THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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DAVID'S STORY

On November 18, 2019, WPTLA returned to The Duquesne Club to hold its yearly dinner for the "Comeback Award." The WPTLA holds this annual recognition dinner to honor a client of a WPTLA member who has persevered through a serious injury. This year, the Comeback Award Committee selected David Gifford, a client of Armand Leonelli, Esquire, and the law firm of Edgar Snyder & Associates.

David, a military veteran, was paralyzed as a result of a motorcycle accident. David has refused to allow his injury to diminish his life, and now spends much of his time helping others who are injured or disabled.

"*I have a very full life now and try to help others realize that an injury does not have to end or reduce one's quality of life, it just changes where and what you do to move on in spite of the injury.*"— David Gifford

"*The more you do, the more you will be able to do.*"— David's motto

Preparation for such an awe-inspiring mindset began in David's youth. At an early age, David learned take his own initiative and to provide for himself. David grew up in an old house, which at times did not even have running water. By sixth grade, David was already working odd jobs to buy his own clothing.

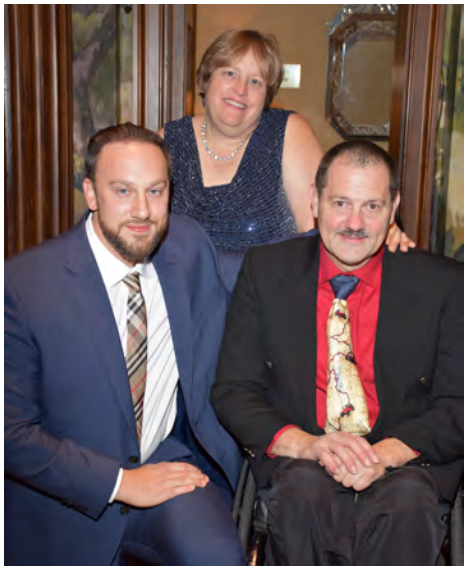
David also discovered his passion for helping others as a young man. David became a camp counselor for troubled teens while in high school. Then, upon graduating, he made the decision to help his country by joining the Army.

Stationed at Fort Wainwright in Alaska, as one of America's "artic warriors," David learned of his love for riding ATVs. David could not get enough of his ATV adventures. So, when David finished his service in the Army, he took a cross-country trip from Alaska to Florida—with a trailer for his ATV, of course. Upon his return to Pittsburgh, David expanded his love of riding to include motorcycles.

He also returned to service with the National Guard. David would often ride his motorcycle to work at the National Guard.

On September 3, 2013, David's life changed. David was riding his motorcycle

(Continued on Page 3)



Dear Laurie, Armand & everyone at WPTLA,

Thank you so much for the generous donation to PHWFF (Project Healing Waters Fly Fishing) in the name of Comeback winner Dave Gifford. Thank you for inviting us to the wonderful dinner & recognition of Dave's service. It was a very inspiring evening!

Kind regards,
Amanda (Thompson) & Bob (Heil)

Pictured on the R: Armand Leonelli, Karen Gifford, David Gifford

Photo credit to Martin Murphy. Additional photos on page 20.

PRESIDENT'S MESSAGE

As we approach the end of the year, I would like to discuss some of the basic principles we should strive to follow as attorneys. Although some of these principles may seem trite, it is always a good idea to reflect on whether we are fulfilling our obligations as professionals.

Always deal fairly and honestly with others.

It goes without saying that you must always tell the truth. Moreover, in dealing with others, whether your clients, an insurance adjuster or opposing counsel, you should be particularly careful choosing your words. Be precise in your speaking and in your writing. If you're not sure about something, say so. If there are facts which should be fairly revealed, do so.

In Western Pennsylvania, even in Pittsburgh, we all practice in what seem like small town communities. Your reputation is always on the line. If you are dishonest or even not scrupulously honest, word will get out.

On rare occasions, I have dealt with opposing counsel who were less than honest. I've never forgotten this, even though this happened years ago. I still question everything these attorneys say and do.

There is a familiar saying in the law, "falsus in uno, falsus in omnibus." This translates to false in one thing, false in everything. This is explained in a standard civil jury charge: "if you decide that a witness intentionally lied about a fact that may affect the outcome of the case, you may, for that reason alone, choose to disbelieve the rest of that witness's testimony..." (Pa.SSJI (Civ) 4.40) Along the same line, I have chosen not to fully trust those who have been false or dishonest in the past.

Your word is your bond.

If you promise to do something, do it. If you make a mistake, accept the consequences. Your reputation is always on the line.

I recently settled a case at the pretrial conference. I promised my client that she would net a certain amount from the settlement, leaving a reasonable margin of error. Afterwards, my expert witness unexpectedly sent me a supplemental bill. The bill reduced the client's recovery to about $1000 less than the expected amount. Even though my client was still receiving a substantial sum, of course I reduced my fee so that she would receive the agreed-upon amount.

Don't cut corners and finish the job.

When accepting a new case, sometimes you underestimate the amount of time and expense involved. Unless the expense makes the case unfeasible, put in the time and effort necessary.

Always do your best work. Take the time to research any unknown issues. Carefully proofread any document that bears your signature or leaves your office under your name. Sloppy work reflects poorly on your abilities.

Be intellectually curious and do your homework.

When working on a legal matter, try to learn as much as you can about the subject at hand. With the availability of the Internet, you can search just about anything.

If it is an injury case, learn as much as you can about the medical condition at issue. Make sure you are using a reliable source, however. For instance, I subscribe to UpToDate, which many doctors consider authoritative. There are many other reliable sources also available.

If it is a motor vehicle crash, look at the roadway on Google Maps, then look at aerial view and even Street View, if available. You can take screenshots to preserve these views for use in deposition or court.

If it is a premises liability/fall down case, again use Google Maps for aerial and street views, if applicable. In Street View, you can even turn back the clock by moving the slider to different points in time.

Trust your instincts.

Finally, always trust your instincts. If something doesn't feel right, it probably isn't. If you are not sure, call a trusted colleague for a second opinion.

I hope everyone has a happy and healthy New Year.

By: David M. Landay, Esq. of

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DAVID'S STORY ... FROM PAGE 1

to work when he was involved in a telescopic collision.

David was rear-ended by a sedan and thrown into an SUV in front him. David sustained fractures at T10-12 and a total dislocation at T11-12. As a result, David became completely paralyzed from the waist-down with no sensation and motor function. His entire thoracic spine was fused with rods and screws.

Rather than focus on the negatives, David simply considered his becoming "a member of the paralyzed community" to be the start of a new life. Due in large part to his self-sufficient personality, David learned quickly how to make the best of his condition. He did not let his injury keep him from the outdoors and he even discovered a way to continue riding. David started handcycling at a competitive level. Also, because of his long-standing desire to help others, David started volunteer work with veterans and those who suffer from a variety of injuries and disabilities.

David now volunteers to encourage as many individuals as he can do what they are truly capable of so that they too can lead fulfilling and positive lives. As David has acknowledged, if it weren't for the accident, his benevolent social footprint likely would not be as great. David now spends much of his time participating in the following activities: volunteering with the Aspinwall VA; volunteering at Mercy Hospital; mentoring peers in the Christopher Reeves Foundation; participating in the Family Unity Network; participating in clinical research studies for spinal cord injuries; and assisting veterans involved in Project Healing Waters.

At the Aspinwall VA, David visits inpatient veterans who are part of the nonprofit, Paralyzed Veterans of America. He lifts the spirits of veterans who find motivation in his story. David also races handcycles as part of the Paralyzed Veterans of America Racing Team. David recently participated in the Pittsburgh Marathon and, as a result of his performance, he has qualified to gain entry to the Boston and New York Marathons. With Project Healing Waters, David participates in the sport of fly fishing with other veterans and helps them build fishing rods.

At home, and apart from his charitable deeds, David enjoys working with his hands, building model cars, and making knives. David's craftsmanship has enabled him to adapt his house to his condition. Specifically, he created a home workshop to accommodate his being in a wheelchair. He has also designed and made a home theater so that he and his loving wife, Karen, can enjoy movies together. David has also modified a Jeep with hand-controls to make it accessible.

David is an inspiring individual who is truly deserving of the Comeback Award. He has transitioned from a member of our military to an invaluable member of our community as a "volunteer warrior."

As part of David's recognition as the Comeback Award recipient, WPTLA donated $2,500.00 to a charity of David's choosing. Of course, in an effort to help as many people as possible, David decided to split the donation between two charitable organizations, the Paralyzed Veterans of America Racing Team and Healing Waters. As previously mentioned, David is a member of both groups, and both are dedicated to providing disabled veterans with outdoor therapeutic activities/sports.

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PENNSYLVANIA SUPREME COURT DECLARES PENNSYLVANIA'S SEVEN YEAR LIMIT ON MEDICAL MALPRACTICE CASES UNCONSTITUTIONAL

Imagine two scenarios. In the first scenario, an individual develops a painful and reddened skin bulge in their abdomen near an old surgical scar. The scar was from surgery performed ten-years in the past. After undergoing an X-ray, the individual learns the painful bulge is a surgical sponge mistakenly left behind during that operation. The sponge is starting to emerge and the patient needs another surgery to remove the sponge completely.

