THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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PRESIDENT'S MESSAGE

It is truly an honor to serve WPTLA as president. I joined WPTLA right out of law school in 1992. As I began to attend meetings, I had the opportunity to meet the best trial lawyers in Western Pennsylvania. As a young lawyer I mostly listened – and learned more practical insight than anyone learns in law school alone. I also got to know some other young up and coming lawyers of my own generation and came to gain confidence that a young lawyer could try and win cases. Many of those young lawyers have gone on to do impressive things and enjoy seeing them around nearly 30 years later.

Perhaps one may think that nearly 30 years later, the foregoing has become irrelevant, but I continue to enjoy learning not only from veterans, but as a veteran, I enjoy learning the latest trends from our younger members.

The bottom line is that WPTLA offers something for every lawyer at every stage in their career. I hope that many of you who do not regularly join us at our events will consider giving these events a try this year and will enjoy the community that WPTLA offers.

A WORD FOR OUR GENERAL MEMBERS

I often wonder why many members do not participate in many of our events. In my mind, I have speculated on a couple of factors. One factor may be the familiar "I do not know anyone." Please be assured, if you come without knowing anyone, myself and members of our board will make an effort to get to know you.

The other factor that I am concerned about is that perhaps some people may feel that they do not have much in common with the typical WPTLA member. If that is the case, I would like to share with you a few things about me, that might have made me feel that I do not fit in.

1. I am essentially a workhorse lawyer. I am not the lawyer that the media seeks out for interviews and I am not the face of a big law firm. Nonetheless, I go to work day after day because I appreciate the opportunity to help my clients and support my family in the process. I hope no one feels that they are too small to be valued in WPTLA. If you feel that way, I hope that you can make it to one of our events and that you will introduce yourself to me.

2. I often wonder if many of our members feel that they are not as political as the leadership of WPTLA or that their views may differ from the leadership. If this is you, let me share what is an open secret: I have many conservative views and share many conservative principles (but no, I was not in the Capitol on January 6). The truth is that assuring just laws for our clients requires our organization to make friends in the legislature among both parties and among legislators who hold varied views on non-civil justice issues. Second, despite my views, I have always been welcomed in WPTLA *(Continued on Page 2)*

"WPTLA offers something for every lawyer at every stage in their career. I hope that many of you . . . will consider giving these events a try this year and will enjoy the community that WPTLA offers." - President Mark Milsop

PRESIDENT'S MESSAGE ... FROM PAGE 1

and my views respected. If you are concerned about being a political outsider, I hope to meet you at one of our events this year, please introduce yourself.

3. I come from a family of modest means and do not belong to country clubs or other such organizations. Please do not feel that you are too small for WPTLA.

Despite the things that may make me a little different, what I share with my predecessor presidents and other members of the organization is the honor of representing my fellow citizens before the Courts, one of the three great pillars of our republic, I hope that many of you - our members - will see in me a different face that maybe shares with you a characteristic or two.

A WORD FOR EVERYONE

The good news is that WPTLA is back. Although Covid is still with us, after a year and a half of shut downs, we are learning to live with the virus and WPTLA is hosting live events. As you are reading this, the first of them are already a done deal. As such, my primary goal for this year is to return to normalcy. Second, our organization like many others must work hard to maintain a strong membership. I urge you to encourage your friends, members of your firm and other colleagues to give WPTLA a chance. Third, I am hoping that we can increase our legislative outreach. I am asking that you consider participating in this by simply finding an opportunity to introduce yourself to your state legislator and state senator so that they will know you when there is important legislation affecting our clients. Fourth, although much of the unrest following George Floyd's death has dissipated, it is time for us to assess what valid concerns exist in the environments that we move within, especially the Court House. I am asking that members share with me their thoughts on whether minority members get the same results at trial and in settlements. If the answer is no, why is that and what can we as trial lawyers do about it. As a related item, members of the board of governors have expressed their hope that we can work to assure diversity among our membership and in our leadership. Please consider inviting people that you know who are diverse to consider membership. If you are a member of a group that is underrepresented in our leadership and are willing to move into leadership, please let me know who you are.

MOVING TOWARD ACTION

As I have said earlier in this letter, I would like to meet each and every general member at one of our events. Our next event will be the Legislative Meet & Greet on September 23rd. Please consider attending. I really mean it when I say I want to meet you as does the rest of our leadership.

By: Mark E. Milsop, Esq. of

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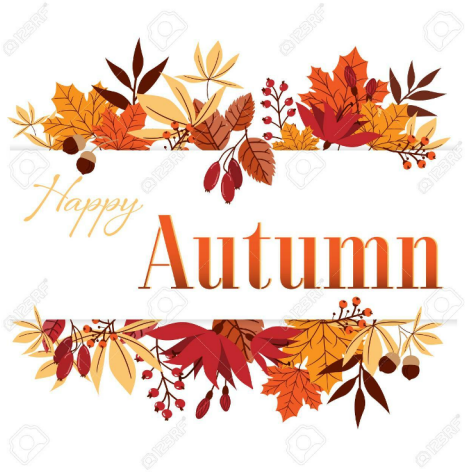

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Winter 2022	Nov 26	Dec 10
Spring 2022	Feb 25	Mar 11
Summer 2022	May 20	Jun 3

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

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PLAINTIFFS-ONLY DATABASE

The Plaintiffs-Only Database Committee is always looking for new submissions to add to the database for our members' reference and use. We are happy to review any type of submission that you are willing to share including: complaints, briefs, motions, DME reports, and doctor's deposition transcripts.

In particular, we'd like to add more submissions to our discovery motions section and the sections containing responses/briefs in opposition to preliminary objections and summary judgment motions. We would also like to continue adding content to our new "Orders and Opinions" section. If you've received a favorable ruling in any court throughout western PA, please consider sharing!

Please forward any submissions to Laurie Lacher, laurie@wptla.org, for consideration.

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Changes to Federal Rule of Evidence 702 – Clarification of an Essential Gatekeeping Function, an Undue Burden on the Federal Judiciary and Litigants, or Barring the Courthouse Door?

Federal judges are tasked with broad, vast, and seemingly boundless responsibilities. They are expected to know, and correctly apply, the law in diverse legal matters with the same judge often presiding over civil matters, criminal trials, copyright or trademark suits, admiralty cases, and other legal matters.

When explaining to clients, or others who may not be familiar with the inner workings of the federal judiciary, what is actually expected of these judges, I often reference a quote delivered by Michael Richards[1] as Cosmo Kramer in the 144th episode of Seinfeld titled "the Andrea Doria": "Oh, I'll take a vet over an MD any day. They gotta be able to cure a lizard, a chicken, a pig, a frog - all on the same day."

In Western Pennsylvania, we are fortunate to have an exceptional federal judiciary. Our judges are fair-minded, hard-working, well-versed in the law and its intricacies, and eminently capable. Nonetheless, every human has limitations. It is unfair to create a crucial position, or modify such an important role, only to craft a job that is only capable of being properly and adequately performed through perfect execution of all tasks by an omniscient, omnipotent individual. Arguably, the presumptively forthcoming changes to Federal Rule of Evidence 702 bring us one step closer to demanding the unattainable from our federal judiciary.

I. The Gatekeeping Obligation

The general gatekeeping obligation imposed upon our district judges is well established See e.g. *United States v. Williams*, 974 F.3d 320, 358 (3d Cir. 2020) citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167 (1999). At this point, it is beyond reasonable argument that a federal district judge is obligated to fulfill her gatekeeping function and ensure that testimony based upon specialized knowledge is only admitted if offered by qualified individuals, is reliable, and fits the case. See e.g. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594-95, 113 S. Ct. 2786 (1993). As stated within the Advisory Committee Note to 2000 Amendments to Rule 702, "The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted."

However, the question of how best to meet this gatekeeping obligation, and therefore ensure that only valid expert testimony is presented to the finder of fact, has persisted. See *Advisory Committee on Evidence Rules*, October 1999 Agenda Book (1999) ("Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation.")

