THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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PENNSYLVANIA LAW VS. ECONOMICS

A colleague of mine recounted an experience he had a few years ago at a conference of forensic economists. When introduced as being from Pennsylvania to the group at his table, a remark was made, "*ah, so you are from that state that does not believe in economics?*" The context of this remark was referring to Pennsylvania's adherence to the principle of total-offset as per the 1982 decision in *Kaczkowski v. Bolubasz*. Indeed, this mandate does not have economic support, and, ironically enough, it is not alone in the annals of Pennsylvania law. Nonetheless, when the law mandates a particular approach, one that might stray from an economist's underlying opinion, practitioners should heed caution that such circumstances do not present an opportunity for an opposing economist or cross-examining litigator to gain ground. In the case of Law vs. Economics, Law must prevail.

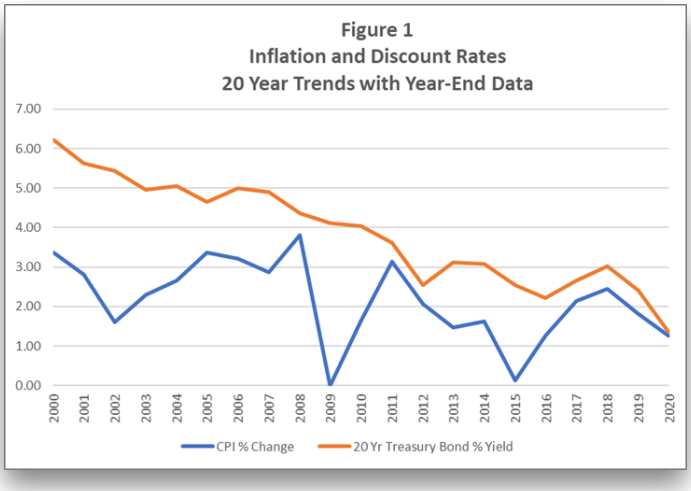
This paper explores four examples of situations where Pennsylvania law and economic thought may conflict. In a litigation setting where two economic approaches are pitted against one another, the one that adheres to the governing mandates is at risk of a superficial appearance of fault or inaccuracy absent a thorough understanding, among all parties involved, of the factors that are in play.

Total Offset: The concept of "total offset" refers to the situation where the growth rates and discount rates in a calculation of present value are equal. In a basic analysis incorporating only inflationary effects, future values are grown, year-over-year, by a projected inflation rate, and then reduced to present value by incorporating an equal, or offsetting, discount rate. When the growth rate and discount rate are the same, *total offset* prevails and renders useless the exercise of the present value calculation. In other words, the current annual rate of one's wages, benefits, pension amounts, or mitigating income is simply multiplied by the future number of years entailed to obtain a value for the future economic loss.

However, virtually no forensic economist, or any other expert in financial matters, would agree with the proposition that future inflation rates will always equal future discount rates, i.e., the rates of return on future "safe and secure" investments. By way of an example, Figure 1, below, shows the 20-year trends of two commonly cited proxies for inflation and discount rates: the Consumer Price Index (CPI) and the yield on a 20-Year United States Treasury Bond.

One can see from Figure 1 that the historical trends of these two measures are far from *offsetting* one another. In fact, there are multiple periods of time where the

(*Continued on Page 3)*



PRESIDENT'S MESSAGE

As I write this, we approach the anniversary of the arrival of COVID-19 in Pennsylvania. For many, the last year has been defined by retraction, isolation and uncertainty and, while hope for a return to normalcy grows with every passing day, the immediate future looks a whole lot like the last year. But here at the Western Pennsylvania Trial Lawyers Association, the last year has been marked by innovation, commitment and generosity, all hallmarks of our organization and trial lawyers more generally.

Though we have been unable to gather together in person, your board of directors and executive director have utilized technology not merely to meet but to provide top notch education and outreach services. WPTLA seminars bring unmatched CLE content in digestible doses on a regular basis.Business partners are able to reach our members and demonstrate how they can improve the quality of services we deliver to our clients while increasing our efficiency and enhancing our work lives.And our connection to and collaboration with both the state and national trial lawyer organizations has never been stronger.

Important events, like our annual President's Challenge 5K supporting the Pittsburgh Steelwheelers, were reimagined to thrive in a virtual environment, allowing us to continue our strong record of support for this worthy organization. WPTLA responded to the crisis of Western Pennsylvania's poor in the COVID era by supporting foodbanks, including the Greater Pittsburgh Foodbank, the Greater Washington County Foodbank, the Fayette County Community Action Foodbank, the Indiana County Community Action Program, the Armstrong County Community Action Agency, Food for Families in Johnstown and the Corner Cupboard Food Bank in Waynesburg.

On the legislative front and despite the personal access problems of this era, WPTLA and its members have used their resources to educate Pennsylvania's legislators about the pernicious risks of immunity bills and other assaults on the framework of our civil justice system, including the threat by some to unseat sitting appellate judges and replace them with regional representatives.

Socially, we have provided virtual beer tasting and wine education events that have proven popular and fun.

And perhaps most importantly, all of you have not only stayed with us but you have showed up, whether it is attending a virtual CLE, contributing to a signature fundraiser or reaching out to your local legislative delegation, our members have demonstrated their commitment to and support of WPTLA and its mission.

Trial lawyers care. Trial lawyers take care of their clients and they support one another. Trial lawyers understand that we are a part of a community and they make the effort to be relevant and positive.Trial lawyers are who we are and why we exist and here at WPTLA we are so grateful for all of you.

I hope very much to see all of you in person again soon. Until then, stay involved, stay engaged and stay with us!

By: Eric J. Purchase, Esq. of

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PLAINTIFFS-ONLY DATABASE

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

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

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

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difference exceeds 100% (i.e., the Treasury yield more than doubles the inflation rate).

One can also observe in Figure 1 that these two measures do indeed appear to be approaching equivalency in current times. However, a closer look, one using monthly data over the past three years, illustrates that even when the long-term annual trends appear to justify *total offset*, the discrepancies between inflation and interest rates remain. Figure 2, below, zooms-in to the 2018-2020 time period of Figure 1.

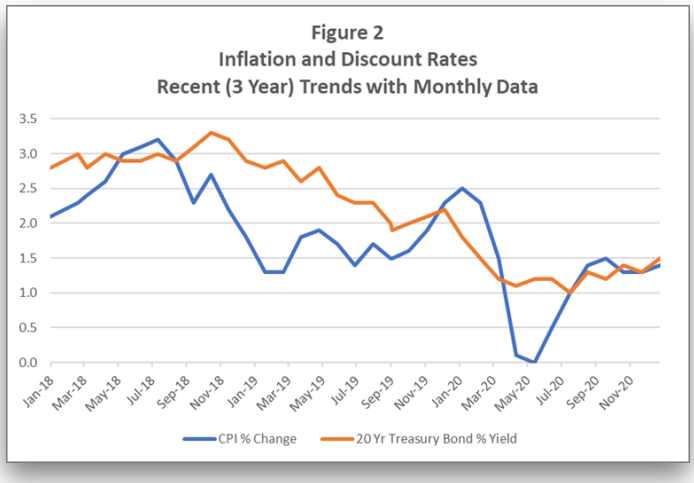

Figure 2 shows that the disparity between the chosen representatives of inflation and discount rates, the CPI and the yield on a 20-Year Treasury Bond, can remain significant when more acute data is analyzed. Figure 2 also illustrates another more recent phenomenon: time periods when inflation exceeds the interest rate. This phenomenon is exaggerated by long-term forecasts of inflation by government agencies such as the Congressional Budget Office and the Social Security Administration which exceed 2%.

Despite the foregoing analysis illustrating that rates of inflation and rates of interest can diverge to significant degrees, Pennsylvania law has long mandated that economists put forth the *total offset* approach when valuing future economic loss. This mandate was established in 1980 with the case of *Kaczkowski v. Bolubasz* (491 Pa. 561; 421 A.2d 1027; 1980 Pa.), and despite its lack of real-world backing from economic theory or data, it remains in effect today.

In applying *Kaczkowski's* total offset provisions, it must be understood that it is not eliminating the present value calculation, it is merely considering its effects moot on current values. In other words, implied in the implementation of total offset is the projection that future values will indeed grow, and thus need a year-over-year growth rate incorporated into the analysis, but the legally required growth rate just so happens to exactly equal the legally required discount rate.

Failing to appreciate this implied notion can cause misinterpretations of the conclusions put forth by forensic economists. A brief example - in a recent economic loss report of a young man who had sustained cognitive injuries, a medical narrative report indicated that he could indeed continue to work at his current and pre-incident job, but would not have the capacity to advance beyond his current level (which entailed mostly unskilled or semi-skilled labor). The Plaintiff's economic report thus used the young man's current wage rate as his mitigating income and projected the current wage rate over the remainder of his worklife with no wage growth, citing the Kaczkowski case and its total offset provisions. Recall that implied in this projection is the assumption that the wage rate will indeed grow by an inflationary measure, but his future wages will not benefit *(Continued on Page 4)*

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from job advancements keeping consistent with the aforementioned medical opinion. Subsequently, in a rebuttal economic loss report, the opposing economist took no issue with the medical opinion that the young man would be unlikely to advance in his job, but criticized the Plaintiff's economic report for failing to incorporate future mitigating wage growth and thus *grossly* overstating the economic loss. This rebuttal report clearly failed to appreciate the implied assumptions put forth in the application of the Kaczkowski decision and its total offset provisions. Absent a thorough understanding of Kaczkowski and the implied assumptions contained therein, such a misguided opinion and projection of economic loss could prevail.