In the second scenario, a hospital fails to do proper testing in a man who donated a liver for transplant into his mother. Proper testing would have revealed the son carried the same rare genetic variance that caused the disease his mother's doctors were trying to cure with the transplant. Ten years after the transplant, the mother is once again diagnosed with the same rare genetic disease. The disease was passed to her through her son's donated liver.

Both patients suffered unfortunate injuries as a result of medical malpractice. Assume neither patient knew or suspected their injuries were caused by medical negligence until at least ten years after the occurrence of the negligence at issue.

Before a few weeks ago, these two individuals did not enjoy the same right of access to the courts to seek monetary damages for their injuries. Under a law called the Statute of Repose, the mother who underwent transplant with a lobe of liver carrying a genetic defect was barred from filing a lawsuit because the failure to properly test her son occurred more than seven years before she discovered she still had the rare genetic disease. On the other hand, the patient in the first scenario would have benefited from an exception to the statute of repose for injuries caused by foreign objects left inside a patient's body. Under that exception, the patient in the first scenario had two-years to file a lawsuit from the date he discovered the injury, regardless of how many years passed since the sponge was left inside his body.

Both patients faced a situation where it was impossible to know they were injured until more than seven years from the date of the negligent act or omission. Yet, only the patient injured by the surgical sponge left behind could recover compensation for the harm caused by this typically inexcusable mistake. If you think it is unfair for access to justice to depend on whether or not a person's injury was caused by a foreign object, you are not alone.

On October 31, 2019, the Pennsylvania Supreme Court handed down its opinion in *Yanakos v. UPMC* and declared Pennsylvania's statute of repose unconstitutional.

The facts in *Yanakos* are very similar to those in second scenario described in the beginning of this article. In September 2003, Susan Yanakos underwent a liver transplant to cure a genetic condition called Alpha-1 Antitrypsin Deficiency (AATD). Susan's son, Christopher, volunteered to donate a lobe of his liver to his mother. However, laboratory tests showed Christopher had the same genetic condition as his mother and was not a candidate to donate his liver. Nevertheless, a surgeon went forward with the operation and transplanted a portion of Christopher's liver into his mother Susan.

Eleven years after the transplant additional testing showed Susan still had AATD, in spite of the donation that should have eliminated the genetic disease from her body.

Before the Court, UPMC argued the statute of response complied with Article I, Section 11 of the Pennsylvania Constitution. The relevant portion of Article I, Section 11 states "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law."

In order to determine whether the statute of repose was constitutional, the *Yanakos* court was required to determine the level of scrutiny it should apply to the question. The level of scrutiny is basically the lens through which the Court must assess the constitutionality of a law. The level of scrutiny depends in large part on the nature of the right at issue. Rights the courts determine are "fundamental" are subject to a higher standard of scrutiny to assure those rights are not infringed upon by government action. After analyzing the nature of the right to a remedy at law secured by Article I, Section II, the *Yanakos* Court decided the right conferred by Article 1, Section 11 was "important" and subject to the intermediate scrutiny test. Under that test, UPMC had the burden to prove to the Court that the statute of repose was "substantially related to achieving an important government interest."

The Court found UPMC proved the statute of repose was related to the important government's interest of controlling the rising costs associated with medical insurance and medical care. However, UPMC failed to produce evidence of how the statute of repose actually achieved this government interest. For instance, UPMC argued a statute of repose would provide certainty in the actuarial process of calculating malpractice premiums. Yet, there was no evidence as to how setting the limit of seven years would produce such actuarial certainty. Likewise, there was no evidence any specific time period would have an effect on controlling *(Continued on Page 5)*

PENNSYLVANIA SUPREME COURT DECLARES PENNSYLVANIA'S SEVEN YEAR LIMIT ON MEDICAL MALPRACTICE CASES UNCONSTITUTIONAL ... FROM PAGE 4

malpractice insurance costs. In fact, the Court reasoned the statute of repose as written already injected unpredictability into the matter of controlling malpractice insurance rates by reason of its exceptions for foreign objects and actions on behalf of minors. In other words, the exceptions to the statute of repose created uncertainty. The exceptions defeated the very purpose for why the rule was passed.

At the end of the day, the impact of the *Yanakos* decision on medical malpractice claims or medical malpractice insurance premiums will likely be more symbolic than anything else. An injury which remains latent and undetectable for more than seven years from the careless or negligent conduct that caused the injury is incredibly rare. Nevertheless, the Pennsylvania Supreme Court rightly recognized the statute of repose would deprive injured people like Susan Yanakos of their constitutional rights to justice without legal justification.

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We are looking to create a small Meet 'n Greet Host Committee of members who attend our events. Members of this committee will ensure that new people and guests are approached at events and talked to, and introduced to others.

The first opportunity for this will be the Junior Member/Young Attorney Meet 'n Greet scheduled for January 23 at Revel & Roost in Pittsburgh.

If you would like to participate in this welcoming endeavor, please contact our Executive Director at 412-487-7644 or laurie@wptla.org.

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES VOLUME 32, 2019-2020

	ARTICLE DEADLINE DATE	TARGETED PUBLICATION DATE
Vol 32, No 3 - Spring 2020	March 6	March 20
Vol 32, No 4 - Summer 2020	May 29	June 12

UPCOMING EVENTS

JUNIOR MEMBER / YOUNG LAWYER MEET & GREET

Thur, Jan 23, 2020

Revel & Roost, Pittsburgh

2 CREDIT CLE

Thur, Feb 6, 2020

Gulf Tower, Pittsburgh

3 CREDIT CLE

Wed, Feb 12, 2020

Koppers Buliding, Pittsburgh

LUNCH 'N LEARN CLE

Thur, Mar 12, 2020

Gulf Tower, Pittsburgh

DINNER & CLE

Thur, Mar 26, 2020

Bella Sera, Canonsburg

MEMBERSHIP DINNER & ELECTIONS

Apr, 2020

Carmody's Grille, Pittsburgh

ANNUAL JUDICIARY DINNER

Fri, May 1, 2020

Heinz Field, Pittsburgh

ANNUAL ETHICS & GOLF

Fri, May 22, 2020

Shannopin Country Club, Pittsburgh

When it Comes to Non-Economic Damages – Drop Your Anchor!

Was Gandhi older or younger than 9 years old when he died?

Before we examine the surprising importance of this question, imagine listening to the following (painful) jury deliberation, "How are we supposed to know what reasonable compensation is for her pain and suffering?" "Well her medical bills were $13,000, so I think $30,000 would be fair. (followed by a collective head nod)" Little do they know that you turned down a $75,000 offer.

While there are many factors that influence jury decision making, when it comes to abstract concepts like the fair value of someone's pain, the anchoring effect weighs heaviest.

Anchoring or focalism is a cognitive bias where an individual depends too heavily on an initial piece of information offered (considered to be the "anchor") when making decisions and subsequent judgments.

Once an anchor is set, other judgements are made by adjusting away from (but in relation to) that anchor, and there is a bias toward interpreting other information around the anchor.

The Research

Now back to Gandhi. Behavioral scientists Strack & Mussweiler, conducted a study asking participants to guess the age of Mahatma Gandhi when he died. But before asking for their estimates, the researchers exposed one group to a low anchor ("Did Mahatma Gandhi died before or after the age of 9 years old?"), and exposed another group to a high anchor ("Did Mahatma Gandhi died before or after the age of 140 years old?"). While it was impossible for either anchor to be the correct answer, each anchor nonetheless had an effect on the participants, as the mean estimate from the low anchor group was 50, while the mean estimate from the high anchor group was 67.

The anchoring and adjustment heuristic was first theorized by Amos Tversky and Daniel Kahneman. In one of their first studies, participants were asked to compute, within 5 seconds, the product of the numbers one through eight, either as 1 x 2 x 3 x 4 x 5 x 6 x 7 x 8 or reversed as 8 x 7 x 6 x 5 x 4 x 3 x 2 x 1. Because participants did not have enough time to calculate the full answer, they had to make an estimate after their first few multiplications. When these first multiplications gave a small answer – because the sequence started with small numbers – the median estimate was 512; when the sequence started with the larger numbers, the median estimate was 2,250. (The correct answer is 40,320.)

In another study by Tversky and Kahneman, participants observed a roulette wheel that was predetermined to stop on either 10 or 65. Participants were then asked to guess the percentage of the United Nations that were African nations. Participants whose wheel stopped on 10 guessed lower values (25% on average) than participants whose wheel stopped at 65 (45% on average).

While there is debate in the scientific community regarding the subconscious mechanism for our anchoring bias numerous studies confirm that the effect is real and powerful.

How Anchor Awareness Can Help You and Your Clients

In any case where your client's non-economic injuries are significant and your economic damages (medical bills, wage loss, etc.) are modest, seriously consider dropping your claim for economic damages. To do otherwise provides the jury an easy path to a small verdict.

By allowing the jury to consider small economic damages, we are not so much shooting ourselves in the foot as dropping an anchor on it.

I find that many lawyers always claim economic damages, no matter how small (burial and funeral costs in wrongful death cases being the most dangerous example) because that's how it has always been done. But we must rethink whether this standard practice does more harm than good.

As plaintiff trial lawyers in Pennsylvania, we are already at a disadvantage due to the prohibition against asking juries to award a specific amount of non-economic damages (a high anchor number). *(Continued on page 7)*

THE ART OF PERSUASION .... FROM PAGE 6

By putting in a low economic damage anchor we exacerbate the situation and greatly increase our chance of an unfair verdict.

