



THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

PUBLISHED QUARTERLY BY
WESTERN PA TRIAL
LAWYERS ASSOCIATION

WINTER 2024
VOLUME 36, NO. 3

OFFICERS

President - Gregory R. Unatin
Immed. Past President - Erin K. Rudert
President-Elect - Katie A. Killion
Vice President - James T. Tallman
Secretary - Jennifer L. Webster
Treasurer - Shawn D. Kressley
Editor - Erin K. Rudert
Executive Director - Laurie J. Lacher

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

ASSOCIATION OFFICE:
909 MOUNT ROYAL BLVD, STE 102
PITTSBURGH, PA 15223-1030
412-487-7644
LAURIE@WPTLA.ORG
WWW.WPTLA.ORG



THE ART OF PERSUASION

The Power of "What If": How Close Counterfactuals Shape Our Perception of Tragedy

Imagine the heart-pounding finale of 'Survivor' and you're one of the constants. You've braved months on a deserted island, endured unimaginable hardships, and now, in the final episode, you're just one step away from victory. But then, in a twist of fate, your torch is extinguished, you finish second. The sting of this loss is profound - not just because you lost, but because you were so close to winning. It's much worse than if you had lost at the beginning. This scenario perfectly illustrates a fascinating psychological phenomenon known as a 'close counterfactual.'"

The Psychology of 'What Could Have Been'

In the realm of psychology, counterfactual thinking is our tendency to dwell on alternate realities. It's the "what ifs" and "if onlys" that haunt our thoughts, leading us to imagine different outcomes based on different decisions or events. This type of thinking doesn't just apply to game shows; it permeates our everyday lives, influencing how we perceive events and their significance.

Consider the insights of psychologist Daniel Kahneman: If a man changes his flight last minute and then dies in a plane crash, his death is perceived as more tragic than the lost lives of the other passengers with long-standing reservations. Why? Because the alternate scenario - him not changing flights - is so

easy to envision. He was so close to having avoided disaster. This ease of imagining a different outcome makes the actual event seem more avoidable, and thus, more tragic.

Applying Close Counterfactuals in Trial

As plaintiff lawyers, understanding and leveraging this concept can be crucial. Often, we're battling against the perceived inevitability of an outcome, colored by hindsight. By emphasizing the close alternatives and choices available to the defendant, we underscore the idea that the tragic outcome was not the only possible one. Things could have been very different if only the defendant had been more careful. And the more close counterfactuals you can show the better. For example, "the doctor could have told the patient about the abnormal results at the office visit in May, and then again in July, and finally in September, any of which would have been in time for my client to obtain the care and treatment he needed that would have made a difference."

You may be hesitant to say that a defendant *almost* did the right thing, because it seems close to an endorsement. But "almost," only counts in horseshoes and hand grenades and the availability of that close counterfactual can help heighten the harm that was experienced.

When emphasizing close alternatives and "the path not taken" keep the focus of judgment on the defendant. After all, hearing the airline scenario above, a

Continued on Page 3

JOINING THE JURY WITH JUDE BASILE

In October, the WPTLA welcomed Jude Basile to lead a CLE titled *Building Blocks for Success at Trial: Empowering Your Jury Through Powerful Themes, Scenes, and Credibility*. Jude's ability to captivate juries became evident as he shared his life story, taking attendees back to his childhood working in his family's pizza shop and reflecting on the tragic passing of a close friend. We felt like we were there with him through it all.

The emotions Jude evoked in telling his own story underpinned the lesson for the day: juries make decisions based upon emotions and later justify those decisions through logic. To make the most of this, Jude encouraged trial lawyers to "Get the jury talking about things that matter" and to "Be one of them." If accepted as "one of them," a jury is much more likely to trust a trial lawyer, especially one who presents a relatable and emotion-evoking case.

"A few members in attendance categorized the Beaver Dinner as a "must-attend" event."

Jude drove this point home by recounting a recent case where he secured a verdict of over \$100 million. He stressed the importance of engaging with the jury, understanding their emotions, and tapping into their sense of justice.

Our very own Brendan Lupetin contributed to the CLE by highlighting the importance of focus groups and how they can help to develop emotion-evoking themes. Brendan emphasized their role in testing ideas, identifying potential case pitfalls, and turning challenges into strengths.

Jude concluded the CLE by addressing damages, asserting that the most substantial awards stem from the loss of something invaluable and precious. According to him, the most significant losses are those involving interpersonal relationships.

In essence, Jude's insights underscored the power of connecting with jurors on an emotional level and leveraging relatable themes to empower them in delivering just verdicts.

By: *Garrett L. Trettel, Esq. of*

Lupetin & Unatin, LLC

gtrettel@pamedmal.com



BEAVER DINNER RECAP

On September 11, 2023, WPTLA hosted our annual Beaver Dinner at the always impressive Wooden Angel. Last year, this dinner didn't make the final list of events due to an already busy September, the first year without this dinner in over twenty years. With 58 members and guests in attendance this year, this dinner was definitely missed.

The Beaver Dinner was accompanied by a fantastic continuing education program. We were fortunate enough to be joined by the Honorable Philip A. Ignelzi of Allegheny County and the Honorable James J. Ross of Beaver County. The judges presented and discussed recent jury verdicts in their respective counties, including the outstanding medical malpractice verdict obtained by John Perkosky and his firm in Beaver County. Hats off to Jennifer Webster, WPTLA's Secretary and CLE Chair, for organizing this excellent CLE.

In addition to Judges Ignelzi and Ross, we were also joined by the Honorable Deborah Kunselman of the Pennsylvania Superior Court and the Honorable Richard Mancini of Beaver County. A special thanks to the business partners who were in attendance as well: Bill Goodman of NFP Structured Settlements; Dr. Nishant Gandhi and Jayme Hartnett of Pain & Spine Specialists; Dave Kassekert of Keystone Engineering; Kevin Keim and Andrea Vivas of Ford Office Technologies; Anthony Mastriano of Synergy Lien Resolutions; Mark Melago of FindLaw; and Howard Schulberg of Schulberg Mediation. A few members in attendance categorized the Beaver Dinner as a "must-attend" event.