Valuing the Future Costs of Life Care Plans: In 2002 via the enactment of the MCARE Act, Pennsylvania law provided an exception to the total offset provisions of *Kaczkowski v. Bolubasz* by requiring, in Section 510, that:

> "*Future damages for loss of earnings or earning capacity in a medical professional liability action shall be reduced to present value based upon the return that the claimant can earn on a reasonably secure fixed income investment.*"

However, in Section 509 the MCARE Act took quite a different approach to how future medical costs shall be paid:

> "*future damages for medical and other related expenses shall be paid as periodic payments … The trier of fact may vary the amount of periodic payments for future damages … from year to year for the expected life of the claimant …The trier of fact may incorporate into any future medical expense award adjustments to account for reasonably anticipated inflation and medical care improvements as presented by competent evidence.*"

The MCARE Act continues, in Section 509, to require that such future damages "*be paid in the years that the trier of fact finds they will accrue*." Thus, the aggregate effect of these MCARE provisions requires that life care plans and/or economic reports value future medical care needs in ***future*** dollars incorporating projected medical inflation and ***not*** reduce such costs to present value. To reduce such an economic estimate to present value would put forth the assumption that a lump sum for future medical costs is to be included in the Plaintiff's award. Per the above noted MCARE provisions, however, no such lump sum exists, and therefore no money is available to invest at the discount rate to make the Plaintiff whole for the future costs. The costs are paid in the future, and the Plaintiff has one opportunity to establish such future costs. A failure to fully incorporate future growth of such costs, or an attempt to reduce them to present value, would result in the Plaintiff not being made whole.

The party responsible for paying the future medical costs is required to do so via periodic future payments. The plaintiff does not receive a present value lump sum, and it should therefore not be a consideration in valuing an award to make the Plaintiff whole. Inclusion of present value calculations in the context of future medical care needs in a case governed by the MCARE Act serves to confuse the trier-of-fact and conflate the tasks of valuing an award (potentially) due the Plaintiff and how such future obligations are to be funded. How a responsible party funds their future obligation stemming from this MCARE framework is not a decision for the trier-of-fact and therefore should not be a consideration from the perspective of valuing economic loss.

Pennsylvania law, via the above noted MCARE provisions, precludes a present value analysis when valuing future medical care needs. Such costs are to be measured in future values, which can be a significant increase over a present value, especially when dealing with life care plans that extend many years into the future. Although this notion is quite contrary to traditional economic theory and analysis, it is a requirement of Pennsylvania law and therefore should not be used as one of the arrows in an economist's quiver. An economic report that presents inflation adjusted future values for medical costs and equipment, without taking the traditional next step of reducing such figures to present value, can result in some daunting valuations. However, such an approach is only following the mandates of Pennsylvania law and providing a framework for making the Plaintiff whole via the payment procedures required by the MCARE Act (i.e., future periodic payments over time and not a present value lump sum). Absent a thorough understanding of this MCARE framework, misguided economic criticisms which attempt to paint this approach as unnecessarily overstating the award have the potential to prevail.

Components of the Personal Maintenance Deduction: Another area of Pennsylvania law that can be considered inconsistent with traditional economic principles lies in the application of the personal maintenance deduction. While many states take a rather expansive view on this measure applied in death cases, some even using the term "personal consumption", Pennsylvania has maintained a rather restrictive definition – restrictive enough, in fact, that it gives pause to many economists calculating such measures, or simply causes them to stray from such restrictive mandates. *(Continued on Page 5)*

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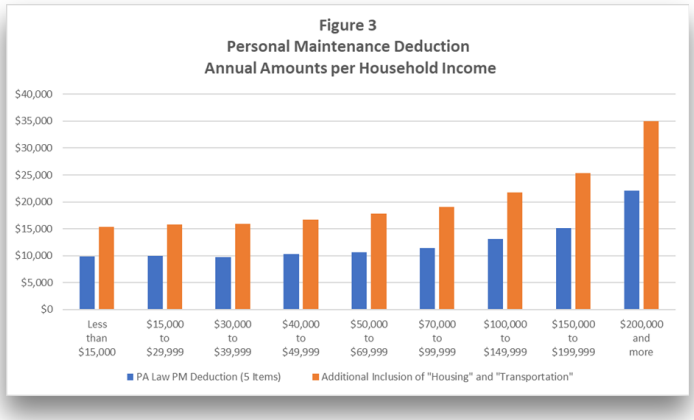
The rationale behind the personal maintenance deduction is that the decedent was an economic unit capable of producing outputs (i.e., earnings) but such outputs require certain inputs, or production costs, to keep the earning power maintained. Thus, the cost of personal maintenance does not include all expenditures that would have been made by the decedent – if it did, it would limit the recoverable amount to merely the *savings* that the decent would have accumulated. Nor does the personal maintenance deduction limit the costs to those of mere subsistence. Pennsylvania law specifically defines the components of this deduction, and such components should be recognized, with no more and no less, by the economist calculating net lost earnings.

The Pennsylvania Supreme Court stated, in *Incollingo v. Ewing*, 282 A.2d 206, 229 (Pa. 1971), that "*the economic loss to a decedent's estate should be measured by decedent's total estimated future earning power less his estimated cost of personal maintenance*". Those expenses have been defined, in *McClinton v. White*, 497 Pa. 610, 617, 444 A.2d 85, 88 (1982), as "*that necessary and economical sum which a decedent would be expected to spend, based upon his station in life, for food, clothing, shelter, medical attention and some recreation*." With this clear and concise list, Pennsylvania law defines the components of the personal maintenance deduction. How well this list fits the traditional analyses of economists is seemingly irrelevant – the law is the law.

For the purposes of this analysis, I will present two examples of potential omissions from Pennsylvania law's definition of the inputs required of the personal economic unit to create outputs (i.e., personal maintenance). The first is transportation. It logically flows that without basic transportation one cannot get to work, nor get home from work, and therefore cannot maintain gainful employment. The second is the distinction between "shelter" and "housing". In adopting the aforementioned *McClinton v. White* case, the Pennsylvania Supreme Court specifically used the term "shelter" as opposed to "housing". This distinction may seem like pure semantics, but when the valuation aspects of personal maintenance are applied, its significance becomes apparent.

A commonly used resource to value the components of the personal maintenance deduction is a publication by the Bureau of Labor Statistics, the *Consumer Expenditure Survey*. This publication presents an annual set of tables which provide data on expenditures, income, and demographic characteristics of consumers in the United States, and is the only Federal household survey to provide information on the complete range of consumers' expenditures and incomes. Using this Survey, one can determine the annual expenditures that the average American spends on the personal maintenance items specified above (i.e., food, clothing, shelter, medical attention, and some recreation). The Survey tables are presented in a variety of categories such as age, size of household, highest education of a household member, household income before taxes, etc.

The following analysis uses the Consumer Expenditure Survey 2020 publication of *Table 1203. Income before taxes: Annual expenditure means, shares, standard errors, and coefficients of variation* to value the five components of the personal maintenance deduction per Pennsylvania law, and the aforementioned omissions which result from confining personal maintenance to just those components. The value of the first exemplar omission, transportation, ranges from an annual value of approximately $4,000 for a household making less than $15,000, to over $20,000 for a household making over $200,000. The second omission results from the distinction between "shelter" and "housing". The former is a sub-set of the latter, which includes various other sub-sets such as utilities and services, household operations, and furnishings and equipment. Using a mid-range household income of $50,000 to $70,000, the annual expenditure for shelter is $10,649, whereas the expenditure for housing is $18,274 – an increase of 72% over the restrictive mandate of Pennsylvania law. Figure 3, below, shows the complete range, across all household income levels, of the difference between the annual value of the personal maintenance deduction per the five items of Pennsylvania law, and the value including the transportation and housing omissions as described herein.



To apply these differences to an exemplar case, assume a 45 year-old Plaintiff decedent who was making $50,000 per year and had a worklife expectancy of 20 years from the time of death. Also assume, under this example, that the case was not brought under MCARE and thus total-offset would apply. The annual difference with the inclusion of "transportation" and "housing" into the personal maintenance deduction is roughly $18,000 (a transportation value of $10,377 *(Continued pn Page 6)*

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and a housing vs. shelter discrepancy of $7,625), or $360,000 when measured over the remaining worklife.

Pennsylvania law's restrictive approach to measuring the components of the personal maintenance deduction can result in net lost earning capacity valuations that appear to be overstated in the presence of a competing and potentially misguided economic analysis. However, Pennsylvania law is clear and concise in its delineation of the components of the personal maintenance deduction. An analysis that puts forth a more expansive approach, one that includes additional components seemingly within the stated rationale for the deduction (i.e., the inputs necessary for the Plaintiff to continue to produce economic outputs) runs astray of Pennsylvania law. Absent a thorough understanding of Pennsylvania law's restrictive approach to valuing the personal maintenance deduction, a litigator may find themselves subject to a competing argument that may make good economic sense, but is nonetheless directly in conflict with the mandates of the law.

The Personal Maintenance Deduction under MCARE: The final section of this series deals, once again, with Pennsylvania law's mandates pertaining to the personal maintenance deduction. This time, instead of Pennsylvania law delineating its components, it precludes it altogether when dealing with future lost earnings in cases brought under the MCARE Act.

The Pennsylvania Supreme Court states as follows in its publication of the *Pennsylvania Suggested Standard Civil Jury Instructions* (Pa. SSJI (Civ) 7.220 Wrongful Death and Survival Actions, Pennsylvania Bar Institute PBI Press, © 2018) in the accompanying Subcommittee Note titled "Wrongful Death and Survival under the MCARE Act":

> "*Damages for future lost earnings should not be reduced for the cost of maintenance in an action governed by the MCARE Act ...*"
>
> *"The MCARE Act may conflict with the Wrongful Death and Survival Acts, as interpreted by common law, because the MCARE Act requires a reduction to present value and the common law clearly rejects this method of calculating lost future earnings and instead adopts the total offset method. Kaczkowski v. Bolubasz, 421 A.2d 1027, 1039-40 (Pa. 1980)."*
>
> *"Thus, the MCARE Act clearly trumps the Wrongful Death and Survival Acts on the issue of reducing lost future earnings to present value.* ***This court should not both reduce the earnings to present value and deduct for personal maintenance expenses****."*

The foregoing mandate appears to be unequivocal, speaking directly to the process of calculating economic loss and providing clear and concise directives to the practitioner doing so. The fact that this mandate is not supported by any form of economic principles or theory should be irrelevant. One does not need to consider themselves an expert in the fields of economics and/or financial matters to appreciate the obvious disconnect between reducing future earnings to present value and applying the personal maintenance deduction. The two concepts are clearly unrelated. The former deals with a deduction to equate current lump-sum Dollars to a future income stream via the use of investments and interest rates, while the latter deals with a deduction for an individual's consumption and spending. True, they do have in common the fact that they are both deductions that work to reduce a calculation of future economic loss on behalf of a Plaintiff's claim, but no other form of shared economic parameters exists between these two concepts.

