THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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2019 KICKOFF RECAP

President Dave Landay chose Bridgeville as the host site of the Western Pennsylvania Trial Lawyers Association's fiscal year kick-off event on August 20-21, 2019 and attendees agreed it was a smashing success. Too often driven past at high speed, Bridgeville proved to be a welcoming and entertaining venue for this year's WPTLA crew, not least because it is home to one of the country's hottest interactive sports phenomenon: Top Golf.

Tuesday was a perfect day for arrival as the Board of Governors gathered at the Hampton Inn Bridgeville for the first meeting of the year. New members and new officers for the year were introduced, including Craig Murphey, Ben Schweers, Treasurer Greg Unatin, Secretary Erin Rudert, Vice-President Mark Milsop, President-Elect Eric Purchase, Immediate Past-President Bryan Neiderhiser, and President Dave Landay.

The Board also addressed important matters ranging from the solicitation of volunteers for the year's work to updates on important charity projects. Following the meeting, all retreated to the nearby Top Golf facility for a restorative meal, refreshing beverages, and the newest golf-related entertainment craze.

Top Golf, for those of you not yet "in the know," is a large, technologically driven entertainment venue based ever so tenuously on golf (in the sense that golf balls and golf clubs are employed) but without the consequence of the occasional bad shot, the tedium of scorekeeping, or the labor of packing a cooler and walking from your cart to the halfway house. Instead, attentive and tolerant servers keep you fed and refreshed while *(Continued on Page 3)*

WPTLA membership should not be just another line item on your resume.

Please take full advantage of all the great opportunities available.

PRESIDENT'S MESSAGE

This is my first message as President of the Western Pennsylvania Trial Lawyers Association. I feel both privileged and humbled to serve as President this year. I have great respect and admiration for the men and women that served before me.

For those that don't know me, I have been a sole practitioner for almost 24 years. I share office space with two other attorneys in the Grant Building. Not surprisingly, my practice is primarily plaintiffs' personal injury. I also prepare estate documents and handle probate matters, including guardianships, however. You may also be surprised to learn that my undergraduate degree is in civil engineering.

As the incoming President, I have established certain goals. These goals are not necessarily unique. Sometimes it takes more than a single year in office to accomplish what needs to be done.

My first main goal is to increase our current level of membership. We have already created an incentive for current members to refer a new member and receive a free CLE. We are also contacting past members to urge them to renew their membership.

My other main goal is to increase public awareness of what WPTLA is and what we do. Hopefully, this will help, in at least a small way, injury victims' prospects at trial. We are instituting a social media campaign using Instagram and similar methods. We are creating a tagline for our communications to explain the purpose of our organization. We have also been interviewing public relations firms to assist us in these endeavors.

WPTLA membership should not be just another line item on your resume. Please take full advantage of all the great opportunities available. This week, on October 12, we have one of my favorite signature events: our 5K Walk, Wheel, Run. If you've never participated in this event before, I guarantee that you will enjoy it. Please come out to North Park and help us support the Pittsburgh Steelwheelers.

We have other great events planned this year. Our Comeback Award Dinner is scheduled for November 18 at the Duquesne Club. If you attend, you will understand why you became a trial lawyer. There are many other great events in store for you this year. Please check our website for more information.

We have also assembled a panel of business partners to assist you in various aspects of your practice. Please consider using our using a business partner the next time you are in need of these services. If you do, make sure to tell them that you are a WPTLA member.

Growing up in Western Pennsylvania, I have been a lifelong Steelers fan. I hope that this is the year we finally get back to the Super Bowl and win another championship. Go Steelers!

By: David M. Landay, Esq. of

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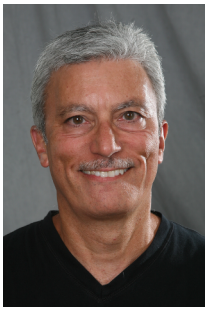

2019 KICKOFF RECAP ... FROM PAGE 1

the venue does everything else. In short, it was perfect for our group. Individual performances varied wildly and there was no clear winner but everyone agreed they grew more masterful as the evening wore on. Business Partners again proved their value to our organization as they joined the group and amped up the fun for all. Special thanks to Dee Sherry of AccentuRate, Mark Melago of FindLaw, John Roseto and Brad Borghetti of Ford Business Machines, Dave Kassekert of Keystone Engineering, Bill Goodman of NFP Structured Settlements and George Hargenrader of Thrivest Link!

Based on some haggard appearances the next morning, there were many who engaged in post-golf activities but those events are shrouded in a veil of secrecy. Rumors abound of the group following local resident Chris Miller to the nearby Pittsburgh Bottle Shop where the festivities continued into the wee hours.

The following morning brought a 2 credit CLE entitled "Learn from Experience: Litigation Tips from Past WPTLA Presidents." Presented by Chad Bowers, Cindy Danel and Rich Schubert, the panel offered war stories, trial tactics, and jury selection tips. All agreed our clients would be better served because of the valuable insight they offered.

By noon or so, a return home was what most had left on their agenda for the day although a small but enthusiastic group was seen headed for downtown Bridgeville. Our 2019 – 2020 WPTLA Year is off to a great start!

By: Eric Purchase, Esq. of

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Saturday, Oct 12 - North Park, Pittsburgh

Bring the family or grab your friends and head on out to North Park this Saturday morning for our 5K Run/Walk/Wheel to benefit the Steelwheelers. Not a runner? Not a problem! Enjoy the sights and sounds of North Park on a casual stroll. Or don't walk at all! But come and support this awesome group of wheelchair athletes!

Don't forget some  to buy raffle tickets for great prizes!!

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As many of you know, the WPTLA's annual 5k to benefit the Pittsburgh Steelwheelers is one our signature events and one that demonstrates WPTLA's ability to give back to the community. This year's race is scheduled for **Saturday, October 12, 2019** at North Park's Boathouse. Registration opens at 9:00 a.m., the wheelers start at 10:00 a.m., and the runners/walkers start at 10:10 a.m. Parking is free and there is a nearby playground for your kids. All registrants receive a t-shirt and entry for door prizes.

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

How did WPTLA get involved? 19 years ago, then-President, the Honorable Beth A. Lazzara, wanted to make a significant difference to a local charitable organization. She came up with the idea for a 5K event as a fundraiser, and was made aware that the Steelwheelers were an organization that were struggling financially and needed support to survive. Thus began the President's Challenge 5K Run/Walk/Wheel. Since that time, WPTLA has been the lifeblood of the Steelwheelers' organization, donating in excess of $460,000.

How can you be involved?

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

· **Donate Prizes** – We are currently accepting raffle prizes and are looking for prizes of significant value, such as sporting event tickets, signed memorabilia, tickets to desirable venues/concerts and collections of gift cards or related items. We are also accepting door prize donations, specifically $10 gift cards. Please contact WPTLA Executive Director, Laurie Lacher, for details on how to donate prizes.

· **Enter the Firm Cup Challenge** – Teams are made up of 3 people, 1 being a current WPTLA member and the other 2 members need to currently work at a law firm. Team members must be provided to Executive Director, Laurie Lacher, before the race begins. Times for each team member will be added together, with the lowest team winning. The Firm Cup will remain in possession of the winning team until next year's race. The winning team name will be engraved on a plate and will receive a donation from WPTLA to the teams' charity of choice.

