THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

PUBLISHED QUARTERLY BY WESTERN PA TRIAL LAWYERS ASSOCIATION

SPRING 2020
VOLUME 32, NO. 3

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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

PRESIDENT'S MESSAGE

For this issue of *The Advocate*, I have updated my Ten Commandments of Lawsuits, which was published before I was an officer or even on the Executive Board. I call these "Commandments" to emphasize how important they are. These are pointers I have learned over the years. Here are my updated Ten Commandments with explanatory comments, when necessary.

UPDATED TEN COMMANDMENTS OF LAWSUITS

1. **Never** accept a case when the client has had more than one prior attorney without finding out the real reason.

2. **Never** handle a motor vehicle or premises liability case without going to the scene or, if not possible, at least viewing it on Google Maps Street View or a similar site.

3. **Never** sign up a personal injury case without having the client sign an ISO (Insurance Services Office) request to search for earlier accident and injury claims. What you don't know *will* hurt you.

4. **Never** accept your client's assurance that his Facebook page is private. Facebook sometimes changes its privacy terms and new settings may be necessary. Be sure, however, to tell your client not to delete any postings on Facebook or other social media. This can have serious consequences to both you and the client.

5. **Never** provide the trial judge with important trial pleadings such as motions *in limine* or points for charge and assume that the judge will file them with the Department of Court Records. These documents may never make it into the official record, which could create a problem on appeal.

6. **Never** file a response to a motion for summary judgment and attach your affidavits or other exhibits to the brief rather than the motion. Briefs and their attachments, even though filed, are not part of the record on appeal.

7. **Never** allow your client to sign a release with a confidentiality clause without including special language to avoid potential tax consequences to your client. *See*, Amos v. *Commissioner,* T.C. Memo 2003-329. (Tax Court finds that $80,000 of a $200,000 settlement paid by NBA player Dennis Rodman when he kicked a photographer was for confidentiality, not bodily injury, and hence subject to income tax.)

8. **Never** give your *(Continued on Page 3)*

Due to the coronavirus pandemic, the following WPTLA events have been canceled:

March 26, 2020 *- Dinner & CLE at Bella Serra in Washington County - Board Meeting to be held by telephone conference*

April 15, 2020 *- Annual Membership Meeting at Carmody's Grille - Board Meeting to be held by telephone conference; Membership Election to be done by e-mail*

May 1, 2020 *- Annual Judiciary Dinner*

JUDICIARY DINNER CANCELED

Due to the Coronavirus pandemic, the Annual WPTLA Judiciary Dinner is now **canceled**. All of us will miss this cherished opportunity for members and their guests to relax, put legal formalities aside, and connect with our judiciary like humans.

When the crisis subsides, we may find the world and the connections between us seem different. Hopefully our bonds will strengthen, pulling us closer together. I am sure our next Annual Judiciary Dinner will be more joyous and special than ever.

But one year is still too long to wait to recognize all those we planned to honor this May. Please take a moment to reflect upon our many wonderful honorees listed below.

To start, we honor several judges who either retired or reached senior status in the last year.

- The Honorable William R. Cunningham
- The Honorable Kathleen A. Durkin
- The Honorable Kate Ford Elliott
- The Honorable Nora Barry Fischer
- The Honorable Anthony G. Marsili
- The Honorable Donna Jo McDaniel

If you have the opportunity to see one or more of the honored judges, please take the time to express your gratitude on behalf of us all.

We also honor the amazing career and achievements of the 2020 recipient of the Champion of Justice Award, Louis Tarasi.

John Gismondi is this year's recipient of the Dan Berger Community Service Award for his amazing contributions to our community through the Gismondi Family Foundation.

I could never attempt to write the words that capture Lou and John's contributions to our profession and community. We will honor both Lou and John in the fashion they deserve at a future event, if not the 2021 Judiciary Dinner.

Finally, we cannot forget our hope for the future. We recognize the President's Scholarship award winners who always impress us so much with their brightness. This year's winners will be announced and highlighted in upcoming issues. You can download or read a copy of the winning essays through the WPLTA website by clicking on https://wptla.org/members/ and entering your member password.

