THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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JUDGE IGNELZI REINVIGORATES THE *FRYE* STANDARD WHILE PROVIDING GUIDANCE TO TRIAL ATTORNEYS IN *WALSH V. BASF*

For over a decade, the Estate of Richard Thomas Walsh has fought the largest chemical companies in the world over the death of Mr. Walsh from Acute Myelogenous Leukemia (AML). Walsh died from AML after nearly forty years of exposure to pesticides as a golf course groundskeeper and superintendent. On November 15, 2021, Judge Philip A. Ignelzi issued a detailed opinion and order denying the defendants' motions to strike the plaintiff's expert reports and for summary judgment in *Walsh v. BASF Corporation*, No. 10-018588 (Nov. 15, 2021, C.P. Allegheny). The opinion is significant for trial attorneys as it provides guidance to future litigants regarding expert reports and *Frye* motions in the Allegheny County Court of Common Pleas. In particular, Judge Ignelzi offers guidance to trial attorneys through extensive footnotes in his *Walsh* opinion. One worth noting at the outset is footnote 19, where Judge Ignelzi announced:

> It is the responsibility of the parties to assure that their respective experts' reports contain concise summaries of the methodologies employed that are prima facie understandable to the layperson. To be clear, this guidance is not intended to chill the zealous advocacy of any party or to inhibit resolution of legitimate expert methodological disputes. It is intended to establish a norm for submission of expert reports and Frye motion practice in conformity with the guidance provided by our Pennsylvania Supreme Court in Walsh.

Walsh, G.D. 10-018588 at *21, n. 19. Judge Ignelzi emphasized this point further in the final sentence of the final footnote stating: "A word to the wise is sufficient: an expert's methodology or objections thereto should be clear, concise, and comprehensible as applied by the relevant scientific community for purposes of the Frye Test standards." *Id.* at *37 n. 35. In the same footnote, Judge Ignelzi cautioned:

> Egregious conduct exceeding the bounds of advocating a good faith basis for a methodology, failing to clarify a methodology or a challenge thereto, shall subject the offending party to sanction; including but not limited to an award of counsel fees.

Id. at *36 n. 35.

Judge Ignelzi's ruling in *Walsh* came on remand from the Supreme Court of Pennsylvania after the state High Court affirmed the Superior Court's ruling vacating Judge Wettick's October 14,

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[A] trial court is not to assess the merits of the expert's scientific theories, techniques, or conclusions. Instead, "the trial court may only consider whether the expert applied methodology generally accepted in the relevant scientific community . . ."

2016, order striking expert reports. *See Walsh v. BASF*, 234 A.3d 446 (Pa. 2020). The essence of the Supreme Court's holding in *Walsh* was that Judge Wettick had gone beyond the constraints on a trial judge when deciding a *Frye* motion and abused his discretion "[b]y questioning the judgment of the Executor's experts and the reliability of their scientific conclusions" and not limiting his analysis to whether the experts had applied methodologies that were generally accepted in the relevant fields of study. *Id.* at 461. In ordering the case remanded, the Supreme Court stated that the trial court should permit the defendants an opportunity to renew their *Frye* motions, which, in fact, occurred.

In a thirty-seven page opinion, Judge Ignelzi distilled a voluminous and complex record in a case pending since 2010 that he inherited on remand. The basic facts of the case are that Richard Thomas Walsh died February 2, 2009. The previous October he had become ill and was diagnosed with AML. Walsh had worked for 38 years as a golf course groundskeeper and superintendent. Walsh had maintained a detailed record of his regular use and exposure to various pesticides in the course of his job and a co-worker also provided testimony to support Walsh's exposure to the defendants' products. The plaintiff alleged that Walsh's regular exposure to the pesticides caused Walsh's AML. The plaintiff submitted expert reports and testimony from a toxicologist and an epidemiologist. As summarized by the Judge Ignelzi, the plaintiff "infers and extrapolates" that because long term exposure to carcinogenic chemicals found in the defendants products have been shown to cause chromosomal aberrations, a feature of AML, and all other applicable causes and risk factors for plaintiff's chromosomal aberrations have been ruled out, it can be concluded that Walsh's long-term exposure to the defendants' pesticides caused his AML. *Walsh*, G.D. 10-018588 at *3-4.

The defendants countered with multiple expert reports on toxicology, epidemiology, pharmacology, and hematology. The defendants' motions challenged the general acceptance of the methodology used by the plaintiff's experts to establish causation between Walsh's exposure to pesticides and his AML. The defendants further asserted that the plaintiffs failed to establish the dose necessary to cause ALM or that plaintiff was exposed to a dose that could have been a substantial contributing cause of his AML. *Id.* at *5. Judge Ignelzi framed the issue before the Court as "whether the plaintiff has proffered sufficient evidence that its experts used generally accepted methodologies within the relevant scientific communities, pursuant to Pa. R.C.P. 207.1 and the Frye standard, in reaching their respective conclusions." *Id.* at *6.

Judge Ignelzi began his analysis with a review of the state Supreme Court's application of the *Frye* Test over the past twenty-five years. As the court noted, *Frye* does not apply every time science enters the courtroom. Rather, it applies only when a party seeks to introduce novel scientific evidence. Drawing on the Supreme Court's opinion in *Walsh*, Judge Ignelzi explained that a trial court is not to assess the merits of the expert's scientific theories, techniques, or conclusions. Instead, "the trial court may only consider whether the expert applied methodology generally accepted in the relevant scientific community, and may not go further to attempt to determine whether it agrees" with the expert's application and conclusions. *Id*. at *8-9 Those are questions for the jury. *Id.* at *9.

Judge Ignelzi next turned an evaluation of the plaintiff's proffered expert reports and whether they used a generally accepted methodology to establish causation. *Id.* at *9. He began this section of his opinion by looking to the language of Pa. R.E. 702(c), which provides that the determination of whether a methodology is generally accepted must be based on testimony of scientists in the relevant field, "not upon any scientific expertise of a judge." Pa. R.E. 702(c). Specifically, at issue in *Walsh* was whether the Bradford Hill Criteria is a reliable method to demonstrate a causal link between chemical and disease. Notably, the experts on both sides agreed that the Bradford Hill methodology was proper methodology. *Id.* at *10-11. The defendants, however, argued that the plaintiff's experts improperly employed their professional judgment in applying the methodology to reach their conclusions. Judge Ignelzi rejected this argument as contrary to the *Frye* Test, stating: "Fundamentally, Defendants' argument is not supported under Frye in ruling out novel science; nor is the Defendants' argument supported as per the guidance provided by our Supreme Court in *Walsh*." *Id.* at 11. Judge Ignelzi further explained that the defendants' objections were to the plaintiff's experts' applications and conclusions which is for cross-examination and rebuttal expert testimony. Such objections are not the proper basis for a *Frye* motion. *Id.* at *12. Consistently, the court dismissed the

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defendants' critique that the plaintiff's experts "cherry-picked" studies, while noting that the plaintiffs accused the defense experts of doing the same. Judge Ignelzi summarized the plaintiff's expert epidemiologists' review of studies on the link between chemicals and disease and found "nothing 'renegade'" about her methodology. Again, Judge Ignelzi explained:

> It is not the role of this Court to question an expert's exercise of professional judgment or to determine which studies, or the weight given a study, an expert must use or employ in forming their opinions on medical causation provided that the opinion is based upon an accepted methodology in the relevant scientific community supported by proffered facts of record.

Id. at *13. Judge Ignelzi further explained that a *Frye* motion cannot be based on disagreements with an expert's conclusions, stating: "It is not uncommon for trials to be 'battles of experts' based on differing conclusions reached by differing experts . . . employing proper methodology." *Id.* at *14. The defendants' critique of the plaintiff's experts' application of the methodology and conclusions was for rebuttal testimony and cross-examination at trial. *Id.* at *15.

Next, Judge Ignelzi considered the defendants' challenges to the plaintiff's toxicology expert and whether he used a generally accepted methodology to arrive at his cytogenetic "fingerprint" conclusion and establish causation. *Id.* at *15. First, Judge Ignelzi reviewed plaintiff's experts reports regarding general causation. To do so, the experts relied upon the Bradford Hill Criteria to demonstrate a causal link between certain pesticides and the chromosomal aberrations that can cause AML. The plaintiff's toxicology expert then utilized a cytogenetic methodology to establish general causation. Judge Ignelzi summarized the review of materials that plaintiff's toxicologist undertook noting that he cited to nine epidemiological studies and had a 25 page index with 446 science related references, in addition to relying upon the plaintiff's epidemiologist's report. In determining that the toxicology expert had not used a novel foundation for application of the cytogenetic fingerprint methodology, Judge Ignelzi relied on the Supreme Court's guidance that under *Frye* an expert is not limited to studies mirroring the exact facts presented in a case but may rely on a synthesis of various legitimate studies. *Id.* at *16-20.

After finding the plaintiff's satisfied the *Frye* Test for general causation, Judge Ignelzi next turned to evaluating plaintiff's expert reports on specific causation. *Id.* at *21. The plaintiff's toxicology expert identified thirteen products produced by the defendants that were part of the plaintiff's claims and that contained either benzene or carcinogen-related chemicals. The court noted that it was not making any findings or ascribing any weight to the chemicals identified and the conclusions reached by the plaintiff's toxicology expert. The court was "constrained but to confirm a proffered basis for [the experts'] methodology as to its general acceptance in the relevant scientific community per the Frye Test." *Id.* at *22. Judge Ignelzi explained that in conducting a product-specific analysis, the plaintiff's toxicology expert employed a cytogenetic fingerprint methodology in conjunction with Walsh's medical history to determine specific causation. The court noted that on four separate occasions Walsh had bone marrow aspirations for cytogenetic analysis. Based on such cytogenetic analysis, Walsh's treating hematologist testimony offered testimony in support of both specific causation and generally

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accepted use of Cytogenetic Fingerprint Methodology. *Id.* at *23-25. Judge Ignelzi then discussed the toxicologist use of the differential diagnosis methodology. Judge Ignelzi quickly determined that "there is nothing novel about using differential diagnosis to make scientific/medical conclusions about causation. Differential diagnosis is a generally accepted methodology." *Id.* at *27. The court noted that the defendants asserted that the plaintiff's toxicology expert misapplied the differential diagnosis method. Judge Ignelzi reiterated his previous holding that the issue of application of a generally accepted method to reach a conclusion is a matter for trial. Judge Ignelzi concluded:

> This Court finds that the differential diagnosis methodology in the medical community at large. Any alleged failure to apply the methodology based upon the underlying facts of a case and alternative risk factors subjects the expert to the intense scrutiny of cross-examination at trial. This Court will not exceed its role as a trier of fact and will not portend itself a self-authenticating scientific/medical sage on complex issues related to expert opinions.