We look forward to seeing everyone at the race on October 12th this year!

To register for the race, go to

https://wptla.org/events/presidents-challenge-5k-run-walk-wheel/ and click on the purple REGISTER button.

By: Chad McMillen, Esq. of McMillen Urick Tocci & Jones
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WPTLA has been the lifeblood of the Steelwheelers' organization, donating in excess of $460,000

COMEBACK DINNER PREVIEW

WPTLA's Annual Comeback Award Dinner will be held this year on Monday, November 18, 2019 at The Duquesne Club in Pittsburgh. As one of the standout events of the WPTLA calendar, the Annual Comeback Award Dinner is a time for us to remember the important reasons that we as WPTLA members chose our paths as Plaintiffs' attorneys. This year's Comeback Awardee is David Gifford, who was represented and nominated by Armand Leonelli of Edgar Snyder & Associates. David was riding his motorcycle when he was involved in a telescopic collision in traffic. As result, David was paralyzed and is now a paraplegic. Despite this life altering accident, David has not allowed his injuries to define him and now devotes his life to helping others in similar circumstances. David embodies the true meaning of the Comeback Award.

David's chosen charities are Project Healing Waters Fly Fishing and Paralyzed Veterans of America Racing team. David himself is a member of Project Healing Waters and a regular hand-cycle racer with Paralyzed Veterans of America. As a retired US Army Veteran and member of the National Guard, David is passionately involved in organizations such as the above that provide support services to Veterans. David is also involved in the Christopher Reeves Foundation and works with individuals with spinal cord injuries.

Please join us at The Duquesne Club for this year's dinner and leave with overwhelming feelings of inspiration and gratitude for what we are able to do for our clients every day.

By: Brittani Hassen, Esq. of

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Check out our new Upcoming Events page at

www.wptla.org/events/

Click on an event or use the View Detail box to see more details about each event, the registration link, and buttons to add the event to your Google calendar or do an iCal export.

There is also a section where you can share the event via Facebook, Twitter, Google Plus, LinkedIn and email.

UPCOMING EVENTS

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL EVENT

Sat, Oct 12, 2019

North Park Boathouse, Pittsburgh

BEAVER DINNER & CLE

Mon, Oct 21, 2019

Wooden Angel, Beaver

3 CREDIT CLE W/ ERIE CBA

Thur, Oct 31, 2019

The William J. Schaaf & Mary B. Schaaf Education Center, Erie

COMEBACK AWARD DINNER

Mon, Nov 18, 2019

The Duquesne Club, Pittsburgh

LUNCH 'N LEARN CLE

Wed, Dec 11, 2019

Gulf Tower, Pittsburgh

JUNIOR MEMBER / YOUNG LAWYER MEET & GREET

Thur, Jan 23, 2020

Revel & Roost, Pittsburgh

2 CREDIT CLE

Thur, Feb 6, 2020

Gulf Tower, Pittsburgh

Post-*Protz* Cases

Unconstitutional Delegation of Legislative Power:

Germantown Cab Co. v. Philadelphia Parking Authority, 206 A.3d 1030 (Pa. 2019)

- In this case, which cited to *Protz*, it was held that there was not an unconstitutional delegation of legislative power. Act 64 did not delegate legislative power, as the Parking Authority just submits a budget request, and then the General Assembly has the power to approve or adjust the budget.

Bucks County Services v. Philadelphia Parking Authority, 195 A.3d 218 (Pa. 2018)

- *Protz* case just briefy mentioned in the concurring opinion of Justice Wecht. Not much relevance.

Shearer v. Hafer, 177 A.3d 850 (Pa. 2018)

- In another concurring opinion by Justice Wecht, he cites to *Protz,* and stated that the General Assembly may authorize a board to develop ethical guidelines. However, the General Assembly may not delegate responsibility to a third party without providing clear guidelines.

Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205 (Pa. Commw. 2018)

- Citing to *Protz,* found Act 43 provisions on temporary structures violated Article ll, Section 1 of PA Constitution, so just severed that part.

City of Williamsport v. Bureau of Codes v. Deraffele, 170 A.3d 1270 (Pa. Commw. 2017)

- Because housing code was not validly adopted per *Protz* - property owner can't be convicted of a violation

Hill v. Am. Med . Response, 423 P.3d 1119 (Ok. 2018) (an Oklahoma Supreme Court case that cited to *Protz*)

- This case held that mandatory use of the AMA Guides, 6th Edition for assessing impairment did not violate the Constitution, as it did not constitute an unlawful delegation of the state's legislative power.

- There is a dissenting opinion that stated that since the Physical Advisory Committee had not held a public hearing on the 6th Edition, the current edition should be the 5th Edition.

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ARTICLE DEADLINES and PUBLICATION DATES VOLUME 32, 2019-2020

	ARTICLE DEADLINE DATE	TARGET PUBLICATION DATE
Vol 32, No 2 Winter 2019	Nov 30	Dec 13
Vol 32, No 3 Spring 2020	Mar 6	Mar 20
Vol 32, No 4 Summer 2020	May 29	Jun 12

Retroactivity:

Gillespie v. Workers' Compensation Appeal Board (Aker Philadelphia Shipyard), 2018 Pa . LEXIS 424 (January 18, 2018)

• Supreme Court Order had granted the Petition for Allowance of Appeal and remanded the case to the Commonwealth Court to determine whether *Protz* applied retroactively, thereby rendering Petitioner's IRE void *ad initio*. In the Commonwealth Court case, the rejected Claimant's argument that his IRE was *void ab initio*, citing *Riley v. WCAB (Cmwlth of PA),* 154 A.3d 396 (Pa. Commw. 2016). In *Riley,* the claimant was evaluated using the 5th Edition of the AMA Guides, instead of the 4th. Claimant did not appeal the IRE within 60 days of notice of change in status - rather she waited 10 years to challenge. The Court held that challenge was untimely and that *Protz* did not invalidate the Claimant's IRE rating. The Court stated "*Protz* does not give (a claimant) a second chance to appeal the IRE."

• The Supreme Court Order also stated that upon remand, the Commonwealth Court may consider any argument that this matter was non-justiciable in light of Petitioner's death. The matter was CLOSED on 6/11/18 as there was no personal representative so no estate was opened.

Womack v. Workers' Compensation Appeal Board (Philadelphia Parking Authority), 2019 Pa. Commw. Unpub. LEXIS 129 (March 13, 2019)

• The issue was whether the WCAB erred in reinstating Claimant's total disability status as of 6/20/17, the date the *Protz* decision was issued, rather than 9/10/13, the date of Claimant's now-unconstitutional IRE? The Commonwealth Court remanded to the WCJ - to determine if Claimant continues to be disabled and entitled to reinstatement as of 1/21/16 (date filed petition) per *Whitfield v. WCAB (Tenet Health System Hahnemann, LLC),* 188 A.3d 599 (Pa. Commw. 2018).

Commonwealth V. Workers' Compensation Appeal Board (Moore), 2018 Pa. Commw. Unpub. LEXIS 541 (October 11, 2018)

• The issues: 1) whether Claimant waived *Protz II* argument on retroactivity because of an untimely constitutional challenge; 2) whether WCAB erred in applying *Protz II* retroactively; 3) whether retroactive application of *Protz II* violates the employer's constitutional right to due course of the law. Court relied on *Dana Holding Corp. v. WCAB (Smuch),* 195 A.3d 635 (Pa. Commw. 2018), so WCAB Order affirmed.

