THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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CREATING COVERAGE WITH *COSENZA*

At the outset, it's worth noting that this isn't an article about the beloved Seinfeld character, George Costanza. Nor is this article an in-depth analysis of the *Cosenza* case – you can read that one for yourself. Rather, think of George Costanza as a mnemonic device to help you remember a case that will, under the right circumstances, create coverage and maximize your client's financial recovery.

The Cosenza Case:

In *Nationwide Mut. Ins. Co. v. Cosenza,* the Third Circuit was presented with a question of first impression – can an insured recover benefits under both the liability coverage and underinsured coverage of the insurance contract? In short, yes – an insured can recover both, but only under the right set of circumstances. *Nationwide Mut. Ins. Co. v. Cosenza*, 258 F.3d 197, 200 (3d Cir. 2001).

In 1995, Mrs. Cosenza was driving a vehicle in which her husband and mother, Ms. Dezii[1], were passengers. They collided with a vehicle driven by Ms. Angela Nicolucci. Mr. Cosenza and Ms. Dezii were seriously injured, and Mrs. Cosenza suffered lesser injuries. Suit was filed against Ms. Nicolucci, who joined Mrs. Cosenza as a defendant, claiming that she was contributorily negligent. Ms. Nicolucci had liability coverage in the amount of $15,000 and the Cosenzas had liability and UIM coverage in the amount of $500,000, respectively, plus an additional $1 million liability umbrella with $500,000 in additional UIM coverage. On the eve of trial, the liability case settled. The Cosenza's received the $15,000 liability limits from Ms. Nicolucci's policy, and Mr. Cosenza and Ms. Dezii also recovered from the Cosenza's liability policy. The Cosenzas, nor Ms. Dezii, received any UIM money from the Cosenza policy in the settlement. After the case settled, the Cosenzas and Ms. Dezii notified Nationwide of their intention to proceed with UIM arbitration under their auto insurance policy and supplemental umbrella policy. They filed a petition in the state court to compel arbitration. In response, Nationwide filed a notice of removal of the proceedings to the District Court. The case was transferred, and the parties moved for summary judgment. The District Court held - among other things that aren't relevant for our purposes - that Mr. Cosenza and Ms. Dezii were prohibited from recovering underinsured motorist benefits for their injuries because they recovered under the liability portion of the same policy. The Nationwide policy contained a dual recovery provision that stated:

> "The insured may recover for bodily injury under the auto liability coverage or the underinsured motorist coverage of this policy, but not under both coverages." *Nationwide Mut. Ins. Co.,*258 F.3d at 204.

Nationwide argued, among other things,

[1] *Ms. Dezii was a class two insured under the Cosenza policy.*

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that the policy language was unambiguous and expressly prohibited double recovery. The Cosenzas didn't necessarily dispute that contention, but rather, argued that the provision was unenforceable as violative of public policy as evidenced by Pennsylvania case law and the intent of the MVFRL. The Third Circuit held that the "dual recovery" contractual prohibition on recovering under both the liability coverage and the UIM coverage does not prohibit a claimant's recovery where the prohibition was contrary to public policy under the Pennsylvania MVFRL, and stated the following with regard to the public policy considerations that guided their decision:

> "Application of the principles underlying the MVFRL also supports invalidating the dual recovery prohibition in multiple tortfeasor cases. First, as discussed above, enforcing the dual recovery prohibition would result in denying appellants benefits for which they voluntarily paid additional premiums. Such a denial is contrary to the intent of the amendments to the MVFRL, which gave consumers the option of purchasing UIM benefits, but that also assumes consumers are entitled to the benefits that they voluntarily opted to purchase. Further, it denies the paid-for benefits in a case where they were injured by someone whose liability insurance purchasing decisions they could not control, the very situation they sought to avoid by purchasing UIM benefits and the very purpose for which UIM insurance exists." *Id.* at 213.

Thus, the *Cosenza* court allowed recovery of UIM benefits, despite receiving liability benefits from the same policy.

The Cosenza Claim in Practice:

If you find your client in the following set of circumstances, you should pursue a *Cosenza* claim[2]:

1. Your client was a passenger in a vehicle that was involved in a crash;
2. The crash was caused by the negligence of two different tortfeasors, regardless of apportionment of fault;
3. The vehicle in which your client was NOT a passenger must be underinsured for the injuries your client suffered;
4. The vehicle in which your client was a passenger must have UIM coverage; and
5. You must recover against the underinsured vehicle's liability policy.

[2] Please note that there are certain policy exclusions which could extinguish the Cosenza claim. You must get a copy of the policy of the vehicle in which your client was a class two insured.

Here is a real-world example of the *Cosenza* claim in practice:

I represent an 18-year-old man who was a front passenger in a BMW that was involved in a crash. My client lost his right leg as a result, and the insurance coverage at play is woefully inadequate to compensate him. The crash occurred as the BMW in which my client was a passenger attempted to illegally pass a GMC on the left-hand side. As the BMW attempted to pass the GMC, the GMC began to turn left whenever it wasn't clear to do so. The BMW had a State Farm policy with liability limits of $100/300 and UIM coverage in the amount of $100/300. The GMC had a state minimum policy with Allstate. I made a claim against the driver of the BMW, along with the driver of the GMC for turning left whenever it wasn't safe to do so. The police report had the BMW at fault, not the GMC. Allstate, the insurer of the GMC, immediately tendered the liability limits without issue. Perhaps, if the limits were higher it would've turned into a fight. Once Allstate tendered the liability limits, I then put State Farm on notice of an impending UIM claim and sought their consent to settle with Allstate. Fortunately, State Farm did the right thing and immediately tendered the UIM limits to my client. Candidly, the BMW is 99% at fault for the crash. However, once Allstate tendered the limits, they accepted some extent of liability. This was enough to trigger UIM coverage from State Farm since the GMC was underinsured for the injuries my client suffered. So, whenever the facts allow, think of George Costanza and create more coverage for your client.

By Carmen Nocera, Esq.

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for 2023-2024.

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Tue, April 4, 2023

PRESIDENT'S MESSAGE

WPTLA's Legislative Interests

WPTLA is not a politically active organization in the same way that our sister organization, PAJ, is politically active. WPTLA has, at times, contributed to PAJ for certain legislative or elective efforts, but our organization focuses more on professional development, service, and education. Our members do benefit collectively from the efforts of PAJ through LawPAC and through their other legislative efforts in Harrisburg. With the changing party majority specifically in the Pennsylvania House, PAJ may have its first meaningful opportunity in some time to try to create and push legislative reform measures as opposed to simply defending against what is perceived as anti-justice legislative efforts. PAJ's Executive Director, Lisa Benzie, requested WPTLA to provide input as to what our members would include as the top three items on their legislative wishlists.

The Board identified several priorities during our January meeting, then voted as a Board on which of the priorities the Board felt should be our top three. In order to have as broad of input as possible on such an important topic, Laurie sent an e-mail survey blast to all members and Joanna compiled the data to identify our members' collective top three priorities. Those priorities are:

1.Increasing the minimum required bodily injury liability limits for automobile insurance policies;

2.Amending the existing medical records copying provisions or adopting new provisions to address electronic records, including codifying that a third party request will be considered a "patient request" and subject to the cost containment provisions of the federal HITECH Act;

3.Closing the existing loopholes in the Rideshare Act to require UM/UIM benefits for Uber, Lyft, etc., and to require mandatory FPB benefits for drivers using app-based delivery services that currently do not even provide FPB coverage.

We received a very large number of responses to the survey, and many of our members had additional input for other topics of consideration, including legislatively protecting the *Whitmoyer* decision, requiring mandatory disclosure of car insurance limits, reforming/eliminating the cap on damages on governmental claims; adding a deliberate intent exception to the Workers' Compensation Act, etc. Because of our members' thoughtful contributions and responsiveness, WPTLA is able to meaningfully share information with PAJ and help our members' interests be heard by PAJ. Thank you to everyone who responded to the survey for your input.

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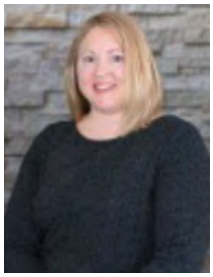

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SUPERIOR COURT ADDRESSES SEVERAL RECURRING UIM ISSUES

In *Erie Insurance Exchange v. Backmeier*, 2022 Pa. Super. 221, the Superior Court recently considered several issues that frequently arise when an injured victim seeks underinsured motorist (UIM) coverage from more than one auto insurance policy. The decision is unfavorable to the plaintiff, but a request for allowance of appeal is pending. Plus, the decision is in some ways fact specific, so it may not have wide precedential effect.

Andrew Backmeier of Erie County was riding his bicycle when he was struck and killed by a car driven by an underinsured driver. He lived with his mother, Elizabeth, who owned three vehicles that were insured with Erie on two different auto policies, two on one policy and one on the other. Elizabeth had UIM coverage on both policies but had signed stacking waivers on both.

Both policies contained a "Limit of Protection" clause, which some carriers and commentators call a "Coordination of Benefits" clause, that applies to unstacked policies only. Through this clause, Erie attempts to cap the UIM benefits that can be obtained from more than one UIM policies at the highest limit shown on any one of the policies.

