



THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

# THE ADVOCATE

## THE ADVOCATE

PUBLISHED QUARTERLY BY  
WESTERN PA TRIAL  
LAWYERS ASSOCIATION

SUMMER 2022  
VOLUME 34, NO. 4

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## WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

ASSOCIATION OFFICE:  
909 MOUNT ROYAL BLVD, STE 102  
PITTSBURGH, PA 15223-1030  
412-487-7644  
LAURIE@WPTLA.ORG  
WWW.WPTLA.ORG

## PENNSYLVANIA SUPERIOR COURT ADDRESSES THE ABILITY OF A WORKER'S COMPENSATION CARRIER TO INTERVENE IN A PERSONAL INJURY LAWSUIT

In the case of *Michele Loftus et. al, v. Katrina Decker: Appeal of Eastern Alliance Ins. Group*, 2022 Pa. Super 44 (Pa. Super 2022), the Pennsylvania Superior Court was presented with a novel question of law:

*Is a Worker's Compensation Carrier permitted to intervene in a third-party lawsuit to pursue recovery of its worker's compensation lien when only a Writ of Summon has been filed by the Plaintiff?*

As described in detail below, in a 2-1 split decision the Pennsylvania Superior Court held that a worker's compensation carrier did not have a "legally enforceable interest" to intervene under Pa. R. Civ. P. 2327 when only a Writ of Summon was filed in the underlying action.<sup>1</sup>

### Background

In this case, the Plaintiff, Michele Loftus, was injured in a motor vehicle collision on January 16, 2019. Because Ms. Loftus was in the course and scope of her employment at the time of the collision, she was entitled to worker's compensation benefits through her employer's worker's compensation policy with Eastern Alliance Insurance Group.

Ms. Loftus ultimately settled her worker's compensation claim with Eastern Alliance through a full Compromise and Release. Ms. Loftus then filed a Writ of Summons against Defendant Katrina Decker on September 25, 2020 in order to protect the statute of limitations and preserve her ability to file a Complaint in the future.

### Trial Court Holding

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

<sup>1</sup> It should be noted that the Pennsylvania Superior Court recently granted an Application for Reargument En Banc to address the novel issues brought up in this case.



Pa. R.C.P. 2327(4).

### Pennsylvania Superior Court Holding

On appeal, Eastern Alliance argued that the trial court erred in holding that intervention cannot be granted until a Complaint is filed. Eastern Alliance argued that Pa. R. Civ. P. 1007(1) states that an "action" may be commenced by a Complaint or Writ of Summons. Accordingly, Eastern Alliance believed that it satisfied the threshold requirement of Pa. R. Civ. P. 2327, which states that "at any time during the pendency of an **action**, a person not a party thereto shall be permitted to intervene therein . . ." (emphasis added).

Responding to this argument, the Pennsylvania Superior Court held that the only purpose of the Praecipe for Writ of Summons is to "provide certainty as to the commencement of an action and to remove a subsequent failure to effect service from consideration in determining whether the statute of limitations has been tolled." *Lamp v. Heyman*, 366 A.2d 882, 886 (Pa. 1976). The Pennsylvania Superior Court went on to explain:

*Because a writ of summons is only to serve that purpose and because there are no facts contained in plaintiff's one sentence writ of summons, we agree with the trial court that there is insufficient facts for an analysis to be made as to whether intervention is proper under Pa.R.C.P. 2327. To hold otherwise would allow the proposed intervenor to plead what is plaintiff's cause of action(s), what facts support that cause of action and what relief plaintiff is seeking, and then state why those facts that it alleged on behalf of plaintiff justify its intervention based on the facts and interests it pleads. In other words, if that were the case, it gets to deal the cards and play both the house and the player's hand.*

Ultimately, the Pennsylvania Superior Court found that Appellant, Eastern Alliance, could not demonstrate a "legally enforceable interest" under Section 319 of the Workers' Compensation Act, 77 P.S. § 671 that would permit intervention under Pa. R. Civ. P. 2327 when only a Writ of Summons was filed. The 2-1 majority opinion was authored by the Honorable Judge Pellegrini and joined by the Honorable Judge Olsen.

The Honorable Judge Murry authored a dissenting opinion based on the rationale that the trial court should have conducted an evidentiary hearing under Pa. R. Civ. P. 2329 before denying the Petition for Intervention by Eastern Alliance.

**Given the novel legal issues brought up in this case, the Pennsylvania Superior Court recently granted an Application for Reargument *En Banc*.** Make sure to check [The Advocate](#) for updates as this case proceeds.

By: Russell J. Bopp, Esq. of

Marcus & Mack, PC

[rbopp@marcusandmack.com](mailto:rbopp@marcusandmack.com)



## UPCOMING CALENDAR of EVENTS

- |                         |   |
|-------------------------|---|
| <b>Aug 5, 2022</b>      | <b>Board Meeting &amp; Breakfast</b><br>By Invitation Only - River's Club, Pittsburgh |
| <b>Sep, 2022</b>        | <b>Legislative Meet &amp; Greet</b><br>Revel & Roost, Pittsburgh                      |
| <b>Oct 6, 2022</b>      | <b>5K Run/Walk/Wheel</b><br>to benefit the Steelwheelers - North Park, Pittsburgh     |
| <b>November 2, 2022</b> | <b>Comeback Award Dinner</b><br>The Duquesne Club, Pittsburgh                         |
| <b>Dec, 2022</b>        | <b>Ethics CLE</b><br>TBA  |
| <b>Jan, 2023</b>        | <b>Past President's Dinner</b><br>TBA   |
| <b>Feb, 2023</b>        | <b>Junior Member Meet &amp; Greet</b><br>TBA  |
| <b>Mar, 2023</b>        | <b>CLE</b><br>TBA   |
| <b>Apr, 2023</b>        | <b>Membership Election Dinner</b><br>Carmody's Grille, Pittsburgh                     |
| <b>May 5, 2023</b>      | <b>Annual Judiciary Dinner</b><br>Heinz Field, Pittsburgh                             |
| <b>May 26, 2023</b>     | <b>30th Annual Golf &amp; Ethics</b><br>Shannopin Country Club, Pittsburgh            |



## JUDICIARY DINNER RECAP

After a two-year hiatus, WPTLA was finally able to hold the Annual Judiciary Dinner on Friday, May 6, 2022. The signature event had a total number of attendees at 146, which was the highest in the past 10 years. This included members, guests and 26 sitting Judges from all over Western Pennsylvania.