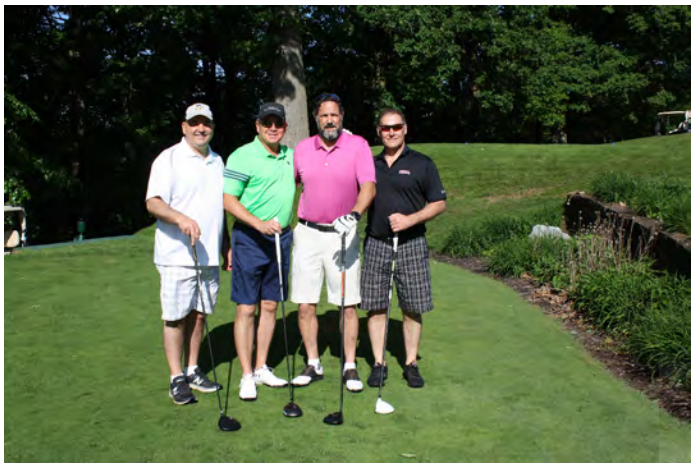
We will have much to celebrate next year. Please keep your calendars open for the first Friday in May 2021!

By: Gregory R. Unatin, Esq. of

Meyers Evans Lupetin & Unatin, LLC

gunatin@meyersmedmal.com

ETHICS & GOLF OUTING PREVIEW



Pictured above, from the 2019 Outing, from L to R: Past President Bernie Caputo, Past President and Golf Chair Jack Goodrich, Dan Connolly, 5K Co-Chair Sean Carmody.

Save the date for the 27th Annual Western PA Trial Lawyers Association Ethics and Golf Outing, which will be held at the beautiful Shannopin Country Club in Pittsburgh on Friday, May 22, 2020.

You can obtain 1 hour of Ethics credits before hitting the course with fellow colleagues and friends.

Guests are welcome and are encouraged. The day will start with the ethics seminar presented by Richard Schubert, Larry Kelly and Jack Goodrich, all past presidents of the organization. A shot gun start will commence at 9:00 a.m. and you can pick your foursome or be placed into a group. In past years, the event has become a very vibrant and social highlight of the year.

You are encouraged to invite friends, family, and referring attorneys, etc., to enjoy the 18 hole shot gun, breakfast buffet and steak fry lunch.

Any and all question can be referred to Jack Goodrich at 412-261-4663.

By: Jack Goodrich, Esq. of

Jack Goodrich & Associates, P.C.

jack@goodrichpc.com

PRESIDENT'S MESSAGE ... FROM PAGE 1

potential client an unrealistic estimate of the value of his case just to convince him to sign the fee agreement. He will always remember this amount and will be reluctant to take less, even if circumstances change.

9. **Never** use digital or electronic documents in trial without having a paper copy as a backup.

10. And finally, **Never** let your law practice keep you up at night. This is easier said than done.

I was very touched when a WPTLA member recently told me that he kept a copy of my original Ten Commandments and referred to it when mentoring a new associate. Since these comments are still applicable today, I will reprint them below:

(ORIGINAL) TEN COMMANDMENTS OF LAWSUITS

1. Never assume a business is owned by a parent corporation when it might be just a franchisee. (McDonald's restaurants, for example)

2. Never assume someone is an employee when he may be an independent contractor. (When in doubt, sue them both.)

3. Never sue a dead person. (Check a resource such as the Social Security Death Index, http://search.ancestry.com/ search/db.aspx?dbid=3693)

4. Never assume the Prothonotary or civil clerk will transmit your complaint to the sheriff or otherwise arrange for service of the lawsuit. (You must make diligent efforts for service of process.)

5. Never wait until the last minute to file a lawsuit. (For obvious reasons.)

6. Never settle with a motorist for less than full value without considering whether there is other coverage (underinsured motorist, for example) or other potentially responsible parties.

7. Never assume the defendant will timely sue other potentially liable parties. (File and serve a separate Writ of Summons which can be consolidated with the original case later, if necessary.)