Elizabeth Backmeier had purchased UIM limits of $100,000 on each her two policies, for a total of $200,000 of UIM coverage.Thus, as the representative of her son's estate, she sought $200,000 of UIM benefits from Erie, because the estate's damages far exceeded the UIM limits plus the tortfeasor's meager bodily injury limits. However, Erie paid her only $100,000 in reliance on the "Limit of Protection" clause. Elizabeth persisted in her demand for the full policy limits from both policies, so Erie filed a declaratory judgment action.

Backmeier made two primary arguments. The first was that the 'Limit of Protection" clause did not apply because she had not effectively waived inter-policy stacking, that is, combining coverages from two separate policies, as opposed to intra-policy stacking, which means combining coverages applicable to more than one vehicle insured on the same policy. This argument relied mostly on the Supreme Court's decisions in *Donovan v. State Farm*, 256 A. 3d 1145 (Pa. 2021) and *Craley v. State Farm,*895 A. 2d 530 (Pa. 2006), both of which stand for the proposition that a policyholder has not effectively waived inter-policy stacking simply by signing the statutory waiver form when the subject policy insures more than one vehicle, because the form itself suggests the waiver applies only to one policy and when there is more than one vehicle insured on the policy, the policyholder may presume she is waiving the right to stack only those vehicles on that policy, i.e. intra-policy stacking.

Both the trial court and the Superior Court held in Erie's favor on this point, because of the unique facts of *Backmeier*. The vehicles insured on the multi-vehicle policy were a Mazda SUV and a motorless trailer. Backmeier argued that the *Donovan/Craley* rule should apply to void the stacking waiver because Erie's policy described both the SUV and the trailer as "vehicles," meaning that the policyholder may very well have presumed that her waiver applied only intra-policy because there were two vehicles insured. The Superior Court rejected that argument on the grounds that the *Donovan/Craley* applies only when more than one *motor* vehicles are insured on a policy, because UIM coverage need not be offered for a motorless vehicle and in Backmeier's case no UIM coverage was purchased for the trailer.

As noted, Backmeier seeks an appeal to the Supreme Court, and one of her arguments is that the *Donovan/Craley* rule should not be limited to *motor* vehicles, especially in the case of the Erie policy where both the SUV and the trailer are defined as "vehicles"' which potentially creates the same confusion for the policyholder as the waiver forms considered in *Donovan* and *Craley*.

Ms. Backmeier's second argument was that, even if the stacking waiver is enforced and the "Limitation of Protection" clause applies, the clause is unenforceable because it contravenes the MVFRL's requirement that auto carriers provide "excess" UIM coverage (coverage limited only by the stated policy limit or by the amount of compensation due the victim, whichever is smaller) as opposed to "gap" coverage *(Continued on Page 10)*

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 35, 2022-2023

Vol 35	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
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

En Banc Panel of the Pennsylvania Superior Court Limits the Ability of a Worker's Compensation Carrier to Intervene in a Personal Injury Lawsuit

The Summer 2022 issue of the Advocate (Vol. 34, No. 4) featured a 2-1 split decision by the Pennsylvania Superior Court in the case of *Michele Loftus et. al, v. Katrina Decker: Appeal of Eastern Alliance Ins. Group*, 2022 Pa. Super 44 (Pa. Super 2022). In this decision, the majority held that a worker's compensation carrier did not have a "legally enforceable interest" to intervene in a Plaintiff's third-party lawsuit when only a Writ of Summons was filed.

Given the novel questions of law presented in the case, the Pennsylvania Superior Court granted an Application for Reargument *En Banc* filed by the Appellant and Oral Arguments were held before the nine Judge panel on September 14, 2022.

In an 8-1 Majority Opinion authored by Judge Carolyn Nichols, the *En Banc* panel of the Pennsylvania Superior Court confirmed that a worker's compensation carrier does not have a "legally enforceable interest" to intervene in a Plaintiff's third-party action under Pa. R.Civ.P. 2327 when only a Writ of Summons has been filed.

Background

In this case, the Plaintiff, Michele Loftus, was injured in a motor vehicle collision on January 16, 2019 in the course and scope of her employment. As such, Ms. Loftus was entitled to worker's compensation benefits through her employer's worker's compensation policy with Eastern Alliance Insurance Group. Ms. Loftus ultimately settled her worker's compensation claim with Eastern Alliance through a full Compromise and Release. Ms. Loftus then filed a Writ of Summons against Defendant Katrina Decker on September 25, 2020 in order to protect the statute of limitations and preserve her ability to file a Complaint in the future.

Trial Court Holding

Eastern Alliance then filed a Petition to Intervene in the underlying action and attached a proposed Complaint to be filed against the Defendant Decker. Ms. Loftus opposed the intervention and the Indiana Court of Common Pleas entered an order denying the Petition to Intervene. In support of the Order, the trial court held that Eastern Alliance did not satisfy the threshold requirements of Pa. R.Civ.P. 2327, which sets forth four categories of non-parties that may intervene in an existing action. In short, the trial court held that Eastern Alliance could not satisfy Pa. R.Civ.P. 2327(4), which requires that "the determination of such action may affect any legally enforceable interest of such person . . . ." Pa. R.Civ.P. 2327(4). In particular, given the procedural posture where only a Writ of Summons was filed, the trial court was not in a position to make a "determination" as contemplated under Pa. R.C.P. 2327(4).

Pennsylvania Superior Court _En Banc_ Opinion

On appeal, Eastern Alliance argued that the trial court erred in holding that intervention cannot be granted until a Complaint is filed. In doing so, Eastern Alliance argued that the Order denying the Petition to Intervene entered by the Indiana Court of Common Pleas was an appealable Collateral Order pursuant to Pa. R.A.P. 313(b):

A collateral order must satisfy a three-pronged test and is defined as an order that: "(1) is separable from and collateral to the main cause of action; (2) involves a right too important to be denied review; and (3) presents a question that, if review is postponed until final judgment in the case, the claim will be irreparably lost." *In re Bridgeport Fire Litigation*, 51 A.3d 224, 230 n.8 (Pa. Super. 2012).

Addressing the three-part test, the *En Banc* panel held that the Order denying the Petition to Intervene satisfied the first prong because it involved a worker's compensation carrier's right to subrogation, which is separate from the third-party cause of action brought by the Plaintiff against the tortfeasor.

With respect to the second prong, however, the Pennsylvania Superior Court held that a worker's compensation carrier does not have a "right too important to be denied review" because it does not have a "legal interest or right to protect" where only a Writ of Summons was filed by the Plaintiff. In doing so, the majority opinion directly limited the subrogation rights set forth in Section 319 of the Workers' Compensation Act:

With respect to Appellant's claim concerning its subrogation rights, we note that Section 319 of the Workers' Compensation Act, 77 P.S. § 671, does not bestow upon any party, directly or indirectly, the right to take any action against a third-party tortfeasor. See Hartford Ins. Group on behalf of Chunli Chen v. Kamara, *(Continued on Page 10)*

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Electric or motorized scooters (collectively referred to herein as "e-scooters") are becoming an increasingly common mode of transportation. An electric or motorized scooter is a scooter with a floorboard that can be stood upon by the operator, with handlebars, and a motor that is capable of propelling the device with or without human propulsion. They are sold and used by individuals of all ages throughout the Commonwealth of Pennsylvania and the United States. E-scooters provide efficient, innovative, flexible, and low-cost transportation to millions of riders across the country. E-scooters relieve traffic congestion and pollution. Their use should be encouraged. E-scooters, however, are arguably "illegal" in the Commonwealth. The City of Pittsburgh has "legalized" scooters through its "Spin" e-scooter program but privately owned scooters are still "illegal" according to the City of Pittsburgh. It is unclear how the City of Pittsburgh made e-scooters any more legal or illegal than anywhere else, as the City does not have the authority to amend the laws of the Commonwealth. The Pennsylvania Vehicle Code, 75 Pa. C.S. §§ 101 et seq. and the Motor Vehicle Financial Responsibility Law (MVFRL) 75 Pa. C.S.§§ 1701-1799.7 have failed to keep pace with transportation innovations, such as e-scooters. E-scooters fall in the interstices of the law. As explained herein, e-scooters are not adequately, if at all, covered by the Pennsylvania Vehicle Code and the MVFRL. There has been legislation proposed to amend the MVFRL to directly cover e-scooters but that proposed legislation has not made it out of committee. Moreover, the proposed legislation does not address the first party benefits insurance issue discussed herein. In this legislative void ,auto insurance companies are relying upon policy provisions and provisions of the Vehicle Code not intended to apply to e-scooters to deny first party benefits to their insureds that their insureds paid for and are entitled to receive because e-scooters cannot be registered in the Commonwealth.

E-scooters Under the Vehicle Code

The Vehicle Code does not include a definition clearly intended to cover e-scooters of the type "legalized" by the City of Pittsburgh. *See* 75 Pa. C.S. § 102. In 1984, the Vehicle Code was amended to include the following definition of a "motor-driven cycle": "A motorcycle, including a motor scooter, with a motor which produces not to exceed five brake horsepower". *Id.* This definition includes "motor scooter" as a subset of a "motorcycle", which does not comport with the current understanding of a what an e-scooter is. The additional definitions provided in Chapter 17 of the Vehicle Code, *i.e.*, the MVFRL, do not include a definition of a motorized or e-scooter. An e-scooter, however, would fall within the broad definition of a "vehicle:"

> Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon rails or tracks. The term does not include a self-propelled wheelchair or an electrical mobility device operated by and designed for the exclusive use of a person with a mobility-related disability.