Greg Unatin of Lupetin & Unatin reflected: "This year's Beaver dinner meeting at the Wooden Angel showed why I always make sure to attend this event. It's a majestic environment perfect for reconnecting with colleagues as we shift pace from summer to fall. We were so lucky for Judge Ignelzi and Judge Ross to share their insight about the common threads for successful plaintiffs' verdicts in recent past. It was a great night and I look forward to more of the same next year."

Steve Barth of Barth Rovnan commented: "The Wooden Angel event always has unique CLEs which I appreciate and look forward to when it is on the calendar."

Keep an eye out for this event next year. We hope to see you there!

By: *Drew W. Rummel, Esq. of*

The Rummel Law Firm, LLC

drummel@therummelfirm.com



THE ART OF PERSUASION ... from Page 1

person might think, "Well, he obviously shouldn't have switched planes."

Understanding and applying the concept of close counterfactuals can profoundly impact how we communicate our trial stories and how juries perceive the competing trial narratives. It's not just about what happened, but also about what could have happened – and how close we were to a different outcome. By exploring these alternate paths, you deepen the jury's understanding of the critical events and help them understand the magnitude of the loss.

Shameless Plug: Please consider checking out my podcast "Trial and Medical Error," where I discuss all things trial and frequently interview WPTLA members on a variety of topics that may be of interest to you.

By: *Brendan B. Lupetin, Esq. of
Lupetin & Unatin, LLC
blupetin@pamedmal.com*



INSIDE THIS ISSUE

Features

Member Pictures & Profiles.....p. 4
Trivia Contest.....p. 14

News

Joining the Jury with Jude Basile ... Garrett Trettel offers his takeaway.....p. 2
Beaver Dinner Recap ... Drew Rummel offers a summary.....p. 2
2023 5K Race Recap ... Chad McMillen provides the highlights.....p. 3
Comeback Dinner Recap ... Brittani Hassen recounts the evening...p. 4
Learn at Lunch: Navigating ERISA, Medicare and Medicaid Lien Resolutions ... Susan Meredith provides an in-depth recap.....p. 6

Columns

The Art of Persuasion.....p. 1
President's Message..... p. 5
By The Rules.....p. 8
Comp Corner.....p. 9
Hot Off The Wirep. 10
Through the Grapevine.....p. 17

2023 5K RACE RECAP

WPTLA held its annual President's Challenge 5K on Saturday, October 7, 2023, at North Park. This year marked the 23rd year of the race. Many volunteers arrived early to set up the registration tables, snack area and raffle tent. Registration and arrivals were brisk, and everyone enjoyed the pre-race socialization and snacks. This year there were 217 registrants and 187 participants.

The race concluded with the raffle prizes, door prizes, the 50/50 winner (WPTLA member, Drew W. Rummel, Esq, who graciously donated his winnings of \$418.03 back to the Steelwheelers), and awards for this year's category winners. The day was a huge success, with many members, Steelwheelers, friends, family, and four-legged companions in attendance. The proceeds of this event, \$35,100.00 were sent to the Steelwheelers. This brings WPTLA's total contribution to the Steelwheelers over the past 23 years to \$642,235.00!

Next year's race is scheduled for September 21, 2024, at North Park, so save the date!

By: *Chad F. McMillen, Esq.
McMillen Urick Tocci & Jones
cmcmillen@mutjlaw.com*



Photos from this event can be found on page 15.

MEMBER PICTURES & PROFILES

Name: Brad Holuta

Firm: Marcus & Mack

Years in practice: 10

Bar admission: 2012



Special area of practice/interest, if any: Personal Injury

Tell us something about your practice that we might not know: I am a classically trained cellist and have played with the Johnstown Symphony for nearly 20 years, since my junior year of high school. The orchestra is great “therapy” after a long day in court, and there are a surprising number of overlaps between the skill sets.

Most memorable court moment: I’ll always remember my very first solo court appearance after passing the bar – an unopposed motion to compel in Somerset County the day before Thanksgiving in my first year. I didn’t yet have the perspective to realize how simple that was, but it was the most over-rehearsed unopposed motion in history. I also always enjoy oral argument in the appellate courts. I love the ornate courtrooms and the high degree of formality, as well as the intellectual exercise.

Most embarrassing (but printable) court moment: At every firm I’ve worked, my boss has accidentally spilled coffee or water on me and/or our file in the courtroom within the first few months of starting the job. We’ve won each time, so I’m starting to wonder if it is on purpose.

Most memorable WPTLA moment: The Comeback Award is always a meaningful evening, and reminds us of the importance of the work we do in helping real people.

What advice would you give yourself as a new attorney just passing the bar?: Remembering that this profession is not something that can ever be fully mastered, and that I’ll continue growing and learning each day and each year. Lawyers are driven by nature, so it is natural to want to know everything and experience everything in the first month. Strive to get better all the time, but also let the game come to you.

Secret Vice: BBQ kettle cooked chips

People might be surprised to know that: My mom is a paralegal at my firm and has been a paralegal for 40+ years. She was my early introduction to the practice of law. I always knew that she was good at her job, but it wasn’t until starting here 5 years ago that I got to see, from the inside, just how high that bar was.

Last book read for pleasure, not as research for a brief or opening/closing: Big fan of John Grisham and Malcolm Gladwell’s work.

My refrigerator always contains: White milk – ever since I was a kid.

My favorite beverage is: Any IPA, but especially “Jai Alai” from Cigar City Brewing or “Truth” from Rheinggeist.

My favorite restaurant is: Used to be the Spaghetti Warehouse at 26th and Smallman in the Strip District. It closed several years ago. My dad was driving past when they were tearing it down, so I have an old brick in my office. Their sourdough bread was amazing. Now I’m happy with any place that served dry rub wings and homemade potato chips.

If I wasn’t a lawyer, I’d be: If I couldn’t be a golf broadcaster on CBS or conductor of a major symphony orchestra, commercial airline pilot.

