THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

PUBLISHED QUARTERLY BY WESTERN PA TRIAL LAWYERS ASSOCIATION

WINTER 2023
VOLUME 35, NO. 2

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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CONSIDERATIONS IN REPRESENTING A CLIENT WITH DIMINISHED CAPACITY

We have all likely interacted with a client who does not seem to fully grasp the legal issues, nuances, and risks in a given matter.

Sometimes a client undoubtedly lacks capacity due to a medical condition or diagnosis. In these situations, it must be confirmed whether the client executed a power of attorney instrument (POA) prior to becoming incapacitated. To the extent the client did appoint an agent under a POA, the POA instrument should be carefully reviewed under the facts to ensure that i) it was validity executed as required under Pennsylvania law, ii) the agent has accepted his or her appointment, and iii) the agent's authority is triggered and broad enough to not only pursue the litigation but to also engage in settlement-related planning.

Applicable Pennsylvania law requires that a POA be executed in the presence of two independent witnesses and a notary, and provides that an agent is without the authority to gift and engage in trust planning unless expressly granted in the POA instrument. 20 Pa.C.S. §§ 5601 & 5601.4.

So, while a POA may authorize an agent to file and settle claims, it may not contain the requisite authority to create a trust to hold settlement proceeds or to engage in post-settlement planning which may otherwise be in the client's best interest for financial, tax or public benefit reasons.

A guardianship proceeding may be necessary when a client who lacks capacity is without a preexisting POA or when the authority under the POA instrument is not broad enough to engage in the necessary planning.

When a client has been adjudicated to be an incapacitated person, Pa.R.C.P. 2064 requires court approval to settle an action and outlines how the settlement proceeds may be distributed. The Rule expressly authorizes the use of a Special Needs Trust for incapacitated clients who receive, or may receive, means-tested public benefits like Medicaid or Supplemental Security Income.

In cases where a client's capacity or lack thereof is less clear, there may be concerns whether a client who can otherwise meaningfully engage fully appreciates the information or advice being communicated. Or perhaps the client, or the client's Agent under the POA instrument, may be considering a course of action against advice that is not objectively in the client's best interests.

Pennsylvania Rule of Professional Conduct 1.14(a) provides guidance "when a client's capacity to make adequately considered decisions in connection with a representation is diminished," and provides that an attorney "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

A concern that a client with diminished capacity may not fully appreciate the

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"[E]ven a client with diminished capacity is entitled to make a "poor decision" against advice."

2022 RACE RECAP

WPTLA held its annual President's Challenge 5K on Saturday, October 8, 2022, at North Park. This year marked the 22nd year of the race. Many volunteers arrived early to set up the registration tables, snack area and raffle tent. Registration and arrivals were brisk and everyone enjoyed the pre-race socialization and snacks. This year there were 271 registrants and 203 participants, which was a record number for the race!

The race concluded with the raffle prizes, door prizes, the 50/50 winner (WPTLA business partner, Dave Kassekert, who won $482.50), and awards for this year's category winners. The day was a huge success, with many members, Steelwheelers, friends, family, and four-legged companions in attendance. The proceeds of this event, $40,900.00 (a record amount!), were sent to the Steelwheelers. This brings WPTLA's total contribution to the Steelwheelers over the past 22 years to $607,135.00!

Next year's race is set for October 7, 2023, at North Park, so save the date!

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More 5K photos on page 21.

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 35, 2022-2023

Vol 35	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
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

WPTLA Members pictured above, from L to R in bottom row: Business Partner Bill Goodman of NFP Structured Settlements, Shawn Kressley, Karesa Rovnan, 5K Committee Member Holly Deihl, Kelly Tocci, and Carmen Nocera,

In top row, from L to R: Mollie Rosenzweig, Pete Giglione, Past 5K Chair Chris Miller, Greg Unatin, Dave Landay, Mark Milsop, Taylor Martucci, Rich Ogrodowski, James Tallman, Veronica Richards, Past 5K Chair Sean Carmody, Bill Goodrich, Keith McMillen, Dan Sammel, Brandon Keller, 5K Committee Member Sam Mack, and Chair Chad McMillen.

CONSIDERATIONS IN REPRESENTING A CLIENT ... FROM PAGE 1

options, risks and benefits in pursuing or settling a claim may be allayed when the client ultimately chooses a recommended course of action that is objectively in the client's best interest.

In other cases, Rule 1.14(b) allows an attorney to "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian" when the attorney reasonably believes a client with diminished capacity "is at risk of substantial physical, financial or other harm unless action is taken."

In some cases, such protective action may simply be connecting the client with third-party professionals, such as an estate planning or public benefits attorney, who may be able to counsel the client in making an informed decision in his or her best interests, or engaging a case manager, social worker, or financial professional.

Third-party professionals can provide insight into whether the client is making what may be an objectively "poor decision" after being reasonably informed and counseled.

While the client relies upon the attorney to provide advice and counsel, even a client with diminished capacity is entitled to make a "poor decision" against advice. An attorney can defend a claim for liability for a client's decision when the client was provided with comprehensive information and counseled as to the risks and benefits.

Involving third-party professionals in such decisions can add value to the representation and insulate an attorney from liability provided the file is carefully documented to memorialize the information, options, and advice provided to the client.

In other cases, such third-party professionals may determine that the client is in fact vulnerable and unable to meaningfully make decisions and therefore in need of additional protective measures.

A guardian ad litem may be sought for the purpose of pursing or settling an action under Pa.R.C.P. 2059 when legitimate concerns exist that the client is at risk despite counseling by the attorney and third parties. The procedure for seeking a guardian ad litem is distinct from seeking a formal adjudication of incapacity and the appointment of a guardian of the person or estate for an incapacitated client, and may therefore be a middle ground for a client whose capacity is diminished or who is in a vulnerable position but who may not otherwise require a more permanent guardianship.