8. Never (in federal court) refrain from suing a party even if that party is timely joined. (The additional defendant can only be liable over to the original defendant, not directly to the plaintiff.)

9. Never accept a client's case without checking whether he has an admissible criminal record. (A jury must believe your client deserves to be compensated.)

10. Never allow your client to sign a general release when a more specific release will do. (A general release could waive claims for medical benefits, UIM benefits, medical malpractice, etc.)

By: David M. Landay, Esq. of

Law Office of David M. Landay, Attorney at Law

dave@davidlanday.com

INSIDE THIS ISSUE

Features

News

Columns

JUNIOR MEMBER / YOUNG LAWYER MEET & GREET RECAP

The future strength and relevance of the Western Pennsylvania Trial Lawyers Association is dependent upon its ability to attract and encourage involvement from younger members. As I have said in prior articles, an organization that fails to encourage younger people to join, and ultimately assume leadership roles, is a dying organization. The importance of this fact for WPTLA cannot be overstated.

Because we recognize the importance of our junior members and young lawyers, WPTLA held its third annual Junior Member / Young Lawyer Meet & Greet on January 23, 2020. Of course, the purpose of the Junior Member/Young Lawyer Meet & Greet is to provide an opportunity for junior members and other young lawyers to develop professional relationships with more senior WPTLA members. This year's event was held at Revel and Roost just off Market Square. A total of thirty-one (31) people were in attendance this year including five young lawyers and representatives from four of our business partners (Dave Kassekert of Keystone Engineering, Brad Borghetti and John Roseto of Ford Business Machines, George Hargenrader with Thrivest, and Mark Melago from FindLaw). Like our past Meet & Greet events, this event was a great success. Everyone that I spoke with enjoyed this exciting venue and had a great time connecting or reconnecting with our business partners, our newer members, and our "more seasoned" members.

Despite the fact that the Junior Member/Young Lawyer Meet & Greet was well attended with a healthy mix of our young lawyers, "more seasoned" WPTLA members, and our business partners, our organization continues to struggle with both the growth of our junior member program and with attracting and encouraging involvement from our current junior members. The fault lies completely within our organization. Simply stated, we need to do a better job of growing our numbers and encouraging our junior members to get involved in WPTLA. Therefore, the question that we must answer is how do we attract junior members to our organization and foster an environment that encourages them to get involved? I actually wrote about this topic in *The Advocate* several years ago, and the answer remains the same - we need to make the benefits of junior membership, and a subsequent regular membership, obvious and appealing. Further, we need to remove any potential barriers to junior membership.If we successfully make becoming a member a "no brainer," the number of younger members should certainly increase.

Currently, junior membership is available to any law student or law clerk that has an interest in becoming a trial lawyer. In an effort to make joining WPTLA a "no brainer," we already offer several benefits to our junior members. First, and probably most importantly, each and every junior member is assigned a mentor. This is an absolutely invaluable opportunity that we, quite obviously, need to do a better job of promoting.When I first began practicing law, I would have jumped at the chance to have an experienced trial attorney who was willing to answer my questions and provide me with some form documents. This mentor program is especially important for the many young lawyers that decide to hang their own shingle and for those that are employed by law firms that don't concentrate their practices on personal injury or other litigation-based areas of the law. Of course, there is a reciprocal gain to the mentor in this mentor/mentee relationship. For instance, the mentor may become a referral source for those junior members that ultimately choose to practice in another area of the law. know that I would certainly be willing to refer a case to an attorney who had been kind enough to have assisted me early in my career.

In addition to providing a mentor, WPTLA also offers junior members the opportunity to publish articles in *The Advocate* allows junior members to promote their career development through publicity within the practicing trial attorney community. Third, we also offer those members the opportunity to network with all of our regular members by offering them free attendance at one of our dinners. Again, similar to the Junior Member/Young Lawyer

(Continued on Page 5)

