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

VALUE IN MEMBERSHIP

With our recent experience with lockdowns, I am comfortable suggesting that we have all come to appreciate that isolation is not a good thing. During the early months of the pandemic, we experienced almost total isolation.Now that society has largely opened up, it is worth asking whether or not there are ways that you have been isolating yourself which you may not have even been aware of? More specifically, I challenge my readers to ask whether you have isolated yourself from others in the Western Pennsylvania personal injury trial bar.

WPTLA offers several benefits to its members.If you are reading this column, you are aware of the Advocate.There is also a member exclusive Plaintiff's only database (which seems to be under-utilized). WPTLA also brings dignity to our bar by offering community involvement such as our 5K, the Comeback Award, our new Christmas drive and the other projects we have undertaken.

HOWEVER, to me these are not the most valuable things WPTLA offers. The two things WPTLA offers which you will not get anywhere else are the opportunity to be an active part of our trial lawyers bar and CLE geared specifically to lawyers who litigate personal injury cases in Western Pennsylvania. Let me comment a little on each.

I was introduced to WPTLA as a young lawyer. Although I have been gifted to work in firms with many talented lawyers, I cannot express strongly enough how much I feel my involvement in WPTLA has contributed to my ongoing growth as a lawyer and an advocate for my clients.As a young lawyer, I was truly amazed by the opportunity to sit down to dinner with so many of the best lawyers in Western Pennsylvania; and I learned much from what they discussed over dinner. When I had questions and theories that I wanted to test, these lawyers were always happy to share their thoughts. I can also attest to the fact that at many of the other young faces I have met as young lawyer in WPTLA have gone on to become great lawyers and some are even judges.

If you are a young lawyer and are not investing in attending our dinner meetings, you are not getting optimal return on your investment.

Since being admitted to the practice in 1992 much has changed in the way that trials are conducted. As I have matured, my viewpoint has not only been enriched by older lawyers, but also by young lawyers who have new insights. If you are a mid career lawyer onward and you are not hearing from our younger members, there is value to you in our meetings.

Our dinner meetings and signature events are meant for our entire membership so do not hesitate to join us. If you do not know anyone, you will discover that our members are friendly and welcoming.

Continued on Page 2

If you know someone who has not renewed or is not a member, it is still not too late to become a member for the 2021-22 membership year.

PRESIDENT'S MESSAGE ... FROM PAGE 1

As to CLE, there are a number of organizations that offer CLE on personal injury litigation. There are other organizations that offer CLE for Western Pennsylvania. However, there is no other organization that brings the two together the way WPTLA has. WPTLA's CLE is geared toward your personal injury cases in Western Pennsylvania.I urge you to take advantage of it.

PROGRESS TOWARD GOALS

At the beginning of the year, I had asked our Board to concentrate on three goals. These included: 1) returning to normal as we learn to live with COVID; 2) stabilizing membership; and 3) encouraging members to get to know their legislators.

I can report to you that we have seen success on the first two goals.

This fall we have hosted several successful live events after a pause of slightly over a year. These events included our Kick-Off Dinner and CLE, our 5K, our Legislative Meet and Greet, our Beaver Dinner where we made the long-delayed presentation to Lou Tarasi of our 2020 Champion of Justice Award, and our Comeback Dinner with award presentation to David & Melanie Vadzemnieks. *We are looking forward to a full slate of events in the spring and I hope you can join us!*

At our January Meeting we will be presenting our delayed 2020 Daniel M. Berger Community Service Award to the Gismondi Family Foundation, honoring its great charitable work.

As for stabilizing membership, President-Elect Erin Rudert was asked to chair the membership committee. Erin, her committee and the executive board have done a great job resulting in an increase of membership by nearly 4% this year. In addition, we renewed our efforts to bring in junior members from the law schools. We have had great success on this front and will be welcoming 15 junior members at our January dinner to be held at The Foundry Table & Tap on January 26, 2022.

If you know someone who has not renewed or is not a member, it is still not too late to become a member for the 2021-22 membership year.

With respect to the third goal, I would consider the nice turn out to our Legislative Meet and Greet a sign of success. However, I must emphasize that both houses in our state legislator are occupied by one party, of which a good many members view the tort system as unfair to business interests without seeing the injustices that would result to injury victims without such a system. The governor's race will soon be in full gear and it is tough to predict whether or not civil justice advocates will have a governor willing to veto unfair tort legislation which will be passed off as "reform." It is for this reason that we need every member to develop a relationship with their legislator and state senators so that we can help those legislators and senators fully understand the issues they will be voting on.In this respect, it is important to have friends in both parties. This ask is not one of partisan political involvement, but merely one of relationship building. As I see it, *a good Plaintiff's lawyer must advocate for his or her clients long before meeting the specific clients.*

DIVERSITY

A final word, we would very much like to welcome additional diverse members onto our board. Although we have some diversity on our board in some categories, we would like to see some more diversity. If you or someone you know would be a good addition to our board, feel free to reach out to me, our executive director Laurie Lacher or any of our officers.

By: Mark E. Milsop, Esq. of

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 34, 2021-2022

Vol 34	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
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

WPTLA is now an affiliate of Trial Guides.

For books, audio/video products, CLE programs or graphics, each time you use our exclusive link to the Trial Guides website and make your purchase(s), WPTLA will receive a portion of your purchase as commission.

After you click the link, you have 2 days to make your purchase in order for WPTLA to receive a commission.

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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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Seven Steps to a Full and Fair Verdict

"What good will money do? Money won't make the pain go away. This feels like a money grab."

Whether you like it or not, these questions and thoughts run through the minds of jurors during our trials. To bring about full and fair compensation for our clients' harms and losses we must help the jury understand *why* they should vote in favor of giving money to our clients. It is not enough to tell the jury they *must* award money or "that's just how it's done."

If you do not provide jurors a reasonable explanation for why our civil justice system uses money to compensate for noneconomic damages, then you risk a verdict derived from detrimental and ill-informed beliefs about giving money for pain and suffering. You risk your client getting less than full and fair compensation for their injuries.

So, what explanation can you give the jury? As with all things trial, there is more than one way to skin a cat. The following are bits and pieces of arguments I have stolen from Nick Rowley, Keith Mitnik and David Ball, and cobbled together into an effective method for helping juries understand why voting for significant money damages in their verdict is the right thing to do. If you have not already read or heard him talk about it, I recommend you seek out Keith Mitnik's "dignity of damages" argument framework.

The following approach to discussing money for pain and suffering damages is typically given in closing argument after you have armed your jurors with your liability and causation arguments. That said, I think there is good reason to consider discussing some of these issues briefly in opening as well.

Here is my seven-step process:

Step one - address the elephant in the room. Confirm the jury's understandable skepticism about awarding money for noneconomic damages. Consider saying something like "I'm going to guess that some of you may have wondered what good will money do? The money won't make the pain and dysfunction go away. And you are right, the money won't erase the hurt."

Step two - reframe. Next, quickly point out that a jury verdict is not about what the plaintiff is going to get. This *is* about what has been taken from the plaintiff through no fault of their own. Your job is to assess, appraise and then vote on the full amount of money for what the plaintiff has lost and for what they have been left with.

Step three - give a short history lesson. Explain simply and succinctly how and why our civil justice system was created. Talk to the jury about how the founders of our country declared that the most important, inalienable rights of every American are life, liberty, and the pursuit of happiness. Our forefathers were dead set on us being a civil society. No more barbaric justice. If our neighbor's horse got loose due to negligence and trampled us, we don't get to lay them out in the street and have our horses trample them. Keith Mitnik, who can turn a phrase like no other, says, "We do not practice eye for an eye justice but on the other hand we do not turn a blind eye to justice because that's no justice at all."

So, what did the founders of the country do? They came up with a civil remedy, the jury trial. We gather fellow members of our community to listen to the facts and evidence, reason with each other, and then vote on a fair amount of money to make up for the harms and losses. It is not a perfect system, but it is the best and most civil system that exists in the world today. And it is so important that it was incorporated into our nation's constitution as well as the Commonwealth of Pennsylvania's. As Abraham Lincoln said, "The greatest service of citizenship is jury duty. "The system does not work with out all of you serving in this capacity.

Sometimes in this section, I will point out that as Americans, everyone one of us in the courtroom has the constitutional right to file a personal injury lawsuit. Maybe some of you would choose not to exercise that right if you were injured by someone's carelessness. And that's fine. But please understand that my client is simply exercising her constitutional right to bring this lawsuit.