Dana Holding Corp. v. Workers' Compensation Appeal Board (Smuck), 2019 Pa.LEXIS 2700 (May 14, 2019)

• Supreme Court Order dated 5/14/19 - Petition for Allowance of Appeal GRANTED, LIMITED to the issues set forth below and DENIED as to all remaining issues. These issues are:

1) Whether the Cmwlth Ct erred in applying the *Protz II* standard to the case on appeal at the time of this Court's decision retroactive to the date of the IRE instead of as the date of the Supreme Court changed the law?

2) Whether the Cmwlth Ct's failure to grant the employer credit for the three year period between the

(Continued on Page 8)

date of the IRE evaluation and the date of this Court's decision in *Protz II* unlawfully violates Employer's constitutional right pursuant to the "Due Course of Law" provisions of the PA Constitution Article I, Section II?

• In the Cmwlth Court case, the Court stated as follows: "because employer's modification petition was still being actively challenged at the time *Protz II* was decided, we are hard pressed to find employer had any reasonable expectation in the finality of the modification of claimant's disability status..."

Timcho v. Workers' Compensation Appeal Board (City of Philadelphia), 193 A.3d 1219 (Pa. Commw. 2018)

• Citing to *Whitfield v. WCAB (Tenet Health System Hahnemann LLC),* 188 A.3d 599 (Pa. Commw. 2018), claim was not waived so long as reinstatement petition was filed within 3 years of the date of the most recent payment of compensation.

Simmons v. Workers' Compensation Appeal Board (Sunoco, Inc. (R&M)), 2018 Pa. Commw. Unpub. LEXIS 646 (December 6, 2018); *Pavlack v. Workers' Compensation Appeal Board (UPMC South Side),* 2018 Pa. Commw. Unpub. LEXIS 311 (June 6, 2018); and *Moore v. Workers' Compensation Appeal Board (Sunoco, Inc. (R&M)),* 2018 Pa. Commw. Unpub. LEXIS 313 (June 6, 2018)

• These cases were remanded per *Whitfield* - again per 3 years from most recent payment of compensation and continued disability.

Whitfield v. Workers' Compensation Appeal Board (Tenet Health System Hahnemann, LLC), 188 A.3d 599 (PaCmwlth 2018)

• Again, this case held that because the Petition for Reinstatement was filed within 3 years of date of most recent payment of compensation, there was a statutory right to seek reinstatement, but claimant must show continued disability.

Thompson v. Workers' Compensation Appeal Board (Exelon Corp.), 168 A.3d 408 (Pa. Commw. 2017)

• Per *Protz II* - reversed the Board's affirmance of the WCJ's modification of Claimant's benefits because under *Protz II,* "306(a.2) is stricken and no other provision of the Act allows for modification of benefits based on an IRE."

Pennsylvania AFL-CIO v. Commonwealth of Pennsylvania, et al., Docket No. 62 MD 2019

• Litigation which seeks injunctive relief - alleging that Act III amendment violates Article II , Section I of the Pa Constitution .

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Save the date for

Wednesday, Dec 11, 2019

Past President Larry Kelly
will deliver a 1 credit
Ethics Lunch 'n Learn CLE

Gulf Tower, Pittsburgh

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TAG LINE/SLOGAN CONTEST

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

We are holding a contest for our members to come up with a short and catchy tagline or slogan to accompany our logo. This tag line/slogan will explain that WPTLA members and other trial lawyers represent injury victims, not just one of the parties involved in a trial. When potential jurors and other members of the public see all of the good deeds that we do, this should improve our standing in the community, allowing us to better serve our clients. The winning tag line, or slogan, will then be used every time our logo appears in all correspondence, advertising and promotions, and on our website.

If you have a suggestion that you'd like to put forth, please send that to our Executive Director using the information above. **Entries must be received by Wednesday, Oct 16, 2019**. All entries will be considered. Members of the Board of Governors will vote on the winning entry. If you win the contest, you will receive a WPTLA-embroidered Nike golf baseball hat.

Pennsylvania Supreme Court Addresses Work Product Privilege

In *Bousamra v. Excela Health*, 210 A.3d 967 (Pa. 2019), the Pennsylvania Supreme Court offered guidance on Attorney client privilege and the attorney work product privilege. The Court held that certain documents were not protected by attorney client privilege where the document in question had been forwarded to a third party. However, the Court recognized a broader work product doctrine and held that "the attorney work product doctrine is not waived by disclosure unless the alleged work product is disclosed to an adversary or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it." *Bousrama*, 210 A.3d at 969.

Bousrama arises out of an action for defamation and interference with contract arising out of statements suggesting that the plaintiff-doctor had performed unnecessary invasive cardiology procedures. The defendant hospital listed certain documents in its privilege log which were copied to members of its publicity firm. A motion to compel was presented. The Court entered an Order finding that the attorney client privilege was waived; and that work product issue was not addressed. The Superior Court affirmed, finding both the attorney-client privilege and work product inapplicable. The Supreme Court in an opinion by Justice Mundy affirmed as to the waiver of Attorney Client privilege and remanded for further findings concerning the work product doctrine. [1]

It should be pointed out that at the outset, the Court stated, we recognize "that evidentiary privileges are not favored." *Bousamra*, 210 A.3d at 975 citing *Commonwealth v. Stewart*, 547 Pa. 277, 690 A.2d 195, 197 (Pa. 1997).

As to the attorney-client privilege, the Court relied upon a traditional understanding of waiver, the Court found the waiver after reviewing and accepting a rather traditional understanding of the rule. The analysis started with a recognition that, "A party claiming a communication is privileged must set forth facts showing the privilege was properly invoked". *Bousamra*, 210 A.3d at 982

The court then outlined the four elements that must be established to support a finding of privilege under the Attorney Client privilege. They are:

> 1) [t]he asserted holder of the privilege is or sought to become a client[;]
>
> 2)[t]he person to whom the communication was made is a member of the bar of a court, or his subordinate[;]
>
> 3) [t]he communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort[;]
>
> 4) [t]he privilege has been claimed and is not waived.

Bousamra, 210 A.3d at 983.

Upon proof of these elements, the burden shifts to the party opposing privilege. *Bousamra*, 210 A.3d at 983.

Hence, upon consideration of the case before it, the Court noted that the document was originally privileged as it was between counsel and an officer of the Defendant. However, the privilege was lost when it was forwarded to the outside publicity firm. *(Continued on Page 11)*

[1] The court determined that the application of these doctrines was a question of law resulting in a *de novo* review and a plenary scope. *Bousamra*, 210 A.3d at 973.

As to the work product doctrine, the court stated that, "This Court has not yet articulated the proper analysis for waiver of the attorney work product doctrine in Pennsylvania." *Bousamra*, 210 A.3d at 975. Thereafter, the Court began its analysis with the language of Rule 4003.3.[2] Next, the Court addressed the purpose of the rule and concluded that the purpose of the rule centered on providing the attorneys the ability to prepare their case rather than on confidentiality.

Ultimately, the Court concluded:

> As the purpose of the doctrine must drive the waiver analysis, we hold that the work product doctrine is waived when the work product is shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it. This waiver rule comports with the prevailing view in state and federal courts across the country, and the rule's fact intensive structure requires evaluation on a case-by-case basis.