Note that Rule 1.14(c) authorizes an attorney to reveal information about a client which would otherwise be confidential under Rule 1.6 if reasonably necessary to protect the client's interests when taking protective action.

In sum, carefully consider a client's capacity and engage third-party professionals such as an estate, trust, and public benefit attorney, case manager, financial professional, or corporate trustee to protect a client with diminished capacity and ensure you are providing comprehensive, value added legal representation.

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COMEBACK DINNER RECAP

WPTLA's Annual Comeback Award Dinner was held on November 2, 2022. In following tradition, this signature event was held at the Duquesne Club with great attendance from WPTLA members, business partners, and past Comeback Award winners. This year's Comeback Awardee was Danielle Salva, who was represented and nominated by Paul A. Tershel of Tershel and Associates. For the first time in the history of the award, the Awardee is an employee of the nominating attorney. Danielle was on her way to work at Tershel and Associates as a legal assistant when she was broadsided by a tractor trailer that lost its brakes and ran a red light. As result, Danielle sustained serious injuries including a subdural hematoma, traumatic brain injury, collapsed lung, multiple fractures requiring surgical repair, and was in a coma for three weeks.

Initially, doctors were unsure if Danielle would survive her injuries. However, Danielle preserved the greatest of obstacles, and after a long 18-month recovery she returned to work at Tershel and Associates. Danielle gave one of the most memorable acceptance speeches in recent memory with her comments demonstrating the true fighter and inspiration she is as a result of circumstances beyond her control. Her positive attitude and outlook on life is a reminder to all of us that people can make it through the hardest of times and come out better on the other side.

Danielle's charity was the Richeyville Fire Department, who were first responders on the scene of her accident. We had the pleasure of welcoming Chief Dave Pohill and George Hagedorn from the Fire Department. These individuals were the brave men that pulled Danielle from the wreckage at the scene and can be credited with saving her life. It was an honor to have them in attendance for the presentation of the award to Danielle.

Lastly, we celebrated Lorraine's retirement from WPTLA. Lorraine has been a driving force of the organization in terms of programs that she's implemented. She will be missed.

By: Brittani R. Hassen, Esq. of
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Pictured above are Board of Governors Member and Nominating Attorney Paul Tershel ,and 2022 Comeback Awardee Danielle Salva.

More photos from the Comeback Award Dinner can be found on page 22.

Last on the evening's program for the Comeback Award Dinner was a Special Presentation. Lorraine Eyler, WPTLA's former Administrator and current Administrative Assistant, will be retiring Dec 1, 2022.

Lorraine has been involved with WPTLA since 1996, when she assisted then-Administrator Deborah Eyler Smith. Lorraine took over as Administrator in July 1996. During her tenure, she worked with various Presidents to create the Comeback Award Dinner, the President's Challenge 5K Run/Walk/Wheel event, and the annual Scholarship Essay Contest. She continued to work the 5K event over the years, only missing one when her daughter played in an out-of-town softball tournament. Lorraine stepped down as Administrator in June 2003. In August 2015, Lorraine was again hired as the administrative assistant.

While she will be back to help us on and off in the near future, her immediate plans are to spend 6 weeks in Florida with her husband Bob and with her daughter Tiffany, who works fulltime at Disney.

See a Thank You note from Lorraine on page 5.

Lorraine J. Eyler
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December 1, 2022

Dear WPTLA Officers, Board of Governors, and Members,

I would like to thank you for the beautiful Brighton jewelry set given to me at the Comeback Award Dinner after the announcement of my December retirement. I would also like to thank President, Erin Rudert for her kind words about my WPTLA accomplishments and long-time involvement.

I have truly enjoyed working with Laurie Lacher and with such a talented group of people who have represented and helped so many individuals through devastating and difficult circumstances. I am also grateful to have worked for an organization who has made giving back to the community a priority.

Thank you for the opportunity to not only work for you once many years ago, but twice! I very much appreciate your generosity and will miss seeing all of you.

Sincerely,

Lorraine J. Eyler

PRESIDENT'S MESSAGE

Finding Value in Community

I was recently speaking with an attorney who is not currently a member of WPTLA, but who has been a member in the past, and asked this attorney why they no longer were a member.The attorney told me that they do not find value in community – not specifically as to WPTLA, but community within any organization.As a person who has spent a lot of time thinking about how to grow our membership, these comments about community caused me to reflect on WPTLA as a community as opposed to an organization, and to consider how individual people find (or don't find) value in our community.

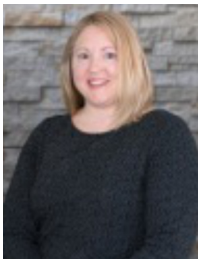
According to clinical and community psychologist David McMillan, a community is defined by four criteria: membership; influence; integration and fulfillment of needs; and shared emotional connection. To be part of a community, you must feel a sense of belonging (membership), feel like you make a difference to the group and that the group makes a difference to you (influence), feel like your needs will be met by other group members (integration and fulfillment of needs), and feel that you share history, similar experiences, time, and space together (shared emotional connection)."An Introduction to the Sense of Community," David McMillan, https://www.drdavidmcmillan.com/sense-of-community/article-1.

Membership is only 25% of the definition of community, yet organizationally our focus tends to be on membership, both from the standpoint of numbers of members and dollars received for dues.Having an organization with paying members does not create a community, and the fact that "membership" can be established solely by paying dues minimizes the importance of membership in the larger perception of WPTLA as a community.As part of our recruitment efforts, I believe we need to focus organizationally on the other three aspects of community to demonstrate to new members that we are more than a professional organization to put on a resume or to use to build business.