> *"Everyone values their autonomy and agency to make important decisions. Stressing that your client was robbed of the ability to choose helps the jury with their choice of how much money to vote for."*

Step four – damages are a "must" not a "maybe." Explain that if the jury finds the defendant liable it is the law in Pennsylvania that the jury MUST vote for an amount of damages to compensate the plaintiff for all of the harms and losses. If you can get away with it, I would recommend you show the jury the general damages instruction that reads, "If you find that the defendant is liable to the plaintiff, you ***must*** then find an amount of money damages you believe will fairly and adequately compensate the plaintiff for all the physical and financial injury [he] [she] has sustained as a result of the occurrence. The amount you award today ***must*** compensate the plaintiff completely *Continued on Page 5*

THE ART OF PERSUASION ... FROM PAGE 4

for damage[s] sustained in the past, as well as damage[s] the plaintiff will sustain in the future." Explain that this is a must and not a "maybe" or "if we feel like it."

Step five – teach about each category of non-economic damages.Explain that the jury should discuss each category separately.Recommend that they talk about each category first in regard to the past damages and then talk about the future aspect of each damage category.

Step six – review the harms and losses in your case. Review every piece of testimony or evidence that supports each damage category. It is helpful to write out each damage category on a flip chart and then write in as you go all the supporting evidence for that damage type.

Keep in mind that research shows that non-economic damage amounts are strongly tied to the degree of interference the injury causes in the plaintiff's life. Highlight those aspects of the plaintiff's injury that most interfere with the way they lived their life before the disaster was "unnaturally thrust into their life through no fault of their own."

Step seven – imagination time. There are a number of different argument devices you can use here (e.g., the want ad) but my personal favorite is what I call the "Evil Man." I start by discussing the time I have spent contemplating my client's injuries and the jury's job to vote for an equivalent amount of money. I then ask the jury to bear with me, use their imagination, and go back in time with me to moments before the defendant's negligence injures the plaintiff.

For example, in a medical malpractice trial that Greg and I tried where our client was injured in an MRI, I took the jury back to my client's house just before he left for the MRI.

"Imagine we are inside Chris' house. We hear him say 'Bye Dad, I'm heading over for the scan and then off to work." We see his dad give him a hug. And then there is knock at the door (knock on counsel table or the jury box for dramatic effect). Chris and his dad look at each other. 'Were you expecting someone?'

Chris opens the door. There is a man standing there in a jet-black suit and tie. 'Is your name Chris?' the man says. 'Yea, who are you? 'Never mind that, I've got something for you. The man steps back and behind him are three large duffel bags lined with bricks of money. It's more money than Chris has ever seen on TV let alone in real life.

The man says, 'that's for you.' Chris, in disbelief, says 'did I win the lottery or something, what did I do to earn that?' The man says, 'Nothing yet. It's what's going to happen to you.' 'What are you talking about?' 'Well, you don't know this yet but in about 30 minutes you are going to lay down for your MRI. And when they inject you with contrast, you are going to have a terrible allergic reaction. You're going to become burning hot. You're not going to be able to breath. You are going to feel impending doom and terror that you are about to die. And because of the hospitals negligence no one is going to help you. You are slowly, agonizingly going to stop breathing. But it does not stop there."

You then describe all the misery that is in store for the plaintiff (all of the most poignant damages discussed in trial). I like to have the evil man say repeatedly, "but wait, there's more..."

Once you are done showing your client (and the jury) the preview of what's in store for them due to the defendant's negligence, the evil man says "but don't worry Chris, you are going to get all of this money and another giant bag of money for each year you are left to deal with this for the rest of your life." "You get all this money Chris!"

Then turn to the jury and ask them, "now, faced with that horror, what do you think Chris says to the man standing before him? I think you know. "No way!" is what he says. I don't want any part of that. I don't care how much money you are offering. I love my life. Please leave. Please."

The man looks at Chris. He's shaking his head, "I'm sorry Chris, you don't have a choice."

And then to snap the jury out of this imaginary world you can clap your hands and then say "ladies and gentlemen, he never had a choice. He never asked for any of this. He didn't get to decide. And that's why we need you. We need you to decide how much money for all of that."

It is important to underscore how the plaintiff was never given a choice (assuming it is not a case of shared responsibility i.e., comparative fault). Everyone values their autonomy and agency to make important decisions. Stressing that your client was robbed of the ability to choose helps the jury with their choice of how much money to vote for.

I hope this damages argument strategy proves helpful for you and your clients. If you have any questions about any part of the process, please call or email me.

By: Brendan B. Lupetin, Esq. of

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SIGNIFICANT ALLEGHENY COUNTY RULE CHANGES

Allegheny County has adopted significant rule changes which will become effective on January 11, 2022.

Perhaps the most noteworthy of the changes is the increase in the jurisdictional amount for arbitration, which has now been raised to $50,000.00.

In addition, the rules for Motions under local rule 208.3 have been overhauled. Many readers will recall that a number of motions which were to be presented to the special motions judge, who had for a long time been Judge Wettick. That position has been eliminated. Most of those functions are now assigned to the General Motions Judge. Under the new rules, Motions will go to either the calendar control judge, the General Motions Judge, the Discovery Motions Judge the Housing Court Judge or a specially assigned judge.

In addition, the procedure for scheduling Preliminary Objections, Motions for Judgment on the Pleadings and Summary Judgment have changed. Instead of scheduling a date with the Motions clerk or the assignment room, the motions are now filed with the Department of Court Records and scheduling is now requested by email. The scheduling requests should be directed as follows:

·Preliminary Objections - civilpos@alleghenycourts.us

·Judgment on the Pleadings and Summary Judgment - civilmsjjops@allegheny.courts.us

There are also changes made to the Arbitration Hearing Notice Form and the Duty to Appear form. These may be significant so be sure to download the updated notice forms before filing your next arbitration complaint.

Juror Note Taking Rules

Rule 2223.2 had been amended. The amendment has two significant features. First, it no longer limits note taking to cases expected to last for more than two days. Second, it expands the scope to allow for note taking during opening and closing statements. Note taking remains forbidden during the court's instruction as to the law.

By: Mark E. Milsop, Esq. of

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MEMBER PICTURES & PROFILES

Name: Nicholas Katko, Esq.

Firm: Edgar Snyder & Associates, LLC

Law School: University of Pittsburgh School of Law

Year Graduated: 2016

Special area of practice/interest, if any: Personal injury

Tell us something about your practice that we might not know: Our firm is heavily involved in charitable causes

Most memorable court moment: Second-chairing my first premises liability trial

Most embarrassing (but printable) court moment: After what I believed to be a well-reasoned argument in motions court, the presiding judge said, "Are you finished yet?" I lost the motion.

Most memorable WPTLA moment: Bringing my dog to the Steelwheelers 5K where he took an "unofficial" third place in the dog group (at least that's what the timekeepers said!).

Happiest/Proudest moment as a lawyer: One of my clients had a traumatic brain injury and his outlook to fully recover was in doubt. He graduated with his Master's degree and started his career as a Physicians Assistant.

Best Virtue: Empathy. It helps me connect with my clients every day in my practice.

Secret Vice: Buying new golf clubs thinking that they're the problem...

People might be surprised to know that: I began boating as a 'hobby' over the last year or so.

Favorite movie: *My Cousin Vinny.* I can never scroll past it when it's on TV.

Last book read for pleasure, not as research for a brief or opening/closing: I'm embarrassed to say that I can't remember. I tend to read feature stories and articles more than a physical book.

My refrigerator always contains: A lot of fruits and no vegetables.

My favorite beverage is: A glass of red wine or bourbon.

My favorite restaurant is: Piazza Talarico in Bloomfield. The atmosphere is old-Italian and they have excellent food.

If I wasn't a lawyer, I'd be: A sportswriter writing feature stories. That was my initial plan until I decided to go to law school.

5K RECAP

WPTLA held its annual President's Challenge 5K on Saturday, October 2, 2021, at North Park. This year marked the 21st year of the race and a return to North Park as last year's race was virtual. Volunteers arrived early to set up in some of the best weather the race has had in years. Registration and arrivals were brisk and everyone enjoyed the pre-race socialization and snacks.There were 228 registrants and 197 participants this year.

The race concluded with the raffle prizes, door prizes, the 50/50 winner (who won $400.00), and awards for this year's category winners.The day was a success, with many members, Steelwheelers, friends, family, and four-legged companions in attendance. The proceeds of this event, $29,800.00, were sent to the Steelwheelers. This brings WPTLA's total contribution to the Steelwheelers over the past 21 years to $561,785.00! Next year's race is set for October 8, 2022, at North Park, so save the date!