Id. at *29. Before addressing the final issue of dosage, Judge Ignelzi again emphasized that he was tasked with determining whether the cytogenetic fingerprint methodology employed by plaintiff's toxicologist involved novel science under the rubric of the Frye Test. Once again, Judge Ignelzi explained that defendants' challenges to plaintiff's expert conclusions cannot be the basis for a *Frye* motion. *Id.* at *30.

The final issue addressed by Judge Ignelzi in *Walsh* was the defendants' argument that the plaintiff had failed to provide evidence that Walsh was exposed to a dose of any of defendants' products that could have been a substantial contributing cause of Walsh's AML. The court easily disposed of this issue based on the record containing Walsh's handwritten notes of products he used and the testimony of his co-worker. Judge Ignelzi concluded that the plaintiff had adduced evidence that Walsh was exposed to the defendants' products during his 38 years as a golf course groundskeeper and superintendent and the plaintiff's experts had opined that the exposures were sufficient to support causation. *Id.* at *30-31.

Judge Ignelzi concluded his opinion with a summary of his holdings. He began with the statement: "The methodology employed by Plaintiff's Experts does not rely upon novel science nor novel methodology in their respective relevant scientific communities." *Id.* at *33. The court held that the expert testimony proffered by the plaintiffs utilized generally accepted methodologies and were not the "fanciful creations of a renegade researcher." *Id.* at *34. Judge Ignelzi further noted that what constitutes novel science has generally been decided on a case-by-case basis. Based on the record before the court, the plaintiffs experts satisfied the *Frye* Test. *Id.* at *35-36 Judge Ignelzi closed his opinion with the following advice:

> [A]ll parties are well-advised to heed the prospective admonition of Sir Austin Bradford Hill:
>
> 'All scientific work is incomplete – whether it be observational or experimental.All scientific work is liable to be upset or modified by advancing knowledge. That does confer upon us a freedom to ignore the knowledge we already have or to postpone the action that it appears to demand at a given time.'

Id. at *37 (Quoting Hill AB. The Environment and Disease: Association or Causation? Proc. Royal Soc. Med. 1965; 58:295–300 at 300.)

"It is not the [Court's role] to question an expert's exercise of professional judgment or to determine which studies . . . an expert must use or employ in forming their opinions . . ."

As noted at the outset, Judge Ignelzi provided important guidance to litigants in his *Walsh* opinion. Throughout the opinion, Judge Ignelzi emphasized that "this trial court does not sit as a super-scientific arbiter of expert conclusions." *Id.* at *23, n. 24. Under *Frye,*the principles and methodology employed by the expert witness must be generally accepted in the relevant scientific community. The conclusions of the expert, however, need not be generally accepted. *Id.* at *28, n. 29 (quoting *Blum v. Merrell Dow Pharms., Inc.*, 764 A.2d 1, 5 (Pa. 2000). In a lengthy final footnote, Judge Ignelzi noted the inherent limitations of a trial court to understand and address scientific issues in a *Frye* motion context. *Walsh*, at *35-37 n. 36. With this in mind, Judge Ignelzi provided the following guidance to

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trial attorneys:

> To be clear, this Trial Court as a pragmatic arbiter of complex legal issues expects henceforth, that parties submitting expert reports and *Frye* motion challenges in the Court of Common Pleas of Allegheny County shall abide by and be constrained by our Supreme Court's guidance in *Walsh*, *infra,* and the parameters set forth herein. Counsel shall be mindful of Rules of Prof. Conduct, Rule 3.2, 42 Pa. C.S.A., Expedition Litigation, wherein, 'A lawyer shall make reasonable efforts to expedite litigation consistent the interest of the client.' **Egregious conduct exceeding the bounds of advocating a good faith basis for a methodology, failing to clarify a methodology or a challenge thereto, shall subject the offending party to sanction; including but not limited to an award of counsel fees.**
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>
> As a prospective admonition, learned counsel is best served to employ their professional legal training to address methodology and not conclusions for purposes of Frye motion challenges. It is the burden of counsel and experts to make clear the methodology employed – the court cannot, as a practical or jurisprudential matter, sift through hundreds, if not, thousands of pages of complex scientific documents – to search, find, and comprehend the analytical basis of an expert's method in the relevant scientific community. This admonition is particularly pertinent in toxic tort cases whereby issues of general and specific causation are essential elements as defined by our Supreme Court. The responsibility to be clear, concise, and readily comprehensible is upon the parties. Frye motions are not the judicial mechanism for challenging an expert's opinion beyond the scope of the proffered methodology(ies) as applied in the relevant scientific community nor to conduct a mini-trial on ultimate factual issues or expert conclusions if granted a hearing on the Frye motion. The parameters for the Frye motion are self-limiting to methodology, not conclusions reached.

Id. at *37 n. 36. Anyone challenging or faced with a challenge to expert testimony in the Allegheny County Court of Common Pleas would be wise to adhere to Judge Ignelzi's guidance.

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Resumption of In Person 5K Results in Record Donation

We are pleased to inform you that upon a final review of the proceeds of our October 2021 5K, we have made a second disbursement to the Steelwheelers in the amount of $4,450.00, bringing our total 2021 donation to **$34,250.00** This is our all time largest donation. The committee is looking forward to the challenge of trying to top this number for the 2022 event, which is scheduled for **Saturday, October 8, 2022** at the Boathouse in North Park. We hope you'll plan to join us for the fun and family-oriented event. Four-legged friends are welcome!

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 34, 2021-2022

Vol 34	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
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

RUSH v. ERIE INSURANCE EXCHANGE

As auto law practitioners well know, in *Gallagher v. GEICO*, 201 A.3d 131 (Pa. 2019), the Pennsylvania Supreme Court held that the "household vehicle" exclusion is unenforceable because it limits the recovery of underinsured motorist coverage in a way that violates the express terms of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. C.S.A. §1701, *et seq*. The Superior Court has now extended the *Gallagher* holding to the "regular use" exclusion, suggesting that any exclusion that limits uninsured (UM) or underinsured (UIM) coverage without an accompanying rejection or waiver form may violate the MVFRL and thus be unenforceable.

In *Rush v. Erie Ins. Exchange,* 265 A.3d 794 (Pa. Super. 2021), *reh'g denied*, 2021 Pa. Super. LEXIS 752, the Superior Court found in favor of a police detective seeking UIM benefits from his personal automobile policy after he was seriously injured in an accident involving his police patrol vehicle. Detective Rush sought UIM benefits under his own auto policy after the tortfeasor's liability insurance and the UIM coverage on his patrol vehicle proved to be inadequate.

Erie Insurance denied coverage based on the "regular use" exclusion in Mr. Rush's personal auto policy. This clause attempts to exclude UM/UIM coverage for injuries sustained in a vehicle that is not owned by the insured, but which he regularly used, *i.e.* his patrol car. This provision created an inequitable theoretical scenario in which a criminal passenger injured in the same patrol car as the detective would have been afforded UM/UIM coverage under the passenger's personal auto policy while the injured detective was ineligible for coverage form his own personal policy.

MVFRL Section 1738 requires stacked UM/UIM coverage as the default provision unless the insured executes a valid waiver. The court reasoned that the "household vehicle exclusion" constituted a "de facto" waiver of stacked UIM coverage required by the MVFRL.

The *Rush* court acknowledged that "absent the 'regular use' exclusion clause, [Detective Rush] would be eligible to receive UIM benefits under the Erie Policies" so the only issue was the enforceability of the "regular use" exclusion.

Section 1731 of the MVFRL provides that insurers shall provide UM/UIM coverage on all auto insurance policies. The only exception to that rule is when the policyholder waives coverage by signing a valid waiver form. Rush had not waived UM/UIM coverage, so the trial court refused to enforce the "regular use" exclusion and awarded him the UIM benefits of his Erie policy. On appeal, the Superior Court affirmed the trial court, holding as follows:

> We agree with the trial court's conclusion. The "regular use" exclusion in the Erie Policies limits the scope of UIM coverage required by Section 1731 by precluding coverage if an insured is injured while using a motor vehicle that the insured regularly uses but does not own. This exclusion conflicts with the broad language of Section 1731 (c), which requires UIM coverage in those situations where an insured is injured arising out of the "use of **a** motor vehicle." In other words, the exclusion limits Section 1731(c)'s coverage mandate to situations where insured is injured arising out of "use of an owned or occasionally used motor vehicle." Since the "regular use" exclusion conflicts with the clear and unambiguous language of Section 1731 of the MVFRL, it is unenforceable.

The Superior Court in *Rush* distinguished a prior ruling by the Pennsylvania Supreme Court in *Williams v. GEICO*, 32 A.3d 1195 (Pa. 2011) that upheld the regular use exclusion against a state trooper injured in his patrol car. *Rush* determined that the *Williams* decision was based on a public policy analysis and argued that the *Williams* court's pronouncement that the regular use exclusion did not violate the express terms of the MVFRL was *dicta*. Furthermore, the *Rush* court explained that *Williams* relied on *Erie Ins. Exchange v. Baker*, 972 A.2d 507 (Pa. 2008) (plurality decision) which was abrogated by the Pennsylvania Supreme Court in *Gallagher.*

Gallagher paved the way for the *Rush* decision and reversed the Pennsylvania judiciary's prior trend of enforcing various UM/UIM coverage restrictions. *Gallagher* established that the "household vehicle" exclusion defied the MVFRL's mandate that insurers provide stacked UM/UIM coverage unless the insured executes a valid waiver. The "household vehicle" exclusion at issue in *Gallagher* precluded payment of UM/UIM benefits to a claimant injured while occupying a vehicle owned by someone in a claimant's household but not insured under the policy from which he sought benefits. The claimant in *Gallagher* was injured while operating his motorcycle and was denied UIM coverage held through his GEICO automobile policy. *Gallagher* represented a departure from many prior rulings upholding similar exclusions. Most noteworthy was the *Gallagher* court's recognition that that the household exclusion "impermissibly narrows and conflicts with the

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mandates of the MVFRL." MVFRL Section 1738 requires stacked UM/UIM coverage as the default provision unless the insured executes a valid waiver. The court reasoned that the "household vehicle exclusion" constituted a "*de facto*" waiver of stacked UIM coverage required by the MVFRL.