Bousamra, 210 A.3d at 978.

The Court then set forth some guidance on the focus of the appropriate case by case analysis:

> The critical inquiry, then, is whether the work product doctrine was waived. We recognize that a fact intensive analysis is required to determine whether Fedele sending outside counsel's email to Cate "significantly increased the likelihood that an adversary or potential adersary would obtain it." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91(4) (2000). Courts tasked with analyzing similar factual situations generally consider whether the disclosure was "inconsistent with the maintenance of secrecy from the disclosing party's adversary." n evaluating the maintenance of secrecy standard, a lower court should consider whether a reasonable basis exists for the disclosing party to believe "that the recipient would keep the disclosed material confidential." *Id.*

Bousamra, 210 A.3d at 978 (citation omitted).

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[2] Rule 4003.3 provides:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. No. 4003.3

Feleccia et. al. v. Lackawanna Junior College et. al. **No. 75 MAP 2017 (August 20, 2019 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)**

Pennsylvania Supreme Court holds that a university has a duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes and that a waiver of liability is unenforceable as to claims of gross negligence and recklessness.

On March 29, 2010, Augustus Feleccia ("Feleccia") and Justin Riech ("Reich") participated in the first day of spring contact football practice at Lackawanna Junior College ("LJC"). While participating in a tackling drill, Resch suffered a T-7 vertebral fracture. Later that same day, Feleccia was injured while attempting to make his first tackle, experiencing a "stinger" in his right shoulder. LJC training staff attended to Feleccia and cleared him to continue practice. Feleccia returned to practice and then suffered a traumatic brachial plexus avulsion while making another tackle with his right shoulder.

Prior to these incidents, LJC held its training staff out as certified athletic trainers to the football team, despite its knowledge they lacked the statutorily required license. Prior to their injuries, Feleccia and Reich had signed various documents in a "participation packet" required by LJC prior to trying out for the football team. These documents included a "Waiver of Liability and Hold Harmless Agreement" ("Waiver") and a form including an "Information/Emergency Release Consent" ("Consent").

"[I]n the absence of provisions in the MVFRL to the contrary, insurers are not compelled to underwrite unknown and uncompensated risks."

Feleccia and Reich filed suit against LJC, its athletic director, several football coaches and members of the training staff asserting claims (collectively LJC Defendants) for damages caused by negligence. The complaint also sought punitive damages. The trial court granted summary judgment in favor of the LJC Defendants. The court ruled the Waiver: (1) did not violate public policy; (2) was a contract between LJC and college students relating to their own private affairs, and (3) was not a contract of adhesion. On appeal, the Superior Court reversed the decision of the trial court.

The Supreme Court granted allowance of appeal to address two issues: 1.) Whether a Pennsylvania college was required to have qualified medical personnel present at intercollegiate athletic events to satisfy a duty of care to the college's student-athletes; and 2.) Whether an exculpatory clause releasing "any and all liability" signed in connection with participation in intercollegiate football was enforceable as to negligence.

In addressing the first issue, the Court relied upon the Restatement (Second) of Torts §323 (1965) and found the evidence of record supported a determination that the LJC Defendants clearly created an expectation on which the student athletes might reasonably rely — i.e. in the case of injury during an athletic event, they receive treatment from a certified athletic trainer, as clearly outlined in the Consent they were required to sign. The Court further concluded that the LJC Defendants undertook a duty to provide treatment by a certified athletic trainer at the March 29, 2010 practice. Finally, the Court concluded that the record

(Continued on Page 13)

demonstrated the existence of a genuine issue of material fact sufficient to overcome summary judgment regarding whether the LJC Defendants breached this duty and caused injuries to Feleccia and Reich.

In addressing the second issue, the Court noted that the LJC Defendants conceded, as they must, that Feleccia and Resch's claims of liability arising from recklessness were not precluded by the Waiver based upon its previous ruling in *Tayar v. Camelback Skip Corp.,* 47 A.3d 1190, 1203 (Pa. 2012). Next, the Court found that the exculpatory clause contained in the waiver which protected the LJC Defendants from "any and all liability" arising out of "any injury" sustained by student athletes while playing football at Lackawanna was enforceable as to Feleccia and Resch's claims of ordinary negligence based upon prior precedent. *See e.g. Chepkevich. v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1194-1195 (Pa. 2010).

However, the Court came to a different conclusion when determining whether claims for gross negligence were also precluded by the exculpatory clause contained within the Waiver. Prior to this case the Court had not had the opportunity to address this issue. The Court began its analysis by defining gross negligence, which was found to involve more than a simple breach of the standard of care and instead described a "flagrant" or "gross deviation" from that standard. The Court concluded that the same policy concerns that prohibited the application of a waiver in cases of recklessness (i.e., allowing it would incentivize conduct that jeopardizes the signer's health, safety and welfare to an unacceptable degree) also required a similar holding with regard to gross negligence. Accordingly, the Court held that the Waiver was not enforceable to preclude liability arising from Feleccia and Resch's claims of gross negligence against the LJC Defendants, and the allegations supporting such claims should be tested at trial on remand.

***Safe Auto Insurance Co. v. Oriental-Guillermo et. al.* No. 26 MAP 2018 (August 20, 2019 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)**

Pennsylvania Supreme Court holds that an unlisted resident driver exclusion in a personal automobile insurance policy with Safe Auto Insurance Co., was enforceable.

On April 29, 2013, Rachel Dixon ("Dixon") was driving a car owned by her boyfriend, Rene Oriental-Guillermo ("Policyholder"). Dixon was involved in a motor vehicle crash with a vehicle in which Priscila Jimenez was a passenger, and which was owned by Iris Velazquez, and operated by Alli Licona-Avila. At the time of the crash, Dixon resided with the Policyholder, who had purchased a personal automobile insurance policy ("policy") for his vehicle through Safe Auto Insurance Company ("Safe Auto"). The policy contained an unlisted registered driver exclusion ("URDE"), which excluded from coverage any individuals who live with, but are not related to, the policyholder, and whom the policyholder does not specifically list as an additional driver on the insurance policy. Specifically, the URDE at issue provides:

LIABILITY COVERAGE AND OUR DUTY TO DEFEND DO NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGE:

1. That occurs while your covered auto is being operated by a resident of your household or by a regular user of your covered auto, unless that *(Continued on Page 14)*

person is listed as an additional driver on the Declarations Page.

Jimenez filed a personal injury lawsuit against Dixon, Policyholder, and Licona-Avila. Safe Auto filed a complaint seeking a declaratory judgment regarding the enforceability of the URDE with respect to Dixon. The trial court granted summary judgment in favor of Safe Auto, finding the URDE unambiguous, valid, and enforceable, and concluding that Safe Auto had no duty under the Policy to defend or indemnify Dixon in the underlying personal injury lawsuit. On appeal, the Superior Court affirmed the order of the trial court in a divided, published opinion.

The Supreme Court granted allowance of appeal to consider the enforceability of an unlisted resident driver exclusion ("URDE") in a personal automobile insurance policy. First, the Court was asked to consider wither the URDE provision violated the PA MVFRL, specifically 75 Pa.C.S. § 1786(a) and (f). The Court found that under its plain language, §1786 speaks to the obligations of the vehicle owner, not the insurer. Thus, the Court held that the URDE did not violate the PA MVFRL.

