THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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CAN MY CLIENT BE REQUIRED TO REENACT OR DEMONSTRATE THE INCIDENT AT THEIR VIDEOTAPED DEPOSITION?

My client was at the time a 35-year-old deckhand who suffered while at work on a barge a comminuted fracture of his right superior orbital ridge, medial orbital wall, and anterior frontal sinus, and, given the dramatic force of the impact from the steel bar which struck him just above his right eye, a concussion. His surgeon performed an open reduction internal fixation procedure, requiring a bicoronal (ear-to-ear) incision and an autopsy-like pulling down of his scalp over his forehead to access the several shattered bones in his skull, which he then stabilized with a titanium plate and eight screws. Since the incident, my client has unabated symptoms of vertigo upon exertion and post-concussion syndrome, including debilitating migraine headaches triggered by sound and light, on average, a few times per week. Mental health professionals have diagnosed my client with PTSD, adjustment disorder, depression, anxiety, and memory issues. My client has nightmares in which he re-lives the incident, waking up screaming.

At his employer's urging, my client attempted to return to work on towboats and barges about four months post-incident. His surgeon went along with it but insisted he wear a helmet. When he attempted to resume work, though, my client suffered PTSD symptoms upon returning to the environment in which he was injured, was "scared of everything," "afraid of getting hit again," and experienced dizziness, heart palpitations, and panic. He also felt unsafe carrying and operating heavy rigging at heights and over water, given his dizziness upon exertion. He had to stop work and has not returned to such work. It was unsafe for him and his co-workers.

We had filed a Jones Act maritime personal injury suit against my client's employer in Allegheny County. His case was on the trial list. Defense counsel's notice of videotaped deposition included this statement: "Plaintiff … may be asked to demonstrate his condition on camera, to show, identify, or demonstrate other aspects of his condition for the video record, and/or demonstrate the action he claims to have been performing at the time of his alleged injury for the video record. "My first reaction to the depo notice: Fine. Why not? It would be good for my client to show defense counsel his scars and what happened in the incident. But then I thought about this particular client's issues. Would it be humane to him to make him, given his PTSD diagnosis, relive and act out, perhaps repeatedly, the incident? Also, given his injuries, could he accurately remember *exactly* what he was doing at the time, how he was holding the bar, how he was standing, where his feet were positioned? I spoke with my client about my concerns. He confirmed them. My concerns were not about him showing his scars (they were atop his head and on his face), but with the request to reenact.

When I was a maritime defense lawyer in Texas, I recalled case law supporting the position that my vessel-operating clients could not be compelled to turn over their vessels to plaintiff's counsel for the purpose of their staging a videotaped

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reenactment of the incident. So, I thought, why should my plaintiff be required to turn over his body for the same purpose?

I researched the issue and found case law on point clearly supporting a refusal to allow my client to essentially be forced to become part of the defense's demonstrative video for trial. I was concerned if my client misremembered any aspect of the incident, it would be recorded on video and then potentially the jury would see him performing his job unsafely, not because that's what occurred in the incident, but because during one of the "takes" during his deposition questioning, that may occur. I wrote to defense counsel, objecting "to any demonstrations or re-enactments ... on the grounds such is not supported by applicable court rules and case law. "We had a brief meet n confer phone call. Defense counsel filed a motion to compel the video deposition as-noticed. I filed a response in opposition and a motion for protective order.

Federal case law generally supports requiring a plaintiff to perform a reenactment of the injury-causing incident at a videotaped deposition. *See, e.g., Carotenuto v. Emerson Elec. Co.,*1990 WL 198820, at *1 (E.D. Pa. Dec. 3, 1990) ("Given the benefits of a videotaped reenactment, defendants will be permitted to carry out such a procedure. The plaintiff, however, will not be compelled to demonstrate what happened to him on an operating machine. Should the defendants determine that it would be probative to replicate plaintiff's reenactment with an operating machine, they may solicit someone to perform that task. The court, however, will not require the plaintiff, unless he is willing, to do so.") and *Roberts v. Homelite Div. of Textron, Inc.*, 109 F.R.D. 664, 668 (N.D. Ind. 1986) (ordering the deposition with conditions including, "[m]atters of staging and photographic technique, such as the use of a zoom lens, the angle of the camera, and the background, shall be determined by the party conducting the deposition, here the defendant. The plaintiff may make suggestions regarding such matters to the party conducting the deposition, and if these suggestions are not heeded, the parties may place their objections on the record."). *But see In re Yamaha Motor Corp. Rhino ATV Prod. Liab. Litig.,*2009 WL 3754199, at *1 (W.D. Ky. Nov. 5, 2009) (allowing reenactment with condition that "plaintiffs will not be compelled to re-enact the events surrounding their accidents if they cannot remember those details or if they are unable to do so without guessing at the facts. A deponent who testifies that he or she cannot recall the position of her hands on the wheel before the accident, for example, will not be required to nonetheless hold the wheel and hypothesize about those details.").

The extant Pennsylvania state court case law, however, just two trial court decisions, does not support forced reenactments at a plaintiff's video deposition. The seminal case is a 1985 Judge Wettick decision. In *Osborne v. Sears, Roebuck and Co.*, 41 Pa. D & C. 3d 64, 67-68 (Alleg. Cty. 1985)[1], the Court addressed public policy considerations which are equally applicable in 2024 as they were in 1985:

> It is questionable whether a film of the reenactment would give the fact finder a clearer picture of what actually occurred. Because of the presence of the camera, the actor may experience "stage fright" and, consequently, operate the saw in a manner very different from the manner in which it was operated during the accident. Several "retakes" may be required before the actor is satisfied with the presentation. The fact finder will very likely be shown each of the filmings with each party arguing as to which filming more accurately depicts how the accident occurred. A photographic reenactment focuses on the ability of plaintiff to portray precisely and accurately how the accident occurred. But the controlling issue at trial is not whether plaintiff can accurately describe how the accident happened or even whether the accident happened exactly in the manner described by plaintiff. Frequently, plaintiffs cannot fully and precisely recall how an accident occurred. Verbal descriptions of the accident may be vague because of memory lapses and uncertainty -- not because of a witness's inability to articulate what the witness knows. Verbal descriptions permit these uncertainties to be expressed. A photographic reenactment does not allow for any uncertainty.
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> ***
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> While a photographic reenactment will give the illusion of certainty, it may only be masking the uncertainty that exists. Although this film would have limited probative value for the reasons discussed in this opinion, it is likely that the film will receive an inordinate amount of attention at trial because of the seductive appeal of visuals on a jury in this television-oriented society.

In *Spraglin v. MHK Associates*, 29 Pa. D. & C.4th 187, 1993 WL 843462 (Cumberland Cty. Oct. 19, 1993), Judge Hess reviewed the above-cited federal decision in *Roberts v. Homelite* (which defense counsel in my case had cited in

[1] *Judge Wettick, in Osborne, preliminarily had concerns about the taking of videotaped depositions, in general, which at the time were uncommon. In my briefing and oral argument, I expressed no objection to my client's deposition being videotaped (I videotape all depositions).*

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its motion), but found Judge Wettick's public policy concerns over a forced video deposition reenactment more persuasive, quoting generously from his opinion in *Osborne*. Judge Hess wrote that "[d]iscovery is governed by the Rules of Civil Procedure. A court has no inherent power to compel discovery. Consequently, defendants' motion will fail unless a rule of discovery authorizes this court to enter an order compelling plaintiff to reenact the accident. ... there is no Pennsylvania discovery rule which even suggests that a court may compel an adverse party to operate a designated piece of machinery or otherwise reenact an accident. "*Spraglin*, 1993 WL 843462 at *3.

Spraglin concerned the operation of an automated cart and my deckhand's case involved the operation of a ratchet and a steel bar which struck my client's head, both industrial setting injuries occurring instantaneously and involving moveable equipment. So, in my motion for protective order, I quoted Judge Hess' concluding remarks in his opinion in *Spraglin*:

> Here, an automated cart is alleged to have suddenly left its designated path striking the plaintiff. Given the propinquity of events, it is literally impossible to reenact the accident as it occurred. The precise trajectory of the cart, the position of the plaintiff and configuration of his body at the time he was injured must all be simultaneously and accurately reproduced. Were the video reenactment to be compelled in this case, we could readily foresee a situation where the trial would revolve less around credibility and more around the thespian talents of the plaintiff.