See Id.

The Vehicle Code provides that all "vehicles" are required to be registered and titled.

> **1301. Registration and certificate of title required.**
>
> **(a) Driving unregistered vehicle prohibited.--**No person shall drive or move and no owner or motor carrier shall knowingly permit to be driven or moved upon any highway any vehicle which is not registered in this Commonwealth unless the vehicle is exempt from registration.
>
> *****
>
> **(c) Certificate of title prerequisite to registration.--**No vehicle shall be registered unless a certificate of title has been applied for or issued if one is required by Chapter 11 (relating to certificate of title and security interests).

75 Pa. C.S. § 1301. E-scooters, however, cannot be registered or titled in the Commonwealth, according to PennDOT. PennDOT has issued a "Fact Sheet" entitled for "Mopeds, Motor-Driven Cycles and Motorcycles." The "Fact Sheet" begins with a section labeled "Purpose" and the statement: "This fact sheet provides the most accurate and up-to-date information necessary to operate and register a moped, motor-driven cycle or motorcycle in the Commonwealth of Pennsylvania." Two paragraphs later, without any heading or other indication that motorized scooters were to be addressed by the "Fact Sheet," it provides the following:

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THE LEGAL LIMBO ... FROM PAGE 8

> A motorized scooter is a 2-wheeled vehicle powered by an engine or an electric motor and does not have a seat or saddle for the driver. **These vehicles are not exempt from titling and registration requirements as set forth by PennDOT and would be required to pass equipment standards and inspection requirements. However, these vehicles do not comply with the equipment standards and inspection requirements for motor vehicles, and cannot be titled or registered within the commonwealth.** In addition, these vehicles cannot be operated on Pennsylvania roadways or sidewalks.

(emphasis added). The "Fact Sheet" makes it clear that under the Vehicle Code an e-scooter cannot be registered and cannot be operated on a roadway. It is interesting to note that the Vehicle Code defines a "roadway" as follows:

> That portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the sidewalk, berm or shoulder even though such sidewalk, berm or shoulder is used by pedalcycles.

75 Pa. C.S. § 102. Thus, based on the "Fact Sheet", one could reasonably conclude that an e-scooter can be operated on a berm or shoulder.

PennDOT also has a webpage entitled "Motor Scooters and Personal Mobility Devices." On this webpage, PennDOT states:

> In order for a motor scooter (motor-driven cycle as defined by the Pennsylvania Vehicle Code) to be legally operated on roadways, it must be titled and registered in the commonwealth and have the proper insurance. In order to be titled and registered it must meet PA's equipment and inspection requirements for motor-driven cycles.

This webpage directs one to the PA's equipment and inspection requirements for motor-driven cycles at 67 Pa. Code § 175.171-194. While one could read this page and attempt to have their motor scooter inspected, titled and registered, as previously noted, PennDOT has determined that a motorized scooter cannot satisfy these requirements and cannot be titled and registered in Pennsylvania. *See* PennDOT Fact Sheet for "Mopeds, Motor-Driven Cycles and Motorcycles." Of course, informational webpages and Fact Sheets are not statutes or even regulations. They are merely intended to provide guidance to residents of Pennsylvania based on the existing statutes and regulations.

The above discussion outlines the confusing state of the law in Pennsylvania surrounding the use of e-scooters. Residents of all ages purchase and ride e-scooters on roadways without thinking twice about whether they are "legal." Adding to this confusion, the City of Pittsburgh has "legalized" e-scooters but only the ones offered through its Spin program.The average resident of Pennsylvania would not have any reason to suspect that they are operating an "illegal" vehicle when riding an e-scooter or, as discussed below, that they would be ineligible to receive first party benefits if hit by a car while riding an e-scooter.

The Impact on First Party Benefits

Chapter 17 of the Vehicle Code contains the MVFRL. Subchapter B of the MVFRL governs first party benefits. Section 1714 of the MVFRL provides as follows:

> **1714. Ineligible claimants.**
>
> An owner of a currently registered motor vehicle who does not have financial responsibility or **an operator or occupant of a recreational vehicle not intended for highway use, motorcycle, motor-driven cycle, motorized pedalcycle or like type vehicle required to be registered under this title cannot recover first party benefits.**

75 Pa. C. § 1714. It is standard for automobile insurance policies to contain an exclusion to first party benefits based on § 1714. Insurers are relying upon such policy exclusions to deny first party benefits to their insureds who are struck by automobiles while operating e-scooters. Based on the Vehicle Code, as outlined above, it is far from clear, however, that an e-scooter constitutes a "motorcycle, motor-driven cycle, motorized pedalcycle or like type vehicle." Moreover, as discussed above, PennDOT has not provided regulations to provide for the registration, titling or inspection of e-scooters. Compounding the confusing status of e-scooters, the City of Pittsburgh has "legalized" e-scooters offered through it Spin program. Consider the following scenario: two friends riding e-scooters in the City of Pittsburgh, one is on a Spin e-scooter and one on privately owned e-scooter, are hit by a car. Are either or both ineligible to use first

(Continued on Page 10)

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(coverage reduced by the availability or recovery of benefits from some other policy.) The court discussed the excess v. gap issue at some length, and ultimately relied on *Generette v. Donegal,* 957 A. 2d 1180 (Pa. 2008), to observe that Pennsylvania is decidedly an "excess" state. However, the court went on to hold that Erie's clause does not violate the "excess" coverage requirement because Ms. Backmeier had waived stacking. Thus the court enforced the clause on waiver of stacking principles, not on the grounds that gap coverage is generally permissible.

Again, Backmeier seeks an appeal to the Supreme Court and another of her arguments is that even if she had effectively waived intra-policy stacking, the "Limitation of Protection " clause does not implement the stacking waiver, rather, it is a separate clause that serves to reduce the UIM coverage limits of both policies without any statutory support to do so.

Appellate UM/UIM decisions are coming fast and furious. Make sure to check future editions of The Advocate for updates on *Backmeier* and other recent decisions.

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LOFTUS UPDATE ... FROM PAGE 6

199 A.3d 841 (Pa. 2018) (Kamara II); Liberty Mutual Ins. Co. v. Domtar Paper Co., 113 A.3d 1230 (Pa. 2015) (Domtar Paper). Instead, our Supreme Court has held that Section 319 provides that only the employee can pursue damages from the tortfeasor, and the insurer has no right to seek a recovery or compel an employee to seek recovery to satisfy a statutory lien under the Workers' Compensation Act. See Kamara II, 199 A.3d at 853; Domtar Paper, 113 A.3d at 1240.

Accordingly, given the fact that Eastern Alliance could not demonstrate a "legally enforceable interest" under Section 319 of the Workers' Compensation Act, 77 P.S. § 671, the Pennsylvania Superior Court held that it was not permitted to intervene under Pa. R.Civ.P. 2327 when only a Writ of Summons was filed by the Plaintiff.

The Honorable Judge Murry authored the sole dissenting opinion asserting that trial court order satisfied the three-part collateral order test and that the trial court should have conducted an evidentiary hearing under Pa. R.Civ.P. 2329 before denying the Petition for Intervention by Eastern Alliance.

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party benefits? Does the City of Pittsburgh's "legalization" of Spin e-scooters have any effect on an insurer's policy exclusion based on § 1714?

We all know that first party benefits are a valuable part of automobile insurance coverage, especially in the absence of other health insurance. The average reasonable insurer in Pennsylvania would not read an exclusion based on § 1714 and understand that they do not have first party medical coverage when hit by a car while using an e-scooter. It is incumbent upon the legislature to clearly address e-scooters in the Vehicle Code to provide for their "legal" use. If this includes the registering and titling of e-scooters, then it is incumbent upon PennDOT to adopt regulations that provide for such registration and titling.It is not fair to the residents of Pennsylvania for it be legal to sale e-scooters in Pennsylvania, for Cities in Pennsylvania to "legalize" and promote their use, but then for the use of e-scooters to be "illegal" under the Vehicle Code, resulting in residents being ineligible to receive first party benefits under their automobile insurance policies.

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Annual Golf Outing is set

Friday, May 26, 2023

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- Ethics CLE and breakfast presented by Rich Schubert and Larry Kelly
- Shotgun start for golf begins at 8:30am
- Lunch and awards to follow

We are hoping to be able to offer an additional event this year, such a pickle ball.

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A Golden Argument When Your Client is in Their Golden Years

How many times have you commiserated with fellow Pennsylvania plaintiffs trial lawyers about our inability to ask for a specific amount of money for pain and suffering damages?

As we are all painfully aware, Pennsylvania law prohibits us from asking the jury to award a specific sum or provide a method for calculating non-economic damages. See *Wilson v. Nelson*, 258 A.2d 657, 660 (Pa. 1969) (no lump sum request permitted); *Joyce v. Smith*, 112 A. 549, 551 (Pa. 1921) (no method of calculating non-economic damages permitted).

To add frustration to the wound, out of the entire United States, only Pennsylvania, Delaware, and Wyoming do not allow counsel to provide the jury with guidance for how to reach a non-economic award. See Stassun v. Chapin, 188 A. 111 (Pa. 1936) (lump sum demands for non-economic damages not permitted); Ruby v. Casello, 201 A.2d 219, 220 (Pa. 1964) (counsel not permitted to provide methods of calculating non-economic damages).