As a community of mostly plaintiffs trial lawyers, we have a built-in connection among each other based on our shared professional endeavors and experiences with law school, career development, clients, cases, firm life, etc.This is why so many of us love to swap war stories – because we can relate to each other's professional lives and know that our community members will appreciate our experiences in a different way than someone who isn't a trial attorney.That moment in conversation where everyone realizes oh – I've been through this same thing – strengthens our ties as a community.This shared emotional connection is a selling point that we need to emphasize to potential new members.

We also need to emphasize to potential new members that they make a difference to our community as a person and as a unique and valued member – not just as a dollar amount.Every person brings their own experiences, and while there may be similarities or parallels, no two people have followed the exact same path to reach the current points in their careers.Each member needs to feel like their presence matters and that the community as a whole benefits from their participation.Likewise, each member needs to be able to identify tangible ways in which the community matters to them – whether it is through professional development, practice help, CLEs, networking opportunities, charitable endeavors, or even on a more basic level of providing a different level of social interaction.

I am going to reframe my conversations with people about WPTLA from the standpoint of inviting them to participate in our community of trial lawyers as opposed to asking them to join as a member.I hope to find a more receptive audience by focusing the conversation on the value and benefits of WPTLA as a community rather than leading with a hard ask for money.As for the attorney mentioned above, I did tell them that even if they do not find value in community, the community still finds value in them and invited them to an event.Maybe they come, maybe they don't, but I believe the interaction was more meaningful than in past times where my primary goal was a dues check.



By: Erin K. Rudert, Esq. of

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Past Presidents' Dinner

This quinquennial event is scheduled for Wednesday, January 11, 2023 at the newly-renovated LeMont Restaurant in Pittsburgh, PA.

Cocktails begin at 5:30, dinner will be served at 6:30pm. Following dinner, all Past Presidents in attendance will be recognized and presented with a gift. A photographer will be available.

Many that attended in 2018 had a wonderful time seeing and reconnecting with old friends and colleagues. Please plan to join us! Invitations have already been mailed.

Make your reservation now at www.wptla.org/events

SUPERIOR COURT DISCUSSES PLEADING RECKLESSNESS AND OTHER INTERESTING ISSUES

I recently read with interest the Pennsylvania Superior Court's decision in *Monroe v. CBH20, LP*, 2022 PA Super 197. That per curiam opinion arose out of a zip line incident which resulted in injuries to the Plaintiff. The incident occurred due to a gap between a landing platform and the ground. The Defendant's knowledge of the defect was evidenced by the fact that the gap was covered by carpeting. An expert report revealed that the problem could have been easily solved.

The Defendant filed a New Matter claiming the benefit of an exculpatory release. The rejoinder to this defense was that the release did not insulate the Defendant from damages due to recklessness. Ultimately the issue came before the trial court with Defendant alleging that the Plaintiff failed to plead facts that sufficiently describe how the Defendant was Reckless. The trial court found the Defendant's argument convincing and granted judgment on the pleadings.[1]

The Superior Court began its analysis with the language of Rule 1019(b) that "Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally. "The Court continued its analysis by citation to Prosser and Keaton for the proposition that "gross negligence and recklessness have not historically been identified as independent causes of action. Instead, they are aggravated forms of negligence." *Monroe*, 2022 PA Super 197. The Court thereafter cited approvingly *Archibald v. Kemble*, 2009 PA Super 79, 971 A.2d 513, which has been frequently cited for the proposition that recklessness can be pleaded generally.[2]

Another interesting issue addressed by the Court was whether or not an expert report attached to a brief should be disregarded. This is based upon the game-playing paradigm that once flourished (and unfortunately to some extent today still prevails) in the Courts. The argument was that a brief is not considered part of the record; therefore, anything attached to a brief is not part of the record. This argument was properly rejected by the Superior Court by looking to Rule 1035.1 to determine what the record consists of.

Ultimately, the judgment was reversed and the case remanded.

In addition to this issue, the *Monroe* decision may be useful to cite for a number of other propositions. They include:

·The court proceeded on the basis of the substantive proposition that "an exculpatory clause in a contract does not release a defendant from liability arising out of recklessness." *Monroe*, 2022 PA Super 197 citing *Tayar v. Camelback Ski Corp.*, 616 Pa. 385, 47 A.3d 1190 (2012).

·The twist to its statement of the standard of review by using the phrase "there is no combination of facts." Specifically, the Court stated "before a court is permitted to enter judgment as a matter of law rather than allow the jury to decide the case, it must be clear and free from doubt that there is no combination of facts to be gleaned from the evidence that would support a finding for the non-moving party." *Monroe*, 2022 PA Super 197 citing *Braswell v. Wollard*, 2020 PA Super 279, 243 A.3d 973, 977 n.3 (Pa. Super. 2020).

·The Court's willingness to accept an expert report submitted after a deadline set by a case management order; and its recognition that any prejudice could have been cured by granting the defendant leave to file its own expert report.

·The interesting thought (not a legal pronouncement) that a motion for judgment on the pleadings after a motion for summary judgment may be untimely.

The one caveat about *Monroe* is that it was decided by a divided en banc court. 5 judges joined the per curiam opinion. One concurred without an opinion. 3 dissented.

ALLEGHENY COUNTY MEDIATION RULE UPDATE

The Court has printed a notice in the Pittsburgh Legal

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[1] The procedural posture was actually a little more complicated.Prior to the Motion for Judgment on the Pleadings the Defendant had filed a motion for summary judgment which was denied. However the court ultimately explained in its opinion why the entry of summary judgment was appropriate.