Spraglin, 1993 WL 843462 at *4.

At the emergency motion hearing before Judge Connelly, defense counsel argued the broad scope of discovery and that Judge Wettick's decision in *Osborne* was now an anachronism. I argued that no Rule of Civil Procedure allows a compelled reenactment at a plaintiff's deposition, the public policy considerations articulated in *Osborne* and *Spraglin*, and my client's unique psychological condition, including how a forced reenactment was likely to re-traumatize him. I assured the Court I would not at trial ask my client to physically reenact the incident, that I would only ask my client at trial to *describe* the incident to the best of his recollection, and that is all that he should be required to do at his deposition. I also argued there was no way for my client, given his injuries, to accurately reenact in defense counsel's conference room an incident which occurred five years ago on the deck of a barge, 119 river miles from Pittsburgh on the Ohio River, in pre-dawn hours, while such barge was made up to a towboat, and while my client and two other deckhands were handling heavy cables, ratchets, and steel bars while wiring together two approximately 195 foot long by 35 foot wide steel barges.

The argument before Judge Connelly was vigorous and the Court clearly wanted to allow for a productive deposition of my client, without re-traumatizing my client or making him guess. So, Judge Connelly ordered that my client could be asked to explain matters, *if he recalled them*, only from a seated position, and only using his hands. The Court spoke of how we all talk with our hands these days. My client, though, would not be required to get out of his chair. I was mindful of Judge Ignelzi's admonition in *Lau v. Allegheny Health Network,* 2021 WL 1235495 (Alleg. Cty. March 30, 2021), that counsel cannot instruct a witness not to answer a question unless it is to preserve a privilege, etc.[2]

[2] *"1. Any objection shall be stated concisely in a non-argumentative and non-suggestive manner; and 2. Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court."*

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But I did not want an inaccurate demonstration memorialized on video and then be in the position of having to argue in a pretrial motion the jury should not see that particular portion of the video. I thought it would be hard to un-ring the bell. I was concerned the trial judge may allow into evidence all the video and then allow any claimed inaccuracies to be addressed with testimony. Appreciating my concern, Judge Connelly instructed counsel that I could object and instruct my client not to perform something and counsel could then come back to court for a ruling, if necessary. Judge Connnelly instructed defense counsel not to ask my client to demonstrate or to ask him "show me" questions. My client would be limited to using his words and his hands to explain his recollection of the incident. Judge Connnelly said he would not be issuing a written opinion, and he did not do so.

Later that morning, my client's video deposition proceeded. My client stayed seated and did his best to explain the incident but did not guess about his body's or the equipment's positioning. I did not have to instruct him not to answer any question or not to do anything. The Court had thoughtfully addressed my concerns. My client's rights and his emotional well-being were protected. I endeavor to have a good relationship with opposing counsel and always try to informally resolve discovery disputes. But, in our representation of often seriously injured clients, I believe we have a continuing duty to protect our clients from being re-traumatized and, in appropriate circumstances, from being forced to serve as props in the defense's demonstrative videos.

By: Frederick B. Goldsmith

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Are you ready to golf?

WPTLA's 31st annual **Ethics & Golf is set for Friday, May 24** at Shannopin Country Club in Pittsburgh. This event features an early breakfast and 1 hour ethics CLE, followed immediately by 18 holes of golf and an awards lunch. Save the date and look for details in your mailbox/inbox soon!

MEMBER PICTURES & PROFILES

Name: Mitchell H. Dugan

Firm: Dugan & Associates

Years in practice: Over 33 years

Bar admissions: 1988

Special area of practice/interest, if any: Workers' Compensation, Social Security Disability, Personal Injury

Tell us something about your practice that we might not know: Traditionally W/C practice has involved taking a lot of medical depositions. Until very recently, it was not unusual to have several medical depositions a week. I have taken many medical depositions over the years.

Most memorable court moment: Client lunged out of witness stand at Ins. Co. atty accusing defendant of having their 2 male cousins fly over from Sicily threatening his family in the school yard. The judge called for a short recess. (During the break I and opposing counsel decided it best to settle before we went missing).

Most embarrassing (but printable) court moment: Client came unhinged on cross-ex about his work capabilities, tore down court room door then tore apart the Workers Compensation hearing office all the while opposing counsel pointing saying 'I told you he could work.'. (The non-printable one is of public record somewhere.)

Most memorable WPTLA moment: Meeting Laurie Lacher

What advice would you give yourself as a new attorney just passing the bar? Put a nickel in a jar for every crazy potential client call. Find a good mentor.

Secret Vice: Sarcasm.

People might be surprised to know that: I train Brazilian Jiu Jitsu.

Last book read for pleasure, not as research for a brief or opening/closing: 21 Lessons for the 21st Century Yuval Noah Harari

My refrigerator always contains: Condiments. You never know when a picnic may break out.

My favorite beverage is: Water/Gatorade

My favorite restaurant is: Red Lobster

If I wasn't a lawyer, I'd be: Renting umbrellas on a beach perfecting my surfing.

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THE PENNSYLVANIA SUPREME COURT CONTINUES ITS RETREAT FROM *GALLAGHER* IN *RUSH V. ERIE INSURANCE EXCHANGE*

The members of this organization, along with all personal injury lawyers in Pennsylvania, had been anxiously awaiting the Pennsylvania Supreme Court's decision in *Rush v. Erie Insurance Exchange*, No. 77 MAP 2022 (Pa. Jan. 29, 2024), since June 27, 2022, when the court granted Erie Insurance Exchange's ("Erie") Petition for Allowance of Appeal from the Superior Court's decision. The issue on appeal in *Rush* was stated as follows:

Whether the decision of the three-judge panel of the Superior Court is in direct conflict with the Pennsylvania Supreme Court decisions in *Burstein v. Prudential Prop. & Cas. Ins. Co*., 809 A.2d 204 (Pa. 2002) and *Williams v. GEICO Gov't Emps. Ins. Co.*, 32 A.3d 1195 (Pa. 2011) and whether the Superior Court erred as a matter of law by finding that the "regular use exclusion" contained in Pennsylvania auto insurance policies violates the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.[ ] [§] 1701, et seq.[.]

> *"The Pennsylvania Supreme held . . . that the 'regular use' exclusion in the Rush policy did not violate the express language of the Pennsylvania MVFRL and was enforceable to preclude UIM coverage."*

Initially, there was great hope that the Supreme Court would continue in the direction of its then considered landmark decision in *Gallagher v. Geico*[1] and invalidate the so-called "regular use" exclusion at issue in *Rush* as violative of Sections 1731, 1733 and 1738 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"), 75 Pa. C.S. §§ 1701, et seq. "Regular use" exclusions preclude underinsured motorist ("UIM") coverage under an insured's policy for injuries sustained by the insured while operating a vehicle they do not own but regularly use. Hope for such a ruling, however, diminished as time passed, especially, after the Supreme Court issued its unanimous ruling in *Erie Ins. Exchange v. Mione*,[2] neutering its holding in *Gallagher*.[3] While *Mione* and *Gallagher* dealt with the household exclusion, rather than the "regular use" exclusion, these decisions were indications of the current Pennsylvania High Court's unwillingness (*Gallagher*) and subsequent willingness (*Mione*) to allow insurance companies to take away coverage mandated by the MVFRL through policy exclusions. The long-awaited decision in *Rush* came down on January 29, 2024.

The Pennsylvania Supreme held in *Rush* that the "regular use" exclusion in the Rush policy did not violate the express language of the Pennsylvania MVFRL and was enforceable to preclude UIM coverage.[4] The Supreme Court reversed a unanimous decision by a three-judge panel of the Superior Court that had held that "regular use" exclusions were unenforceable because such exclusions limited the scope of UIM coverage required by the MVFRL.

