THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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PUBLISHED QUARTERLY BY WESTERN PA TRIAL LAWYERS ASSOCIATION

FALL 2022
VOLUME 35, NO. 1

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THE ART OF PERSUASION

Interference, the Path to Bigger Damage Awards?

Life's Little Interferences

Imagine you are walking to court when a tiny rock finds its way into one of your fancy lawyer shoes. It's nothing, right? But a few steps later that tiny pebble becomes a boulder. Instead of thinking about gavel you're thinkin' bout gravel (ba dump!).

But seriously, imagine you had to walk around like that for the rest of your life. Miserable right? We can immediately understand how bad that would suck.

We appreciate this misery because we understand the significance and impact even the smallest interferences have on our ability to enjoy life.

Do you think then that it might be effective at trial to not only describe the types and extent of harms your client has suffered but to also explain how the damages specifically *interfere* with their ability to live life like they did before?

Research Time

While you think about that question, allow me to douse you with some jury research.

In 2019, three researchers, let's say their last names were Reed, Hans, and Reyna, conducted a series of mock trials followed by deliberations and juror debriefings. The study, cleverly titled "Accounting for Awards: An Examination of Juror Reasoning Behind Pain and Suffering Damages Award Decision," examined and identified the key reasons why jurors awarded money for pain and suffering damages.

What would you guess was the most mentioned reason jurors felt compelled to award money for a plaintiff's pain and suffering? (Cue extended train horn following a Pens' goal) That's right! How much the injury interfered with the plaintiff's life. In fact, this was mentioned by nearly half of all jurors surveyed.

While there were numerous other factors mentioned by the mock jurors, the researchers concluded that interference was the only measured factor that related to the given award. And importantly, the researchers found that the mock jurors who mentioned the injury interfering with the plaintiff's life gave higher damage awards than jurors who did not.

I recommend reading the entire study (it's not too long) as there were a ton of other interesting takeaways. But for purposes of this article, don't forget the importance of framing your client's damages through the lens of interference.

Be the Pebble - How to Apply Interference to Your Case

So how do we put it all together? You

Continued on Page 3

"[M]ock jurors who mentioned the injury interfering with the plaintiff's life gave higher damage awards than jurors who did not."

PRESIDENT'S MESSAGE

What makes an industry group meaningful to young professionals?

WPTLA has not lost overall membership numbers through the pandemic due in large part to the efforts of our Executive Board and membership committee members. However, over the past 12 years, WPTLA's membership has declined 11.5%. This is not unique to WPTLA or the legal industry. Prior to the pandemic, 68% of professional organizations surveyed reported difficulty growing membership in 2019, and the majority of those responding reported membership losses, no gains, or gains less of 1% to 5%. The ABA noted a decline in membership in 2018, and in 2021, one Bloomberg Law writer penned a headline that "Bar Associations Are Outdated," with about half of all bar associations reporting membership losses in 2018 and 2019.

The one thing that is consistent among the many articles and blog posts addressing the 10+ years of member attrition is this: the values and benefits of an organization need to align with what younger members want from the organization. Millennials are and have been the largest generational group in the American work force since 2016, and Gen Z is expected to make up over a quarter of the workforce within the next 3 years. WPTLA is positioned to potentially lose 102 members within the next 5-7 years *solely* due to retirement. While our membership efforts largely focus on getting renewals from prior members, we need to shift organizationally to think about what younger attorneys want from an industry group. We need to do more than prioritize signing up Junior Members – we need to understand what drives those younger members to want to participate and remain engaged with an organization over time *and what* will make them encourage their peers to join. Members on paper don't translate to a thriving future (or present) for any organization.

We are a membership association – we *only* exist because of and to serve our members. We have an overall mission as an industry-specific organization, but the most significant method through which WPTLA accomplishes its mission is by serving its own membership. What was and is important to a member who has been in practice for 40 years is very different than what is and will be important to a new member who has been in practice for 2 years. We can't lose sight of what makes membership valuable to our existing members, but we also need to learn what makes membership valuable to our newest members.

We have tried to survey our existing members several times over the past 5-7 years to understand what value existing members see in WPTLA membership. We have not had a high level of engagement with those surveys. We, unfortunately, don't have a lot of younger members to survey to find out what makes membership valuable to them. What I would ask each of you reading this article to do is think about who in your life is a younger professional – it may be a family member, a co-worker, someone you mentor, etc. – and ask that person what is important to them from the standpoint of an industry organization. If you get an answer – report back to me. As an organization, we want to know – do people want ***more***: more networking, more education, more volunteer opportunities, more Zoom offerings; or ***less***: less e-mails, less travel, less fee-driven participation, less alcohol/food-based events, less barriers to entry; or ***something completely different*** that we don't even think about because we may not perceive it as important.

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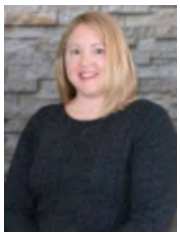

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 35, 2022-2023

Vol 35	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Winter 2023	Dec 2	Dec 16
Spring 2023	Feb 24	Mar 10
Summer 2023	May 19	Jun 2

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

THE ART OF PERSUASION ... FROM PAGE 1

have to drill down and extract the best examples of how your clients' injuries interfere with their lives? Consider the following approach

1. Spend time with your client and their family. In addition to asking them how the injury impacts their life, observe them, and imagine how the injury interferes with every aspect of their life. Get granular.
2. Talk with friends and peripheral people in their lives to gain a third-person perspective on how the injury interferes with their life and wellbeing.
3. Finally, take what you have learned and discuss the damages and identified interferences with a focus group. Find out what regular people think. Which aspects of interference most resonate with everyone? What other ways do most people imagine the injury would interfere with the plaintiff's life. "Ms. Focus Grouper, what parts of Mr. Plaintiff's injury do you think cause the greatest interference with his ability enjoy his life as he did before?"
4. Take everything you've learned and run it by your client to see if it fits with their actual experience.
5. After you have identified the key examples of interference, line them up with the relevant sub-categories of non-economic damages in your jurisdiction. For example, your client's hand injury that makes it difficult for them to tie their shoes and button their shirt would fall under "inconvenience," while the inability to throw the ball with their child would fall under "loss of life's pleasures." This will help you organize the proof the jury needs to render a fair and full verdict for your client.
6. Practice this testimony with your client and your condition witness. Think through how to show and tell the jury about the interference

Break a leg!

