. Nationwide Ins. Co., 919 A.2d 267 (Pa. Super.2007), allocatur granted, 934 A.A2d 687 (Pa. 2007)

- Liability limits collected, seeking UIM
- Carrier sought to offset UIM benefits by amounts payable through disability policies provided to insured through his employer
- Pa. Super: credit or offset should not be granted. Personal policy paid for separately and are not duplicative of benefits under MVFRL
- Allocatur granted

# Case Analysis Issues

## UM/UIM

### Blood (29-30)

- Insureds had elected \$35,000 in UM/UIM with a stacking option
  - Later reduction in liability limits from \$500g to \$300g
  - No selections on UM/UIM coverage options noted on form
  - Pa. Supreme: Under MVFRL, change in liability coverage had no effect on otherwise valid UM/UIM reduction
  - Burden shifts to insured to request any change in writing
- 

# Case Analysis Issues

## UM/UIM

American St. Ins. Co. v. Braheem, 918 A.2d 750 (Pa. Super. 2007)

- Intoxicated passenger recovered from intoxicated driver liability limits and then own UIM limits
- Decedent sought further UIM benefits from plaintiff carrier
- Carrier raised breach of consent to settle clause, notice requirement, and subrogation waiver clause
- Superior Court: no prejudice could be shown for notice and consent clause breaches – carrier given credit for full liability and primary UIM, and driver was judgment-proof
- Possible prejudice, however, if Dram Shop statute run; remanded to see value of any Dram Shop claim and extent of prejudice

# Case Analysis Update

## UM/UIM

### Nationwide Mut. Ins. Co. v Yungwirth, 940 A.2d 523 (Pa.Super 2008).

- Claimant injured in uninsured ATV which was not on a public road at that exact moment
- No definition for “motor vehicle” under MVFRL
- Vehicle Code: MV = “a vehicle which is self-propelled”
- Vehicle Code: ATV = “off highway vehicle”, “not intended for highway use”
- Specific ATV definition prevails – policy definition excluding ATV from definition of UM vehicle not void



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# Wayman, Irvin & McAuley, LLC

Founded in 1965, Wayman, Irvin & McAuley, LLC, has earned its reputation for zealous representation of clients in a diverse range of legal matters. Concentrating in the area of insurance defense for over 40 years, the firm has represented insurance carriers and their insureds in all state and federal courts in Pennsylvania, Ohio and West Virginia. We understand the insurance business and the unique needs of the carrier, the broker and the risk manager. Please visit our Web site, [www.waymanlaw.com](http://www.waymanlaw.com), for a more detailed look at the firm's capabilities and staff as well as a wealth of resource materials.