Are we being paranoid that our inability to ask for a specific amount hurts our clients' chances of a fair verdict? No. In empirical studies, jurors report being deeply challenged by the task of arriving at damages awards. See Valerie P. Hans & Valerie F. Reyna, To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards, 8 J. EMPIRICAL LEGAL STUD. 120, 122 (2011). Anecdotally, I repeatedly receive the same frustrated feedback from mock focus group jurors and actual jurors alike.

So what are we to do? Short of an appellate miracle, we must make lemonade from this legal lemon.

My partner Greg and I were recently confronted with this issue. Our 70-year-old client was rear ended while stopped at a stop light. She suffered a concussion, an inner ear injury and was left with symptoms of dizziness and vertigo that will plague her for the rest of her life. What she did not sustain was any amount of economic loss we felt comfortable claiming as damages. Resultantly, we claimed only our client's pain and suffering damages. We took a calculated risk recognizing the jury might not appreciate and in turn compensate for what was taken from our client.

We tailored our case presentation to contrast our client's life just before the crash with what it has been since. All our witnesses were bluntly asked to explain the before and after differences of our client. As best we could, we sought to weave in stories that touched on as many of the categories of non-economic loss as possible.

The evolution of our client's headaches and neck discomfort following the crash established pain and suffering. The 100+ doctor and physical therapy appointments our client attended underscored the inconvenience she experienced. Humiliation was supported by stories of our once mentally sharp client's inability to keep up and process conversations. Stories of our client avoiding social interactions with friends and family for fear of symptom flare ups proved her mental anguish. And while there were numerous ways in which our client was robbed of her ability to enjoy life's pleasures as she once did, we focused on the impact her injuries had on her greatest passion, work and always trying to add value to the world.

Notwithstanding our testimonial efforts, we had to find an effective means to show the jury how to think of the non-economic harms and losses in monetary terms. But how?

In troubled times I turn to trial greats for inspiration and remembered Keith Mitnik's brilliant "not all time is equal" argument. [1]

This particular "damage matrix" as attorney Mitnik calls it is particularly effective when your client is older. Among other things, this argument taps into the persuasive "scarcity bias" i.e. the rarer or less of something there is, the more valuable it is. Think rookie baseball cards, Beanie Babies, and Pandemic toilet paper.

Here's how it goes. First you point out the phenomenon we have all experienced and witnessed that young people have little appreciation for time and always want to skip ahead ("youth is wasted on the young"). When you're little, you want to be older so you can stay up later and watch big kid shows. Then you can't wait to see PG-13 and R-rated movies, then it's getting your driver's license, then it's turning 21 and

[1] *For any trial lawyers reading this who are unfamiliar with attorney Mitnik, I urge you to buy and read Keith's books "Don't Eat the Bruises," and "Deeper Cuts," and listen to his podcast. Attorney Mitnik is nothing short of brilliant and seems to have a game-changing angle for every trial situation.*

(Continued on Page 13)

THE ART OF PERSUASION ... FROM PAGE 12

on and on it goes.

Then you transition by pointing out that eventually we start to realize that our time on earth, with our loved ones, and in this life is limited.

We develop an appreciation of the value of time when we realize it is finite and that we only have so much of it left. Instead of wanting time to speed up, now we want it to slow down or better yet stop. The older we get the more precious our remaining time becomes. This is why we call our latter years the "golden years". The closer we get to death the more valuable every minute becomes.

Now that we have established the golden minute analogy we can capitalize on the power of the numerical anchoring effect. This effect is a cognitive bias whereby an individual's decisions are influenced by a particular reference point or 'anchor' – in this case, a number. We do this by determining our client's life expectancy. From this figure we calculate the approximate number of minutes left in our client's life. With this information we are ready to drop anchor.

Here is, verbatim, what we said in our most recent closing argument:

"*And then you get to a point in your life you don't want to skip ahead anymore. You'd like to go back in time. But becauseyou can't do that, you appreciate the time that you have so much more. It's why they*

call them the golden years, because they're gold. It's a precious resource, our life, our time.

You're going to hear an instruction that Kathy has something like from the date of the crash -- there are these actuarial tables -- 11.7 years is her expectancy. That's not a crystal ball. It might be less, might be more.

But at that moment, we live life minute by minute, hour by hour. She had so many hours. She had 5.7 million golden minutes left in her life at the time Mr. Trombola crushed her, and those golden minutes are forever tarnished through no fault of her own."

This was a comfortable transition that allowed me to get a non-objectionable large number into the ears of the plaintiffs.

If you find yourself in a similar situation heading into trial, I would urge you to try this argument. In my experience, it's as good as gold.

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JUDICIARY DINNER PREVIEW

On May 5, 2023, we will hold our Annual Judiciary Dinner at Acrisure Stadium. During the dinner we will recognize seven Judges who have retired or attained senior status in 2022. We will also honor the memory of the late Chief Justice Max Baer, of the Supreme Court of Pennsylvania. I am sure many of you will have fond memories of appearing before one, or several, of our honorees.

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

Attendees of last year's event seemed to enjoy the more compendious format.

Drew Rummel of Morgan & Morgan remarked: "The judiciary dinner is my favorite event because it typically draws a larger crowd and I enjoy the networking opportunity. Last year's event seemed to move along at a nice pace while still giving the appropriate amount of recognition to the various award recipients."

Joe Froetschel of Phillips & Froetschel similarly expressed: "Last year's return of the Judiciary Dinner was fantastic. The number of jurists that we had in attendance was wonderful, and I really enjoyed the condensed presentation to allow more time to socialize!"

The evening will follow a similar presentation as last year's program with the Judges being recognized following the dinner portion of the evening.

The 2023 Judicial Honorees are as follows:

Stephanie Domitrovich, Court of Common Pleas of Erie County

Oliver J. Lobaugh, Court of Common Pleas of Venango County

Jeffrey A. Manning, Court of Common Pleas of Allegheny County

Daniel J. Milliron, Court of Common Pleas of Blair County

William R. Shaffer, Court of Common Pleas of Butler County

D. Brooks Smith, U.S. Court of Appeals for the Third Circuit

Robert G. Yeatts, Court of Common Pleas of Mercer County

Additionally, during the event we will award $2,000 to each of the three winners of our annual WPTLA President's Scholarship High School Essay Contest, and will present the Pittsburgh Steelwheelers with the proceeds raised from our October President's Challenge 5K. Finally, presentations will be made of the Daniel M. Berger Community Service Award and the Champion of Justice Award.

This signature event is always well attended and we expect this year will be no exception. The evening provides an opportunity to socialize with colleagues while also paying tribute to all of our honorees. We hope to see you at this wonderful event!

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PAST PRESIDENT'S DINNER RECAP

WPTLA hosted our quinquennial Past Presidents' Dinner on Wednesday, January 11, 2023, at the LeMont Restaurant in Pittsburgh's Mt. Washington neighborhood.This was the organization's first time back at the LeMont in several years, and the general feedback from those in attendance was that the food was excellent. The view, as always, was spectacular.

We were honored to have 22 Past Presidents in attendance, covering four different decades of our organization's senior leadership. Those in attendance included:

Chad Bowers	Dave Landay
Bernie Caputo	Jason Matzus
Rich Catalano	Chris Miller
Liz Chiappetta	Mark Milsop
The Honorable Christine Donahue	Bryan Neiderhiser
Chuck Evans	Sandy Neuman
Dick Galloway	John Quinn
Josh Geist	Vonnie Richards
Bill Goodrich	Tim Riley
Mark Homyak	Carl Schiffman
Larry Kelly	Rich Schubert

The evening's events included a cocktail hour, dinner, and the presentation of a gift to the Past Presidents. This year's gift was a printed leather coaster set with a case. The dinner was our new Administrative Assistant, Joanna's, first event manning the check in table, and she did an excellent job. Thanks to everyone who attended this every five year signature event, and WPTLA looks forward to hosting another successful event in 2028.

By: Erin Rudert, Esq. of Ainsman Levine, LLC

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Pictured above, from L to R in the top row: Mark Homyak, Tim Riley, Bernie Caputo, Josh Geist, Chad Bowers, Chris Miller, Larry Kelly, Sandy Neuman, Bryan Neiderhiser, Dave Landay and Mark Milsop. In the bottom row: Chuck Evans, John Quinn, Rich Schubert, Bill Goodrich, Vonnie Richards, Carl Schiffman, Liz Chiappetta, Dick Galloway, The Honorable Christine Donahue, and Rich Catalano.

More photos from the Past President's Dinner can be found on page 30.

A Favorable Outcome under Lamp v. Heyman in Federal Court

Although much has been written about *Lamp v. Heyman*, 366 A.2d 882 (Pa 1976) due to its importance (a potentially devastating impact in a plaintiff's case) I find all case law applying it to be of interest and will continue to write about it from time to time.

As a very brief reminder, *Lamp* is the case in which the Pennsylvania Supreme Court disapproved of the procedure of filing and holding a writ of summons. Hence, after filing a Writ or Complaint, the Plaintiff must act in good-faith to serve initial process after the Writ or Complaint has been filed or the case will be dismissed. Hence, under *Lamp* and its progeny, service must be promptly attempted and if not accomplished the Plaintiff must act in good faith to reissue and re-attempt service.