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INSIDE THIS ISSUE

Features

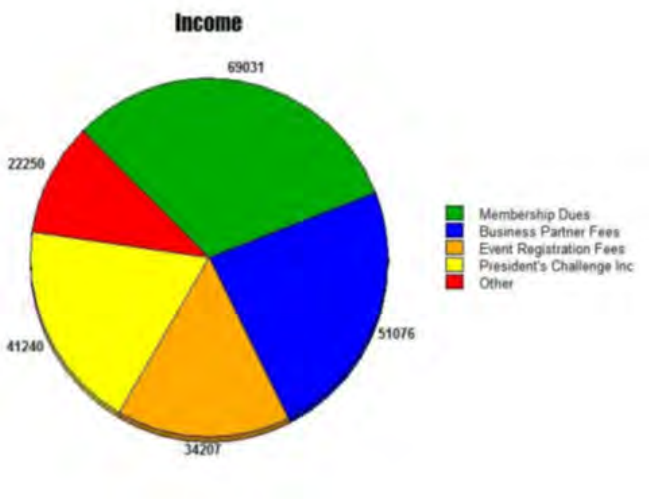
News

Columns

OBSERVATIONS OF A PAST PRESIDENT

THE IMPORTANCE OF OUR BUSINESS PARTNERS

In concluding my year as President, I along with executive director Laurie Lacher, prepared an annual report. One element of the annual report was the following pie chart showing sources of our revenue:



As you can see, business partner income comprises a full 23% of our income; and is almost equal to dues as a source of revenue. This means that if we did not have our business partners, our dues would pretty much need to double. However, it would not be that simple if the dues increased twofold. In the process, we would lose members and start a potential downward spiral. Although we do adjust our dues in modest increments from time to time, we have been able to control our dues with business partner income.

So why do I point this out? You have probably guessed that my intent is to encourage you to meet our business partners, learn what they do and give them a chance. Our business partners cover just about every aspect of our practice. Need an expert witness? An out of town Court reporter? An Investigator, a settlement planner, legal research, a mediator, marketing assistance, life care planning, case funding, social media help, a reliable pharmacy, a pain doctor, a life care planner? As I said it, our business partners offer essential services for every member. If you already have vendors in these areas, that is ok, but consider giving our business partners an opportunity to serve you and to supplement your current help.

As a reminder, these are our business partners:

1. AccentuRate • 888-703-5515 • https://www.accenturate.com/
2. Alliance Medical Legal Consulting • 267-644-1000 • https://www.alliancemedicallegal.com/
3. FindLaw • 412-601-0734 or 412-980-0915 • https://www.findlaw.com/
4. Finley Consulting & Investigations •412-364-8034 • https://finleyinvestigations.com/
5. Injured Workers' Pharmacy • 412-258-0054 • https://www.iwpharmacy.com/
6. Keystone Engineering • 863-344-7606 • https://www.forensicexp.com/
7. LexisNexis • 716-997-9214 • https://www.lexisnexis.com/en-us/home.page
8. Medivest • 862-312-6098 • https://medivest.com/
9. NFP Structured Settlements • 412-263-2228 • https://www.nfpstructures.com/
10. Pain and Spine Specialists • 724-984-9167 • https://painandspinespecialists.com/
11. Planet Depos • 412-634-2686 • https://planetdepos.com/
12. Schulberg Mediation • 888-433-3767 • https://www.schulbergmediation.com/
13. Thrivest Link • 267-538-1512 • https://thrivestlink.com/

Our business partners are largely professionals that one or more of our members in leadership were already utilizing. Our business partners are all high quality members from their fields – meaning that utilizing them can only help your case.

On a related note, WPTLA dues for members practicing more than 5 years are available at two levels. This is a recognition that some members have been particularly successful while for others personal injury is only a part of their practice or they maintain a tight margin. As such, it is important to our organization that those who can maintain their membership at President's club levels. Members who have already paid their general membership dues can upgrade. It is worth noting that the 3 credit CLE benefit allows the increased cost of President's club membership to mostly pay for itself. There are of course, benefits to membership at every level as laid out on our website at https://wptla.org/join-wptla/.

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THE 22ND ANNUAL PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL PREVIEW

As many of you know, the WPTLA's annual 5K to benefit the Pittsburgh Steelwheelers is one our signature events and one that demonstrates WPTLA's ability to give back to the community. This year's race is scheduled for **Saturday, October 8, 2022** at North Park's Boathouse. Registration opens at 9:00 a.m., the wheelers start at 10:00 a.m. and the runners/walkers start at 10:15 a.m. Parking is free and there is a nearby playground for kids. All participants receive an entry for door prizes.

Why the Steelwheelers? The Steelwheelers are a local non-profit organization that supports programs for the physically challenged. The money that WPTLA raises is put to good use in helping to fund the costs of competition for wheelchair basketball, rugby, track and field, and hand-cycling. The Steelwheelers have to travel to numerous states to compete in these sports. Money is needed for transportation, hotels, uniforms and registration fees.

How did WPTLA get involved? 22 years ago, then-President, the Honorable Beth A. Lazzara, wanted to make a significant difference to a local charitable organization. She came up with the idea for a 5K event as a fundraiser, and was made aware that the Steelwheelers were an organization that were struggling financially and needed support to survive. Thus began the President's Challenge 5K Run/Walk/Wheel. Since that time, WPTLA has been the lifeblood of the Steelwheelers' organization, donating in excess of $566,000.

How can you be involved?

·**Participate** – In addition to running or walking in the race yourself, contact your family, co-workers, friends, and neighbors about this family and pet-friendly event in North Park.

·**Sponsorship** – lawyer, law firm and business sponsorships make up the majority of the proceeds raised by this event. Reach out to local business and clients to sponsor.

·**Donate Prizes** – We are currently accepting raffle prizes and are looking for prizes of significant value, such as sporting event tickets, signed memorabilia, tickets to desirable venues/concerts and collections of gift cards or related items. Please contact WPTLA Executive Director, Laurie Lacher, for details on how to donate prizes.