Rush arose from a 2015 motor vehicle accident in which Matthew Rush, a police detective in Easton, PA, sustained serious injuries when two other drivers crashed into his unmarked police car. At the time of the accident, Rush had two personal auto policies through Erie Insurance Exchange ("Erie"), both of which provided stacked UIM coverage and contained identical "regular use" exclusions. Rush submitted a claim for UIM benefits under both Erie policies. Erie denied coverage citing the "regular use" exclusions, as it was undisputed that Rush did not own but regularly used the police car.[5]

After the denials by Erie, Rush filed suit in the Court of Common Pleas of Northampton County. The trial court ruled in Rush's favor finding that the "regular use" exclusion was unenforceable because it violated the

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[1] *201 A.3d 131 (Pa. 2019). In Gallagher, the Supreme Court found the household exclusion to be in violation of the MVFRL because it eliminated stacking in a manner contrary to § 1738 of the MVFRL. Id. at 138.*

[2] *289 A.3d 524 (Pa. 2023).*

[3] *In Mione, the court stated: "We reiterate today that the holding in Gallagher was based upon the unique facts before us in that case, and that the decision there should be construed narrowly." Mione, 289 A.3d at 530. The court concluded:*

> *"[W]e continue to reject the view that household vehicle exclusions are ipso facto unenforceable. Gallagher did not undermine Eichelman's central holding in that regard; it simply held that a household vehicle exclusion cannot conflict with Section 1738 by purporting to take away coverage that the law says is mandatory unless waived using a specific form. In cases where the exclusion does not interfere with the insured's ability to stack UM/UIM coverage, Gallagher's de facto waiver rationale is not applicable."*

Id. at 531-32 (citations omitted). Notably, former Chief Justice Baer authored the majority ruling in Gallagher. Chief Justice Baer passed away prior to and did not participate in the decision in Mione.

[4] *Rush v. Erie Insurance Exchange, No. 77 MAP 2022, at 37.*

[5] *Id. at 1-2.*

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MVFRL by modifying Section 1731 of the MVFRL and eliminating coverage to which Rush would otherwise be entitled.[6] Erie appealed to the Superior Court. A three-judge panel unanimously affirmed the Trial Court, albeit, based on different reasoning. [7]

The Superior Court premised its ruling on Section 1731(c), which requires UIM coverage where an insured is injured arising out of the "use of a motor vehicle." The intermediate appellate court held that the "regular use" exclusion in the Erie Policies conflicted with Section 1731(c) by precluding coverage if an insured is injured while using a motor vehicle that the insured regularly uses but does not own. In other words, in the view of the Superior Court, the exclusion impermissibly circumscribed the broad mandate of Section 1731 to situations where an insured is injured arising out of either a use of an owned motor vehicle or an occasionally used motor vehicle. Thus, the Superior Court held that because the "regular use" exclusion conflicts with the clear and unambiguous language of Section 1731 of the MVFRL it is unenforceable. [8]

Erie filed a petitioned for allowance of appeal to the Pennsylvania Supreme Court, which was granted. After nineteen months, the Supreme Court issued its decision in *Rush* on January 29, 2024. As in the lower courts, on appeal to the Supreme Court, Erie relied heavily on the Supreme Court's two prior decisions on the "regular use" exclusion: *Burstein v. Prudential Prop. & Cas. Ins. Co.*[9] *and Williams v. GEICO.*[10] Central to the Pennsylvania High Court's holding in *Rush* was its determination that *Burstein* and *Williams* were controlling precedents; whereas, the Superior Court had found them not to be controlling.[11]

The *Rush* court discussed these two decisions at length. In *Burstein*, the court had determined that the "regular use" exclusion did not violate public policy because the exclusion furthered the public policy of cost containment and was enforceable to preclude recovery of UIM benefits.[12] In that decision, the court also rejected the insureds' argument that UM/UIM coverage was "universally portable" and held that such coverage does not "follow the person" as do first party benefits.[13] Nine years after *Burstein*, the Supreme Court was again presented with a challenge to the validity of "regular use" exclusions in the *Williams* case. In *Williams*, the Pennsylvania Supreme Court rejected the insured's two primary arguments. First, that there was legislative evidence that first responders were a more favored class that demanded higher protections and, thus, the "regular use" exclusion violated that public policy.[14] Second, that "regular use" exclusions violated Section 1731 of the MVFRL by acting as an implicit waiver of that coverage.[15] The *Williams* court also did not treat it as opportunity to overrule *Burstein* and again held that the "regular use" exclusion was enforceable to preclude recovery of UIM benefits.[16]

After discussing the *Williams'* decision, the *Rush* court turned to the question of whether its 2019 decision in *Gallagher v. Geico*[17] required a different result from *Williams* and *Burstein*.[18] In *Gallagher*, the Supreme Court found the "household" exclusion to be in violation of the MVFRL because it eliminated stacking in a manner contrary to § 1738 of the MVFRL.[19]

The Rushes argued that *Gallagher* stands for the broad proposition that in the absence of a UIM waiver of stacking UIM coverage cannot be eliminated by the "household" exclusion and that the same reasoning should be applied to invalidate the "regular use" exclusion. [20] The Pennsylvania High Court, however, disagreed, citing

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[6] *See Rush v. Erie Ins. Exchange, No. C-48-CV-2019-01979, at 9-10 (North Hampton C.P. June 26, 2020).*

[7] *Rush v. Erie Ins. Exchange, 265 A.3d 794 (Pa. Super. 2021). The trial court's decision was based on § 1738 of the MVFRL. The Superior Court based its ruling on § 1731.*

[8] *Rush, at 796-97.*

[9] *809 A.2d 204 (Pa. 2002).*

[10] *32 A.3d 1195 (Pa. 2011).*

[11] *Rush, No. 77 MAP 2022, at 33-38. The Superior Court had determined in its Rush decision that the Supreme Court's statement in Williams that the "regular use" exclusion did not violate the MVFRL was dicta and was not controlling. Further, the Superior Court noted in its opinion that Williams' relied upon Erie Ins. Exch. v. Baker, 972 A.2d 507 (Pa. 2008) (plurality decision), which had been abrogated by Gallagher. The Superior Court did not address the Burstein decision.*

[12] *Burstein, 809 A.2dat 207-08.*

[13] *Id. at 209. Notably, the Rush court found the portability and public policy arguments in Burstein to be intrinsically tied together. See Rush, No. 77 MAP 2022, at 19.*

[14] *Williams, 32 A.2d at 1206.*

[15] *Id. at 1207-08.*

[16] *Id. at 1208-09.*

[17] *201 A.3d 131 (Pa. 2019)*

[18] *Rush, No. 77 MAP 2022, at 29-33.*

[19] *Gallagher, at 138.*

[20] *Rush, at 31.*

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to its 2023 decision in *Erie Ins. Exchange v. Mione*.[21] In *Mione*, the court distinguished *Gallagher* on the basis that unlike the insureds in *Gallagher* the insured in *Mione* had waived UIM benefits on the policy covering the accident vehicle and was seeking stacked UIM benefits on his automobile policy in the first instance.[22] The *Mione* court held that for the "household" exclusion to act as a *de facto* waiver of stacking the insured must have received UIM benefits under some other policy first.[23] The *Rush* court further noted that the court in *Mione* "made clear that 'the holding in *Gallagher* was based upon the unique facts before us in that case, and that the decision there should be construed narrowly.'"[24] The *Rush* court also seized on the "implicit rejection of the notion that UIM coverage is portable and not susceptible to exclusions from coverage" by the court in *Mione*.[25] The court in *Rush* concluded its discussion of *Gallagher* by explaining that the insureds' argument that the *Gallagher* decision should lead to the "regular use" exclusion being found unenforceable "conflates issues surrounding stacked UIM coverage under Section 1738 with the issue of portability of UIM coverage arising under Section 1731."[26]

Thus, instead of a broad application of *Gallagher*, the Supreme Court held that "resolution of the issue before us" was controlled by "our precedent directly addressing the validity of the 'regular use' exclusion; namely, *Burstein* and *Williams.*[27] Fundamental to the *Rush* court's holding that "regular use" exclusions do no violate the MVFRL was its determination that the holdings in *Burstein* and *Williams* support the proposition that UIM coverage is not universally portable and does not "follow the person" as do first party benefits.[28] The *Rush* court explained:

> Once it is decided that UIM coverage is not universally portable . . . any argument that Section 1731 prohibits exclusions from coverage in the insurance contract must fail. If the MVFRL does not require that UIM coverage follow the insured in all circumstances, then the MVFRL cannot be read to prohibit exclusions from UIM coverage. Consequently, the insurance contract controls the scope of the UIM coverage and the 'regular use' exclusion is enforceable.[29]

Because the court found that *Burstein* had addressed the question presented to it, the *Rush* court concluded that affirming the Superior Court would require it to overrule *Burstein* and *Williams*. The court chose not to do so, explaining that in light of "decades of reliance by insureds and insurers, and no justification to allow this Court to depart from decades of established law, we maintain our course unless and until the General Assembly or the Insurance Department acts in a way to suggest we do otherwise."[30] The court concluded its opinion stating its ultimate holding that "the 'regular use' exclusion in the Insureds' policy is valid and enforceable, and we reverse the order of the Superior Court.[31]

"UIM coverage is not universally portable and does not 'follow the person' as do first party benefits."