II. The Current Status of the Gatekeeping Obligation as Enumerated in Rule 702

The requirement imposed upon our judiciary has been codified, and periodically amended (the most significant of which being in response to *Daubert*, *supra*) to ensure it reflects the current state of the law, with the current iteration reading as follows:

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In short, Rule 702 provides for the admission of expert testimony that satisfies the requirements of "qualification, reliability and fit." *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 80 (3d Cir. 2017). A district court is expected to act as a gatekeeper preventing opinion testimony from reaching the finder of fact that does not meet these three requirements. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008)

III. The Current Liberal Policy of Admissibility and Flexible Inquiry

Consistent with the overarching spirit *(Continued on Page 5)*

[1] *Reference to this actor and/or role should not be construed as endorsement of the man.*

of the Federal Rules of Evidence, Rule 702 embodies a "liberal policy of admissibility" and a "strong preference" for admitting any evidence that may assist the fact-finder. See e.g. *Pineda*, 520 F.3d at 243; *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997) ("The Rules of Evidence embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact.").

Each of the aforementioned requirements is to be evaluated in a flexible fashion. See e.g. *Kumho Tire*, 526 U.S. at 150 (Setting forth that "there are many different kinds of experts, and many different kinds of expertise:" that there is no "definitive checklist" for admissibility; and that the relevant inquiry must be "tied to the facts of a particular case" and holding "[W]e can neither rule out, nor rule in, for all cases and for all time, the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue."). The district courts exercise "broad latitude" in determining how to access these requirements. See *id*.

Indeed, admissibility has largely been considered the norm, if not the default, with the courts generally permitting credibility determinations to be presented to the finder of fact since these go to the weight of the evidence rather than its admissibility. See e.g. *Heller v. Shaw*, 167 F.3d 146, 157 (3d Cir. 1999) (*citing Kannankeril*, 128 F.3d at 809) (Third Circuit emphasizing that district courts should take care not to "mistake credibility questions for admissibility questions"); *Daubert*, 509 U.S. at 596 ("[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *but cf*. *Wood v. Showers*, 822 F. App'x 122, 125-26 (3d Cir. 2020) ("Evaluating the reliability of an expert's methodology is not a credibility determination but a critical gatekeeping function for judges — not juries — to perform.").

This is not to say that districts courts permitted the admission of all proffered expert testimony. See e.g. *In re: Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787, 800 (3d Cir. 2017). Rather, it is an affirmation of the general principle that "A court should not . . . usurp the role of the fact-finder" and "an expert should only be excluded if the flaw is large enough that the expert lacks the 'good grounds for his or her conclusions.'" *Id*. citing *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir. 2000) (internal quotation marks and citation omitted).

Generally, courts have found that the qualification prong is satisfied if the witness possesses "specialized expertise." *Schneider v. Fried*, 320 at 404. Courts "have interpreted this requirement liberally, holding that 'a broad range of knowledge, skills and training qualify an expert.'" *Id*. (citation omitted). Moreover, "it is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir.1996).

The reliability prong is met so long as the proffered expert testimony/evidence is based on "good grounds" that characterize "the practice of an expert in the relevant field" rather than "subjective belief or unsupported speculation." *See Schneider v. Fried*, 320 F.3d 396, 404 (3rd Cir. 2003); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 152 (1999) (noting that reliability can be established by the expert's personal knowledge or experience). Courts have stated the standard for determining reliability "is not that high." See e.g. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994); *United States v. Fernandez*, 795 F. App'x 153, 154-55 (3d Cir. 2020) ("Following 'a liberal policy of admissibility,' Rule 702's 'standard is not that high, but is higher than bare relevance.'").

The expert testimony must also "fit," in that the testimony "must be relevant for the purposes of the case and must assist the trier of fact." *Id*. (*citing Daubert*, 509 U.S. 509 at 591); *Fernandez*, 795 F. at 155 ("expert evidence which does not relate to an issue in the case is not helpful.").

The interpretation of Federal Rule of Evidence 702 to encompass, and require, a flexible inquiry and the general policy of admissibility is shared by many district courts and federal appellate courts throughout the United States. See e.g. *In re Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation*, 424 F. Supp. 3d 781, 790 (N.D. Cal. 2020) (quoting *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)) ("[T]he gatekeeping function is meant to 'screen the jury from unreliable nonsense opinions'"); *U.S. v. Finch*, 630 F.3d 1057 (8th Cir. 2011) *Continued on Page 6)*

("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.").

In short, the paramount consideration respecting these three requirements should be whether the expert testimony will assist the trier of fact. See e.g. *United States v. Velasquez*, 64 F.3d 844, 850, 33 V.I. 265 (3d Cir. 1995).

IV. Criticism of the Application of Federal Rule of Evidence 702 and Rule Changes and History of the Movement for Change

Advocates for a more restrictive reading of the Rule 702 requirements argue that courts have consistently failed to correctly apply these requirements since these courts have found that questions regarding the sufficiency of an expert's basis and the application of the expert's methodology are questions of weight as opposed to admissibility. They have criticized what they deem to be an overly lenient approach to the application of Rule 702.

The genesis of the movement to amend Rule 702 appears to be data gathered and presented by Lawyers for Civil Justice; a coalition of corporate counsel and defense bar practitioners that advocates for reform of procedural rules.

The data Lawyers for Civil Justice presented included 232 federal court decisions reciting variations of the statement, "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination;" 170 federal decisions setting forth variations of the statement that, "Questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility:" and, 79 federal decisions stating variations of the premise that the, "[s]oundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." The sources cited by Lawyers for Civil Justice include both district court rulings and appellate court decisions.

When confronted with a plethora of learned courts throughout numerous jurisdictions reaching nearly identical decisions regarding the proper application of Rule 702, a fact which many would find strongly supports amendment of the Rule to clarify that this approach is indeed the correct application, Lawyers for Civil Justice and the Advisory Committee on Evidence Rules reached the opposite conclusion. They instead determined that the underlying Rule must be amended to preclude this liberal interpretation and flexible application of the Rule 702 requirements.

Proponents of amendment of Federal Rule of Evidence 702 claim that the same is necessary to ensure proper judicial application of the Rule. They assert that amendment will result in clarification of the intent of Rule 702, will combat what they deem to be improper or inconsistent judicial application of Rule 702, and that doing so is necessary to restore the district court's gatekeeping role.

As stated within the Advisory Committee on Evidence Rules, April 2018 Agenda Book (2018) "In sum, the 2000 amendment specifies that sufficient basis and application of method are admissibility requirements − the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods. It is not the case that the judge can say, 'I see the problems, but they go to the weight of the evidence.' After a preponderance is found, then any slight defect in either of these factors becomes a question of weight. But not before. . . . A look at the case law indicates that wayward courts are not confused by what Rule 702(b) and (d) say. It does not appear to be a matter of vague language. The wayward courts simply don't follow the rule. They have a different, less stringent view of the gatekeeper function. So it would seem that any language change would not be one of clarification of text, but rather one which ends up to be something like: 'We weren't kidding. We really mean it. Follow this rule or else.'"; Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2021 Summary (2021) ("A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion is based on sufficient data, some courts have asked whether a reasonable jury could find that the opinion is based on sufficient data. *(Continued on Page 7)*

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The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.").

The desire of the Evidence Rules Committee to amend Rule 702 to codify the above was unanimous. See Advisory Committee on Evidence Rules, April 2021 Agenda Book (2021) ("It is not appropriate for these determinations to be punted to the jury, but judges often do so. For example, in many cases expert testimony is permitted because the judge thinks that a reasonable jury could find the methods are reliable. There is unanimous support in the Evidence Rules Committee for moving forward with an amendment to Rule 702 that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met.")

V. "New" Federal Rule of Evidence 702

Per the Advisory Committee on Evidence Rules, June 2021 Agenda Book (2021), as unanimously approved by the Evidence Rules Committee, the amended Rule will read as follows:

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent has demonstrated by a preponderance of evidence that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods;
>
> (d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

The major difference between the current iteration of Rule 702 and this amended version is the inclusion of **a requirement that the district judge find that the proponent of the expert testimony demonstrates each of the three requirements "by a preponderance of the evidence."**

This rule change may initially appear textual and slight. However, as noted within the Committee Notes accompanying the amendment, the intent is to fundamentally change the practice under the Rule and ensure compliance with the "proper" reading of the same.