[2] By way of caveat, the Monroe Court did note that "Once discovery is complete, then a plaintiff can be required to produce evidence of recklessness." Monroe v. CBH20, LP, 2022 PA Super 197. However by way of editorial by me, this should not be interpreted to mean that the plaintiff should be required to produce and admission of recklessness. Rather, in the majority of cases the proof of recklessness is in the form of an inference (i.e., circumstantial – such as in Monroe where the evidence showed that the defect was covered by carpet).

COMP CORNER

CAN LEWIS APPLY TO IMPAIRMENT RATINGS OF 35% OR MORE?

This is a follow-up to the column in the last edition of The Advocate. There, I noted that Doug Williams' argument regarding an impairment rating evaluation of 35% or more potentially ties a Defendant's hand from pursuing a subsequent Termination Petition. Readers will likely recall the case of *Lewis v. WCAB* (Giles and Ransome), 919 A.2d 920 (Pa. 2007) which dealt with serial Termination Petitions. A previous Termination Petition had been denied and Defendant obtained a new evaluation and sought to terminate benefits in the case that led to the Supreme Court's decision. The Supreme Court determined that in those circumstances a Defendant must prove a change of condition in the subsequent Termination Petition. Can this be applied to impairment ratings?

The Supreme Court's reliance in *Lewis* on the seminal modification case of *Kachinski v. WCAB* (*Vepco Construction Company*), 516 Pa. 240, 532 A.2d 374 (Pa. 1987) may be instructive. The Court in reaching its decision in *Lewis* relied upon one of the four prongs of modification in *Kachinski* - specifically the requirement that the Defendant show a change in medical condition. The logic was that if an individual had a disability the burden of proof in a modification included such a requirement. The Court determined that where a prior Termination Petition had been denied, the Defendant needed to show a change in condition in order to prevail on a subsequent Termination Petition. Frankly, this finding is not really inconsistent with the burdens that Claimants have to meet on certain Reinstatement Petitions filed after a prior judicial determination.

There are two situations where a 35% impairment rating can come into play in litigation. The parties could have litigated a prior Modification Petition where an examination was obtained outside the 60 day window following the receipt of 104 weeks of benefits. Conceivably, there could be an impairment rating of 35% or more obtained by the Claimant and one under that obtained by the Defendant which led to the filing of the petition. If the Claimant prevails in such litigation he has, in the judicial determination, an impairment rating of 35% or more. Given *Lewis*, if a subsequent impairment rating comes in under 35% shouldn't the Defendant have to show a change in condition? Would that not necessarily follow in light of the fact that a Claimant is to be at maximum medical improvement at the time of the impairment rating? In the case where there is a judicial determination, the *Lewis* argument might be a reasonable one to make. Query – what if there is a new version of the AMA guides in use at the time of the later IRE?

The second situation may be more problematic. Claimant undergoes an impairment rating evaluation, and it comes back at 35% or more. Nothing is filed because the Defendant doesn't have a basis to convert from total disability to partial disability. A subsequent IRE is obtained, and it comes back below 35%. Can the argument still be made that the Defendant needs to show a change in condition even though no judicial determination was involved?

An impairment rating evaluation whether litigated or not certainly has a significant effect automatically within the system. Ratings of 35% or more mean the Claimant stays on total disability benefits until other actions are taken. Given the substantial effect such a rate has on the status of the case, the longevity of Claimant's benefits, and the burdens associated with changing them, one could argue that a change of condition is required in order to establish an impairment rating below 35%. Combine that with the maximum medical improvement aspect of rating evaluations and you may have a colorable argument that could persuade the courts.

I recently had the opportunity to try this argument out. However, the case settled on terms favorable to the Claimant, and we did not reach a decision.

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BY THE RULES ... FROM PAGE 8

Journal indicating that "the first trial term to which this Rule will apply is May 2023." The notice further stated "Rule 212.7 will not apply to cases on the March trial list. The stated rationale is that the earlier trial lists were not published with 6 months notice. The undersigned notes that despite this notice, the Rule was technically effective September 13, 2022; and the six month prior publication provision appears to be part of a note.

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***Monroe v. CBH2O LP, d/b/a Camelback Ski Resort,*No. 1862 EDA 2019 (Pa. Super. Nov. 21, 2022) (en banc) (per curiam)**

Superior Court addresses the proper pleading standard for allegations of recklessness in a Complaint and holds that they can be averred generally pursuant to Pa. R.C.P 1019(b).

In this personal injury case, the Superior Court considered, *inter alia*, whether a trial court committed an error of law in holding that general allegations of recklessness pled in a Plaintiff's Complaint were legally insufficient.

The Court provided an analysis of the pleading requirements under Pa. R.C.P. 1019 and determined that the plain language of this rule indicates that, while a party must plead the material facts that support a cause of action, a party may generally aver knowledge, intent, and state of mind. The Court found that gross negligence and recklessness are states of mind and that they are forms of negligence, not independent causes of action. For this reason, Pa. R.C.P. 1019(b) allows the plaintiff to plead gross negligence and recklessness generally.

Next, the Court examined its prior opinion in *Archibald v. Kemble*, 971 A.2d 513 (Pa. Super. 2009) where it had previously affirmed the concept that recklessness could be averred generally. The Court found that the *Archibald* decision recognized an important distinction between the pleadings stage of the case and the summary judgment stage of the case. The Court then provided the following analysis of that distinction:

> At the pleadings stage, the rules allow a plaintiff to make a general averment of gross negligence or recklessness because a plaintiff may not be fully aware of the defendant's state of mind. Only through discovery can the plaintiff ascertain what the defendant knew or should have known about the risk involved. It would place an undue burden on the plaintiff to plead specific facts about a defendant's state of mind at the time a lawsuit is initiated.
>
> Discovery gives the plaintiff an opportunity to learn this information. Through interrogatories, depositions, and requests for admission, a plaintiff can learn whether a defendant had notice of a dangerous condition before the plaintiff was injured. A plaintiff can discover information about the defendant's training and experience to see if the defendant knew or should have known about the risk involved that led to plaintiff's injuries. The discovery phase of the case also gives the plaintiff time to hire an expert to investigate and opine on the standard of care and whether it was breached, not only in terms of ordinary negligence, but whether there were gross or reckless deviations from the standard of care. Once discovery is complete, then a plaintiff can be required to produce evidence of recklessness.