Decisions following *Rush* have not clarified whether exclusions such as the "household vehicle" and the "regular use" are void *ab initio* or whether the issue is fact specific, requiring the court to make a case-by-case determination. In December of 2021, the United States District Court for the Eastern District of Pennsylvania approached the question on a fact specific basis, holding that "the enforceability of the household vehicle exclusion depends on the validity and scope of the [p]olicy's stacking waiver..." *Gramaglia-Parent v. Travelers*, 2021 U.S. Dist. LEXIS 248541. Since Gramaglia-Parent had signed a valid stacking waiver, the federal court held that the "household vehicle" exclusion in her Travelers Insurance auto policy was enforceable. The court declined to address the question of whether the "regular use" exclusion remained enforceable following the Superior Court's recent decision in *Rush*. *Gramaglia-Parent*, *22, n. 7.

Two very recent federal court cases have aligned with *Rush*. In *Johnson v. Progressive Adv. Ins. Co., No.*2:21-CV-01916-AJS (E.D. Pa. Feb. 23, 2022, Schwab, J.) Progressive relied on the regular use exclusion to deny UIM coverage to a plaintiff who regularly used her sister's vehicle. Citing *Rush*, the Eastern District Court denied Progressive's motion to dismiss and determined that the regular use exclusion violated Section 1731 of the MVFRL. Noting that an application for review by the Pennsylvania Supreme Court was pending (but not yet granted) in *Rush,* the *Johnson* court preserved Progressive's right to re-assert the issue should *Rush* be overturned.

Similarly, in *Evanina v. The first Liberty Insurance Corp.*, No. 3:20-CV-00751-MEM (M.D. Pa. Feb. 25, 2022, McMannion, J.) the Middle District Court denied the carrier's request for summary judgment based on the household use exclusion. Judge Manion noted the "unsettling trend" among insurance companies attempting to circumvent the clear language of the MVFRL and held, "...[I]n conjunction with the Pennsylvania Superior Court's recent decision in *Rush*, this court predicts that the Pennsylvania Supreme Court will find the regular use exclusion is contrary to the unambiguous provisions of the MVFRL and therefore invalid and unenforceable, as it did with respect to the household vehicle exclusion."

Rush is a natural extension of *Gallagher*. It remains to be seen what other coverage exclusions may be deemed unenforceable under the same rationale.

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PRESIDENT'S MESSAGE

I am happy to report to you that just over halfway through our 2021-22 year, the Association is doing well. So far, we were able to hold a full slate of fall events with good attendance. Most recently, although we strategically postponed the junior member meet and greet to avoid attendance challenges from the worst of the Omicron surge, the rescheduled event was a success on February 16 with over 56 attendees. With cases subsiding again, I look forward to our three remaining events being successes. If you have not yet come out to an event, I hope to see you!

I did want to offer you my thoughts on a few topics:

Looking Forward to our May 6 Judicial Dinner

This will be our first live judicial event in three years. As such, we will be honoring and recognizing 18 judges who have retired or assumed senior status in the past 3 years. The list of judges is impressive and I am sure that all of you will have fond memories of an experience in front of one or more of these judges.

I also want to note how excited I am to honor several of our own.

We will be presenting Our Champion of Justice Awards for both 2021 and 2022. The Honorees will be Jerry Myers and Chuck Evans, both of whom I have had the honor of meeting and seeing in action.

Many of you know that I started my career working with Chuck Evans and learned much from him. Aside from his trial work, I truly came to appreciate his tireless work to make the laws fairer to injured persons and to elect the best jurists. Chuck spent countless hours behind the scenes bundling donations, assuring turn out for candidate events and serving on campaign committees. The candidates that Chuck supported spanned from members of the state legislature to US Senators and judges from the Court of Common Pleas to the Supreme Court. I know our civil justice system would not work as well as it does without Chuck's hard work.

Although I met Jerry Myers later, I quickly came to recognize how hard he works for his clients when a case I was working on was consolidated with several of Jerry's cases against a common defendant. Jerry's hard work made him one of Western Pennsylvania's trailblazers teaching corporations and insurance companies that they need to pay up or face potentially serious verdicts in trial.

Our bar should also be proud of the good work exemplified by our Berger Award winners this year. Our own John Gismondi will be recognized for the work of his family foundation. John sets a good example of a lawyer whose court room success results in his giving back to the community. Finally, the 2022 Berger Award winner will be Cindy Miklos who is one of our business partners. In addition to generously supporting many of WPTLA's charitable endeavors (both financially and with input of her marketing savvy), Cindy has worked diligently for years to raise money for juvenile diabetes.

I would ask every member to make an effort to come out and support this signature event.

A Few Thoughts on Policing

Although I am completely supportive of efforts to train police officers in the use of force and to avoid singling out citizens solely on the basis of ethnic and racial characteristics as well as the need to discipline and hold accountable the few bad officers, some well meaning efforts may have unintended side effects. As far as our practices are concerned, initiatives to curtail stops for registration and inspection issues may well have the tendency to allow uninsured drivers to go undetected. Drivers who do not register or inspect their vehicles may well be likely to not have proper insurance as well. In the long term, our future clients will suffer if the number of uninsured drivers increases due to the lack of enforcement of these laws. Although Uninsured and Underinsured motorist coverage will be available to some, our most needy clients do not always have this coverage or have adequate coverage for their injuries. For those of you in a position of influence in local areas considering such policies, I hope you will ask that the policy makers consider the potential impact on the ability of injured people to recover from financially responsible drivers. The issue should not be whether or not it is ok to pull over an unregistered vehicle, the issue should be whether this should lead to pretextual searches.

The Ongoing Importance of Legislative Awareness

Senate Bill 676. This bill to eliminate the ability of consumers to stack coverage limits from multiple vehicles reminds us of the importance of following key legislation and having relationships with our political representative of both parties.

Following a number of court decisions concerning uninsured (UM) and underinsured (UIM) motorist stacking and invalidating certain exclusions, some in the legislature have suggested that stacking should not be allowed. SB 676 would do exactly that.

However, because of the tremendous work of the lobbyists at PAJ and the relationships our members have with elected officials throughout the state, the bill has stalled in its current form. Supporters of the bill have been forced to come to the negotiating table and work on an amendment and try to land on a proposal

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that works for everybody.

At the writing of this message the most recent amendment would eliminate stacking, but it would increase BI limits to 25/50 with the possibility of going as high as 30/60. The amendment would also require policy holders to have UM/UIM coverage to at least the same amount as their selected BI levels. Consumers must also be given the opportunity to purchase additional UM/UIM coverage. If they decline this right, they must sign a form at every policy renewal. The form explains how important UM/UIM coverage is, how it protects them, and the cost to purchase certain intervals of coverage.

The current proposed amendment has a number of positive features such higher BI limits, mandatory offering of UM/UIM, and the ability to buy coverage above liability limits, but it may have disadvantages for those who already have generous stacking available. However, there is a concern that if this issue is not addressed in this current session, less favorable legislation may follow in future sessions. I would ask that you continue efforts to develop relationships in the legislature so you can help persuade and educate your contacts on issues that impact WPTLA membership. Thank you for all you do!

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NEW 2022-2023 CLE Requirements

In 2021, the Supreme Court of Pennsylvania allowed practicing attorneys to earn all 12 required CLE credits through prerecorded on-line programs. This is no longer the case. For all compliance periods ending in 2022-2023, attorneys are required to earn at least six credits in person or through live webinar CLEs. The remaining six required credits may be earned through on-demand previously recorded CLE courses. Additionally, the on-demand programs will NOT carry forward to following years. Only those credits obtained in-person or via live webinar can be carried over into future complaint periods. For more information on the updated requirements, visit the PACLE website at www.pacle.org. Also, if you need CLE credits, check out WPTLA's prerecorded CLE programs and upcoming live CLE's on our website at www.wptla.org

CLE ONLINE

ARE YOU IN COMPLIANCE GROUP 1? 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 with 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/

PAIN & SPINE SPECIALISTS

Workers Compensation and Personal Injury Specialists

Pain and Spine Specialists of Pennsylvania strives to provide a comprehensive approach to treating personal injuries and injured workers. Our board certified physicians are available to evaluate and treat new patients within a week, provide narrative reports as needed, and are available for depositions and trials upon request.

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THE SUPREME COURT OF PENNSYLVANIA TO THE RESCUE ON SNAP REMOVALS

In the Winter 2019 edition of The Advocate, we authored an article about "snap removals" and the erosion of the forum defendant rule due to the United States Court of Appeals for the Third Circuit in *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018), upholding the use of "snap" removal of cases from state court to federal court by defendants. Since our article first appeared, there have been a litany of cases from the United States District Courts within the Third Circuit refusing to remand cases removed to federal court through a snap removal.[1]

Fortunately, the Supreme Court of Pennsylvania has recognized the unfairness of snap removals and amended Rule 400 of the Pennsylvania Rules of Civil Procedure, effective on April 1, 2022, to allow a competent adult to serve original process, which, as explained below, will allow a plaintiff to immediately serve a Pennsylvania citizen defendant, when there is complete diversity of citizenship between all plaintiffs and all defendants, with original process after filing a lawsuit, as opposed to waiting for a sheriff to make service.

Snap Removal Explained

As we previously explained in our first article, snap removal exists in the nexus between 28 U.S.C. § 1441(a), which acts in concert with 28 U.S.C. § 1332 to permit removal of cases from state to federal court so long as the monetary jurisdictional condition for the controversy exceeding $75,000.00 is met and the parties are adequately "diverse" as contemplated by the statute, and the forum defendant rule which is found at 28 U.S.C. § 1441(b)(2). The forum defendant rule states that: "A civil action otherwise removeable solely on the basis of the jurisdiction under section 1332(a) [diversity of citizenship] of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

A snap removal occurs when a plaintiff, who is not a citizen of the same state as the defendants, files a lawsuit in state court in which one of the defendants is a citizen; *however*, before the in-state citizen defendant is served with original process, a defendant files a notice of removal to federal court. Defendants rely on the "properly joined and served" language in 28 U.S.C. 1441(b)(2) to argue that removal is permitted since the notice of removal was filed prior to the in-state citizen defendant being served with original process—in other words, the in-state citizen defendant has not been "properly joined and served."[2]

In *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, the defendant—a citizen of Pennsylvania—filed a notice of removal before the plaintiff—a citizen of Illinois—served the defendant with original process after filing the lawsuit in the Court of Common Pleas of Allegheny County. 902 F.3d at 149-50. In affirming the District Court's denial of a motion to remand, the Third Circuit authorized snap removal and stated: "the language of the forum defendant rule in section 1441(b)(2) is unambiguous. It's plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served." *Id.* at 152. The Third Circuit further found "this result may be peculiar in that it allows Stone Mansion to use pre-service machinations to remove a case that it otherwise could not; however, the outcome is not so outlandish as to constitute an absurd or bizarre result." *Id.* at 153-54.