·**50/50 Raffle** – You can enter the race's 50/50 raffle by going to https://wptla.org/community-service/ and clicking on the "Online 50/50" link under the Steelwheelers section. The winner will be selected on October 9, 2022.

We look forward to seeing everyone at the race on October 8th this year!

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5K Online Registration is available through Oct 5. Scan the code below to register.

SCAN ME

MEMBER PICTURES & PROFILES

Board of Governors Member

Name: Paul A. Tershel

Firm: Tershel and Associates

Years in practice: 42

Bar admissions: Pa.; Western/Eastern District Courts; U.S. Supreme Court

Special area of practice/interest, if any: civil litigation

What advice would you give yourself as a new attorney just passing the bar?: Be honest with your clients, the courts, your fellow attorneys. Work hard.

If I wasn't a lawyer, I'd be: a writer.

ALLEGHENY COUNTY MANDATORY MEDIATION

Allegheny County's mandatory Mediation rule is now effective since September 3rd of this year. The new rule, found at Local Rule 212.7 spells out the requirements. Under the rule, all parties are required to participate in a formal mediation "no later than 45 days prior to the commencement of the assigned trial term.

The rule does provide for several exceptions. The first exception requires the calendar control judge to excuse the case from mediation based upon a motion and "good cause shown." In addition, all parties may agree to waive mediation and file a signed certification. A note to the rule makes clear that the judge may find "good cause" based on the expense of mediation relative to a party's inability to afford the expense of mediation. The rule also exempts, arbitration appeals, asbestos cases and landlord-tenant cases.

Another note explains that the timing of the deadline is based upon an intent to provide the parties with the flexibility to determine when the mediation would be most effective. Accordingly, some parties may choose to engage in mediation shortly after the case is filed whereas others may delay mediation until the completion of discovery or even shortly before the trial date.

The note to the rule indicates that trial lists will generally be published 6 months before the trial term. Nonetheless, it is noted that the January trial list was only published with just over three and a half months' notice; and as of the date of submission of this article the March trial list has not yet been published.

The rule further requires, with the exception of agreement of the parties, all parties with a financial interest and nonparties with a financial interest to attend the mediation.

Upon completion of the mediation, the plaintiff is required to file a certification which shall also be served by email upon Calendar Control.

NEW STATEWIDE VENUE RULE CHANGES

Effective January 1, 2023 the restrictions on venue limiting venue in medical professional liability actions have been removed. This has been accomplished by eliminating Rule 1006(a.1) and making other conforming changes to Rules 1006 (venue in actions against individuals), 2130 (partnerships), 2156 (unincorporated associations) and 2179 (corporations).

Former Rule 1006 (a.1) limited malpractice cases to "a county in which the cause of action arose." Subsequent to the amendment, venue can be had where the defendant may be served, where the cause of action arose or where a transaction or occurrence from which the cause of action arose took place.

A separate Adoption Report noted that the change was justified in light of the decline in malpractice filings over the last 15 years. It also noted that the pre-amended rule provided special treatment for a particular class off defendants.

Although a change in the venue rule was fist published in 2018 for comment, comments were received that suggested that the change would result in increase malpractice claims, with a reduction in patient access and quality of care with physicians leaving the state. Following a report from the Legislative Budget and Finance which was inconclusive. As a result, the rule provides that it will be re-evaluated in two years. Nonetheless, the committee noted other changes which have been made in the MCare Act and in the Rules including the requirement of a certificate of merit.

It is noteworthy that the Adoption Report also addressed the claim that health care costs would increase. However, the committee noted "With utmost respect, it is suggested that efforts are better focused on reducing the occurrence of negligence". Hence the Report stated "a majority of the Committed did not find justification for the continued disparate treatment of victims of medical malpractice.

WAIVER OF THE RIGHT TO AMEND

D'Happart v. First Commonwealth Bank, 2022 PA Super 132 presents a cautionary tale. There the Superior Court held that a trial court did not err in dismissing a complaint with prejudice based upon preliminary objections without granting leave to

(Continued on Page 8)

COMP CORNER

Retroactivity of Credit Provision in Act 111

As practitioners know, the Commonwealth Court has addressed the issue of the retroactivity of the credit provision regarding receipt of partial disability benefit prior to the effective date of the Act on multiple occasions. For instance, see *Rose Corporation v. WCAB (Espada),* 238 A.3d 551 (Pa. Cmwlth. 2020), and *Pierson v. WCAB (Consol PA Coal Company LLC),* 252 A.3d 1169 (Pa. Cmwlth. 2021) among others. To date, the Commonwealth Court has been resolute in applying the credit retroactively and the Pennsylvania Supreme Court has eschewed all opportunities to address the issue.

A Potential Flaw in Act 111 Benefiting a Few Claimants?

Act 111 lays out the procedure for obtaining an impairment rating evaluation and describes what happens after an evaluation. Section 306(a)(2) of the Act notes:

> If such determination results in an impairment rating that meets a threshold impairment rating that is equal to or greater than thirty-five per centum of impairment under the American Medical Association "Guides to the Evaluation of Permanent Impairment" 6th edition (second printing April 2009), the employee shall be presumed to be totally disabled and shall continue to receive total disability compensation benefits under clause (a)...

Section 306(a)(5) goes on as follows:

> Total disability shall continue until it is **adjudicated or agreed under clause (b)** that total disability has ceased or the employee's condition improves to an impairment rating that is less than thirty-five per centum of the degree of impairment defined under the American Medical Association "Guides to the Evaluation of Permanent Impairment," 6th edition (second printing April 2009).

(emphasis added)

Section 306(b)(1) of the Act is limited to describing what we have come to know as earning power assessments.

So how does this potentially favorably effect some claimants? Consider the following hypothetical. A woman undergoes an impairment rating evaluation for a serious head injury which includes post-concussion syndrome and post-traumatic stress disorder. The IRE physician concludes there is a 37% whole body impairment. Some time later, defendant avails itself of an independent medical exam where the doctor finds the claimant with a 37% impairment rating to be fully recovered. A termination petition then follows. In light of Section 306(a)(5) can the employer proceed with a termination petition? Remember, total disability shall continue until it has adjudicated or agreed under **clause (b)** that total disability has ceased or a subsequent IRE provides a rating of less than 35%. There is no adjudication or agreement that under clause (b) (the earning power assessment provision) that total disability has ceased. Arguably, defendant cannot avail itself of a termination petition until it obtains an impairment rating of less than 35% or until it has shown earning power.