It is worth noting that Justice Wecht issued a concurring opinion. While Justice Wecht agreed that the Superior Court misinterpreted Section 1731 of the MVFRL, he disagreed with the majority that *Burstein* controlled the outcome of the decision.[32] Moreover, Justice Wecht explained that in his opinion the case should be remanded to the Superior Court for consideration of the "regular use" exclusion under Section 1738 of the MVFRL, which was not addressed by the majority. Justice Wecht noted that the trial court in *Rush* had based its ruling on Section 1738, but that the Superior Court's decision was based on an alternative basis, which is what the Supreme Court addressed and rejected.[33] As discussed above, in *Gallagher*, the Supreme Court found the "household"

[21] *Id. at 31-32 (citing Mione, 289 A.3d 524 (Pa. 2023).*

[22] *Mione, at 529.*

[23] *Id. at 530.*

[24] *Rush, at 32 (quoting Mione at 530 (citations omitted)).*

[25] *Id.at 32.*

[26] *Id.at 33.*

[27] *Id.*

[28] *Id. at 28, 34-38.*

[29] *Id.* at 36.

[30] *Id.* at 37.

[31] *Id.*

[32] *Id.*, concurring op. at 1.

[33] *Id.*

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THE PENNSYLVANIA SUPREME COURT ... FROM PAGE 8

exclusion to be in violation of the MVFRL because it eliminated stacking in a manner contrary to Section 1738 of the MVFRL.[34] The *Mione* court narrowed the scope of *Gallagher* by holding that for the "household" exclusion to act as a *de facto* waiver of stacking the insured must have received UIM under some other policy first.[35] Justice Wecht argued in his concurrence that because these issues were never addressed by the Superior Court, *Rush* should have been remanded.

While Justice Wecht's concurrence suggests a small window through which a court may find the regular use or household exclusion violates § 1738 of the MVFRL, keep in mind that Justice Wecht dissented in *Gallagher* and he may be lamenting a missed opportunity to close that window. Nevertheless, if you have a case involving the "regular used" exclusion where the insured is entitled to UIM on the "regularly used" vehicle and has stacked UIM on his or her personal auto policy, you should continue to argue that *Gallagher* and *Mione* render the "regularly used" exclusion unenforceable.

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[34] Gallagher,201 A.3d at 138.

[35] Mione, 289 A.3d at 530.

By: James T. Tallman, Esq. of
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JUDICIARY DINNER ANNOUNCEMENT

On May 3, 2024, we will hold our Annual Judiciary Dinner at Acrisure Stadium. During the course of the evening, we will recognize fourteen Judges who have all left full-time status from the bench in 2023. I am sure many of you have fond memories of appearing before one, or several, of our honorees and I encourage all of you to attend this very special event.

The evening opens with cocktails and hors d'oeuvres at 5:00 p.m., with dinner to follow at 6:30 p.m.

The event will continue to follow the same condensed presentation format as last year's program with the Judges being recognized following dinner. This version of the event seems to be overwhelmingly preferred as it allows for more time socializing between our members and honored guests.

The 2024 Judiciary Dinner Honorees are:

Hon. Thomas P. Agresti, United States Bankruptcy Court
Hon. John T. Bender, Superior Court of Pennsylvania
Hon. Kim Berkeley Clark, Court of Common Pleas of Allegheny County
Hon. Elizabeth Doyle, Court of Common Pleas of Blair County
Hon. D. Gregory Geary, Court of Common Pleas of Somerset County
Hon. Rita Donavan Hathaway, Court of Common Pleas of Westmoreland County
Hon. Patrick T. Kiniry, Court of Common Pleas of Cambria County
Hon. Norman A. Krumenaker III, Court of Common Pleas of Cambria County
Hon. Lisa P. Lenihan, United States District Court
Hon. David J. Tulowitzki, Court of Common Pleas of Cambria County
Hon. Timothy M. Sullivan, Court of Common Pleas of Blair County
Hon. Marie T. Veon, Court of Common Pleas of Venango County
Hon. John F. Wagner, Jr., Court of Common Pleas of Fayette County
Hon. Ilissa Zimmerman, Court of Common Pleas of Blair County

In addition to honoring these judges, we will also award $2,000 to each of the three winners of our annual WPTLA President's Scholarship High School Essay Contest and present the Pittsburgh Steelwheelers with the proceeds raised from our President's Challenge 5K held in October. Finally, we will honor the recipients of the Daniel M. Berger Community Service Award and the Champion of Justice Award.

The Judiciary Dinner is always well-attended and we expect this year will be no exception. The evening provides a great opportunity to socialize with colleagues while also paying tribute to all our honorees. We hope to see you at one of WPTLA's signature events of the year!

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of Delvecchio & Miller, LLC
shawn@dmlawpgh.com

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NAVIGATING THE BENEFITS AND RISKS OF AI IN THE LEGAL INDUSTRY

The legal industry, long known for its slow adoption of new technologies, is witnessing a rapid influx of artificial intelligence (AI) applications. This surge has sparked a crucial conversation:

How can legal professionals leverage the benefits of AI while mitigating its potential risks?

The Adoption Landscape: From Skepticism to Smart Integration

In January 2023, ChatGPT's meteoric rise to 100 million active users sent shockwaves through the tech world, solidifying AI's presence across industries. While the legal sector initially exhibited a spectrum of opinions on AI adoption, ranging from complete resistance in larger firms to unbridled enthusiasm from some legal newcomers, a new era of pragmatic exploration has begun. Recognizing the potential value proposition, legal professionals are now focusing on assessing the usefulness of AI while keeping an eye on the associated risks.

Unveiling the Advantages: Streamlining Legal Workflows

The benefits of AI for lawyers are well-documented. AI-powered tools can significantly enhance research efficiency, document organization, legal analysis, and more. These advancements can free up valuable time for lawyers to focus on higher-level tasks demanding human expertise, like strategic client counseling and complex case development.

Opening Pandora's Box: Ethical and Operational Considerations

However, integrating AI necessitates careful consideration of potential risks. Ethical obligations are paramount. Most states require lawyers to possess a thorough understanding of any technology they employ. Instances have surfaced where lawyers, relying heavily on AI-driven drafting services, failed to verify crucial information, leading to inaccurate case citations or even fabricated references. Such negligence can expose clients to serious consequences, as evidenced in the Mata v. Avianca, Inc. case, where the lawyer faced penalties for signing off on inaccurate documentation generated by AI.

Furthermore, transparency regarding AI usage and its impact on billing practices is crucial. While AI can streamline research and drafting, lawyers must consult their state bar associations concerning the ethical implications of incorporating AI outputs into client billing.

Public vs. Private AI: Tailoring Technology to Specific Needs

Another consideration involves the public nature of information processed through AI. Sensitive client information should be strictly limited when using public AI platforms. Conversely, private AI solutions will be soon available to most, and offer increased control over data privacy, making them more suitable for handling confidential client information.

Marketing in the Age of AI: Striking a Balance Between Efficiency and Quality

The influence of AI extends beyond internal legal operations, reaching the marketing realm. Platforms like Gemini and ChatGPT have democratized content creation, paving the way for a future dominated by AI-generated content.

While the allure of quickly producing vast quantities of content is undeniable, the risk of emotionally thin quality is significant. Unedited AI-generated content, lacking essential human input and lacking emotional intelligence, is unlikely to achieve optimal search engine optimization or resonate with your potential client. Google's algorithms are increasingly sophisticated and prioritize quality content. Human expertise is critical to creating accurate meta descriptions, compelling writing styles, and alignment with the firm's unique voice and perspective.

In this context, the value of skilled legal professionals who understand the nuances of your firm and its target audience becomes even more prominent. High-quality content, crafted with human oversight, can navigate AI filters and meet Google's stringent quality standards, allowing your firm to stand out in a growing sea of AI-generated content.