By: Chad McMillen, Esq.

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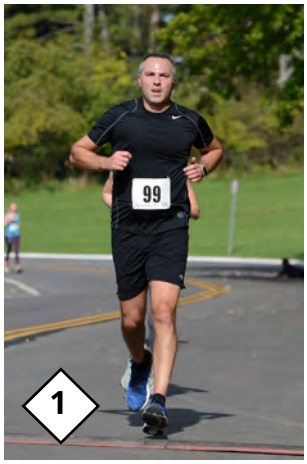
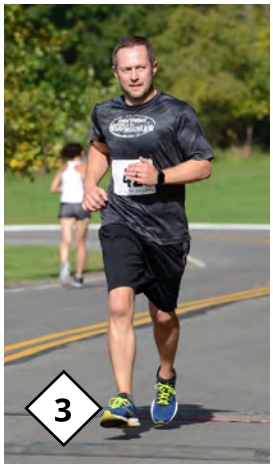
WPTLA members pictured above, from L to R: Vice President Greg Unatin, Board of Governors Member Russell Bopp, Board of Governnors Member Rich Ogrodowski, President Mark Milsop, Board of Governors Member Joe Froetschel, President-Elect Erin Rudert, Pete Giglione, Steve Barth, Past President Veronica Richards, Mark Smith, 5K Committee Member Holly Deihl, Board of Governors Member Brendan Lupetin, Board of Governors and 5K Committee Member Curt McMillen, Jennifer Fisher, Keith McMillen, Immediate Past President Eric Purchase, 5K Committee Member Sean Carmody, Board of Governors Member and 5K Chair Chad McMillen.

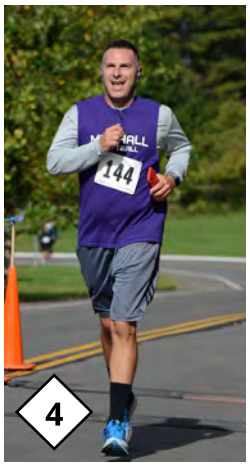
Pictured from L to R: Chris Inman, Jimmie the dog, Secretary and 5K Committee Member Katie Killion, Gabby Killion, Board of Governors Member Brittani Hassen, Zeppelin the dog, Ben Webb, Chad McMillen, Keith McMillen and Curt McMillen.

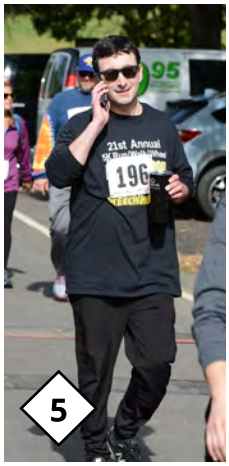
More photos of the 5K Event on p. 8

5K PHOTOS









Pictured from L to R: in Photo 1 is Board of Governors Member and 3rd Place Male WPTLA Finisher Rich Ogrodowski; in Photo 2 are Rowan Bopp and his dad, Board of Governors Member Russell Bopp; in Photo 3 is 2nd Place Male WPTLA Finisher Pete Giglione; in Photo 4 is Mark Smith; in Photo 5 is Vice President Greg Unatin; in Photo 6 is Past President Dave Landay; in Photo 7 are Board of Governors Member and 2nd Place Female WPTLA Finisher Karesa Rovnan with her son Maddox, and Steve Barth; in Photo 8 is President Mark Milsop; in Photo 9 are Leslie Smith with her husband, Board of Governors Member Nat Smith; in Photo 10 is Board of Governors Member Kelton Burgess; in Photo 11 is James Lopez, in Photo 12 is Board of Governors Member Joe Froetschel with his fiance Marla; in Photo 13 is Past President Carl Schiffman; in Photo 14 is Board of Governors Member and 1st Place Male WPTLA Finisher Brendan Lupetin; in Photo 15 is Macie McMillen with her dad, Board of Governors Member and 5K Chair Chad McMillen.

Thanks to all who participated and/or sponsored this event!

BEAVER DINNER AND CHAMPION OF JUSTICE AWARD RECAP

WTPLA's annual Beaver County Dinner was held at the Wooden Angel on October 18, 2021, where our Members were able to enjoy a night of networking and dining with honored members of the Beaver County Judiciary, including The Honorable Deborah L. DeCostro, The Honorable Richard Mancini, The Honorable James J. Ross, and The Honorable Laura Tocci.

After dinner, Past President and Champion of Justice Chair Larry Kelly presented the Champion of Justice Award. This award is reserved to only those trial attorneys who have dedicated their life to pursing justice for their clients in the trenches of a courtroom. This year's recipient is one of the most accomplished trial attorneys to have practiced in the Commonwealth of Pennsylvania—Attorney Louis M. Tarasi.

A 1959 graduate of the University of Pennsylvania School of Law, Attorney Tarasi truly exemplifies what it means to be a Champion of Justice. Through his relentless devotion to the pursuit of justice for his clients, Attorney Tarasi has developed a strong reputation as one of the top trial attorneys in the United States. Over the course of his career, Attorney Tarasi achieved tremendous success in the courtroom, highlighted by the $5 billion verdict that he obtained serving as counsel in the *Exxon Valdez* litigation.

Attorney Tarasi has served as the President for WPTLA, President of the Pennsylvania Association for Justice, Pennsylvania Governor for the American Association for Justice, and member of the American Board of Trial Advocates. He was admitted to practice before the United State Supreme Court, as well as the Eastern, Western, and Middle Districts of Pennsylvania. He is a certified specialist in civil trial practice and has received the Amicus Curiae Award.

Attorney Tarasi's decorated career and devotion to the pursuit of justice is an inspiration to all of our Members.

See page 20 for photos from the dinner and presentation.

By: Russell Bopp, Esq. of

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CLE ONLINE

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

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

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

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

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

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

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

Log on now at https://cle.wptla.org/

COMEBACK DINNER RECAP

WPTLA's Annual Comeback Award Dinner was held on November 10, 2021 at the Duquesne Club.After the cancelation of the dinner last year due to the COVID-19 pandemic, it was great to be back together for one of WPTLA's signature events.The Annual Comeback Award Dinner is a time for us to remember the important reasons that we as WPTLA members chose our paths as Plaintiffs' attorneys. This year's Comeback Awardees were David and Melanie Vadzemnieks, who were represented and nominated by Tim Riley of Connor Riley Friedman & Weichler. David was catastrophically injured in a motor vehicle accident when another driver fell asleep at the wheel after combining alcohol and prescription medication. As result, David sustained a severe brain injury in addition to multiple severe orthopedic and internal injuries. Despite this life altering accident, David and his wife, Melanie, have not allowed his injuries to define their lives in a negative way.Melanie volunteers as a public speaker at school districts and other venues to discuss the impacts of distracted driving. She has devoted her life to caring for David, as well as doing her part to prevent accidents like David's from happening again.

Unfortunately, due to David's injuries he was unable to attend the Comeback Award Dinner this year. However, Melanie was able to attend and her grace, courage, and fortitude in the face of David's injuries were an inspiration to all attending this year's dinner. Melanie read the same victim impact statement that she provided during the defendant's criminal proceedings. This statement truly embodied the meaning of the Comeback Award – it showed incredible determination to live life thankful for each day despite what some may see as difficult circumstances.

David was an active member of the Springfield Volunteer Fire Department, which was his chosen charity. We were lucky enough to be joined by two members of the Springfield Volunteer Fire Department who accepted WPTLA's donation in the name of David and Melanie Vadzemnieks. Lastly, we were able to celebrate the life of former Comeback Award winner Kimberly Puryear, who unfortunately passed away earlier this year. Steve Barth, who represented Kimberly for her accident, said a few words in her memory, and reminded all of us that those special clients do become friends.

By: Brittani Hassen, Esq. of

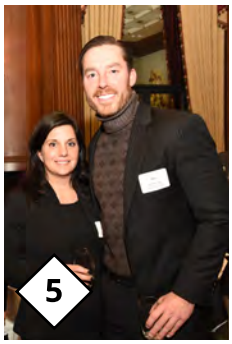
Kontos Mengine Killion & Hassen

bhassen@kontosmengine.com

Pictured above, from L to R: nominating attorney Tim Riley, Comeback Award Chair Brittani Hassen, 2021 Comeback Awardee Melanie Vadzemnieks, and President Mark Milsop.

More photos from the Comeback Award Dinner can be found on page 11.