Current Practice of Snap Removals in Pennsylvania

Because of the requirement in Rule 400 of the Pennsylvania Rules of Civil Procedure that a sheriff serve original process within the Commonwealth, subject to a few exceptions, there is usually a lag of several days or weeks before a citizen defendant of Pennsylvania is served with original process. With docket monitoring subscription services, a defendant can quickly learn of a lawsuit and file a notice of removal to federal court before being served. Defendants have taken advantage of this lag time to remove cases to federal court that the forum defendant rule would normally prevent from being removed.

Newly Amended Rule 400 of the Pennsylvania Rules of Civil Procedure Addresses Snap Removals

To address the Third Circuit's decision in *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.* permitting snap removals, on January 18, 2022,[3] the Supreme Court of

[1] See e.g. *Carroll v. Comprehensive Healthcare Mgmt. Servs.*, Civil Action No. 21-1298, 2022 U.S. Dist. LEXIS 6092 (W.D. Pa. Jan. 12, 2022) and *In re Sorin 3T Heater-Cooler Sys. Prods. Liab. Litig. (No. II.)*, No. 2816, 2021 U.S. Dist. LEXIS 225175 (M.D. Pa. Nov. 22, 2021).

[2] There exists a jurisdictional split regarding proper interpretation and application of the "properly joined and served" language found within 28 U.S.C. § 1441(b)(2). See e.g. *Deutsche Bank Tr. Co. v. Fid. Nat'l Title Grp.*, No. 2:20-CV-2220 JCM (EJY), 2021 U.S. Dist. LEXIS 25429 (D. Nev. Feb. 10, 2021). The Third Circuit's interpretation appears to be consistent with majority view. A more thorough analysis of the differing interpretations of this language can be found at within *Bowman v. PHH Mortg. Corp.*, 423 F. Supp. 3d 1286 (N.D. Ala. 2019) and *Gentile v. BioGen IDEC, Inc.*, 934 F. Supp. 2d 313 (D. Mass. 2013).

[3] https://www.pacourts.us/Storage/media/pdfs/20220118/210021-adoptionreport(jan.18,2022).pdf

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THE SUPREME COURT OF PENNSYLVANIA TO THE RESCUE ON SNAP REMOVALS ... FROM PAGE 11

Pennsylvania entered an Order[4] amended Rule 400 of the Pennsylvania Rules of Civil Procedure to level the playing field for plaintiffs in the Commonwealth.[5] The amendment, which is effective on April 1, 2022, adds subsection (b)(4), which states:

> (b) In addition to service by the sheriff, original process may be served also by a competent adult in the following actions: ... *(4)a civil action in which there is a complete diversity of citizenship between all plaintiffs and all defendants, and at least one defendant is a citizen of Pennsylvania."*[6]

By allowing any competent adult to serve original process on the Pennsylvania citizen defendant when there is complete diversity between all plaintiffs and all defendants, a plaintiff doesn't have to rely on the sheriff and thereby eliminates nearly all the lag time between filing the lawsuit in a Pennsylvania state court and serving the original process.

Starting on April 1st, as soon as a plaintiff files a lawsuit and obtains original process, the plaintiff can immediately forward the original process to a competent adult to attempt service on the Pennsylvania citizen defendant. The amendment to Pa. R. Civ. P. 400(b) acts to add a "narrow category of cases for which a competent adult, in addition to the sheriff, may serve original process for any civil action in which there is a complete diversity of citizenship between all plaintiffs and of all defendants, and at least one defendant is a citizen of Pennsylvania" and is specifically "intended to ameliorate 'snap' removal and the holding of *Encompass Ins. Co.*"

This doesn't completely solve the snap removal issue, as a defendant could still learn of a lawsuit filed in state court and file a notice of removal before being served with process. However, if the plaintiff is properly prepared and utilizes the freshly minted addition allowing them to utilize any competent adult to serve original process in the appropriate circumstances, the newly amended Rule 400 should drastically reduce the number of snap removals!

So, if you have a case that meets the requirements of Rule 400(b)(4), and you want to avoid a snap removal, our advice is that as soon as the plaintiff files a lawsuit in a Pennsylvania state court, the plaintiff should (1) immediately provide the original process to a process server (or any other competent adult)[7]; (2) have the process server ready with a mobile printer outside the defendant's home, office etc.; and, (3) after printing the original process, have the process server immediately serve the defendant.

[4] https://www.pacourts.us/assets/opinions/Supreme/out/Order%20-%20105017543157173607.pdf

[5] https://www.pacourts.us/Storage/media/pdfs/20220118/205946-order(jan.18,2022).pdf

[6] https://www.pacourts.us/Storage/media/pdfs/20220118/210021-adoptionreport(jan.18.2022).pdf;*In re Order Amending Rule 400 of the Pa. Rules of Civil Procedure, No. 727*, 2022 Pa. LEXIS 69, at *1 (Jan. 18, 2022)

[7] This can frequently be accomplished via email.

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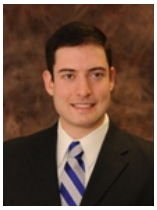

2022 Scholarship Essay Contest

Our 2022 Scholarship Essay Contest is in full swing with high school students throughout western PA writing essays to submit for consideration. This year's topic addresses the right to a jury trial in civil cases as guaranteed by the 7th Amendment to the US Constitution and Article 1, Sect 6 of the Constitution of the Commonwealth of PA. The question posed is:

> Have the various appellate decisions and legislative action unfairly restricted the people's constitutional right to a jury trial in a civil case?

We have asked the students to take a position as to whether or not the right to a civil jury trial been unfairly and/or unconstitutionally restricted.

In December, we sent letters to 274 high schools within the Western District of PA, inviting them to participate in our contest. Of those, 105 schools asked for the information about the 2022 contest. The deadline for submissions to WPTLA is March 25. The 12 Scholarship Essay Committee members will read all essays submitted and rank them from best to worst. Three winners will be invited to the Judiciay Dinner on May 6, where they will receive a $2,000.00 scholarship prize and a certificate.

MY MEDIATION PREP CHECKLIST

The following is what I do to prepare for a mediation. When I began practice 31 years ago as a defense lawyer in Houston, Texas, mediation was already the norm. Since then, I have litigated, mediated, or tried personal injury and death, insurance coverage, and property damage cases in state and federal courts in Texas, Pennsylvania, West Virginia, Ohio, New York, Michigan, Wisconsin, and Illinois, the last decade or so as a plaintiff's lawyer. I'm comfortable with and enjoy mediating cases, so much so I recently completed the formal training required to be listed as an approved mediator for the WDPA, after attaining that certification by the West Virginia State Bar.

1. **Make sure it's the right time to mediate.** When the issue of mediation and its timing come up, I make sure in a phone call with opposing counsel we both agree with the timing of the mediation and the choice of mediator, and that each side has everything needed to evaluate the case. I tell opposing counsel my client's and my general expectations, not firm numbers, but, for example, if I view my client's case as having a value in seven figures, I want to make sure the other side gets that and does not think I'm crazy. If I think, as to my case, or sense or learn as to the other side's, the time is not right, for example, we still need to depose a key witness, I arrange for an agreement to push the mediation back. If I learn the other side just wants to use the mediation to feel my client out, to test them, or to engage in discovery, then the timing is not right. If the two sides are firmly in different ballparks, why waste the time to mediate now? Maybe there will be developments in the case which will occur down the road which will make mediation in a few months' time more productive. Courts are generally receptive to motions to delay mediation.
2. **Consider a focus group.** If my case has significant value, I focus group my case. This provides me and my client more information about the strengths, weaknesses, and value of their case, and informs strategy and theme decisions.
3. **If an MSA is needed, have it performed at least a month ahead of time.** If my client has a serious injury which will require future medical care, prescriptions, and/or medical appliances, I commission an outside Medicare Setaside Analysis and provide to the firm preparing it all the medical records and other data they need to perform the analysis. If there are no such future medical needs, I get my client's treater(s) to put that in writing.
4. **Is a lifecare plan needed?** If my client's injuries are this significant and will require expensive, long-term, future medical care, caregivers, prescriptions, home alterations, prostheses, and/or medical appliances, I retain a lifecare planner and obtain their written analysis, which will inform case value and settlement demand amount.
5. **Determine if there are outstanding spousal or child support obligations, tax, or other liens.** I find out this information well ahead of time. I am not addressing in this article all the potential liens one must consider, but I make sure my client is aware of *all* the liens, all the outstanding obligations, including an MSA – all the sums they'll have to pay to others from their settlement, so there are no surprises which could prevent a mediated settlement.
6. **Make sure your client knows what their net will be.** I always send my client an up-to-date case costs sheet well before the mediation, and include in it anticipated costs through mediation, including any bills in the pipeline, such as court reporter and expert invoices, and their estimated share of the mediator's fee, a discussion of all liens, and, if applicable, the cost to fund and administer an MSA, along with my attorney's fee. I provide to my client well before the mediation all the information and numbers they will need to determine how much money they will be netting at various settlement offer dollar amounts.
7. **Videotape all depositions.** Witnesses can die or disappear when you need them most. A lawyer's or another person's reading, or quoting from a deposition transcript in a demand e-mail, does not have the impact of a good, videotaped deposition clip. I incorporate clips from video depositions into pre-mediation videos I send to the other side, and for presenting testimony and impeaching witnesses at trial.
8. **Prepare a pre-mediation video.** If my client's case has significant value, I prepare a pre-mediation video which I upload to a private YouTube channel and then e-mail the link to opposing counsel, who can then share it with in-house counsel, claims personnel, and/or insurance adjusters. I started doing these because I was familiar with putting together a video story from my previous work as a TV news reporter and videographer, and I thought some opposing counsel, when they wrote to their clients for settlement authority, might filter or

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MY MEDIATION PREP CHECKLIST ... FROM PAGE 13

put an unfair spin on the strong facts and witness testimony in my case. I have been told by mediators the videos have had a big impact in the other room. The decisionmakers on the other side get to see how well my client and their spouse, and other key witnesses, come across, versus opposing counsel describing such in a written report to their client. They will, I hope, be able to see for themselves that a jury will like my clients. They can see and hear the invasiveness of the type of surgery(ies) my client underwent, because lately I have started inserting in my pre-mediation videos, clips I find online showing the type of surgery my client endured. Hip replacement surgery, for example, is grisly. It requires a long incision, forcefully dislocating the hip joint, sawing off the femoral head, and hammering a steel appliance into the femur. Seeing and hearing a video of this evokes a gut reaction which reading what I just wrote cannot. And if their corporate rep. came off as callous at their deposition, those who are writing the checks should see it for themselves, with the thinking if they do not settle, a jury will see that performance and perhaps come up with a damages number they would rather avoid. By way of example, this is one of my recent pre-mediation videos, which I am sharing with my client's permission. The folks at PostScript Productions and I put this together. It includes video and photos I shot with my iPhone and medical illustrations by the talented Phil Ashley at Precise Inc.:**https://youtu.be/0G4_xo5STnU**