The Court next addressed whether the URDE was contrary to the underlying policy of the PA MVFRL. The Court found that the policy contained a clear and unambiguous URDE, which excluded coverage for injury or property damage that occurred while the Policyholder's vehicle was operated by a resident of his household or by a regular user of his covered vehicle, unless that person is listed as an additional driver on the Declarations Page. The Court held that, in the absence of provisions in the MVFRL to the contrary, insurers are not compelled to underwrite unknown and uncompensated risks. Thus, the Court determined that the URDE in this case was not contrary to public policy.

Mitchell. v. Shikora, D.O. et. al. No. 55 WAP 2018 (June 18, 2019 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)

Pennsylvania Supreme Court holds that evidence of risk and complications of surgery was admissible in a medical negligence claim to establish the applicable standard of care and to show that the physician's conduct complied with that standard.

In May 2016, Dr. Evan Shikora, was to perform a laparoscopic hysterectomy on Lanette Mitchell. Just prior to performing the procedure, Dr. Shikora realized that he had severely cut Mitchell's colon. The hysterectomy was cancelled and a general surgeon, was called in to perform an emergency loop ileostomy.

In December 2016, Mitchell filed a medical negligence action against Dr. Shikora, University of Pittsburgh Physicians d/b/a WomanCare Associates, and Magee Women's Hospital of UPMC (collectively "Defendants"). Mitchell's theory was that Dr. Shikora's failure to identify her colon before making an incision into her abdomen constituted a breach of the applicable medical standard of care. Mitchell did not plead a claim for battery or lack of informed consent.

Prior to trial, Mitchell filed a motion in limine to exclude evidence of her informed consent regarding the risks of the procedure, which included perforation of the colon, as well as evidence of the risks themselves, as irrelevant, unfairly prejudicial, or confusing. The trial court granted Mitchell's motion with respect to evidence of her informed *(Continued on Page 15)*

consent regarding the risks of the procedure, as she had not raised such a claim. However, with respect to whether a bowel injury was a known risk or complication of the surgery, the trial court denied the motion to preclude such evidence.

The case proceeded to a jury trial where Mitchell offered testimony from a medical expert who provided his opinion that cutting into the colon without proper identification of the anatomy below the incision breached the relevant standard of care. Mitchell was not questioned regarding her pre-operation discussions with Dr. Shikora as to the risks and potential complications of the surgery, or the informed-consent process.

For the Defendants, Dr. Shikora testified, acknowledging that injury to the bowel is a recognized complication of surgery and that the riskiest part of the procedure is entry into the abdominal cavity. Defendants also provided the testimony from a medical expert who testified that in making the initial incision during this procedure a physician often cannot see through the tissue, and, thus, the surgeon does not know what is behind it. He further testified that this is when complications may occur, which can be unavoidable and can occur absent surgical negligence.

A jury returned a verdict for the Defendants. Mitchell filed a post-trial motion for a new trial on the ground that the trial court erred in denying her motion in limine in part. The trial court denied the motion, relying on the Supreme Court's previous ruling in *Brady v. Urbas,* 111 A.3d 1155 (Pa. 2015).

On appeal, a three-judge panel of the Superior Court reversed and remanded for a new trial. The Superior Court analyzed the Supreme Court's previous decision in *Brady* and held that, "in a trial on a malpractice complaint that only asserts negligence, and not lack of informed consent, evidence that a patient agreed to go forward with the operation in spite of the risks of which she was informed is irrelevant and should be excluded."

The Supreme Court granted allowance of appeal to consider whether the Superior Court's holding conflicted with the *Brady* decision. At the outset of its analysis, the *Mitchell* Court outlined its previous decision in *Brady*, stating that the opinion spoke in terms of two discrete categories of evidence: (1) informed-consent evidence; and (2) risks and complications evidence. As to the first category, the Court held that manifestations of a patient's actual, affirmative consent to surgery, and the risks thereof, are irrelevant to the question of negligence. However, the Court contrasted this with other types of evidence, such as evidence of risks and complications. According to the *Mitchell* Court, the *Brady* decision specifically rejected a *per se* rule that all aspects of informed-consent information are always irrelevant in a medical malpractice case and that evidence of the risks and complications of a surgical procedure could be relevant in establishing the standard of care.

The Mitchell Court found that the Superior Court's analysis was inconsistent with its previous decision in *Brady,* as it blurred the distinction between informed-consent evidence and evidence regarding the risks and complications of medical procedures. The Court determined that risks and complications evidence may assist the jury in *(Continued on Page 16)*

"[T]he Court recognized its ruling allowed for the potential that a jury might mistakenly conclude that an injury was merely a risk or complication of a surgery, rather than as a result of negligence, the Court believed that the significant consequences of a prohibition on such evidence tipped the scales in favor of admissibility."

determining whether the harm suffered was more or less likely to be the result of negligence. If further reasoned that this evidence may aid the jury in determining both the standard of care and whether the physician's conduct deviated from the standard of care. Accordingly, the Court held that evidence of the risks and complications of a procedure may be admissible in a medical negligence case for these purposes.

While the Court recognized its ruling allowed for the potential that a jury might mistakenly conclude that an injury was merely a risk or complication of a surgery, rather than as a result of negligence, the Court believed that the significant consequences of a prohibition on such evidence tipped the scales in favor of admissibility.

Applying its holding to the facts of the case, the Court found that the trial court had properly distinguished between informed consent evidence, which it did not admit, and surgical risks and complications evidence, which it admitted. Therefore, the Superior Court's order was reversed and judgment on the verdict was reinstated.

Valentino et. al. v. Philadelphia Triathlon LLC, No. 17 EAP 2017. (June 18, 2019 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)

An evenly divided Supreme Court affirms a Superior Court ruling that a waiver form served to prevent a widow from suing for the death of her husband who died competing in a triathlon.

In 2010, Plaintiff's decedent, Derek Valentino ("decedent") participated in a triathlon in Philadelphia. The decedent signed a waiver form when he signed up to participate in the event, which was organized by Philadelphia Triathlon LLC ("PT LLC"). During the event, the decedent never completed the swimming portion of the competition and his body was recovered from the Schuylkill River on the day after the incident. The decedent's widow, Michele Valentino ("Estate") pursued wrongful death and survival claims.

The trial court granted PT LLC's motion for summary judgment and dismissed all of the Estate's wrongful death and survival claims. On the Estate's motion for reconsideration, the trial court upheld summary judgment on the survival action based on the Waiver. However, the trial court reversed itself regarding the wrongful death action, finding that the claim should be remanded for further proceedings based on the Superior Court's decision in *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 663 (Pa. Super. 2013), appeal denied, 86 A.3d 233 (Pa. 2014).

On appeal, a divided en banc panel of the Superior Court affirmed summary judgment on all claims. The Court reasoned that in order for a decedent's heirs to recover damages in a wrongful death action, there must be an underlying tortious act by the defendant. The Superior Court further held its decision in *Pisano*, which allowed non-signatory wrongful death claimants to file a court action despite their decedent's execution of an arbitration agreement, was limited to the facts of that case. The Court considered the Waiver to be an express assumption of all risks which, eliminated any legal duty otherwise owed to anyone by PT LLC, creating a complete bar to tort liability.