In sum, the judge, not the jury, must make a finding that the proponent of this type of evidence as met each of the requirements for admissibility (qualification, reliability, and fit) under a preponderance of the evidence standard. It is no longer acceptable for a judge to review proffered expert testimony and determine that a fact-finder *could* determine that each of these requirements is met by a preponderance of the evidence; the judge must find that they *do* meet this standard.

VI. The Burden and the Harm

As is apparent from the numerous citations set forth in Section IV of this article, this author's pessimism, and overall negative view of the amendment to Rule 702, is not shared by the Advisory Committee on Evidence Rules. In fact, the amendment of Rule 702 has been lauded by many organizations such as the International Association of Defense Counsel, Federation of Defense & Corporate Counsel, the general counsel of 50 of the nation's top corporations, and others.

At the risk of sounding hyperbolic, this author views the amendment of Federal Rule of Evidence 702 as an incredible burden to place upon our already taxed federal judiciary, a usurpation of the fact-finding role of the jury, and a thinly veiled attempt to bar the courtroom doors.

With regard to the burden that will now be placed upon the federal judiciary, a judge will no longer fulfill her duty by evaluating the proffered opinions, methodology, underlying controversy, etc. determining that a sufficient basis exists by which a jury *could* find, by a preponderance of the evidence, that the expert was sufficiently qualified and that opinion was reliable, and that the testimony fit the facts of the case. Rather, the judge must *weigh the evidence* presented by the proponent of the proffered expert testimony, determine whether the proponent of the proffered expert testimony has demonstrated to the requisite evidentiary standard that the requirements have been met, and render her own opinion that each of the criteria has *(Continued on Page 8)*

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pierced the evidentiary threshold.

This process will undoubtedly be exceptionally time-consuming and expensive. It will result in significant delay as a challenge to proffered expert testimony will necessarily result in a robust hearing where the proponent must present sufficient evidence to meet the evidentiary burden or risk the exclusion, in part or in total, of the expert testimony. The judge will be forced to make credibility determinations inherent in the evaluative process necessary to determine the appropriate weight to place on different aspects of the proffered evidence. It will force our judges to act as the fact-finder and weigh the evidence.

Perhaps more worrisome, is the partial loss of one of the most basic tenants of our federal judicial system: the guarantee of a right to civil trial by jury. See *U.S. Const. amend. VII.* In order to effectuate this guarantee, there is a separation between the judge, who typically makes legal determinations relevant to the controversy, and the jury, who acts as the trier of fact. By shifting the fact-finding function related to the proffered expert testimony from the jury to the judge, the amended Rule deprives litigants of this Constitutional protection. Simply stated, when a judge weighs the evidence presented and determines whether a proffered expert's opinions meet the Rule 702 requirements by a preponderance of the evidence, this determination is no longer within the province of the jury. The judge has weighed the evidence and found that the proffered testimony is relevant, the product of acceptable methodology and reliable, fits the case and is relevant.[2]

Finally, it is important to see the amendment of Rule 702 as what it truly is: one step closer to shutting the courthouse doors. It is a tick of the judicial equivalent of the Doomsday Clock bringing us one minute closer to midnight. Litigation is time consuming and expensive. The minimum injury/damage threshold for case selection constantly increases. Just causes are frequently not pursued solely because they are financially untenable.

By way of example, this author's Firm's practice focuses primarily on product liability litigation. It is not uncommon for the costs in a case to reach into the many tens of thousands of dollars with certain matters requiring the advance of expenses well into the six figures. The vast majority of these expenses are related to technical consultants and retained expert witnesses. From a business perspective, it is not economically feasible to accept a case and litigate on a client's behalf unless the potential recovery is sufficient to justify the outlay of litigation expenses. With amended Rule 702, and the anticipated change in its application, these litigation expenses will snowball and necessarily increase the injury/damage threshold necessary to render a case financially viable. As a result, more injured people will go without legal representation and will be unable to receive financial compensation for harms they have suffered through the legally culpable acts of another.

VII. Conclusion

In this author's estimation, Rule 702 as presently drafted presents an appropriate construct for the process of evaluating whether proffered expert evidence should be admitted for consideration by the jury. As currently crafted, and in light of the liberal policy of admissibility of evidence that may assist the finder of fact, it would appear that current Rule 702 properly delegates the judicial and fact-finding functions between the judge and jury. Moreover, the current iteration of Rule 702 certainly seems to strike a fair balance empowering a district judge to utilize her discretion and regulate whether "junk science" or other improper expert testimony makes its way into her courtroom while still permitted the jury to render all credibility determinations when reaching its findings of fact. The amendment to Rule 702 blurs that line if not erasing it entirely.

With regard to my concerns and the perceived future challenges outlined within this article, I hope I am wrong. It is my sincere desire that time, proper implementation, judicial discretion, and skillful practice ultimately render the fears and potential difficulties outlined within this article baseless or, at the very least, demonstrate that they are disproportionate to the actual harm. Only time will tell.

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[2] *This certainly introduces an interesting issue at trial. Will a proponent be able to state to the jury during argument that the judge has already determined by a preponderance of the evidence that his proffered expert is qualified, utilized reliable methodologies, reached conclusions that fit the case, etc.? Will a jury be permitted to reach an opposite conclusion following its deliberations or will it be instructed that it must accept the expert as qualified, regardless of what is adduced during cross-examination, since there has already been a judicial determination on these issues?*

THE 21ST ANNUAL PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL PREVIEW

As many of you know, the WPTLA's annual 5K to benefit the Pittsburgh Steelwheelers is one of our signature events and one that demonstrates WPTLA's ability to give back to the community. This year's race is scheduled for **Saturday, October 2, 2021** at North Park's Boathouse. Registration opens at 9:00 a.m., the wheelers start at 10:00 a.m. and the runners/walkers start at 10:10 a.m. Parking is free and there is a nearby playground for kids. All registrants receive a race t-shirt and entry for door prizes.

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

How did WPTLA get involved? 21 years ago, then-President, the Honorable Beth A. Lazzara, wanted to make a significant difference to a local charitable organization. She came up with the idea for a 5K event as a fundraiser, and was made aware that the Steelwheelers were an organization that were struggling financially and needed support to survive. Thus began the President's Challenge 5K Run/Walk/Wheel. Since that time, WPTLA has been the lifeblood of the Steelwheelers' organization, donating in excess of $530,000.

How can you be involved?

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

·**Sponsorship**– Lawyer, law firm and business sponsorships make up the majority of the proceeds raised by this event - reach out to local business and clients to sponsor. As of the printing of this issue, the deadline for sponsor artwork on the race shirts has passed, but we are still accepting sponsorships that will be listed on participant information, on signs at the race, and on our website.

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

·**50/50 Raffle**– You can enter the race's 50/50 raffle by going to https://wptla.org/community-service/ and clicking on the "Online 50/50" link under the Steelwheelers section. The winner will be selected on October 3, 2021.

We look forward to seeing everyone at the race on October 2nd this year!

By: Chad McMillen, Esq. of
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NEED CLE CREDITS QUICKLY? WPTLA CAN HELP!

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

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DEFECTIVE SERVICE NOT A BASIS FOR DISMISSAL ABSENT PREJUDICE

In *Harris v. Couttien*, 2021 PA Super 160, the Pennsylvania Superior Court made it clear that the harsh remedy of dismissal is not necessarily appropriate where service is defective.

The underlying claims in *Harris* included wrongful use of civil proceedings, abuse of process, malicious prosecution and civil conspiracy. The *pro se* Plaintiffs admitted to attempting service by US Mail rather than the Sheriff. The Defendants did admit to receiving the complaint the next day. Nonetheless, the Defendants filed Preliminary Objections seeking dismissal of the action. The Preliminary Objections were sustained by the Court of Common Pleas in Pike County. The subject appeal followed.

On appeal, the Court in an opinion by Judge Dubow reversed, The Court stated the black letter rule that:

> Most important to our analysis, where the mode of service of process is defective, and the defendant has not suffered prejudice from the defective mode of service, the remedy is for the court to set the service aside. *Weaver v. Martin*, 440 Pa. Super. 185, 655 A.2d 180, 184 (Pa. Super. 1995). In such a circumstance, the trial court errs if it dismisses the complaint. *Id.*

Harris, 2021 PA Super 160.