Perhaps, the legislature in its rush to push Act 111 through had not thought out all of the consequences. Kudos to WPTLA and PAJ member Doug Williams for this innovative argument.

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BY THE RULES ... FROM PAGE 7

amend. In so doing, the Court found that by failing to request amendment of the complaint, the party waived the argument for appeal. Unfortunately, the Court did not specify what is necessary to preserve the request. Is an oral request enough? Can it be included as an alternative argument in a brief? Or, must a written motion be filed?

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Khalil v. Williams, No. 24 EAP 2021 (Pa. July 20, 2022)

Supreme Court reverses summary judgment, allowing a legal malpractice claim based upon the alleged failure of attorneys to properly advise Plaintiff of the consequences of signing a Release to proceed.

In this case, the Pennsylvania Supreme Court considered whether a plaintiff's legal malpractice claims against her former attorneys were barred under the court's prior decision in *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991), which held that a plaintiff cannot sue their attorney on the basis of the adequacy of a settlement to which the plaintiff agreed, unless the plaintiff alleges the settlement was the result of fraud.

Dr. Alham Khalil ("Plaintiff") owned a condominium in a building insured by Travelers. Plaintiff's property was damaged by a water leak from the unit above, which led her to move out and stop paying condominium fees. Plaintiff subsequently sued Travelers, her upstairs neighbors, and her own property insurer, State Farm as a result of the leak ("Water Damage Case"). Thereafter, the condominium association sued Plaintiff for unpaid fees, which prompted counterclaims from Plaintiff and a joinder complaint against her former neighbors and the building's property management company ("Fees Case").

Plaintiff retained Gerald Williams, Esq., and Beth Cole, Esq., (Defendant attorneys) in the Water Damage Case and subsequently reached a settlement, in principle, with Travelers. However, the text of the settlement release barred Plaintiff's counterclaims in the Fees Case, which Plaintiff claimed she did not want. Before signing the release, Plaintiff alleged that she spoke with the Defendant attorneys who wrongly assured her on multiple occasions that the counterclaims would not be disrupted by the Travelers release. Plaintiff further claimed that the release she signed contained the protections she wanted, but that her signature was forged on a later draft that did not. Based upon the signed release, the opposing parties in the Fees Case were able to obtain a dismissal of Plaintiff's counterclaims.

Plaintiff sued the Defendant attorneys for: legal malpractice based on negligence; legal malpractice based on breach of contract; negligent misrepresentation; breach of contract; and fraudulent misrepresentation. The Defendant attorneys moved for summary judgment, arguing Plaintiff was actually trying to revisit the settlement amount of the Water Damage Case, a practice prohibited by the *Muhammad* decision, in the absence of fraud.

The trial court granted summary judgment in favor of Defendant attorneys, holding there were no genuine issues of material fact, and that Plaintiff's claims were barred as a matter of law under *Muhammad*. The trial court found that Plaintiff had consented to a settlement and then later attempted to second guess the amount of the settlement. The trial court further determined that the *Muhammad* fraud exception did not apply because Plaintiff's claims that she did not actually sign the Travelers Release but signed a different version of the release had been rejected by the court, and, thus, were precluded under the doctrine of collateral estoppel.

On appeal, the Superior Court, affirmed in part, reversed in part, and remanded. With regard to Plaintiff's allegations of fraud against Defendant attorneys, the Superior Court reversed the trial court's decision finding that the issue was not actually litigated in the Fees Case, and therefore, was not estopped from being raised in the malpractice case. With respect to Plaintiff's remaining claims, the Superior Court ultimately concluded that *Muhammad* applied to bar Plaintiff's claims sounding in negligence and contract against Defendant attorneys. The Superior Court affirmed the trial court's dismissal of the first four counts of Plaintiff's complaint which were based in negligence and/or breach of contract.

The Supreme Court granted allocatur to consider whether *Muhammad* controlled given the facts of the present case. Following a comprehensive review of the Complaint, the Supreme Court concluded that the Superior Court erred in holding that Plaintiff's negligence and breach of contract claims were barred under the *Muhammad* decision. The Court noted that the Defendant attorneys and the lower courts had all incorrectly focused their arguments and analysis solely on Plaintiff's allegations of fraud. The lower courts ignored other averments in Plaintiff's complaint, which did not allege fraud, but, rather, alleged legal malpractice by Defendant attorneys in allowing Plaintiff to enter into a settlement agreement in the Water Damage Case that subsequently precluded her from raising her claims in the Fees Case, while repeatedly advising Plaintiff that

(Continued on Page 10)

HOT OFF THE WIRE ... FROM PAGE 9

the settlement agreement would not preclude those claims. The Supreme Court found that these allegations, which did not challenge the amount of the settlement, but were based on the alleged failure of Defendant attorneys to properly advise Plaintiff of the consequences of signing the Travelers Release, were precisely the type of claims that are permissible under the law.

The Court's review of the Complaint confirmed that Plaintiff had not merely challenged the amount of her settlement in the Water Damage Case, but rather it had alleged that Defendant attorneys provided incorrect legal advice regarding the scope and effect of the Travelers Release. Accordingly, the Supreme Court held that its decision in *Muhammad* barring lawsuits based on the adequacy of a settlement was not implicated by the facts of this case. The Superior Court's decision was reversed to the degree it affirmed the trial court's grant of summary judgment in favor of the Defendant attorneys.

Koch v. Progressive Direct Ins. Co., No. 1302 MDA 2021 (Pa. Super. Aug. 4, 2022)

Superior Court holds that the original rejection of UIM coverage at inception of a policy carries through to the time of an accident even where a subsequent addition of UM coverage is requested by the insured and provided by the insurer.

In June of 2015, Bryan Koch ("Plaintiff") was driving his motorcycle with his wife riding as a passenger when they were struck by a drunk driver. As a result of the crash, Plaintiff's wife was killed and Plaintiff sustained severe injuries including the amputation of his left leg. Plaintiff settled all 3rd party claims against the drunk driver for his total available policy limits of $15,000.00 for each plaintiff.