Anecdotally, I have not claimed any economic damages in my last several jury trials with good results. Personally, my default position is to waive any economic damages that total less than $100,000 and possibly higher if the personal losses to my client are sufficiently significant.

Now before you email me about legal malpractice implications, I absolutely think it is best to obtain your client's consent ahead of trial before your willy-nilly forego your client's economic loss claims. I address this with a letter explaining my plan and rationale to the client. I leave the decision up the client and have them sign a letter confirming agreement with my plan to drop the economic claims ("You are free to decide"). I have yet to have a client disagree with my recommendation.

If I have failed to persuade you on the power of anchoring and nominal economic loss claims, please consider that I have personally listened to Don Keenan, David Ball and Keith Mitnik (among many other trial wizards) tout the importance anchoring in this regard.

In sum, to stand a chance of bringing about just results for our client's righteous claims we must strive to reduce, if not eliminate, self-inflicted wounds. By allowing the jury to consider small economic damages, we are not so much shooting ourselves in the foot as dropping an anchor on it.

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Junior Member/Young Attorney

Meet 'n Greet

Thursday, January 23, 2020

Revel & Roost, Pittsburgh

Details coming to your inbox!

ERIE CLE RECAP

On October 31, the WPTLA and the Erie County Bar Association joined forces to present a seminar entitled the "ABCs of Focus Groups." The event was held at the ECBAs beautiful new Will J. Schaaf and Mary B. Schaaf Education Center. The presenter was WPTLA's own Brendan Lupetin of Meyers Evans Lupetin & Unatin, LLC. The three-hour presentation was tremendous. Brendan's expertise in the management and use of focus groups is unparalleled. Brendan generously shared his system for easily and cost-effectively setting up and conducting his own focus groups, and how the feedback from those groups has maximized his settlements, improved his discovery plans, his use of experts and his trial strategy. Brendan also provided all attendees with copies of the documents he uses to set up and conduct the focus groups. The information is remarkably comprehensive and practical. Every detail is addressed, and all attendees now have the tools they need to use focus groups to enhance their practice and benefit their clients. Thanks to Brendan for his great work and generosity!

By: Craig Murphey, Esq. of

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Pictured above is Brendan Lupetin presenting his "Focus Groups" CLE in Erie on Oct 31, 2019. Photo courtesy Erie County Bar Association.

GRATITUDE DURING THE SEASON - AND ALL YEAR LONG

When asked by Forbes magazine about his five keys to happiness, billionaire Bill Gates spoke of following through on commitments; being philanthropic, in word, deed, and coin; exercise (tennis, to be specific); and putting love of family first.

And when looking for perspective, he tries to view his life not through the eyes of his younger self, but those of himself 20 years from now – allowing for the wisdom of years to replace the haste of youth or even the moment.

More than all else, it would seem, Mr. Gates' happiness is founded on gratitude and generosity that impacts himself and those around him. And aside from the depth and breadth his billions afford him as part of his Giving Pledge commitment, being happy and thankful requires little but kindness.

It is hard to believe I started this crazy journey almost 30 years ago. I assure you that the vision I had of myself when starting my own structured settlement firm at the age of 23 is not what NFP has become. As one of the original business partners of the Western Pennsylvania Trial Lawyers Association, I would like to think we have learned so much from each other. I would like to think kindness steers us. We are all committed to being your clients' most staunch advocates in what can be their toughest and often tragic times. Yet, sympathy also is at work. Whether through serious personal injury to themselves or the harm or untimely passing of a loved one, your mission is to hold others accountable while our goal is to help you bring some form of closure to a horrible situation.

It is a noble calling.

As founder of a structured settlement firm and a trust services company, I see the struggles that people face across all walks of life. I also witness the relief we and our attorney partners bring when a client's settlement is converted into something that brings long-time peace of mind and financial security to their lives.

I can't help but thinking of the importance that the phrase "attorney client privilege" plays in all our professional engagements. It's a privilege to be chosen to work with clients to help them through difficult situations.

So as the holidays approach, what am I thankful for…?

I am thankful for my health and that of my family.

I am thankful for the gift of friendship and having the opportunity to work with so many people I do not consider clients but friends.

I am thankful for having the good fortune of starting my own company 27 years ago and calling my brother the best partner in the business world.

I am thankful for the role I can play in helping you and your clients find closure. We are called on to be a partner in what often are the most trying times they have faced, and entrust us to handle their affairs as a confidant and close partner.

I'm thankful that you trust us and ultimately they trust us with their personal and family health, fiduciary, and financial affairs and futures.

These are what make me thankful in my life and career. Gratitude, it seems, is timeless, if you look at it with the right perspective.

By: Bill Goodman, MSL, CSSC, President and Founder

NFP Structured Settlements

WPTLA Business Partner

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Settlement Considerations Involving DPW Liens

Many practitioners encounter settlements where the injured worker has received medical benefits through a DPW program. These payments constitute a subrogation issue that need to be dealt with at the time of settlement. Practitioners have responsibility to the Commonwealth of Pennsylvania under state law and the applicable regulations.

62 P.S. §1409 sets out the responsibility injured workers and their counsel have for DPW payments. §1409 (b)(1) states as follows:

> "When benefits are provided or will be provided to a beneficiary under this section because of an injury for which another person is liable, or for which an insurer is liable in accordance with the provisions of any policy of insurance issued pursuant to Pennsylvania insurance laws and related statutes the department shall have the right to recover from such person or insurer the reasonable value of benefits so provided."

The Act goes on to require a DPW beneficiary pursuing a claim seeking recovery of medical expenses which had been paid under the medical assistant program are also required to give reasonable notice to DPW if he/she is not pursuing recovery of the expenses. See §1409 (b)(5)(iii). Practitioners should be particularly aware of §1490 (b)(5)(iv) which states as follows:

> "Notice of any settlement shall be provided to the department by the beneficiary and any third party or insurer within thirty days of the settlement. Where judicial approval of the settlement is required, reasonable notice of the settlement shall be provided to the department before a judicial hearing for approval of the settlement. Notice is reasonable if it allows the department sufficient time to intervene in the action and prosecute its claim."

Clearly, if a settlement does not include reimbursement of the DPW lien known to the parties at the time of settlement, notice must be given to DPW if the parties are not addressing the DPW lien. Said notice has to be at least 30 days pursuant to §259.4(d) of the Pennsylvania Code regulations applicable to third-party liability. The notices sent to the department must be done by either certified or registered mail.

§259.6 of the Pennsylvania Code specifies civil money penalties for violation of the obligation set out under 62 P.S. §1409. Furthermore, in section (c) of the regulation:

> "Persons who are required to disclose information regarding third-party liability to the Department include the beneficiary, any representative of the beneficiary, **and any liable third-party or insurer in possession of that information.**" (emphasis added)

Therefore, practitioners and carrier maintained possible civil liability for failure to comply with notice requirements in the settlement of cases involving the non-pursuit of DPW medical liens. Both claimant and defense counsel have to handle such situations with care. If there is a choice to not pursue the DPW interests, agreed upon settlements are likely to be significantly delayed. Certainly, the settlements would be delayed at least for the 30 day period required for notification to the department.

By: Tom Baumann, Esq. of Abes Baumann, P.C.

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Board of Governors

Have you wanted to get more involved in WPTLA? Do you like to participate and have a say in what goes on? The nominating committee will soon convene to determine the slate of nominations for the Board of Governors and Treasurer for the 2020-2021 year, which runs from July 1, 2020 - June 30, 2021.

To be considered, please contact our Executive Director or one of our Officers before Jan 15, 2020.

MENTION OF INSURANCE

A recent Allegheny County decision reminds us that it is a myth that every mention of insurance by a Plaintiff's witness must result in a mistrial. In *Werksman v. Banas*, 167 PLJ 221 (2019), Judge Connelly denied Post Trial Motions seeking a new trial based upon the incidental mention of insurance. The testimony in question was as follows:

> I pulled into the Dunkin Donuts parking lot, called the police. They came. They took, you know names and numbers and whatnot. We exchanged insurance information.

The foregoing drew a timely objection and motion for mistrial at sidebar. In the opinion following post-trial motions, the Court offered that the comment, "appeared to the court to be vague and inadvertent, and not intentionally elicited to prejudice the trial. Moreover, we offered to provide a curative instruction to the jury, which defense counsel tactically refused." Hence, the Court cited *Deeney v. Krauss*, 147 A.2d 369 (Pa. 1959) for the exception to the general rule against the mention of insurance, "where the reference to insurance is so vague and indefinite as to preclude any prejudicial effect."

Judge Connelly thereafter noted that the Defendant failed to establish prejudice. This was true despite a verdict of $175,000.00 where the Defendant's expert witness, Howard Senter, M.D. conceded that the accident necessitated a microdiscectomy with ongoing, potentially permanent neurological issues in the left lower extremity.

EVIDENCE OF WORKERS' COMPENSATION INSURANCE

Legend has it that an Allegheny County jury bragged about figuring out that the Plaintiff had workers' compensation insurance and avoided a double recovery. Unfortunately, the jury was not smart enough to understand liens.