JUNIOR MEMBER / YOUNG LAWYER MEET & GREET RECAP ... FROM PAGE 4

Meet & Greet, this is another opportunity for junior members to develop professional relationships with other WPTLA members. Fourth, if we are wise, we should be looking to these junior members as our future interns, associates, and partners. We really should give priority and preference to interviewing and hiring our junior members. After all, by joining WPTLA while in law school or while working as a law clerk, these individuals have already demonstrated a true interest in devoting their careers to the work of trial lawyers. Finally, in an effort to make junior membership more appealing, the Board of Governors has recently voted to reduce membership fees for this class of membership to make it extremely affordable. Now, for just $35 a law student who joins our organization will be a member for the duration of his/her law school career. The Board also created a new level of membership that allows young lawyers (those who have been in practice for 0-5 years after passing the bar) to join our organization for $35 per year. The Board is also discussing other incentives to increase the number of junior and young members.

By: Bryan Neiderhiser, Esq. of

Marcus & Mack, P.C.

bneiderhiser@marcusandmack.com

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.

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 4 - Summer 2020	May 29	June 12

UPCOMING EVENTS

ANNUAL ETHICS & GOLF

Fri, May 22, 2020

Shannopin Country Club, Pittsburgh

KICK OFF EVENT

Aug, 2020

Erie

LEGISLATIVE MEET & GREET

Sep, 2020

Pittsburgh

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL

Sat, Oct 3, 2020

North Park Boathouse, Pgh

BEAVER DINNER & CLE

Oct, 2020

Wooden Angel Restaurant, Beaver

COMEBACK AWARD DINNER

Thu, Nov 19, 2020

Duquesne Club, Pittsburgh

All events above are tentative, based on the progression of the coronovirus pandemic and guidelines from local and state government.

CLE RECAPS

WPTLA recently held two CLE programs that did not disappoint. The first program, "Rettger: The Long and Winding Road," featured WPTLA past-president and current president of PAJ Paul A. Lagnese, Esq. and David M. Paul, Esq. For anyone practicing medical malpractice you have undoubtedly studied the *Rettger* case. *Rettger* is well-known for establishing that the term "loss of services" under the Pennsylvania Wrongful Death Act includes more than just "household chores." Specifically, the court held that the term, "clearly extends to the profound emotional and psychological loss suffered upon the death of a parent or a child where the evidence establishes the negligence of another as its cause." *Rettger v. UPMC*, 2010 Pa. Super. 41. This concept is important in all wrongful death cases; While pecuniary loss suffered due to the death of a loved one can certainly impact a family, the most significant damage is in the non-economic loss of the human and how that affects a family. Clearly, Attorneys Lagnese and Paul recognized that and emphasized that theme at trial.

Attorneys Lagnese and Paul provided valuable insight regarding their approach in tackling many issues and shared helpful practice suggestions. For instance, Attorney Lagnese pointed out how state statutes and codes can be a great source of powerful jury instructions. In *Rettger*, he used a standard of nursing conduct from the Pennsylvania Administrative Code to craft the following jury instruction: "Under Pennsylvania law, a registered nurse must act to safeguard the patient from the incompetent practice of any individual.If the attending physician fails to act after being informed of such abnormalities, it is then incumbent upon the nurse to advise the hospital authorities so that appropriate action might be taken. When there is a failure of the hospital's nurse to report changes in the patient's condition and/or when there is a failure of the hospital's nurse to question a physician's order which is not in accord with standard medical practice and the patient is injured as a result, the hospital is liable for such negligence." This jury instruction was given in the *Rettger* case and upheld as a correct instruction by the appellate courts. The jury ultimately attributed 100% of the negligence to the Defendant Hospital, clearly having heard the important charge on a nurse's responsibility to activate the chain of command and safeguard her patient.

The program did not end with the presentation. Attendees received over 500 pages of trial materials to take home including items such as briefs, testimony excerpts and court opinions.

These materials are currently being converted into an electronic file, to be made available to WPTLA members. Stay tuned for details on how to get yours.

The second program, "Financial and Ethical Considerations for Civil Litigation" featured two WPTLA business partners, William S. Goodman, Esq. (president and co-founder of NFP Structured Settlements and NDC Advisors) and Robert Matthew Hanak, II, Esq. (forensic economist, Forensic Human Resources). William Goodman addressed a variety of topics including structured settlements, the array of trusts available to protect our clients' settlement funds and how attorneys are handling Medicare Set Aside issues. James Wilkinson, RN, BSN, MBA, a member of the NDC Advisors team, also presented, explaining to the room the ways NDC Advisors can help maximize our clients' resources and get them the best medical care and equipment possible post-settlement and/or verdict.