A Strategic Approach to AI Integration

AI can be a powerful tool for legal professionals, offering significant efficiency gains and competitive advantages across various business functions. However, responsible integration necessitates an understanding of the associated risks. Ignoring the potential of AI, risks putting your firm at a disadvantage in the evolving landscape. Embrace AI strategically, starting with manageable solutions and fostering partnerships with reliable providers. Continuously refine your understanding of AI to help shape the future of your legal practice in this era of technological transformation.

By: Jim Hayes, Director of Growth

Above The Bar Marketing

jim@abovethebarmarketing.com

PRESIDENT'S MESSAGE

Can I Borrow Two Cents?

"The beautiful thing about learning is nobody can take it away from you."—B.B. King

Striving to become a better trial lawyer is one of the most rewarding aspects of my career. I am thankful for the accomplished attorneys who take the time to share their insights, methods, cognitive frameworks, and tips and tricks. Some of us are fortunate to work with attorneys who readily share their knowledge. Others acquire knowledge from the canons of Trial Guides or the hottest podcasts. Yet there is a source of immense knowledge many of us have barely tapped: our fellow members of WPTLA.

I am excited to announce our first ever WPTLA listserv will launch by this Spring. The listserv will be an amazing resource for our members. I challenge members to let your guard down and ask for help when you need it. Don't worry about asking a dumb question. In this business, nobody knows everything all the time.

The PAJ MedMal listserv helped me understand the nuances of medical malpractice litigation during my first few years as an attorney. It remains an incredibly valuable resource for me today. For example, one of our most accomplished and intelligent medical malpractice attorneys in Pittsburgh has a knack for posing questions on perplexing issues which arise in medical malpractice litigation. Almost everybody has at least a vague notion about the issues, but not a clear answer. Discussion on the listserv helps generate consensus and guidance on these thorny matters.

We can share intel on defense experts with ease. But we need improvement with sharing our knowledge and experience among our membership. Like the lawyer in the example above, we should feel comfortable asking others for their thoughts on any important issue. So, as we roll out the new listserv consider the following types of posts:

- **Request thoughts on how to approach a case**. Maybe you have never handled a premises liability case at Target. Will you figure it out as you go along? Of course. But you owe it to your client to pick the brain of somebody who has travelled the same path against the same defendant. Maybe you will learn the best way to tailor a preservation letter concerning surveillance video – and before it's too late.

- **Seeking ideas for creating and using trial exhibits, like timelines and medical illustrations**. What are people doing when it comes to using posters versus showing everything on a screen? Is there a website or application with helpful anatomical exhibits? How do I simplify a complex legal concept or theory of negligence with a single image?

- **Help forming analogies, rules, and case frames**- Questions like these are like a box of chocolates. Or maybe you already have a rule you like, but you need the foundation. Chances are another member can cite the ANSI standard or other guidelines you need.

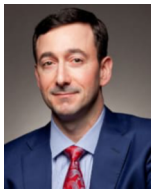
- **Scouting a jurisdiction**- Are you trying a case in an unfamiliar court? Get the lay of the land from a fellow member on the listserv.

- **Help with unique client issues**– Should your client attend trial? Do you face client management issues unlike any you have dealt with before? A fellow listserv member has been there.

- **Debating issues involving grey areas of the law**– The collateral source provisions of the MCARE Act can be a source of frustration for me. And think about all the issues that arise after you sue multiple defendants who point their fingers in every direction. The listserv can help you untangle the mess.

- **Boosting our general knowledge and development**- Share a link to an article, blog, or website which brought you new insight or perspective.

We have members who have a lot to learn and others who have a lot to teach. Whether the issue is complex or routine, our new listserv will make the most impact when all the great minds of WPTLA lend their ".02". The more of us who ante up and provide feedback, the more wisdom out there to win. And we will all share the pot. I look forward to learning from all of you.



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Annual Membership Dinner & Elections

Make your plans and register to attend our annual Membership Dinner & Elections, where we'll vote on the nominations for the Officers, Board of Governors Members, and LAWPAC Trustee for the 2024-2025 year.

This members-only event will be held at **Carmody's Grille**, owned by President's Club Member Sean Carmody, on **Wednesday, April 17**. Cocktails begin at 5:30 and we'll sit for a buffet dinner at 6:15. Elections will take place during dinner.

Registration is available at **https://wptla.org/event-registration/?event_id=16857**

The final board meeting of the 2023-2024 fiscal year takes place prior to the event.

Understanding the Use of Trusts in Litigation Recoveries

Trusts in the Litigation Recoveries

Trusts are often used to hold the proceeds from litigation recoveries for an injured plaintiff who is i) a disabled individual who receives or may benefit from receiving means-tested public benefits such as Medicaid or Supplemental Security Income, ii) a minor or incapacitated person for whose protection applicable law requires proceeds to be held in a restrictive manner, or iii) an individual unaccustomed or otherwise unable to manage sophisticated financial matters.

Trusts often used include what are commonly referred to as Special Needs Trusts, Asset Protection Trusts, "Flip" Special Need Trust, Support Trusts, Sole Benefit Trusts, and Supplemental Needs Trust, each of which may include Special Needs or Medicare Set Aside Provisions.

In addition to Trusts, injured clients may consider qualified structured settlement annuities (including those which are Medicaid compliant), a "rapid spend down" of the recovery and, in some instances, gifting.

Payback Special Needs Trusts

The primary purpose of a Payback Special Needs Trust ("SNT") is to qualify medically eligible (i.e. disabled) but otherwise resource ineligible (i.e. over the resource limit for public assistance) individuals for public benefits by placing their assets into trusts exempted as countable or "available" resources under federal and state law.An individual who establishes a SNT is generally seeking to qualify for Medicaid (also referred to as Medical Assistance in Pennsylvania) and Supplemental Security Income. Qualifying for these benefits involves a two part inquiry: (1) is the applicant medically needy; and (2) is the applicant financially needy.

Medicaid is often the most sought after of these two benefits as it generally provides comprehensive health care coverage without deductibles or co-pays, and often covers not only necessary medical treatment but also experimental/preventive treatment and in home therapies.

Individuals who establish SNTs are medically needy and are either unable to obtain insurance coverage at affordable rates or to afford the out of pocket cost-sharing.These individuals are often severely disabled and might otherwise be forced to deplete their litigation recovery on requisite treatment to qualify as financially needy and receive Medicaid.

SNTs serve to enable these individuals to place their assets into an irrevocable, restricted trust and thereby receive public assistance while conserving their assets to assist in the future treatment of their disability with the notable caveat that the SNT assets be used for the "sole benefit" of the disabled individual and subject to the State Medicaid Agency's right to reimbursement upon termination.

Payback Special Needs Trusts v. Supplemental Needs Trusts

Understanding SNTs in the context of public benefits requires distinguishing them from "Supplemental Needs Trusts," which are also commonly referred to as "common law discretionary trusts. "SNTs differ from Supplemental Needs Trusts in that they are generally funded with the assets of the disabled beneficiary, whereas Supplemental Needs Trusts are funded with the assets of a third party.

Supplemental Needs Trusts are often used in estate and gift planning (rather than in litigation recovery) and are generally excluded as an available resource in determining a disabled beneficiary's eligibility for public benefits so long as certain restrictive language is included.

Supplemental Need Trusts are not bound by federal and state SNT requirements and are not subject to a "sole benefit" requirement or payback to the state Medicaid agency.Supplemental Needs Trusts therefore allow for greater control over distributions and the ultimate disposition of assets held in trust.

It is crucial to understand, however, that although a Supplemental Needs Trust may not be an available resource for public benefits purposes, the manner in which distributions are made to a public benefits recipient may affect their eligibility for benefits. Distributions must therefore be made from Supplemental Needs Trusts in such a way as to avoid affecting a loved one's eligibility for benefits. Supplemental Need Trusts should be considered any time one is gifting or bequesting assets to a loved one who is disabled, receives public benefits or is elderly.

Planning for Disabled Clients

A disabled client who receives Medicaid or Supplemental

(Continued on Page 15)

Security Income will, in most instances, lose these benefits upon receipt of a lump sum litigation recovery. When the recovery in question is less significant, the disabled client may be able to engage in a rapid "spend down" of the recovery for fair consideration (e.g. generally no gifting) within the month of receipt to bring the countable resources back within the applicable public benefits limit.