For the Plaintiff's counsel, the question is what should a jury know about workers' compensation insurance. In *Nazarek v. Waite*, 2019 PA Super 235, 216 A.3d 1093, the Superior Court addressed the question of whether or not a Plaintiff could introduce evidence of his workers' compensation lien. In *Nazarek*, the Plaintiff was operating a vehicle in the course and scope of his employment when his vehicle was rear ended by a vehicle operate by Waite. After a verdict in favor of Nazarek, the Defendant appealed arguing that the trial court erred by permitting evidence of the workers' compensation lien, and the workers' compensation settlement and release. In conjunction with this issue, the Defendant made the uninformed assertion that introduction of the lien would result in a double recovery.

The Court began its analysis by noting that the purpose of the collateral source rule is to avoid a situation where a party is not compensated because there was coverage by a collateral source.[1] The Court then correctly noted that there is a statutory right of subrogation. The Court, in an opinion by former Justice Stevens, further approved the trial court's adept finding that:

> The evidence that was presented was not presented to preclude Plaintiff [Nazarak] from recovering; Plaintiff [Nazarak] will not receive double pay. Workers' compensation is not a collateral source because the lien must be paid back, as the stated purpose of allowing subrogation of claims by the employer is to prevent workers' compensation from being a collateral source.

Nazarak, 216 A.3d at 1101. As such, the collateral source rule was not implicated.

With respect to evidence of the compromise and release, the Defendant claimed that this was violative of 42 Pa.C.S. 6141 ("Effect of Certain

[1] The Court did, in dicta, state "A plaintiff is prevented from introducing evidence about the lack of workers' compensation during trial due to the possibility of creating sympathy." *Nazarak* 216 A.3d at 1101 citing *Hileman v. Pittsburgh and Lake Erie R. Co.*, 546 Pa. 433, 685 A.2d 994, 999 (1996).

(Continued on Page 11)

Settlements"). Subsection (c) of that statute provides:

> **(c) Admissibility in evidence.--**Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

As to this issue, the *Nazarek* Court found that the settlement at issue was "arguably" not admissible, but found the admission of the settlement was not grounds for a new trial.

With respect to the jury instruction issue, the Court found that it was not necessary to give the specific instructions requested by the Defendant because the instruction given by the trial court was adequate. The instruction given by the trial court was:

> You have heard testimony from a representative of Liberty Mutual Insurance Company that Seth Nazarak received benefits under the Workers' Compensation Act. Here in this civil lawsuit Mr. Nazarak is seeking an award of money. If Mr. Nazarak is successful in this lawsuit and receives an award of damages from you, Liberty Mutual will be entitled to receive reimbursement from the award of damages for a portion of the Workers' Compensation it paid to Mr. Nazarak.

It is appropriate to note that this approach brings workers compensation benefits in line with social security benefits which have been found admissible over 10 years ago. See Simmons v. Cobb, 2006 PA Super 222, 906 A.2d 582(the collateral source rule does not preclude a plaintiff from introducing evidence of Social Security Disability Benefits).

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[2] This opinion does not mandate the use of this instruction. The author of this article encourages you to object to the inclusion of the qualifier "a portion". This could result in the jury reducing the award which would in turn result in the Plaintiff being undercompensated since the plaintiff would need to use the portion of the award for his pain and suffering to pay for the attorney fees on the award given to the carrier. This could open the door to reductions for any subrogation lien. The formula in the workers compensation statute would be upended by the reduction since the legislature intended to benefit the employee by effectively paying the attorney fee on its share of recovery. This would be no different than reducing a pain and suffering recovery by the attorney fee. As such, **a Plaintiff's attorney has an obligation** to object to language referring to the inclusion of "a portion."

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***Sayles v. Allstate Insurance Co.,* No. 58 MAP 2018 (November 20, 2019 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)**

Pennsylvania Supreme Court holds that an automobile policy provision requiring an insured seeking first-party benefits to submit to a medical exam whenever the insurance carrier requires and with a doctor selected by the carrier conflicts with the PA MVFRL and therefore is void as against public policy.

This matter arose out of two separate lawsuits (*Scott v. Travelers* and *Sayles v. Allstate*) commenced in the courts of common pleas, which were subsequently removed to federal district courts and thereafter consolidated for disposition by the United States Court of Appeals for the Third Circuit. The cases each involved an auto insurer insisting that pursuant to a provision in their auto policy, their insureds were required to submit to an Independent Medical Exam ("IME") as a condition precedent for payment of first party medical claims.

The Third Circuit petitioned the Supreme Court of Pennsylvania for certification of the following question:

> Whether, under Pennsylvania law, a contractual provision in a motor vehicle insurance policy that requires an insured to submit to an independent medical examination by a physician selected by the insurer, when and as often as the insurer may reasonably require, as a condition precedent to the payment of first-party medical benefits under that policy, conflicts with the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. § 1796(a), and is therefore void as against public policy.

The Supreme Court conducted an analysis of § 1796(a) and found that it imposes mandatory obligations on insurers, which when compared to the IME provisions contained in the aforementioned policies resulted in a number of irreconcilable conflicts.

First, the Court found that Section 1796(a) requires an insurer who wishes to compel a first party claimant to undergo an IME to file a petition with a court, and, also, to show good cause for the IME. In addition, any court order for an IME was required to give the insured "adequate notice of the time and date of the examination," as well as "state the manner, conditions and scope of the examination." 75 Pa. C.S. § 1796(a). By contrast, the IME provisions of the policies at issue did not require an insurer to file a petition, or to establish good cause. Instead, the provisions allowed the insurer to unilaterally require that the insured make themselves available for an IME at a time and place of the insurer's choosing.

Second, the Court found that Section 1796(a) requires a judge to adjudicate the petition. However, the IME policy provisions contained no such requirement. In fact, as the Court noted, under the provisions it was the insurer alone that decides when a request is justified, and if the insured has adequately complied.

Third, the Court found that under Section 1796(a), if a judge grants an insurer's request for IME, the judge selects the physician who will perform the IME, and sets the manner, conditions, and scope of the examination. By contrast, the IME policy provisions allowed the insurer to unilaterally select the physicians and did not set any limits on the scope or conduct of the IME.

Fourth, the Court found that the IME policy provisions allowed the insurer to determine whether, the insured's benefits should be terminated for noncompliance with an IME. By contrast, Section 1796(a) vests this authority solely with the judge who orders the IME.

Based on the foregoing conflicts, the Supreme Court found that the IME policy provisions "manifestly conflict with, and are repugnant to, the statutory protections for individuals insured under automobile insurance policies regarding the conduct of IMEs as established by the General Assembly in Section 1796(a)". As a result, the Court held that these IME policy provisions are void as against the public policy of this Commonwealth.

Barnard v. The Travelers Home and Marine Insurance Company No. 42 EAP 2018 (September 26, 2019, Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)

(Continued on page 13)

Pennsylvania Supreme Court holds that under the PA MVFL an insurance company must offer an insured the opportunity to waive stacking any time they acquire UIM coverage for more than one vehicle, regardless of whether this acquisition occurs when they initially apply for an insurance policy or when they subsequently increase their UIM coverage limits for multiple vehicles.

In September 2007, Michelle Barnard ("Barnard") purchased a personal automobile policy from Travelers to insure her two vehicles. As part of this policy, Barnard purchased UIM coverage in the amount of $50,000 per vehicle. Barnard waived stacking of her UIM coverage limits. On May 24, 2009, Barnard increased the UIM coverage limit on each of her vehicles to $100,000. Barnard did not execute a new stacking waiver at this time.

On June 17, 2016, Barnard was involved in a motor vehicle accident with an underinsured motorist. When Barnard sought UIM benefits from Travelers, Travelers offered her $100,000 based upon the UIM coverage limit on one of her vehicles. Barnard filed a complaint for declaratory judgment, seeking $200,000 in stacked UIM benefits. Travelers removed the case to the United States District Court for the Eastern District of Pennsylvania, where the parties filed cross-motions for summary judgment. The District Court held that, because Barnard had acquired additional UIM coverage for both of her vehicles in 2009, she had purchased UIM coverage such that a new stacking waiver was required.

On appeal, the Third Circuit filed a petition to certify the following question to the Supreme Court of Pennsylvania:

> If an insured under a policy of insurance subject to the Pennsylvania Motor Vehicle Financial Responsibility Law has waived stacking but later secures an increase in the limit of her UIM coverage on her existing policy, must her insurance carrier obtain a separate waiver of her right to stack the coverage or does a prior waiver of the right to stack the coverage remain in effect?

The Court began its analysis by determining that the plain language of 75 Pa.C.S. § 1738 required an insurance company to offer an insured the opportunity to waive stacking of UIM coverage limits whenever they purchase UIM coverage for more than one vehicle under a policy. The Court reasoned that if an insurance company did not obtain a stacking waiver at that time, the amount of UIM coverage available to an insured would be the sum of the limits for each motor vehicle as to which the injured person is an insured.

The Court found that the case *sub judice* turned upon the meaning of the term "purchase" in Subsection 1738(c). Under a plain meaning analysis of subsection 1738(c), the Court ruled that an insured purchases UIM coverage when they pay to acquire UIM coverage "for more than one vehicle under a policy." 75 Pa.C.S. § 1738(c). Based upon the unambiguous language of subsection 1738(c), the Supreme Court concluded that an insurance company must offer an insured the opportunity to waive stacking any time they acquire UIM coverage for more than one vehicle, regardless of whether this acquisition occurs when they initially apply for an insurance policy or when they subsequently increase their UIM coverage limits for multiple vehicles.