PHOTOS FROM THE COMEBACK AWARD DINNER



Pictured above from L to R: in photo 1: Kathryn Monbaron, Amber Manson-Webb, Board of Governors Member Nick Katko, Drew Rummel, and Board of Governors Member Joe Froetschel. In photo 2: George Kontos, Board of Governors Member Jennifer Webster, and Board of Governors Member Karesa Rovnan. In photo 3: Board of Governors Member Russell Bopp, Brad Holuta, and Past President Chris Miller. In photo 4: Jason Powell and Desiree Parker, of the Springfield Volunteer Fire Department, and Melanie Vadzemnieks. In photo 5: Cori Kapusta and Board of Governors Member Ben Schweers. In photo 6: President-Elect Erin Rudert and Karesa Rovnan. In photo 7: past and current Comeback Awardees Melanie Vadzemnieks (2021), David Fleming (2006), Beckie Herzig (2001), Karrie Coyer (2007/2008), Brenda Gump (2014), Davanna Feyrer (2012), David Gifford (2019). In photo 8: Past President Mark Homyak and Stephanie Cup, and Alice and Phillip Clark. In photo 9: Forensic Human Resources's Don Kirwan and Drew Leger. In photo 10: Iryna and Mark Haak, Past President Jason Matzus, President Mark Milsop and Carmen Nocera. In photo 11: Brandon Sprecher, Tyler Setcavage and Board of Governors Member Rich Epstein. In photo 12: Scott Melton, Mark Milsop, and Julianne Graziano. In photo 13: Jennifer Fisher, Immediate Past President Eric Purchase, Finley Consulting Investigations' Chris Finley and Rod Troupe.

PUBLIC ACCESS POLICY CHANGES

The Public Access policy has been amended. Effective January 1, 2022. The amendment creates a statewide uniform policy of utilizing a confidential information form rather than filing redacted and unredacted versions of documents. This will only affect practice in a few counties; but Allegheny County is one of the counties which will be affected.

SANCTIONS FOR AN IMPROPER CERTIFICATE OF MERIT

The Superior Court has recently held that where a certificate of merit has been filed without the attorney having an underlying opinion from an appropriate professional, the sanctions to be imposed must be limited to those which were caused by the violation. Hence, In *Green v. Trustees of the University of Pennsylvania*, 2021 Pa. Super 209, the Superior Court has vacated an award of sanctions and remanded the case for the correct calculation of sanctions.

The case arises from a fairly complex procedural history. However, Judge Bowes began her discussion by stating "The following is a cautionary tale for attorneys who venture outside their area of expertise." *Green*, 2021 Pa. Super, 209 at *2.

The original suit included claims for both malpractice and intentional torts arising out of the alleged hypnotization and sexual assault of a patient by an internal medicine physician. The plaintiff eventually filed the report of a psychiatrist setting forth deviations from the standard of care. The defense moved for summary judgment arguing that the psychiatrist's opinion was inadmissible as to the internal medicine physician. Summary judgment was granted and not appealed. Defense counsel then requested the written opinion underlying the certificate of merit, and plaintiff's counsel did not respond. Defense counsel then sought sanctions.[1] Plaintiff's counsel did not respond and the motion was granted as uncontested, awarding over $84,000.00 in attorney fees. Plaintiff's counsel then filed a motion for reconsideration claiming that he was unaware of the motion due to a system that a former assistant had set up. Counsel further claimed that any violation was not willful and provided an affidavit from a physician that orally advised counsel that the defendant's standard of care was outside the standard of care. He also maintained that not all fees incurred were causally related to the certificate of merit.[2] Because the Motion was not acted on before an appeal was due to be filed, plaintiff's counsel filed an appeal and the trial court thereafter denied the motion as moot.

In addressing the issues before it, the Court began by noting that the failure to file a response to the motion was not fatal since the motion is not a pleading and failure to file a response is not an admission. Hence, the fact that the motion was "unopposed" did not relieve the judicial duty to exercise its discretion and render necessary findings.[3] Hence because the trial court had not conducted an analysis of what harm was caused by the conduct in question or whether sanctions were appropriate, the trial court abused its discretion.

The Court vacated the sanctions order and remanded for determinations of whether counsel failed to comply with Pa.R.Civ.P 1042.3 and to consider the factors in the Comment to Rule 1023.1 in determining whether sanctions were warranted and whether the conduct was a cause of the harm.[4]

NEW RULE FOR CITATION OF THE RULES OF CIVIL PROCEDURE

Rule 51 of the Pennsylvania Rules of Civil Procedure has been amended to change the proper citation of the rules from Pa.R.C.P. to Pa.R. Civ.P.

INDIANA COUNTY ARBITRATION LIMITS

Indiana County's arbitration limits are now $50,000.00.(LR 1301). Indiana uses a procedure for the appointment of arbitrators where as a list of 5 potential arbitrators is prepared and each side may strike 1.

[1] Sanctions are authorized by rule 1042.92 (b) which provides in pertinent part:

> A court may impose appropriate sanctions, including sanctions provided for in Rule 1023.4, if the court determines that an attorney violated Rule 1042.3(a)(1) and (2) by improperly certifying ...and that such conduct was a cause in bringing about the harm.

Pa. R.C.P. No. 1042.9 (emphasis added)

[2] The Court also analyzed the defense's claim that the failure to file a response to the motion for sanctions was a waiver; and that in raising his defenses for the first time in the motion for reconsideration, he failed to present his arguments to the trial court since an appeal was filed before the trial court acted on the motion for reconsideration. The Superior Court rejected that argument and analogized the motion to a motion to petition to open a default judgment and to respond nunc pro tunc.

[3] The Court discussed the Comment to Rule 1023.1 as containing appropriate factors for the imposition of sanctions. Those factors include:

- whether the improper conduct was willful or negligent
- whether is was part of a pattern of activity or an isolated event;
- whether it infected the entire pleading or only one particular count or defense;
- whether the person has engaged in similar conduct in similar litigation;
- whether it was intended to injure;
- what effect it had on the litigation process in time or expense;

(Continued on Page 15)

Pennsylvania Supreme Court Finally Addresses Traveling Employees

In *Peters v. WCAB (Cintas Corporation),* 1 MAP 2020, the Pennsylvania Supreme Court has clarified the eligibility of traveling employees for workers' compensation benefits. The extremely thorough Opinion provides precise guidance on pursuing such claims.

Jonathan Peters (hereinafter Peters) was employed by Cintas Corporation as a sales representative. For three days a week, he worked half day in a branch office of the employer and traveled through the remainder of the Monday to Friday work week. On Friday, February 27, 2015 after his last appointment of the day, he traveled to a tavern for an employer-sponsored event. While Peters believed the event to be mandatory, the Workers' Compensation Judge ultimately concluded, based on employer testimony, that the event was voluntary. Nonetheless, the Judge concluded that the events were regularly scheduled to mark the end of a "sales blitz" week where appetizers and drinks were served paid for by the employer. Peters was injured in an automobile accident on the way home from this event.

Peters filed a Claim Petition alleging that he was a traveling employee and as such, was in the course of his employment at the time of his injury. Peters testified, along with two representatives of the employer, which disputed the business nature of the pub celebration. The Workers' Compensation Judge ultimately concluded that Peters' injury was not compensable as it was not in the course of employment. Curiously, the WCJ applied case law that did not involve traveling employees. Peters appealed to the WCAB which affirmed and also did not prevail before the Commonwealth Court.

The Commonwealth Court noted that according to Claimant's testimony, he had passed the exit for his home on his way to the employer function at the bar. The Commonwealth Court concluded that since the Claimant had passed the exit for his home, that he was not within the course of his employment beyond that point. The court found this despite the fact that Claimant passed the exit for his home to attend an employer-sponsored event.

Judge Renée Cohn Jubelirer dissented from the majority. She noted that the presumption afforded Peters under the traveling employee doctrine applied at the time of Peters' accident. She called to task the majority's emphasis on Peters' passing the exit on his way home to attend the employer-sponsored event. While the WCJ had found the event to be voluntary, Judge Jubelirer did not believe this controlled the results. She noted that a purely social function can further an employer's business by "fostering good relationships" between employees.

Peters' appeal to the Supreme Court followed. There, the Court, through the Opinion of Justice Mundy, conducted an exhaustive analysis of the relevant case law regarding traveling employees. The Opinion is really most impressive and a must read for practitioners confronting a traveling employee case. I will quote at length from the Court's Opinion:

For a traveling employee, the act of travel is essential for carrying out the business of his or her employer. A traveling salesman, for example, cannot carry out the business of his employer without traveling to present products and solicit business. As such, the act of traveling, in and of itself, furthers the business and affairs of a traveling employee's employer. So too do the activities incidental to travel such as lodging, refueling, and stopping for food and drink.