Turning to the facts of the instant case, the Court found that the Plaintiff's Complaint pled specific allegations of negligence and also included general allegations of recklessness. The Court held that this was sufficient to meet the requirements of Rule 1019(a) and (b) and found that the trial court had erred as a matter of law in concluding otherwise.

Noting that some trial courts in the commonwealth had been misapplying the plain language of Rule 1019 as it pertained to allegations of recklessness, the Superior Court provided a clear rule on this issue moving forward, stating as follows in footnote 6:

> [A]ll other trial court decisions that have sustained preliminary objections or granted judgment on the pleadings based upon demands for heightened factual averments to support a claim of willful, wanton, or reckless conduct **did not accurately apply the law**. Our ruling today removes any doubt that, so long as a plaintiff's complaint (1) specifically alleges facts to state a *prima facie* claim for the tort of negligence, and (2) also alleges that the defendant acted recklessly, the latter state-of-mind issue may only be resolved as a matter of law after discovery has closed.

***Chilutti v. Uber Technologies, Inc.* ,2022 PA Super 172 (Pa. Super. Ct. Oct. 12, 2022)**

Superior Court holds a mandatory arbitration agreement between Uber and one of its passengers to be invalid.

In this personal injury action, the Plaintiff, who uses a wheelchair for mobility assistance, used the Uber software application to obtain a ride home from a medical appointment. While in *(Continued on Page 11)*

HOT OFF THE WIRE ... FROM PAGE 10

transit, the driver of the Uber made an aggressive left-hand turn, causing Plaintiff to fall out of her wheelchair and strike her head, rendering her unconscious.

Plaintiff filed a complaint against Uber seeking to recover for her injuries sustained

in this incident. In response, Uber filed a petition to compel arbitration in which they argued the terms and conditions of the Uber application required Plaintiff to arbitrate her injury claims. The trial court granted the petition to compel arbitration and this appeal followed.

The Superior Court conducted an extensive analysis of the interplay between the Commonwealth's public policy, which favors arbitration, and the constitutional right to a jury trial. The Court found that the constitutional right to a jury trial should be afforded the greatest protection by the courts. As such, the Court set forth a new standard of review to be applied to the question of whether or not a party has made an unambiguous manifestation of assent to arbitration in an online/website agreement. The required elements of this new standard are: (1) explicitly stating on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company's "terms and conditions," and the registration process cannot be completed until the consumer is fully informed of that waiver; and (2) when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the "terms and conditions" provision but should appear at the top of the first page in bold, capitalized text.

> ***"[W]hen a litigant fails to request a special verdict slip that would have clarified the basis for a general verdict, and the verdict rests upon valid grounds, the right to a new trial is waived."***

Turning to the facts of the instant case, the Court found that Uber's alleged arbitration agreement had been sent to the Plaintiff via a set of hyperlinked "terms and conditions" on a smartphone application. The Plaintiff did not click on or access the terms and conditions before the registration process was completed. Furthermore, the definition of arbitration was not contained in the agreement and there was no link to the definition. There was also no explanation as to the difference between binding and non-binding arbitration in the agreement. For these reasons, the Court found that the Plaintiff was not informed in an explicit and upfront manner that she was giving up her constitutional right to seek damages through a jury trial proceeding. Accordingly, the trial court's ordering granting Uber's Petition to Compel Arbitration was reversed.

***Estate of Cowher v. Kodali, No.*77 MAP 2021 (Pa. Sept. 29, 2022)**

Supreme Court applies the General Verdict Rule to uphold a lump sum jury award in a medical malpractice action.

Following trial of this medical malpractice case, the jury awarded the Plaintiff, a lump sum amount of damages under the Survival Act but did not itemize the amount of pain and suffering damages or other components of its aggregate award. On appeal, the Superior Court granted certain defendants in the case a new trial on survival damages based on their claim that the admission of plaintiff's expert opinion testimony on pain and suffering was erroneous.

The Supreme Court granted allocator to address the following narrow question: Where Defendants failed to request an itemized verdict slip such that the jury would have been required to separately value the amount of each element of damages under Pennsylvania's Survival Act and where Defendants failed to object to the general verdict slip given to the jury during deliberations, knowing that they intended to challenge any pain and suffering award rendered by the jury, whether those same defendants have waived a new trial on damages?

The Supreme Court held that the Defendants had waived a new trial on survival damages pursuant to the General Verdict Rule. This rule provides that when a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal. Elaborating on the rule, the Supreme Court stated that a defendant who fails to request a special verdict form in a civil case will be barred on appeal from complaining that the jury may have relied on a factual theory unsupported by the evidence when there was sufficient evidence to support another theory properly before the jury. Thus, under the rule, when a litigant fails to request a special verdict slip that would have clarified the basis for a general verdict, and the verdict rests upon valid grounds, the right to a new trial is waived. The rule has been an explicit feature of Pennsylvania law since 2009.

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HOT OFF THE WIRE ... FROM PAGE 11

In the instant case, the Supreme Court found that the Defendants, despite having multiple opportunities to do so, never once requested a special verdict breaking down types of damages despite knowing before trial commenced that the propriety of Plaintiff's expert's testimony was a possible appellate issue. In fact, Defendants affirmatively sought a lump sum award of survival damages from the trial court. For these reasons the Supreme Court concluded defendants had waived their claim to a new trial under the General Verdict Rule.