A disabled client with a more significant recovery or for whom a rapid spend down is not appropriate may be a good candidate for a payback SNT if timing permits the client to create and fund the SNT (even via an assignment) before age 65. When the disabled client is over age 65 and therefore not a candidate for a SNT, a Medicaid compliant annuity (which may also be a qualified structured settlement annuity) may be another viable planning option.

Special consideration must be given to a disabled client who has minor or disabled children or a dependent spouse. In each of these instances, applicable law generally allows the disabled client to transfer or allocate a portion of the recovery to such dependents without penalty-- however the transfer must be carefully made so as not to impact the disabled client's public benefits.

For example, applicable law allows a parent to fund a "sole benefit" trust for a minor or disabled child and to transfer assets to a spouse without impacting Medicaid or SSI, however each of these transfers could result in deemed resources to the disabled client thus impacting public benefits.In the case of a spouse, a Medicaid compliant annuity may be an appropriate tool to shift assets without negatively impacting public benefits.

A "Flip SNT" -- a trust initially drafted as a general support trust but which contains a mechanism by which it may be converted or "flipped" to a SNT -- is often times a good option for a client who would benefit from financial management and who is not presently receiving (but who may benefit in the future from) Medicaid or SSI.

Non-disabled clients may also benefit from general support trusts (or annuities) for financial management and advocacy and asset protection. Consideration must also be given to the need for a Medicare Set Aside, and often times settlement Trusts provide for Medicare Set Aside Subtrusts when indicated.

Unique planning opportunities may also exist for clients with substantial recoveries large enough to enable them to forego Medicaid and Supplemental Security Income and instead engage in more sophisticated asset protection and tax planning.

It is important to keep in mind that each of these planning opportunities, even while condoned by applicable law, may require court approval for minor or incapacitated clients under Pa.R.C.P. 2039 and 2064. Further, nearly all clients would benefit from executing basic estate planning documents such as a simple Will, appropriate Financial and Healthcare Power of Attorney instruments and Advanced Directives or Living Wills.

Connecting injured clients with appropriate public benefit, estate and trust professionals adds value, ensures clients are informed of their options, and limits potential malpractice claims against litigation attorneys who don't practice in the public benefits, estate and trust fields.

Nora Gieg Chatha is a fellow of the American College of Trust and Estate Counsel (ACTEC) and Certified Elder Law Attorney by the National Elder Law Foundation who formerly served as Counsel for Pennsylvania's Medicaid Program and works frequently with litigation attorneys and their injured clients.

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UPCOMING EVENTS

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

Sat, Jun 22, 2024 - Community Service Event, Angel Ridge Animal Rescue, Washington, PA

JUNIOR MEMBER MEET & GREET RECAP

"Leaders are like gardeners ... As leaders, we are not only responsible for harvesting our own success but for cultivating the success of the next generation."

-Susan Collins

To kick off 2024, WPTLA held a Junior Member Meet & Greet at the Foundry Table & Tap on the North Shore. At the event, experienced trial lawyers and law students shared seats at the same tables, exchanging stories and making connections. With great food, fun games, and a tremendous turnout, the event was a superb success.

I had the opportunity to speak with Neill Peirce, a 2L at Duquesne Law, about his experience that evening. He said, "The meet and greet was a great opportunity for myself and the other junior members to make some connections with attorneys from around the area. Overall, it was an amazing event and I was very glad I was able to attend!"

Joining Neill in representing Duquesne Law were Alex Giatras, Lesly Madera, and Jake Warner. Many other law students, including Mac Ference, a 3L from Ohio Northern, were also in attendance.

As an aside, being a "baby lawyer" myself, I can all too well remember the days of law school. I often felt lost and was never sure of what I wanted to do until I met my mentor, Greg Unatin. I was happy to hear WPTLA members providing some of the same sage advice and guidance that Greg gave to me when I was wrapping up my schooling.

Like any dedicated gardener, WPTLA members should take pride in the success they have harvested from their efforts. In looking ahead, they should also be mindful to keep room in their gardens for the seeds they have yet to sow, as those plants will bear the fruits of the future. Maybe one of those sprouting junior members will turn out to be your next superstar associate!

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Photos from the event can be found on page 21.

Views From the Bench:

A Roundtable Discussion with Judges Gary M. Gilman (P.J.), Arnold I. Klein, and Harry F. Smail

Make your reservation now to attend this 2-credit substantive CLE on **Monday, April 8** at The Rivers Club in Pittsburgh. Food and beverages will be available 9:00 - 11:00AM. The course runs 9:30AM -12:00PM. Doors open at 9:00AM. Plan to arrive early and have breakfast before the course begins!

Our panel of judges handle some of the most active civil dockets in our region. This two-credit CLE will give members an inside perspective on what does and doesn't work inside the courtroom, including the judges' observations and advice on the following topics:

- The scope of individual Voir Dire and the best ways to identify your best and worst jurors;
- Potential pitfalls in pretrial practice and how to arm the court for productive conciliation;
- What strikes a chord with today's jurors and motivates their decision making in various types of civil cases;
- The qualities of effective opening and closing statements;
- How jurors respond to videotaped versus live witness testimony - does it matter?
- Effective use of courtroom technology, demonstrative exhibits, flip charts, and other tools you should use to teach the jury/
- Opinions on "speed trials" - Are they common, and do they work?

You are guaranteed to boost your knowledge of ways to overcome the challenges of a jury trial and reach a successful verdict for your clients.

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https://wptla.org/event-registration/?event_id=17336

PRESERVE THE ISSUE: HILLS AND RIDGES

One procedural trend that can be observed in the appellate courts is the problem of waiver. One issue that should be preserved in all snow and ice cases is the ongoing viability of the "hills and ridges" doctrine, especially as it applies to business invitees.

The reason for this is that the Pennsylvania Supreme Court has shown a willingness to explore this issue. In September, 2023 in the case of *Meritra v. Camelback Lounge*, 1193 EDA 2022, the Court had granted allowance of appeal to consider the following issues:

> (1) Should the hills and ridges doctrine be applied in situations where the injured party is a business invitee?
>
> (2) Should the hills and ridges doctrine be applied in situations like this one where the injured party is a business invitee and the defendant is a winter-weather business, like a ski resort, that derives its income from the public partaking in activities which depend on the presence of snow/ice?

As most practitioners who represent injury victims recognize, the Hills and Ridges doctrine was never a particularly well founded approach to slip and fall cases due to the natural accumulation of snow and ice. In the case of a business invitee, there are several practical problems with this doctrine. They include the following:

- ·There is a practical difference between businesses and private possessors of property.
- ·There is a practical difference between "trip and fall" and "slip and fall cases.
- ·The Court should also recognize the practical difficulties in applying "Hills and Ridges" language.
- ·The use of a hills and ridges test is not practical since it does not take into account the full range of ways in which a neglected walkway can become slippery and dangerous.

Any brief addressing this issue should address and expand upon each of the above

In addition, it is important make the legal argument that legally, the hills and ridges doctrine is inconsistent with the long recognized legal duty owed to business invitees.

Duty in premise liability cases in Pennsylvania follows Sections 343[1] and 343A[2] of the Restatement (Second) of Torts (1965). See, e.g., *Jones v. Three Rivers Mgmt. Corp.*, 483 Pa. 75, 88, 394 A.2d 546, 552 (1978); *McKenzie v. Cost Bros., Inc.*, 487 Pa. 303, 308, 409 A.2d 362, 364 (1979). Hence, under Pennsylvania law, a possessor owes a business invitee a duty of reasonable care which includes a duty to inspect.

Given the foregoing, to the extent that the hills and ridges doctrine serves as a bright line rule of sorts for notice, it contradicts the duty that would otherwise be imposed on possessors of land. It also imposes a lesser duty than reasonable care.

Finally, anyone briefing this issue should support their argument by reference to Judge Bowes' concurring opinion in the Superior Court. Judge Bowes, in her concurring opinion in the Superior Court, stated "I must express my concern regarding the continued application of this doctrine to business invitees like Appellant." *Meritra v. Camelback Lodge & Indoor Waterpark*, 292 A.3d 1118 (Pa. Super. Ct. 2023) In support thereof, she quoted Judge Olszewsk's statement that "I see no reason to shield private business owners from liability where an injured business invitee proves a business owner's failure to exercise reasonable care." *Morin v. Traveler's Rest Motel, Inc.*, 704 A.2d 1085, 1089-90 (Pa. Super. Ct. 1997) (Olszewski, Concurring).