There have now been several cases which have declined to dismiss a case due to a lack of proper service in the absence of prejudice. The most recent of those cases was a federal court decision out of the Middle District of Pennsylvania in *Kerr v. Sagan*, No. 3:21-CV-00459, 2022 U.S. Dist. LEXIS 187583 (M.D. Pa. Oct. 13, 2022).

In *Kerr*, the plaintiff had filed suit against the defendants, New Jersey residents. Plaintiff there after sent the complaint to the defendants by first class mail. The defendants claimed that they did not receive the complaint by mail. According to the plaintiff, settlement negotiations were ongoing at that time. After the statute of limitations, Plaintiff realized an appearance had not been entered and emailed the complaint and a "counter-offer". 10 days later the complaint was reinstated and service was attempted by certified mail. The Defendants thereafter signed for the certified mail. Eventually the case was removed to Federal Court and a Motion to Dismiss was filed. [1]

The Court began its analysis by indicating that the initial attempt at service was insufficient. The Court thereafter went on to assess whether this initial attempt, although insufficient amount to good faith.

The Court began its analysis by looking to *Gussom v. Teagle*, 247 A.3d 1046 (Pa. 2021) as the Pennsylvania Supreme Court's most recent decision following the Lamp line of cases. In *Gussom*, which it summarized as requiring the good faith effort to be diligent and timely. The Court also stated later in the opinion that it is the plaintiff's burden to show this.

The Court then offered a succinct restatement of Pennsylvania law on this topic as follows;

> Whether a plaintiff acted in good faith is assessed on a case-by-case basis and is in the "sound discretion of the trial court." *See Callan*, 2018 U.S. Dist. LEXIS 166487, 2018 WL 4635962, at *5 (citing *Williams*, 199 F. Supp. 3d at 924). Rigid compliance is not required, and courts should avoid "the draconian action of dismissing claims based on technical failings that do not prejudice the defendant." *McCreesh v. City of Philadelphia*, 585 Pa. 211, 888 A.2d 664, 674 (2005); *Est. of Ginzburg by Ermey v. Electrolux Home Prods., Inc.*, 783 F. App'x 159, 160 (3d Cir. 2019) (quoting *McCreesh*, 888 A.2d at 674). At the same time, "the plaintiff must have *actually* tried to put the defendant on notice of the suit." O'Meally, 2022 U.S. Dist. LEXIS 72588, 2022 WL 1172973, at *2 (emphasis in original). "The service does not have to have been perfect, however, so long as the defendant had 'actual notice' of the suit and was not 'prejudiced' by the improper service." *Id.* (quoting *McCreesh*, 888 A.2d at 666). Notwithstanding this "flexible approach," *McCreesh*, 888 A.2d at 666, courts have emphasized that "'[s]imple neglect and mistake to fulfill the responsibility to see that requirements for service are carried out may be sufficient' to find that a plaintiff did not act with good faith." *Callan*, 2018 U.S. Dist. LEXIS 166487, 2018 WL 4635962, at *5 (quoting *Englert v. Fazio Mech. Servs., Inc.*, 2007 PA Super 233, 932 A.2d 122, 124 (Pa. Super. Ct. 2007)).

Kerr v. Sagan, No. 3:21-CV-00459, 2022 U.S. Dist. LEXIS 187583, at *11-12 (M.D. Pa. Oct. 13, 2022).

Hence, the Court declined to dismiss the case after explaining:

> The Court finds that Plaintiff has demonstrated that he acted in good faith. The Court finds the following facts dispositive: (1) before the statutory period expired, Plaintiff "*actually* tried to put the defendant on notice of the suit," *O'Meally*, 2022 U.S. Dist. LEXIS 72588, 2022 WL 1172973, at *2; (2) Plaintiff's error was a simple mistake, and because he thought he effectuated service in July 2020, it

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[1] *The Court analyzed the motion under FRCP 12(b)(5) insufficient service of process and 12(b)(6) failure to state a claim upon which relief can be granted.*

COMP CORNER

Disturbing Unreported Opinion from Commonwealth Court

The Commonwealth Court has recently decided the case of *City of Pittsburgh v. WCAB (Ronald Dobbs)*, 1431 C.D. 2021. In this case the claimant was injured on December 10, 1993, prior to the effective date of Act 57 which first provided for Impairment Rating Evaluations (IRE). Defendant obtained an Impairment Rating Evaluation and filed a Modification Petition on March 19, 2021. Claimant challenged whether an IRE was applicable to an injury predating Act 57 and Act 111 which reenacted Impairment Rating Evaluations following the determination by the Pennsylvania Supreme Court that the IRE provisions of Act 57 were unconstitutional.

The Judge and the Workers' Compensation Appeal Board concluded that the IRE provisions of Act 111 did not apply to injuries preceding the effective date of Act 57. On appeal to the Commonwealth Court defendant argued that the specific provisions in Act 111 did not limit its applications to injuries suffered on or after the effective date of the act.

During the appeal the defendant argued that Act 111 applied to all work injuries including any injuries prior to its enactment and effective date. It noted that Act 57 specifically limited applications to injuries after its effective date and that there was no such provision in Act 111. Claimant argued that the application of the IRE provisions of Act 111 to injuries prior to its effective date deprived claimants of a vested right to compensation in violation of the Pennsylvania Constitution.

Commonwealth Court determined that application of Act 111 did not deprive the claimant of vested rights. It states "Rather, Act 111 simply provided a mechanism for employer to pursue a change in claimant's disability status by requiring medical evidence that claimant's whole body impairment was less than 35%. " (Slip opinion Pg. 11)

This case follows a long line of Commonwealth Court decisions regarding Act 111 that are favorable to the employer. *Dobbs* has a good summary of such cases. Unfortunately, the Pennsylvania Supreme Court has refused to take up any cases involving Act 111 issues. PAJ stalwarts, Larry Chaban and Dan Siegel have done yeomans work preparing amicus briefs for PAJ. Perhaps the Supreme Court is avoiding controversial cases with the threat of a constitutional amendment requiring election of justices by geographic districts hanging over its head. This writer notes he has no evidence supporting this except just a gut hunch.

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> defies logic to expect him to have repeated his efforts to do so, as "diligen[ce]" might otherwise require; and (3) crucially, Plaintiff alleges that settlement discussions were "ongoing," which "evince[es] [*14] a reasonable inference" that Defendants had actual notice of the lawsuit despite insufficient service of process. (Doc. 19 at 3.)

Kerr v. Sagan, No. 3:21-CV-00459, 2022 U.S. Dist. LEXIS 187583, at *13-14 (M.D. Pa. Oct. 13, 2022)

Although one would not want to find themselves in the position of defending a *Lamp v. Heyman* based motion, this decision at least offers some hope that the case can proceed despite an error. Nonetheless, the case makes it clear that an attorney who knows service was not effective must diligently act to again attempt service.

Rule 238

The rate for calculating delay damages for the period of delay occurring in 2023 has been posted by the Civil Rules Committee is 7 ½ %. (You will add 1% to that.)

Something to Think About

The tradition in the IME's physician's deposition has been to ask for the doctor's records before starting cross examination. At that point the doctor pushed a stack of ragged documents over to you and you took your time picking through them. Today it is not so easy. Often there is less paper and some CD's or it is all on the doctor's computer. There are no rules and a paucity, if not absence of case law.

Is it time that we think of a consistent answer to this situation? Should there be a rule of pre-deposition disclosure? Should defense counsel be required to turn things over? Should there be a new approach to Cooper Interrogatories? How does this relate to privilege? I am not sure I know the answer, but these are questions that we need to think about.

If any readers have obtained a ruling on this type of issue, I would like to highlight it in a future article.

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Erie v. Mione *No.* 89 MAP 2021 (Pa. February 15, 2023)

Pennsylvania Supreme Court affirms trial court and Superior Court's decision to limit the holding in Gallagher to stacking and finds it inapplicable to situations when a host vehicle has no UM/UIM coverage.

This personal injury case arises out of a dispute over whether Albert and Lisa Mione ("Plaintiffs") were entitled to UIM benefits for a motorcycle crash. At the time of the crash, Albert, his wife Lisa and Angela Mione all resided together. Plaintiffs recovered the applicable policy limits from the 3rd party insurer and then sought to recover UIM benefits from an Erie auto policy issued to himself and his wife as well as a second Erie auto policy issued to Angela Mione. Neither of these Erie policies listed the motorcycle as a covered vehicle. Instead, the motorcycle was insured under a Progressive policy, where UM/UIM benefits had been waived.

During the dec action, Erie filed a Motion for Judgment on the Pleadings arguing that the Plaintiffs were precluded from recovering UIM benefits under the Erie policies because the motorcycle was not listed as a covered vehicle on either Erie policy and both policies contained a "household exclusion" clause that precluded recovering UIM benefits for injuries arising out of the use of a non-listed vehicle. The trial court granted Erie's motion holding that the exclusions were valid and enforceable, citing the Supreme Court's decision in *Eichelman v. Nationwide Insurance Co.,* 711 A.2d 1006 (Pa. 1998).