The event, held at Heinz Field, honors those members of the Judiciary who retired or achieved Senior Status during the preceding calendar year. This year, we honored those qualifying judges for the years 2019, 2020, and 2021. The judges, in attendance, that were honored included: The Honorable Michael Della Vecchia, Michael F. Marmo, Thomas J. Doerr and Anthony G. Marsili.

The evening began with a cocktail reception featuring passed hors d'oeuvres, then moved to a beautiful sit down dinner before the program began. The program included summaries and interesting facts about the life and career of each Judge being honored. The Judges were presented with a custom-engraved set of rocks glasses.

The Association made its annual presentation of the Daniel M. Berger Community Service Award for the years of 2020 and 2022. The 2020 winner was The Gismondi Family Foundation and John Gismondi, Esquire. The Foundation provides grants to all types of non-profit organizations. It tends to focus on programs which support the basic necessities in life. The 2022 winner was Cindy Miklos of Planet Depos, for her work with JD RF. JD RF funds research and advocates for policies that support Type 1 diabetes. The winners received donations to their charities, totalling \$2,500.00, which were comprised of contributions from WPTLA, Berger Lagnese & Paul, NFP Structured Settlements, and Planet Depos (2020) /Kontos Mengine Killion & Hassen (2022).

WPTLA also presented the 2021 and 2022 Champion of Justice Awards. The 2021 winner was Jerry I. Meyers, Esquire and the 2022 winner was Charles E. Evans, Esquire. The award is given in recognition to those who fight, unwavering, for injured victims and preserve the rights of all people to have fair access to the court system. The winners received a plaque recognizing their achievement.

Three high school seniors, Cole Gross from Bedford High School, Hunter Rheinfrank from Mount Lebanon High School, and Samantha Podnar from North Allegheny Senior High School, attended the dinner with their families in order to be recognized as the winners of the WPTLA Scholarship Essay Contest. This year, the Association received 15 essay submissions. The Committee members scored and graded the essays, which is a difficult task every year as all of the submissions are worthy of winning and it seems that the essays get better year after year. These three students' essays stood out from the rest and were selected as the best after the Committee vote. Each received a plaque and a scholarship check in the amount of \$2,000.00.

The Steelwheelers were also recognized, with many members in attendance at the dinner. Recognition of the \$34,250.00 donated in November represents the proceeds raised by WPTLA during its annual 5K race at North Park.

The evening concluded with dessert and conversation, as many of the Judges and attendees stayed to converse after the program. We hope to see everyone in attendance at next year's event.

Photos from the Judiciary Dinner can be found on page 24.

By: Katie A. Killion, Esq. of  
Kontos Mengine Killion & Hassen



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## PRESIDENT'S MESSAGE

### Words of Appreciation

I am amazed that the 2021-22 fiscal year is coming to an end, and with that my term as President of WPTLA. I am able to move on knowing that 2021-22 was a good year and the organization has even better years ahead. I say this because of the appreciation that I have developed for our executive officers, our board of governors and our executive director Laurie Lacher and her Assistant Lorraine Eyler. Without this hardworking and dedicated core, the year would not have come together. I have great confidence in handing over the leadership of this great group to incoming President Erin Rudert who has already been working behind the scenes to continue WPTLA's growth and relevance.

I would be remiss if also did not thank my wife, Monica and my daughter Annamaria for their patience when I said I had to be at the various events throughout the year. I realize these things add up. In addition, I am appreciative of my firm, Berger and Green and especially Bill Kenny for allowing me the time to field calls and attend to my duties at WPTLA.

***"[T]he song 'The Impossible Dream' is about us -- particularly the lyrics 'to right the unrightable wrong.' Lets keep it up."***

Finally, I would like to thank all of you for your continued support of WPTLA and its activities. Without such an active and supportive membership, WPTLA would not exist. I also thank you in advance for the support that I know you will continue to provide to our executive officers and board in the coming years.

I am going to keep this column short because I have separately included in this newsletter an annual report that will give all of you an overview of all that WPTLA does in a given year.

### My Final Insight

As for my final insight, I continue to tout the importance of WPTLA in providing a community for so many like-minded attorneys to get together and stand together in support of our common goal, making the civil justice system including the jury trial work for those who are the victims of the negligence of others. There

are so many voices out there trying to undermine justice for our clients that we can overcome only with one community. We go to work everyday as people in other offices look to exploit any possible mis-step we may make and to make our clients look like they are exploiting a lottery. It is so great to come together with others who fight the same battle every day.

Long ago, while attending the Man of LaMancha, I realized that the song "The Impossible Dream" is about us -- particularly the lyrics "to right the unrightable wrong." Lets keep it up.

WPTLA forever!

By: Mark E. Milsop, Esq. of

Berger and Green.

[mmilsop@bergerandgreen.com](mailto:mmilsop@bergerandgreen.com)



## THE ADVOCATE



### ARTICLE DEADLINES and PUBLICATION DATES VOLUME 35, 2022-2023

Vol 35	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Fall 2022	Sep 9	Sep 23
Winter 2023	Dec 2	Dec 16
Spring 2023	Feb 24	Mar 10
Summer 2023	May 19	Jun 2

*The Editor of The Advocate is always open to and looking for substantive articles. Please send ideas and content to [er@ainsmanlevine.com](mailto:er@ainsmanlevine.com)*

## WASHINGTON COUNTY 2022 DINNER & CLE RECAP

WPTLA's Washington County Dinner was held at the Bella Sera Event Villa on March 23, 2022, where our members were able to enjoy a night of networking and a CLE presented by Past President, Mark J. Homyak, Esq.

After dinner, Attorney Homyak gave an informative presentation on "Opportunities for Justice in the Pennsylvania Supreme Court." In addition to being a Past President of our organization, Attorney Homyak is active in numerous trial lawyer organizations including the Academy of Trial Lawyers of Allegheny County and the Pennsylvania Association for Justice.