Interestingly, the *Harris* decision was not decided under *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976). However, the *Harris* Court did cite to *McCreesh v. City of Phila.*, 585 Pa. 211, 888 A.2d 664 (2005) which analyzed a case of defective service under *Lamp* and failed to dismiss it. As such, the *Harris* case may signal the beginning of a trend to analyze defective service and no service cases differently.

It must be emphasized that the *Harris* decision clearly includes a conclusion that there was no prejudice. As such, caution should be exercised in defective service cases to either establish a lack of prejudice or explain why the *Harris* case's ruling should be extended.

Another interesting defective service decision was rendered by a trial court in Monroe County in *O'Mara v. Perez*, No 4685 Civil 2020 (Monroe Cnty June 4, 2021). There Judge Williamson sustained preliminary objections as to improper service, but declined to dismiss the case. The Plaintiff had been assaulted by an out of state Defendant at a waterpark. Service of a Writ was mailed by certified service to the address on the police report in September 2020. The Defendant nonetheless stated that she lived at a different address and that the person who signed for the mail was not her authorized representative. The Court stated it was unclear as to whether the Defendant was aware of the Writ but that the record established that the Defendant was aware of the Complaint which was filed in February 2021.

Of note, the Court began its analysis by stating that a defendant challenging personal service bears the burden of supporting the objections by presenting evidence, but that proper service is necessary for jurisdiction.

Ultimately, the court determined that service would be set aside and proper service required. The Court did note a lack of intent to stall the judicial machinery and a lack of prejudice before citing to *McCreesh*.

SUMMARY JUDGMENT DENIED ON OPEN AND OBVIOUS PREMISES CASE

A Federal Judge in Western Pennsylvania has properly denied summary judgment in a premises case based on a recognition of the manner in which people actually walk and watch where they are going. In *Perotti v. Festival Fun Parks, LLC*, Civil Action No. 2:19-cv-1176, 2021 U.S. Dist. LEXIS 140056 (W.D. Pa. July 27, 2021), the Plaintiff's injury resulted from a 6 inch diameter hole in a parking lot. The Plaintiff testified that at the time, she was looking ahead and did not see the hole. If she had seen the hole, she would have walked around it. The defense noted that there was nothing that obstructed her view of the hole. The Plaintiff and her companion both testified that the hole was hard to see.

The Court utilized the following standard:

> The dispositive issue in this case is whether a reasonable person exercising normal perception and with average intelligence in the same circumstances as Perotti would have seen the hole in the parking lot. Shields and Perotti claim the hole could not be easily seen and was even camouflaged.

Perotti v. Festival Fun Parks, LLC, Civil Action No. 2:19-cv-1176, 2021 U.S. Dist. LEXIS 140056, at *6-7 (W.D. Pa. July 27, 2021).

Hence, analyzing the case under a no-duty rule and applying a traditional summary judgment analysis, the Court denied summary judgment.

It is refreshing to see a Federal Court arrive at the correct result in a summary judgment motion in a personal injury case. However, the foregoing decision may have been analyzed differently in view of the fact that the no duty rule is the counterpart of assumption of the risk, subject to a standard requiring a subjective appreciation of the risk. Hence, it can be argued that a subjective standard would have been the technically better approach. Nonetheless,

(Continued on Page 12)

MEMBER PICTURES & PROFILES

Name: Richard Ogrodowski

Firm: Goldsmith & Ogrodowski, LLC

Years in practice:19

Bar admissions: Admitted to PA in 2001 and WV in 2002

Special area of practice/interest, if any: Representing workers who were seriously injured or killed on highways, railways, waterways, job sites, oil rigs, and gas wells.

Tell us something about your practice that we might not know: My law partner Fred Goldsmith and I decided in 2005, over burgers at the Union Grill in Oakland and while we worked at two different larger defense law firms, that we wanted to help seriously injured folks. In 2006, we opened Goldsmith & Ogrodowski, LLC, and a few years later started helping seriously injured people and the families of deceased loved ones.

Most memorable court moment: As a young lawyer, I had to cover, at the last minute, an argument before an irascible federal judge outside Pennsylvania where I had to be admitted immediately before the hearing. The judge was not impressed with the motion being argued, which I learned within 5 seconds of starting the argument. Immediately, he began asking me over and over whether I had anything better as soon as I would try to make a point. This went on for a couple of minutes. Eventually, I scrapped the remaining arguments and told him I had nothing left. Seeing I was demoralized, the judge then smiled and told me I did a good job, but there was no way he would grant the motion. It was a good lesson as a young attorney. Now, each time I consider filing a motion, filing a brief, or the line of questioning for examining a witness at trial, I think about whether it will elicit a similar response from the judge.

Most embarrassing (but printable) court moment: This isn't a court moment, but it's close. In a deposition of a doctor—when I was just starting to handle personal injury cases, I accidentally referred to the cervical spine as the cervix—no idea where that came from. The doctor had a good laugh.

Most memorable WPTLA moment: Being nominated to join the Board of Governors.

What advice would you give yourself as a new attorney just passing the bar?: Maintain equanimity; be present—don't worry about the past or about what may or may not happen in the future.

Secret Vice: Potato chips; pizza.

People might be surprised to know that: All of my friends from college, including my wife, call me "Og."

Last book read for pleasure, not as research for a brief or opening/closing: Grant by Ron Chernow

My refrigerator always contains: Filtered water, unsweetened green tea, hummus, and blueberries.

My favorite beverage is: Unsweetened green tea (Pinot Noir and/or an IPA on the weekends).

My favorite restaurant is: Casbah

If I wasn't a lawyer, I'd be: Economist (or history teacher)

COMP CORNER

Legislative/Lobbying Efforts on Workers' Compensation in Harrisburg

House Bill 1387 is one which would amend the statute authorizing the UEGF the result of which would be to make it more difficult for Claimants to establish what their earnings were at the time of the injury. Furthermore, it will require the Department of Labor and Industry to report to the IRS and/or the Department of Revenue any reasonable suspicion that a Claimant or uninsured employer has not reported or underreported federal or state tax. This Bill was reported out of the House Labor Committee and passed the House on June 15 on a party-line vote. It is presently unclear whether the Senate will pass this bill.

Senate Bill 319 is a bill to repeal the Whitmoyer decision. It passed the Senate on June 14, but has not yet come through the House. Whether this bill will pass through the House is unclear.

House Bill 421 is a bill to amend the Workers' Compensation Act to provide for the panel network to extend longer than 90 days. This bill remains in the House Labor Committee.

House Bill 1732 is a bill to provide compensation for posttraumatic stress disorder for first responders. Interestingly, it does not provide a presumption to a class normally protected by the legislature. It remains in the House Labor Committee.

One senator has issued a sponsorship memo to repeal the Tooey case. This bill has not yet been filed.

A sponsorship memo has been circulated to amend the Workers' Compensation Act to eliminate the need for witnesses or notaries for a Compromise and Release Agreement if a Claimant appears before a Judge and provide sworn testimony regarding same. The bill is not yet filed. It is not expected to be controversial and should draw bipartisan support.

A sponsorship memo has been circulated to include Covid-19 as an occupational disease under workers' compensation for frontline workers. A bill has not yet been filed.

The organization will also be working to introduce a bill to expand disfigurement covered under the Act.

At any point in time, the PAJ lobbying team is working on half a dozen issues affecting the practice of workers' compensation. This is in addition to such issues as selecting Supreme Court justices by election districts. Please remember this when you are called upon to donate money to candidates or contribute to LAWPAC.

By: Tom Baumann, Esq. of

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BY THE RULES ... FROM PAGE 10

perhaps Judge Stickman has implicitly recognized that assumption of the risk is antiquated and that future cases should be analyzed under a comparative negligence standard.

The undersigned is of the mind that we must utilize the state courts to refine the law regarding this area of the law - and perhaps finally obtain recognition from the Pennsylvania Supreme Court that most applications of assumption of the risk and its counterpart no duty rule is incompatible with our comparative negligence statute.