Matthew Hanak faced the challenge of teaching economic lessons and met the challenge easily. From explaining the true meaning of "work-life expectancy" to giving practical tips on how to help your expert economist evaluate your client's full potential for future earnings based on productivity increases, the morning was filled with useful information.

WPTLA continues to coordinate CLE programs and I encourage you to attend. For a full list of our upcoming events please visit WPTLA.org.

By: Karesa Rovnan, Esq. of

Richards & Richards LLP

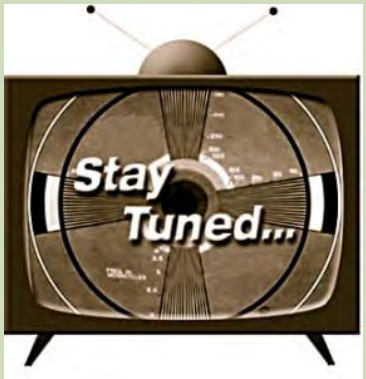
kmr@r-rlawfirm.com

UPCOMING CLE SERIES

Stay tuned for a new series of CLE programs featuring WPTLA members who have had landmark cases.

War Stories: A Series

Look for details coming next year on when and where you can attend one.



WILLS CLINIC

The WPTLA Wills Clinic, in partnership with the ACBF and Operation Better Block in Homewood, has been helping low income residents of Homewood and surrounding communities complete simple wills, healthcare directives, and durable powers of attorney since 2017. WPTLA recently learned that a lovely gentleman who had his will drafted through the Clinic passed away. His good friend, who helped him set up the appointment with the Wills Clinic, contacted Gabrielle DeMarchi, Community Development Coordinator from Operation Better Block and told Gabby that, prior to his passing, the client expressed his appreciation for the program and was happy that he was able to get his will completed at no cost to him. The Wills Clinic is an opportunity to help individuals who have no other way to access these important services that allow them to have peace of mind as they approach the end of their lives.

The time commitment to volunteer is minimal (about 1-2 hours total between the meeting and the paperwork you need to complete) and all forms and instructions are available on the Member page of the WPTLA website. The fact that your practice does not include estate planning is not an excuse to not volunteer!! The process is very easy and your representation on a*pro bono publico* basis is covered through a separate malpractice insurance policy maintained by the ACBF. There are currently not enough volunteer attorneys to meet the needs of the number of people interested in the services offered through the Wills Clinic. In order for this program to continue, we need volunteers.

If you are able to participate, please contact Laurie Lacher at laurie@wptla.org to inquire about scheduling a meeting.

By: Erin Rudert, Esq. of

Ainsman Levine, LLC

er@ainsmanlevine.com

MEMBER PICTURES & PROFILES

Name: Kelton Merrill Burgess

Firm: Law Offices of Kelton M. Burgess, LLC

Law School: Duquesne University School of Law

Year Graduated: 2004

Special area of practice/interest, if any:Litigation/Personal Injury; Probate & Estate Planning

Tell us something about your practice that we might not know: I practice in PA and CA and have offices in Allegheny County and Butler County. I am General Counsel for a large crane company and construction company, as well as general counsel for several investment firms.

Most memorable court moment: First solo (not second chair) jury trial in 7th Circuit District Court

Most embarrassing (but printable) court moment: Finishing closing arguments and realizing zipper of pants was down all afternoon.

Most memorable WPTLA moment: TBD

Happiest/Proudest moment as a lawyer: Hanging my own shingle after leaving Big Law.