At the time of the crash, Plaintiff's motorcycle was insured by Progressive under a policy that provided bodily injury coverage of $100,000 each person and $300,000 each accident. Plaintiff presented a demand to Progressive for bodily injury and UIM benefits. Progressive refused to pay the UIM claim arguing that Plaintiff had signed a waiver form rejecting UIM coverage when he originally acquired the policy in 2004.

Plaintiff filed a breach of contract and declaratory judgment action, asserting that Progressive had breached the insurance policy by failing to pay the UIM policy limits. Plaintiff claimed that he as an individual and his wife's Estate were each entitled to available UIM benefits in the amount of $100,000.00. Cross motions for summary judgment were filed by the parties.

In support of Plaintiff's motion, he presented evidence of a telephone conversation he had with a representative of Progressive, nine months before the accident, where he sought to purchase additional coverage for his motorcycle. At the conclusion of this conversation, Plaintiff successfully added UM coverage to his policy in the amount of $100,000 each person and $300,000 per accident. However, the Progressive representative never discussed the availability of UIM coverage. In its motion for summary judgment, Progressive argued that Plaintiff's rejection of UIM coverage in 2004 was still effective and carried forward through the addition and deletion of different motorcycles to the policy as Plaintiff never affirmatively changed this designation rejecting UIM coverage. The trial court granted summary judgment in favor of Plaintiff finding he had not made a "knowing waiver" of UIM coverage and that the rejection of UIM form that Plaintiff signed in 2004 during the inception of the policy was void.

On appeal, the Superior Court reversed the trial court's decision and granted summary judgment in favor of Progressive. The Court noted that Progressive had produced a valid, signed rejection form from Plaintiff, which complied with §1731 of the MVFRL. The Superior Court relied upon the language of §1731, which specifically provides that any person who completes a valid waiver form rejecting UM or UIM coverage under §1731(b)-(c) is precluded from claiming liability of any person based upon inadequate information. The Court also found that the Plaintiff's policy remained the same throughout the years and Progressive had consistently sent the Plaintiff policy renewals, which repeatedly advised Plaintiff that he had rejected UIM coverage.

Finally, the Court observed that under §1791, once the mandates of §1731 are met in terms of a valid waiver form, no other notice or rejection was required. As such, the Superior Court determined that when Plaintiff contacted Progressive nine months prior to the accident and indicated that he wished to obtain more coverage on the existing policy, the Progressive representative was not required to give Plaintiff additional notice of a particular benefit or to obtain another UIM rejection form.

The Superior Court held that

(Continued on Page 11

HOT OFF THE WIRE ... FROM PAGE 10

the UIM rejection forms signed by the Plaintiff at the beginning of the policy remained valid such that the Plaintiff was not entitled to UIM coverage at the time of the accident. The trial court's grant of summary judgment in favor of the Plaintiff was reversed and the case was remanded with instructions for judgment to be entered in favor of Progressive.

Clark v. Schuylkill Canal Ass'n, Inc., No. 611 C.D. 2020 (Pa. Cmwlth. June 13, 2022)

Commonwealth Court finds a County to be immune from liability in a death case under the Recreational Use of Land and Water Act

In September of 2014, Rebecca Clark (Plaintiff) was with a group of friends in Lock 60 Recreational Area ("park") in Upper Providence Township near the Schuylkill River. Plaintiff and her friends walked from the paved parking area, with their chairs, through an area of mowed grass, and down a dirt path to the riverbank. The camp site included a trash barrel and a fire pit. The parking area, about 50 yards away, included a paved driveway, a parking circle, and a kiosk displaying the park's rules and regulations. At the time of this incident, Plaintiff, walked about 15 feet away from the fire pit to use her cell phone. While seated on a rock near the riverbank using her phone, Plaintiff was struck with a large dead tree that fell, causing her death.

A wrongful death lawsuit against a number of parties including Montgomery County was filed on behalf of the Plaintiff's estate.It was determined that the park was owned by Montgomery County ("County") at the time of the incident. The park was held open and accessible to the public free of charge for hiking, bonfires, picnicking, and walking along the Schuylkill River and Canal. The County employed park rangers, whose duties included reporting any dangerous conditions on the property, including identifying and reporting dangerous trees. The County also employed maintenance workers, whose duties included identifying and reporting dangerous conditions. The County was aware that the area was frequently used for fishing and bonfires, both day and night.

Plaintiff's estate retained an expert witness who opined that the tree which killed Plaintiff was 90 feet from the paved parking area and it had been obviously dead and decaying for at least 10 to 12 years before the incident. According to Plaintiff's expert, the County was negligent in not recognizing the clearly dangerous condition of the tree and that it was foreseeable that the tree would fall and injure a visitor. The County moved for summary judgment, asserting immunity under the Recreational Use of Land and Water Act ("RULA") from negligent conduct. The trial court granted summary judgment in favor of the County.

On appeal the Commonwealth Court affirmed the trial court. The Court applied a four-point test to consider whether RULA applied to protect a particular landowner from tort liability. The factors to be considered were: (1) the nature of the area in question, that is, whether it was urban or rural, indoors or outdoors, large or small; (2) the type of recreation offered in the area, that is, whether persons entered to participate in one of the recreational purposes listed in the Act; (3) the extent of the area's development, that is, whether the site was completely developed and/or significantly altered from its natural state and the characters of the area's development; and, (4) whether the area was adapted for a new recreational purpose or would be amenable to recreational purposes of the act even without alteration.

> *"[U]nder §1791, once the mandates of §1731 are met in terms of a valid waiver form, no other notice or rejection was required."*

Applying the facts of this case to the four-point test factors, the Court found that the accident occurred at a 60-acre outdoor, rural, forested area along a riverbank. The site was not largely developed or improved in any significant way or altered from its natural state in any significant manner. The area was also not adapted for any new recreational purpose but consisted of a muddy riverbank, rocks, and trees left open for those who enjoy the outdoors. The Court found that the land had dangers comparable to those of a natural forest. Following the analysis, the Commonwealth Court held that the County was immune from suit under RULA given that the Plaintiff's fatal accident, caused when a tree fell, occurred in a natural and undeveloped recreational area. The trial court's decision was affirmed.