NEW RULE OF IMMIGRATION STATUS

It should be noted that the Pennsylvania Rules of Evidence have been amended to add Rule 413 "Evidence of Immigration Status." The rule does speak for itself and should not require much analysis. The rule provides in section (b)

> *(b) Civil Matters; Evidence Generally Inadmissible*. In any civil matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the action, or to show bias or prejudice of a witness pursuant to Rule 607.

By: Mark Milsop, Esq. of

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KICKOFF EVENT – AUGUST 31 AND SEPTEMBER 1, 2021

WPTLA's Kickoff Events took place over two days on August 31 and September 1, 2021. The events included a Board of Governors Meeting, followed by our first in-person social event at Dave & Busters in the Pittsburgh's North Hills. The second day was an informative three-hour CLE, held at the Koppers Building in Pittsburgh. The following serves as a recap of the events.

Night 1

With the restrictions imposed by the COVID-19 pandemic, our members have not had many chances to eat, drink and be merry together. To many people, including this practitioner, the event was a welcome opportunity to socialize with friends and colleagues. Dave & Busters provided a great space for our group, a cash bar and good food. We want to give our special thanks to our sponsors and business partners in attendance: Bill Goodman from NFP Structured Settlements, Andy Getz from Thrivest Link, and Mark Melago and Justin Niedzwecki from FindLaw whose support helps make these events possible.

The social aspect of the evening was preceded by the first meeting of our newly appointed Board of Governors. We had a good turnout of members and their families for the dinner and games. We all had the opportunity to eat, drink and be merry and to socialize. Arcade games were the main course for the evening, and as we charged once more unto the digital breach, members did their best to meet the challenges that modern game developers have to offer. As the evening concluded, we were serenaded with the beeps, boops, and virtual explosions that Dave and Buster's is best known for. This practitioner soon learned that his six-year-old daughter possesses her father's incredible gaming skills. What can I say… the kid's a natural.

DAY 2

After an evening of business, fellowship and arcade games, it was time for CLE. We arrived at the Koppers Building for three hours of CLE in the wake of Hurricane Ida's remnants, which battered our Burgh with blistering winds and rain. With coffee and bagels in hand we proceeded into the conference room where WPTLA members were treated to a fantastic presentation: Two Counties Two Verdicts – More in the War Stories Series, presented by WPTLA Members, Joshua P. Geist, Esquire and Douglas L. Price, Esquire.

After this year of COVID restrictions, shutdowns and practice delays it was a pleasure to hear these two exceptional trial attorneys recount their courtroom victories. Attorney Geist presented his case: *Berger v. Wilson* (Allegheny County GD-17-007297) which resulted in a $2.1 million plaintiff verdict. Attorney Price, another exceptional attorney, presented his case *Povrzenich v. Ripepo, et al.* (Washington County Case No. 2015-4727), which resulted in a plaintiff's verdict in excess of $4 million.

The two presenters did a fantastic job at breaking down the CLE into each phase from discovery and pre-trial motions, to the use of demonstrative evidence, closings and verdicts, etc. The CLE was inspiring! It was an opportunity to learn how they used tools such as David Ball, Esquire's style of opening and the Miller Mousetrap, to obtain multi-million-dollar plaintiff verdicts. Attorneys Geist and Price made us long for the opportunity to get back into the courtroom. At least one such attorney, yours truly, found himself slipping into the occasional daydream, longing for the opportunity to try cases of such magnitude to a jury.

In closing, the Kickoff was a great success! WPTLA, like many other organizations and companies has taken its lumps through this COVID pandemic. We have felt the impact from membership decline, lack of social events and comradery, but the Kickoff events reminded us that we are not defeated. We will get through this together and emerge stronger than before. As our President, Mark Milsop, reminded us, the best way to return to normalcy, or albeit the new normalcy, is to continue to keep going and growing as an organization, to continue to participate in events, and to look to our membership to strengthen our bond and resolve.

Keep healthy, keep safe and keep on fighting.

By: Kelton Burgess, Esq.,

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2021 ESSAY CONTEST WINNING SUBMISSIONS

The Western Pennsylvania Trial Lawyers 2021 President's Scholarship Essay Contest drew seventeen submissions from school districts across western Pennsylvania. This year's essay contest centered on whether or not the use of physical force in an unsuccessful effort to detain a suspect by law enforcement resulted in a "seizure" under the Fourth Amendment.

The facts in the case arose out of a civil rights suit filed against police officers alleging excessive use of force in violation of the Fourth Amendment of the United States Constitution. On July 15, 2014, in Albuquerque, New Mexico, Roxanne Torres parked her vehicle in her parking spot at her apartment complex. Her vehicle was approached by two New Mexico State Police officers who were attempting to serve an arrest warrant on another woman. The officers attempted to open the door of the vehicle and claimed they identified themselves as police. Ms. Torres claimed she was unable to hear what the individuals were saying and did not realize they were police officers. Believing she was being carjacked, she accelerated and attempted to leave the parking lot. Believing that they were going to be hit by the car, both officers fired into the car, striking Ms. Torres and injuring her. Ms. Torres drove from the scene and sought medical attention for her injuries at a hospital, after which she was arrested. The U.S. District Court for New Mexico granted summary judgment and dismissed Ms. Torres' suit holding that because there was no "seizure" of Ms. Torres by the officers, there could be no violation of the Fourth Amendment. The 10th Circuit Court of Appeals affirmed the District Court's decision. The case was taken up by the United States Supreme Court.

The question that was posed to the students was whether or not the use of physical force in an unsuccessful effort to detain the suspect by law enforcement resulted in a "seizure" under the Fourth Amendment? The contestants were required to take a position as to whether or not the unsuccessful use of force to detain a suspect results in a "seizure" so as to involve the Fourth Amendment of the United States Constitution.

The issue was ultimately decided by the Supreme Court of the United States on March 25, 2021. The Supreme Court held that the application of physical force to the body of a person with the intent to restrain them is to be considered a seizure even if the person is not detained.

The winners of the contest were Jeremiah Giordani of Ambridge High School, Brian Johnson of Holidaysburg Area Senior High School, and Rachel O'Day of Saltsburg Middle/High School. Their winning essays will be published in *The Advocate*. I wish to thank all the students who participated and the members of my committee, Russell Bopp, Brittani Hassan, Nicholas Katko, Mark Milsop, Craig Murphey, Erin Rudert, Nathaniel Smith, James Tallman, and Kelly Tocci. Special thanks to Laurie Lacher for all her hard work on the essay contest.

By: Chad Bowers III, Esq., of

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The premise for amending the United States Constitution was to prevent the execution of injustices by an oppressive government against its citizenry. Hence, certain civil liberties were established in order to protect persons from an absolute overreach of authority. Emerging from the Lockean principle of natural entitlements was a widespread proclivity for inalienable rights, those which are inherently afforded to each individual. Such a distinct reliance on freedom and independence is expressed throughout what many consider to be the cornerstone of American government. For instance, the Constitution's Fourth Amendment prohibits unreasonable searches and seizures by any members of government and prevents a person's conviction on the basis of illegitimately-obtained evidence. As is the case with any and all legislative frameworks, this amendment has been subject to interpretation throughout recent history. Specifically,the actions of law enforcement have been placed under the strictest scrutiny, aided by advancements in modern technology and the pervasiveness of social media. Questionable acts of excessive force utilized by police officers in the process of criminal apprehension have been met with public outrage. While clearly such behavior constitutes an impermissible violation of civil liberty, an evaluation of former judicial disputes, coupled with an adherence to strict analysis of the Fourth Amendment's original context, indicates that the use of physical force by government officials is entirely warranted during a properly executed arrest.

Not unexpectedly, many arrests are accompanied by varying degrees of resistance. In an updated report from the National Institute of Justice, a collection of data from 53 agencies indicated that the majority (87%) of 2,310

"police use-of-force" incidents occurred during arrest-related scenarios. Clearly, it has become common practice for officers to incorporate some degree of forced apprehension during this frequently exercised procedure. Moreover, the use of physical force during an arrest, the quintessential "seizure," has been associated with a significant number of fatal, or near-fatal, outcomes in circumstances where the arrested individual was not affiliated with the alleged criminal activity.