Not only are these two measures disconnected from a conceptual standpoint, but they can also bear quite a divergence from a monetary standpoint (thereby eliminating any reasonable basis to assume that they offset one another). Take, for example, a Plaintiff making $50,000 a year with a remaining worklife of 20 years – a current, or total-offset, value of $1,000,000 in lost earning capacity. To illustrate the monetary difference between the personal maintenance deduction and the calculation of present value, I will use two scenarios of inflation and interest rates: (1) an inflation projection by the Social Security Administration and the Congressional Budget Office of 2.4%, combined with the current yield on a 20-year U.S. Treasury Bond of 1.8%, and (2) a 10-year average inflation rate of 1.7% combined with a 10-year average Treasury Bond rate of 2.7%. Each of these scenarios for calculating present value will be compared to a value for the personal maintenance deduction as obtained from the Bureau of Labor Statistic's *Consumer Expenditure Survey* for a household income level of $50,000 to $70,000 - an annual expenditure rate of $10,671.

The monetary divergence of these measures becomes quite evident under the first scenario where the future projection of inflation is greater than the current interest rate. Under this unique set of circumstances, the growth rate entailed in a present value calculation exceeds the discount rate resulting in the ***reduction*** to present value not being a reduction at all, but an increase from the current, or total-offset, value. Under this first scenario the negative reduction (aka, an increase) to present value results in an increase of roughly $60,000, while the present value of the 20 years of the above referenced personal maintenance deduction is over $220,000.

(Continued on Page 8)

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Using a set of inflation and interest rates more in line with historical norms, the above referenced 10-year averages, also results in the present value and personal maintenance deductions being far apart from an aggregate monetary standpoint. The assumptions of this second scenario example result in a present value reduction of approximately $87,000 which compares to a present value of personal maintenance of $195,000 .It should be noted that this 10-year average set of inflation and interest rates is used for illustrative purposes only and this approach to calculating present value is not being advocated or substantiated by the author.

Pennsylvania law, via the Supreme Court's publication of the Subcommittee Notes to the Suggested Standard Civil Jury Instructions, specifically precludes the application of the personal maintenance deduction on future values in the presence of a present value calculation under MCARE. One might think that an implied assumption accompanies this preclusion where the two measures are either mutually exclusive from an economic standpoint or are equivalent and offsetting from a monetary standpoint. As the above analysis indicates, neither of those circumstances exists. Nonetheless, this should not give rise to a justification or argument for an economic analysis to stray from the Pennsylvania law preclusion and put forth both a reduction to present value and a reduction for personal maintenance in a case governed by MCARE. This is yet another example of a situation where Pennsylvania law is not fully supported by traditional economic principles and theory, but must prevail nonetheless and thereby eliminate the potential for conflicting economic analyses to stray from the law under the guise of proper economic thought.

Authored by: R. Matthew Hanak, II, JD, MBA

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FHR LLC
FORENSIC HUMAN RESOURCES

WPTLA RECEIVES FINAL APPROVAL AS LONG DISTANCE CLE PROVIDER

We are happy to update you and let you know that on February 4, 2021, we received notification from the PA CLE Board that we have now been formally approved as a Long Distance CLE Provider. We had started this process last summer.

Thanks to our Executive Director Laurie Lacher for her diligence in making this happen, to all presenters who were part of our CLEs that were offered to support our application, and to all of you who attended these CLEs.

MEMBER PICTURES & PROFILES

Name:

Benjamin William Schweers

Firm: Kapusta Deihl & Schweers

Law School: Lewis and Clark in Portland, Oregon.

Year Graduated: 2012

Special area of practice/interest, if any: Personal Injury, including asbestos-related cases.

Tell us something about your practice that we might not know: My firm is one the few majority women-owned personal injury law firms in Western Pennsylvania.

Most memorable court moment: Giving my first closing argument.

Most embarrassing (but printable) court moment: Being called Harvey Specter (a *Suits* reference) by a judge during motions court – it must have been the peak lapels....

Most memorable WPTLA moment: Back-to-back wins at the Steelwheelers 5k run. It is a great event, and I hope to compete again this year.

Happiest/Proudest moment as a lawyer: Attending my younger brother's graduation from Northwestern Law and taking a picture with him and my dad. The three of us are all lawyers. My paternal grandfather was a lawyer, too.

Best Virtue: I am an active listener.

Secret Vice: Chelsea boots.

People might be surprised to know that: I used to be a "ski bum" in Lake Tahoe, California.

Favorite movie: I can get it down to three. *Taxi Driver*, *Pulp Fiction*, and more recently, *The Last Black Man in San Francisco*.

Last book read for pleasure, not as research for a brief or opening/closing: *Players* by Don DeLillo and *Dubliners* which is a series of short stories by James Joyce. Read in preparation for a family trip to Ireland that has been postponed.

My refrigerator always contains: My Mom's leftovers from our Sunday dinners, but they do not last long.

My favorite beverage is: Murphy's Irish Stout.

My favorite restaurant is: Umami. A Japanese Pub in Pittsburgh's Lawrenceville neighborhood. They serve food late and have the best music playing—often by a live DJ.

If I wasn't a lawyer, I'd be: Something in the fashion industry. I love clothes and see dressing as a form of non-verbal communication and an artistic outlet.

THE ART OF PERSUASION

INOCULATE OR DIE (OR JUST HAVE A TOUGHER CASE TO TRY)

In his book "Don't eat the bruises," superstar trial lawyer, Keith Mitnik explains the importance of putting defense arguments "in context." This technique helps create the best frame through which the jury will see your case. If you are a trial lawyer and have not read Keith's book, go buy it now at Trial Guides.

Keith's "in context" technique works by inoculating the jury. "Inoculate," means to treat a person with a vaccine to produce immunity against a disease. Think weakened form of a virus (Isn't that all we think about these days?). All of the bad things the defense lawyer will say about your case is the disease. Left untreated, the defense disease will infect your jurors with a tainted view of your case. The "in context" approach or any preemptive steps you take to blunt defense arguments is the vaccine.

Thank goodness we get to go first in opening statements.

Why is this important? Because of anchoring and confirmation bias. If the first thing a juror hears about your case comes from the defense attorney, that point will become anchored in the juror's mind. Then, due to confirmation bias, the jurors will look for information throughout trial that will confirm that belief. Possibly one that will kill your case. Yikes, good luck overcoming that.

Inoculation, putting defense arguments "in context," "taking the sting out," or whatever you want to call it is case critical. When you prepare your opening statement, you need to spend a lot of time figuring out the strongest defense arguments. Then you need to figure out how to undermine them. Consider (cue broken record) running a focus group to find your silver bullets.

Inoculation is Top 3 importance for your opening statement. This is not anecdotal. The effectiveness of inoculation is supported by research.

The Research

A 2010 "Meta-Analysis of Research on Inoculation Theory," (Banas & Rains, 2010) looked at 54 studies of more than 10,000 participants to see if inoculation is a persuasive strategy. The researchers concluded that inoculation is effective. Those exposed to a weakened form of an argument first are more likely to resist the full-strength message later.

54 studies!Boom! You cannot argue with that. So start verbally vaccinating juries... now.

How to Inoculate

But wait there's more! Don't just warn the jury about the defense arguments and say they are wrong. Instead, follow these three steps:

1. Point out the defense. "You're going to hear this..." or "the defense will claim..."

2. Acknowledge the "truthiness" of the argument. "And that might sound valid because..."

3. Explain why the defense is wrong. "But here is why that is wrong..."

On the last point, I find that metaphor works well to undermine the argument in question. For example, I have used, "But the evidence will show that argument is just a smoke screen designed to blind you from the truth."

Lastly, inoculate quickly and succinctly. Do not belabor the point or you risk jurors thinking the defense argument is an important issue.

I hope this article is the best medicine for what ails you and your trials.