COMEBACK DINNER RECAP

WPTLA’s Annual Comeback Award Dinner was held on November 8, 2023 at the Duquesne Club. The Annual Comeback Award Dinner is a time for us to remember the important reasons that we as WPTLA members chose our paths as Plaintiffs’ attorneys. This year’s Comeback Awardee was Troy Jordan, who was represented and nominated by Russell Bopp from Marcus and Mack. Troy was catastrophically injured in a motorcycle accident when an impaired driver crossed the center line and hit Troy head on. As result, Troy sustained severe spinal cord injuries that resulted in total paralysis of his lower extremities, along with permanent bowel and bladder dysfunction. Despite this life altering accident, Troy and his wife, Debra, have moved forward with their lives to overcome Troy’s injuries. Debra is legally blind, and Troy’s injuries made their new life difficult, but they refused to let his accident keep them down. After his accident, Troy left his profession as a welder and obtained a degree in Information Technology to allow him to pursue a new career. Troy and Debra work as a team to keep their family up and running and have made changes to their home and vehicles to accommodate Troy’s injuries.

Troy was a true sign of perseverance, determination, and fully embodied the characteristics of a Comeback Award Winner while at this year’s dinner. His short but powerful acceptance speech was impactful and memorable.

This year’s charity as selected by Troy was the Johnstown Sitting Bulls Sled Hockey Team. We were lucky enough to be joined by Russell White of the organization who accepted the charitable donation on behalf of WPTLA and in the name of Troy Jordan.

By: *Brittani R. Hassen, Esq.*, of
Kontos Mengine Killion & Hassen
bhassen@kontosmengine.com

Photos from this event can be found on page 16.



PRESIDENT'S MESSAGE

Finally Getting the Respect We and Our Clients Deserve

If you are like me, you root for the underdog. As attorneys representing people who claim compensation for injuries, we empathize with the underdog. After all, we tend to be a little disfavored in the minds of jurors when they meet our clients and us for the first time.

But I sense the tide has turned. Recently, our members have achieved wonderful verdicts in Western Pennsylvania courtrooms. In the past, I would not hesitate to describe certain Pennsylvania counties as "bad counties" for plaintiffs. If I said that now I would be fooling myself considering the verdicts our members achieved this year in counties like Beaver, Fayette, Butler, and McKean counties.

Here is a rundown of some of most significant verdicts around Western Pennsylvania in 2023:

- \$16.1 million medical malpractice verdict in Beaver County (John Perkosky – stillbirth)
- \$3.25 million medical malpractice verdict in McKean County (Victor Pribanic and Sherie Painter Cannin – Leg BKA);
- \$3.2 million premises liability verdict in Erie County (Brendan Lupetin and Maggie Cooney – slip and fall)
- \$1.1 million medical malpractice verdict in Butler County (Harry Cohen and Dorothy Dohanics – birth asphyxia)
- \$1 million medical malpractice verdict in Fayette County (Tom Crenney, James Tallman, and Alicia Nocera – surgical negligence leading to death)
- \$6.5 million property damage verdict in Allegheny County (Michael Calder and Jennifer Webster – damage to residential property from construction site sediment run-off)

Results like these are achieved by trial lawyers who always strive to get better. They may also reflect changing perspectives and beliefs among conservative jurors. These verdicts may prove our communities are moving beyond stereotypes about personal injury lawsuits and the people who bring these cases to court.

I know I preach to the choir. One of the great things about our organization is the collective pride in helping people and the work we do. The love of plaintiffs' trial work forms bonds between us.

Until recently, the rewards of plaintiffs' trial work seemed like a mystery to aspiring law students. My

inbox rarely contains a cover letter or resume from a law student seeking employment. For multiple reasons, including salary, too many law students consider a career as a personal injury trial lawyer an option of last resort.

But I feel like the tide is also turning inside Barco Law Building and on The Bluff. I have met local law students with a genuine desire to do the work we do. Their desire is sparked by participation in trial advocacy classes or mock trial teams. With the guidance of dedicated WPTLA members who serve as adjunct professors and coaches, articulate law students find their voices and talents belong in a courtroom. Many of these future trial lawyers recognize representing people injured through no fault of their own is truly important work.

Now is the time to cultivate the next generation of amazing trial lawyers and law firm leaders in Western Pennsylvania. I know a handful of WPTLA law firms bring law school students and new graduates into their firms almost every year. And unless I am just getting old, I believe there are now many new faces and young lawyers among our ranks. Either way, we should all make a deliberate effort to show law students and recent law school graduates interested in civil justice and trial work that we are interested in THEM.

It all starts with the junior members of WPTLA. We currently have 39 junior members! Let us give these future trial lawyers opportunities to learn and hone their skills.

First, look out for the invite to the Junior Member Meet and Greet on January 18, 2024. Do your best to stop by. The event will take place in a relaxed setting with great food and drinks. Next, make an offer to a junior member they cannot refuse. There is no need to offer a full-time associate position or summer clerkship. All you need to do is invite a junior member to sit-in or zoom-in at a deposition, an arbitration, or mediation. Better yet, invite a junior member to watch you in trial.

Being a plaintiffs' trial lawyer is no longer our best kept secret. Embrace the future leaders of our firms and WPTLA. When we help law students or new lawyers do the work they are meant to do, it will inevitably benefit our clients and the success of our firms for years to come.

If you would like to connect with and mentor one of our new junior members, contact Executive Director Laurie Lacher or Junior Member Committee members Gianni Floro or Carmen Nocera.

By: Gregory R. Unatin, Esq. of

Lupetin & Unatin, LLC

gunatin@pamedmal.com



On November 30th, Synergy Settlement Service's Lien Resolution Experts presented an overview of the legal rights of ERISA, Medicare and Medicaid health plans during a one-hour Zoom lunch and learn. Teresa Kenyon, Esq., the Director of Lien Resolution for Synergy, covered the difference between a self-funded ERISA plan that is exempt from state law and a fully insured ERISA plan that is subject to state law. She stressed the importance of obtaining all Plan documents pursuant to ERISA §1024(b)(4). Weak plan language or the absence of specific language giving the Plan first priority to funds can assist in the negotiation process with the lien holder. The US Supreme Court in *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) found that when there are gaps in the Plan language, the court can look outside the Plan's terms which can be beneficial in obtaining a reduction of the lien.