The Supreme Court granted an allowance of appeal in order to examine two issues: 1) Whether the Superior Court erred when it determined that a waiver of liability form also binds heirs, thereby precluding *(Continued on Page 17)*

them from bringing a wrongful death action; and 2) Whether the defense of assumption of risk should be abolished except in those situations where it is specifically permitted by the Comparative Negligence Act. Subsequently, the Supreme Court issued a *Per Curiam* Order affirming the Superior Courts decision to uphold the waiver as to all claims. The Pennsylvania Supreme Court was evenly split on the issues with Justice Wecht not participating. As such, by operation of law, the Superior Court decision stands.

By: Shawn Kressley, Esq.,

of DelVecchio & Miller

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"A lot of people mistake habit for hard work. Doing something over and over again is not hard work."

-Shannon Sharpe,

former NFL player and CBS sports analyst.

The ABCs of Focus Groups

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Hear our own **Brendan Lupetin**, of Meyers Evans Lupetin & Unatin, speak abut how to easily and cost-effectively set up and conduct your own focus groups, as well as learn how to gain useful insights that will help you improve your discovery plan, maximize settlements and improve your chances at trial.

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Oct 31, 2019 - CLE featuring Brendan Lupetin - 3 credits - Erie County Bar Association, Erie

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Mar 26, 2020 - Dinner & CLE - 1 credit - Bella Sera, Canonsburg

May 22, 2020 - Ethics CLE & Breakfast - 1 credit - Shannopin Country Club, Pittsburgh

WEAPONIZING "COLLATERAL SOURCES" TO INCREASE JURY AWARDS

The venerable collateral source rule provides that payments from a collateral source shall not be used to diminish the damages recoverable by a plaintiff. The rule was intended to prevent a plaintiff from obtaining redress for injuries merely because a jury learns that the plaintiff had received benefits, i.e., money, a collateral source. *See Moorhead v. Crozer Chester Med. Ctr*, 765 A.2d 786, 790 (Pa. 2001) (overruled in part on other grounds *Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008); *Nigra v. Walsh*, 797 A.2d 353, 356 (Pa. Super. 2002). Without question, the collateral source rule serves this purpose where there the payee of the collateral source has no right of subrogation. For example, if a plaintiff receives life insurance or social security disability or death benefits, it would be unfairly prejudicial for a defendant to be able to use evidence of receipt of such benefits to diminish a jury's award. In such instances, evidence of the receipt of such "collateral source" benefits is barred at trial. Where the "collateral source" payee has a right of subrogation, however, the rule does not apply in same manner. For example, a plaintiff is permitted to place into evidence the amount of medical expenses paid and wage loss paid through workers' compensation because of the employer's right of subrogation.

Typically, plaintiffs have entered such evidence without explicitly stating that the plaintiff received workers' compensation benefits. Rather, evidence would be entered that plaintiff had wage loss of a certain amount and medical expenses of a certain amount. Often times, this is done by way a stipulation of the parties. At trial in a case recently dealt with on appeal by the Superior Court of Pennsylvania, the plaintiff's counsel took dramatically a different approach. *See Nazarak v. Waite*, No. 1888 MDA 2018, 2019 Pa. Super. LEXIS 762 (Pa. Super. August 2, 2019).

In *Nazarak* the Superior Court of Pennsylvania held that it was not reversible error for the trial court to allow the plaintiff to enter evidence regarding his workers' compensation lien and his obligation to repay it. *Nazarak* arose out of a motor vehicle accident involving two commercial vehicles. Plaintiff Seth Nazarak was working when the accident occurred and sustained serious injuries. The jury found in favor of Mr. Nazarak and awarded him $750,000. *Id.* at *1-4.

An appeal was filed raising several issues including whether the trial court erred in permitting evidence of the plaintiff's workers' compensation lien. At trial, plaintiff was permitted to enter into evidence the amount he received in workers' compensation medical and indemnity payments, testimony by the plaintiff that he received workers' compensation benefits, and testimony from a representative of the workers' compensation carrier that plaintiff would be obligated to repay the benefits to the carrier from any recovery. *Id.* at *6 fn. 3. The Superior Court reasoned that because it was the plaintiff who offered the evidence the collateral source rule was not implicated, as *(Continued on Page 19)*

the tortfeasor was not attempting to use a "collateral source" to diminish the plaintiff's recovery. *Id.* at *10-11. Notably, the defendant/appellant in *Nazarak* argued that admission of workers' compensation evidence would improperly establish causation. The *Nazarak* trial court rejected the argument reasoning that existence of a workers' compensation lien does not imply causation, "particularly" because the defendant had admitted liability. *Id.* at *9. The Superior Court held that trial court did not abuse its discretion by permitting the evidence of the workers' compensation lien. *Id.* The Superior Court went on to not find any reversible error and affirmed the judgment.

While the Superior Court found the collateral source rule not be implicated in *Nazarak*, the goal of the collateral source rule was by the admission of the disputed evidence. In a case like *Nazarak* involving a plaintiff injured while working the jury will likely speculate that the plaintiff received workers' compensation benefits. The jury, however, may not know that such benefits become a lien against a recovery that has to be repaid. Thus, there is a risk that the jury could reduce an award to a plaintiff by speculating about workers' compensation benefits received if the jury does no know that such benefits have to be repaid. By explicitly laying out the facts concerning the workers' compensation benefits received and the lien, this risk is eliminated and gives full effect to the purpose of the collateral source rule. There is also the potential indirect benefit of evidence of receipt of workers' compensation benefits corroborating the medical evidence that the accident caused the injured. As noted above, in *Nazarak*, the trial court based its ruling, at least in part, on the fact that the defendant had admitted liability. The Superior Court did not expressly address this issue in finding that the trial court had not abused its discretion. This is could be an issue on further appeal in *Nazarak* or in future cases.

The approach taken by counsel *Nazarak* to lay out the facts of the workers' compensation lien could be used for other types of benefits where this is a lien. For example, in a non-workers' compensation case where there is a lien for payment of medical bills. Permitting evidence of an insurance company's right to subrogation could eliminate a jury speculating that the plaintiff had health insurance and any award for medical bills would be a windfall to the plaintiff. This approach does not undermine the collateral source rule but rather gives its stated purpose full effect.

By: James Tallman, Esq., of Elliott & Davis

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Annual Judiciary Dinner

Friday, May 1, 2020

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TRIVIA CONTEST

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

Trivia Question #20

What type of person shall not be honored on a US Postal Stamp, according to the US Postal Service and the Citizen's Stamp Advisory Committee?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by November 22, 2019. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of November 25, 2019. The correct answer to Trivia Question #20 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 #19 – **Who do you e-mail to make submissions to the Plaintiffs'-only database? Answer: Chris Miller**

Congratulations to Question #19 winner Sandy Neuman, of Richards & Richards!

Every year WPTLA sponsors a Scholarship Essay Contest, open to high school seniors in the Western District of PA. All public, private, and parochial schools are invited to participate. The scholarships - three $2,000 prizes - are awarded based upon the submission of an essay, which is read and scored by committee members.

The 2019 question posed to the students dealt with the 8th Amendment and a factual case.