In the instant case, the Court found that Barnard paid to obtain additional UIM coverage for her two vehicles in 2009, two years after she originally purchased her policy with Travelers. Accordingly, the Supreme Court answered the certified question by holding that Travelers was required to offer Barnard the opportunity to waive stacking of the new, aggregate amount of UIM coverage at that time.

Yanakos et. al. v. UPMC et. al., No. 10 WAP 2018. (October 31, 2019 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)

Pennsylvania Supreme Court holds that the seven-year statute of repose contained within the MCARE Act is unconstitutional because it violates the Remedies Clause of the Pennsylvania Constitution.

Susan Yanakos suffered from a genetic condition called Alpha-1 Antitrypsin Deficiency (AATD). In the summer of 2003, one of Susan's physicians, advised that she needed a liver transplant due to the progression of her AATD. Because Susan was not a candidate for a cadaver liver, her son Christopher volunteered to donate a lobe of his liver to his mother.

Christopher underwent an extensive medical evaluation to determine whether he was a suitable liver donor. As part of that (*Continued on page 14)*

process, Christopher advised that several of his family members suffered from AATD, but that he was unsure whether he did as well. Additional laboratory tests for Christopher were ordered, but he was never informed of the results, which allegedly showed that he did have AATD and was not a candidate for liver donation. One month after Christopher's consultation the liver transplant operation went forward.

More than twelve years later, in December 2015, Christopher, Susan, and Susan's husband, William Yanakos (collectively "the Yanakoses") sued UPMC, University of Pittsburgh Physicians, Dr. Marcos, and Dr. Shaw-Stiffel (collectively "UPMC Defendants"). In their complaint, the Yanakoses alleged that they did not discover the UPMC Defendants negligence until eleven years after the transplant surgery, when additional testing revealed that Susan still had AATD, which the transplant should have eliminated.

In their answer to the Yanakoses' complaint, the UPMC Defendants raised the affirmative defense that the seven-year statute of repose in the MCARE Act barred the Yanakoses' claims. The UPMC Defendants filed a motion for judgment on the pleadings based on the MCARE Act's repose period which was granted by the trial court. The Yanokoses appealed to the Superior Court of Pennsylvania who affirmed the trial court's decision.

The Supreme Court of Pennsylvania granted the Yanokoses petition for appeal to determine whether the seven-year statute of repose, located at §1303.513(a) of the MCARE Act, comports with Article I, Section 11 of the Pennsylvania Constitution, which guarantees "all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law."

The Court began its analysis by discussing the history and jurisprudence surrounding Article I, Section 11 of Pennsylvania Constitution, commonly referred to as the Remedies Clause. The Court concluded that because the MCARE Act curtailed the important constitutional right to a remedy, the Supreme Court was required to apply intermediate scrutiny to determine whether the MCARE statute of repose was substantially related to achieving an important government interest.

Applying intermediate scrutiny, the Supreme Court concluded that the governmental interest in controlling the rising costs of medical malpractice insurance premiums and of medical care was important. However, the Court also concluded that the MCARE Act's statute of repose was not substantially related to achieving either one of those goals. In support of this position, the Court noted that there was no evidence in the legislative history as to how the General Assembly arrived at a seven-year statute of repose. The legislature did not cite any statistics on the number of medical malpractice actions commenced after seven years of the occurrence giving rise to the action and there was no indication that such a time period, as opposed to a longer or shorter period, would have any effect on malpractice insurance costs. Further, the Court found that the parties failed to provide any evidence suggesting the seven-year repose period had any substantial relationship to the legislative goal of controlling malpractice insurance costs.

Based upon this analysis, the Supreme Court held that the MCARE Act's statute of repose was unconstitutional and reversed the Order of the Superior Court, remanding the case for further proceedings.

Lane v. USAA General Indemnity Co., NO. 18-537 (Surrick, J. E.D. Pa. Oct. 18, 2019)

Federal District Court holds that a general release signed in a third-party claim cannot be used by an underinsured motorist carrier to release an underinsured motorist (UIM) claim

In this case, USAA attempted to use a third-party release to avoid paying an underinsured motorist claim. USAA argued that because the third-party release used broad language waiving any and all claims against "any other person, firms or corporations" that it was a blanket release, which included waiver of the Plaintiff's UIM Claim. USAA argued that the issue was controlled by the Supreme Court's decision in *Buttermore v. Aliquippa Hosp.,* 561 A.2d 733 (Pa. 1989), which held that absent fraud, accident or mistake, a plaintiff who executed a general release with a third-party discharging all claims effectively discharged a defendant even though that defendant was not explicitly named in the release. USAA also cited to the recent Philadelphia Court of Common Pleas case of *Crisp v. ACE Am. Ins. Co.,* 2017 Phila Ct. Com. Pl. LEXIS 125 (Phila. Cnty. C.C.P. 2017) where a trial court granted summary judgment in favor of an underinsured motorist carrier who argued that a UIM claim was precluded by the Plaintiff signing a general release.

(Continued on page 15)

The District Court was not persuaded by USAA's reliance on *Buttermore v. Aliquippa Hosp.,* 561 A.2d 733 (Pa. 1989), finding that case to be distinguishable because it did not involve UIM benefits. In addition, the District Court was not persuaded by USAA's reliance upon the Philadelphia Court of Common Pleas decision in *Crisp*.

On the contrary, the District Court held that that the authoritative caselaw addressing this issue was the Pennsylvania Superior Court's decision in *Sparler v. Fireman's Ins. Co. of Newark, N.J.*, 521 A.2.d 433, 437(Pa. Super. 1987) allocator denied, 540 A.2.d 535 (Pa. 1988), where the Court held that in the absence of unequivocal language to the contrary, a general release of a third-party tortfeasor will not be held to discharge the separate contractual obligation of an insurance carrier to provide underinsurance benefits. The District Court also noted that the Superior Court had relied upon *Sparler* in its recent decision in *Nationwide Ins. Co., v. Schnieder*, 906 A.2d 586, 596 (Pa. Super. 2006) where the court held that absent explicit language to the contrary, an injured party's executed general release with the primary UIM insurer did not discharge the secondary UIM insurer from its contractual obligation to the injured party.

Based on *Sparler*, the District Court found that the Plaintiff's general release did not preclude the Plaintiff from pursuing the action against USAA for UIM benefits because the executed release did not contain language unequivocally discharging USAA from its contractual obligation to provide UIM benefits to the Plaintiff.

A similar holding was reached in another recent decision of the Federal District Court in the Middle District of Pennsylvania. ***See Bonk v. American States Insurance Co.,* 3:18-CV-2417 (Caputo, J., M.D. Pa. Oct 1, 2019)**

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REMAINING EVENTS 2019-2020

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

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

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TRIVIA CONTEST

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

Trivia Question #21

What Pittsburgh location is recognized by a plaque that reads, in part, "Yankees by a score of 10-9"?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by January 31, 2020. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of February 3. 2020. The correct answer to Trivia Question #21 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!)

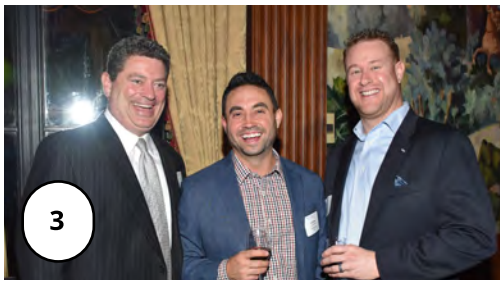
· There is no limit to the number of times you can win. Keep entering!

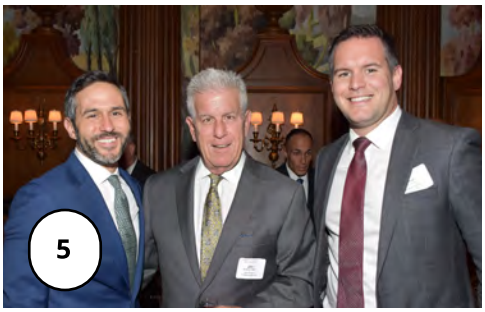
The correct answer to each trivia question will be published in the subsequent issue of The Advocate along with the name of the winner of the contest. If you have any questions about the contest, please contact Erin Rudert – er@ainsmanlevine.com.

Answer to Trivia Question #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? Answer: A living person.**

There were no entries to win Trivia Contest #20! You can't win if you don't enter!