During their travels, traveling employees are subject to the risks associated with travel that stationary employees are not. Therefore, the hazards of travel became the (hazards of employment). *Ball-Foster Glass Container Co.*, 177 P.3d at 697 (citation omitted). In light of this, we agree with the Supreme Court's conclusion in *Combs* that a traveling employee must have a broader scope of employment than a stationary one. Therefore, to effectuate the humanitarian purpose of the Act, a traveling employee must be considered in the course of his or her course of employment during the entirety of work-related travel unless the employee abandons his or her employment. (Slip opinion, p.24)

Ultimately, the Court remanded the case to the WCJ to determine whether Peters' actions following the employer-sponsored event constituted an abandonment of employment.

This decision represents an excellent clarification of the status of the law regarding traveling employees. It will remain a must read for any counsel representing people in such claims.

Kudos to PAJ stalwart Dan Siegel for his excellent work on behalf of Peters.

By: Tom Baumann, Esq. of

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BY THE RULES ... FROM PAGE 13

•whether the responsible person is trained in the law;
•what amount is needed to deter that person from repetition in the same case; and
•what amount is needed to deter similar acts by other litigants.

Pa. R.C.P. No. 1023.1

[4] The trial court had also ordered other sanctions including the payment of the doctor's increased insurance premium and a requirement that counsel request the media remove certain articles about the lawsuit and advise that the lawsuit lacked merit. The Superior Court also indicated that the trial court was required to make findings concerning these sanctions as well.

By: Mark Milsop, Esq. of

Berger and Green

mmilsop@bergerandgreen.com

JUNIOR MEMBER PROFILES

Name: Katerina Vassil

Law School Attending: University of Pittsburgh School of Law

Year in Law School: 1L

Undergrad School and Graduation Year: Temple University Class of 2021

Undergrad Major: Bachelor of Science in Public Health

What made you want to go to law school? I chose to attend law school because I believe that a career in law will allow me to achieve my goals of helping people and advocating for others. Working with a variety of people and organizations have shown me that it is possible to pursue a legal career while incorporating my own passions into my work. I hope to incorporate my interests in health and my undergraduate health studies into a health-related legal career. This will allow me to have an impact on the lives of others, and to use both my voice and my training and expertise as an attorney to spark change in my communities and in the overarching systems in our society.

Name: Melissa Zentz

Law School Attending: Duquesne University School of Law

Year in Law School: 2024

Undergrad School and Graduation Year: The Catholic University of America, 2021

Undergrad Major: Philosophy and Politics

What made you want to go to law school? I want to be an advocate for those in need and be there for those who have no one else. I was lucky to have a support system that got me through difficult times in my life, but all too often people do not have anyone to help them. I want to be there for those who have nowhere else to turn whatever the circumstances may be.

***Rush v. Erie Insurance Exchange* 2021 Pa. Super. 215 (Pa. Super October 22, 2021)**

In a case of first impression, the Pennsylvania Superior Court invalidated the regular use exclusion as violating the PA MVFRL.

Plaintiff, Matthew Rush ("Plaintiff"), was a police detective who suffered serious injuries when two other drivers crashed into his police car on November 28, 2015. It was uncontested that the Plaintiff did not own or insure this car under his personal auto policies with Erie Insurance ("Erie"). It was also uncontested that the Plaintiff regularly used the police car for work.

The City of Easton insured the police car through a policy of insurance that provided for $35,000 in UIM coverage. The insurance companies for the other drivers and the City of Easton provided Plaintiff with their policy limits as a result of the November 28, 2015, accident.

In addition to the above coverages, Plaintiff and his wife insured three (3) personal automobiles through two (2) policies all with Erie. Plaintiffs paid for stacked UIM coverage on both policies. The first policy provided for $250,000 of UIM coverage on one vehicle and the second policy provided for $250,000 of UIM coverage stacked on two (2) vehicles. Both Erie Policies included identical "regular use" exclusion clauses, limiting the scope of UIM coverage under the policies when an insured suffers injuries arising from the use of a motor vehicle that he/she regularly uses but does not own or insure under the Erie Policies.

Plaintiffs filed a claim for UIM benefits under the Erie Policies, which Erie denied based on the "regular use" exclusion. In response to the denial, Plaintiffs filed a declaratory judgment action seeking a judicial determination of whether the MVFRL permits Erie to limit the scope of its UIM policies through the "regular use" exclusion. The trial court granted Plaintiff's summary judgment motion holding that the "regular use" exclusion in the Erie Policies violated the requirements of the MVFRL. Erie appealed the trial court's decision.

Following an analysis of the MVFRL, specifically section 1731, the Superior Court agreed with the trial court's conclusion. The Superior Court determined that the"regular use" exclusion improperly limited the scope of UIM coverage required under Section 1731 by precluding coverage in situations where an insured is injured while using a motor vehicle that the insured regularly uses but does not own. The Court held that this exclusion conflicts with the broad language of Section 1731(c), which requires UIM coverage in situations where an insured is injured arising out of the "use of a motor vehicle." Specifically, the exclusion limits Section 1731(c)'s coverage mandate to situations where an insured is injured arising out of the use of an owned or occasionally used motor vehicle.The Court concluded that since the "regular use" exclusion conflicts with the clear and unambiguous language of Section 1731 of the MVFRL, it is unenforceable.

The Superior Court found Erie's reliance on the Supreme Court case of *Williams v. GEICO Govt. Emp. Ins. Co.,* in support of its argument as unpersuasive. The Court noted that Erie's argument was focused on *dicta* in that Opinion and that the *Williams* decision was subsequently abrogated by the Supreme Court in *Gallagher v. GEICO Indemn. Co.*

Based on the foregoing, the Order granting summary judgment in favor of the Plaintiffs was affirmed by the Superior Court.

Franks v. State Farm Mutual Automobile Insurance Co. 2021 PA Super 192 (Pa. Sup. September 24, 2021) (*en banc*)

The Superior Court* sitting *en banc and in a matter of firm impression found that the removal of a vehicle from an insurance policy does not constitute a "purchase" of coverage requiring that the insured be provided the opportunity to waive the stacked limits of coverage at the time of removal.

On January 18, 2013, Robert and Kelly Franks, ("Plaintiffs") applied for automobile coverage with State Farm for two vehicles. The first named insured under the policy executed a form rejecting stacked UIM coverage. State Farm issued the policy, with non-stacked UIM coverage limits of $100,000 per person/$300,000 per accident.

In 2014, the Plaintiffs added a third vehicle to the policy and executed a second rejection of stacked limits of UIM coverage. Subsequently at the request of the Plaintiffs, a vehicle was deleted from the policy, reducing the total number of vehicles from three (3) to two (2). When the third vehicle was deleted from the policy, Plaintiffs did not request and State Farm did not make any changes to the coverages for the two remaining vehicles.

On August 11, 2016, Plaintiff-husband *(Continued on Page 17)*

sustained injuries in a motor vehicle accident that was caused by the negligence of another driver ("tortfeasor"). After ascertaining that the bodily injury liability coverage available to the tortfeasor was insufficient to fully compensate them, the Plaintiffs asserted a claim for UIM benefits under the policy. In response to the claim, State Farm paid the Plaintiffs UIM benefits in the amount of $100,000.

On July 9, 2018, the Plaintiffs filed a complaint for declaratory judgment, seeking a declaration that State Farm was obligated to pay them an additional $100,000 in UIM benefits because there was no valid waiver of stacked UIM coverage in effect at the time of the accident. State Farm filed a counterclaim for declaratory judgment, seeking a declaration that it was obligated to pay only the $100,000 already tendered. Following a non-jury trial, the trial court entered an order granting declaratory judgment in favor of State Farm, ruling that the insurer was only obligated to pay a total of $100,000 in UIM coverage to the Plaintiffs.

On appeal by the Franks, a divided three-judge panel of the Superior Court reversed the trial court's decision. State Farm filed an application for re-argument before the Court *en banc*, which was granted.