Best Virtue: Keeping my word/promises. Reliability and Trustworthiness

Secret Vice: Jazz Music

People might be surprised to know that: I play multiple instruments

Favorite movie: Lawrence of Arabia

Last book read for pleasure, not as research for a brief or opening/closing: Let's Explore Diabetes with Owls by David Sedaris

My refrigerator always contains: Milk

My favorite beverage is: Chocolate Milk

My favorite restaurant is: Di Anoia's Eatery

If I wasn't a lawyer, I'd be: A pilot and military officer

The Third Circuit Court of Appeals has recently addressed whether UberBLACK drivers are employees under the Fair Labor Standards Act (FLSA) and the Pennsylvania Minimum Wage Act (PMWA) *Razak v. Uber Techs., Inc.*, CIVIL ACTION NO. 16-573 (E.D. Pa. Apr. 11, 2018). Plaintiffs Ali Razak, Kenan Sabani and Khaldoun Cherdoud, three Pennsylvania drivers who used Uber technologies ride sharing mobile phone application, brought a class-action on behalf of all persons who provide limousine services through UberBLACK under the FLSA and PMWA. The author notes that the decision does not apply to other Uber platforms such as UberX or UberPool. Nonetheless, the decision in the case may well be instructive regarding the other services.

Plaintiffs alleged that they were employees of Uber under the relevant federal and state statutes and were improperly compensated as a result. The Plaintiffs owned and operated independent transportation companies that provided limousine services for people seeking such services through Uber. Each of the Plaintiffs, either individually or through their company, entered into a technology services agreement with Uber. The agreement outlined the relationship between the Plaintiffs and Uber riders, the Plaintiffs and Uber, and the Plaintiffs and their drivers, if applicable. It described driver requirements, vehicle requirements, financial terms, among other things. Each driver is required to sign a Driver Addendum, which is a legal agreement between the Plaintiffs, and or their companies, and the driver of the vehicle before the driver can utilize the Uber App. The addendum outlines driver requirements, insurance requirements, dispute resolution and the "driver's relationship with Uber". Said clause includes language that would purport to establish the parameters of the driver's working relationship with Uber.

UberBLACK Drivers are free to reject trips for any reason except for unlawful discrimination. If a driver ignores three trip requests in a row, he will be deactivated and could not accept additional trips. Uber determines the financial terms of all fares and Uber deposits money from fares in the transportation companies Uber account while deducting a commission. Uber regulates how long a driver can work and drivers do not know the final destination for the ride when accepting a fare.

Extensive discovery was taken in the case. According to the Circuit Court opinion, no material facts were in dispute. Uber filed for summary judgment after discovery was complete on the issue of whether Plaintiffs are employees, rather than independent contractors. The District Court granted the motion from which the appeal was taken. Both the District Court and the Court of Appeals analyzed the case under the seminal decision in *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985). There, the Circuit Court set out six factors to determine whether a worker is an employee under the FLSA, many of which will be familiar to the workers' compensation practitioner:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
> (4) whether the service rendered requires a special skill;
> (5) the degree of permanence of the working relationship; and
> (6) whether the service rendered is an integral part of the alleged employer's business.

The Court of Appeals then reviewed the District Court opinion. The District Court had looked at the six factors from *DialAmerica* and concluded that four factors demonstrated independent contractor status and two demonstrated employment status. The District Court concluded that Uber did not have the right to control the manner in which the work was to be performed, concluded that the opportunity for profit and loss supported independent contractor status, that UberBLACK drivers must purchase or lease their own vehicle to drive for UberBLACK demonstrating an independent status, and found that the impermanent relationships that can exist between drivers and Uber corresponded with independent status.

The District Court concluded that the service does not require a special skill, which would support employee status. It also concluded, over Uber's objection, that the limousine driving service is an essential part of Uber's business as a transportation company.

The Court of Appeals initially noted that as this involved a grant of summary judgment, that can only occur if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court then conducted its own analysis of the six prongs of *DialAmerica* to determine whether there were no genuine disputes as to the material facts. It concluded in nearly all of the prongs that a material dispute of fact continued to exist. As for the factor perhaps most relevant to workers' compensation practitioners, the Court analyzed the right to control factor. *DialAmerica* describes the factor as follows: "the degree of the alleged employer's right to control the manner in which the work is to be

(Continued on Page 11)

ALLEGHENY COUNTY MOTIONS COURT CHANGES

With Judge Colville being appointed to Federal Court, there are changes in Motions Practice in Allegheny County. Discovery Motions on General Docket cases will now be heard by Judge Ignelzi on Fridays at 2PM only. The Motions to be presented to Judge Ignelzi also include those related to affidavits of non-involvement and pre-complaint discovery. He will continue to accept Motions via an add on list. These Motions will be heard in Court Room 815.