Depending on how you look at it, the plaintiff's attorney in the *Meritra*_ case withdrew the appeal prior to oral argument. Hopefully, the Court will again be willing to take this case up again.

Author's note: I was privileged to have the opportunity to submit PAJ's Amicus brief in the Supreme Court in *Meritra*. If you will be appealing this issue, I would encourage you to contact PAJ for Amicus support.

Damages for Delay

The Prime Rate to be used for calculating delay damages under Pa. R.C.P. No 238 for delay occurring in 2024 will be 8 ½%. This is a full percent greater than 2023's rate of 7 1/2 %. To this amount, you would add 1% percent pursuant to the Rule.

[1] Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

[2] Section 343A provides:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

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COMP CORNER

PAJ Working on Comp Bills in Harrisburg

This is an update on pending legislation benefiting injured workers in Harrisburg. The first bill would codify the payment of workers' compensation through direct deposit. This is House Bill 760. The bill does not initially require insurance carriers or self-insured employers to offer a direct deposit. However, after a year of the effective date of the bill, all insurers and self-insured employers are required to permit payment of compensation by direct deposit. The employer/carrier is required to notify claimants that they may choose the option of direct deposit. Claimants are obligated to provide direct deposit authorization directly to the employer/carrier. The injured worker is permitted to change banking institutions by providing new direct deposit forms. If a claimant requests direct deposit and provides the appropriate documentation, direct deposit is to be instituted within 45 days of receipt thereof. Lump sum payments will continue to be made by check unless the employer agrees to make direct deposit.

The second major bill under consideration is House Bill 930. This bill would significantly expand benefits for permanent disfigurement. It has two major provisions. The first would be to expand coverage to the body rather than merely the head, face, or neck. The second would be to increase the amount of benefits payable from 275 weeks to 400 weeks. Furthermore, claimants would not be precluded from collecting partial or total disability benefits and disfigurement benefits at the same time.

As you can imagine, these bills have a significant priority with the PAJ lobbyist in Harrisburg.

Both bills are now in the Senate labor committee. Prospects there cannot be determined at this time. However, the Senate labor Chairman is up for reelection this year and that may have an effect on his willingness or not to move the bill.

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CLE ONLINE

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/

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 36, 2023-2024

Vol 36	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
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

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Sulivan v. Werner Co., No. 18 EAP 2023 (Pa. December 22, 2023)

Supreme Court holds that evidence of a product manufacturer's compliance with industry safety standards is not admissible in a strict liability design defect case.

In this product liability case, the Plaintiff was seriously injured at a jobsite when the platform of a mobile scaffold collapsed, causing him to fall through the scaffold to the ground. Plaintiff brought a design defect claim against the manufacturer of the scaffolding. The trial court granted Plaintiff's motion *in limine* to preclude the defendants from adding into evidence any industry or governmental standards with regards to the scaffolding. Following trial, a verdict was entered in favor of the Plaintiff.

Defendants appealed the trial court's decision regarding the motion *in limine*. In a unanimous published opinion, the Superior Court affirmed the trial court. *Sullivan v. Werner Co.,*253 A.3d 730 (Pa. Super. 2021).

The Supreme Court granted an allowance of appeal to consider whether evidence of a product's compliance with industry and governmental safety standards is admissible in products liability cases following the Court's previous decision in *Tincher v. Omega Flex, Inc.,*104 A.3d 328 (Pa. 2014).

During its analysis, the Court explained that industry standards generally govern conduct. For example, OSHA standards seek to regulate the conduct of employers and employees to ensure safe and healthful working conditions. Likewise, ANSI standards seek to regulate a manufacturer's conduct in designing and manufacturing a product. The Court found that compliance with standards reflects on the manufacturer's conduct and not any attribute of the product itself. As such, any instance where OSHA or ANSI would deem a defendant's conduct compliant with its standards is not relevant to the risk-utility test set forth in *Tincher* and diverts the jury's attention from the relevant inquiry.

The Supreme Court held that evidence of compliance with industry standards is inadmissible under the risk-utility test in strict products liability cases. In this regard, the Court reaffirmed the post-*Tincher* validity of the previous rule that evidence of industry standards and a product's widespread design within an industry go to the reasonableness of the defendant's conduct in making its design choice, and that such evidence would have improperly brought into the case concepts of negligence law.

***Nationwide v. Castaneda*, 2023 PA Super 253 (Pa. Super Dec. 5, 2023)**

Superior Court invalidates the unlicensed driver exclusion in the limited context of a first party medical benefits claim.

Plaintiff was driving her mother's car, with permission, but without a valid driver's license, when she was rear ended by another car resulting in severe injuries. Plaintiff submitted a claim for first party medical benefits to her mother's auto policy with Nationwide, which covered the vehicle she was driving at the time of the crash. Nationwide denied the claim asserting it had no duty to cover Plaintiff's medical expenses under the unlicensed driver exclusion contained in the policy. The trial court granted judgment on the pleadings in favor of Nationwide on the issue. Plaintiff appealed to the Superior Court.

The Superior Court began its analysis by confirming that first party medical expense coverage is mandatory, no-fault coverage required of all auto policies under the MVFRL in section 1711. The Court also recognized that under section 1718 there are several enumerated grounds on which an insurer must exclude a claimant from recovering first party benefits.

Given the mandatory system the legislature constructed for medical expense benefits, the Superior Court held that the Plaintiff was entitled to coverage for her medical expense claim unless one of the limited exclusions in Section 1718 applied to her claim. As section 1718 does not include an unlicensed driver exclusion, the Superior Court found that it was not a valid exclusion upon which Nationwide could rely to refuse coverage for Plaintiff's medical expenses. As such, the Superior Court reversed the trial court's decision granting judgement on the pleadings to Nationwide.

In its Opinion, the Superior Court also stressed that their conclusion was confined to claims for first party medical expense benefits, which were the only benefits at issue in the case *sub judice.*

***Olar v. Bennett,* 2023 PA Super 282 (Pa. Super. December 29, 2023)**

Pennsylvania Superior Court orders new trial where lower court did not instruct jury on a driver's duty of care and did instruct jury on the sudden emergency doctrine.

This personal injury action arose out of an automobile crash involving two pedestrians. The Plaintiffs left a birthday party at the Fraternal Order of Owl's Nest 9051 (Owl's Nest). They attempted to walk across Little Deer Creek Valley Road to return to their vehicle, which was parked in the lot across the road. Little Deer Creek Valley Road is a two-lane roadway with a posted

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speed limit of 25mph. The area is lit with streetlights lining the northbound lane, and ambient light from shops and business along the southbound lane. The Defendant, who was driving northbound on Little Deer Creek Valley Road, struck the Plaintiffs with his minivan as they were crossing the road. Plaintiffs suffered serious injuries.

At trial, Plaintiffs testified that they left the Owl's Nest, looked in both directions and, seeing no traffic, entered the southbound lane of Little Deer Creek Valley Road and crossed the double yellow line. Plaintiffs also testified that they were on or near the berm of the road, at the entrance to the parking lot, when they were hit. One Plaintiff had no recollection of the accident while the other testified that he did not hear or see Defendant's vehicle until it got close enough to hit him when it was within about one or two feet.

The Defendant driver testified that he had a clear view of the road in front of him, was going 20 to 25 mph and that he did not see the Plaintiffs until he hit them. The Defendant tested negative for any drugs or alcohol.

The Plaintiffs presented an expert accident reconstructionist who testified that the Plaintiffs would have been visible at a distance of nearly 300 feet. The expert also testified that, even if the Defendant were traveling at a higher speed of 30 mph, he still could have been able to stop his vehicle prior to striking the Plaintiffs if he had been paying attention.

The sole eyewitness to the accident testified that he saw the Plaintiffs enter the road at a slow pace, and also confirmed they did not dart out. The witness did not hear any horns, skidding or screeching tires before the Plaintiffs were hit.

At the conclusion of trial, the parties submitted points for charge. The trial court refused to charge on Plaintiffs' requested points, which explained the legal duty of a motorist to keep a proper lookout ahead, to be attentive, and to exercise ordinary care under the circumstances then presenting. Over Plaintiffs' objection, the trial court also granted Defendant's request for a charge on the sudden emergency doctrine, which was subsequently given to the jury.