Plaintiffs appealed to the Superior Court, arguing that *Gallagher v. GEICO Indemnity Co.,* 201 A.3d 131 (Pa. 2019) invalidated all household exclusions in Pennsylvania, and that the decision's rationale applied equally to the facts of their case. The Superior Court affirmed the trial court, concluding that stacking and §1738 were not implicated because Plaintiffs did not have UM/UIM coverage on the host-vehicle policy and therefore did not have the requisite UM/UIM coverage on which to stack other household policies with UM/UIM benefits. The Superior Court also relied on the *Eichelman* decision, finding that the Plaintiffs were using the Erie Auto Policies to procure UIM coverage in the first place. As this was not a stacking case, the Superior Court held that the rationale of *Gallagher* did not apply.

The Supreme Court granted *allocatur* in order to consider whether the lower courts had erred in distinguishing *Gallagher* and applying *Eichelman*. The gist of the Plaintiffs' argument before the Supreme Court was that *Gallagher* had overruled *Eichelman sub silentio*.

Following an in-depth analysis of both the *Eichelman* and *Gallagher* decisions, the Supreme Court affirmed the decisions of the lower courts. The Court rejected the view that household vehicle exclusions are *ipso facto* unenforceable and reiterated that the *Gallagher* decision should be construed narrowly. Further, the Court found that the decision in *Gallagher* did not undermine *Eichelman*'s central holding. It simply held that a household vehicle exclusion cannot conflict with §1738 by purporting to take away coverage that the law says is mandatory unless waived using a specific form. The Court concluded that in cases where the exclusion does not interfere with the insured's ability to stack UM/UIM coverage, *Gallagher*'s *de facto* waiver rationale is not applicable.

Erie Ins. Exchange v. Backmeier, 2022 PA Super 221 (Pa. Super. Dec. 28, 2022)

As an issue of first impression, the Superior Court upholds a UIM Limit of Protection Clause

See p. 5 for a more detailed analysis of the Backmeier opinion from Craig Murphey, Esq.

On September 25, 2020, Andrew Backmeier, was riding his bicycle when he was struck and killed by an underinsured motorist. The victim's mother sought UIM recovery through her two (2) Erie auto insurance policies. The two (2) policies each provided $100,000/$300,000 in UIM benefits. The victim's mother had executed valid stacking waivers for each of the Erie policies. Both policies contained a "Limit of Protection" clause, which capped total recovery under all household policies at the highest limit available under any single policy. Erie tendered a total of $100,000 of UIM coverage pursuant to the "Limit of Protection" clauses.

Erie filed a declaratory judgement action requesting the Court to find that the total recovery under the two policies should be set at $100,000 based upon the "Limit of Protection" clauses in each policy. The trial court granted Erie Insurance's Motion for Judgment on the Pleadings and denied the injured party's cross-motion.

In a matter of first impression, the Superior Court was asked to determine whether a "Limit of Protection" clause may reduce or limit the amount of second priority UIM coverage when more than one second priority UIM coverage policy is applicable. The Court ruled that, under the circumstances of this particular case, a "Limit of Protection" clause does not violate the MVFRL's excess coverage requirement when stacking

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had knowingly and effectively been waived.

The Court found that the "Limit of Protection" clauses only applied in instances when stacking had been waived. A plain reading of the clauses capped the UIM coverage provided by one or more second priority UIM coverage policies to the "highest limit of liability" for any one motor vehicle insured under any one second priority UIM coverage policy. In other words, the coverage limits of all second priority UIM coverage policies could not be aggregated or "stacked" one upon the other. The Court declared that this was precisely how the concept of unstacked UIM coverage was supposed to operate. The Court found that to conclude otherwise would allow a policyholder to waive stacking, receive a reduced premium and then permit stacking of second priority UIM coverage. The Order granting judgment on the pleadings in favor of Erie was affirmed.

Ritchey v. Rutter's Inc., 2219 EDA 2020 (Pa. Super. 2022)

The Pennsylvania Superior Court affirms a Philadelphia County trial court's decision to deny Defendant's motion to transfer venue based on the doctrine of forum non conveniens.

This appeal arose out of a dispute regarding whether a Defendant could transfer a personal injury case from Philadelphia County to either Cumberland County or York County, on the basis of *forum non conveniens*. Plaintiff, David Ritchey ("Plaintiff") sustained catastrophic personal injuries when a truck, owned by Defendant Rutter's and operated by a Rutter's employee, made an abrupt stop to make a left turn causing him to be ejected off his motorcycle. At the time of the incident, Plaintiff resided in Cumberland County, which is also where the crash occurred. Defendant Rutter's, though headquartered in York County, regularly conducted business in Philadelphia County for purposes of venue.

Plaintiff's Complaint was filed in Philadelphia County. Defendant, Rutter's filed a motion to transfer venue based upon the doctrine of *forum non conveniens* set forth at Pa. R.C.P. 1006(d)(1). Rutter's alleged that the case should be transferred from Philadelphia County to either Cumberland or York County because the witnesses and parties would suffer significant hardship and inconvenience if forced to travel more than 100 miles (each way) to Philadelphia County for depositions and trial. Rutter's offered 20 affidavits from purported witnesses in support of the motion to transfer. Ultimately, the trial court denied the Defendant's motion for transfer, finding the supporting affidavits represented a "superficial, forced showing of inconvenience," falling short of the heavy burden of proof required under a *forum non conveniens* analysis. The trial court's decision was appealed by Defendant Rutter's.

The Superior Court began their analysis by examining *Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156 (Pa. 1997),* the Supreme Court's seminal case on the issue of *forum non conveniens*. The Superior Court also discussed the Supreme Court's more recent decision on this issue, *Bratic v. Rubendall,* 99 A.3d 1 (2014), which reaffirmed the *Cheesman* standard but held that "the showing of oppression needed for a judge to exercise discretion in favor of granting a *forum non conveniens* motion was not as severe as suggested by some of the Superior Court's post-*Cheeseman* cases.

After review of the controlling caselaw, the Superior Court reiterated that a plaintiff's forum choice should be rarely disturbed and should be given great weight and deference by the trial court in a *forum non conveniens* analysis. Further, under *Cheeseman*, the Defendant has a heavy, but not draconian, burden in justifying a request to transfer venue, which may be met by:

> showing that the plaintiff's choice of forum is vexatious to him by establishing with facts on the record that the plaintiff's choice of forum was designed to harass the defendant, even at some inconvenience to the plaintiff himself. Alternatively, the defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof... but... the defendant must show more than that the chosen forum is merely inconvenient to him.

The Superior Court found no reversible error in the trial court's decision to deny Defendant's motion to transfer venue based upon *forum non conveniens*. Noting that there is a vast difference between a finding of inconvenience and one of oppressiveness, the Superior Court found the following factors relied upon by the trial court as persuasive support for its decision to deny transfer: (1) the use of technology to conduct remote depositions and garner witness statements has become a vital component of pre-trial discovery in civil trials; (2) the witnesses originally identified as having hardships may offer cumulative testimony or not even be necessary; (3) Defendant Rutter's affidavits amounted to nothing more than a superficial showing of inconvenience; (4) Plaintiff received three (3) months of medical care at a Philadelphia county hospital and rehabilitation center; (5) two of Plaintiff's expert witnesses were located in

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Philadelphia; (6) two key witnesses testified that it would not be oppressive for them to travel to Philadelphia County; and (7) the likelihood that a substantial number of expert witness would be involved in the liability and damages phases of trial, for whom neither Philadelphia nor York or Cumberland Counties would be convenient forums.

Geist v. State Farm Mut. Auto. Ins. Co., 49 F.4th 861 (3rd Cir. Sept. 29, 2022)

Third Circuit holds that the MVFRL requires insurers to obtain elections of lower UIM-coverage limits only when they issue new policies.

This case arose out of a motor vehicle crash where Miranda Geist ("Plaintiff") was injured. Plaintiff obtained a settlement from the negligent motorist's insurer and then made a claim to recover UIM benefits with her parents' auto insurer, State Farm.

The State Farm policy was originally issued in 2010 and it insured two (2) vehicles providing liability coverage of $100,000/$300,000. The policy also provided UIM benefits of $50,000/$100,000 with stacking. From the date of purchase until the date of the crash, the named insured (Plaintiff's dad) made only two changes to the policy: (1) he removed the second vehicle in January 2011; and (2) added a vehicle in February 2013. At the time the vehicle was added to the policy, the named insured did not execute an acknowledgment for UIM-coverage limits below the bodily injury-coverage limits.

Because the named insured never executed this acknowledgment when he added a vehicle to the policy, Plaintiff argued she could recover up to $200,000 in UIM benefits, the stacked total of UIM coverage for the two (2) insured vehicles. State Farm, however, paid her only $100,000 in benefits, maintaining that the policy provided only up to $50,000 in UIM coverage per vehicle. A dec action was commenced by Plaintiff and a District Court for the Eastern District of PA granted State Farm's motion to dismiss finding that, under the MVFRL, an insurer must seek an election of UIM-coverage limits that are less than the bodily injury-coverage limits only when it issues a new policy, and, as long as the insurer obtains such an election, the UIM-coverage limits remain in effect as long as the policy does. This decision was appealed to the 3rd Circuit.

On appeal, Plaintiff argued that §1731 and §1734 require an insurer to obtain a written election to provide UIM coverage limits lower than bodily injury-coverage limits when a policyholder adds a new vehicle to an existing automobile insurance policy, and, if the insurer fails to do so, it must provide UIM-coverage limits equal to the bodily injury-coverage limits.