Motions which were previously presented to Judge Colville in his role as "Special Motions" Judge are now to be presented to the General Motions Judge.

Arbitration Motions, including those related to discovery, are now to heard by the General Motions Judge.

Motions previously heard by the Calendar Control Judge (Judge Hertzberg) do not appear to be affected by these changes.

The Arbitration and Discovery Motions can still be scheduled in advance by calling the Assignment Room at (412) 350-5463.

DELAY DAMAGES

Delay damages have now been set for 2020 at 4 ¾ %.

PLEADING THE DISCOVERY RULE IN LIMITED TORT CASES

A recent unreported Superior Court case provides important guidance for avoiding a trap for lawyers wishing to file suit for a limited tort plaintiff after the statute of limitations. The black letter takeaway is that if you are filing suit after the statute of limitations, the Complaint must specifically state that the Plaintiff's condition worsened.

In *Moyer v. Conroy*, No. 283 MDA 2019, 2020 Pa. Super. Unpub. LEXIS 164 (Jan. 13, 2020), the Superior Court affirmed a trial court decision granting Judgment on the Pleadings in favor of a defendant. The key timeline is as follows: The collision occurred on October 12, 2015. On April 28, 2017 the Defendant pled guilty to DUI. Suit was filed January 30, 2018.[1]

[1] *Lending credence to the saying that "bad facts make bad law", the procedural posture is a little more complex. Apparently a prior lawsuit was filed on July 22, 2017. Preliminary Objections were filed September 18, 2017 because the plaintiff had died prior to filing suit and the executor was not named as the plaintiff. The case was dismissed October 16, 2017. The subject action was subsequently filed. The Superior Court decision in the subject decision goes into much detail about the prior lawsuit. I would question whether that was appropriate for judgment on the pleadings, although the opinion is not clear as to whether that information was included in the pleadings before the trial court.*

The Defendant framed the issue on appeal as:

When an otherwise time-barred auto accident and limited tort plaintiff pleads case law holding that the two-year statute of limitations is tolled until a seriously injured limited tort plaintiff develops that serious injury, should a motion for judgment on the pleadings (asserting that plaintiff's action is time barred) be denied because the pleadings reveal an issue of fact as to whether the statute of limitations was tolled?

Moyer v. Conroy, No. 283 MDA 2019, 2020 Pa. Super. Unpub. LEXIS 164, at *4 (Jan. 13, 2020).

In analyzing this question, the Superior Court, in an opinion authored by Judge Musmanno, distinguished prior case law applying the discovery rule to prevent dismissal of a case involving an injury which had worsened.Specifically, Judge John L. Musmanno explained that in both *Walls v. Scheckler*, 700 A.2d 532 (Pa. Super. Ct. 1997) and *Varner-Mort v. Kapfhammer*, 2015 PA Super 14, 109 A.3d 244, the plaintiff had pleaded that their conditions had worsened.[2] Instead, the court relied upon *Haines v. Jones*, 2003 PA Super 283, 830 A.2d 579 (plaintiff had not claimed her condition had worsened and rejecting exhaustion of first party benefits as basis for discovery rule).

Judge Musmanno noted that the response to motion for judgment on the pleadings did not make mention of the date of the Defendant's DUI plea. *(Continued on Page 11)*

[2] *Although the Varner Court followed Wall, it contained dicta questioning the Wall decision.Hence, if you are considering strategically delaying the filing of a case based upon Wall, you should carefully read the case law. It is the author's suggestion that Wall should be relied upon only when you are first contacted more than two years after the underlying collision.*

Kick Off Event in Erie!

Plans are in the works for the annual kick off in August.

Details include Golf, 1st Board of Governors meeting for the year, Meet & Greet, Bowling, then CLE the next morning.