Attorney Homyak shared with members his rare experience in arguing not one, but two cases before the Pennsylvania Supreme Court. His presentation showcased the decisions in both *Leight v. Univ. of Pittsburgh Physicians*, 246 A.3d 126 (Pa. 2020) (*holding that there is no liability under the Mental Health Procedures Act where a patient clearly warrants an involuntary emergency examination, but the treating physicians fail to effectuate commitment*) and *Cagey v. Commonwealth*, 179 A.3d 458 (Pa. 2018) (*holding that the plaintiff's allegations of negligent installation and design of a guardrail fit squarely within the Sovereign Immunity Act's real estate exception and therefore PennDOT is not immune from suit*). In both cases, the Court's decision turned on the Court's interpretation

of a statute. Attorney Homyak took our members through the reasoning in those decisions, including the dissenting and occurring opinions, and how plaintiff attorneys can use them to their advantage in the future. He emphasized that if an attorney feels that a statute has been misapplied in one of their cases, now is the time to take the issue to the Supreme Court. Attendees were also supplied with a wealth of case law to help them navigate a multitude of issues ranging from insurance bad faith to the course and scope of employment for traveling employees. Attorney Homyak's experiences and shared insights were undoubtedly a valuable resource to those who attended.

WPTLA gives a special thank you to all who came out to join us in person at this wonderful event. We are all grateful to have the opportunity to gather again. Stay tuned for future CLE's put on by WPTLA and our Past Presidents, as well as other speakers!

By: Karesa M. Rovnan, Esq. of  
Richards & Richards LLP  
[kmr@r-rlawfirm.com](mailto:kmr@r-rlawfirm.com)



*Bella Sera*  
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Pictured above in the top row from L to R: Board of Governors Member Laura Phillips, Eve Semins, Jennifer Fisher, CLE Presenter and Past President Mark Homyak, Immediate Past President Eric Purchase receiving his President's Plaque, and President Mark Milsop.

Pictured in the bottom row from L to R: President-Elect Erin Rudert, Drew Rummel, Board of Governors Member Shawn Kressley, Past President Chris Miller, Immediate Past President Eric Purchase, and Treasurer James Tallman.



On April 19, 2022, the Western Pennsylvania Trial Lawyers Association gathered for our monthly meeting on the second floor at Carmody's Grille in Neville Island, owned by our esteemed member Sean Carmody.

Dinner was delicious and the camaraderie, conversations and drinks flowed freely. There were no speakers or presentations as the official business of electing our leaders and representatives took place. Following the elections many of the members stayed to enjoy the atmosphere of Sean's restaurant, trade war stories, give valuable litigation advice and catch up on our busy personal lives.

The following Officers, Board of Directors and LAW PAC Trustee for the 2022-2023 calendar year were each elected by unanimous vote:

#### Officers

Erin K. Rudert (President)

Gregory R. Unatin (President-Elect)

Katie A. Killion (Vice President)

James T. Tallman (Secretary)

Jennifer L. Webster (Treasurer)

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Steven E. (Tim) Riley, Jr.

Article submitted by:

Scott L. Melton, Esq., of

Scott L. Melton, Esquire

[smeltonlawfirm@gmail.com](mailto:smeltonlawfirm@gmail.com)



*Pictured above in the top row from L to R: Past President Rich Catalano, President's Club Member Scott Melton, Past President Dave Landay, Business Partner Jayme Hartnett of Pain and Spine Specialists, Carmen Nocera, Board of Governors Member Russell Bopp, and Business Partner Rod Troupe of Finley Consulting & Investigations.*

*In the bottom row from L to R: Business Partner Will Erlanger of NFP Structured Settlements, President's Club Member Jon Perry, Business Partner Bill Goodman of NFP Structured Settlements, President's Club Member Ken Fawcett, Past President and Board of Governors Member Chad Bowers, Past President Bernie Caputo, Secretary Katie Killion, President Mark Milsop and Business Partner Dave Kassekert of Keystone Engineering.*



If you missed the 29th Annual Western Pennsylvania Trial Lawyers Association Ethics and Golf Seminar, held on May 25, 2022 at Shannopin Country Club, you missed a real doozy.

The morning started with a great seminar led by Past President Larry Kelly and Past President Jack Goodrich dealing with the Disciplinary Board's most recent decisions and how to avoid getting into trouble with the Disciplinary Board. It was a panel discussion based on their years of experience serving on the Disciplinary Board.

As the rain continued to pelt the golf course, many eyes looked strangely at Jack Goodrich as he decided that the golf outing would be played. 36 brave golfers took to the course, most of whom were shaking their heads in disbelief.

Lo and behold, within 25 minutes, the rain stopped, all raingear was removed, and everyone was treated to a beautiful sunny Southwestern Pennsylvania afternoon.

This year's best team with a scramble score of 11 under par consisted of:

- Greg Rosatelli
- Sam Mack
- Curt McMillen
- Gary Rosatelli

Skill prizes were as follows:

- Closest to flag stick #7 – Greg Rosatelli, 10 ft 1 inch
- Tee shot #14 – Larry Kelly, 2 ft 11 inches
- Closest second shot on #13 – Wynn Hassan
- Longest drive on fairway #1 – Curt McMillen
- Longest put on hole 18 – Mark Aletto, 24 ft 4 inches

As Chairman of the Ethics and Golf Seminar – which we began back in 1993 – I welcome everyone to return again next year for the 30th Annual Event, scheduled for the Friday before Memorial Day (May 26, 2023).

Finally, we hope everyone had a great time and if you missed this event – shame on you!