The 3rd Circuit disagreed, finding that the plain text of the MVFRL requires insurers to seek elections of lower UIM-coverage limits only when they issue new policies. When applying that conclusion to the facts of the case, the Court found that no events in the years prior to the subject motor vehicle accident had triggered the obligations under §1731 and §1734 because State Farm had never issued a new policy to the insured. As neither §1731 nor §1734 required State Farm to seek a new written election of UIM coverage limits when Plaintiff's parents insured a new vehicle, the 3rd Circuit held that Plaintiff had failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). The decision of the District Court was affirmed.

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UPCOMING EVENTS

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

Tue, Apr 11, 2023 - "Learn at Lunch" CLE - *Working with a Pain Management Specialist to Maximize Recovery* - Sudhir Rao, of Pain and Spine Specialists - via Zoom

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

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

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

William Blackstone called the jury "a privilege of the highest and most beneficial nature" and "the grand bulwark of [every Englishman's] liberties" (Jolly, Richard L., et al. 6). The civil jury has been a fundamental part of the American legal system since before its importance was codified in the Seventh Amendment,and it has repeatedly proven an institution that produces reliable decisions and essentially connects citizens to the justice system. But decades of procedural changes, legislative action, and appellate decisions, motivated by a campaign led by those who wish to strip ordinary citizens of their power, have deteriorated the civil jury, restricting it in a way that betrays the intentions of the Founders, Constitution, and strong tradition of American self-governance.

The civil jury played an important role in colonial America, allowing colonists to challenge the power of the repressive British government; the First Congress of the American Colonies declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies" (Jolly, Richard L., et al. 7). The eighteenth grievance in the Declaration of Independence reads "For depriving us...of the benefits of Trial by Jury," and a major objection to the ratification of the Constitution was the lack of a provision codifying the civil jury (US 1776, Jolly, Richard L., et al. 8). Even while the Founders crafted a government with various checks on the power of the general public, they highly prioritized maintaining the civil jury. Jefferson himself espoused the importance of popular influence in the judiciary, writing that it was better to leave the people out of the legislative process than the judicial because "[t]he execution of laws is more important than the making of them" (Jolly, Richard L., et al. 8). In 1774, John Adams wrote that "Representative government and trial by jury are the heart and lungs of liberty" (Zouhary).

The Founders unmistakably wished for the longevity of the civil jury; the right is clearly established in the Constitution and ingrained in the legal culture of early America. Yet the civil jury has been stripped of its power; a fundamental right originally guaranteed to the people has been incrementally restricted to the point that the institution now barely resembles its influential former self.

Juries have become, according to one judge, "mere assistants of the courts." "The civil jury is dead,"writes Professor Renee Lettow Lerner. And numbers back these proclamations. Juries decided 5.5% of federal civil cases in 1962 but just 0.48% in 2020. States saw a decline from 1.8% in 1976 to 0.6% in 2002. Of the states included in an analysis by the Court Statistics Project, juries disposed of a median of just 0.09% of civil disputes in 20I9. That year, Hawaii reported just one civil jury trial, while Alaska reported zero (Jolly, Richard L., et al. 4).

The path of this decline is clearly seen in various pieces of legislation and court decisions, which have worked in tandem to stop cases before they go to trial and limit the power of the civil jury.

In 1938, Congress passed the Federal Rules of Civil Procedure, which aimed to"secure the just, speedy, and inexpensive determination of every action and proceeding" (United States, Congres, House). Juries, which have long been criticized for their length and expenses, were directly in the line of fire. One scholar noted at the time that "[v]irtually everyone connected with urging uniform procedural rules denigrated juries," and one of the rule committee's assistants bluntly wrote that "the number of jury trials should be cut down...so as to not jeopardize the attainment of other objectives" (Jolly, Richard L. ,et al. 11-12). The legislation directly targeted a constitutional right, making the justice system more productive-and less just.

Myriad practices degrading the civil jury trial, and public litigation in general, have been implemented in the name of efficiency. The Federal Rules began to require pretrial discovery practices that pushed litigants towards settlement, limited the number of trials by allowing liberal joinder of parties and claims, and directed judges to facilitate settlement during pretrial conferencing. As Richard Jolly, Valerie Hans, and Robert Peck write in "The Civil Jury: Reviving an American Institution," "Trials were no longer the process of resolving disputes, but rather the result of a breakdown in the settlement process" (13). The Federal Rules also established the jury-waiver default rule, which reversed the precedent requiring a litigant to request a bench trial, with a jury trial as the default. One attorney later wrote that this change effectively limited use of the civil jury while preserving the constitutional

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right by "requiring a party to make a timely demand or be deemed to have waived his rights" (Jolly, Richard L,et al. 12).

The Civil Justice Reform Act, passed in 1996, aimed to streamline the judicial process in federal district courts, similar to the Federal Rules. Supreme Court decisions regarding the legislation have implemented a more restrictive requirement for plaintiffs to plead the legitimacy of their claims than previously existed, giving judges more power to block a case before it goes to trial. The increasing prominence of summary judgment, which empowers judges to dismiss cases for which they believe there is "no genuine dispute of material fact" to be had, has also cut the civil jury out of the judicial process; now, approximately 19% of federal cases are resolved this way. Mandatory arbitration, which requires employees and consumers to mediate disputes with a business instead of in court, has similarly contributed to the decline in trials. (Jolly, Richard L., et al. 13-14)

Further, damage caps diminish juries' power. By restricting their ability to award plaintiffs compensation, damage caps "arbitrarily supplant the jury as fact-finder of the value of a given dispute" and "limit the incentive of litigants and their attorneys to bring such claims," write Jolly and his co-authors (14). And the twelve-person jury has been largely abandoned; now, only one in eight civil trials is decided by a traditional twelve-person jury, while most are decided by juries of eight or fewer. As larger juries are more likely to include members of a minority group in the community and less likely to be influenced by outlier jurors, this change is especially damaging (Gensler).

These actions deteriorating the civil jury have been justified with the reasoning that juries are not worth their monetary and temporal costs, a perspective that has been driven by a decades-long push by political and social elites to diminish the role of juries, stripping the power of regular citizens to protect their own interests.

The foundation for the modern campaign against civil juries began with a 1970 Supreme Court case, *Ross v Bernhard,* which investigated whether the Seventh Amendment right applied to stockholder derivative actions (United States, U.S. Supreme Court). A footnote attached to the Court's conclusion stated that when determining the applicability of a jury trial, "the practical abilities and limitations of juries" must be considered. While subsequent use of the phrase by the Supreme Court has been minor, the suggestion that juries' deficiencies warranted practical assessment gained steam. 34 subsequent federal appellate and 114 district court opinions (but only 15 state court opinions) mentioned the "practical abilities and limitations of juries," demonstrating to those who opposed civil juries that their arguments questioning the competency of lay-jurors could be rewarded (Jolly, Richard L., et al. 16).

A corporate public relations campaign ensued, aiming to paint juries as unequipped for complex cases and sympathetic to plaintiffs. Issues of outrageous punitive damage awards were blown out of proportion. Corporate groups spread "skewed and fictionalized stories about runaway juries giving large verdicts to undeserving plaintiffs to create a political environment primed for jury-restrictive legislation while blaming plaintiffs' lawyers and juries for a broken civil justice system," as Jolly and his co-authors write. Insurers and business groups funded studies to support their complaints about bet-the-company litigation, even citing these studies and outlier news stories in certiorari petitions and briefs to the Supreme Court as evidence that runaway punitive damages awarded by juries were exceedingly prevalent and cruel (Jolly, Richard L., et al. 17).

The campaign worked. After the Court's initial resistance to imposing limits on punitive damages, Justice Sandra Day O'Connor was the first to bemoan "skyrocketing" punitive damage awards. This view soon overtook the Court, which held that "grossly excessive" punitive damages violated due process. It concluded that judges could override juries' decisions, determining that punitive damages no longer served a compensatory purpose and thereby removing them from the jury's jurisdiction-despite a strongly established constitutional history naming juries "judges of the damages." And believing claims that juries routinely fell for"junk science," the Court put judges in a role that would allow them to prevent juries from hearing certain expert testimony (Jolly, Richard L., et al. 18-19).

Years of attacks eroding the legitimacy of the civil jury have dug the institution's grave, and actions taken in light of COVID-19 might be the nail in the coffin. Courts have deferred civil jury trials in the face of tight budgets,

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creating a backlog of potentially millions of cases; as Jolly and his co-authors write, "The policy choice to cut these budgets is part of a broader, growing notion that civil trials can be easily discarded with if done in furtherance of some vague notion of efficiency" (19). This response to the COVID-19 crisis-the elimination of a foundational part of the American justice system in trying times-could have begun a dire cycle: Regular citizens become less invested in the legal system, jurists and litigants believe their decisions do not require public scrutiny, more people to go to private adjudication services, there are fewer jury trials, and fewer lawyers train to argue before a jury (Jolly, Richard L., et al. 20). The civil jury pronounced dead by the hands of the few, at the expense of the many. Centuries ago, William Blackstone warned of this situation---of "secret machinations, which may sap and undermine [the jury]," and that, no matter how convenient these appear initially, "delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty" (Jolly, Richard L., et al. 29).

These degradations of the civil jury largely have not been based on fact. Attacks on the competency of jurors are generally unsubstantiated, and concerns over expenses are far outstripped by the value of civil jury trials.