9. **Prepare a credible demand e-mail or letter.** I write demand e-mails not only for opposing counsel to see, but also for those who will be deciding what to pay on a case. I am direct. Professional. Collegial. Not obnoxious. I do *not* want to annoy the other side or overstate my case. I *do* want them to understand I know my case *and their case*, and that if the case does not resolve I intend to try it and will be prepared to do so. I lay out the facts and law in a fair manner. I do not want the other side to laugh it off as puffery. If my case has weaknesses (I have yet to encounter the perfect case), I address them frontally and explain why they are not that significant, or even show how they *help* my case. For instance, I recently had a client (featured in the above-linked video) who was in so much pain from his injuries and surgeries that he began over-using his prescription opioids. But he recognized he was in trouble – that he had become addicted, and had the maturity to check himself into a residential drug treatment facility and get unhooked from the pills. If the other side was thinking of using his drug addiction – ultimately caused by their negligence – against my client, I explain in my demand e-mail how a jury may find that callous.
10. **Send the demand e-mail at least two weeks before the mediation.** Having previously served as defense counsel for Lloyds syndicates, domestic insurers, and self-insured corporations, and as in-house counsel, I know getting settlement authority takes time. Opposing counsel will typically have to receive my demand e-mail, find the time to read it, evaluate it, and send their client or an insurer my demand e-mail along with their own detailed analysis of the procedural history of the case, the judge, the venue, me, my client, the fact witnesses, the experts, along with their evaluation of the damages potential at trial, including an analysis of the percentage chances of each side prevailing at trial. Some insurers make defense counsel fill out a matrix which does the math. Then the recipients of defense counsel's letter or e-mail need time to digest it all and secure appropriate settlement authority. So, I never wait until a few days before the mediation, or until the mediation, to make a formal demand. And if the case merits it, I include with my demand e-mail a link to my pre-mediation video. If I want to include medical records, photos, videos, or medical illustrations with my demand e-mail, I embed such in the e-mail, or place them in a Dropbox folder, so I can e-mail a link to the Dropbox folder with my demand. This way the information can be easily shared amongst the decisionmakers on the other side. I try to make life easy for them.
11. **Prepare a credible and helpful confidential mediation position statement.** In my position statement e-mail, which I send to the mediator at least by their deadline, which is usually one week before the mediation, I attach the demand e-mail I sent to the other side, include a link to my pre-mediation video, and boil the case down into a palatably sized document. No one has the time, interest, or attention span to read a book on my case. I cut to the chase. I make it easy for the mediator to understand my case. I make it clear I have looked at my case dispassionately and that I understand the other side's positions but that, for reasons I enumerate and clearly explain, my case is better. I address my case's weak points. The other side's position statement

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MY MEDIATION PREP CHECKLIST ... FROM PAGE 14

will be *all about* what they perceive as my case's weak points. If the law is specialized, I provide to the mediator a primer on applicable law. I don't speak down to the mediator. If the operations or equipment involved in my client's case are unique, I explain it all, in plain English, and include photos or illustrations. I do not make the mediator have to do their own research. If there are important expert reports or deposition excerpts, photos, videos, or documents, I send them, or excerpts of such, to the mediator. I do not send the mediator entire deposition transcripts or an entire safety manual. Instead, I do the work and send only the significant pages. Plus, with most mediators billing by the hour, including for mediation prep time, I do not want my client to have to pay a mediator to read irrelevant materials. I know I have done my job when the mediator thanks me for my position statement, for its succinctness, and most importantly for its even-handedness. I often hear from the mediator before a mediation that the other side's position statement is ridiculously long and unreasonably one-sided, as though it were primarily written to impress their client. I don't do that.

12. **Fully prepare the client and other key family members.** I generally explain the mediation process fairly early on to my clients, so they know it is coming. I know spouses are a team when it comes to lawsuits, so I prepare them both to be in a position to make the difficult decisions they will be making at the mediation. Often, one spouse is injured and the other has a consortium claim. I explain how mediation is often court-ordered and, regardless, it is a good idea to at least *try* to resolve the case while they still control it. As the time for the mediation gets closer, I have a lengthy sit-down with my client(s). If not in-person, I at least have the conversation over Zoom, because I want to see their facial expressions and body language. They will have already pre-approved my demand e-mail and confidential mediation position statement. But, I also want to see they "get" what a mediation is all about, how the process works, who the mediator is, why we have agreed to use him or her, what we can expect the other side to do and say during the mediation, what we can expect the mediator to do and say, how caucus sessions work, how we likely will never see or meet the other side's lawyers and client rep's, how they should not get upset when the other side starts with a lowball offer, and how, even though this is a serious matter, close to their heart, they have to think about the mediation as a business negotiation. They have to be emotionally intelligent. They have to listen to my recommendations and often, if we find the mediator credible, the mediator's hints and recommendations, as well. I tell my client there will be a lot of time to kill, and to consider bringing a book or magazine. I tell them the mediation could take all day, and sometimes into the night. I tell my client(s) the pros and cons of settling, everything from how it is voluntary, how they lose a great deal of control over their case once a trial starts, the anticipated additional case costs through trial, how I cannot guarantee how the judge will rule on critical motions, or that we will definitely be able to seat a group of jurors who likes or cares about them. Above all, I make sure I know, and my clients have thought about and know, their settlement expectations, *and that such are reasonable*. If I sense my client's settlement expectations are unreasonable, I tell them so, and why, in a compassionate but firm manner. If I think based on their expectations, or signals I have gotten from the other side, a mediation at this time would be a waste of time, I let everyone know that and try to postpone it.
13. **Fully prepare the lienholder for the mediation.** I keep the lienholder apprised of the progress of the case and ask they in turn to keep me apprised of the amount of the lien. If I am going to ask them to reduce their lien by more than a contract, policy, or applicable law requires, I explain that to them ahead of time in an e-mail and a phone call and try to get their buy-in.
14. **Ensure everyone necessary will be at the mediation and for as long as it takes.** I have had mediations fail because the adjuster on the other side had a plane to catch, or they or a lienholder thought the mediation would only last a few hours. So, I ensure beforehand in my written communications with opposing counsel and the lienholder, that they will have someone with meaningful settlement authority present the whole day, either in-person, or via Zoom or phone. Most mediators, and most local or statewide mediation-related court rules or statutes, require that both sides, and the lienholder, have someone present at the mediation who has full authority to settle. Nevertheless, I like to have the other side and the lienholder confirm that to me, or I ask the

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MY MEDIATION PREP CHECKLIST ... FROM PAGE 15

mediator to obtain these assurances. I do not want to waste my or my client's time or money at a mediation that fails because the right people were not present or immediately available.

15. **Have a pre-mediation call with the mediator.** Unless my client's case is simple, involving well-traveled law and non-complex facts, I ask the mediator for a phone call a day or so before the mediation. Whether I know the mediator or not, I want to develop a rapport with them, show them my client and I are reasonable, find out how they conduct their mediations (will there be opening statements, if so, who from? an opening meet 'n' greet session?) (I find most plenary session opening statements counterproductive because they tend to anger people, when the purpose of mediation is to try to turn *down* the temperature), and to give the mediator a heads up about anything that may snag settlement negotiations. It could be there's a large lien, a large ego, insurance coverage or indemnification issues, a party who wants to "send a message," equipment or operations they may not have dealt with before, or unique applicable law. If I need the mediator's help bringing my client down to earth, or slowing their rush to settle, I talk with the mediator about that before the mediation, so they know what they are walking into. Good mediators appreciate candid and well-prepared lawyer advocates and well-prepared clients. They do not appreciate lawyers who can't turn off the aggressiveness, who are unprepared, or whose clients are unprepared.
16. **If the case is going to settle or not, be prepared for trial.** I will not take a case I will not later on be proud to stand in front of a judge and jury and try. I make sure my client understands some cases just will not settle for the appropriate amount and that's what judges and juries are for. If the other side is not valuing the case in what I believe is a reasonable manner, then I make sure my client and I are prepared to take it to trial, that I have obtained all the discovery I need, that I have aboard the experts I need, and that my client is prepared for all possible trial outcomes. I try not to walk into a mediation *having* to settle. I tell my clients if the other side puts enough money on the table to get us to *not* try this case, then that will be my client's decision, with my input, to take the money. But, if the money or other terms are insufficient, I tell my client we have to be prepared to walk away.

Conclusion

I have a love-hate relationship with mediations. I loved the trial advocacy courses and competitions in law school. I loved clerking for a federal judge after law school and watching lawyers in trial do things well, and not so well. And I absolutely love the final adrenaline-rush days and nights of preparing for trial and trying a case. It's when I really feel like a lawyer. On the other hand, a mediated settlement can often be the best outcome for my client. So, if the final offer is right, I have to tell my client to take the money, that I'll get to try the next one.

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UPCOMING EVENTS

Wednesday, March 23, 2022 **Dinner & CLE**

Bella Sera Event Villa, Canonsburg

Tuesday, April 19, 2022 **Membership Dinner**

Carmody's Grille, Pittsburgh

Friday, May 6, 2022 **Annual Judiciary Dinner**

Heinz Field, Pittsburgh

Friday, May 27, 2022 **Ethics & Golf Outing**

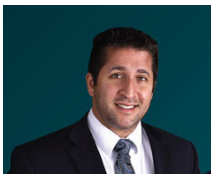
Shannopin Country Club, Pittsburgh

Wednesday, June 22, 2022 **Learn at Lunch CLE**

via Zoom

JUNIOR MEMBER MEET & GREET RECAP

The Junior Member Meet & Greet was held on February 16th at The Foundry Table & Tap in Pittsburgh. A total of 9 junior members from The University of Pittsburgh and Duquesne were in attendance. The atmosphere was upbeat as junior members were eager to meet and converse with WPTLA members. Many of the junior members inquired into the actual practice of law along with whether they could attend Motions Court, depositions, arbitration or trial. It was nice to see their interest in litigation. Events like the Meet & Greet are important for junior members to not only meet WPTLA members but also to create opportunities to observe the litigation process. Hopefully this is something that we can build upon for the future. Thank you to all WPTLA members who participated.