By: Brendan B. Lupetin, Esq. of

Meyers Evans Lupetin & Unatin

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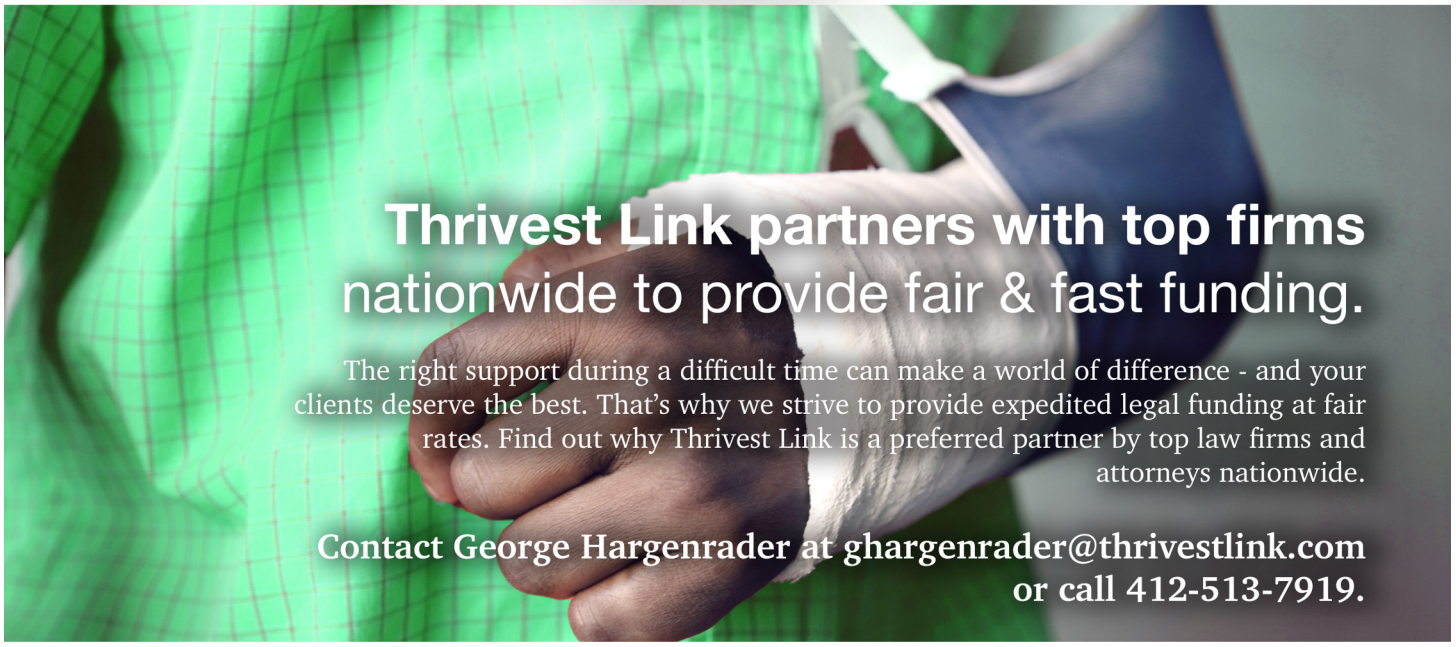

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WILL GIVE LEGAL ADVICE FOR WINE ...

On Thursday February 25th, fifteen WPTLA members and Business Partners were treated to a discussion via ZOOM led by **Adam Knoerzer**, a Pittsburgh-based wine educator and Sommelier with Burghundy, LLC. (see: Burghundy.com) Adam exhibited and entertained us with his wealth of specialized knowledge on grape growing and wine production, provided deep dives into what factors influence the characteristics of wine, and he took on all questions while demonstrating his vast wine knowledge clearly aged like fine wine.

Preparation for the class was limited to obtaining the recommended 2017 Empire Estate Riesling grown in the Finger Lakes region or any other preferred wine and being thirsty for social time, knowledge and wine. As for the Finger Lakes, **did you know** that Cayuga Lake and Seneca Lake are the deepest and lowest in elevation of the 11 glacial finger lakes, and therefore have the biggest impact on their surrounding vineyards? These glacial finger lakes originated as a series of northward-flowing streams and scouring glaciers widened, deepened, and accentuated the existing river valleys. Glacial debris left by the receding ice, acted as dams, allowing lakes to form. Western warmer shores being better for reds and eastern cooler shores for whites. ***Wow...we didn't, but now we do thanks to Adam!*** The closing of the lecture hour involved a demonstration and practice of tasting techniques used by the professionals (think gargling, but substitute wine), and those with any sips left in their glasses took time thereafter to socialize. ***Isn't life grape.***

Refreshingly, there was no whining during the event. It was a good time had by all, capping off a potentially perfect day....starting with coffee and ending with wine!

By: Nathaniel B. Smith, Esq. of

Goldstein Heslop Steele Clapper Oswalt & Smith

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KICKING OFF THE NEW YEAR WITH THREE STELLAR CLES

The arrival of 2021 brought the promise of vaccinations, and hopefully the emergence from quarantine. But as we wait for the much anticipated return of in-person events, WPTLA continued to offer valuable programs and education to its members by hosting a hat-trick of on-line CLEs from two of our most prominent business partners and a former WPTLA President.

On January 6th, Cindy Miklos from Planet Depos hosted the one-hour CLE, *Navigating Remote Depositions.* While nearly everyone has had some experience with video services such as Zoom and Teams over the past year, Cindy was able to offer more than a few helpful recommendations for even the most seasoned and technically savvy attendees. The program highlighted the basics of remote depositions, including lesser contemplated issues such as cameras, sound quality, and layouts of the screen. One thing to keep in mind is how the deposition will look to the viewer—whether it is an adjuster, mediator, judge or jury—and Cindy gave several recommendations to improve recordings and the final product. Cindy also discussed different approaches for employing and utilizing exhibits, and the benefits of using technicians to handle voluminous documents and other multi-media. Hopefully everyone who attended will be able to use these tips and tactics to improve their next video deposition.

Not to be outdone, another distinguished business partner—Varsha Desai from Alliance Medical Legal Consultants—hosted *Strategies for Calculating Future Projected Medical Costs* on January 18th. During the one-hour CLE, Varsha was able to demonstrate the benefits of obtaining an established life-care plan for negotiation and settlement of claims. This included coordinating with medical providers to adequately and accurately detail clients' short-term medical needs, as well as predicting long-term requirements for the rest of their lives. In addition to life-care plans, Alliance offers Medicare set-asides and other future medical calculations for clients. Varsha's emphasis on putting together an entire package—including the ever-increasing costs of medication and health care services—adds a tangible benefit not only to the client's future planning, but immediately to their case for mediation, arbitration, and trial.

Finally, on February 18th, we capped off the trio with the two-hour CLE, *War Stories: Trail v. Lesko – An Historic Multi-Million Dollar Verdict* with John Gismondi. The program discussed all aspects of the case and trial, which culminated in one of the largest dram shop verdicts ever within the Court of Common Pleas. John provided an in-depth look at the tragic facts behind *(cont. on p. 14)*

PENNSYLVANIA SUPREME COURT CURTAILS USE OF "SUDDEN EMERGENCY" AS A DEFENSE TO NEGLIGENCE

The Pennsylvania Supreme Court issued its ruling in the case of *Graham v. Check* on December 22, 2020.This case very narrowly addressed the sudden emergency doctrine and how it is to be applied in negligence cases in a post-Comparative Negligence Act landscape.

This case stems from a motor vehicle collision on State Route 30 in East Pittsburgh. Plaintiff, Francis Graham, was struck by a vehicle operated by Defendant, Larry Check, while Graham was crossing an intersection within a marked crosswalk. Graham realized he did not have change while waiting at a Port Authority bus stop, and began crossing Route 30, a four lane highway, toward a gas station in order to get change. Graham started crossing Route 30 when traffic on Route 30 had a red light, but Graham did not know how long the light had been red and did not look at the pedestrian signals when he began crossing. Graham had safely crossed three of the four travel lanes of Route 30 when the traffic light for Route 30 changed to green. Check was operating his vehicle eastbound on Route 30 and was approaching the intersection where Graham was crossing. Check was slowing down for the red light as he approached the intersection; however, the light turned green before Check reached the intersection and he began accelerating in response to the green light. Check testified that he did not see Graham until Graham was just feet in front of Check's vehicle, at which time Check braked immediately but could not avoid striking Graham.

The collision occurred in the early morning hours before daylight, at a generally unlit intersection, and Plaintiff was wearing dark clothing. Check was traveling in the right-hand lane of traffic for the eastbound direction, and there was a vehicle in the left-hand lane stopped at the intersection as Check approached the intersection. Check was driving in the fourth lane that Graham would have to cross to safely reach the opposite side of Route 30, and Graham was walking from Check's left to right. Check testified that as he approached the intersection, his view of the crosswalk was partially obscured by the vehicle stopped in the left-hand eastbound lane. Check further testified that his vehicle's headlights were on, he was not distracted by anything in his vehicle, he had driven the same route to and from work for approximately 30 years, and that he had rarely seen pedestrians crossing the street in the direction that Graham was crossing that morning. However – Check presented testimony through an expert witness that conflicted Check's own testimony as to the distance at which Check could have observed Graham. Check testified he was no more than 7-10 feet from Graham when he first saw him, but Check's expert witness testified that Check would have had an unobstructed view of Graham from at least 54 feet away. The expert presented braking as Check's only alternative and did not make any calculations or present an opinion when questioned as to whether Check could have swerved, or taken some combination of measures to avoid striking Graham. Check's counsel also argued – alternatively – that Graham appeared suddenly in the intersection – suggesting that he was running or quickly crossing the street – but also argued that he was moving so slowly as to be practically loitering in the crosswalk.

The driver of the stopped vehicle, Millach, was the only eyewitness to the collision. His testimony as cited in the record and opinions simply confirmed that it was dark that morning, the intersection was not well lit, Graham was wearing dark clothing, and Graham was still crossing the street when the light changed from red to green.

This case was tried to verdict in Allegheny County. At trial, Plaintiff's counsel objected to the Court's decision to charge the jury on sudden emergency, arguing that the facts did not support a finding of sudden emergency. Plaintiff's counsel argued that a pedestrian such as Plaintiff is covered by the assured clear distance ahead rule and, alternatively, that if Check was paying attention, he should have been capable of seeing Graham in the crosswalk before he did, which factually negates the doctrine. Plaintiff's counsel further requested a custom charge of the duty of a driver to a pedestrian regarding the driver's duty of vigilance and attentiveness. The trial judge declined to charge the jury based on any custom instructions, and instead used only instructions from the Pa.SSJI (Civ.), including instructing on sudden emergency.

The jury found no negligence on the part of Check and entered a verdict in favor of Defendant. Plaintiff filed timely post-trial motions, which were denied. Plaintiff then appealed to the Superior Court, raising the same two issues: whether a sudden emergency instruction should have been given to the jury and whether the trial court erred in declining to charge the jury based on Plaintiff's custom instruction on the duty of care of a driver. A panel of the Superior Court comprised of Judges Shogan, Kunselman, and Strassburger, unanimously upheld the trial court's charge and the finding of the jury. The Superior Court only considered the first issue – regarding the appropriateness of the sudden emergency instruction – because the custom jury instruction issue was not preserved for appeal.