She recommended obtaining the Plan's IRS Form 5500 which can be obtained from the Department of Labor or freerisa.com. If the box is checked indicating the Plan is an insured plan, this can be used as a negotiation tool. She also cautioned that the form can cover all plans administered by the Plan Administrator and therefore, if two blocks are checked this could be because certain plans are self-funded and certain are fully insured.

Allison Oswald, Operations Projects Team Lead/Senior Lien Resolution Specialist, covered Medicare liens. She noted that first, you will want to make sure all conditional payments claimed by Medicare are related to the client's injury and treatment. Unrelated claims can be challenged by the dispute procedures in place. She also covered three types of compromise requests that can be made. First, pursuant to section 1870(c) of the Social Security Act a request for financial hardship can be made. This will require the client to complete a detailed financial disclosure form but could allow for a partial or full waiver of the lien. Under section 1862(b) of the Social Security Act, a waiver can be requested if it is in the best interest of the program. Finally, under the Federal Claims Collection Act, a one-time request can be made for a reduction if the cost of collection is not justified.

Ms. Oswald covered the Final Conditional Payment process which can be used if you expect a settlement within 120 days. This process will lock in the amount owed to Medicare, but a case can only be enrolled one time. It is an excellent tool for estimating the net to the client and avoiding surprise claims after settlement.

Kevin James, Esq, Lien Resolution Attorney, provided

an overview of Medicaid recovery rights. Federal law only allows the State to assert a lien and recover from the portion of the settlement representing compensation for medical expenses paid. Mr. James noted that often with a settlement there is not a specific breakdown of the settlement funds to know what has been allocated for medical expenses. He suggested that an allocation should be made if possible or the attorney could try to disclaim medical expenses or amend the complaint to remove medical expense claims, but he cautioned in such circumstances notice may need to be provided to Medicare.

He noted that *Gallardo v. Marsteller*, 596 U.S. 420 (2022) allows the State to seek reimbursement for future medical expenses as well as past expenses but since Pennsylvania law limits Medicaid's interest to payments actually made, *Gallardo* should not be applicable in Pennsylvania. See 62 PS §1409(a)(4). Mr. James also pointed out the importance of asking for a reduction under the *Ark. HHS v. Ahlborn*, 547 U.S. 268 (2006) case. Although this case did not specifically approve a pro-rata method of allocation, it did follow such an allocation.

Overall, the presentation by the Synergy group was an excellent overview of the issues you will need to navigate when addressing ERISA, Medicare and Medicaid Liens. The program was well attended with 38 participants.

By: Susan Meredith, Esq. of
Caroselli Beachler & Coleman, LLC
smeredith@cbmclaw.com



Thank you for selecting Troy Jordan for your Comeback Award recipient. Your generous gift helps our organization provide a valuable experience to children & adults with disabilities.

We are so appreciative of those who join us in our efforts to offer a competitive team experience to these very deserving individual

Sincerely,
Sitting Bulls /Sled Hockey
Ashley Ohler, Secretary



Happy Holidays!

Sending you our warmest wishes for a holiday season filled with love, joy, and peace.



 **NFP**[™]
Structured
Settlements

800-229-2228
nfpstructures.com

BY THE RULES

Allegheny County Makes Electronic Filing Mandatory

Effective November 13, 2023, electronic filing became mandatory in the civil division. The changes were published at 53 Pa. Bulletin 6427. A link can be found on the Department of Court Records login page.

Failure to Join Indispensable Party Objection Presents Danger in Premise Liability Cases

The recent bad decision in *Simone v. Alam*, 2023 PA Super 175, 303 A.3d 140, highlights some courts' willingness to overreach and use the defense of failure to join an indispensable party to dismiss an otherwise meritorious case. In *Simone*, the plaintiff had filed a negligence suit against her landlord for injuries resulting from a fall. In her lawsuit, the plaintiff alleged that the defendant "owned, possessed, maintained, controlled and/or had the right to control" the premises. After discovery had begun, the defendant sought to dismiss the case based upon the failure to join an indispensable party, the defendant's brother who was a joint owner of the property. The motion was granted and the case was dismissed.

In its decision, the court treated the issue of failure to join an indispensable party as one of subject matter jurisdiction. The court also recited the proposition that "A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Simone v. Alam*, 2023 PA Super 175, 303 A.3d 140

The lessons here are to be sure you know who all of the property owners are, and also to make sure that you specify grounds of liability separate and distinct from the ownership of the property.

On appeal, the plaintiff argued that the joint owner was merely a tenant in common and that it was only the landlord defendant who was negligent. Nonetheless, the Court focused on the fact that the defendant had been sued as owner of the property (notwithstanding that this only one of several bases of negligence alleged). Hence, it was sufficient for the court that the action was premised, "in part, on Alam's ownership of real property." *Simone*, 2023 PA Super 175 *13, 303 A.3d 140.

Although this ruling offers a cautionary tale to readers, it is problematic in at least two respects: 1) There is no claim in this case for a judgment *in Rem*. Accordingly, a purely monetary judgment against the named defendant would have no effect against the unnamed joint owner; and 2) the decision extends beyond negligence premised upon bases other than ownership. More specifically the decision lacks any good argument

as to why claims based upon maintenance and control¹ of the premises should be dismissed as these claims are not dependent upon the individual who was not named.

In my opinion, a better approach to this issue was taken by the Superior Court in *Gaynor v. Gyuris*, 707 A.2d 534 (Pa. Super. Ct. 1998). There, the plaintiff filed a negligence action against a property owner based upon a slip and fall on ice. The suit named only the husband property owner. The defendant husband then sought to have the case dismissed because his wife, an owner by the entireties had not been named. On appeal, because the basis for liability was the husband defendant's occupancy of the property rather than ownership, the dismissal was reversed. Judge DeSole explained, because Appellee was sued in his capacity as an occupant rather than as owner, Appellee's wife was not an indispensable party to the action and, therefore, Appellant's complaint was improperly dismissed. *Gaynor*, 707 A.2d at 536.