COMEBACK AWARD DINNER PHOTOS





Pictured L to R:

In #1: Board of Governors Members Steve Barth and Karesa Rovnan, Past President Veronica Richards, and Chris Hildebrandt

In #2: Board of Governors Member Nat Smith and Past President Bill Goodrich

In #3: Past President Chris Miller, Business Partners Charlie Georgi and Mark Melago of FindLaw

In #4: Mike Rosenzweig and Secretary Erin Rudert

In #5: Guido Gurrera, Business Partners John Roseto and Brad Borghetti of Ford Business Machines

In #6: Past Comeback Awardees Phillip Macri, Karrie Coyer, Kimberly Puryear, Rebecca Herzig, Davanna Feyrer and 2019's David Gifford

In #7: Business Partner Cindy Miklos of Planet Depos and President-Elect Eric Purchase

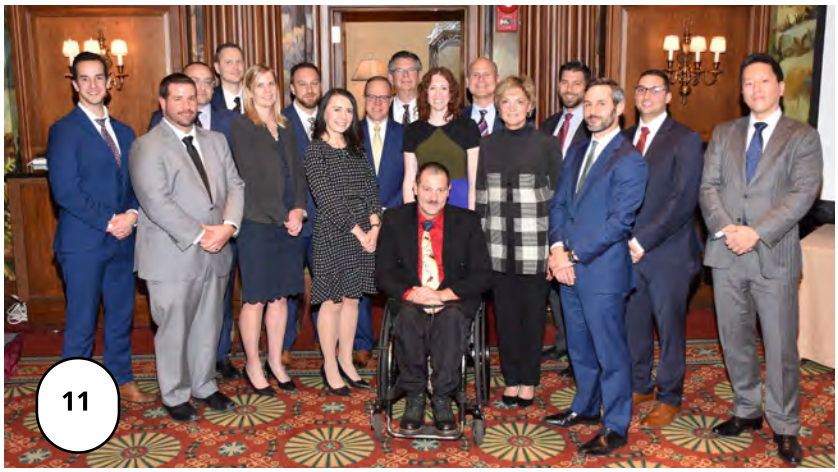
In #8: Brad Holuta and Treasurer Greg Unatin

In #9: Board of Governors Members Jennifer Webster and Laura Phillips

In #10: President Dave Landay, Board of Governors Member and Comeback Award Chair Brittani Hassen, Nominating Attorney Armand Leonelli, Monica Molino, 2019 Comeback Awardee David Gifford, Amanda Thompson of Healing Waters, Karen Gifford, and Bob Heil, also of Healing Waters

In #11, standing: Nick Katko, Drew Rummell, Brad Trust, John Zeller, Christine Zaremski-Young, Armand Leonelli, Amber Manson, Jason Lichtenstein, Rick Rosenthal, Mollie Rosenzweig, Mike Rosenzweig, Cindy Danel, Ryan Carroll, Guido Gurrera, Adam Haggag and Sammy Suggiura, all of Edgar Snyder & Associates. Seated is David Gifford.

Photo credit to Martin Murphey



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.

As demonstrated by the example of Vernon Madison, the 8th Amendment bars 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 Eighth Amendment's commitment to human dignity through the "evolving standards of decency", as well as precedent standards from *Ford v. Wainwright* and *Panetti v. Quartennan,* indicate that the execution of Mr. Madison is unconstitutional. Madison is medically proven to be in an altered state of mind that severely limits his ability to independently remember his case and have rational understanding of the facts presented to him. Because of this, he is unable to believe he is responsible for the crime; this makes it impossible for his execution to serve penological objectives of deterrence and retribution. His inability to understand the reason for his punishment makes this execution cruel and unusual, as barred by the 8th Amendment.

The expert testimony of witnesses Dr. Goff and Dr. Kirkland, as well as a battery of tests and imaging techniques, make it clear Madison case suffered severe cognitive decline following multiple strokes and the onset of major vascular neurocognitive disorder, or dementia. These strokes are all well-documented events with clear temporal links to Madison's cognitive decline. Madison's IQ of 72 is borderline intellectual disability, and has declined *(Continued on page 22)*

significantly. His Working Memory Score of 58 places him in the range of behaviors shared with those the law recognizes as intellectually disabled. The 21-Item Test administered by Goff eliminated the possibility of malingering or dissimulation, and any attempt at subterfuge from one with IQ and WMS scores as low as Madison's are near impossible regardless. Goff 's interview questions specifically designed to evaluate competency to be executed could not be completed due to Madison's lack of a cohesive train of thought. Goff concluded "Mr. Madison does not seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the state. He cannot remember story elements immediately after hearing them, and does not remember most of the alphabet or the names of the President, governor, and the warden of his prison. He is also incapable of rationally processing basic information, and cannot rephrase basic sentences or perform simple calculations. The clinical interview and tests support the conclusions that retrograde amnesia has left Madison unable to remember much of the last 30 years, that his complete blindness and inability to walk leave him physically disabled, that his working memory is too low to remember the crime or keep up with current proceedings, and that he cannot understand the information presented to him in such a way as to understand why he is being punished.

Because Madison cannot remember the events of the last 30 years due to dementia, he clearly cannot remember committing the crime, as he claims. In fact, he does not remember anything of his proceedings, including the sequence of events from offense to arrest, the trials, and the name of the victim. (He does not remember other information from this time period as well, such as his mother's death and the names of the guards at the prison.) Though non-eyewitnesses rely on others' testimony to understand the facts of a case, Madison cannot, as the Respondent suggests, understand the case from the information presented to him. This is firstly because, whether he sees it or it is told to him, Madison is incapable of retaining the facts of the case, making him incapable of remembering any understanding about his responsibility. Secondly, his long-term lack of information about the case, and his inability to retain information or process basic rational thought, mean that he has no reason to believe he has committed the crime. While a rational amnesiac might appreciate the validity of others' evidence, the lack of rational understanding experienced by Madison due to cognitive decline keeps him from ever understanding his case. This is why he continues to deny responsibility- he truly has no information in his long-term memory, and no ability to assimilate new information or think rationally, that would allow him to connect the crime to his punishment. He allows his counsel to manage all his affairs because he cannot remember or think cohesively about the information himself. Memory is ultimately not objectively verifiable, as the Respondent notes, but neither is understanding. Both must be assessed through a variety of professional tools, and those available, including testimony, testing, and imaging, are objectively verifiable.

These confirm that Madison could not possibly remember committing the crime. The issue of understanding stems from both his lack of memory and lack of rational thought, both of which are inevitable due to his diagnosed dementia.

Madison has a lack of intellectual capacity marked both by his borderline IQ and low WMS, with functioning on par with the intellectually disabled. The physical documentation of his cognitive decline proves Madison unable to remember the crime or think rationally. He lacks the ability to understand his crime in relation to his punishment, leaving him with a permanent delusion of innocence. The effect of this delusion is no different than that of delusions caused by mental illness: he is incapable of understanding why he is being punished. His borderline IQ suggests he may also *(Continued on page 23)*

lack the theory of mind to comprehend the severity of the crime he has committed (not that he can remember the details of the crime long enough to comprehend them). This delusion of innocence and physical inability to remember or understand proceedings leaves Madison incapacitated due to damage to his memory. His functioning and behavior are on par with that of the intellectually disabled, for whom the death penalty is barred. Indeed, by the scheduled execution date, Madison's borderline IQ very well may decline into the range of intellectual disability. Had the age of onset been just months earlier, Madison would have been undeniably incompetent. The symptoms of dementia will only

continue to damage Madison's intellectual capacity due to the progressive and degenerative nature of vascular dementia. Dr. Goff's incompetency checklist could not even be completed with Madison, demonstrating complete intellectual incompetency. All three Eleventh Circuit judges agreed that Mr. Madison did not have a rational understanding of the link between the crime and his scheduled execution, and was therefore incompetent to be executed.

"Evolving standards of decency that make the progress of a maturing society" dictate that penological justifications for imposing the death penalty are not served by the execution of someone who is incompetent. The execution of those who are incompetent is therefore in violation of the 8th Amendment. The degenerative nature of dementia and a patient's inability to rationally understand the punishment have led many professional organizations (Ame1ican Bar Association, American Psychiatric Association, American Psychological Association, National Alliance of the Mentally Ill) to support a complete bar on capital punishment for dementia patients. These expert opinions are essential in the interpretation of the law as it relates to medicine, as technological breakthroughs continue to refine diagnosis and treatment of medical conditions. Technologies such as MRI, FLAIR, gadolinium contrast, DWI, and CT angiograms are used in the diagnosis of dementia, and in Madison's case in particular. This data guides the medical community's knowledge of cognitive decline, which the law ought to follow as current breakthroughs change society's understanding of this condition.

This Court overturned the lower court, finding no support in *Ford* for the proposition that "a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution." Such a standard is "too restrictive to afford a prisoner the protections granted by the 8th Amendment". Understanding must be based in one's own memory and ability to perform rational thought. In other contexts, courts have increasingly found that people with dementia require legal protection due to diminished capacity. This legal protection ought always to include protection against death penalty, due to lack of understanding. In one case *(re Estate of Lynch),* "significant memory loss and impairment of executive functioning" due to dementia was found a cause of incompetency. Loss of memory and reasoning gradually occurs with all sufferers of dementia, leaving them all eventually incompetent. In the context of slow legal processes, what passed as competent on trial day might well become incompetency at the execution. Because of the guaranteed eventual incompetency, a dementia sufferer cannot be inferred to have capacity, because that capacity will soon be gone.

The punishment of an incompetent person clearly holds no retributive value. Indeed, as in common law, 'madness' is a kind of punishment. Because a prisoner in cognitive decline will never grasp their responsibility for the crime, lacks the understanding of its connection to their punishment, and often cannot grasp the seriousness of the crime, capital punishment will not help them understand their offense. Madison may understand the state seeks retribution, but he cannot understand what he is being punished for, and any retributive value is

(Continued on page 24)

therefore worthless. His lack of memory of the event *and* his inability to retain and process information told to him leaves him constantly in a belief that he is innocent. This delusion is genuine, based in an inability to experience reality the way the community does, and no retributive value exists in executing one who continues to believe in his own innocence. Any person who does not understand the reason they are being punished, regardless of cause, constitutionally may not be executed. Dementia sufferers' tragic fate is never to understand.