***Williams v. The GEO Group, Inc.*,2022 PA Super 148 (Pa. Super. Aug. 24, 2022)**

Superior Court affirms order granting Plaintiff's motion to compel a psychological autopsy report prepared by Defendant prison

This negligence action arose out of the Plaintiff's decedent's suicide while an inmate in a private prison owned by the Defendant. Plaintiff alleged that decedent covered the window of his cell and the officer on duty failed to intercede prior to his death by suicide.

In discovery, the Defendant provided Plaintiff with all requested documentation except a report called a "psychological autopsy." The preparation of this report was required under the Defendant prison's suicide prevention policy. The Defendant claimed that the document was protected as being privileged as a peer review document under the Peer Review Act ("PRPA"), as a work product document, and because the document was not relevant to Plaintiff's cause of action. Plaintiff filed a motion to compel the report, which was granted by the trial court.

On appeal, the Superior Court found that the report was not privileged under the PRPA. The Court found privilege under PRPA extends only to materials prepared in furtherance of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. The evidence in this case confirmed that this report was not the product of peer review but instead the result of the Defendant prison's routine internal policies following an inmate's death. Further, there was evidence that the report was generated by reviewing both medical and non-medical information following a request for the preservation of evidence in anticipation of potential litigation. As such, the Court concluded that the purposes underlying the enactment of the PRPA, which concerns the self-policing of medical professionals in a bid to improve medical care, were not the motivation behind the drafting of the report.

Next, the Court found that the report was not privileged under the scope of Pa. R.C.P. 4003.5 because the authoring doctor and the rest of the contributors were acting in the regular course of their employment with the Defendant prison. Thus, they did not qualify as "experts retained or specially employed by another party in anticipation of litigation," as specified under Pa. R.C.P. 4003.5(a)(3).

> ***"[P]rivilege under PRPA extends only to materials prepared in furtherance of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care."***

Finally, the Court held that the report was discoverable under Pa. R.C.P 4003.1, finding its content was informative of the subject matter in the pending action, namely the circumstances surrounding the suicide. As the information was clearly relevant and not subject to privilege it was discoverable. The Defendant's argument that the report, which contained primarily mental health information, was not relevant to plaintiff's negligence action was found to have no bearing on its discoverability by the Court.

The Superior Court affirmed the order compelling production of the report.

By: Shawn Kressley, Esq.,

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UPCOMING EVENTs

Jan 11, 2023 – Past President's Dinner –LeMont Restaurant, Pittsburgh

Feb 16, 2023 - Junior Member Meet 'n Greet - The Foundry Table & Tap, Pittsburgh

Mar 8, 2023 - long distance substantive CLE on cell phone forensics

Apr 4, 2023 - Annual Membership Election Dinner Meeting – Carmody's Grille, Pittsburgh

Fri, May 5, 2023 - Annual Judiciary Dinner - Acrisure Stadium, Pittsburgh

Fri, May 26, 2023 – Ethics and Golf - Shannopin Country Club, Pittsburgh

MEMBERS PICTURES & PROFILES

Name: Carmen J. Nocera

Firm: Ainsman Levine, LLC

Years in practice: 3

Bar admissions: Pennsylvania

Special areas of practice:

Personal injury and workers' comp

Tell us something about your practice that we might not know: Before becoming an attorney, I was an environmental health and safety consultant in the construction industry. My job was to prevent injuries in the workplace and ensure OSHA compliance. Now, a significant portion of my practice includes representing injured workers.

Most memorable court moment: Receiving my first arbitration verdict for a very well-deserving client and his wife.

Most embarrassing court moment: Fortunately, I haven't experienced any embarrassing moments just yet. I'll be sure to let everyone know when I do!

Most memorable WPTLA moment: The first Comeback Award Dinner that I went to was the most memorable WPTLA moment. It serves as a great reminder of why we work so hard for our clients.

What advice would you give yourself as a new attorney just passing the bar?: Take care of yourself and your well-being. You cannot take care of others if you're not taking care of yourself. Exercise, get sleep, eat well, and decompress. This is all easier said than done but it's essential.

Secret vice: Coffee – although it is not much of a secret.

People might be surprised to know that: I love to cook. If I was not an attorney, I would go to culinary school and open a restaurant.

Last book read: *A Man's Search for Meaning* by Viktor Frankl

My refrigerator always contains: Hot sauce

My favorite beverage: Diet Coke

My favorite restaurant: Carmella's Café in Youngstown, Ohio. It is my family's restaurant and is named after my paternal grandmother. Tell them Carmen sent you!

If I wasn't a lawyer, I'd be: I would be a chef and restaurateur.

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2022 SCHOLARSHIP ESSAY CONTEST WINNING SUBMISSIONS

The second winning essay from WPTLA's 2022 President's Scholarship Essay Contest is printed below.

To the founders, the civil jury was a beacon of democracy, for it epitomized the foundational principles that united the American colonies. Premier among them, self-actualization and fair deliberation. The civil jury was so immensely interconnected with their notion of civic engagement that they deemed it unnecessary to codify its protections during the amalgamation of what were, at the time, considered radical privileges and immunities in the Constitution. Just over 150 years later, this once bright beacon has grown desolate, stripped of its dignity by corporate machinations and judges who seek to consolidate judicial power in the hands of an elite few. Under the guise of modernizing America's institutions, these few have dimmed the founder's vision of a participatory judiciary and unconstitutionally ventured to disincentivize jury trials in civil cases.

To adequately assess whether or not the actors behind the various appellate decisions and legislative actions from the late 20th to the early 21st century overstepped their constitutional bounds, the irreparable value of a jury trial in a civil case must first be discerned. Jurist William Blackstone once stated that "delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty." Among the principles which the 7th Amendment seeks to preserve is the indispensable right t fair deliberation. The civil jury reigned as the tried and true medium of this objective, across the arc of the nation's history, until powerful economic actors began to accumulate disproportionate representation in government.