The Supreme Court granted Plaintiff's petition for allowance of appeal, limited to the following issue:

When the Superior Court affirmed the trial court's jury instruction concerning the sudden emergency doctrine, did the court erroneously relieve the defendant motorist of his legal duty to a visible pedestrian in a crosswalk?

Justice Wecht, writing for a five *(Continued on Page 13)*

DEFENDANT'S NEW MATTER MAY BE STRICKEN

One particularly annoying part of Plaintiff's practice is the ever-looming threat of Preliminary Objections as to specificity by certain defense counsel who then turn around and file boiler plate, often baseless, New Matter. For example, in a number of cases filed and served well in advance of the two year mark, one may find New Matter citing to the statute of limitation.

In *Barnes v. Williamsport Petroleum*, Oct. 6, 2020 No. 20-0092 (Pa. Com. Pl 2020), Judge Linhardt of Lycoming County provided a reminder that where plaintiff's counsel sees fit to object to conclusory averments in new matter, an order striking the new matter may be appropriate.

In *Barnes*, the Plaintiffs filed suit for damages caused by a fall in the parking lot of business premises. There, after the Defendant filed boiler plate new matter covering 16 paragraphs, plaintiffs' counsel filed preliminary objections pursuant to Pa.R.C.P. No. 1019(a). The Defendant did not dispute that its new matter was boilerplate, but argued that Rule 1019(a) does not apply to new matter. Defendant claimed that its position was supported by the 1994 revisions to Rule 1030(b) which provided that affirmative defenses of assumption of the risk, comparative negligence and contributory negligence do not need to be pleaded. The Court rejected this approach and found that the amendments to Rule 1030 did not create an opportunity to just set forth boiler plate defenses. [1]

EVIDENCE OF VALUE OF LOST SERVICES MUST BE PRESENTED

It is not enough to simply provide some examples of a spouse's services to support an award of damages in a wrongful death case. In *McMichael v. McMichael*, 241 A.3d 582 (Pa. 2020), the Pennsylvania Supreme Court upheld the denial of a new trial based upon an award of zero dollars for economic damages for a wrongful death.

The underlying case arose out of the death of a husband due to a work accident while clearing trees. The wife presented evidence that the decedent had performed home repairs, mowed the lawn, did 80% of the cooking and drove her to work in inclement weather. She also testified that she was unable to service the furnace. Neither the plaintiff nor her economic expert offered testimony as to the value of these services.

The jury ultimately awarded $135,000.00 for survival damages and nothing for wrongful death. It is noteworthy that plaintiff's counsel had allowed that the wife's economic damages were "relatively small." The trial judge has noted that there "wasn't really a lot of evidence . . . that the Decedent supported his family." *See McMichael*, 241 A.3d at 591.[2]

Ultimately, in an opinion by Justice Todd, the Court relied on the following black letter rule:

As noted above, the burden of proving damages is on the plaintiff, and the amount and items of pecuniary damages cannot be presumed, but must be proven by facts and, where possible, with certainty.

McMichael v. McMichael, 241 A.3d 582, 590 (Pa. 2020) citing *Vrabel v. DOT*, 844 A.2d 595, 601 (Pa. Commw. 2004). The Court then concluded that since there was no evidence of the value of the services. The rationale was that although there was testimony about the services the decedent performed, there was no evidence of the value.

The lesson here, is that evidence specifically valuing the lost services of the decedent should be presented in a wrongful death action. Preferably this evidence should be elicited from an expert.[3]

Fortunately for the Plaintiff, the Supreme Court did find that the award of zero non-economic damages did not bear a reasonable relationship to the evidence presented and ordered a new trial limited to the non-economic wrongful death damages.

SCOPE OF NEW TRIAL

In *Mader v. Duquesne Light*, 241 A.3d 600 (2020) the Supreme Court clarified the proper scope of the grant of a new trial. There, the Court clarified that where the trial court's errors deal with "specific and discrete issues, the grant of a new trial should be limited to those issues." *Mader*, 241 A.2d at 613.

There, the Plaintiff sustained non-fatal injuries as the result of an electrocution. The jury had awarded damages for past and future medical expenses but not for lost wages or non-economic damages. The trial court granted a new trial upon the Plaintiff's Motion as to all damages. The Supreme Court found that the new trial should not have been granted as to past and future medical expenses but approved a new trial limited to the non-economic damages and wages. *(Continued on Page 13)*

[1] The Court noted in footnote 13 that the failure to set forth a cause of action upon which relief can be granted cannot be waived but went on to make clear that this is not an affirmative defense and does not need to be set forth in New Matter.

[2] The Supreme Court noted that there was no evidence presented as to other items of economic wrongful death damages such as medical, funeral or estate administration expenses.

[3] The *McMichael* plaintiff did present an economic expert, but it is unclear why that expert offered no testimony as to the value of household services.

PENNSYLVANIA SUPREME COURT ... FROM PAGE 11

justice majority, issued a detailed opinion first analyzing the facts of this case within the framework of sudden emergency, but also addressing the continued viability of the sudden emergency doctrine as a defense in Pennsylvania. The majority of the Court declined to fully abolish the doctrine, but criticized its characterization as a "defense" to negligence. The Court held that calling the doctrine a "defense" is a misnomer, as it is not a defense to negligence – a sudden emergency is merely a factor for the jury to consider in assessing reasonableness. The Court effectively limited the use of the sudden emergency charge to extraordinary situations where the conduct of the parties' is not adequately addressed by the general instructions on negligence and comparative fault, which already encompass the "reasonable under the circumstances" language. The Court, further, commented that it felt abolishing the sudden emergency doctrine in its entirety would advance Pennsylvania law, but that the issue was not presented within the framework of this appeal and that the Court would await "a more suitable case."

Based on the Court's interpretation of sudden emergency, the Majority concluded that Check had not met his burden in proving such an extraordinary sudden emergency to merit a separate charge on sudden emergency. The Court further found that even under the prior interpretation of sudden emergency, that Check's own conduct in failing to observe Graham obviated the need for the instruction, especially taking into consideration the heightened duty of care a driver has to pedestrians at an intersection, even a little traversed intersection. The Court found that the sudden emergency instruction was likely to have led to jury confusion and improper application of the sudden emergency doctrine, vacated the jury's verdict, and remanded the case to the trial court for further action consistent with the Court's opinion.

Elizabeth Jenkins tried this case to verdict before Judge Della Vecchia in Allegheny County, and handled the appeals before both the Superior Court and Supreme Court. Erin Rudert authored an amicus brief at the Supreme Court level on behalf of the Pennsylvania Association for Justice. The PAJ Amicus Committee would like to invite and remind all practitioners in Pennsylvania that the Committee is a valuable resource at the appellate level to advance pro-civil justice efforts. The Amicus Committee considers requests for assistance on a case-by-case basis. You may contact committee members and WPTLA members, President-Elect Mark Milsop or Vice President Erin Rudert, for information on how to request the Committee's involvement in your appeal.

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 33, 2020-2021

Vol 33, No 4	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Summer 2021	May 21	Jun 4

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

BY THE RULES ... FROM PAGE 12

(Past medical expenses had been stipulated to and expert testimony was offered as to future medical expenses.)

In holding that the trial court erred, the Court carefully reviewed the facts as there was no *per se* rule. Nonetheless, the black letter rule is:

> a trial court should consider whether the properly awarded damages were fairly determined, and, if so, the interrelatedness of the types of damages and whether the proper damages award can stand independent of the erroneously awarded (or erroneously not awarded) damages.

Mader, 241 A.3d at 615 (Pa. 2020).

PRIME RATE FOR DELAY DAMAGES

The Prime Rate for the calculation of delay damages for delay occurring in 2021 is 3 ¼%. See 51 Pa. B. 265, Issue 3.

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Superior Court Orders Production of Engineering Report Related to Third-Party Case Involving Fatal Work Injury

Superior Court recently entered a decision in *Virnelson v Johnson Matthey Inc.*, No. 3526 EDA 2019 ordering production of a report from an independent firm to investigate the cause of an accident at a pharmaceutical plant. On July 17, 2015 plaintiff decedent Virnelson experienced a fatal fall at Johnson Matthey Pharmaceutical Ventures while employed by that entity. He was inspecting a filter dryer when he was apparently exposed to excessive nitrogen, causing loss of consciousness and a fall onto the concrete floor. Plaintiff's widow filed suit against Johnson Matthey Pharmaceutical Ventures and Johnson Matthey Pharmaceutical Materials Inc.

Shortly after Virnelson death the defendants had contracted with BakerRisk to investigate the accident. As part of the investigation the company conducted interviews of witnesses and employees. A report was issued to the defendants. Parts of the report made it into the hands of OSHA investigators, supplied by the defendants.

Plaintiff learned of the existence of the report during discovery. Plaintiff then sought a motion to compel production of the report. Defendants argued the report was prepared in anticipation of litigation and therefore constituted privileged materials. Claimant noted that the defendants had hired BakerRisk rather than their attorneys. As such, the report could not have been prepared in anticipation of litigation. Plaintiff also argued that, since portions of the report were made available to OSHA that the defendant had hired BakerRisk to obtain a lower fine from OSHA. The trial court ordered production of the report. Appeals were taken at that time to the Superior Court. Superior Court remanded the initial appeal because it did not feel an appropriate factual record was made regarding the initial determination that the report was discoverable.

Upon remand, the hearing was held and factual documentation was presented. The trial court concluded the report was not prepared in anticipation of litigation and ordered its discovery.

Multiple issues were raised on appeal although the general allegation was that the report was not discoverable as it was prepared in anticipation of litigation.