(Continued o Page 12

HOT OFF THE WIRE ... FROM PAGE 11

Bixler v. Lamendola, No. 3:20-CV-01819-CCC (M.D. Pa. July 5, 2022)

District Court denied Defendant's MSJ based on the lack of an expert medical opinion, finding that under the facts of the case, no medical expert testimony was needed to establish causation under PA law.

In October 2018, Steven Bixler (Plaintiff) was involved in an automobile accident while transporting an empty log trailer on Route 42 in Catawissa, Pennsylvania. Plaintiff was traveling at a speed of 45 to 50 miles per hour, when Defendant Andrew Lamendola, (Defendant) who was travelling in front of Plaintiff in the same direction, attempted to make an illegal U-turn. Plaintiff applied the brakes and turned his tractor trailer to try to avoid the collision but the two vehicles collided while Plaintiff's tractor trailer was still moving at 25 to 30 miles per hour.

Plaintiff and his wife filed a lawsuit against Defendant arising from the personal injuries and damages he sustained in the crash. At deposition, Plaintiff testified he believed parts of his body struck parts of the interior of the cab because of a bump on his head and bumps and bruises on his knees and arm. Plaintiff did not immediately notice any pain so he declined medical treatment until two days post-crash when he began experiencing left hand numbness. Upon experiencing pain, Plaintiff immediately sought medical treatment with his family doctor and was referred to a neurologist. After an MRI, neck X-rays, and a nerve test, the neurologist diagnosed Plaintiff with a bulging disc in his neck, which caused a pinched nerve leading to the left-hand numbness. Plaintiff testified he was given three options by the neurologist: do nothing, physical therapy, or surgery. Plaintiff testified that he chose to do nothing and that he still experiences stiffness in his neck and has numbness in his hand about twice per week. Plaintiff denied experiencing numbness before the accident.

Following discovery, Defendant moved for summary judgment, in part, based on Plaintiff's lack of an expert medical opinion to establish causation. The District Court observed that Pennsylvania courts generally require expert medical opinion testimony to prove causation in personal-injury cases. However, expert opinion testimony is not required, if there is an "obvious causal relationship" between the alleged negligent act and the injury complained of. A causal relationship is obvious if the injury is either "an immediate and direct" or the "natural and probable result" of the alleged negligence. Following an extensive review of Pennsylvania case law on the subject, the District Court found that cases in which expert testimony are not required typically share two common traits: (1) the plaintiff begins exhibiting symptoms of the injury immediately after the accident or within a relatively short time thereafter; and (2) the alleged injury is the type one would reasonably expect to result from the accident in question.

The District Court found that a jury could easily find Plaintiff's injuries were the "natural and probable" consequence of the accident. The Court found the following facts persuasive: 1) the collision occurred while Plaintiff's truck was traveling 25 to 30 miles per hour; 2) Plaintiff suffered bumps and bruises from being thrown around during the collision, but he declined medical treatment because he did not initially notice any pain; 3) two days post-crash, Plaintiff began experiencing left-hand numbness, and he promptly treated with his family doctor; and 4) Plaintiff specifically denied ever having experienced left-hand numbness before the accident. The District Court concluded that the instant case was precisely the type of case in which medical expert testimony was not required under Pennsylvania law. Accordingly, the District Court denied Defendant's motion for summary judgment on this issue, holding that a jury could causally link Plaintiff's injury to the accident without the aid of an expert.

By: Shawn Kressley, Esq.,

of DelVecchio & Miller

shawn@dmlawpgh.com

UPCOMING EVENTS

Tue, Sep 27, 2022 - Legislative Meet 'n Greet – Revel & Roost, Pittsburgh

Sat, Oct 8, 2022 - 5K Run/Walk/Wheel to benefit the Steelwheelers - North Park Boathouse

Wed, Nov 2, 2022 - Comeback Award Dinner - The Duquesne Club, Pittsburgh

*** Dec, 2022**- Ethics CLE featuring members of the PA Disciplinary Board

*** Jan, 2023** – Past President's Dinner – Pittsburgh

*** Feb, 2023** - Junior Member Meet 'n Greet, Pittsburgh

*** Mar, 2023 -** CLE on cell phone forensics

*** Apr, 2023** - Annual Membership Election Dinner Meeting – Carmody's Grille, Pittsburgh

Fri, May 5, 2023 - Annual Judiciary Dinner - Heinz Field, Pittsburgh

Fri, May 23, 2023 – Ethics and Golf

** Indicates events not yet confirmed*.

ARE YOU IN COMPLIANCE GROUP 3? NEED CLE CREDITS QUICKLY? WPTLA CAN HELP!

As an approved long distance provider with the PA CLE Board, WPTLA is now offering CLE courses for credit on our website to purchase and view/download. Take your pick from several recent courses, including:

Trial Simplified, a 1 credit substantive course featuring Brendan Lupetin illustrating the importance of keeping things simple for the jury to follow;

War Stories: Trail v Lesko, a 2 credit substantive course featuring Past President John Gismondi featuring a fascinating 'behind-the-scenes' look at his historic $28M award in a dram shop case;

Hallmark Moments on the Road to a $32 Million Verdict, a 1 credit substantive course featuring Jon Perry discussing the verdict in the *Straw* case, the largest verdict in Allegheny County involving a child;

How to Tell the Good Guys from the Bad Guys: An Inside Look at the PA Disciplinary Board, a 2 ethics credit course featuring three Past Presidents and current/former members of the PA Disciplinary Board;

Two Counties Two Verdicts - More in the War Stories Series, a 3 credit course with Josh Geist and Doug Price presenting their recent $1M+ cases.

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The first Board of Governors meeting of the 2022-2023 year was held on Friday, August 5, 2022 at the River's Club in Pittsburgh. Members of the Board of Governors were treated to a buffet breakfast before the meeting began.

33 members participated in this meeting; 14 in person and 19 via Zoom, including a Past President and PAJ's Director of Legislative Affairs and Lobbyist.

Among the business discussed was President Erin Rudert's goals for the year, committee assignments, and the formation of some ad hoc committees.