John P. Goodrich, Esq. of  
Goodrich & Associates, P.C.  
jack@goodrichpc.com



*Pictured at L from L to R: Frank Keith, Past President & Golf Chair Jack Goodrich, Kevin Schmitt, and Mark Aletto.*



*Pictured at R from L to R: President's Club Member Joe George, Wynn Hassan, Past President Larry Kelly, and Patrick Curren*



*Pictured at L from L to R: Greg Hanczar, Larry Baun, Evan Slater, and Past President Mark Homyak.*



*Pictured at R from L to R: Hamka Abdullah, Kirk Hannah, President's Club member Phil Clark, and Bill Flannery*



*Pictured at L from L to R: Gary Rosatelli, Board of Governors member Curt McMillen, Board of Governors Member Sam Mack, and President's Club Member Greg Rosatelli*

RULE 1311.1 Update

Although it had been sometime since the Judicial Code had been amended to allow counties to increase their compulsory arbitration limits to \$50,000.00, the language of rule 1311.1 allowing the use of documentary evidence in lieu of testimony continued to apply only to cases in which the amount of damages was limited to \$25,000.00. The amendment now provides for the use of documentary evidence where damages are limited to an amount equal to the jurisdictional limits of the applicable county for compulsory arbitration. This change is effective July 1. Presumably, it should apply to all cases which go to trial after July 1, but some Defendants may argue that the date of the election to proceed under Rule 1311.1 is controlling.

Delay Damages After Covid

The decisions that the undersigned has seen seem to agree that the period for delay damages is not abated during any periods of delay due to Court closures during the Covid Pandemic. The Pennsylvania Superior Court has already weighed in on this issue in *Gettling v. Mark Sales and Leasing*, 2022 PA Super 58.

The *Gettling* case was based upon a partially severed foot caused by the rollover of a riding mower that followed an inappropriate recommendation of a riding mower by a merchant given the known terrain of the plaintiff's property and for the merchant's removal of a tag containing a warning. After a jury trial and an award of just over 2 million dollars, the plaintiff sought and was awarded delay damages. On appeal, the defendant argued that delay damages could not be imposed during the period of judicial emergency. Judge Kunselman explained:

COVID-19 and the judicial emergency it created did not diminish the rights of plaintiffs to be made whole, nor did they prohibit defendants from engaging in settlement negotiations or making reasonable offers to help alleviate court dockets. In fact, the Rental Company and the Gettings engaged in settlement talks **during the judicial emergency**. Thus, simply because the flow of cases had temporarily stopped, it does not follow that all legal practice had also ceased. The Rental Company was free at all times during the judicial emergency to increase its offer to induce the Gettings to settle and thereby to avoid delay damages.

Moreover, the interest on the damages was the plaintiffs' money by right, by virtue of the jury's verdict and the common-law rule of *Marrazzo, supra*. We do not read the March 18, 2020 Order of the Supreme Court as permitting tortfeasors to reap unjust windfalls from a five month delay that was clearly beyond the control of their victims. Here, closure of the Court of Common Pleas of Lycoming

County did not alter the indisputable fact that the Rental Company retained and had unfettered use of the Gettings' money throughout the judicial emergency.

*Gettling v. Mark Sales & Leasing, Inc.*, 2022 PA Super 58 at \*20-21.

Another Covid Issue

The *Gettings* decision also dealt with an additional interesting Covid issue that arose during the August 2020 trial. During the trial, one of the jurors reported an indirect Covid exposure (his wife was exposed to a relative who was diagnosed with Covid). That juror was dismissed and the court adjourned to sanitize the courtroom. The following morning counsel for the defendant asked for a mistrial based upon Covid concerns of the corporate designee/owner of the merchant. After citing the efforts of the court to operate safely, the motion was denied. At the Post-Trial stage, the defendant expanded that basis for its Covid related motion for mistrial to include the rules of procedure, rules of evidence and constitutional provisions. The Motion for Post-Trial Relief was denied and was affirmed by the Superior Court. The Superior Court's opinion emphasized that the reasons raised for the first time in the post-trial motion were waived by not presenting them at the time of the initial motion for mistrial.

Standard of Review for Summary Judgment

I have recently become aware of a case that exemplifies how the standard of review for motions for summary judgment is supposed to work in state court. That decision is *Noga v. Wal-Mart Stores East, LP*, No. 10170 of 2019 CA (Lawrence Cnty). There, the plaintiff fell on a sidewalk while leaving a Wal-Mart Store. In a motion for summary judgment, the defendant contended that the plaintiff could not prove the cause of her fall without speculation. Judge Hodge denied summary judgment based upon deposition testimony of a Wal-Mart employee who completed a report stating that Mrs. Noga "tripped on the sidewalk" and that she "she tripped on a patch of pavement cracked and raised." The report also included photos. Although the opinion is concise, it is notable for what it does not discuss – any testimony by the plaintiff as to whether she fell on the defect identified in the report.

Mark E. Milsop, Esq. of

Berger and Green

[mmilsop@bergernadgreen.com](mailto:mmilsop@bergernadgreen.com)





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### **Workers' Compensation Insurance Continues to be Profitable**

The National Council on Compensation Insurance (NCCI) recently reported on the state of workers compensation. NCCI President noted, "the workers compensation system is strong and resilient." Net written premium increased to \$43 billion in 2021. 2021 also represented the eighth consecutive year of an underwriting profit for workers compensation insurance. Furthermore, NCCI described workers compensation reserves as, "robust."

The organization found that Covid effects are decreasing, possibly due to the effects of vaccination and vaccine mandates. Lost time, injuries/claims have also continued to decline. Furthermore, NCCI found that payroll increased more than 10% in 2021, which could lead to increased costs in the future as lost time injuries produce higher compensation rates as a result. The findings mitigate against the need for further anti-worker changes to the Pennsylvania workers compensation act.

### **Legislature Continues to Wrestle with Medical Marijuana**

The Senate is considering Senate Bill 749 which would regulate medical marijuana in the workplace. The bill is an amazing mish-mash of bad science and writing. For instance, the bill describes impairment in the following manner: "symptoms of being under the influence of marijuana that may decrease or lessen an employee's performance of essential duties or tasks that an employer, in good faith, believes will result in carelessness, negligence or disregard for the safety of themselves or others and disrupt business operations." Imagine the litigation nightmare of defining "in good faith." Furthermore, under the influence is defined as follows: "a drug test pursuant to which it is determined that an employee or job applicant tests positive for marijuana at a level of tetrahydrocannabinolic acid in urine equal to, or greater than, 15 ng/mL or fails to submit to a marijuana test." This level can exist in urine for an extended period of time after ingestion without causing any level of intoxication.