The court reviewed the testimony and documentary evidence regarding the defendant's decision to hire BakerRisk. It concluded that said evidence established that BakerRisk was hired to investigate the "root causes" of the fatal incident so as to prevent such occurrences in the future. Footnotes 11, 12, and 13 cite extensively to the factual record supporting the court's conclusion. Therefore, the report did not qualify as one prepared in anticipation of litigation.

Query: In the litigation of a denied fatal claim should not counsel routinely request whether an outside expert was retained and a copy of such report? Most practitioners send out a standard request for production? This might require a specific request and answer.

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KICKING OFF THE NEW YEAR ...

FROM PAGE 10

the fatal accident, along with the subsequent investigation and discovery process. The program then shifted to the preparation and trial: including the formulation and use of themes; proving "visible intoxication" through expert and lay witnesses; crafting effective cross-examinations; understanding and explaining blood alcohol levels; maximizing economic damages where there are limited earnings; and strategies to obtain punitive damages. In addition to the trial tips and strategies, there were more than a few good stories, including the tense moments during jury deliberations, which included a question almost straight out of the classic legal thriller, *The Verdict*.

While everyone in the organization is likely looking ahead to an in-person gathering, and hopefully raising a glass to the end of the long lockdown, there is certainly something to be said for the ability to attend stellar programming remotely from our desks, home offices, living rooms, kitchens, cars, or—as some viewers' videos attested—outdoors enjoying warmer climates.

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Bourgeois v. Sno Time Inc., No. 50 M.A.P. 2019 (Pa. Supreme Court December 9, 2020), ---- A.3d ---- (Pa. 2021).

The Pennsylvania Supreme Court reverses summary judgment for failure to review all evidence and in particular two expert reports in a light most favorable to the Plaintiff as non-moving party.

On February 16, 2013, Ray Bourgeois ("Plaintiff") purchased a snow tubing season pass at Roundtop Mountain Resort ("Defendants"). The reverse side of the season pass contained a release agreement, which provided that snow tubing involves "inherent and other risks that could lead to serious injury or death." The release provided that the signatory both assumed all the risks of snow tubing and released Ski Roundtop from liability. Plaintiff skimmed the release agreement and signed it.

In the afternoon of the next day, after completing several runs, Plaintiff rode his snow tube down the hill. At the end of the run, Plaintiff's tube went over a flat deceleration mat, which did not slow him down. He then collided with a second, folded mat, which caused the tube to stop abruptly. Due to the sudden stop, Plaintiff's momentum propelled him over the front of the tube and face down into the snow. With his head stuck in the snow, the momentum of his body carried him forward, which hyperextended his neck causing quadriplegia.

On January 16, 2015, the Plaintiff commenced a personal injury lawsuit.After the parties completed discovery, Defendants filed a motion for summary judgment arguing that the release agreement precluded recovery on mere negligence and that the Plaintiff had failed to produce sufficient evidence of reckless or grossly negligent conduct. In response, the Plaintiff argued that the Defendants had a duty to protect its patrons and prevent them from encountering the dangerous condition it created at the bottom of the hill by using folded kitchen mats as deceleration devices. The Plaintiff argued that there was clearly a question of fact for the jury as to whether Defendants' deliberate decision to use kitchen floor mats as a safety device to bring tube riders to a stop after they had increased the height of the hill to make the ride too fast for the amount of runout space rose to the level of gross negligence or reckless conduct.

In conjunction with their response, the Plaintiff submitted two liability expert reports. The first expert, Mark Di Nola, had 25 years of experience conducting accident investigation and risk management in the ski insurance industry, he served as a risk management consultant in the ski industry and he was familiar with the national tubing operations resource guide and the generally accepted practices and principles for snow tubing slope design and deceleration aids, including rubber deceleration mats. Mr. DiNola's opinion was that Defendants' decision to use deliberately deployed folded anti-fatigue rubber mats as deceleration devices constituted an extreme departure from the ordinary standards of conduct for a tubing park operator in Pennsylvania and the generally accepted practices and principles employed by the ski industry for tubing park operations.The Plaintiff's second liability expert, Gordon Moskowitz, performed a biomechanical incident analysis and concluded that the Plaintiff's collision with the folded deceleration mat was the direct cause of his injuries.

The Defendants did not submit any competing expert reports in support of its motion for summary judgment. Nonetheless, the trial court granted summary judgment for the Defendants. First, the trial court held that the release agreement on the snow tubing season pass barred the Plaintiff's negligence claims because the exculpatory provision was valid, enforceable, and sufficiently conspicuous. In addition, the trial court held there was no evidence from which a reasonable jury could conclude Defendants' act of folding the deceleration mats grossly deviated from the standard of care and therefore summary judgment was proper for Plaintiff's claims of gross negligence and recklessness.Notably absent from the trial court's discussion was any mention of either expert report that the Plaintiff submitted with their response to the motion for summary judgment.

Plaintiff appealed and the Superior Court affirmed the trial court's grant of summary judgment in a 2-1 non-precedential memorandum decision. Notably, the Superior Court majority did not address the trial court's failure to discuss the Plaintiff experts' reports. Instead, the Superior Court conducted its own review of the experts' reports and concluded neither expert established the standard of care. *(Continued on Page 16)*

The Supreme Court granted allocator to consider whether the Superior Court had conflicted with existing law by failing to address the trial court's disregard of Plaintiff's expert reports and by failing to review the expert reports in a light most favorable to the non-moving party.

After reviewing the record, the Supreme Court concluded that the Superior Court erred in failing to consider the evidence presented, specifically the expert reports, in a light most favorable to the Plaintiffs. First, the Supreme Court found that because the trial court erred in not considering the expert reports at all, the Superior Court erred in not reversing the trial court on this basis alone. The Supreme Court found that the trial court's written opinions explaining its conclusion that the Plaintiff did not produce sufficient evidence to show gross negligence or recklessness completely lacked any discussion or citation to the reports. The trial court's failure to consider the experts' reports was also evidenced by its conclusion that the lack of evidence on gross negligence and recklessness was dispositive even though the expert reports raised genuine issues of material fact on those claims for a jury to resolve.

Second, the Supreme Court found that the Superior Court's *sua sponte* rejection of the expert reports because the reports failed to set forth a duty or standard of care and failed to define the industry standard for the use of rubber mats as deceleration devices was also error. The Supreme Court found that if the Superior Court had reviewed the reports in a light most favorable to the Plaintiff, as required by law, they would have seen that inherent in the experts' many opinions regarding the breach of the duty was also a recognition that Defendant's duty was to protect its patrons from unreasonable risks in bringing their snow tubes to a controlled stop. In addition, the Supreme Court held that the Superior Court erred in criticizing the expert reports on the ground they did not define an industry standard for the placement of deceleration mats.The Supreme Court stated that any dispute over what those industry standards were would go to the weight and credibility of an expert's testimony, which is not a proper consideration at the summary judgment stage and should be resolved by a factfinder at trial.

For these reasons, the Supreme Court reversed the order of the Superior Court affirming summary judgement and the case was remanded for further proceedings.

***Adams v. Rising Son Med. Ctr.*, No. 2020 Pa. Super. 298 (Pa. Super. December 29, 2020)**

Superior Court holds that a trial court's decision to preclude Plaintiff from offering evidence of Decedent's statements to healthcare providers concerning her symptoms and family history was reversible error and warranted a new trial.

This issue arose out of a medical malpractice action where the Plaintiff's Estate alleged that a number of the decedent's medical providers ("Defendants") failed to diagnose a deep vein thrombosis, which caused or increased the decedent's risk of death due to a pulmonary embolism.

During trial of this case, there were numerous evidentiary issues including whether the court had erred in precluding evidence as to what the Plaintiff's decedent told medical providers in the emergency room regarding her family history of deep vein thrombosis. This information was contained in her medical records from the emergency room. The Administratrix of Plaintiff's estate, who accompanied the decedent in the emergency room, also heard what the decedent had told her medical providers.

Before the trial court, Plaintiff argued that what the decedent had told her medical providers was admissible under the hearsay exception for statements made for purposes of diagnosis and treatment, Pa. R.E. 803(4).The Defendants argued that a statement made for purposes of medical treatment qualified for this hearsay exception under only if was proffered by a healthcare provider. The trial court agreed with the Defendants and precluded the statements in the decedent's medical records from evidence. The trial court also precluded the Administratrix from testifying at trial regarding what she heard the decedent tell her healthcare providers.

Plaintiff filed an appeal to the Superior Court which alleged errors in a number of the trial court's evidentiary rulings including the admissibility issue of decedent's statements to her healthcare providers under Pa. R.E. 803(4). On appeal, the Defendants argued that this hearsay exception required that the statement be offered by a medical provider, and/or corroborated by a third person, or that the statement be offered by someone who had no interest in the litigation. Defendants argued *(Continued on Page 17)*

that absent such conditions, hearsay statements would not be sufficiently trustworthy for admission because the statements would be offered by someone who had a vested interest in the litigation.

The Superior Court disagreed with the Defendants' position noting that there were only two (2) requirements for a hearsay statement to come within the exception set forth at Pa. R.E. 803(4). First, the declarant must take the statement for purposes of receiving medical treatment. Second, the statement must be necessary and proper for diagnosis and treatment.

The Superior Court concluded that the two elements of the hearsay exception for medical treatment were met in this case.The Court found no authority or rational basis for limiting the applicability of the hearsay exception for statements made for purposes of health care to instances where the statements were corroborated or offered by healthcare providers. The Court also found that non-healthcare provider third-parties who are present when the statements are uttered are capable of reporting those statements in court, as they are subject to cross-examination.

The Superior Court found that the trial court erred in excluding this evidence at trial and that the exclusion was highly prejudicial to the Plaintiff.As such, the Court ruled that a new trial was required to cure the error.

Matthews v. Prospect Crozer, LLC, 2020 PA Super 274 (Pa. Super. Nov. 23, 2020)

Pennsylvania Superior Court upholds a grant of summary judgment for two service companies finding no duty of care where a tree limb fell and injured a person walking on the sidewalk.