Following trial, the jury found the Defendant was not negligent and returned a verdict in his favor. Plaintiffs appealed the denial of their proposed points for charge and the instruction given to the jury by the trial court on sudden emergency.

The Superior Court agreed with Plaintiffs' argument that the purpose of the proposed instructions on a driver's duty of care was to explain to the jury that a motorist has a duty to be vigilant in watching the road ahead, and that striking pedestrians in his field of vision, if the jury were to find they were in his field of vision, is proof of negligence. The Superior Court found that the trial court's failure to instruct the jury on a driver's duty of care precluded clarification of a material issue in this case.

With regard to the charge on sudden emergency, the Superior Court concluded that the evidence presented at trial did not support a determination that the Defendant was confronted with a sudden and unforeseeable occurrence as required by law. The Court determined that night driving is not an emergency and a driver has an obligation to adjust his speed based upon road and weather conditions, including visual obstructions, to ensure his ability to react to foreseeable events. The Court also noted that the Defendant testified he did not know why he did not see Plaintiffs in the roadway until impact. Under these circumstances, the Court concluded that a driver's inexplicable failure to see pedestrians crossing the road is not a sudden emergency. Accordingly, the judgment was reversed and the case was remanded for a new trial.

Coryell v. Morris, 2023 PA Super 232 - Pa: Superior Court 2023

Despite inconsistent prior appellate rulings, Superior Court determines that it can review a trial court's denial of a motion for summary judgment after a jury verdict based on its own finding that the issue was one of law and not fact.

This case arises from a motor vehicle crash. Prior to the crash, the pizza chain Domino's had entered into a Standard Franchise Agreement under which Robizza, Inc., was to operate one of its stores. The Standard Franchise Agreement authorized Robizza to operate under Domino's name, marks, trade dress, and logos and specified operating and product standards for the store.

While returning from a delivery, an employee of Robizza driving a company owned vehicle collided with a motorcycle driven by Plaintiff who was ejected and suffered substantial injuries. A personal injury action was filed against the Defendant driver, Robizza and Domino's. The claim against Domino's was that it was vicariously liable for the acts of the Defendant driver.

Domino's and Plaintiffs both moved for summary judgment on vicarious liability. While disagreeing over the construction of the franchise agreement and what kind of relationship it created, they both agreed that the agreement was unambiguous and controlling. Both also asserted that the trial court and not a jury should determine vicarious liability, since the matter was essentially one of contract interpretation.

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Nevertheless, the trial court denied both motions for summary judgment, stating, without explanation, that there was a genuine issue of material fact as to the extent of control asserted by Domino's. Following trial, a jury found Domino's vicariously liable and awarded damages.

On appeal by Domino's, the Superior Court addressed two central issues. First, the Court needed to discern what it was reviewing: the denial of summary judgment or the denial of the post-trial judgment notwithstanding the verdict. At the core of this issue was whether the denial of a summary judgment motion can be addressed after the case had proceeded to trial and a judgment had been entered. Identifying contrasting treatment of this issue by the Superior Court in decisions past, the *Coryell* Court found that the inconsistency in the law on this issue needed to be resolved. However, the Superior Court declined to do so in this case feeling it would be unfair to the instant parties. Ultimately, the Court side-stepped the summary judgment review debate in this case by concluding that because the parties all agreed the franchise agreement was unambiguous and controlled the franchisor-franchisee relationship, vicarious liability was a legal issue rather than a factual one, and the trial court was obligated to determine that issue.

Because vicarious liability should have been determined as a matter of law by the trial court, the second issue for the Superior Court was to determine whether the franchise agreement created a master-servant relationship between Domino's and the franchisee, Robizza. The Court observed that the inquiry in such cases focuses on whether the alleged master has day-to-day control over the manner of the alleged servant's performance. After reviewing the franchise agreement, the Court held that Domino's did not control or have the right to day-to-day control over how Robizza operated its store. As such, Domino's could not be held vicariously liable for the negligence of Robizza's employees since the relationship between the two parties was that of independent contractor-contractee rather than master-servant. The Superior Court reversed and remanded to the trial court for entry of an order that as a matter of law Domino's could not be vicariously liable for the negligence of Robizza's delivery driver.

By: Shawn D. Kressley, Esq. of

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Have you made your plans yet to attend our annual Judiciary Dinner?

Registration is open for this annual signature event, scheduled for **Friday, May 3** at Acrisure Stadium in Pittsburgh. The evening begins with cocktails and heavy hors d'oeuvres from 5:00 - 6:15PM. We'll then move to the dining area and sit for dinner at 6:30PM. Immediately following dinner our recognition program will begin. Along with the 14 judges being honored, we'll recognize the 3 winners of our Scholarship Essay Contest, and the 2023 donation made to the Steelwheelers from our 5K event.

Two highlights of the evening will be the presentation of the Champion of Justice award to Past President John Quinn, and the presentation of the Daniel M. Berger Community Service Award to Past President Veronica Richards, for her work with The Lighthouse Foundation.

After the awards presentation, stick around for the ice cream and sundae bar, socialize with your contemporaries, and watch the fireworks display from PNC Park. Yes, it's fireworks night!

Sponsorship of the event is open through Wednesday, April 24.

Register now at **https://wptla.org/event-registration/?event_id=17249**

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TRIVIA CONTEST

Enter for a Chance to Win a $100 Visa Gift Card

Trivia Question #39

How many times has there been a February 30?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by June 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 #39 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 #38 –**What animal is the most commonly struck by lightning?**

Answer:Giraffe

Congratulation to Lauren Kelly Gielarowski, of Luxenberg Garbett Kelly & George, on being the winner of contest #38. Lauren will received a $100 Visa gift card.

Remember, you can't win if you don't enter!!

Pictured above, from Left to Right:

In #1 - Past President Chris Miller, Junior Member Jacob Warner, Junior Member William Jelley, and Treasurer Shawn Kressley.

In #2 - Gina Zumpella, Board of Governors Member Drew Rummell, and Secretary Jennifer Webster.

In #3 - Board of Governors Member Rich Ogrodowski, Bianca DiNardo, and Vice President James Tallman.

In #4 - President Greg Unatin, James Trettell, Junior Member Neill Peirce, Junior Member Mac Ference, and Ryan Very.

In #5 - Past President Bill Goodrich, Gianna Kelly, Laurien Gielarowski Kelly, and Sarah Watson.

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Through the Grapevine....

Board of Governors Member Carmen Nocera has joined the firm of Harry S. Cohen & Associates, P.C., located at Two Chatham Ctr, Ste 985, Pittsburgh 15219 412-281-3000 cn@medmal1.com

Board of Governors Member Sam Mack has moved to the firm of Winslow Law Group. Sam can be found at 4600 J. Berry Ct, Ste 330, Canonsburg, 15317. 412-710-8215 smack@winslowlawgroup.com

John Eric Bumbaugh, Sr has changed his firm name to Bumbaugh George, PLLC. All other information remains the same.

Past President and Presidents Club Member Rich Schubert, **Presidents Club Member Larry Chaban**, **Bill Chapas** have moved the office of Alpern Schubert P.C. to 302 E Main St, Ste 202, Carnegie, 15106 412-765-1888.

Member James Lestitian is now in private practice and can be found at 249 Arrowhead Ln, Eighty-Four, 15330. 412-860-6128 jjl@lestitian-law.com

Young Lawyer Jeanette Robilliard-Clark is now with McMorrow Law, LLC. She can be contacted at 10475 Perry Hwy, Ste 204, Wexford, 15090 724-940-0100 jeanette@mcmorrowlaw.com

President and Presidents Club Member Greg Unatin, **Board of Governors Member Brendan Lupetin**, **Board of Governors Member Maggie Cooney**, and **Garrett Trettel**, have moved the firm of Lupetin & Unatin, LLC to 310 Grant St, Ste 3204, Pittsburgh 15219. All other information remains the same. Additionally, **Presidents Club Member Mark Smith** has joined the firm.

Presidents Club Members Lauren Kelly Gielarowski and Gianna Kelly have moved the Pittsburgh office of Luxenberg Garbett Kelly & George to One Oxford Centre, 301 Grant St, Ste 270, Pittsburgh 15219. All other information remains the same.

Our most sincere condolences to the family, friends, coworkers and peers of **Past President Steve Moschetta**, on his recent and untimely passing.