FACTUAL BACKGROUND:

Madison v. Alabama

Circuit Court of Alabama (January 16, 2018)

Vernon Madison was charged with killing an on-duty police officer in April 1985. He was convicted of capital murder and sentenced to death in 1997 after several re-trials. During his incarceration, Madison suffered several serious strokes which has resulted in vascular dementia, and long term memory loss. He is now blind, often disoriented, exhibits slurred speech, and suffers from impaired cognitive function. This is a result of his strokes and age. He is unable to remember committing the crime for which he is to be executed.

Madison has been found competent by the state of Alabama to be executed. Madison filed for federal habeas corpus relief. Madison contends that his execution violates the 8th Amendment Prohibition against cruel and unusual punishment when he cannot remember committing the crime with which he has been convicted. He also argues that the 8th Amendment bars his execution due to his current mental and physical state.

TOPIC QUESTION:

Does the 8th Amendment bar the death penalty for an individual who can no longer recall his crime and does not have a rational understanding of the circumstances of his punishment.

The students were instructed to base their essay not on whether or not there should be a death penalty, rather, whether or not Vernon Madison's execution would violate the 8th Amendment prohibition against cruel and unusual punishment. Supporting briefs were included.

Of the 281 schools invited to participate, 111 requested information. Of those 111 schools, 37 submitted a student's essay. The 10-person committee read each essay submitted, and a final 3 were identified. Follows is one of those three submissions.

Vernon Madison's story began with his shameless murder of officer Julius Schulte. In 1985, he was placed on death row after his jury had determined that he was to be held mentally competent for his crime. Although, as the years passed, Madison began to experience complications from a set of four strokes that stole his ability to remember the crime that he had committed and destroyed his mental competency. Madison filed petitions for habeas corpus relief, but his death sentence was still upheld by the Alabama Supreme Court despite the extent of his mental deterioration that could not consider him mentally viable.

The question Madison's case had presented had never been seen before or contemplated in legal history: Is it a violation of the Eighth Amendment to execute an individual who was held mentally capable at the time of his crime, but is no longer considered competent due to their inability to recall their crimes or rationally understand the circumstances of their punishment? Under the current resolution, it is in fact a *(Continued on Page 23)*

violation of the Eighth Amendment to execute a person who cannot be considered mentally competent enough to understand the full proceeding of their punishment. Therefore, it is a violation of the Eighth Amendment to execute Vernon Madison.

Throughout the course of this argument, the contentions should be viewed through a lense of morally justified retribution. Morally justified retribution can be defined or described as a set of principles that govern a person's behaviour or the conducting of an activity that fulfills a set of standards placed at which can be described as "right or wrong." Justification is the act of showing something to be right or reasonable and retribution can be seen as punishment enacted by a government entity in order to "level the scales." Therefore, the criterion to be met during this argument is that it is morally unjustified to punish an individual who cannot substantiate an understanding of their punishment due to a lack of competence, memory loss, or any other debilitating factor that prevents an individual from being able to self-evaluate their own crimes and justify their own punishment.

The first contention that affirms the resolution (it is a violation of the Eighth Amendment to execute Vernon Madison) is competency. Competency, according to the Merriam-Webster Dictionary, is the quality or state of having sufficient knowledge, judgment, skill, or strength (as for a particular duty or in a particular respect). Due to Madison's mental illness and debilitating mental capacity that does not allow him to determine right from wrong or psychologically understand the reasoning for his execution, it is a cruel and unusual punishment to kill him. To chastise a person who cannot fathom or understand the reasoning for their punishment is an infringement on basic human principles.

The exploration of Vernon Madison's competency can be seen by his examination that was performed by two individuals: Dr. Karl Kirkland, who was a court-appointed psychologist, and Dr. John Goff, who is a neuropsychologist retained by Madison. From an initial petition, Kirkland's testimony had been negated due to a suspected inability to provide a fair psychological evaluation due to drug abuse. Madison then appealed and was re-evaluated for another petition on December 18th, 2017. At this trial, Dr. John Goff had re-evaluated the rapid decline of Vernon Madison and recognized that he had, in fact, overlooked Madison's dire situation from the initial petition that demonstrates the extent of Madison's disabilities.

Through heavy testing and continuous evaluation, it was established that Madison suffered from vascular dementia. This includes significant brain damage that encompasses dead brain tissue that is continuing to grow throughout his occipital lobes and cerebellar hemispheres. It results in Madison speaking in a slurred manner, becoming legally blind, losing the ability to walk independently, suffering urinary and fecal incontinence, developing severe, debilitating long-term and short-term memory loss to the point that he cannot remember the alphabet past letter G, and intelligence that is so severely impaired that it is classified within the range of borderline intellectual disability. In fact, Dr. John Goff had testified the following, "He cannot independently recall the facts of the offense; the sequence of events from the offense to his arrest, to his trail or previous legal proceedings in his case; *(Continued on Page 24)*

or the name of the victim, and as a result he does not have a rational understanding of why he faces execution. He similarly cannot rationally understand a range of relevant features connected to his death sentence and confinement."

We, as a society, recognize the basic morality that encompasses the importance of rehabilitation and treatment- especially for those who are incompetent, uneducated, and **ill.** The reason that humans educate children before punishment is a basic philosophical feeling that every human holds in their heart: equity. Rick Riordan, an author, once said, "Fairness does not mean everyone gets the same. Fairness means everyone gets what they need." The reason why humans feel so morally obligated to provide children a reason for their punishment or extend treatment to those who committed a crime while they were mentally ill is because we seek to give the most fair, equitable sentence that benefits the needs of others.

Wouldn't it be an outrage to punish a child before they received an explanation for their wrongdoing? Children need to grasp the concept of their infractions so that their punishment makes sense to them in the way that they can learn and grow from their discipline. In the case of Vernon Madison, he is mentally incapable of understanding any explanation given to him. Providing the reasons for punishments is basic human decency that we extend to all people and if individuals cannot understand that explanation, it is morally wrong to punish them. Cannot these same, simple principles about morality be applied to Vernon Madison despite the fact his competency and ability to understand his punishment is a question that followed his crime?

Therefore, Vernon Madison cannot be considered competent emotionally, mentally, or physically. Vernon Madison does not have the capacity to even begin to understand the idea of retribution or the premise of an execution. It is not morally justified retribution to put a man to death who cannot differentiate between right and wrong or begin to contemplate the philosophical depths of a punishment from a crime he cannot member. It is a basic principle of human morality to save punishment from those who cannot gain something from it. It would be a cruel, unusual, and discriminatory practice to not provide the same moral, justified retribution to Vernon Madison that we extend to all humans.

The second contention that strengthens the resolution is justification of punishment. Vernon Madison after his thalamic stroke lost all ability to live a full, complete life that is not marred by disability or the mere right to his own conscience. Through multiple years of prison, medicinal tests, and personal suffering, Vernon Madison's execution would not be a justifiable punishment because he has already received retribution for his heinous crimes.

Vernon Madison was charged with capital punishment in 1985, meaning he has served thirty-four years in prison. For thirty-four years, Madison has remained inside concrete walls where he has posed no threat or imminent harm to any community or individual. If justice is defined as each receiving their due, then isn't a life spent in prison from the prime age of 34 years enough sacrifice given? Isn't it ironic enough that Vernon Madison has suffered so extensively that he has lost all mental faculties to the point that he can no longer *(Continued on Page 25)*

control his movement, eyesight, bladder, or bowel movements? In fact, during Madison's third appeal in 1994 before he had experienced his strokes and was deemed mentally capable, the jury had unanimously opted to mandate a life in prison rather than death row. This decision was overruled by an Alabama judge. According to that jury, Madison had done far more than receive his "due" even before he was declared incompetent. Therefore, Madison's crimes had been accounted for and had been justified for the immense time and suffering he has experienced within prison.