On March 2, 2018, Lonnie Matthews ("Plaintiff") was walking on a sidewalk adjacent to the Drexel Hill Property owned by Defendant, Prospect Crozer. As he walked by, a large branch fell off a maple tree on the Drexel Hill Property, striking Plaintiff and severely injuring him. At the time of the accident, Defendant, Prospect Crozer and Defendant Anthony's Landscaping and Tree Service Co. ("ALTS") had a contract in which ALTS agreed to provide snow removal for the Drexel Hill Property. Similarly, Defendant Prospect Crozer and Defendant IVS Landscaping, Ltd. ("IVS") had a contract in which IVS agreed to provide landscaping services for the Drexel Hill Property. Those contracts did not include the inspection or maintenance of the trees on the Drexel Hill Property. However, ALTS had performed occasional tree work on the Drexel Hill Property in the past but always at Prospect Crozer's request.

Plaintiff filed a Complaint on May 8, 2018, against numerous defendants including ALTS and IVS. Following discovery, ALTS and IVS filed Motions for Summary Judgment alleging that Plaintiff had failed to establish that ALTS or IVS owed him a legal duty. The trial court granted summary judgment in favor of ALTS and IVS on the basis that it was unable to conclude as a matter of law that ALTS or IVS owed a duty to Plaintiff. In response to Plaintiff's Motion for Reconsideration, the court revisited the issue but again granted summary judgment in favor of ALTS and IVS, finding that Plaintiff failed to prove that ALTS or IVS owed him a legal duty. In particular, the trial court rejected Plaintiff's argument that the Restatement (Second) of Torts § 324(A) ("Section 324(A)") imposed a duty on ALTS or IVS. The trial court found that because Plaintiff could not establish that ALTS or IVS had "undertaken" an obligation to inspect and maintain the trees on the Drexel Hill Property, Section 324(A) did not impose a duty on them.

The Plaintiff appealed the ruling to the Superior Court. After review of the record, the Superior Court agreed with the trial court's finding that the Plaintiff failed to present sufficient facts in discovery to prove that ALTS or IVS owed him a legal duty under Section 324A.

First, the Superior Court found that "hypothetical testimony" by ALTS and IVS representatives, that had they noticed an issue with the trees on the Drexel Hill Property they would have notified Prospect Crozer, was insufficient to establish that ALTS or IVS actually undertook to inspect and maintain the trees. Similarly, the Superior Court found that although ALTS trimmed the tree at issue in 2010 and removed a fallen branch a few years later, both at Prospect Crozer's request, it was not reasonable to infer from those isolated actions that ALTS had gratuitously undertaken or agreed to inspect and maintain the trees for the next eight years, when the accident occurred. Finally, the Superior Court found that Prospect Crozer's expectation that ALTS and IVS would inspect and maintain the trees on its Drexel *(Continued on Page 18)*

Hill Property was not, alone, sufficient to obligate them to do so.

The Superior Court concluded that in order to establish the existence of a duty under Section 324A, the plaintiff must adduce evidence that the defendant undertook a service that he should recognize as necessary for the protection of the plaintiff. The Plaintiff failed to adduce any evidence to prove that ALTS or IVS assumed such an undertaking at the time of the accident and, therefore, the Plaintiff could not prove that ALTS or IVS owed him a legal duty. For these reasons, the Superior Court concluded that the trial court had properly granted summary judgment to ALTS and IVS.

Matthews v. Erie Insurance Group, 2021 Pa. Super. 6 (Pa. Super. January 12, 2021)

Superior Court holds that the reformation of a UIM policy must also include the forum selection clause which accompanied that coverage.

On April 15, 2017, Jason Matthews ("Matthews") was involved in an accident while operating a motor vehicle insured by Erie, under a policy issued to Ion Construction, Inc. Matthews was a named insured under the policy and he asserted that Ion Construction, Inc., never rejected underinsured motorist ("UIM") coverage, and therefore the policy should be reformed to include UIM benefits.

On August 22, 2019, a declaratory judgment action relating to this matter was filed.Erie filed preliminary objections to the Complaint seeking, *inter alia*, transfer of the case to the Bucks County Court of Common Pleas due to improper venue. On January 24, 2020, the trial court sustained the preliminary objections to venue and transferred the case to the Bucks County Court of Common Pleas, reserving the other preliminary objections for determination by that court. In sustaining Erie's preliminary objections as to venue and transferring the matter to Bucks County, the trial court discerned that reformation of the insurance contract to provide for UIM coverage must also include the forum selection provisions that would have accompanied such coverage in the absence of an invalid waiver.

On appeal to the Superior Court, Matthews alleged that the trial court had erred when it ruled that Erie could enforce a forum selection clause to transfer venue that was not contained in the original insurance contract. Matthews argued that the reformation he sought should only be with respect to a provision of UIM benefits and should not be expanded to include additional contract provisions such as a forum selection clause.

The Pennsylvania Superior Court rejected Matthews argument and affirmed the trial court's decision. The Court agreed with Erie that Matthews' position would afford greater rights to those insureds that did not purchase UIM coverage as compared to those insureds who did purchase UIM coverage and, therefore, would be subject to the forum selection clause in the carrier's UIM coverage provisions. The Court also found that, because Matthews was contending that he was entitled to UIM coverage, it would be just and fair that he should also be subject to the forum selection clause asserted with that coverage.

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JUDICIAL HONOREES FOR 2020

In lieu of the Annual Judiciary Dinner, which had to be canceled again this year due to the COVID pandemic, we would like to recognize the following judges who either reached Senior Status during the calendar year of 2020, or chose early retirement from the bench.

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

FACTS:

In 2015 the Montana legislature enacted a tax credit scholarship program to provide parents and students a choice in their education for Kindergarten through 12th grade. The statue gave a tax credit to individuals and businesses who donated to non-profit scholarship organizations. The organizations then gave scholarships to parents who wished to send their children to private schools. Montana excluded any school that was "owned or controlled in any part by any church, religious sect, or denomination." Three families filed suit alleging that the act violated the Religion and Equal Protection Clauses of the US Constitution.

The students were asked to respond in essay form to the following question:

Does a state student aid program violate the Religion and Equal Protection Clauses of the United States Constitution if it allows students the choice of attending a religious school?

A True Violation of the United States Constitution:

Federal Money for Sectarian Schools

The Founding Fathers of the United States Constitution believed that American citizens ought to have complete religious freedom. In order to combat religious persecution in the New World, the Founding Fathers established the Religion and Equal Protection clauses within the United States Constitution in order to protect each citizen's right to believe and practice what he or she would like. In the Supreme Court case *Espinoza v. Montana Department of Revenue,* three low-income families argue that a particular scholarship program they applied to violates the Religion and Equal Protection clauses of the United States Constitution because the program excludes religious schools from its funding.[1] However, I believe that a state student program that allows students the choice of attending a religious school violates the Religion and Equal Protection clauses of the United States Constitution because federal money cannot be used to enhance one particular individual's understanding of religion, its instruction, or alter the direct purpose of a scholarship program without violating the United States Constitution.

In the Bill of Rights, the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," meaning that the federal government will not favor or oppose one religion over another.[2] By remaining neutral, the government allows the citizens of the United States to practice their choice of religion without fear of persecution. However, federal money cannot be used to enhance a particular religion for a citizen because this funding would be considered "favoring one religion over another." Hence, religion must play no part in the usage of federal money in order to prevent a violation of the Religion and Equal Protection Clauses of the United States Constitution. For example, in *Locke v. Davey,* college student Joshua Davey is prohibited from utilizing public money he earned through the Promise Scholarship, a federally funded scholarship program in the state of Washington, because he was planning to major in theology.[3] The Supreme Court decided this was not a valid usage of federal money: "In accordance with Washington's state constitution--which included a provision that no public money or property was to be appropriated for or applied to any religious worship, exercise, or instruction--the scholarship program did not permit students to use the scholarship to pursue 'a degree in theology.'" Since Davey was attempting to use the scholarship funds to enhance his understanding of Christianity, the Supreme Court decided that "a state does not violate the First Amendment's free exercise clause when it funds secular college majors but excludes devotional theology majors." Similar to Joshua Davey's case, Kendra Espinoza and her fellow petitioners want to utilize federal scholarship money to fund her children's tuition at Stillwater Christian School. However, Montana's Blaine Amendment statute legally prohibits this scholarship fund from being used to enhance one specific religion: "...public corporations shal not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy... controlled in whole or in part by any church, sect, or denomination."[4] Thus, the scholarship funds are simply not applicable to the tuition of Stillwater Christian School because federal money cannot be utilized to aid any sectarian purpose or school under both the Blaine Amendment and the First Amendment of the United States Constitution. If these petitioners were to utilize the scholarship funds at a secular school, then they would not be violating the United States Constitution and the Blaine Amendment because the federal money would not be used to enrich a particular religion, instead solely benefiting the education of each child.

(Continued on Page 20)

Along with the doctrine upheld at Stillwater Christian School, the educational instruction itself adheres to a specific orthodoxy. Each child receives both academic and religious instruction simultaneously, heavily contrasting with an education provided at a secular school. While every curriculum has similar academic goals, the curriculum at Stillwater Christian School "equips students to think, write and speak clearly and to be thoroughly grounded with a biblical worldview."[5] The plaintiff in *Espinoza v. Montana Department of Revenue* utilizes the Supreme Court case *Trinity Lutheran Church of Columbia, Inc. v. Comer* to defend that "the Blaine Amendment discriminates against religious conduct, beliefs, and status in violation of the free-exercise clause under Trinity Lutheran. "However, *Trinity Lutheran Church of Columbia, Inc. v. Comer* hardly substantiates the plaintiff's argument because the Trinity Lutheran Church was denied federal grant money for the enhancement of a playground facility due to the religious nature of the church and the preschool,[6] even though the money would not enhance religious instruction. The reason Trinity Lutheran Church won their case was because the federal money was going towards "the health and safety of children and therefore was in the same class of government-provided services that religious organizations should be able to access."[7] Since the Trinity Lutheran Church allocated the grant monies to the health and safety of the children in the form of playground enhancement, the plaintiff's argument cannot utilize this case as evidence because the two cases are not alleging the same argument. On account of the religious instruction that is indoctrinated at Stillwater Christian School, federal money simply cannot be utilized to fund tuition at Stillwater Christian School without violating the Religion Clause of the First Amendment.