The lessons here are to be sure you know who all of the property owners are, and also to make sure that you specify grounds of liability separate and distinct from the ownership of the property.

New Rule on Custody of Exhibits

New Pennsylvania Rules of Judicial Administration 5101-5105 will become effective as of April 1, 2024 governing the Custody of Exhibits.

Under Rule 5101 providing definitions, it is necessary that the term Exhibit is defined so as to include any exhibit which has been offered whether or not admitted. From there Rule 5102 requires a local rule concerning who is to be the custodian during the proceedings. The custodian is then required to file and secure the exhibits. Additional details are found in the following rules.

The adoption of these rules is of little import until local rules are adopted. However, practitioners should be aware that such rules will be adopted moving forward and that they will be found in the local rules of Judicial Procedure.

¹ Although the Complaint specified both ownership and possession, the court had defined ownership as including possession. See *Simone*, 2023 PA Super 175 *10, 303 A.3d 140 (owners of property as tenants in common "own and possess in equal shares an undivided interest in the whole property").

By: Mark E Milsop, Esq., of

Berger and Green

mmilsop@bergerandgreen.com



COMP CORNER

Commonwealth Court Addresses Res Judicata and Injury Description in Compromise & Release Stipulation

In an unreported opinion the Commonwealth Court in *Bennett v. Jeld-Wen, Inc.* Workers' Compensation Appeal Board #707 C.D. 2022 dealt with res judicata in the context of the injury description in a compromise & release stipulation.

Claimant Berniece Bennett suffered a work-related injury in 2010 that was determined to be complex regional pain syndrome of the left upper extremity. She entered into a compromise & release agreement describing the injury as CRPS of the left upper extremity and cervical scarring only. In the stipulation she acknowledged that she did not suffer any other mental, physical, specific loss, disfigurement, or other scarring injuries within the scope of employment. Medical was kept open.

Post settlement, Bennett began experiencing trigger finger issues, something that had also occurred prior to settlement but were never included in the description of injury. She saw her long-term treating orthopedic for that problem in September 2020 a little less than three years after entering into the compromise & release agreement. Her surgeon at that time did not believe that the trigger thumb was related to work and instructed his staff to submit the bills to Medicare. After the Claimant filed her review petition, she again saw her surgeon who changed his opinion as to causation.

The only medical witness who testified was the Claimant's treating orthopod. The doctor was cross examined regarding the variance in his opinions approximately 2 months apart. Ultimately, the Workers' Compensation Judge determined that the witness was "less than credible." The Claimant subsequently appealed to the Workers' Compensation Appeal Board which sustained the Judge's determination. The appeal to the Commonwealth Court then followed.

On appeal the Claimant argued that that the Board erred because the only medical evidence in the case was that of her treating physician. The Court properly found that the witness was disbelieved by the Workers' Compensation Judge and that the findings of fact were supported by substantial evidence. Query that could the Claimant have prevailed in any of her arguments when the threshold issue is her witness was disbelieved.

Claimant maintained an argument that the trigger thumb issue was obviously the result of the work injury and noted that it had never been litigated prior to the compromise & release agreement. The Court determined that the Claimant was bound by the terms of the compromise & release agreement and noted "Claimant did not expressly reserve the right to revisit the

description in the future." The Court went into a somewhat extensive discussion of the prior case law, focusing on *DePue v. WCAB* (N. Paone Construction, Inc.) 61 A. 3d 1062 (Pa. Commonwealth 2013). There, the Court noted that unless the Claimant expressly reserved the opportunity to amend the injury description in the compromise & release stipulation, the Claimant was prevented from doing so in the future. Query in light of this precedent what was the purpose of this appeal except perhaps to get this into the Pennsylvania Supreme Court.

Practitioners will need to be careful regarding injury descriptions in the compromise & release stipulation. Claimant should be directly informed that they would be bound by this description even if they are continuing to receive reasonable and necessary medical care related to the injury. They will need to be told that the likelihood of expanding the description of injury post settlement is little to none.

By: Tom Baumann, Esq. of
Abes Baumann, P.C.
tcb@abesbaumann.com



THE ADVOCATE



ARTICLE DEADLINES and PUBLICATION DATES VOLUME 36, 2023-2024

Vol 36	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Spring 2024	Feb 23	Mar 8
Summer 2024	May 17	May 31

The Editor of The Advocate is always open to and looking for substantive articles. Please send ideas and content to er@ainsmanlevine.com

HOT OFF THE WIRE

Hangey v. Husqvarna et. al., No. 14 EAP 2022 (Pa. November 22, 2023)

Pennsylvania Supreme Court revisits the test for determining proper venue and rejects Defendants' assertion that the revenue within the forum county as a percentage of total revenue has ever been a legitimate part of that test.

In this catastrophic personal injury case, the trial court granted preliminary objections, which transferred venue from Philadelphia County to Bucks County. The trial court's determination was based on a finding that the corporate defendant did not regularly conduct business in Philadelphia County because only 0.005% of the company's total national revenue was derived from that county. On appeal, the Superior Court reversed, holding the trial court abused its discretion in transferring venue. The Supreme Court granted discretionary review to evaluate the Superior Court's determination.

Following an extensive analysis of the controlling law on the issue, the Pennsylvania Supreme Court held that in evaluating whether a company "regularly conducts business" in the forum county under Rule 2179(a)(2), courts are to perform the quality-quantity analysis first articulated in *Shambe v. Delaware & Hudson R.R. Co.*, 135 A. 755, 757 (Pa. 1927). This test states:

[T]he business engaged in must be sufficient in quantity and quality The term 'quality of acts' means those directly furthering, or essential to, corporate objects; they do not include incidental acts. . . . By 'quantity of acts' is meant those which are so continuous and sufficient to be termed general or habitual. A single act is not enough. . . . Each case must depend on its own facts[.]