By: Samuel L. Mack, Esq. of

Luxenberg Garbett Kelly & George

smack@lgkg.com

Pictured above, from L to R: Ben Cohen, Carmen Nocera, Business Partner Cindy Miklos, Treasurer James Tallman, Junior Member Jason Whiting, Junior Member Justin Lindsay, and Scott Melton.

Pictured below, from L to R: Junior Member Nick LaCava, Secretary Katie Killion, Board of Governors Member Brittani Hassen, James Lopez

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.

THE BENEFITS OF A MORNING ROUTINE

Anxiety! For years as a new (and not so new) lawyer, I went to bed anxious and woke the next morning feeling the same way. Rather than try to calm myself after waking up, I immediately rushed to the shower to get ready for the day and the drive to the office. I vividly recall trips to the office on Route 28 with my stomach aching as to what may or may not happen that day or about some looming deadline—the fight or flight response already having kicked in high gear. My body never had a chance to relax and recover. Over the years, and it has taken many years, I have developed a morning routine that has tremendously helped break the cycle of anxiety and prepare me for the day with calm and ease (for the most part). While I'd like to say I do everything listed below each day, I just do my best—sometimes an early morning meeting, hearing, or kiddos' athletic event prevents it from happening.

My morning routine has especially been effective dealing with the uncertainty and disruption the Covid-19 pandemic has caused the past two years. For me, the morning routine provides some control and certainty to start the day in a chaotic and changing world.

While I focus on a morning routine, the activities I mention below can be used at any time during the day to restore calm. I regularly will pause through the day to remind myself to return to the present, remind myself not to ruminate about things that are out of my control, or to focus on my breathing. This can be done at anytime and anywhere—whether I'm walking, making dinner, washing the dishes etc.

I'm always reading about new ways to improve my wellbeing and am open to any thoughts from others. There is no one size fits all but perhaps some of the things I mention below will be of benefit through your day.

1. **Gratitude When I Wake Up:** As soon the alarm goes off at 5:45 a.m., which is before my wife and kids wake up, I do not jump out of bed. I take a minute or two and express gratitude for another day on this Earth. I then select someone else—it can be anyone—and wish positivity for them. I try not to look at any emails for the next 30 minutes.
2. **Drink a Large Glass of Water and Make Green Tea:** After heading downstairs, I drink 16 ounces of water to hydrate. Your body will thank you. I'm not a coffee person. Instead, I make a cup of green tea, which gives me a little boost and warms me.
3. **Journal:** I then sit down on the couch, write the date in a notebook, and jot down a thought, an inspiring quote, or passage from scripture.
4. **Scripture:** After I journal (or sometimes I do this before journaling), I read a brief passage from scripture. This reminds me to be thankful, kind, and humble. I do the journaling and scripture reading in under 5 minutes.
5. **Breathwork:** I then spend 4 minutes of breathing in and out of my nose. I change the breathing each morning. One morning it might be box breathing (5 seconds in, hold for 5 seconds, breath out for 5 seconds, and hold for 5 seconds), another morning it might be slowly breathing in for 7 seconds and out for 7 seconds. I feel fresh and energetic after the nasal breathwork.
6. **Meditation:** Following my breathwork, I do mindfulness meditation for 10 minutes—again focusing on my breath. This is trying to rewire my brain to focus on the present moment and not some unrealized event that may or may not happen or something that has already happened and can't be changed. My mind will wander all the time; however, you simply go back to focusing on the breath without getting upset at yourself. Be gentle. Meditation also reinforces equanimity (or calm) through the day. When I begin to ruminate, get upset, get pissed-off, or get angry, I try to focus on the present moment and repeat the words equanimity or calm. It's a challenge to break the pattern, but this is a good start.
7. **Making Breakfast for the Kids:** The above takes about 30 minutes. By now, the kids are up and making their way downstairs. From kindergarten to 12th grade, my mom always made breakfast for me before I caught the bus (or eventually drove) to school. I have always appreciated that she showed her love and caring for me in this way. I try to do the same for my kids.
8. **Exercise:** Once the kids head to school at 7:15 a.m., I spend a few minutes foam rolling my back and legs to loosen up tight muscles. I also roll the bottom of my feet on a lacrosse ball, which can be painful at first, but helps release tension in the feet. I then either lift weights or run, which is followed by my special banana blueberry smoothie, and then a shower.

While the above routine does not prevent anxiety, it calms and prepares my mind and body for the day. Anxiety, anger, etc. will arrive at some point, but the morning routine reinforces the tools I need to deal with them. Perhaps one of the above tools will work for you. Wishing you all the best!

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ANNUAL JUDICIARY DINNER PREVIEW

It's Back!

WPTLA's Annual Judiciary Dinner

in honor of the Judges serving the people of Western Pennsylvania

2020 Honorees – (Senior Status or Retired in the calendar year of 2019)
The Honorable William R. Cunningham, of the Court of Common Pleas of Erie County
The Honorable Kathleen A. Durkin, of the Court of Common Pleas of Allegheny County
The Honorable Kate Ford Elliott, of the Superior Court of PA
The Honorable Nora Barry Fischer, of the US District Court
The Honorable Anthony G. Marsili, of the Court of Common Pleas of Westmoreland County
The Honorable Donna Jo McDaniel, of the Court of Common Pleas of Allegheny County

2021 Honorees – (Senior Status or Retired in the calendar year of 2020)
The Honorable James G. Arner, of the Court of Common Pleas of Clarion County
The Honorable Katherine B. Emery, of the Court of Common Pleas of Washington County
The Honorable Thomas S. Ling, of the Court of Common Pleas of Bedford County
The Honorable Anthony J. Vardaro, of the Court of Common Pleas of Crawford County
The Honorable Donald R. Walko, Jr., of the Court of Common Pleas of Allegheny County

2022 Honorees – (Senior Status or Retired in the calendar year of 2021)
The Honorable Robert L. Boyer, of the Court of Common Pleas of Venango County
The Honorable David R. Cashman, of the Court of Common Pleas of Allegheny County
The Honorable Guido A. DeAngelis, of the Court of Common Pleas of Allegheny County
The Honorable Michael Della Vecchia, of the Court of Common Pleas of Allegheny County
The Honorable Thomas J. Doerr, of the Court of Common Pleas of Butler County
The Honorable Michael F. Marmo, of the Court of Common Pleas of Allegheny County
The Honorable William J. Martin, of the Court of Common Pleas of Indiana County

Cocktails at 5:00 pm Dinner at 6:30 pm, doors open at 4:55 pm.

WPTLA President's Scholarship winners will be recognized. as well as the recipients of the 2020 and 2022 Daniel M. Berger Community Service Award and the 2021 and 2022 Champion of Justice Award. The Pittsburgh Steelwheelers will also be recognized.

Friday, May 6, 2022

UPMC Club at Heinz Field, 100 Art Rooney Avenue, Pittsburgh, PA

Invitations coming to your mailbox soon! Reservations/Cancellations are needed by Friday, April 29, 2022.

Contents of Petition for Allowance of Appeal

Pennsylvania Rule of Civil Procedure 1115 (Content of Petition for Allowance of Appeal) has been amended to require a statement of where the issue was raised or preserved. This section should follow the Order in Question section.

Although this may seem like a "nuts and bolts" type of amendment, the undersigned sees this as part of a larger trend whereby appellate courts have become increasingly vigilant about ruling on issues that may have been waived.

Amendments of Caption (Rule 401)

An amendment to Pennsylvania Rule of Civil Procedure will take effect on April 1, 2022. This change specifies that a new party may only be added to a Writ or Complaint only before any party has been served. Although this rule adds clarity to what was a previously unclear rule (the prior rule provided simply that a new defendant could be added to a reissued or reinstated complaint), the amended rule still leaves some ambiguities. Although I would expect that the intent is that the content of the Complaint may also be amended accordingly, although it does not say so.

In addition, it would be desirable to add a provision that in a multi-defendant case, the caption (and complaint) can be amended with the written consent of all parties who have been served. This would avoid the necessity of motions practice where there is an unserved defendant but the remaining defendants are agreeable to the amendment.

The rule has been further amended to technically address the concept of writing reinstated or reissued on a reinstated complaint or reissued writ. The amendment to that provision changes the practice to merely require that the document be designated reissued or reinstated.

Rule 238

For the purpose of calculating delay damages, the prime rate for 2022 is 3 ¼% (to which you will add 1%).

Discovery Of Mental Health Records

In an opinion by Judge Stevens, the Pennsylvania Superior Court held that a patient's mental health records were protected by the Psychiatrist/Psychologist-Patient Privilege in *Tavella-Zirilli v. Ratner Cos., L.C.*, 2021 PA Super 240, 266 A.3d 696. There, the plaintiff had filed an action against her hairdresser for causing chemical burns, scarring and a rash and other injuries. During discovery, the defendants noticed an intent to subpoena records from a psychological treatment provider. A resulting motion was resolved by having the records sent to plaintiff's counsel. Plaintiff's counsel then filed a privilege log concerning certain psychological records claiming privileges under both the Mental Health Procedures Act (MHPA) as well as the Psychiatrist/Psychologist-Patient Privilege. The trial court then appointed a special master in response to a defense motion and an order was thereafter compelling production of the records to a master for in camera review. The plaintiffs appealed.

The Superior Court found that the MHPA did not apply because the records did not involve inpatient or involuntary treatment. As to the claim of privilege under the Psychiatrist/Psychologist-Patient Privilege, the Court first noted that the requests at issue were general and broad requesting all records without any limitations including time frame. Although the court stated that the privilege does not protect the plaintiff's communications, records reflecting her private thoughts were protected. As, such, the trial court erred in requiring the production of the documents in their entirety.

More significantly, the court also found that the plaintiff did not implicitly waive her privilege by placing her mental and physical condition at issue. In this respect, the Court's black-letter ruling was that:

> Therefore, Ms. Tavella-Zirilli's general averments in the amended complaint of "loss of life's pleasures; mental anguish; embarrassment and emotional distress" do not result in a waiver of the privilege. Amended Complaint at ¶ 22.

Tavella-Zirilli v. Ratner Cos., L.C., 2021 PA Super 240, 266 A.3d 696

The court further that the attempt to provide some protection via in camera review was inadequate because:

> it failed to impose adequate safeguards to prevent disclosure outside of litigation, such as a protective order or confidentiality agreement restricting Appellees, their attorneys, and any other person receiving the records or information from the records, from disclosing the records or information

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Commonwealth Court Again Addresses Constitutionality of Social Security Retirement Set Off

Commonwealth Court has again determined the set off is constitutional in *Sadler v. Philadelphia Coca-Cola (Workers' Compensation Appeal Board),*1294 C.D. 2020.