The Superior Court, sitting *en banc*, provided an analysis of the *Sackett* trilogy and the line of cases thereafter. The Court noted that this line of cases involved the application of section 1738 when a vehicle on a multi-vehicle policy was replaced by another vehicle, or when a vehicle was added to a multi-vehicle policy. The Court could find no reported case in which a party claimed section 1738 requires the execution of a new stacking waiver upon removal of a vehicle from a multi-vehicle policy. Despite the lack of precedent, the Court found "considerable guidance" from the Supreme Court's analysis in *Barnard v. Travelers Home and Marine Ins.*

Applying that guidance to the case *sub judice* the Court found that the Plaintiffs did not effectuate a "purchase" of coverage within the plain meaning of section 1738(c). When the Plaintiffs deleted the third vehicle from their policy, they did not obtain something that they did not already possess but rather they eliminated a portion of their existing coverage. The Court also noted that the Plaintiffs did not make a payment of any sort and, in fact, had received a credit from State Farm and a reduction in their total premium. The Superior Court applied the definition of the word "purchase" as set forth in *Barnard* and determined that the deletion of a vehicle from a policy does not result in a "purchase" as contemplated by section 1738(c)."

Accordingly, the Court held that under the plain language of section 1738(c), the removal of a vehicle from an insurance policy does not constitute a "purchase" of coverage requiring that the insured be provided the opportunity to waive the stacked limits of coverage at the time of removal. The judgment of the trial court was affirmed.

***Brooks v. Ewing Cole, Inc.*No. 4 EAP 2021 (Pa. September 22, 2021)**

The Pennsylvania Supreme Court holds that an adverse ruling by a trial court against a claim of sovereign immunity by a Commonwealth entity was immediately appealable under the collateral order doctrine.

This case arises out of personal injuries sustained by Wanda Brooks ("Plaintiff") when she walked into an unmarked glass wall while she was attempting to exit the Family Court building in Philadelphia on January 8, 2015. The Plaintiff's second amended complaint for her personal injury action averred that the Family Court was a Commonwealth entity and subject to liability under the real estate exception to sovereign immunity. In its answer to the second amended complaint, the Family Court admitted that it was a Commonwealth entity. The Family Court asserted in its new matter that the Sovereign Immunity Act, barred Plaintiff's negligence action against it.

Following the completion of discovery, the Family Court moved for summary judgment on the grounds that it was subject to sovereign immunity and therefore immune from tort claims. The trial court denied the summary judgment motion. This summary judgment denial was appealed to the Commonwealth Court. The Commonwealth Court concluded that an order denying a summary judgment motion based on sovereign immunity did not satisfy the collateral order doctrine because the Family Court's claim of sovereign immunity would not be irreparably lost if appellate review was postponed until final judgment.

The Supreme Court granted review to determine whether an order denying summary judgment based on a sovereign immunity defense was a collateral order, appealable as of right under Rule 313.

(Continued on Page 18)

HOT OFF THE WIRE ... FROM PAGE 17

Following an analysis of the collateral order doctrine, the Supreme Court concluded that because sovereign immunity protects government entities from a lawsuit itself, a sovereign immunity defense is irreparably lost if appellate review of an adverse decision on sovereign immunity is postponed until after final judgment. The Court found that subjecting a governmental entity, which claims it is immune, to the legal process undermines the purposes of sovereign immunity by, *inter alia* ,expending taxpayer dollars on its defense and diverting employees' time from conducting government business. Further, the Court found that forcing governmental entities to litigate claims from which they may be immune could have a chilling effect on government policymaking.

The Supreme Court specifically held that:

> The Commonwealth Court's decision undermines the purposes of sovereign immunity and transforms it from a protection from suit into a mere shield against damages. This is against the express intention of the legislature as stated in 1 Pa.C.S. § 2310. While it is accurate that the issue of immunity may be reviewed after final judgment, by that time the government's monetary resources and employees' time will have been subject to unnecessary depletion. Further, subjecting the government to unnecessary litigation has potentially deleterious effects on its policymaking decisions. Once the government litigates a case to final judgment, "the bell has been rung, and cannot be unrung by a later appeal.". Immediate appellate review of the adverse decision on sovereign immunity under Rule 313 is the only means by which the [Commonwealth entity] may vindicate its rights in this case.

Accordingly, the order of the Commonwealth Court was reversed and remanded to the Commonwealth Court for further proceedings consistent with the Supreme Court's opinion.

By: Shawn Kressley, Esq.,

of DelVecchio & Miller

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UPCOMING EVENTS

Wed, Jan 26, 2022 - Junior Member Meet 'n Greet + Award Presentation
The Foundry Table & Tap, Pittsburgh

Feb, 2022 - CLE Program (TBA)

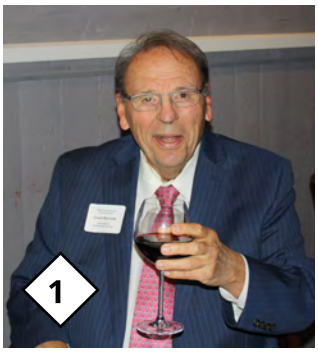
Wed, Mar, 2022 - Washington County Dinner & CLE
Opportunities for Justice in the Pennsylvania Supreme Court
Bella Sera, Canonsburg

Tue, Apr 19, 2022 - Annual Membership Election Dinner Meeting
Carmody's Grille, Pittsburgh

Fri, May 6, 2022 - Annual Judiciary Dinner
Heinz Field, Pittsburgh

Fri, May 27, 2022 - Golf Outing & Ethics CLE
Shannopin Country Club, Pittsburgh

PHOTOS FROM BEAVER DINNER & AWARD PRESENTATION



Pictured above, from L to R: In photo 1: Past President and 2018 Champion of Justice Winner Joe Moschetta. In photo 2: Beth Tarasi and 2020 Champion of Justice Winner and Past President Lou Tarasi. In photo 3: Past President Bill Goodrich and The Honorable Richard Mancini of the Court of Common Pleas of Beaver County. In photo 4: Past Presidents Mark Homyak and Tim Riley. In photo 5: Beth and Lou Tarasi. in photo 6: Treasurer James Tallman and Past President Rich Catalano. In photo 7: Past President Bernie Caputo, Ken Fawcett, The Honorable Deborah DeCostro and The Honorable Laura Tocci, both of the Court of Common Pleas of Beaver County. In photo 8: Board of Governors Member Sam Mack, Past President and Champion of Justice Chair Larry Kelly, and The Honorable James Ross of the Court of Common Pleas of Beaver Copunty. In photo 9: Board of Governors Member Rich Ogrodowski, Eric Iamurri, Vice President Greg Unatin, and Board of Governors Member Russell Bopp. In photo 10: Tyler Setcavage, Brandon Sprecher and James Thornburg.

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. The 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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Words have meaning. When the founders wrote the fourth amendment, when they inscribed the word "seizure," they did more than just scratch a quill to a piece of parchment paper. They meant something by it. They had a definitive, bounded idea that they poured into the words that they wrote. We should be careful not to stretch the boundaries of the theories that undergird the constitution in order to achieve desired ends.

The Fourth Amendment to the Constitution of the United States of America states that "The right of the people to be secure in their persons ...against unreasonable...seizures, shall not be violated." Given the decades of precedent, the historic evidence, and the linguistic usage of the word "seizure," one would inexorably conclude that a seizure is "the act of using force to take control of a [person]" (Oxford Dictionary 2021). All available evidence suggests that the vague and unreasonable standards of "seizure" put forth by the petitioner, "appl[ying] physical force to restrain someone," (petitioner's brief) by itself does **not** effectuate a seizure. Thus, Ms.Torres, nor anyone who is not restrained by physical force is not seized.

The question that undergirds Torres v. Madrid revolves around the idea of a seizure, where two conflicting perspectives arise. The petitioner argues that an "arrest occur[s] the moment an officer applied physical force to someone with intent to restrain," and that, "the Fourth Amendment encompasses the common-law definition of arrest." The interpretation of this standard is that a Fourth Amendment "seizure" is effectuated at the exact moment physical force is applied to an individual with the intent to restrain. On the other side, respondents argue that "[i]n order to 'seize' a person, a law enforcement officer must restrain that *(Continued on Page 23)*

person's liberty." (respondent's brief) The interpretation here is that the individual must be brought under control in order to be seized While historical evidence provides foundation for both theories, the latter theory is supported by more extensive and voluminous precedent.