PAJ is opposed to the bill as written. At this writing, most of the labor union have also indicated opposition.

### **WHITMOYER Bill Fails to advance**

The legislature has failed to yet pass the long-awaited attempt to remedy the change to subrogation wrought by the *Whitmoyer* case. House Bill 922, which would reinstate

subrogation for future medical expenses, has not yet made it to the floor for the full body vote. PAJ lobbyists regularly report on the status of the legislation and their efforts to stave off a bill which harms our clients. Consider this column's information as validation for your dues.

*By: Tom Baumann, Esq. of*

*Abes Baumann, P.C.*

*tcb@abesbaumann.com*



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- Six (6) credits must be live-online or in-person/classroom
- Up to (6) credits may be completed through pre-recorded online courses
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**Hartford Fire Insurance Company v. Davis 2022 PA Super 85 (Pa. Super. May 9, 2022)****Superior Court reverses summary judgment in favor of UIM carrier for trial court's failure to give full effect to all terms of the policy in place on the date of loss**

This case arose out of a September 9, 2005, motor vehicle accident where Plaintiff, Charles Davis was injured while operating a vehicle owned by his employer. The vehicle operated by the Plaintiff was insured by Hartford under a commercial automobile insurance policy. During the annual renewals of the policy up through the time of the Plaintiff's accident, it had been the practice of the insurance company to obtain a UIM coverage rejection form for each policy term renewal. However, Hartford failed to obtain a UIM coverage rejection form for the 2005-2006 policy period. At the time of the accident, a Pennsylvania UIM coverage endorsement was appended to the 2005-2006 policy although the policy did not specify any limit of UIM coverage for Pennsylvania.

The trial court granted Hartford's motion for summary judgment finding that the UIM policy issued for the year of the accident did not specify a limit of UIM coverage for Pennsylvania and therefore, the coverage limit was \$0 and the Pennsylvania UIM endorsement attached to the policy was a nullity. The trial court further held that Plaintiff's employer had effectively waived UIM coverage in Pennsylvania by executing a rejection of UIM coverage in 2003.

On appeal, the Superior Court reversed the decision of the trial court. The Court found that the policy at issue expressly provided for UIM coverage at the time of the accident because the 2005-2006 policy issued by Hartford contained a UIM Coverage Endorsement. Additionally, the UIM Coverage Endorsement was referenced on both the Declarations Pages and in the List of Policy Provisions and Endorsements.

The Court held that Section 1731 of the PA MVFRL mandates that an insurance company issuing a policy in Pennsylvania must provide UM/UIM coverage equal to the bodily injury liability coverage, unless the insured validly rejects UM/UIM coverage or validly requests lower limits of coverage pursuant to section 1734. The insurance policy issued by Hartford to Plaintiff's

employer on the date of loss provided \$2,000,000.00 in liability coverage. Thus, absent a valid and specific rejection for the 2005-2006 policy term, the Pennsylvania UIM coverage limit was also \$2,000,000.00.

Contrary to the trial court's findings, the Superior Court found no valid and specific rejection of the UIM coverage for the policy in effect at the time of the accident. The Court rejected Hartford's argument that the 2005-2006 UIM Coverage Endorsement was issued as the result of a clerical error and therefore the rejection of UIM coverage form executed by Plaintiff's Employer in 2003 was applicable to the 2005-2006 policy.

The Court found it immaterial that the policy issued by Hartford for the 2005-2006 term did not specify a limit of UIM coverage for Pennsylvania. Under the MVFRL, liability and UIM coverages must be co-extensive unless rejected in accordance with Subsection 1731. As there was no valid rejection of UIM coverage form ever executed for the 2005-2006 policy term, by operation of law, the policy at issue was required to provide UIM coverage in an amount equal to the liability coverage of that policy, which was \$2,000,000.00.

The Superior Court found that the trial court failed to give full effect to all the terms of the 2005-2006 policy, namely, the UIM Coverage Endorsement. Accordingly, the Court held that the trial court erred in granting summary judgment in favor of Hartford. That Order was vacated and the case was remanded for proceedings consistent with the Superior Court's opinion.

**Getting v. Mark Sales & Leasing, Inc., No. 348 MDA 2021 (Pa. Super. April 7, 2022)*****Superior Court determines that Court shutdowns due to COVID-19 did not stop the calculation of delay damages owed by Defendants during that time frame***

In this personal injury action, Defendants, Mark Sales & Leasing, Inc. and Lemuel Scott Barger appealed from the judgment entered after a jury awarded Plaintiffs, Harold and Veronica Getting \$2,047,217.51 in damages. Among other issues on appeal, the Defendants claimed that they should not owe the Plaintiffs, delay damages for the length of time that the COVID-19 pandemic shuttered Pennsylvania courts.

The Court examined Pa. R.C.P. 238 and determined that while the award for delay of time under this Rule may be in the nature of interest, in reality, it is merely an

extension of the compensatory damages necessary to make a plaintiff whole. The Court found that COVID-19 and the judicial emergency it created did not diminish the rights of plaintiffs to be made whole, nor did they prohibit defendants from engaging in settlement negotiations or making reasonable offers to help alleviate court dockets. The Superior Court did not read the March 18, 2020, Emergency Order of the Supreme Court as permitting tortfeasors to reap unjust windfalls from a five-month delay that was clearly beyond the control of their victims.

In this case, the closure of the trial court did not alter the indisputable fact that the Defendants retained and had unfettered use of the Plaintiffs' money throughout the judicial emergency. As such, the Court found that the Defendants must compensate the Plaintiffs for using their money during the judicial emergency to the fullest extent of Pa. R.C.P. 238. The Superior Court agreed with the trial court's finding that delay damages under Rule 238 continued to run during the 2020 judicial emergency and found the Defendants arguments on this appellate issue meritless.