Finally, the act prohibiting schools that were "owned or controlled in any part by any church, religious sect, or denomination" from receiving federal money was accused of violating the Equal Protection Clause of the United States Constitution by the plaintiff. Under further examination, however, I found this allegation to prove false. The Fourteenth Amendment explicitly states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." While Kendra Espinoza believes that she is being denied privileges of the United States, I believe that there is no legal privilege being deprived in her situation. Espinoza still has the ability to take her children to a religious after-school program or church, and nothing prohibits her from sending her children to a secular private school in order to secure the scholarship funds. The purpose of the tax-credit scholarship program enacted by the Montana state legislature is to fund a choice of education to any parent who wishes to send their children to private schools, provided the selection abides by a complete separation of church and state. By permitting Espinoza to utilize federal money to fund tuition at a sectarian private school, the money would be promoting the growth of Christianity in her daughters, utilizing the federal money in a way that is simply unconstitutional. In *Eulitt v. Me. Dep't of Educ.,* the parents of catholic school girls alleged that *"Me. Rev._Stat._Ann._tit._20-A._§2951(2)* which prohibited public tuition payments to go to sectarian violated the Equal Protection Clause of the Fourteenth Amendment."[8] However, the parents didn't realize that by challenging this law, they were reinforcing rather than undermining the Constitutional nature of the law. The law specifies that a private school may be approved for the receipt of public funds for tuition purposes if the private school met certain requisite conditions, one of which specified that the private school ought to be nonsectarian.[9] This condition was implemented to ensure complete separation of church and state so as to abide by the Equal Protection Clause of the Fourteenth Amendment, and both Espinoza and the Eulitt family have attempted to eliminate this separation for their benefit. Espinoza is attempting to alter the direct purpose of the scholarship without considering the risk she is imposing on the United States Constitution. The combination of church and state, no matter the purpose, is positively unconstitutional.

In summary, "public money" that is donated to a federal scholarship program becomes "federal money." This money cannot be used to enhance one particular religion or its instruction without violating the Religion and Equal Protection Clauses of the United States Constitution. Hence, a state student-aid program violates the Religion and Equal Protection Clauses of the United States Constitution if it permits students the choice of attending a religious school. Further, Espinoza and her fellow petitioners are attempting to alter the direct purpose of the state student-aid program by trying to utilize federal money for the religious enhancement of their children, violating the Equal Protection Clause of the United States Constitution consequently.

(Continued don Page 21)

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3. *Locke v. Davey.* February 25, 2004. https://www.dropbox.com/s/inl62iasx9j5qcl/LOCKE.pdf?dl=0

4. *Blaine Amendment in Montana.* ij.org/images/pdf_folder/school_choice/50statereport/states/montana.pdf.

5. "Mission: Vision: CoreValues / Mission, Vision, and CoreValues. "*Mission\ Vision\ CoreValues/ Mission, Vision, and CoreValues,* www.stillwaterchristianschool.org/domain/232.

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7. "Trinity Lutheran Church of Columbia, Inc. v. Comer." *{{Meta.siteName}}* www.oyez.org/cases/2016/15-577.

8. *Eulitt v. Me. Dep't of Educ.* October 22, 2004. https://www.dropbox.com/s/i2bef1itinhhrgj/EULITT.pdf?dl=0

9. Title 20-A, §2951: Approval for Tuition Purposes, www.mainelegislature.org/legis/statutes/20-A/title20-Asec2951.html.

Nathaniel Lerch

Clarion Area Jr./Sr. High School

UPCOMING EVENTS

Thurs, April 14, 2021 - last Board of Governors Meeting for the year, via Zoom - 4:30pm

Thurs, April 14, 2021 - Election Membership Meeting, via Zoom - 5:30pm. This will be the election of Officers, Board of Governors, and LAWPAC Trustee for 2021-2020, plus approval of the amended bylaws.

Mon, April 26, 2021 - A conversation with Dave Kassekert of Keystone Engineering, hosted by Eric Purchase, via Zoom - 12:00pm

Thurs, May 6, 2021 - A conversation with Mark Melago of FindLaw, hosted by Eric Purchase, via Zoom - 12:00pm

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

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

2021-2022 SLATE OF NOMINEES

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**** Fiscal year runs July 1 – June 30.***

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

Trivia Question #27

What form of inoculation preceded vaccination, dating back to the early 1700s?

Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by May 21, 2021. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #27 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 #26 – **Which Olympic event features a move named after one of Santa's most famous reindeer? (Hint: The move is technically described as a single straight front somersault with one and a half twists.) Answer: Trampoline**

Congratulations to Mike Calder, of Rosen & Perry, for winning Trivia Question #26. Mike has graciously asked us to donate his gift card to Pennies from Heaven.

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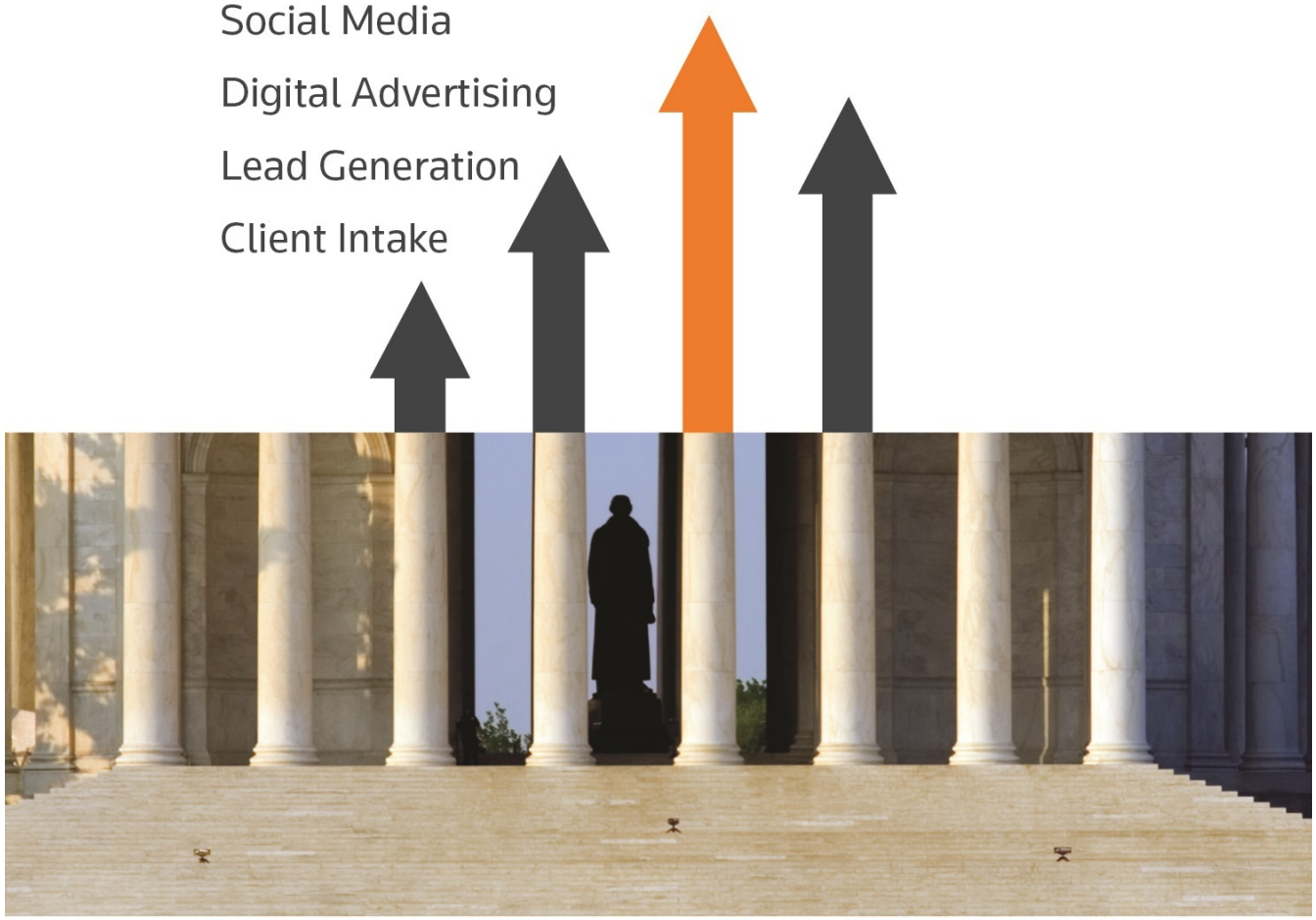

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Through the Grapevine....

Congratulations to **Past President Jack Goodrich** on being appointed Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania.

Congratulations to **Members James Burn, Susan Paczak,** and **Douglas Williams** on being named partners at the firm of Abes Bumann.

Congratulations to **President's Club Member Michael Calder** on becoming a shareholder of Rosen & Perry.

More congratulations to **Board of Governors Member Russell Bopp** on being selected to the Top 40 Under 40 Trial Lawyers for the National Trial Lawyers Association.

Sincere condolences to **Board of Governors Member Craig Murphey** on the recent passing of his mother, Rosemary Murphey.

Member John Biedrzycki has a new office mailing address: Biedrzycki Law Office, Defender House, 1140 Boyce Rd, Pittsburgh 15241

Member Stephen Yakopec is using a new email address for legal matters: steve@syakopeclaw.com