First, case after case supports the notion that a seizure requires the element of control over the subject. In *Terry v. Ohio*(1968), Chief Justice Warren wrote that, "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person within the meaning of the Fourth Amendment." This is but the first of many court decisions which supports the notion that, in order to effectuate a seizure, an individual must be restrained and apprehended, something that Ms. Torres was not. The simple nature of this opinion clearly lays out, in common terms, that an essential aspect of a seizure is the "restrain[t] [of an individual's] freedom." *(Terry v. Ohio)* The Chief Justice made very clear the entirety of the circumstances surrounding what constitutes a seizure. He wrote that, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." His precise and nonambiguous language speaks volumes to the definition of a seizure. First, it is important to note that the word "only" indicates that there is only one of two ways a seizure may be effectuated. The "show of authority'' definition of seizure is not under question in this case, but the "physical force" definition of seizure is. This decision sets the standard for seizures effectuated through physical force as requiring the "restrain[t] [of] the liberty of a citizen." Considering the undeniable fact that Ms. Torres managed to evade police custody, her "liberty'' was not restrained, thus she was not seized under *Terry.*

Fast forward 12 years and the court once again affirms the requirement of restraint to effectuate a seizure. In *US v. Mendenhall* (1980), Justice Stewart concluded that a required element of a seizure was a limitation of free movement. He wrote that when a citizen is "free to ... walk away, there has been no intrusion upon that person's liberty." *(US v. Mendenhall)* Again, this supports the perspective that restraint is a required element of a seizure. Moreover Justice Stewart declared, in no uncertain terms, that "[w]e adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." In *Mendenhall,* the court endorsed the idea of a seizure that was consistent with precedent and historical notions that a seizure is the act of taking possession of an individual. That is why, Justice Stewart reasoned, that "a person is seized only when ... his freedom of movement is restrained." At risk of repeating myself, Ms. Torres was able to evade police custody and "walkaway'' in a sense, so she was not seized under the conditions of *Mendenhall.*

In 1989 the Supreme issued a decision perhaps most damaging to the petitioner's argument. In *Brower v Inyo County,* Justice Scalia and a unanimous court once again affirmed the idea that for a seizure to be effectuated, there must be a termination of one's freedom of movement. Justice Scalia wrote that, "[c]onsistent with the language, history, and judicial construction of the Fourth Amendment, a seizure occurs when governmental termination of a person's movement is effected through means intentionally applied." *(Brower v Inyo County* 1989) There are two parts to what make up a seizure effectuated through physical force. First, and most relevant to this case, is that there must be a "governmental termination of a person's movement." The constant and invariable Supreme Court standard of restraint as a necessary component for a seizure is reaffirmed. The second component of a seizure, according to *Brower,* is the termination of a person's movement which must be "effected through means intentionally applied." The clear interpretation is that the law enforcement agent's actions must be intended to (and result in) the termination of a citizen's movement. This two part test to determine whether a seizure has occurred is important because 1) it is undisputed that Ms. Torres's movement was not terminated and 2) it is unclear that the intent of the officers was to terminate her movement (considering their stated intent was to prevent themselves from getting hit, perhaps they were intending her to stop driving directly at them). Justice Scalia continues on to suggest that both of these components of a seizure are mutually inclusive. He writes, "It is clear, in other words, that a Fourth Amendment seizure does not occur [unless] there is a governmental termination of freedom of movement through means *intentionally applied."* The standard for a seizure, put concisely is "an intentional acquisition of physical control." This statement fits into the years of precent which requires a seizure to include the aspect of "physical control."

(Continued on Page 24)

In the years following, hundreds of decisions in federal courts and the Supreme Court use the standard of a seizure laid out by those and many more decisions. In those cases, the court examined whether an individual's freedom of movement was restrained, whether they were free to walk away, or whether an officer had taken physical control over them. That was the standard that was followed *almost always.* In order to determine the correct answer to the central question of which standard constitutes a seizure, touching with the intent to restrain or actually taking physical control, it was suggested earlier that there is evidence to support both theories, although more evidence gives credence to the idea that physical control is necessary. Evidence in the form of significant court patterns and invariable holdings that support the physical control theory has been presented. Now, the evidence that seems, on its face, to support the petitioner's perspective on what consists a seizure shall be explored.

First, it is important to make a comparison in terms of the magnitude of precedent supporting each theory of a seizure. As already indicated, hundreds of rulings have supported, expanded, and relied upon the restraint or physical control requirement for a seizure. And there is not a single case (that I am aware of) that held that a seizure can be effectuated by touching with the intent to restrain. There is one Supreme Court *opinion,* however, that the petitioner relied upon extensively to give credence to their perspective. The opinion in the 1991 case *California v. Hodari D.* included some opinions of the standards of a seizure that contrast with decades of precedent and historical evidence. In *Hodari,* Justice Scalia, not three years after penning the opinion in *Brower,* wrote that, "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence [is] the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." Ignoringthe facts of the *Hodari* case, the decades of precedent, the context surrounding this statement, and the historical evidence, it may appear that this opinion supports the petitioner's theory that a seizure is "appl[ying] physical force to restrain someone." For the indicated reasons, the opinions expressed in the *California v. Hodari D.* decision should be contextualized and not used to conclude anything in *Torres.*

It is important to remember the circumstances surrounding the court's opinion in *Hodari.* In that case, the circumstances were such that there was no physical contact or physical control. And the court ruled that there was no seizure. Any opinion that tries to define the standards surrounding what a seizure is can go no further than opining what a seizure is with regard to the circumstances of the case. In other words, Justice Scalia can conclude whether or not no submission with no physical contact is or is not a seizure since that was consistent with the circumstances of the case. However, for Justice Scalia to suggest that touching with the intent to restrain is a seizure goes beyond the court's holding. The court held *in Hodari* that if there is no submission and no physical contact, there can be no seizure. But the case did not deal with circumstances surrounding physical contact without submission, so Justice Scalia's opinions expressed as to whether or not those conditions effectuate a seizure are dicta. In other words, his belief that a seizure can be effectuated by simply touching with the intent to restrain might be his opinion, but that was not the court's holding in Hodari, which means it should not be used as precedent to decide *Torres.* Furthermore, it is highly relevant to note that Justice Scalia's opinions conflict with long-standing, complex, and time tested standards of what constitutes a seizure. In other words, *Hodari* is an outlier. Perhaps that is why the petitioner had to rely so heavily on the opinion in *Hodari.* In the petitioner's brief and replies, they reference *Hodari* 77 times. Given the fact that the opinions in *Hodari* the petitioners rely upon so heavily are divorced from the facts of *Hodari,* one would expect that they would try to rely on other precedent. Another aspect of the *Hodari* opinion that puts into question the reliability of it, is the context surrounding Justice Scalia's use of the word "seizure." When he uses the word "seizure," it appears that he is accepting the idea that a seizure is the act of taking physical control of an individual. Take his statement, "the word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ('She seized the purse-snatcher, but he broke out of her grasp.')" In this quote, Scalia is trying to suggest that colloquial usage of the word "seizure" applies to instances where an individual breaks free, and their movement is no longer restrained. But upon further examination of his example that he gives, it becomes clear that he is suggesting quite the opposite. He writes, "[s]he seized the purse-snatcher, but he broke out of her grasp." The image that is meant to come to mind is *(Continued on Page 25)*

an individual taking possession of a purse-snatcher, but then loosing control of him. But pay very close attention to how Justice Scalia use the word "but." If an individual declares, "I was hungry, but then I ate," the assumption is that they are no longer hungry. Likewise, Justice Scalia writes, "She seized the purse-snatcher," indicating she took possession of him, ''but he broke out of her grasp, "indicating that the purse snatcher is no longer in possession of the woman in the example, and consistent with the example related to hunger,is no longer seized. The word ''but'' indicates that a status given in the clause delivered prior to the conjunction is no longer persistent into the clause that follows the word. Therefore,the purse-snatcher was seized when he was taken control of, but then the status of being seized ended when she (from the example) no longer had possession of him. Thus Scalia unintentionally confirms what decades of precedent upheld: a seizure requires having control over an individual. All of the indicated underlying circumstances contribute to the conclusion that Hodari is a weak precedent to base the decision in Torres on. And an even weaker decision to base an entire upheaval of decades long precedent that held a seizure must have the element of physical control.

As indicated earlier, there is, in fact, evidence that suggests both perspectives on what constitutes a seizure, touching with the intent to restrain or physical control, may be correct. But court precedent extensively and thoroughly supports the idea that restraint is required for a seizure to be effectuated. And the evidence that indicates that the "application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee" (*California v. Hodari D.)* can effectuate a seizure is significantly less voluminous and ingrained in the legal system than the former theory. But even if legal precedent is set aside and the actual history of the fourth amendment is examined, it is clear that, again, when the founders wrote the word "seizure" they meant taking physical control over a citizen.