**Loftus v. Decker 2022 PA Super 44 (Pa. Super. March 10, 2022)**

***Superior Court holds that a Worker's Compensation Insurance Carrier does not have the right to force an injured Plaintiff to take action against a tortfeasor to recover the carrier's lien***

Eastern Alliance Insurance Group, a workers' compensation carrier ("Comp Carrier"), appealed from an order of the Court of Common Pleas of Indiana County denying its petition to intervene in an action commenced by a praecipe for writ of summons filed by Michele and Richard Loftus ("Plaintiffs") against Katrina Decker. The Comp Carrier sought to intervene and file a complaint on behalf of Plaintiffs to seek damages out of which it could satisfy its statutory lien for compensation it paid on behalf of the employer.

On appeal, the Superior Court first found that the trial court had not abused its discretion in denying intervention until after the Plaintiffs had filed their Complaint. The Court found that until a plaintiff actually files a complaint setting forth the cause of action it wants to plead, the intervention analysis required by Pa. R.C.P. 2327-2328 is not possible, which would make the act of filing an intervention petition prohibited.

After deciding the procedural issue, the Superior Court

turned its analysis to whether the Comp Carrier was entitled to intervention even if the petition was procedurally sound and all the facts alleged were accepted as true. Using the recent Supreme Court decisions in *Domtar* and *Kamara*, the Superior Court made the following findings:

1. Section 319 of the Workers' Compensation Act only permits an employee to bring an action against a third-party tortfeasor;
2. under Section 319, the employee is under no obligation to protect an employer's lien rights;
3. the employer cannot bring a civil action in its own name or "in the name of the employee" to satisfy its statutory lien unless the employee "voluntarily" participates in the action; and
4. an employer may be able to have an employee's rights against a third party as part of a compromise and release agreement to settle a workers' compensation claim.

Before the Superior Court, the Comp Carrier argued that it could intervene and file a complaint because it was not independently seeking to recover its liens but was just intervening in the existing action commenced by the Plaintiff's praecipe for writ of summons. The Superior Court determined that by making this argument, the Comp Carrier was attempting to conceal that it was using the intervention process to make an impermissible attempt to seize the litigation and to independently bring an action to recover its own lien. The Court found that the Comp Carrier's argument was directly contrary to the holdings in both *Domtar* and *Kamara*.

The Superior Court determined that the Comp Carrier did not have a legally enforceable interest to file on its own behalf or otherwise force an employee to file a complaint against a third-party tortfeasor to protect its subrogation rights. As such, the Superior Court quashed the Comp Carrier's appeal.

By: Shawn Kressley, Esq.,  
of DelVecchio & Miller  
shawn@dmlawpgh.com





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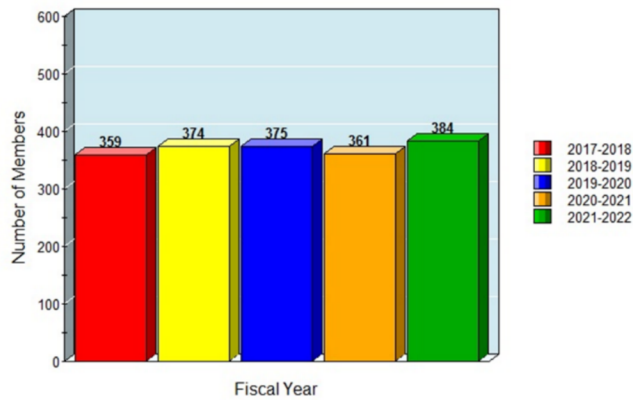
**PAINANDSPINESPECIALISTS.COM**

## 2021-22 WPTLA Annual Report

### Key Indicators

#### 2021-22 Membership UP

#### Membership by Year

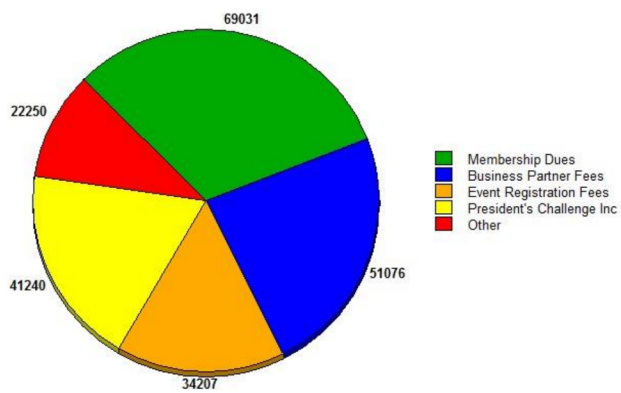


### FINANCES

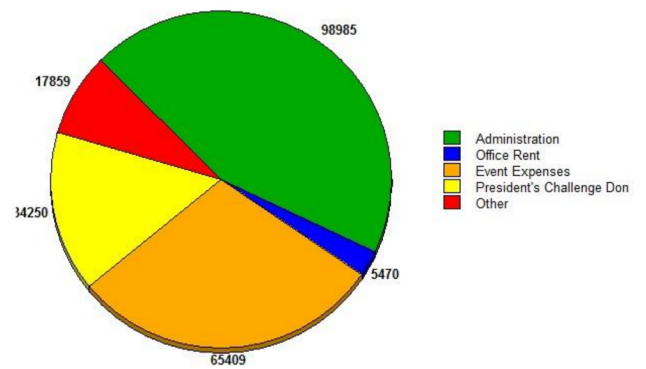
Total Revenue  
projected through 6/30/22 = \$217,804

Total Expenses  
projected through 6/30/22 = 221,973

#### Income



#### Expenses





## Networking Events

Kickoff Event – 8/31/21-9/1/21



Beaver Dinner – 10/18/21



*2020 Champion of Justice Lou Tarasi*

Junior Member Meet & Greet – 1/26/22



3/23/22

Washington County Dinner & CLE –



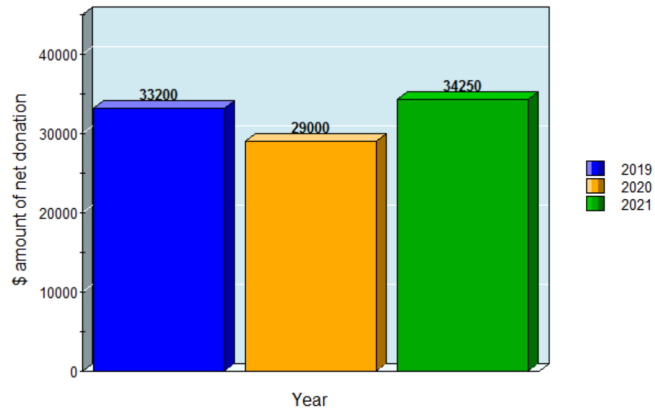
Membership Dinner – 4/19/22



## Community Involvement

## President's Challenge 5K

## President's Challenge 5K Net Donations



*At left are members of WPTLA that attended the 5K event in Oct 2021.*

*At right are members of the Steelwheelers that attended and participated in the 5K event in Oct 2021 plus members of the 5K committee.*



## 2022 High School Scholarship Essay Contest

Does the use of physical force in an unsuccessful effort to detain a suspect by law enforcement result in a "seizure" under the Fourth Amendment?