The facts of the case of Torres v. Madrid (US 19-292) illustrate the usage of such potentially lethal force by law enforcement while attempting to arrest an individual, ultimately found not to be the presumed suspect, as a possible violation of the citizen's Fourth Amendment right to be secure against unreasonable searches and seizure. On July 15, 2014 in Albuquerque, New Mexico, Officers Janice Madrid and Richard Williamson were preparing to serve an arrest warrant for Kayenta Jackson, a woman suspected of "having been involved in drug trafficking, murder, and other violent crimes." At Jackson's apartment complex, the officers noted that Roxanne Torres, the petitioner in this case, was standing outside the building and abruptly got into her car. Both officers suspected this might be Ms. Jackson. Officer Williamson claimed he approached the closed driver-side window and advised Torresto "show me your hands" several times. He, as well as Officer Madrid, who was standing near the front of the vehicle on the driver's side, felt the petitioner was making "furtive movements." According to her testimony, Ms. Torres, who admitted she was "tripping out" on "meth," did not recognize the agents as officers because she "could not read the markings on their clothing" and they "never identified themselves as police." She felt she was being car jacked and accelerated her vehicle. Both officers fired into the car, wounding the suspect, although she was able to leave the parking lot. Torres was later arrested at the hospital where she sought treatment for her injuries.

Ms. Torres subsequently sued the officers in federal court by asserting that they had used unreasonable force in violation of the Fourth Amendment of the United States Constitution. The U.S. District Court dismissed the suit, stating that the petitioner failed to demonstrate that she was "seized" due to the officers' use of force. The officers fired their weapons after Torres moved her vehicle, and despite being shot, she left the scene without submitting to their authority. The Tenth Circuit affirmed this finding, stating that without a seizure by the police officials, there could be no violation of the Fourth Amendment. This case has now reached the Supreme Court where petitioner Torres appeals to the Justices to reverse the lower court's ruling.

While there has been substantial judicial disagreement regarding this issue, both the majority of precedent case law as well as the stated intent of the Founders support the position that the unsuccessful use of force by Officers Madrid and Williamson to detain Ms. Roxanne Torres does indeed qualify as a seizure. The Supreme Court needs look no farther than to its own ruling in the case of California v. Hodari D. (1991). The precipitating event occurred during 1988 in Oakland, California, when a group of youths fled as a patrol car approached. A policeman pursued Hodari D., who upon seeing the officer, threw away a rock of crack cocaine; he was subsequently tackled to the ground. The California Court of Appeals ruled that the evidence was inadmissible because the defendant was seized, without cause, when the patrolmen began the chase. The decision was reversed by the Supreme Court which ruled that Hodari D. was not seized until he was tackled. In writing for the majority opinion, Justice Antonin Scalia acknowledged that at the Founding, the quintessential seizure was a common law arrest; an arrest could be accomplished either through the application of force with intent to restrain, or by a "show of authority" which caused the person to submit. The Court further recognized that the seizure was achieved "even though the subject does not yield." Given this definition, which was endorsed by the Supreme Court, it must be determined that Ms.Torres was seized. The officers certainly applied force intended to restrain when they fired bullets into her body. Moreover,given that at common-law "mere touch" with a hand is adequate to affect a seizure, surely a gun held by that same hand indirectly accomplishes the same thing. Finally, in *Tennessee v. Garner* (1985), the Supreme Court found that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. "Specifically, they ascertained that it was indeed a seizure when police officials fatally shot a fleeing suspect; surely it should not be any less a seizure simply because Ms. Torres managed to survive a similar situation.

(Continued on Page 16)

2021 ESSAY CONTEST WINNING SUBMISSIONS ... FROM PAGE 15

In contrast, the police officer respondents in this case contend that a subject must be controlled or taken into custody before the definition of seizure has been met. They cite Supreme Court cases such as *Brower v. County of Inyo* (1989), in which the decedent, Brower, was killed after crashing his stolen car into a police roadblock. Justice Scalia, in stating the opinion of the Court regarding these proceedings, noted that a seizure only occurs "when there is a governmental termination of freedom of movement." This finding does not conflict with the argument that Torres was seized during her interaction with the police. Ms. Torres' true freedom of movement ended when the police officers approached her vehicle. Had she remained free, she would have encountered no difficulty upon attempting to leave the parking lot. Therefore, her experience meets the definition of seizure as proposed by the Court in Brower. In addition,Officers Madrid and Williamson may also reference the case of the United States v. Mendenhall (1980). In this instance, the respondent, Sylvia Mendenhall, attempted to suppress the introduction of heroin as evidence by claiming it was obtained through an unconstitutional seizure by DEA agents at the airport. Writing the majority opinion for the Court, Associate Justice Stewart noted that an individual has been seized by an officer if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The police official respondents contend that Torres was not restrained, and thus "free to leave," because she was able to flee from the scene. However, it is highly unlikely that Ms.Torres believed that she was free, safe, or secure, while she mobilized her vehicle as the officers fired bullets into her body.

In conclusion, Roxanne Torres was indeed seized during her interaction with Officers Madrid and Williamson on the evening of July 15, 2014; furthermore, the materials relative to her specific experience demonstrate clearly that the unsuccessful use of force to detain a suspect results in a seizure as per the context of the Fourth Amendment to the United States Constitution. The common-law definition of seizure as well as multiple subsequent Supreme Court opinions offer a plethora of historical precedence and support for this interpretation of criminal apprehension. Certainly, this finding is consistent with the intentions of the Framers,who structured the Fourth Amendment to protect individuals from any unreasonable and unjustified intrusions on their personal security.

Works Cited

- US Department of Justice - Use of Force by Police: Overview of National and Local Data - https://www.ojp.gov/pdffiles1/nij/176330.pdf

Essay submitted by Brian Johnson, of Hollidaysburg Area Senior High School.

UPCOMING EVENTS

Sep 23, 2021 - Legislative Meet 'n Greet - Revel n Roost - Pittsburgh

Sat, Oct 2, 2021 - 5K Run/Walk/Wheel to benefit the Steelwheelers - North Park Boathouse

Mon, Oct 18, 2021 - Beaver County Dinner + Awards - Wooden Angel, Beaver

Wed, Nov 10, 2021 - Comeback Award Dinner - The Duquesne Club, Pittsburgh

Dec, 2021 - Lunch 'n Learn CLE - Pittsburgh

Jan, 2022 - Junior Member Meet 'n Greet

Feb, 2022 - CLE Program

Mar, 2022 - Washington County Dinner & CLE - Canonsburg

Apr, 2022 - Annual Membership Election Dinner Meeting - Pittsburgh

May, 2022 - Annual Judiciary Dinner - Heinz Field, Pittsburgh

May, 2022 - Golf Outing, Pittsburgh

***Donovan v. State Farm Mutual Automobile Insurance Co.*, No. 17 EAP 2020. (Pa. Aug. 17, 2021)**

Pennsylvania Supreme Court holds UIM Waiver Form, Household Exclusion Clause and Coordination of Benefits Clause are invalid for effective waiver of UIM inter-policy stacking.

This case came before the Pennsylvania Supreme Court on three (3) certified questions sent by the Third Circuit Court of Appeals on issues surrounding inter-policy stacking and the Household Exclusion.

The Plaintiff, Corey Donovan ("Plaintiff") was involved in an accident while on his motorcycle where he sustained serious injuries. Plaintiff recovered the liability limits of $25,000.00 from the tortfeasor's vehicle as well as the UIM coverage limits on his motorcycle policy with State Farm of $50,000.00. Next, the Plaintiff sought coverage under another State Farm policy issued to his mother, under which the Plaintiff was an insured as a resident relative. Plaintiff's mother's policy listed three (3) vehicles, but she had previously executed a signed waiver of intra-policy stacked coverage on her policy which contained the language set forth in 75 Pa. C.S. § 1738(d).