Even more, it would be an unjust punishment to execute Vernon Madison when his incompetence would prove no deterrence or moral lesson to Vernon himself or any other criminals. Madison's death would be meaningless, morally, due to its inability to teach a lesson. There is no deeper meaning to executing a feeble, senile man who cannot even grasp the idea of his own execution. The opposition would argue that various inmates on death row may try and follow Madison's path of "incompetence," but this is a logical fallacy when modem technology has provided us with a sure way to clarify what competence truly looks like.

In the end, punishing a person who has already served an adequate sentence and agonized over personal implications is not justified. Madison has already received his chastisement. There is no lesson that can be taught from executing Vernon Madison; there is no morality in a story where a man dies without meaning. The opposition would try and claim that Madison's crime of murdering a cop is unforgivable and has lingered with Julius Schulte's family and that they have a right to claim Madison's death- giving it meaning. This, however, is not justified retribution. Retribution is the responsibility of the government and not the people, just like the Alabama judge had the right to overrule the jury- the people. It is not morally justified retribution, under our constitutional government, to base an execution on the feelings of a family when there are multiple other factors to prove that justice has already been served m the case of Vernon Madison.

Therefore, it would be a violation of the Eighth Amendment to execute Vernon Madison due to the fact that his punishment does not meet a criterion of being justified. Not only has Madison diligently served a life sentence and has posed no harm to others, but his execution will teach no lesson or deter other prisoners from committing nefarious murders. A discipline that has no meaning and is empty of a lesson or theme will never be morally justified.

In conclusion, it is a violation of the Eighth Amendment to execute Vernon Madison when considering the level of incompetence that he suffers and the justification of his punishment. It is morally unjustified to take the life of an individual that cannot fathom the reasoning for their own punishment from memory loss, mental illness, or any other means that would deteriorate the mind. While the opposition to the resolution would vehemently argue that it is justified for Vernon Madison to offer his life in order to pay for his grave infringement on another's right to life, Mahatma Ghandi once said, "An eye for an eye makes the whole world blind."

Submitted by: Brandie L. Ray

Bellwood-Antis High School

THANK YOU FROM BRANDIE L. RAY

June 17, 2019

To Whom it May Concern,

Thank you. I wanted to send this letter to convey how appreciative I am of the scholarship that your organization was able to provide for me. This year, specifically, has proved to be especially financially challenging for my family and I. I've spent my whole high school career preparing for college in order to receive enough grants and scholarships to even be able to consider post-secondary education and because of the situations we faced this year, the question of college became even more imposing and unlikely.

It has been an immense struggle as well as a magnificent challenge to conquer high school the way that I have academically along with developing my leadership skills. I felt adequately prepared to move onto college, but the fact is that I would have never been able to attend without your organization. I can proudly say that if I work hard throughout this summer to save a little more money, there is a great possibility that I will not have to take out student loans for my first year of college. I will be debt free because of the contributions you've made to my education and I want to show you that it was all worth while by sharing some personal accomplishments I've made.

After I had submitted my application, I had recently graduated form a course at the Central Pennsylvania Institute of Science and Technology concerning my EMT certification. I can proudly say that after taking two grueling tests, I became a certified EMT May 13th. I was recently hired with the Hollidaysburg ambulance service and I also intent to hold two other positions at DelGrosso's Amusement Park as an EMT and lifeguard. My education is my top priority and that's why I am pushing myself to maintain and upkeep three jobs this summer. So I promise you, your contribution through your scholarship will not be in vain because my dedication will take me far. in fact, despite some "senioritis" I may have felt this y ear, I was able to graduate with the fourth highest GPA in my class.

Now that high school is coming to a close, I plan to attend Juniata College. I'm not sure if I want to attend law school or medical school after I am finished with my undergraduate degree, but I have finally decided that I will major in biology with a possible minor in politics or peace and conflict studies. I want to adequately prepare myself with the best critical thinking and analytical skills that can possibly be provided to me and no matter how challenging it may get, I will never relent in college. I know that I am destined to make great leaps and strides whether it be as a lawyer, doctor, surgeon or medical researcher.

Overall, my appreciation and thanks for your contribution is something that will follow me throughout my college career. I will work harder, keep my head up, and keep my mind focused and determined to prove to you that despite the amount of candidates you may have had for your scholarship, that I was the right candidate to lead your legacy. Thank you again for the sacrifices you have made so that I could success.

-Brandie L. Ray

Oct 12, 2019 – 5K Run/Walk/Wheel – North Park Boathouse, Pittsburgh

Oct 21, 2019 – Beaver Dinner & CLE – Wooden Angel, Beaver

Oct 31, 2019 – 3 credit CLE w/ Erie County Bar Association – ECBA, Erie

Nov 18, 2019 – Comeback Award Dinner – Duquesne Club, Pittsburgh

Dec 11, 2019 – Lunch 'n Learn Ethics CLE – Gulf Tower, Pittsburgh

Jan 23, 2020 – Junior Member/Young Lawyer Meet 'n Greet – Revel & Roost, Pittsburgh

Feb 6, 2020 – 2 credit CLE – Gulf Tower, Pittsburgh

Feb 12, 2020 – 3 credit CLE w/ Forensic Human Resources & NFP Structured Settlements – Koppers Bldg, Pittsburgh

Mar 26, 2020 – Dinner & CLE – Washington County

Apr, 2020 – Membership Meeting w/ Elections – Carmody's Grille, Pittsburgh

May 1, 2020 – Annual Judiciary Dinner – Heinz Field, Pittsburgh

May 22, 2020 – Ethics & Golf – Shannopin Country Club, Pittsburgh

Monday, Oct 21, 2019 - Dinner & CLE - Wooden Angel, Beaver

The Honorable James J. Ross, of the Court of Common Pleas of Beaver County, will discuss how the civil system is working in Beaver County, and new developments in the law.

Make your reservation at https://wptla.org/events/beaver-dinner-cle/

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
909 MOUNT ROYAL BOULEVARD, SUITE 102
PITTSBURGH, PA 15223-1030

Through the Grapevine….

Congratulations to **Past President Rich Schubert** on achieving recertification as a Civil Trial advocate with the National Board of Trial Advocacy. Board Certification is the highest, most stringent, and most venerable honor an attorney can achieve.

Congratulations to **Peter Giglione** on receiving the Duquesne Law Alumni Outstanding Achievement Award this past weekend.

Congratulations to **Past President Larry Kelly** on being named Secretary of the Pennsylvania Association for Justice at their annual retreat in July.

More congratulations to **Past President Larry Kelly** on being honored as a Distinguished Alumni of Slippery Rock University at the 2019 Distinguished Alumni Awards Dinner this month.

William P. Bresnahan has moved his office and changed the firm name. You can now find Bill at Bresnahan & Finnegan, P.C., 300 Oxford Dr, Ste 75, Monroeville, PA 15146.

Our condolences to the colleagues and friends of **Past President Robert A. Cohen**, who passed earlier this year.