LEGISLATIVE MEET & GREET

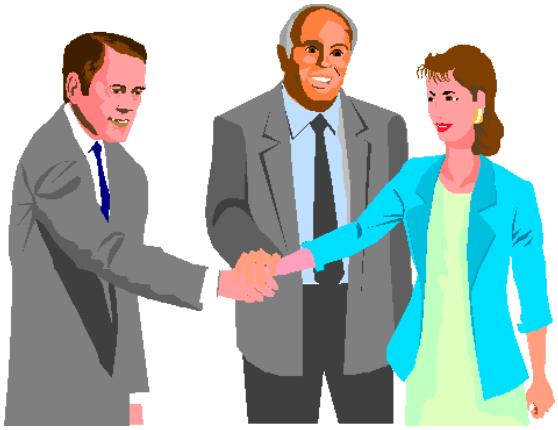
Please make a special effort to attend our Legislative Meet & Greet this year with our state legislators from the Western District of PA. **The PA Association for Justice is sponsoring an open bar in recognition of the importance of having strong attendance.** Your presence at this event will help impress upon our guests how important consumer issues are to our members and provide you with the opportunity to discuss issues of importance with our legislators. There are a number of key issues that will be discussed in the House and Senate this fall.

Date: Tuesday, September 27, 2022

Time: 5:30-7:30 p.m.

Place: Revel & Roost
242 Forbes Ave, 2nd Floor,
Pittsburgh, 15222

Cost: $50.00–includes heavy hors d'oeurves
Open Bar sponsored by PAJ



Go to *http://wptla.org/events/* to register.

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As the kids head back to school, we can't help think about the thousands of children we have provided educational structured settlements to over the last 30 years. If you have a client who is a minor, a tax free structured settlement should be considered to assist in paying for college expenses and tuition.

Typically, attorneys and parents request a college plan with four annual payments between ages 18 to 21. We would suggest that you also consider providing a minimal monthly payment during the college years and then a large lump sum at age 22 or 23. Experience has taught us that in most cases, this is a better alternative because the student will not be disqualified for any loans, grants or financial aid. Payments made to the student while they are enrolled may impact an applicant's ability to receive financial aid.

Over the past 30 years, we have worked on over 50,000 cases in the Commonwealth of Pennsylvania. Our knowledge, creativity and experience help us stand out from the crowd when it comes to serving you and your clients. Call us to help determine the right approach to a structured settlement for your client's needs.

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2022 SCHOLARSHIP ESSAY CONTEST WINNING SUBMISSIONS

The Western Pennsylvania Trial Lawyers 2022 President's Scholarship Essay Contest drew fifteen submissions from school districts across western Pennsylvania. The contest centered on the people's constitutional right to a jury trial in a civil case.

The right to a jury trial in a civil case is guaranteed by the 7th Amendment to the United States Constitution and Article 1, Section 6 of the Constitution of the Commonwealth of Pennsylvania. The right to a civil jury trial is also codified in Title 42 Pa. C.S., Section 5104. Over time, since the 7th Amendment has been adopted, the right to a civil jury trial has been eroded by various appellate court decisions and legislative action.

7th Amendment: In Suits at Common Law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United Sates, other than according to the rules of the common law.

Supporting Material: A Civil Jury: Reviving an American Institution. The Civil Justice Research Initiative. U.C. Berkeley School of Law.

The question that was posed to the students asked if the various appellate decisions and legislative action unfairly restricted the people's constitutional right to a jury trial in a civil case? And further asked the students to take a position as to whether or not the right to a civil jury trial has been unfairly and/or unconstitutionally restricted.

The winners of the contest were Cole Michael Gross of Bedford High School, Hunter Rheinfrank of Mount Lebanon High School, and Samantha Podnar of North Allegheny Senior High School. Their winning essays will be published in this and the next 2 editions of *The Advocate*. Thanks to all the students who participated and the members of the committee: Chair Chad Bowers, Russell Bopp, Elizabeth Chiapetta, Brittani Hassen, Nicholas Katko, Matt Logue, Craig Murphey, Bryan Neiderhiser, Nathaniel Smith, and Kelly Tocci.

The Erosion of the Civil Jury Trial in American Courts

The civil jury has played a crucial role in our judiciary system since the founding of our nation. As colonies of the British Empire, early Americans exercised their right to a jury in civil trials to resist the biased and authoritative reign of English common law. As our nation's constitution and the judicial system began to develop, our founders understood the categorical importance of jury trials in solving civil disputes. The fourth president of the United States, James Madison,was especially clear in his support. "The trial by jury in civil cases is as essential to secure the liberty of the people as anyone of the pre-existent rights of nature." Deciding civil cases through jury trials has also been shown to increase civic involvement and contribute to the legitimacy of our legal system among ordinary citizens. However, as our judicial system has evolved over the centuries, the use and impact of jury trials in civil cases have significantly declined. The constitutional right to have your case heard before a jury in a civil case under the seventh amendment has been unjustly restricted in American society due to overwhelming socio-economic interests, which have implemented harmful judicial and procedural changes to our legal structure.

When determining precisely how jury trials in civil suits have been restricted, it is important to understand by what means the process has eroded over time. From examining the records kept by the state and federal courts, it is evident to see that the percentage of civil cases resolved by jury trials has trended downward significantly. According to the Administrative Office of U.S. Courts, this percentage has decreased from 5.5% of all civil trials in 1962 to a record low of 0.49% in 2020. This remarkable decline in jury trials has been paired with the steady erosion of civil trials altogether. The rate of civil trials per judgeship itself has declined significantly over the same timeline. In 1962, the average judge in U.S. district courts oversaw 10 civil trials a year. In 2020, the average has declined to less than two.This is largely because of an increase in out-of-court settlements and the continued reduction in total cases filed. This is a striking and worrisome decline of one of the most important legal processes in our nation..