The essay should 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.

It should be understood that this essay is not an essay on whether the use of force is justified, civil justice reform, the Black Lives Matter movement, the defund the police movement, or blue lives matter movement.

## Winning Essays and their Schools:

Cole Gross, of Bedford HS

Hunter Rheinfrank, of Mt Lebanon HS

Samantha Podnar, of North Allegheny  
HS

## Daniel M. Berger Community Service Award



presented to Cindy Miklos, Business Partner with Planet Depos,  
for her work with JDRF.

## Holiday Donation Project



PRESENTS FOR PATIENTS® was founded in 1984 by St. Barnabas Health System, with the goal to help patients cope with the loneliness they often feel during the holidays by providing them with a gift and visitor. The secondary goal was to provide members of the public with an opportunity to visit their local nursing homes to witness the acts of goodwill and compassion that occur every day.

This year, due to COVID, facilities have strict no visitor guidelines in place. But you can help us spread Christmas cheer by gifting a warm fleece blanket to the patients who call St. Barnabas home by donating \$30.

**Total Donations = \$2,696.88**



### Signature Events

2022 Judiciary Dinner - May 6, 2022



*Above are WPTLA members and spouses that attended the Judiciary Dinner.*

2021 Comeback Award Dinner – November 10, 2021  
Comeback Awardees David & Melanie Vadzemnieks

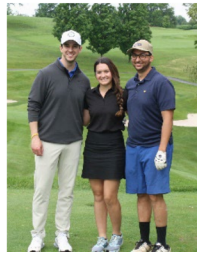


*Pictured above is Melanie Vadzemnieks with her attorney, member Tim Riley*

David was travelling to work at about 6:00 am in June, 2011 when he was catastrophically injured in a motor vehicle collision with a driver who had fallen asleep at the wheel after taking prescription medication for back pain and alcohol. The impact propelled David's vehicle across the median on Interstate 90 and into the path of an oncoming semi which struck his car on the driver's side. At that time, he sustained a severe brain injury as well as numerous severe orthopedic and internal injuries. At the time of the crash David and his wife Melanie owned a home and small farm and had 2 children, then 13 and 10, whom Melanie home-schooled. Due to the nature of his injuries, he must reside in a facility where he can receive the level of care he requires. Melanie had to sell the family home and farm, and relocate her children to a home she could more easily care for in a school district where her children could be enrolled, as she would now need to obtain employment to support the family. With unfathomable harm to David, the upheaval and changes in her family's life and the loss of the dreams she held for their futures, Melanie made a statement during the sentencing phase of the criminal trial for the woman that had caused the accident. In it, she forgave the woman.



## Golf Outing – May 27, 2022



*Pictured above are WPTLA members that participate in the Golf Outing.*

## CLEs

*Two Counties Two Verdicts: More in the War Stories Series\** featuring WPTLA members Josh Geist and Doug Price. Sept 1, 2021 – live-online and in-person program

*How a Single Cyber Attack Can Put Your Firm Out of Business and the Five Steps to Protect Yourself\** featuring Tom Kirkham, founder and CEO of IronTech Security. Dec 1, 2021 - live-online program

*Opportunities for Justice in the Pennsylvania Supreme Court* featuring WPTLA member Mark Homyak Mar 23, 2022 – in-person program

*Ethics Update with Insight into the Disciplinary Board and How It Works* featuring WPTLA members Jack Goodrich and Larry Kelly. May 27, 2022 – in-person program

*Death/Injury Caused by Fire: Successfully Presenting Your Case \** featuring Marc Fennel, of MKA International, Inc. Jun 22, 2022 – live-online

\* These programs are available online to purchase for pre-recorded online course credit at [www.cle.wptla.org/](http://www.cle.wptla.org/)



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March 21, 2022

Mark E. Milsop, Esquire

C/O WPTLA

909 Mt Royal Boulevard – Suite 102

Pittsburgh, PA15223

Dear Mark:

On behalf of the Steelwheelers, I wish to thank you and the members of the Western Pennsylvania Trial Lawyers Association for your support of the Steelwheelers through the President's Challenge 5K over the past 21 years. It is incredible that after the past two years of insanity the run was the most successful it has ever been. This is truly a testament to the efforts of Chad McMillen and the President's Challenge Committee, Laurie & Lorraine and to the generosity of the members of the WPTLA.

The past two years have been difficult from a competition standpoint but our teams have finally been able to experience the seasons they have been patiently awaiting. The WPTLA's support has been vital to our existence and our ability to provide opportunities for athletes with disabilities by helping to fund competition and equipment for the wheelchair basketball, wheelchair rugby and handcycling teams.

The rugby and basketball teams just finished full seasons for the first time in 2 years and the handcyclers are preparing for the Pittsburgh Marathon. We were also able to host the 18th Annual Steel City Slam Quad Rugby Tournament in Slippery Rock after a "Covid break", attracting 7 teams and nearly 50 student volunteers and providing the only chance for friends and families to see the team play locally. This tournament is a direct result of the support of the WPTLA and it would not have happened without it! In February the basketball team finished 2nd in a highly competitive tournament in Vegas.

The members of the Steelwheelers thank you for your support and for continuing to be the life blood of the Steelwheelers through the President's Challenge 5K.