The Supreme Court determined that the trial court erred when applying the quantity prong of this test, and therefore abused its discretion when it sustained preliminary objections to venue and transferred the case to Bucks County.

The Supreme Court held that the percentage of a defendant corporation's national revenue derived in the forum county is not alone sufficient to determine that a corporation did not "regularly conduct business" there for purposes of Rule 2179(a)(2). Instead, the Supreme Court explicitly held and reaffirmed that it is the word 'regularly' which is to be construed and not 'principally.' A corporation may perform acts 'regularly' even though these acts make up a small part of its total activities.

The Supreme Court also rejected the defense argument that the word "sufficient" as used in *Shambe's* articulation of the quantity prong requires a trial court to quantify a company's in-county business as a percentage

comparison to its total national business. The Court confirmed that it had never held that the word "sufficient" in the quantity prong requires a comparison to the company's overall national business. Instead, the reviewing Court is to look at the quantity prong as a whole; considering whether the acts are "continuous and sufficient" to the extent they could be called "general or habitual." The Supreme Court pointed out that if courts were to look at the percentage of sales only, a small business and a large business could theoretically conduct the exact same amount of business in the same county, and the small business could be subject to venue in the county while the large business is not.

Finally, the trial court was found to have erred when it used the "1 to 2 percent of total business" language from a previous decision of the Court as a benchmark line for all cases. The Supreme Court reiterated that "each case must depend on its own facts and just because one to two percent was sufficient in one case does not mean that a lesser percentage like .005% is insufficient in a different case". The appropriate question to ask is whether the acts are being 'regularly performed within the context of the particular business. Viewed from the perspective of those in the forum county, two companies conducting the same amount of business can have the same impact on the community, regardless of whether one of the companies conducts substantially more business elsewhere.

Based on the foregoing, the Supreme Court affirmed the Superior Court finding that the trial court had improperly transferred venue from Philadelphia County to Bucks County

Tranter v. Z&D Tour Inc. et. al., 2023 PA Super. 200 (Pa. Super. October 11, 2023)

Superior Court reverses trial court's decision to transfer a case from Philadelphia County to Westmoreland County based on the doctrine of forum non conveniens

These personal injury actions, which were consolidated for purposes of appeal, arose out of a multi-vehicle crash on Interstate 70 in Westmoreland County. Plaintiffs filed civil complaints in the Philadelphia County Court of Common Pleas against numerous defendants, including FedEx, Sioux Trucking, Inc., Brandon Stowers, Penske, and UPS.

Several Defendants filed preliminary objections to the Complaint seeking, *inter alia*, dismissal or consolidation with a similar case pending in Allegheny County. In response, the Philadelphia Court of Common Pleas directed the parties to conduct

(Continued on Page 11)

discovery limited only to the issue of venue and *forum non conveniens*. Following discovery, several Defendants filed Motions to Transfer the litigation to Westmoreland County based on *forum non conveniens*. In support of the motions were eleven affidavits from first responders and others who lived and worked in and around Westmoreland County. There was also thirty-two unnotarized statements submitted by the Defendants in support of their motions. The trial court granted the Motions to Transfer based on *forum non conveniens*, concluding that because the potential witnesses would have to travel over 200 miles if called to testify at trial, the Defendants had established that Philadelphia County was an oppressive and vexatious venue.

On appeal, the Superior Court reversed the trial court finding it had abused its discretion and erred as a matter of law in granting the petitions to transfer venue to Westmoreland County based on *forum non conveniens*. The court began its analysis by observing that a plaintiff's choice of forum is entitled to great weight and must be given deference by the trial court. As a result, a plaintiff's choice of forum should rarely be disturbed. The Court also observed that when a *forum non conveniens* transfer request is based on allegations of witness hardship, the Defendant must not only identify the allegedly encumbered witness but must also make a general statement of what testimony that witness will provide **and** that each potential witness will be "key" to the defense of the action.

In the case *sub judice*, the Superior Court found that none of the Defendants had indicated in their various filings how any of the alleged witnesses would be relevant or necessary to their defense. Instead, the Defendants merely focused on the hardship element of these witnesses in traveling to Philadelphia County while failing to address the threshold issue of the importance of the witnesses to its defense. As such, the Defendants had failed to meet their heavy burden to overcome the plaintiffs' choice of forum and the trial court had abused its discretion in transferring the cases from Philadelphia to Westmoreland County.

Defendants did not owe any duty to the Plaintiff to direct traffic on the road or to restrict on-street parking, which was legally permissible.

Kistler v. Dietrich et. al. Nos. 2023 PA Super 177(Pa. Super. September 22, 2023)

Pennsylvania Superior Court affirms MSJ finding Defendants who were conducting an estate sale held no legal duty to a Plaintiff motorist who was injured in a motor vehicle crash that was caused, in part, by parked

vehicles of individuals attending the sale.

Plaintiff alleged that he was injured in a crash while riding his motorcycle near the Defendants' residence at the time of an estate sale on the property. The crash occurred when another motorist entered an intersection near the estate sale and, without the right of way, struck Plaintiff's motorcycle causing him serious injuries. Plaintiff alleged that many members of the public were attending the sale and had parked on the side of the road, which created visual limitations and deficiencies for motorists in the area. Plaintiff claimed that the Defendants who hosted the estate sale had acted negligently in creating an unreasonable risk of harm for motorists in the area and for failing to have traffic and parking control for the area surrounding the estate sale.

The estate Defendants filed a Motion for Summary Judgment asserting that the Plaintiff had failed to establish any duty was owed to him by the estate. Specifically, the estate Defendants asserted that they owed no duty to the Plaintiff to direct traffic and that they had no duty to provide off-street parking for the sale. The Defendants also pointed out that parking was legally permitted on both sides of the street in the area of their property. Perhaps most importantly, it was uncontested that the Plaintiff did not attend the sale and there was no evidence that the motorist who struck the Plaintiff was planning on attending the sale. The trial court granted summary judgment.