Summary of the case:

Claimant, Carl Sadler, suffered significant injuries to his low back and upper extremities in a work injury on July 2, 2012 after working for the employer for four weeks. He remained on compensation for an extended period of time during which he began receiving Social Security retirement benefits. Presumably, Claimant's Social Security Disability benefits converted to retirement benefits at the Claimant's full retirement age. Pursuant to section 204 (a) of the Workers' Compensation Act, the workers' compensation carrier issued a Notice of Benefit Offset reducing the Claimant's work comp benefits by 50% of the Social Security Retirement benefit. Litigation followed on the constitutionality of the offset as well as Termination and Modification Petitions. The Workers' Compensation Judge does not have the authority to deal with constitutional issues. Claimant's counsel properly preserved the issue. Claimant raised the issue with the Workers' Compensation Appeal Board which is also not a Constitutional body. Claimant then appealed to the Commonwealth Court.

Commonwealth Court argument and decision:

Claimant raised an equal protection argument before the court. Previously, the Commonwealth Court determined in *Caputo v. WCAB(Commonwealth)*, 34 A.3d 908 (Pa. Cmwlth. 2012) that the offset for 50% of the old-age Social Security benefit does not violate equal protection. Claimant's counsel was rather enterprising in attempting to get around the Caputo decision. Counsel noted that section 204(a) of the Act provides for three types of offsets: pension, severance and retirement Social Security benefits. The offset for the first two types of payments is limited to the extent to which the benefit is funded by the Employer directly liable for payment of compensation. For instance, a Claimant who works for a union hall and has pension contributions made by many Employers would have a small credit against his compensation if he worked only a short period of time for the Employer responsible for payment of workers' compensation. In *Sadler*, even though the Claimant only worked for the Employer responsible for payment of compensation for four weeks, one half of his total Social Security Retirement benefit was used to reduce his workers' compensation payment despite the minimal contribution to the payment by the time of injury Employer. Counsel argued this disparate treatment violated the equal protection clause of the Pennsylvania Constitution.

Commonwealth Court conducted an exhaustive review of the relevant case law. It explored at length the *Caputo* decision along with *Kramer v. Workers' Compensation Appeal Board (Rite Aid Corp.)*, 883 A.2d 518 (Pa. 2005) (severance) and *Mosley v. Workers' Compensation Appeal Board (City of Pittsburgh)*, 937 A.2d 607 (Pa. Cmwlth. 2007) (pension). It also quoted from *Kramer* as follows:

> "In reviewing equal protection challenges, we apply the following principles:
>
> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However . . . [t]he right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law **does not preclude the Commonwealth from resorting to legislative classifications provided that those classifications are reasonable rather than arbitrary and bear a relationship to the object of the legislation."(Emphasis in original)**

The Court's thorough decision concluded that even if the classification in this case is imperfect it does not rise to a violation of equal protection.

Claimant's counsel has sought allowance from the PA Supreme Court and participation by the Amicus Committee. Look for updates here if allowance is granted.

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Albert v. Sheeley's Drug Store, Inc., No. 5 MAP 2021 (Pa. Dec. 22, 2021)

Supreme Court dismisses a wrongful death action based upon the doctrine of in pari dilecto which acts to preclude a plaintiff from recovering damages if their cause of action is based, at least partially, on their own illegal conduct.

In this wrongful death case, the Plaintiff's decedent had been struggling with substance abuse issues including the prior use of Oxycontin with his friend, Zachary Ross.Zachary had a mother who was suffering from blood cancer and had been prescribed several opioid pain medications, which she filled at a particular pharmacy called Sheely's Drug Store (Sheely's). Worried that Zachary would attempt to pick up his mother's opioid medication and use it illegally, family members called Sheeley's and placed a restriction on who could pick up the mother's prescriptions.

On March 16, 2016, Plaintiff's decedent was suffering from an unknown illness and taken to the hospital by his parents where he was diagnosed with a headache and given intravenous morphine. While in the hospital decedent was simultaneously texting Zachary discussing various ways they could potentially obtain more drugs. On the same day decedent was discharged, Zachary called Sheeley's pretending to be his mother and asked about refilling an OxyContin prescription. The pharmacist on-duty at the time reported that the OxyContin prescription could not be filled yet, but that a prescription for fentanyl patches was ready to be picked up. Still pretending do be his mother, Zachary told the pharmacist "she" wanted to send her son to pick up the patches but stated that he did not have a driver's license or other form of identification. The pharmacist said that this would not be a problem since he personally knew and would recognize Zachary.

Decedent was aware of what Zachary had done and agreed to drive him to Sheeley's, where they successfully picked up the fentanyl patches.After arriving at Zachary's house, the decent consumed fentanyl from one of the patches, became unresponsive and was later pronounced dead from an overdose. Zachary plead guilty to involuntary manslaughter and multiple drug offenses in connection with the decedent's overdose.

A civil suit against Sheeley's was filed by the decedent's father in which he alleged that Sheeley's negligently allowed Zachary to pick up his mother's fentanyl prescription, which proximately caused the decedent's overdose and death. Sheeley's sought summary judgment, arguing that suit was barred by the wrongful conduct rule, otherwise known as the*in pari delicto* doctrine. The trial court agreed and granted summary judgment in favor of Sheeley's. The Superior Court affirmed the decision.

The question on appeal to the Supreme Court was whether claims brought against a pharmacy on behalf of a decedent who overdosed on illegally obtained prescription drugs are barred by the doctrine of *in pari delicto*. The Court noted that the doctrine of *in pari delicto* was an equitable doctrine that acts to preclude a plaintiff from recovering damages if their cause of action is based, at least partially, on their own illegal conduct.

Under Pennsylvania's formulation of *in pari delicto*, courts must consider: (1) the extent of the plaintiff's wrongdoing vis-à-vis the defendant; and (2) the connection between the plaintiff's wrongdoing and the claims asserted. Under the first prong, the plaintiff must bear "substantially equal or greater responsibility" for the underlying harm as compared to the defendant. As for the second prong, the plaintiff's cause of action must directly arise from or be "grounded upon" an illegal act.

The Supreme Court found that the decedent's criminal conduct directly resulted in his death, while Sheeley's conduct of dispensing a controlled substance to the decedent's friend was several links removed in the chain of causation. The Court also distinguished the doctrine of *in pari delicto* from comparative negligence principles stating that "comparative negligence principles apply whenever a plaintiff is contributorily negligent, while *in pari delicto* applies whenever a plaintiff engages in criminal conduct that directly causes the harm for which he or she seeks redress".

Based on the Court's analysis, they affirmed the trial court's grant of summary judgment in favor of Sheely's. The Court found that the doctrine of *in pari delicto* principally exists because holding otherwise would force courts to condone and perhaps even encourage criminal conduct, thus diminishing the public's perception of the legal system.In closing, the Court cautioned that "[l]itigants should be well aware that the judiciary is not tolerant of fraud and illegality, and those who come before it seeking common-law redress relative to matters

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in which they bear sufficient culpability may suffer disadvantage as a consequence of their own wrongdoing".

Lageman v. Zepp, No. 21 MAP 2021 (Pa. Dec. 22, 2021)

Supreme Court holds that a Plaintiff is permitted to rely upon direct evidence and the doctrine of res ipsa loquitur to prove negligence in the same case.

This case arose from a medical malpractice action involving the allegedly negligent placement of a central venous pressure line during an exploratory laparotomy. The Supreme Court granted review in this case to clarify whether resorting to the doctrine of *res ipsa loquitur* is precluded when the plaintiff has introduced enough direct evidence that the doctrine is not the only avenue to a finding of liability (i.e. whether the two (2) ways of satisfying the plaintiff's evidentiary burden are mutually exclusive).

Following a lengthy analysis of the doctrine and its use under Pennsylvania law, the Court held that these two (2) methods of satisfying the Plaintiff's burden of proof are not mutually exclusive and therefore, *res ipsa loquitur* may still apply even in a case where a Plaintiff has also produced direct evidence of negligence by a Defendant. In support of its conclusion, the Court observed that "[i]t has long been the law of Pennsylvania that a plaintiff has no obligation to choose one theory of liability to the exclusion of another". The Court found that in cases where the evidence available to the plaintiff is ambiguous and less than conclusive on the elements of negligence, asking the plaintiff to choose which evidentiary approach to pursue is manifestly unfair. The Court also reasoned that permitting a Plaintiff to present direct evidence while simultaneously invoking *res ipsa loquitur* would only disadvantage a Defendant as the claims asserted against them become more meritorious as more competent evidence emerges.

After determining that both methods of evidence could be used in the same case, the Court noted that in order to support a *res ipsa loquitur* jury instruction the Plaintiff must simply set forth *prima facie* evidence of the three (3) factors in Section 328D of the Restatement. Accordingly, creating a jury question as to the Section 328D factors should not require "Herculean labors" because the factors speak for themselves, as will the evidence in a given case as to whether it supports the instruction.

The Court concluded that determining when the jury instruction is warranted hinges entirely upon whether the plaintiff has made out *prima facie*s howing of the Section 328D factors, **not** whether the defense has a credible counter-narrative or the plaintiff has also made out a plausible basis for recovery without resort to the doctrine. In effect, direct evidence and *res ipsa loquitur* run in parallel toward the same destination, and if either arrives, the plaintiff recovers.

Kramer v. Nationwide, 2021 PA Super 233 (Pa. Super. December 2, 2021)

Superior Court finds coverage and a duty to defend under a homeowner's policy for a wrongful death action caused by a drug overdose which occurred at the insured's home while they were away.

In September of 2018, Adam Kramer hosted the Plaintiff's decedent and others in his parents' home while they were out of town. Early in the morning following the party, the decedent was found dead. The cause of death was a drug overdose.

The decedent's mother ("Plaintiff") filed a wrongful death and survival action against the parents and their son, alleging that at the time the son hosted the decedent, the son was widely known to use and sell controlled substances. The suit also asserted that the son was negligent in supplying the decedent with the drugs that caused his overdose. In both the survival and wrongful death claims the parents were also alleged to be negligent in allowing their son to use their home for such illicit activities.

Nationwide was the parents' home insurer at the time of this party but it refused to provide a legal defense to the Plaintiff's claims. Nationwide claimed that it did not have to provide a defense, based upon coverage exclusions in the policy, which applied when certain damages arise from criminal conduct or the use of controlled substances.