Compounding state deficits, tales of incompetent jurors and groans of ineffiency eventually overshadowed the integral role of the civil jury in American civics, amounting to a price which legislators were no longer willing to pay. Fleming James Jr. reflected this sentiment when he declared: "The right of jury trial should not be expanded. This method of settling disputes is expensive, dilatory -- perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as to not jeopardize the attainment of other objectives." Put plainly, the drafters of the 1938 Federal Rules of Civil Procedure did not intend to preserve the keystone institution which was the civil jury, but rather to confer power to powerful economic entities and elite, non-representative, judges. In stark contrast to the philosophy first conceived by William Blackstone and commended by the founders, Charles E. Clark proclaimed: "General rules of convenience should prevail." It is clear that this new, unconstitutional, objective of disincentivizing trial by jury in civil cases would have to be achieved through the illusion of constitutional means. These objectives would first be instituted with a jury-waiver default rule but later exacerbated with progressively arbitrary rules.

A 2020 study, sponsored by the American Bar Association, reveals the effectiveness of the red tape in place that disincentivizes civil trial; eighty-nine percent of surveyed judges felt "litigants would rather settle than go to trial." Among the most potent tools cited in this reasoning were damage cap tort reforms and binding arbitration. Although it was not expressly unconstitutional for the federal government to incentivise arbitration settlements, empirical evidence shows that these tools are clearly tailored to favor the litigant with more capital and have disproportionately benefited the defendant in medical malpractice, employment, and consumer contract cases. Tort reforms which impose caps on damages are unconstitutional in practice, because of the extent to which they allow a more powerful economic actor to disincentivize a financially vulnerable defendant from taking their case to civil trial. Tort reforms do not directly deprive a plaintiff of their trial, but they certainly deprive them of just compensation; Regardless of the case's verdict, damage caps allow the more powerful actor to insure that the plaintiff spends more money than they receive in punitive damages. Any rational actor would rather seek arbitration, where the outcome will not necessarily be a net loss even though an arbitration agreement is certainly much more challenging to appeal. Sandra Day O'Connor helped usher in public acceptance of these tools, primarily tort reform, when she claimed that excessive punitive damages have an adverse effect on product development. This appeal to authority was timed perfectly; many were already skeptical of whether the merits of a civil jury were worth the cost.

Arguably the greatest merit of the civil jury is its capacity to deliberate fairly. Corporate machinations have sought to undermine this long-standing truth with their new found association to a modernizing world:

Continued on Page 20

they depicted themselves as victims and jurors as the bewildered herd. The Supreme Court echoed this composition fallacy in 1996 with the case of Cooper Industries, Inc. v. Leatherman Tool Co., when it condemned the jury for its "expression of its moral condemnation," through the medium of excessive punitive damages. Corporations would use their influence to perpetuate this trend by portraying jurors as too inexperienced to analyze technical evidence, too reliant on anecdotal evidence, and too emotionally charged. Coinciding calls for a cheaper, more convenient, and objective process of civil deliberation have conferred fact finding and damage assessment powers to judges, historic domains of the jury.

Judges and jurors are both influenced by many of the same biases; race, sex, age, political affiliation, etc. The assumption that judges are less biased is false, for they are equally as susceptible to emotional bias and far more susceptible to corporate bias (via their campaign and past work experience). Jurors have a panoply of experience in areas in which most judges have little to none. The conferring of power from civil juries to judges thus reveals a more disturbing, unconstitutional, truth: judges are more likely to dish out preferential treatment for corporations. Given the argument that judges are generally not as objective as a jury, appellate decisions and legislative actions that confer power to them are certainly not aimed at expanding democracy and equality of opportunity as laid out by Lewis Brandeis in the Ashwander Rules. Indeed, not only do these actions blatantly overstep Hamilton's promises of a harmless Judiciary in Federalist 78 and the founders' intentions for the 7th Amendment, but they also blatantly contradict Brandeis' 1936 concurrence. This preferential treatment of corporations is not only supported by the law, but also is perpetuated in the interpretation and application of the law through the medium of judges.

The preferential treatment of powerful economic entities and the bias of judges is reflected in a 2006 study that reveals how 80% of employment descrimination cases were decided using Summary Judgement (Rule 56). Rule 56 and Rule 12(b)(6) of the 1938 Federal Rules of Civil Procedure empowers non-representative judges with the authority to select which cases are worthy of a trial and what evidence can be presented. Providing judges with this gatekeeper role based on their discretion effectively gives them the privilege to decide to whom the 7th Amendment applies and to whom it does not, arguably violating the equal protection clause of the 14th Amendment.

Another manifestation of the convenience of which Charles E. Clark spoke, was echoed in the 1996 Civil Justice Reform Act. Although sections of the 1938 Federal Rules of Civil Procedure such as Rule 12(b)(6) and Rule 56 had previously been used to incentivize the dismissal of inconvenient cases, a mechanism to facilitate the transition of the civil court system from a deliberate, non-partial, institution to a conveyor belt of of inexpensive resolutions had never been so dubiously codified. Among the greatest merits of a civil jury was its capacity to be thorough and fair in its deliberations; Rule 12(b)(6), Rule 56 and the 1996 Civil Justice Reform Act incentivise judges to short-circuit civil cases, sacrificing this quality for sheer quantity.