Legal experts in one survey viewed jury trials as the procedure they preferred the most and among the fairest procedures (Jolly, Richard L., et al. 15). Research has shown that judges and juries award punitive damages at about the same rate; the Supreme Court recognized this when it reversed its stance that juries recklessly awarded punitive damages, conceding that data revealed "an overall restraint" on the part of juries (Jolly, Richard L., et al. 23, 18). And juries are not clueless in the face of scientific evidence; in fact, the complexity of evidence is unrelated to agreement rates between juries and legal experts (Jolly, Richard L., et al. 23).

The jury's diversity of voices and requirement for jurors to deliberate together enhances the quality of fact-finding (Jolly, Richard L., et al. 22). And despite their legal expertise, judges are not immune to bias; they are vulnerable to partisan pressures, special interest funding, demographic biases-judges also have a diversity problem-and mistakes of routine. Juries come with a fresh perspective (Jolly, Richard L., et al. 21). And though jurors may carry bias, they can balance each other out, whereas judges lack immediate counterweights. As William Blackstone wrote, the jury is a "strong and two-fold barrier...between the liberties of the people and the prerogative of the crown" because "the truth of every accusation...[must] be confirmed by the unanimous suffrage of twelve of [a defendant's] equals and neighbors indifferently chosen and superior to all suspicion" (Jolly, Richard L., et al. 6).

Relying on community members allows for greater participation in the legal system and promotes faith in governmental institutions, expanding democracy in a critical way. Civil juries, just as they did at the time of the country's founding, "tie the hands of powerful actors to the mast of the community," as Jolly and his co-authors write, shedding light on unfair practices (6). Jurors ground the application of the law to community norms, and public litigation has possibilities for error correction, reinforces lawful behavior by publicly holding civil defendants accountable, and informs policy-makers about their constituencies. (Jolly, Richard L., et al. 22). Further, jury service positively impacts those who participate, increasing civic engagement and positive perceptions of the legal system. In the words of Alexis de Tocqueville, "[Jury service] invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government" (Jolly, Richard L., et al. 25).

Considering the benefits of the civil jury and its importance to the health of American democracy, its decline is not only unconstitutional but also extremely unfair to the public.

As J. Kendall Few writes, "Trial by jury must be preserved: not as a mere formality, stripped of its discretion by arbitrary and inflexible rules dictated by the captains of commerce and industry for the furtherance of their own selfish interest, but free to search out and find the truly essential justice of each individual case" (Monk). Policy changes to re-implement the jury-trial default rule, repeal damage caps, and prioritize twelve-person juries would more fully honor the Seventh Amendment. Courts should ensure that juries are accurate cross-sections of their communities and resolve problems of racial bias in jury selection (Felton). Reforms such as giving jurors preliminary substantive legal instructions, allowing notetaking and questions, and permitting jurors to discuss with each other during arguments would help jurors better understand evidence. And expedited jury trials can

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solve time and cost problems of traditional jury trials (Jolly, Richard L., et al. 27-29).

The importance of the civil jury was codified in the Seventh Amendment, and its value to the Founders emerges clearly centuries later. Its benefits are evident, and its glaring decline, driven by fallacious and exaggerated arguments, has deprived the public of a fundamental right in a way that is both unfair and unconstitutional. chipping away at democracy incrementally but devastatingly. Tocqueville warned of this nearly 200 years ago, writing "If the lights that guide us ever go out, they will fade little by little, as if of their own accord" (Jolly, Richard L., et al. 20). The civil jury is a vital pillar of American democracy-let society not ignore the evidence that it is regrettably being administered its last rites.

Works Cited

Felton, Emmanuel. "Many juries in America remain mostly White, prompting states to take action to eliminate racial discrimination in their selection." *The Washington Post,* 23 Dec. 2021, www.washingtonpost.com/national/racial-discrimination-jury-selection/202l/12/l8/2b6ec690-5382-llec-8ad5-b5c50clfb4d9_story.html.

Gensler, Steve, et al. *Bringing Back the Twelve-Person Civil Jury.* Bolch Judicial Institute, Duke Law School, 2020, judicature.duke.edu/articles/better-by-the-dozen-bringing-back-the-twelve-person-civil-jury/.

Jolly, Richard L., et al. *The Civil Jury: Reviving and American Institution.* Berkeley Law, Civil Justice Research Institute, Sept. 2021,

civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf.

Monk, Brandon Paul. "7 Quotes That Illustrate the Importance of Trial by Jury to Remember Next Time You Have Jury Duty." *Avvo,* 8 Sept. 2016,

https://www.avvo.com/legal-guides/ugc/7-quotes-that-illustrate-the-importance-of-trial-by-jury-to-remember-next-time-you-have-jury-duty

United States, U.S. Supreme Court (U.S.). *Ross v. Bernhard.* Docket no. 42, 2 Feb. 1970, caselaw.findlaw.com/us-supreme-court/396/531.html.

United States, Congress, House. Federal Rules of Civil Procedure. United States Code, title 28, www.law.comell.edu/rules/frcp/rule_l.

Zouhary, Jack. "Jury Duty: A Founding Principle of American Democracy. "*Civil Jury Project at NYU School of Law,* civiljuryproject.law.nyu.edu/jury-duty-a-founding-principal-of-american-democracy/.

Essay submitted by Sam Podnar, of North Allegheny Senior High School.

TRIVIA CONTEST

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

Trivia Question #35

What name did Frank Epperson originally give to his frozen dessert creation when he "invented" it by accident in 1905 at the age of 11?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by May 26, 2023. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #35 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 #34 –**Stellar dendrite describes the crystalline shape of what (all too) common outdoor winter object?**

Answer: Snowflakes

Congratulations to Michael Megrey, a President's Club member with Woomer & Talarico, on winning a $100 Visa gift card!

Photos from the Past Presidents' Dinner

Jan 11, 2023

From L to R in photo #1: Past Presidents Carl Schiffman and Bill Goodrich. In #2: Past Presidents Dave Landay, Chuck Evans, The Honorable Christine Donahue, Rich Schubert, and Jason Matzus. In #3: Board of Governors Members Tyler Setcavage and Matt Logue. In #4: President Erin Rudert and Board of Governors Member Brendan Lupetin. In #5: Past Presidents Dick Galloway, Tim Riley, and Rich Catalano. In #6: Past President Bryan Neiderhiser and Brad Holuta. In #7: Past Presidents Josh Geist and Tim Riley. In #8: Past President Bernie Caputo and Board of Governors Members Rich Ogrodowski and Gianni Floro. In #9: Board of Governors Member Shawn Kressley, Gina Zumpella, and Past President Chris Miller. In #10: Lauren Kelly, Gianna Kelly, and Past President Larry Kelly. In #11: Bob Daley, Sara Watkins, Board of Governors Member Maggie Cooney, and Aaron Rihn. In #12: Board of Governors Member Carmen Nocera and Past President Dave Landay.

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Through the Grapevine....

Congratulations to **Tim George** as he holds the reins this calendar year as the President of the Erie County Bar Association.

Business Partner Howie Schulberg, of **Schulberg Mediation**, has a new street address at 1174 Harvard Rd, Pittsburgh 15205. Phone and email remains the same.

President's Club Member Dennis Liotta can now be reached at 806 Saddleback Ct, Greensburg, PA 15601. 412-638-5089 daliotta77@gmail.com

President's Club and Board of Governors Member Rich Epstein's firm has joined with Brouse McDowell LPA. His new email is repstein@brouse.com.

Young Lawyer Jessica Nelson, of SWMW Law, has a new email address: Jessica.Nelson@swmwlaw.com.

Auxiliary Member Kila Baldwin is now with Anapol Weiss, One Logan Sq, 130 N 18th St, Ste 1600, Phila, PA 19103. 215-735-1130 kbaldwin@anapolweiss.com

Board of Governors Member Karesa Rovnan has joined forces with **Steve Barth** as Barth Rovnan, LLC, 116 Blvd of the Allies, Pittsburgh 15222. Karesa can be reached at 724-612-7475 or kmrovnan@gmail.com.

President's Club Member Greg Rosatelli has moved to Medure Bonner Bellissimo, LLC in New Castle. 724-653-7855 grosatelli@medurebonnerlaw.com

President's Club Member Caitlin Harrington is now with Margolis Edelstein at 983 Third St, Beaver 15009. 724-774-6000 charrington@margolisedelstein.com

William Schenck, of Schenck & Long, has a new address at 297 Pittsburgh Rd, Ste 2B, Butler 16002.

Drew Rummel now works with Morgan & Morgan, 603 Stanwix St, Ste 1825, Pittsburgh 15222. 412-222-5540 drummel@forthepeople.com

President's Club Member Mike Gianantonio has joined Friday & Cox LLC at 1405 McFarland Rd, Pittsburgh 15216 412-561-4290 mgianantonio@fridaylaw.com

James Lopez has moved to Atlanta, GA and is with Monge & Associates.

Brandon Sprecher has moved to Chambersburg and is working with the assistant attorney general.

Past President Jason Matzus has moved his office to Ste 1500 in the Grant Bldg. All other info remains the same.

Lastly, our heartfelt condolences to **Past President Mark Homyak** on the passing of his son, and **President Erin Rudert** on the loss of her step-father-in-law.