Many historical documents inspired the writing of the constitution but the influence of the Magna Carta was paramount to the text that made it into the amendments. The 39th clause of the Magna Carta deals with seizures stating that "[n]o free man shall be seized or imprisoned." *(Magna Carta from British Library translation* 1215) The specific text used is important since it uses the words "seizure" and "imprisonment'' interchangeably. This use of "seizure" is consistent with the original meaning of the the word. According to the US National Library of Medicine "[t]he word *seizure* is derived from the Greek meaning 'to take hold.'" All of this historical evidence indicates that the meaning of the word "seizure" at the time of the founding was the "acquisition of physical control." (Browerv. Inyo County) Furthermore, the historical events that led to the fourth amendment can shed light to what the founders meant when they ratified the amendment. One of the most significant events that led to the creation of the fourth amendment was the use of "writ of assistances" by British officers. These decrees allowed the unreasonable seizure or taking physical control of goods, and in some limited cases, people. Considering the underlyingcircumstances that led to the creation of the fourth amendment, it seems clear that the founders were attempting to prevent officers from unreasonably taking possession and having control over citizens. So, in order to prevent American officers from restricting the freedom of movement of their citizens, they wrote that "[t]he right of the people to be secure in their persons ... against unreasonable ...seizures, shall not be violated." *(Fourth Amendment to the Constitution)*

Precedent, linguistic usages, and historical evidence indicate what constitutes a seizure. They set consistent standards for how a seizure of a person may be effectuated, namely, taking control over an individual. Decades of highly consistent, precise, and non-ambiguous precedent supports this notion. No precedent supports any other definition of what constitutes a seizure, beyond opinions expressed by Justices coming to conclusionsdivorced from facts of certain cases. Moreover, colloquial and historic usage of the word "seizure," again, supports the notion that a seizure requires taking possession of another individual. And the intent of the fourth amendment, to stop the government from unreasonably restricting the freedom of movement of its citizens, is consistent with how it has been used and interpreted. Thus, the premises surrounding the interpretation of the fourth amendment leads to the conclusion that a person is not seized if they are not taken under control by law enforcement officers. In the case Torres v. Madrid, the officers did not take possession of Ms.Torres. She was able to drive away and evade police custody, which inexorably leads to the conclusion that she was not seized.

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Words have meaning. When the founders inscribed the word "seizure" to the fourth amendment, they had the idea to protect their citizens from the government unreasonably restricting their freedom of movement and taking control over them them. They expressed that idea in the text of the fourth amendment which serves as a conduit for their message. And while it seems that Ms. Torres was wronged, the boundaries of the ideas that the founders put into the fourth amendment should not be redrawn in order to achieve a perceived notion of justice. Because interpreting the law in order to achieve desired ends is no justice at all. A seizure is when physical force is used to take control over an individual. That is what the founders meant, that is what the word means, and that is how the courts have interpreted it. Thus, the Supreme Court should affirm the tenth circuit's decision in Torres v. Madrid and not redefine an important pillar of American law.

Essay submitted by Jeremiah Giordani, of Ambridge Area High School.

COMMUNITY OUTREACH

The WPTLA Community Outreach Committee recently met to discuss ways that WPTLA can continue to engage with the community at large while also being sensitive to the difficulties Covid has created among service organizations. The Wills Clinic is still in existence with Zoom appointments being offered, but many of the Committee's prior efforts focused on in person service events with organizations like Habitat for Humanity. In 2020, WPTLA made a donation to the Greater Pittsburgh Community Food Bank to help local families affected by food insecurity during the pandemic. This year, the Committee met and discussed various giving opportunities and decided to make a donation to Presents for Patients, a charity that provides gifts and items patients in nursing homes.

PRESENTS FOR PATIENTS

Through the generosity of our participating members, WPTLA made a donation of $2,696.88 to Presents for Patients, which will sponsor a gift of a blanket, a pillow, a musical snow globe, or a drink tumbler for nearly 100 patients in Western Pennsylvania nursing homes. The Covid restrictions limited WPTLA's participation this year to making a cash donation, but we hope to work with Presents for Patients again in the future to directly provide gives to patients through the program.

The Community Outreach Committee is active throughout the entire year, and we welcome any suggestions from our members for ways in which WPTLA can positively engage with the public throughout Western Pennsylvania.

TRIVIA CONTEST

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

Trivia Question #30

What common household appliance used to be so big that it had to be moved from house to house by horse drawn carrier?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by February 25, 2021.Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #30 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 #29 –**What country's national animal is the unicorn? Answer: Scotland.**

Congratulations to Katie Killion, of Kontos Mengine Killion & Hassen, on being the recipient of a $100 Visa gift card!

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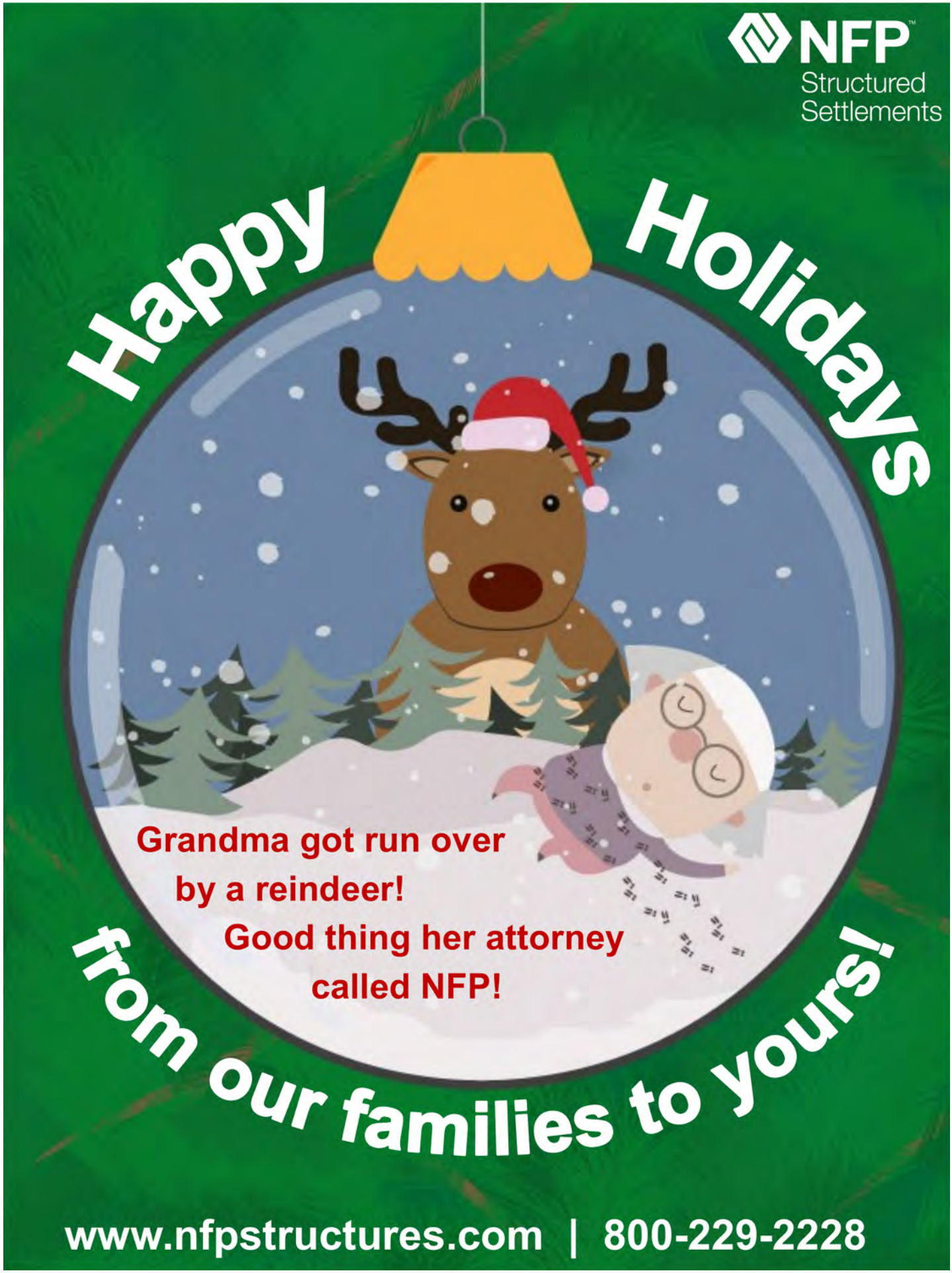
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Through the Grapevine....

A speedy recovery to **Tony Mengine** on his ankle surgery.

And more hopes to **Past President John Quinn** for quick healing with his recent cervical neck surgery.

Chris Apessos can now be reached via Quinn Logue, LLC, Attn: G. Christopher Apessos, 200 First Ave, Third Fl, Pittsburgh 15222. M: 412-805-2470, O: 412-765-3800, F: 7-866-480-4630, chris@quinnlogue.com

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