The civil jury, in many ways, has been America's north star. It was a uniting force during the revolution and it has endured evolving socio-political circumstances and, no matter how polarized the nation, brings representatives of diverse swaths of people together in a harmonious manner for a not-so-harmonious situation. Perhaps DeTocqueville's warning of how our civic institutions will come to pass is fitting, if the trends of the past are any measure of the future: "If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten we may apply the methods derived from them badly; we might be left without the capacity to invent new methods and only able to make a clumsy and man unintelligent use of wise procedures no longer understood." As an American, one would not like to believe this. The civil jury, just like the Constitution, is both living and inspirational. Although its beacon of principle may fade, its roots are so deep that its memory will never grow desolate.

Essay submitted by Hunter Rheinfrank, of Mt Lebanon High School.

TRIVIA CONTEST

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

Trivia Question #34

Stellar dendrite describes the crystalline shape of what (all too) common outdoor winter object?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by March 4, 2023. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #34 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 #33 –**Washington Irving, the author of The Legend of Sleepy Hollow, is famous for introducing the modern version of what other, jollier character to the world?**

Answer: Santa Claus

Unfortunately, there were no entries received for this contest!

5K PHOTOS

Oct 8, 2022

Pictured in 1, from L to R: Board of Governors Member Clint Kelley and his wife Cindy.

In 2, from L to R: Board of Governors Member Shawn Kressley and past 5K Chair and Past President Chris Miller.

In 3: 5K Committee Member and Vice President Katie Killion and her daughter Gracie.

In 4: Kelly Tocci and her husband David.

In 5: Past President Davd Landay and his family.

In 6: 5K Chair and Board of Governors Member Chad McMillen and his daughter Macie, and Secretary James Tallman.

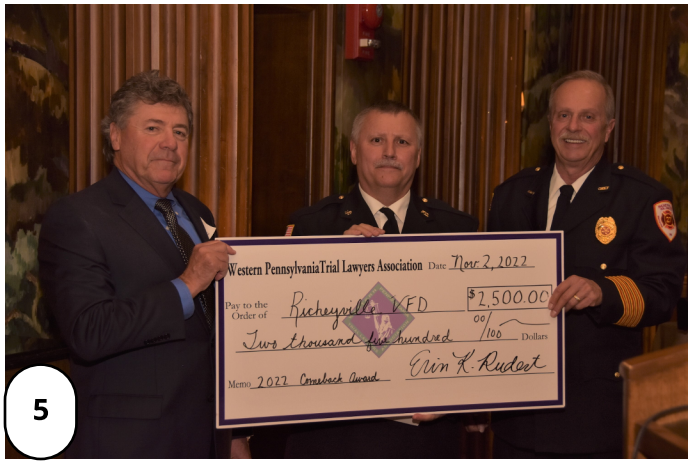
In 7: Immediate Past President Mark Milsop.

In 8: Board of Governors Member Carmen Nocera and his partner Ben, Dan Sammel, Brandon Keller.

In 9: Board of Governors Member Karesa Rovnan

In 10: Male WPTLA Member Winner Rhett Cherkin

In 11: Female WPTLA Member Kathryn Monbaron.



Comeback Award Dinner

Nov 2, 2022

Pictured above in #1: Board of Governors Member Russell Bopp and Past President Bryan Neiderhiser.

In #2: Tim Wojton and Drew Rummell.

In #3: Board of Governors Members Joe Massaro and Russell Bopp.

In #4, from L to R: Tony Mengine, Chris Inman, Nick LaCava, James Lopez, George Kontos, Vice President Katie Killion, Comeback Chair and Board of Governors Member Brittani Hassen, and Taylor Martucci.

In #5, from L to R: Nominating Attorney and Board of Governors Member Paul Terhsel, Richeyville Fire Chief Dave Pohill and Firefighter George Hagedorn.

In #6, from L to R: 2012 Comeback Awardee Davanna Feyrer, 2007/2008 Comeback Awardee Karrie Coyer; 2001 Comeback Awardee Rebecca Herzig, and 2022 Comeback Awardee Danielle Salva.

In #7, from L to R: Comeback Award Chair and Board of Governors Member Brittani Hassen, 2022 Comeback Awardee Danielle Salva, President Erin Rudert.

Thank You

Dear Laurie ~ Thank you sooo much for coordinating a wonderful event!

My family, friends and coworkers enjoyed the night and so did I. My accident is always a hard subject for everyone, but last night was very humbling to come together and remember that horrible day and empowering to celebrate my comeback.

From the bottom of my heart - Thank you - Danielle

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Through the Grapevine....

Be sure to say hello and introduce yourself to our new Administrative Assistant, **Joanna Crammond**.

Past President and President's Club Member Veronica Richards and **Board of Governors Member and President's Club Member Karesa Rovnan** have moved their office to 101 Bradford Rd, Ste 100, Wexford, PA 15090. All other contact info remains the same.

Treasurer and President's Club Member Jennifer Webster has joined the firm of Rosen & Perry, P.C., where she'll focus her practice in medical malpractice and personal injury. She can be reached at 437 Grant St, Ste 200, Pittsburgh, PA 15219. 412-281-4200 jwebster@caringlawyers.com

Member Laura Phillips and **Board of Governors Club Member and President's Club Member Joe Froetschel** have formed the new law firm Phillips Froetschel LLC, focusing on medical malpractice and negligence, and personal injury. They are at 310 Grant St, Ste 700, Pittsburgh, PA. 412-546-5220 laura@pittmedmal.com; joe@pittmedmal.com

Board of Governors Member and President's Club Member Richard Epstein is joining the firm of Ekker Kuster McCall & Epstein with Brouse McDowell effective Jan 1, 2023. They will continue to be a full service law firm.

Members Nick LaCava and Taylor Martucci have joined the firm of Kontos Mengine Killion & Hassen as associates. Both were junior members with WPTLA and law clerks at KMKH. They will focus their practice on plaintiff's personal injury, medical malpractice, and civil rights litigation.