On appeal, the Pennsylvania Superior Court affirmed, holding that in a motor vehicle accident case, the estate sale Defendants did not owe any duty to the Plaintiff to direct traffic on the road or to restrict on-street parking, which was legally permissible. The Superior Court also found that, as a matter of law, the estate Defendants had not assumed any duty to the Plaintiff under the Restatement (Second) of Torts §323(4) and §324A.

Moffitt v. Miller, 2023 PA Super 168 (Pa Super. September 18, 2023)

Superior Court affirms the admission of evidence of Plaintiff's intoxication in a pedestrian versus motor vehicle crash

On August 5, 2018, at 1:15 a.m., Defendant's vehicle struck Plaintiff as she attempted to cross the street in the middle of the block while walking home from a nearby bar. As a result of the crash, Plaintiff sustained several injuries. Medical records in the case showed that Plaintiff's blood alcohol content (BAC) was .313% at the time of the incident. Prior to trial in the subsequent personal injury action, the trial court denied Plaintiff's motion to exclude all references to

(Continued on Page 12)

HOT OFF THE WIRE ... FROM PAGE 11

her alcohol consumption.

The jury's verdict found each party 50 percent negligent and awarded Plaintiff a lump sum of \$8,500 in damages. Plaintiff filed a motion for post-trial relief, which the trial court denied finding that it properly rejected Plaintiff's motion *in limine* to preclude evidence of her alcohol use on the day of the accident.

On appeal, the Superior Court affirmed the trial court's decision. In doing so, the Court relied upon the Supreme Court's holding in *Coughlin v. Massaquoi*, which held that the admissibility of BAC evidence is within the trial court's discretion based upon general rules governing the admissibility of evidence, and the court's related assessment of whether the evidence establishes the pedestrian's unfitness to cross the street. The Superior Court also noted that *Coughlin* permitted expert testimony on intoxication if an expert testifies thoroughly regarding the effects that a given BAC has on an individual's behavior and mental processes, and where that expert specifically opines that a particular BAC would render a pedestrian unfit to cross the street.

Plaintiff argued that *Coughlin* was not controlling in her case because there were witnesses to her behavior who established that she was not impaired. Plaintiff believed that the *Coughlin* holding was limited to situations when there were no witnesses regarding intoxication. The Superior Court disagreed, finding that there was no such limitation in the *Coughlin* Court's opinion.

Ultimately, the Superior Court found no abuse of discretion in the trial court's decision that evidence concerning Plaintiff's alcohol consumption was relevant and probative to the issue of causation in this case. Plaintiff's testimony showed that she began consuming alcohol during the afternoon leading up to the accident, that she continued drinking upon returning home, and then drank beer at a bar immediately before the incident. Defendant's expert, Dr. Dackis, testified that a .313% BAC level impaired Plaintiff's motor skills and sensory awareness. The trial court's decision to permit evidence of Plaintiff's intoxication was affirmed.

By: Shawn D. Kressley, Esq. of

DelVecchio & Miller, LLC

shawn@dmlawpgh.com



UPCOMING EVENTS

Jan 18, 2024– Junior Member Meet & Greet, The Foundry Table & Tap, Pittsburgh

Jan 25, 2024– Zoom Board Meeting

Feb 2024– CLE

Mar 2024– Microbrewery Event, Pittsburgh

Apr 17, 2024– Membership Dinner + Elections
Carmody's Grille, Pittsburgh

May 3, 2024– Annual Judiciary Dinner , Acrisure Stadium, Pittsburgh

Fri, May 24, 2024– Ethics and Golf, Shannopin Country Club, Pittsburgh



**NEED CLE CREDITS?
WPTLA CAN HELP!**

As an approved long distance provider with the PA CLE Board, WPTLA's website offers CLE courses to purchase and view/download for credit. Take your pick from several interesting courses, including the recent *Building Block for Success at Trial* featuring Jude Basile, or Todd Hollis's *Charting the Course for Justice*. We also have the Nov 30 program offered by Synergy Lien Resolutions on ERISA, Medicare and Medicaid Lien Resolution.

Log on now at <https://cle.wptla.org/>

Please support our Business Partners, as they support WPTLA.



Alliance Medical Legal Consulting

Varsha Desai
267-644-1000
vdesai@alliancemedicallegal.com



NFP Structured Settlements

Bill Goodman
412-263-2228
wgoodman@nfp.com



Finley Consulting & Investigations

Chris Finley
412-364-8034
cfinley@finleyinvestigations.com



Pain and Spine Specialists

Laura Cossick
724-984-9167
lcossick@painandspinespecialists.com



Ford Office Technologies

Brad Borghetti
724-707-4668
bborghetti@fordtech.com



Planet Depos

Charlie Georgi
888-433-3767
Charlie.georgi@planetdepos.com



Hess Physical Therapy

Jessica Homer
412-709-4036
jessica@hesspt.com



RBC Wealth Management

Jordan Dunsmore
412-201-7239
jordan.dunsmore@rbc.com



Injured Workers' Pharmacy

Jason Jacobs
412-258-0054
jjacobs@ispharmacy.com



Synergy Lien Resolution

Anthony Mastriano
216-469-0609
amastriano@synergysettlements.com



Keystone Engineering

Dave Kassekert
866-344-7606
dwkassekert@forensicexp.com



Schulberg Mediation

Howie Schulberg
412-634-2686
howard@schulbergmediation.com



LexisNexis

Linda Coons
716-997-9214
linda.coons@lexisnexis.com



Thrivest Link

Andy Getz
267-538-1512
agetz@thrivestlink.com



Medivest

Brian Schultz
862-312-6098
bschultz@medivest.com



TRIVIA CONTEST**Enter for a Chance to Win a \$100 Visa Gift Card****Trivia Question #38****What animal is the most commonly struck by lightning?**

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by March 1, 2024. Prize for this contest is a \$100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #38 will be published in the next edition of The Advocate.