The first issue addressed by the Court was whether an insured's signature on the waiver form mandated by 75 Pa. C.S. § 1738(d) results in the insured's waiver of inter-policy stacking of UIM coverage where that policy insures multiple vehicles. Relying on its previous decision in C*raley v. State Farm Fire and Casualty Co.,*895 A.2d 530 (Pa. 2006), the Court found that the language in the mandated waiver did not alert insureds that they were waiving the ability to stack the coverage for which premiums were paid in "this policy" on top of the coverage available under a separate policy. The Court ruled that, in the absence of a valid waiver both policies default to stacked coverage by operation of law. Thus, Plaintiff's mother's signature on the form required by Section 1738(d) did not result in the waiver of the Plaintiff's right to stacked UIM coverage under his mother's auto policy.

After finding that the waiver form at issue in this case was invalid the Court next considered whether the household vehicle exclusion included in Plaintiff's mother's policy barred coverage to Plaintiff. After review, the Court found the logic of the case *sub judice* to be indistinguishable from that in its previous decision in *Gallagher v. GEICO*, 201 A.3d 131 (Pa. 2019). Specifically, the Court found that in both cases the insured did not validly waive inter-policy stacking. Whether the insured did not sign a waiver (*Gallagher)* or whether the insured signed a deficient waiver as to inter-policy stacking, (*Donovan*), the result was the same: the policy defaulted to inter-policy stacking of UM/UIM coverage. The Court held that in either factual scenario the household vehicle exclusion could not operate as a *de facto* waiver of inter-policy stacking because it failed to provide the insured with a knowing waiver of that coverage. Accordingly, the household vehicle exclusion could not be enforced to waive inter-policy stacking in regard to Plaintiff's mother's policy because it did not comply with the requirements for waiver of stacking under Section 1738(d).

Finally, the Court addressed the third certified question relating to whether the coordination of benefits provision in the Plaintiff's mother's State Farm policy could effectively waiver inter-policy stacking of UIM coverage. Based upon the same reasoning used in *Gallagher*, the Court determined that the coordination of benefits provision could not operate as a *de facto* waiver of inter-policy stacking. As such, the Court held that the lack of a valid waiver of inter-policy stacking rendered the coordination of benefits provision in the Plaintiff's mother's policy inapplicable.

Having answered the questions presented, the Pennsylvania Supreme Court ordered that the matter be returned to the Third Circuit for further proceedings.

***Leadbitter v. Keystone Anestheisia Consultants, LTD.* No. 19 WAP 2020 (Pa. August 17, 2021)**

The Pennsylvania Supreme Court sets forth rules on the discoverability of documents contained within a physician's credentialing file in a medical negligence lawsuit.

This case came before the Court on a discretionary appeal concerning discovery in a medical negligence lawsuit in which the Plaintiff, James Leadbitter ("Plaintiff") suffered complications, including permanent brain damage following a spinal surgery.

Plaintiffs filed a complaint raising, *inter alia,* claims of negligence against multiple defendants, including the hospital where the surgeon held privileges. As part of that claim, the Plaintiffs alleged that the Defendant Hospital's credentialing and privileging process was inadequate, and that it knew or should have known *(Continued on Page 18)*

the Defendant surgeon lacked the expertise to be authorized to perform the surgery in question.

The Plaintiffs served a set of interrogatories and request for documents seeking the complete credentialing and/or privileging file for the surgeon. The Defendant Hospital responded by supplying much of the requested file, but it withheld and/or redacted several documents under the evidentiary privilege set forth in Pennsylvania's Peer Review Protection Act (the "PRPA"). A subsequent privilege log from the Defendant Hospital asserted that five (5) total documents in the Defendant surgeon's file were non-discoverable: an OPPE (Ongoing Professional Practice Evaluation) Summary Report; a Professional Peer Review Reference and Competency Evaluation, which contained evaluations prepared by other physicians of the surgeon's performance; and three (3) documents described as response to queries which had been submitted to the National Practitioner Data Bank ("NPDB").

"[T]he statutory definition of "peer review" [is] limited to individuals or organizations who are approved, licensed or otherwise regulated to practice or operate in the health care field" under Pennsylvania law."

Plaintiffs filed a motion to compel seeking the entire unredacted file. The trial court granted the motion, expressly relying on the Supreme Court's decision in *Reginelli v. Boggs*, 645 Pa. 470, 181 A.3d 293 (Pa. 2018), and directing the Hospital to produce the Defendant surgeon's credentialing file in full and without redactions. In response, the Defendant Hospital filed an interlocutory appeal. The Superior Court affirmed the trial court's order in a published decision. *See Leadbitter v. Keystone Anesthesia Consultants, Ltd.,*229 A.3d 292 (Pa. Super. 2020).

The Supreme Court granted further review to consider the following issues as framed by the Defendant Hospital:

(1) Whether the Superior Court's holding directly conflicts with the PRPA Act, 69 P.S. §§ 425.1,*et seq.,* and misapplies *Reginelli v. Boggs,*181 A.3d 293 (Pa. 2018), by ordering the production of acknowledged "peer review documents" solely because they were in the physician's credentialing file?

(2) Whether the Superior Court's holding directly conflicts with the Federal Healthcare Quality Improvement Act, 42 U.S.C. § 11137(B)(1) ("HQIA"), and federal regulations which protect from disclosure, responses to statutorily-required inquiries of the NPDB by ordering the production of such documents because they were in the physician's credentialing file?

With regard to the first discovery issue, the Supreme Court agreed with the Defendant Hospital's core position that a committee, which performs a peer-review function, although it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected under Section 4 of the PRPA. Specifically, the Court held that a hospital's credentials committee qualifies as a "review committee" for purposes of Section 4 of the PRPA to the extent it undertakes peer review. Turning to the facts of the case *sub judice*, the Court found that the documents redacted and/or withheld by the Defendant Hospital under the PRPA privilege were not discoverable by Plaintiffs if they constituted peer review "proceedings" or "records," in accordance with the PRPA's definition of peer review. The Court further instructed that the statutory definition of "peer review" was limited to individuals or organizations who are approved, licensed or otherwise regulated to practice or operate in the health care field" under Pennsylvania law. The Court left it up to the trial court on remand to review the withheld and/or redacted documents *in camera* and make a determination as to whether they were protected as peer-review materials pursuant to the statutory definition of "peer review."

With regard to the second discovery issue involving the federal HQIA, the Court found that this act and its regulations treat all information provided by the NPDB to hospitals in response to a request concerning a specific practitioner as privileged material. In addition, the Court held that that this privilege survives regardless of any state law to the contrary. Accordingly, the three (3) documents listed in the Defendant Hospital's privilege log as results from a query to the NPDB were not discoverable.

Based on the foregoing, the Supreme Court reversed the order of the Superior Court insofar as it ordered discovery of the NPDB query responses. The Court then vacated all other respects of the opinion and remanded the case back to the trial court for an *in-camera* review of the other withheld documents consistent with its opinion.

Degliomioni v. ESM Productions, Inc. and the City of Philadelphia No. 5. EAP 2020 (Pa. June 22, 2021)

Supreme Court finds an exculpatory release for a bike race which immunized the city of Philadelphia for its own negligence was unenforceable on the grounds that it violated public policy.

The case came before the Count on discretionary review to consider the validity of an

(Continued on Page 19)

exculpatory release signed by a participant in a charity bike ride that purported to immunize the City of Philadelphia from liability for breaching its duty to repair and maintain public streets. The Plaintiff, Anthony Degliomini participated in the May 2015 Philadelphia Phillies Charity Bike Ride ("Bike Ride"), a twenty-mile ride along a designated route through the streets of South and Center City Philadelphia. During the Bike Ride, Plaintiff crashed when he rode into an unmarked and un-barricaded sinkhole in South Philadelphia, which measured sixteen square feet in area and six inches deep. As a result of the crash, Plaintiff suffered severe injuries, including spinal cord injuries leading to incomplete quadriplegia, and multiple bone fractures which required surgical procedures and ongoing medical treatment. Plaintiff and his wife filed a negligence action against the City of Philadelphia (the City), event planner ESM Productions, and several other defendants.

The City attempted to have the claims against it dismissed based upon the Plaintiff signing a release prior to his participation in the event, which contained an exculpatory clause that purportedly waived "any and all claims of liability for death, personal injury, other adverse health consequence, theft or loss of property or property damage of any kind or nature whatsoever arising out of, or in the course of, my participation in the event even if caused by the negligence of any of the Releasees" (including City of Philadelphia).