The slow death of the civil jury trial is not by accident, rather it is a coordinated assault on our legal system by capital and political interests. For many decades, powerful economic actors have opposed the use of jury trials, as they have been found to be far more likely to side with litigants in wrongful death,

(Continued on Page 19)

liability, and worker's compensation claims. To combat this, these special interests have crafted individual media campaigns to overstate the frequency of high damage awarding cases at the hands of juries. In many cases, this is done to tum public opinion away from jury trials. This allows the reforms we have seen enacted in recent years that diminish the power of civil juries to stand. Additionally, these interests have taken advantage of America's campaign finance system and the media traction from their campaigns to lobby for restrictions on jury trials in civil cases in favor of judicial decisions. This is coupled with attempts to install more favorable judges in elections. According to the Brennan Center for Justice, more than $39 million dollars of campaign cash was flooded into the 2018 elections to select candidates for state supreme court justices. These actions are largely due to the fact that trials decided by judges are far more likely to favor employers over employees in civil suits. This is especially true with judges who have backgrounds in corporate law or as prosecutors.

Those who defend the fairness of these judges would point to the fact that the law requires them to remain impartial in their rulings, regardless of who may have financed their election. However, as politicized as our judicial system has become, it is evident that this money can affect the rulings of even the most unbiased of judges at the state level. Additionally, Research conducted by the University of Las Vegas has found that federal Supreme Court judges endorsed by a political party are far more likely to side with their ideological agendas than against them. When it comes to financial interests, judges often seeking to keep their positions will take their backer's interests into account when ruling on a case. This is in no way claiming that judges are willingly ignoring their duty. This is the simple fact of how many judges must operate in our modem society to continue in their roles. This is precisely why civil trials by jury should be emboldened once again, to protect our legal system against these special economic and political interests who seek to influence the decisions of our judgeships.

The decline of civil jury trials is not limited to the politicization of judgeships. Legislative and procedural changes over time, in fluenced by economic interests, have also been effective at absolving juries of their responsibilities in many cases. One of the most prominent of these changes is the implementation of bench trials as the new standard for most civil cases. When extremely anti-jury scholars were drafting the Federal Rules of Civil Procedure in 1938, they had introduced the jury-waiver default rule. The implementation of this rule now made bench trials the default in civil cases, as opposed to the long-standing legal tradition of jury trials being the default choice. With this change, litigants now must formally request a trial by jury, which is a significant factor in the unjust reduction of civil trial juries.

Some may argue that procedural changes such as these are not implemented with the intent to limit civil trial juries, but are instead put in place to reduce costs for courts and speed up the dockets. However, it can be argued that our constitutional rights are far too important to be infringed upon because of the perceived costs. As citizens, there are ver yfew institutions that should receive financial investment more than our court system. What does it say about the American legal structure, if proper justice and compensation for victims can be hastened due to the perceived costs? Attacks on our civil institutions are attempting to mask under the guise of efficiency. As our constitution is written, It would be nearly impossible for opponents of jury trials to gather the necessary legislative and public support to replace the seventh amendment or the amendments with similar text in state constitutions. Knowing this, those who oppose the civil trial jury must turn to other means and arguments to reduce their role. While procedural changes such as these do not *inherently* restrict our constitutional rights they *effectively* neutralize the intent of the seventh amendment by imposing severe restrictions on their original authority.

It is evident that one of the most important judicial functions in American society has been unfairly restricted. Our constitutional right to the civil trial jury is eroding before our very eyes. From the economic and political interests opposing its existence, to the judicial and procedural changes that have harmed the process, the continued use of the civil trial jury is at risk. This is a fact of our legal system that we cannot allow to continue. We must seek to reverse these detrimental changes for fairer decisions, improved civic involvement, and to promote the legitimacy of our legal system.

Essay submitted by Cole Gross, of Bedford High School.

TRIVIA CONTEST

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

Trivia Question #33

Washington Irving, the author of The Legend of Sleepy Hollow and creator of the Headless Horseman, is famous for introducing the modern version of what other, jollier character to the world?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by December 4, 2022. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #33 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 #32 – **The final climactic scene of "The Good, the Bad, and the Ugly" features *this* specific event, which was also the subject of game theory, social behavior, and statistical logic books written by Martin Shubik and Richard Epstein.**

Answer: A truel – or a three-person duel.

Congratulations to Josh Kirkpatrick, a Junior Member and 2L at Duquesne University, on being the recipient of a $100 Visa gift card!

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
909 MOUNT ROYAL BOULEVARD, SUITE 102
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Through the Grapevine....

Members on the Move:

President's Club Members Michael Gallucci, John Kane, and Janice Savinis, and General Member **Ken Fryncko**, all of Savinis Kane & Gallucci, LLC, have moved to 436 7th Ave, Ste 322 Koppers in Pittsburgh, 15219.

Mark Smith has moved his office to 707 Grant St, Ste 3250 in Pittsburgh, 15219.

Gianna Kelly and **Lauren Kelly** are now working at the new Pittsburgh office of Luxenberg Garbett Kelly & George, at 500 Grant St, Ste 2900, Pittsburgh 15219.

Kila Baldwin, **Board of Governors and President's Club Member Joe Froetschel**, **Past President and President's Club Member Jason Matzus**, and **Laura Phillips** have formed a new firm, Baldwin Matzus. Joe, Jason and Laura are working out of 310 Grant St, Ste 3210, Pittsburgh 15219. P: 412-206-5300 Emails: joe@baldwinmatzus.com, jason@baldwinmatzus.com and laura@baldwinmatzus.com. Kila can be reached at P.O. Box 22433, Philadelphia, 19110. P: 215-313-9858 Email: kila@baldwinmatzus.com

Past President and President's Club Member Sandra Neuman has also started a new firm, Sandra Neuman Law, LLC. She is working out of 954 Greentree Rd, Ste 1000, Pittsburgh, 15220. P: 412-368-0367 Email: ssn@sandraneumanlaw.com

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The ACBA recently honored their members who have been in practice for 50 or 60 years. Of those, WPTLA members include 60-year milestones **Past President and President's Club Member Lou Tarasi**, **Past President and President's Club Member Joe Moschetta**, **President's Club Member Bob Peirce**, and **Denny Phillips**. 50-year milestones are **Past President and President's Club Member Richard Catalano**, **Past President John F. Becker**, **Larry Green**, **President's Club Member John Caputo**, and **President's Club Member Dan Joseph**. Congratulations to all!

Board of Governors Member and Secretary James Tallman has been named the President of the Rotary Club of North Boroughs.

Congratulations and best wishes to **President and President's Club Member Erin Rudert** on her marriage.

Heartfelt condolences to **Immediate Past President and President's Club Member Mark Milsop** on the recent passing of his father.