Rules:

- Members only!
- One entry per member, per contest
- Members must be current on their dues for the entry to count
- E-mail responses must be submitted to admin@wptla.org and be received by the date specified in the issue (each issue will include a deadline)
- Winner will be randomly drawn from all entries and winner will be notified by e-mail regarding delivery of prize
- Prize may change, at the discretion of the Executive Board and will be announced in each issue
- All entries will be considered if submitting member's dues are current (i.e., you don't have to get the question correct to win – e-mail a response even if you aren't sure of your answer or have no clue!)
- There is no limit to the number of times you can win. Keep entering!

The correct answer to each trivia question will be published in the subsequent issue of The Advocate along with the name of the winner of the contest. If you have any questions about the contest, please contact Erin Rudert – er@ainsmanlevine.com.

Answer to Trivia Question #37 – **What is the largest known living organism on Earth (based on area)?**

Answer: The largest single living organism based on area is a specimen of *Posidonia australis* seagrass (aka Poseidon's ribbon weed) located in Shark Bay off Western Australia, covering approximately 200 square kilometres (77 square miles) – equivalent to around 28,000 soccer fields or more than 450 times bigger than Vatican City, the world's smallest country.

<https://www.guinnessworldrecords.com/world-records/606952-largest-living-organism>

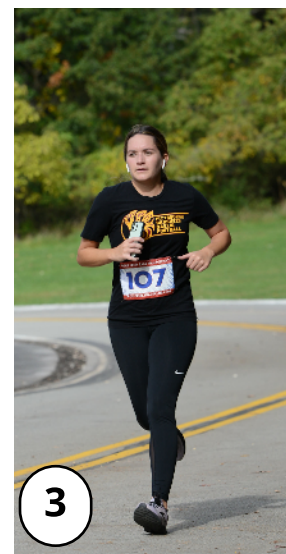
Congratulations to Andrew J. Leger, Jr., a President's Club Member from the Pittsburgh firm of Andrew J. Leger, Jr. PC, as the winner of Contest #37!



1



2



3



4



5



6

Photos from
our 5K event
Oct 7, 2023



7



8

Event proceeds
benefit the
Pittsburgh
Steelwheelers



9

From L to R, in the photos above:

#1 Patrick Cavanaugh

#2 WPTLA Members in top row: Garrett Trettel, Mark Milsop, Mark Conboy, Dave Landay, James Tallman, Nick Katko, Mike Megrey, Carmen Nocera, Greg Unatin, Dan Sammel. In bottom row: Steve Barth, Karesa Rovnan, Chad McMillen, Shawn Kressley, Chris Miller, Erin Rudert.

#3 Katie Monbaron

#4 Pete Giglione

#5 In the back row: Chad McMillen, President Greg Unatin, Executive Director Laurie Lacher and Darryl Jackson.

#6 Garrett Trettel

#7 5K Committee Members Sam Mack and Curt McMillen

#8 Caron Landay, Paige Landay, Dave Landay

#9 5K Chair Chad McMillen





1



2



3



4

**Comeback Award Dinner
Nov 8, 2023**



6



5



7

In the photos above, from L to R:

#1 President Greg Unatin, Russell White III and Brian Buchkovich, both of the Johnstown Sitting Bulls Sled Hockey Team

#2 Greg Unatin, 2023 Comeback Awardee Troy Jordan, Debra Jordan, Comeback Award Chair Brittani Hassen

#3 Tony Mengine, George Kontos, Brittani Hassen, Taylor Martucci, Katie Killion and Nick LaCava

#4 Erin Rudert, Dan Sammel, Shawn Kressley

#5 Brad Borghetti, of Ford Office Technologies, Greg Unatin, Caroline Huber

#6 In the top row: Nominating Attorney Russell Bopp, Bob Marcus, Debra Jordan, George Audi, Cindy Holuta and Brad Holuta. In the bottom row: Kathryn Jordan, Troy Jordan and Abigail Jordan.

#7 Russell Bopp, Chris Miller, Gina Zumpella, and Bob Marcus.

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
 909 MOUNT ROYAL BOULEVARD, SUITE 102
 PITTSBURGH, PA 15223-1030



Through the Grapevine....

Congratulations to **Emeritus Members Shelley Elovitz** and **James Lestitian**, as well as **Member Robert Isacke** on hitting their 50-year milestone for practicing law.

President's Club Member Cindy Stine has moved her firm to 110 E Pittsburgh St, Ste 2. All other contact information remains the same.

A speedy recovery to **Board of Governors and President's Club Member Carmen Nocera** who had surgery for a complex rotator cuff issue.

Board of Governors and President's Club Member Ben Schweers, along with associates **Cori Kapusta** and **Anthony Bianco** have joined a new firm - Dian Omar Branham Shirley, LLP. Their emails are, respectively, bschweers@dobslegal.com, ckapusta@dobslegal.com, and abianco@dobslegal.com. All other contact information remains the same.

Congratulations to **President's Club Member Laura Phillips** for receiving the Robert L. Ceisler Professionalism Award from the Washington County Bar Association. This award is "for practicing of the law as a profession, a genuine calling inspired by service to the system of justice and understand that civility is a viture."

President's Club Member Eve Elsen has joined Phillips Froetschel, LLC as a partner. Her contact information is 310 Grant St, Ste 700, Pittsburgh 15219. Phone: 412-546-5220 Email: eve@pittsburghmedmal.com.

President's Club Member Michael Rosenzweig has opened Michael Rosenzweig Law, LLC. His contact information is 5219 Pembroke Pl, Pittsburgh 15232. Phone: 412-496-9950 Email: mike@callmelaw.com.

Board of Governors and President's Club Member Drew Rummel has started his own firm - The Rummel Firm, LLC. Drew's contact information is Foster Plaza 5, Ste 400, 651 Holiday Dr, Pittsburgh 15220. Phone: 412-790-1087 Email: drummel@therummelfirm.com

Young Lawyer Garrett Trettel has joined Lupetin & Unatin, LLC. His contact information is Gulf Tower, Ste 3200, Pittsburgh 15219 Phone: 412-281-4100 Email: gtrettel@pamedmal.com.

President's Club Member Jon Perry was recently presented with the Trial Lawyers Care Award from the American Association of Justice. The Care Award recognizes a trial lawyer who has gone above and beyond to serve his or her community.