The trial court rejected the City's argument and the case proceeded to trial where the jury concluded that the City was negligent and awarded $3,086,833.19 in damages to the injured Plaintiff. The City moved for judgment notwithstanding the verdict on the basis of the exculpatory release. The trial court denied the motion on the grounds that the exculpatory clause was not valid because it violated public policy by exculpating the City from liability for conduct that breaches its exclusive duty to the public.

A three-judge panel of the Commonwealth Court reversed in an unpublished memorandum opinion. While the Commonwealth Court agreed that the dispositive issue regarding the validity of the Release was whether it contravened public policy, it also observed that Pennsylvania courts have consistently upheld exculpatory releases pertaining to recreational activities as non-violative of public policy, and therefore valid and enforceable.

The Supreme Court granted review to determine the enforceability of the exculpatory release as it pertained to the City. Following an extensive review of the caselaw governing exculpatory clauses as well as the PA Tort Claims Act, the Supreme Court held that it is contrary to public policy to enforce an exculpatory contract immunizing the City from its essential duty of public service, which exists notwithstanding the context of a recreational event. The Court found that because the release signed by the Plaintiff would allow the City to give itself immunity for a personal injury claim that the Tort Claims Act expressly allowed the Release would impermissibly achieve for the city what Pennsylvania law plainly prohibited. The Court found that any other application of the Release would elevate the City's private exculpatory contract over the public duties assigned to it and the authority afforded to it by the General Assembly. Under such circumstances the enforcement of the Release would jeopardize the health, safety and welfare of the public at large, and as such the Release was rendered invalid as it violated public policy principles.

Based upon the foregoing, the decision of the Commonwealth Court was reversed.

"[I]t is contrary to public policy to enforce an exculpatory contract immunizing the City from its essential duty of public service, which exists notwithstanding the context of a recreational event."

***Gleason v. Alfred I. Dupont Hospital,* No. 2021 PA Super 156 (Pa. Super. Aug. 5, 2021)**

Pennsylvania Superior Court permits a worker's compensation carrier to intervene in a third-party personal injury litigation to protect its subrogation lien.

John Gleason ("Plaintiff") was employed as an MRI Field Service Technician by Medical Imaging Group (MIG). While Plaintiff was performing maintenance on an MRI machine at a hospital, a fire and explosion occurred in the main distribution panel. Plaintiff suffered severe burns, scarring, disfigurement and temporary blindness. Plaintiffs filed two (2) third-party actions against various defendants alleging negligence and loss of consortium.

(Continued on Page 20)

HOT OFF THE WIRE ... FROM PAGE 19

Plaintiffs reached a proposed settlement agreement with the defendants and they filed a petition seeking the trial court's approval of its terms. The agreement provided for a total settlement payment of $1.45 million dollars. That sum was allocated between the Plaintiffs, with $580,000 to the Plaintiff and $870,000 to his wife for the loss of consortium claim. All defendants joined in support of the Plaintiffs' petition without taking a position on the allocation between the spouses. The trial court approved the unopposed settlement but because the cross-claims were not disposed of by the settlement agreement, the case remained listed for trial.

MIG's workers compensation insurer, the Hartford paid $988,474 to and on behalf of Plaintiff in medical expenses, wage loss benefits and to fund a medical set aside account for his future medical expenses. Plaintiffs offered to pay the Hartford $352,287, representing the amount remaining from Plaintiff's settlement after deduction of attorneys' fees and costs. In response, the Hartford filed a petition to intervene, seeking protection of its statutory lien interest under Section 319 of the PA Workers' Compensation Act (WCA). The petition to intervene was denied on two (2) separate occasions by the trial court.

The Hartford filed an appeal of the trial court's decision. The trial court filed a Rule 1925(a) opinion stating that The Hartford's appeal was premature and should be suspended until the conclusion of trial on the outstanding cross-claims.

On appeal, the Superior Court first determined that the Hartford had met all the requirements of the collateral order doctrine and therefore jurisdiction over the appeal was proper. Turning to the merits of the appeal, the Court reaffirmed that Section 319 of the WCA permits an employer or its insurance carrier to recover a portion of the benefits from any award of money the employee receives in a civil lawsuit. Additionally, the Court found that under Pa. R.C.P. 2327, which governs intervenor status, an insurance carrier who has paid workers' compensation benefits may intervene in an employee's third party action in order to protect and preserve the carrier's right of subrogation. "*Van Den Heuval v. Wallace*, 555 A.2d 162, 163 (Pa. Super. 1989)

The Court found that in the case *sub judice* the lack of party status had denied the Harford the ability to fully protect its subrogation interest and left it without recourse to effectively challenge the consortium apportionment contained in the unopposed settlement agreement. The Court determined that because the Hartford had paid almost 1 million dollars to the Plaintiff in workers compensation benefits, justice required that it be allowed to intervene in a case where the settlement agreement against the third-party tortfeasor was structured in a manner that limited the worker's compensation lien to only about one third of the amount of the lien. Based on the foregoing, the Superior Court concluded that the trial court had abused its discretion when it disallowed intervention by The Hartford, which was necessary to fully protect its subrogation rights and to challenge the apportionment of the settlement proceeds between the Plaintiff and his wife for the loss of consortium claim.

The trial court's Order was reversed and the case was remanded with instructions to allow the requested intervention.

By: Shawn Kressley, Esq.,

of DelVecchio & Miller

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Mark your calendar for **Monday, Oct 18, 2021** to attend our Beaver Dinner and Award Presentation at the **Wooden Angel** in Beaver, PA.

Not only the famed wine list and sumptuous food at the restaurant are in store, but we will be pleased to present the **2020 Champion of Justice Award to Past President Lou Tarasi**.

Look for details coming to your inbox/mailbox soon!

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

Trivia Question #29

What country's national animal is the unicorn?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by December 3, 2021. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #29 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 #28 –**What specific feature of the sentence "The quick brown fox jumps over the lazy dog" made it the sentence of choice for calibrating display settings and displaying exemplar fonts? ANSWER: It contains every letter of the alphabet.**

Congratulations to contest winner Mike Calder, of Rosen & Perry, on being the recipient of a $100 Visa gift card! Mike is donating his prize to Senior Hearts Rescue & Renewal – a 501(c)(3) non-profit senior dog rescue organization located in the Pittsburgh area.

Break the tension!

Who better to **untangle** the issues in your case than a Neutral who is an **active litigator?**

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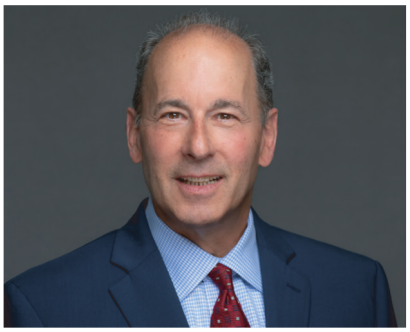

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Through the Grapevine....

Member Howard J. Schulberg is pleased to announce the formal opening of his ADR-focused practice: Schulberg Mediation. More about Schulberg Medication can be found at www.schulbergmediation.com

Congratulations to **President's Club Member Lawrence Chaban** who was recently honored by the PBA Workers' Compensation Law Section with its 2020 Irvin Stander Memorial Award.

Kudos to **President's Club Member** and **Board of Governors Member Russell Bopp** on being selected for membership into The National Trial Lawyers: Top 40 Under 40 Civil Trial Lawyers.

Congratulations to **President's Club Member** and **Past President Jack Goodrich** on being appointed board chair of the Disciplinary Board of the Supreme Court of Pennsylvania.

Make note of the firm name change for **President's Club Member** and **Vice President Greg Unatin**, **President's Club Member** and **Board of Governors Member Brendan Lupetin**, **Past President Chuck Evans**, and **Member Joshua Lamm** to Lupetin & Unatin, LLC. Their new emails will now end with pamedmal.com. And best wishes to **Past President Jerry Meyers** on his retirement.

And finally, hearty congratulations and well done to **President's Club Member** and **Past President Larry Kelly**, who, after taking on the role of baseball coach at Shenango High School at the age of 67, guided his team to the WPIAL Class 2A title for the first time in school history.