With great appreciation,

The Pittsburgh Steelwheelers

CC: Chad F. McMillen, Esquire



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TRIVIA CONTESTEnter for a Chance to Win a \$100 Visa Gift CardTrivia Question #32

**The final climactic scene of “The Good, the Bad, and the Ugly” features *this* specific event, which was also the subject of game theory, social behavior, and statistical logic books written by Martin Shubik and Richard Epstein.**

Please submit all responses to Laurie at [admin@wptla.org](mailto:admin@wptla.org) with “Trivia Question” in the subject line. Responses must be received by September 9, 2022. Prize for this contest is a \$100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #32 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](mailto: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](mailto:er@ainsmanlevine.com).

Answer to Trivia Question #31 – **If you own this type of pet in Switzerland, you are legally required to own two of them, as they are deemed to be social animals and owning just one is considered animal abuse.**

**Answer: Guinea pigs.**

Congratulations to Paige Tamecki, of Edgar Snyder & Associates, on being the recipient of a \$100 Visa gift card!

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*In photo #1, from L to R: Judiciary Dinner Chairs James Tallman and Katie Killion*

*In photo #2, from L to R: Magan Luisi and Past President Steve Moschetta*

*In photo #3, from L to R: Past President Paul Lagnese, Past President Veronica Richards and Ken Arnstein*

*In photo #4, from L to R: Sara Klein, The Honorable Arnie Klein, Kathleen Marmo and The Honorable Michael Marmo, Judiciary Honoree*

*In photo #5, from L to R: President's Club Member Steve Barth and The Honorable Michael McCarthy*

*In photo #6, from L to R: The Honorable Beth Lazzara and Past President Bill Goodrich*

*In photo #7, from L to R: 2021 Daniel M. Berger Community Service Award Winner John Gismondi and Daniel M. Berger Community Service Award Chair Paul Lagnese*

*In photo #8, from L to R: Past President Jerry Meyers and The Honorable Thomas Doerr, Judicial Honoree*





Name: Timothy Grant Wojton, Esq.

Firm: Scanlon & Wojton, LLC

Law School: Duquesne University

Year Graduated: 2009

Special area of practice/interest.

if any: Medical Malpractice / Personal Injury



Tell us something about your practice that we might not know:

My father was a sole practitioner and trial attorney from about 1978 until his untimely death in 2017. Most of my work ethic, approach to the practice, and even small, funny, idiosyncratic things come from his mentorship and my five years working with him before branching out in 2014 to join my good friend and classmate, Matthew J. Scanlon. My father served as sort of wise old sage to me and Matt prior to his passing, and we still, to this day, often ask ourselves, "what would the old man do?"

Most memorable court moment: I served second-chair on a contentious defamation case in Butler County between two County Commissioners in 2016. My father and I represented the defendant. We were thrilled when the jury rendered a verdict in our client's favor. However, when the judge polled the jury, five (5) of the jurors said that the verdict was *NOT their verdict!* We, the judge, and opposing counsel decided the only solution was to declare a mistrial.

Most embarrassing (but printable) court moment: I remember just passing the Bar in 2009, and a week later presenting a bread-and-butter, *uncontested rescheduling* motion on a case I had been working on for over a year. The judge casually asked: "so, what's this case about?" At which point I froze, deer in the headlights, unable to muster a response. Mind completely

blank. The Judge looked at me with a wry smile, lifted her brow, and said, "really?"

Most memorable WPTLA moment: Have yet to experience that. Looking forward to it.

Happiest/Proudest moment as a lawyer: Trying my first medical malpractice trial in January 2020. It was a 5-day jury trial on a claim involving an 85-yr old woman who suffered sigmoid diverticulitis, resulting in perforation and sepsis. Defense offered zero until the morning of jury selection, at which point they begrudgingly offered \$10,000. We ended up winning a \$700,000 verdict.

Best Virtue: Doubt. Always playing Devil's Advocate and second-guessing my own case.

Secret Vice: Chocolate and other sweets.

People might be surprised to know that: My wife, Magdalena, is from Poland and she and our kids and I visit her family in her hometown of Ślesin every year. I'm still trying to learn Polish. "To jest bardzo trudne" (translation: it's very difficult!)

Favorite movie: There are so many. How about top three? "Sneakers," "The Natural," and "Rocky IV"

Last book read for pleasure, not as research for a brief or opening/closing: The Point of it All, by Charles Krauthammer

My refrigerator always contains: Kielbasa

My favorite beverage is: Coke Zero

My favorite restaurant is: Arlecchino Ristorante

If I wasn't a lawyer, I'd be: an assistant to my wife's photography business! Check her out [atmwpicture.com](http://atmwpicture.com)!

## MEMBERSHIP RENEWAL NOW AVAILABLE

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## *Through the Grapevine....*

Rudberg Law Offices has merged with Edgar Snyder & Associates, and those attorneys can be contacted at US Steel Tower, 600 Grant St, 10th Fl, Pittsburgh 15219. [www.edgarsnyder.com](http://www.edgarsnyder.com)

Congratulations to **Board of Governors Member Joe Froetschel** on being elected Chair and **President's Club Member Jonathan Stewart** on being elected Treasurer of the Allegheny County Bar Association Civil Litigation Section.

Kudos to **President's Club Member Julian Gray** on being appointed to serve on the Board of Directors of the National Elder Law Foundation.

**Eve Elsen** can now be found at Morgan & Morgan, P.A., 603 Stanwix St, Ste 1825, Pittsburgh 15222. P: 877-378-3148 Email: [eelsen@forthepeople.com](mailto:eelsen@forthepeople.com)

**Past President Paul Lagnese** has changed the name of his firm to Berger Lagnese & Paul.

**Joyce Novotny-Prettiman's** and **Nicholas Kennedy's** new firm name is Quatrini Law Group.

**Carmen Nocera** has joined Ainsman Levine, and can be reached at 412-338-9030 or [cn@ainsmanlevine.com](mailto:cn@ainsmanlevine.com)

Warmest congratulations to **Board of Governors Member Nick Katko**, on the birth of his daughter Claire. Everyone is healthy, happy, and sleep deprived!