The parents filed a declaratory judgment action seeking to compel Nationwide to provide them with a defense in the underlying action. The parties filed cross-motions for summary judgment. The trial court granted parents' motion for summary judgment finding that Nationwide had a duty to defend. Nationwide appealed the trial court's decision.

On appeal, the Superior Court reviewed the policy exclusions, which limited coverage and the corresponding duty to defend where controlled substances are involved. The Court also reviewed the

Continued on Page 25

section of the policy which defined "bodily injury" as "bodily harm, including resulting care, sickness or disease, loss of services or death." The Court found that Nationwide would have no obligation to pay out for such damages under the definition of “bodily injury” if the parents were ultimately found liable for them. Likewise, Nationwide would have no duty to defend with respect to those discreet classes of damages.

However, the Court also observed that the wrongful death claim against the parents in the underlying action was not limited to damages for bodily injury as defined in the policy. More specifically, the Plaintiff was also seeking other types of damages rooted in the families’ "emotional distress, mental distress or injury, or any similar injury," none of which would be the direct result of bodily harm to the decedent's family itself.

The Court reasoned that since these are the types of damages that do not fall under the ambit of the policy's "bodily injury" definition, the policy’s “controlled substance” exclusion would not apply to them. Having construed the relevant portions of the subject policy as excluding coverage as to some, but potentially not all of the damages sought from the parents, the Court held that Nationwide would be obligated to pay out on the covered portions of the underlying claims if the parents were ultimately found liable. Consequently, that obligation triggered Nationwide's duty to defend in the underlying action against the parents.

The order of the trial court granting summary judgment in favor of the parents was affirmed.

Klar v. Dairy Farmers of America et. al. 2021 Pa. Super. 252 (Pa. Super December 17, 2021)

Superior Court finds that an employer who furnished alcohol at an employee event was considered a social host and therefore not liable for injuries caused by an employee involved in a subsequent DUI accident after leaving the event.

On August 17, 2014, Plaintiff, David Klar (“Plaintiff”) was injured in a cross-over motor vehicle accident when a vehicle operated by Defendant, Roger Williams (“Williams”) came across the center line and struck his motorcycle.Prior to the motor vehicle crash, Defendant Williams had been attending a golf outing sponsored by his employer, Dairy Farmers of America’s (“DFA”). Defendant DFA had sponsored this golf outing and encouraged its employees to attend. The employees who participated in the event, including Defendant Williams, were required to make a monetary contribution to offset the cost of the greens fees, food, and alcohol. After collecting the contributions from its employees, Defendant DFA paid for the event in its entirety.

In his Complaint, the Plaintiff alleged that Defendant Williams had consumed an amount of alcohol that raised his blood alcohol level to more than three (3) times the legal limit. Defendant Williams then left the event and shortly thereafter was involved in the crash with the Plaintiff. The Plaintiff sued Defendant Williams and his employer, Defendant DFA under negligence claims. Defendant DFA filed a Motion for Judgment on the Pleadings arguing that it was not liable under the Dram Shop Act because it was a social host. The trial court granted Defendant DFA’s motion finding that an employer who collects contributions for a social event was still considered to be a social host with respect to any liability claims under the Dram Shop Act.

Plaintiff appealed this decision to the Superior Court.On appeal, Plaintiff conceded that Defendant DFA was not licensed under the Liquor Code and that DFA could not have obtained a license for the golf outing. Instead, Plaintiff argued that Defendant DFA fell within Liquor Code Section 4-493(1)'s category of "any other person" and was therefore negligent per se, as it sold, furnished or gave beer to Defendant Williams when he was visibly intoxicated. The Superior Court disagreed with the Plaintiff finding that under prior Supreme Court precedent in *Manning v. Andy*, 310 A.2d 75 (Pa. 1973), the section 4-493(1) “any other person” category did not apply to non-licensees under the Liquor Code.

Next, Plaintiff argued that Defendant DFA otherwise breached its common law duty by providing alcohol to Williams when he was already intoxicated. The Superior Court again disagreed based upon the rule adopted by the Pennsylvania Supreme Court in *Klein v. Raysinger*, 470 A. 2d 507 (Pa. Supreme 1983), which holds that the conduct of a social host who furnishes alcohol to an adult is not the proximate cause of a subsequent occurrence.

The Superior Court also noted that under the concept of a collective purchase, the presence of renumeration would not defeat the rule set forth in *Klein*. In the

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BY THE RULES ... FROM PAGE 21

outside this litigation. Without such a restriction on the use of the mental health records and information obtained by the order, protection of the Zirillis' expectation of confidentiality is inadequate.

Tavella-Zirilli v. Ratner Cos., L.C., 2021 PA Super 240, 266 A.3d 696

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HOT OFF THE WIRE ... FROM PAGE 25

instant case, Plaintiff had specifically averred that Defendant Williams paid Defendant DFA to offset costs and expenses related to the outgoing including greens fees, food and alcohol. Defendant DFA then utilized the collected money from all participants to pay for all greens fees, food and alcohol. Adopting the analysis of the trial court, the Superior Court found that this type of collective fee did not qualify as remuneration and it failed to place Defendant DFA in the position of being a licensee. Accordingly, Defendant DFA was deemed a social host and could not be held liable for a claim of common law negligence based upon the decision in*Klein.*

The Superior Court affirmed the trial court's Order granting judgment on the pleadings in favor of Defendant DFA.

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Get Ready to Golf!

The 29th annual Golf & Ethics
is scheduled for
Friday, May 27, 2022
at
Shannopin Country Club, Pittsburgh, PA

Details are still being worked on but put the date on your calendar. Plan to join us for an Ethics credit with breakfast, then golf with your peers. And don't forget to stay after for a hot lunch buffet and awards.

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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Feeling protected under the U.S. Constitution is a critical part of being an American citizen. Without the structure this important document holds, the American law system would simply fall to its knees. Keeping life, liberty, and the pursuit of happiness under the safety net of the law is a given right to the people of the country. These specific American rights are to be protected and exercised with the highest amount of standard possible. As the Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Therefore, the use of physical force in an unsuccessful effort to detain a suspect by law enforcement does result in a "seizure" under the Fourth Amendment.

In order to understand how the force was a seizure, let's first examine seizure in the context of search warrants. A search of a person's home or property should only be conducted under the presence of a warrant. Probable cause is also a requirement that must usually be met before police receive a warrant, conduct a search, or make an arrest. Without probable cause or a warrant, the search would therefore be unconstitutional. Once someone is arrested without a warrant, they are required to be brought before an authority shortly afterward for a judicial determination of probable cause. Also, "fruit of the poisonous tree" or evidence obtained from an unlawful search may not be introduced in a court setting. If law enforcement were to use unnecessary force in this particular circumstance, it would certainly result in a seizure under the Fourth Amendment In Ms. Torres's situation, the police officers did have a warrant but made the decision to use unnecessary force at the time of the so-called "search." Since they had needless firearm usage, I absolutely believe this case to be a violation of Ms. Torres's Fourth Amendment rights to not be seized by the officers.

Continued on Page 29

Furthermore, in the civil rights suit against the police, Ms. Torres alleged excessive use of force by the officers in violation of the United States Constitution's Fourth Amendment. The U.S. District Court concluded there was no "seizure" of Ms. Torres and that the officers were entitled to "qualified immunity." But what exactly does qualified immunity mean? As stated by the Legal Information Institute, this term is defined as a type of legal immunity in which "protects a government official from lawsuits alleging that the official violated a plaintiffs rights, only allowing suits where officials violated a clearly established statutory or constitutional right." However, in this instance,I do feel as though the officers did violate Ms. Torres's constitutional right of protection from seizure. Despite the fact that the officers did not seize the physical property of Ms. Torres, they did seize her health, life, and safety as an individual.

According to the National Institute of Justice, Law enforcement officers should use only the amount of force necessary to "mitigate an incident, make an arrest, or protect themselves or others from harm." The use of police force is necessary for some instances depending on the situation but usually, the only needed force in a law enforcement situation would be verbal or physical restraint. Although not ideal, these are less-lethal acts of force in a hostile situation. The resistance of arrest is a criminal charge in the United States; however, the use of unnecessary force in this environment would be deemed unconstitutional. Two wrongs do not make a right. Therefore,using bluntforce in a situation where it is not needed would absolutely be considered a seizure under the Fourth Amendment. Ms. Torres believed she was being carjacked. As a result, she accelerated away from the officers in question. The police shot at Ms. Torres since they anticipated they were going to be "hit by the car." This particular reasoning raises some eyebrows. If the officers had enough time to pull out and start shooting, presumably they would have had time to react in a different manner. The use of firearms was completely unnecessary in that situation and could be perceived as a seizure of Ms. Torres.

The New Mexico State Police officers were unjust in their decision to use excessive force in the detainment attempt of Roxanne Torres. The absolute disregard for equitable law and fallacious jurisdiction towards the situation begs the question if these state officers truly know the constitutional rights of citizens. Thus, the use of physical force in an unsuccessful effort to detain a suspect by law enforcement does in truth ensue a seizure due to the information listed above. As cases arise and new forms of unconstitutional law may come into play, the judicial process will aid to protect the Constitutional rights of United States citizens. We the People,as well as Ms. Torres, have the undeniable right to be secure against unreasonable searches and seizures.

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Essay submitted by Rachel O'Day, of Saltsburg Middle/High School.

TRIVIA CONTEST

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

Trivia Question #31

If you own this type of pet in Switzerland, you are legally required to own at least two of them, as they are deemed to be social animals and owning just one is considered animal abuse.

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by May 31, 2021. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #31 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 #30 –**What common household appliance used to be so big that it had to be moved from house to house by horse drawn carrier?**

Answer: A vacuum cleaner.

Congratulations to Karesa Rovnan, of Richards & Richards, on being the recipient of a $100 Visa gift

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December 23, 2021

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Through the Grapevine....

Carmen Nocera can now be found at Ainsman Levine, LLC, 310 Grant St, 15th Fl, Pittsburgh, PA 15219. P: 412-338-9030 Email: cn@ainsmanlevine.com

Josh Lamm has opened his own firm, Lamm Injury Law, LLC, 1100 Liberty Ave, Ste 1008, Pittsburgh, PA 15222. P:724-272-4337 Email: lamminjurylaw@gmail.com

A speedy recovery to **Board of Governors Member Mike Ferguson**, who is recovering from not one but two knee replacement surgeries!

Congratulations to **Brandon Sprecher** and his wife Meghan on the birth of their first child. Harlan Joseph was born on February 16.