The execution of an incompetent person also has no deterrent value. Cognitive decline itself is a kind of deterrent, as it keeps the prisoner from planning or committing more crimes. As this Court noted in *Ford:* the execution of an incompetent person "provides no example to others and thus contributes nothing to whatever deterrence value is intended by capital punishment." The incompetence and lack of understanding of a prisoner without memory or ability to think rationally means their execution does not stand as an example to others as a fair show of justice, but, rather, makes the system out to be cruel and unjust. Incompetent people cannot come to terms with their conscience about crime, so they have not understood their crime. Protecting these individuals from the death penalty protects the dignity of society. Capacity and understanding are essential for deterrence and retribution to have value, and Madison has neither due to his inability to believe and understand his guilt and sentencing.

A rule that prohibits the execution of those in cognitive decline will not, as the Respondent suggests, cause a decline in executions due to malingering. Generally, the installment of such rules does not significantly increase the amount of competency-to-be-executed challenges. *Panetti* and *Ford' s* broad allowance to file competency challenges has rarely disrupted executions. "Indeed, of the 1,308 death-sentenced inmates who were eligible to file a Ford claim between 1986 and July 2013- many of whom have been estimated to have some form of mental illness- 93% did not even raise a competency-to-be-executed challenge." The increasing sophistication of diagnosis techniques also eliminates the risk of prisoners falsely claiming dementia. Truly incompetent prisoners will be saved from execution without understanding, and competent prisoners will not be affected. The amount of death-row inmates should be based on a case-by-case evaluation of understanding and justice, rather than assuming it is always desirable, as the Respondent suggests, to have more executions.

Determination of competency requires inquiry into a "prisoner's ability to comprehend the reasons for his punishment or a determination into whether he is unaware of why he is to suffer it." Madison is unaware of why he is to suffer it because, as demonstrated, his lack of memory and reasoning leave him with the genuine delusion of innocence. His ability to comprehend the reasons for his punishment are, therefore, compromised. The definition of sanity in law is purposely vague, in order to adapt to new scientific understanding of conditions such as dementia. This Court has not limited the disorders that are recognized as potential causes of incompetency. Madison's claim has the evidence to support his diagnosis and the demonstration of his incompetency because of it. Because dementia inevitably leads to complete cognitive decline and mental disability, and because it prevents not only the remembering of facts but also the rational understanding of them, an individual who cannot recall his crime and lacks rational understanding may not be executed under the Eighth Amendment.

Submitted by: Ellen Poplavska

North Allegheny Senior High School

WPTLA held its annual President's Challenge 5K on Saturday, October 12, 2019, at North Park. This year marked the 19th year of the race, and the third year at North Park.

Volunteers arrived early to set up in the drizzly, cold conditions. Several students from the University of Pittsburgh's Prosthetics & Orthotics Program were on site to lend a hand. Despite the weather, registration and arrivals were brisk and everyone enjoyed the pre-race socialization and snacks and tried to keep warm. The rain stopped just as the race was about to start, and racers were able to run, walk, and wheel under cloudy, but dry, skies.

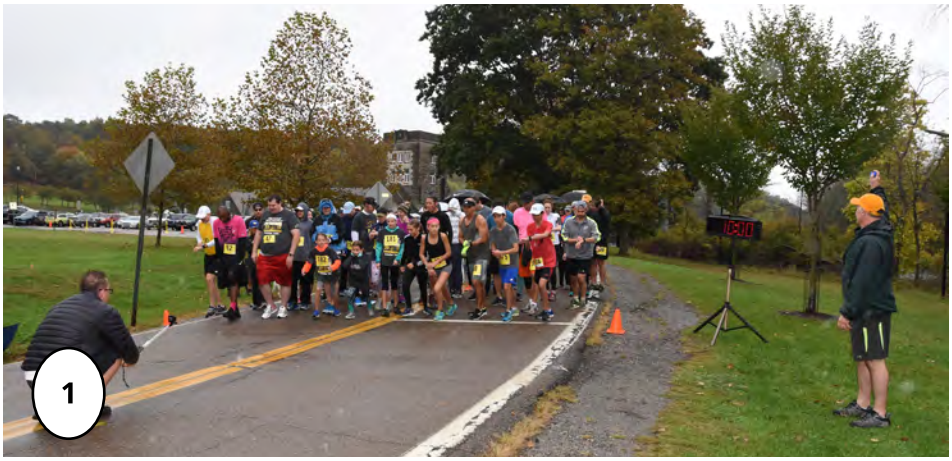
The race concluded with the raffle prizes, awards for this year's category winners, and presentation of the President's Challenge Firm Cup to the winning team. The Edgar Snyder & Associates team of Phil Kondrot, Stephen Von Bloch, and John Zeller took home the top prize. This marks the 5th consecutive year that a team from Edgar Snyder & Associates has won the Cup. See the acknowledgment letter on page 27 from the charity of their choice to receive a $1,000 donation.

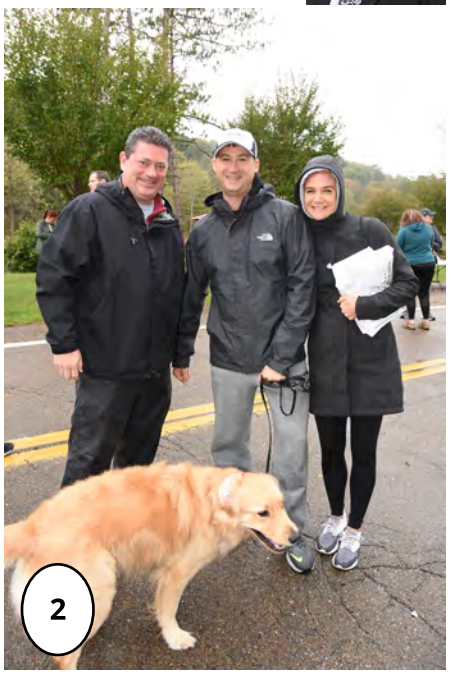
The day was a success, with many members, Steelwheelers, friends, family, and four-legged companions in attendance. The proceeds of this event, $33,200, were sent to the Steelwheelers. This brings WPTLA's total contribution to the Steelwheelers over the past 19 years to $502,985! Next year's race is set for October 3, 2020, at North Park, so save the date!

By: Erin Rudert, Esq.,

of Ainsman Levine

er@ainsmanlevine.com





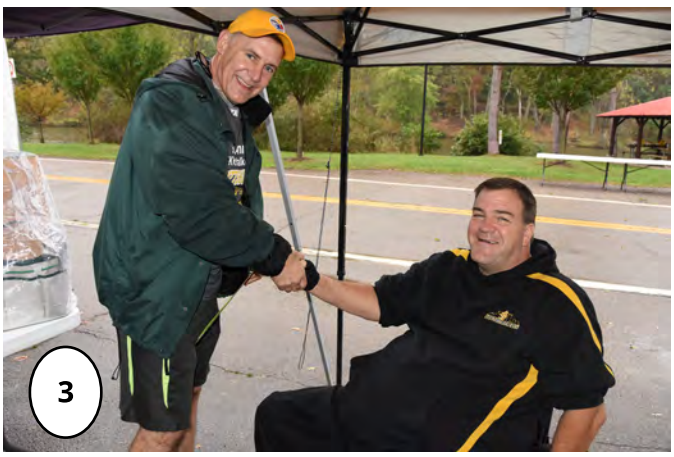
Pictured from L to R:

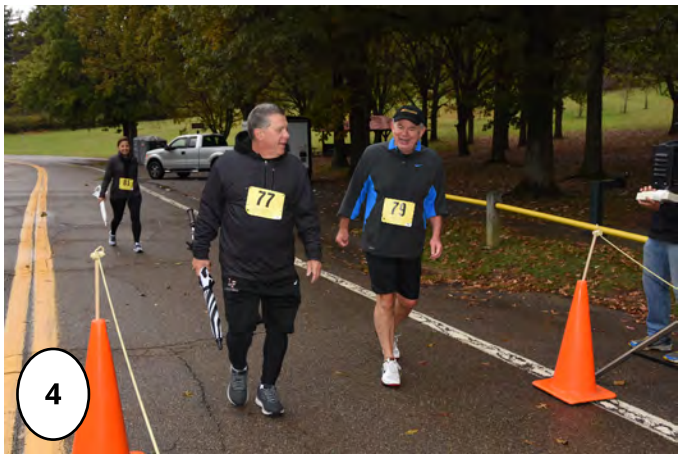
In #1: 5K race participants and Co-Chair Sean Carmody

In #2: Past President and Past Race Chair Chris Miller, and Board of Governors Member Shawn Kressley and family

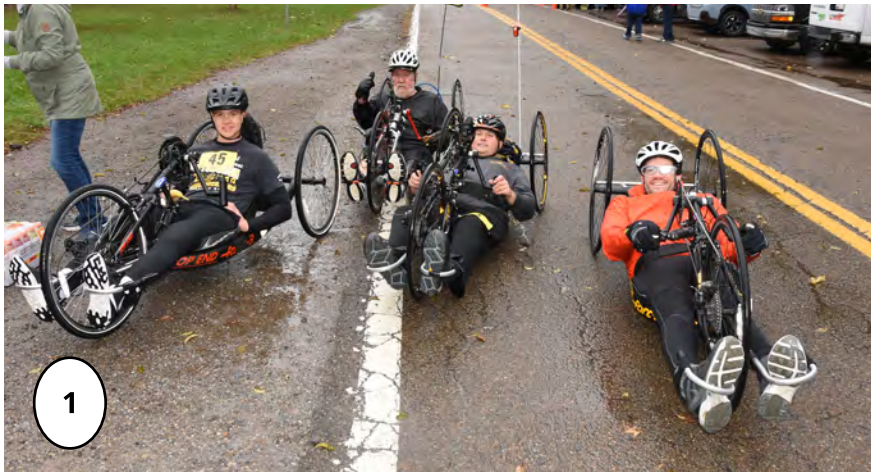
In #3: Race Co-Chair Sean Carmody and Steelwheeler Bob Eyler

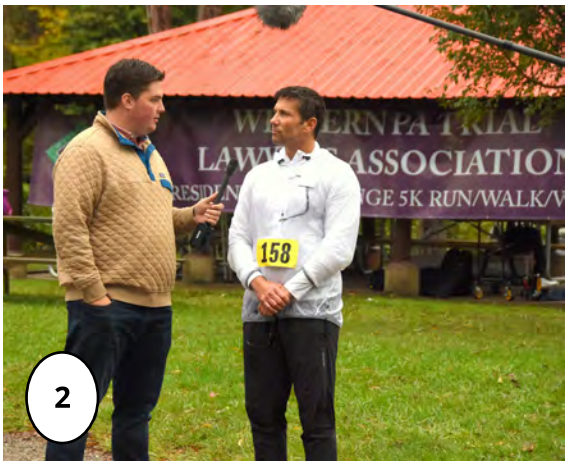
In #4: Curt McMillen and Keith McMillen

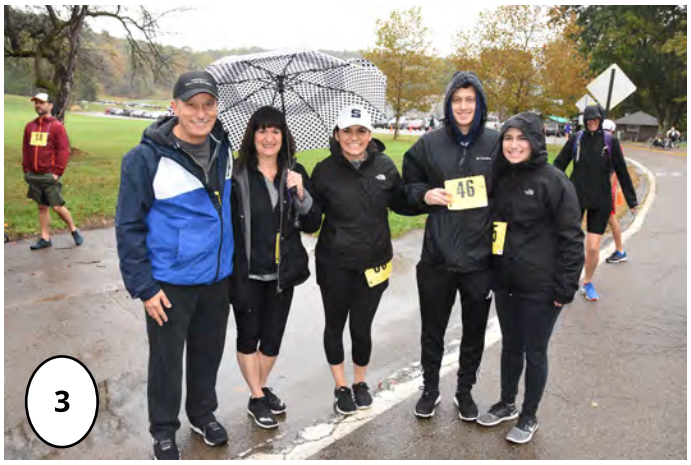


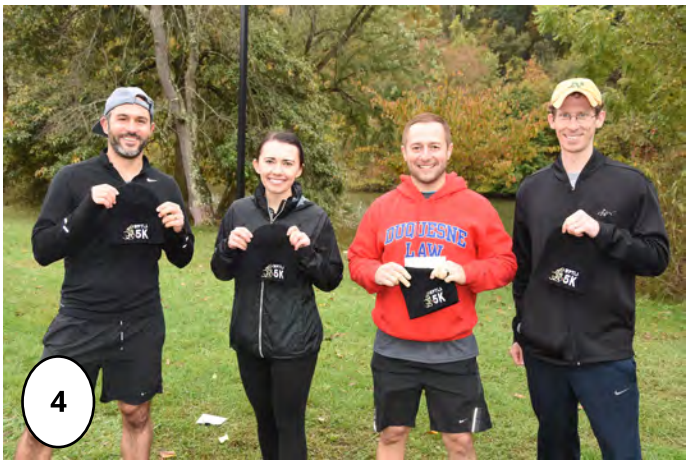


ADDITIONAL PHOTOS FROM THE 5K









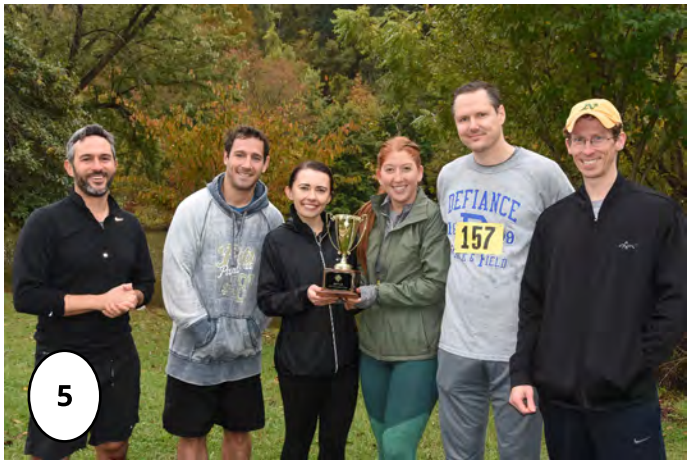
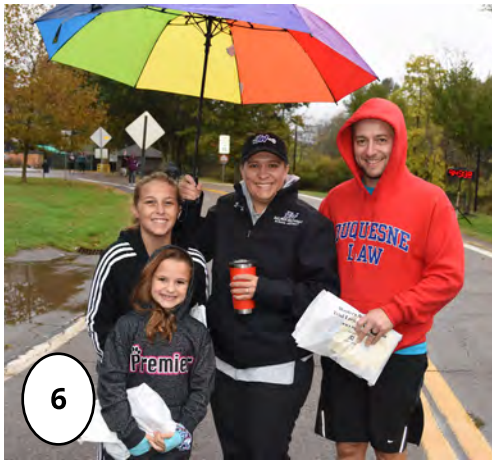


Photo credit to

Martin Murphy

Next year's race will be held on Sat, Oct 3, 2020 at North Park. Save the date!



Pictured from L to R:

In #1: Steelwheeler handcyclists Auren Halbert, Tom Furnival, Tom Antolic, and Bryan McCormick

In #2: Luke Lacher interviewing 5K Committee Member and Board of Governors Member Dave Zimmaro

In #3: President Dave Landay and family

In #4: WPTLA top finishers Guido Gurrera, Amber Manson, Pete Giglione, and Phil Kondrot

In #5: Firm Cup participants Guido Gurrera, Stephen Von Bloch, Amber Manson, Erin Barefoot, John Zeller, and Phil Kondrot

In #6: Pete Giglione and family

variety
the children's charity

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www.varietypittsburgh.org

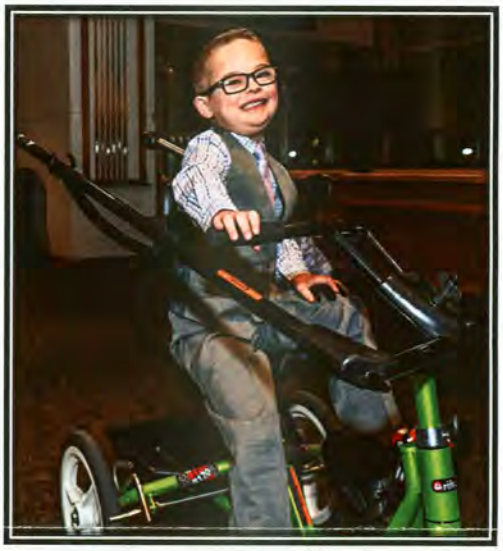
December 17, 2019

Western PA Trial Lawyers Association
909 Mount Royal Blvd. Suite 102
Pittsburgh, PA 15223

Dear Friends of Variety:

Thank you for the donation of $1,000 to **Variety – the Children's Charity** for Williams's Wish. Your generosity will help children with disabilities live a more enriching life. Through programs like **My Bike®**, we hope to ensure that children with disabilities can experience the freedom, joy, and belonging that is created through riding a bike.

Liam received his bike at age 7. His mother shared the following, *"Mommy, I'm happy, I've always wanted to ride my bike like other kids."*



Thank you for helping to make sure that children like Liam can have opportunities just like other kids. Your support will help children discover the possibilities for their own lives.

Sincerely,

Charles LaVallee

Charles P. LaVallee
Chief Executive Officer

Thanks so very much and Happy Holidays! We are especially grateful to the 5K Firm Challenge winning team – please "relay" our gratitude

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

Through the Grapevine....

Congratulations to **Sherri Hurst**, on the birth of her daughter, Olivia Katherine Norman. Mom and baby are doing just fine.

Jack Goodrich and Associates, P.C. is the new name of the firm headed by **Past President and President's Club Member Jack Goodrich**. Other members in his firm include **Nancy Goodrich** and **Lauren Nichols**.

Congratulations to our newest Young Attorneys, who passed the bar this past Fall: **Bianca DiNardo**, of Goodrich & Geist; **Lindsay Offut**, of Quinn Logue; **Ben Cohen**, of Harry S. Cohen & Associates; and **Drew Rummel**, of Edgar Snyder & Associates. We look forward to meeting you at the Junior Member/Young Attorney Meet 'n Greet in January!

Continued health to **Stephen Yakopec**, whose knee replacement is working out well!

Congratulations to all of our members who were honored by Best Lawyers.