BY THE RULES ... FROM PAGE 10

A discussion of the *Moyer* decision could digress into a "Monday morning quarterbacking session."[3] Nonetheless, the decision is clear that if a plaintiff is to succeed in asserting the discovery rule, the Complaint must specifically aver that the Plaintiff's condition worsened.

A NOTE ABOUT DECORUM

Although the winter months are drawing to a close, I have twice recently seen attorneys arguing motions with their coat still on. I was always told by my mentors that when the mood in the courthouse becomes too lax and casual the jurors start to lose sight of the importance of the issues in front of them; a sentiment that works against the plaintiffs. Accordingly, the tip for the day is that you should remove your overcoat before addressing the Court.

---

[3] The decision offers no insight as to why a new suit was not filed when the preliminary objections were filed in the prior suit, and one could wonder if a different result would have been reached if the plaintiff in the subject lawsuit had filed a motion for leave to amend the complaint prior to the entry of judgment on the pleadings. There is also the question of why the date of the DUI conviction issue was not preserved.

By: Mark Milsop, Esq. of

Berger and Green

mmilsop@bergerandgreen.com

COMP CORNER ... FROM PAGE 9

performed" (how many times have practitioners in this area of the law read that?). The Court of Appeals noted "while not dispositive, this factor is highly relevant to the FLSA analysis." (Slip Opinion pg. 18) The Court noted the allegations made by the Plaintiffs included as follows: that Plaintiffs, while online for Uber, cannot accept rides through other services, Uber's Deactivation Policy prevents seeking fares outside of the Uber system by causing the de- activation, that frequency with which drivers can be offered rides is under the strict control of Uber, and that the number of trip requests available to drivers is driven by Uber.

Plaintiffs maintained that drivers are punished for canceling trips and that drivers are coerced into driving for Uber as the company will make automatic weekly deductions against their accounts, even if no activity occurs. Furthermore, Uber deactivates drivers who fall short of the 4.7-star rating that is required according to their agreements.

The Court conducted further analysis of the *DialAmerica* criteria. It concluded that material disputes of fact existed regarding all the criteria except whether a special skill was required for employment. While this case is not ultimately dispositive of whether an employment relationship exists under the Fair Labor Standard Act, it provides useful guidelines for the argument that Uber, and presumably Lyft drivers, are employees under the Pennsylvania Workers' Compensation Act. The decision highlights elements in the various written agreements that support, at least in Uber's case, that the drivers are under the control of the company. Certainly, it points the way for practitioners to review the document on the relevant points to help establish the elements of control.

By: Tom Baumann, Esq. of

Abes Baumann, P.C.

tcb@abesbaumann.com

VIEW OUR
Upcoming CLEs

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

***Dean v. Bowling Green-Brandywine, No. 26 MAP 2019 (Feb. 19, 2020,*Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2019)**

Pennsylvania Supreme Court overturns nonsuit in favor of a drug addiction treatment facility and its physicians based upon improper application of the qualified immunity under Section 114 of the Mental Health Procedures Act.

On November 20, 2012, Andrew Johnson ("Plaintiff") voluntarily admitted himself to Bowling Green-Brandywine Addiction Treatment Center (Brandywine) seeking drug rehabilitation treatment for his addiction to opiates and benzodiazepines. During intake he reported his health history to Brandywine staff, which included Bipolar and ADHD diagnoses from when he was a child. At the same time, Plaintiff reported he was not currently receiving mental health treatment, was not under the care of a psychiatrist, and had never been prescribed any medications to treat any mental health issues. The assessment form listed the reason for Plaintiff's admission as "to get off the pills."

Plaintiff was placed on a methadone taper for "complete withdrawal from all opioid/opiate medications." Plaintiff also underwent a psychosocial assessment which noted that he was experiencing "anxiety" at the time of his admission. Plaintiff would continue to report anxiety during the length of his stay.

On two separate occasions during his stay Plaintiff was sent to a local emergency room for evaluation of an elevated heart rate and blood pressure as well as his complaint that he was unable to see or move. During both these visits he was diagnosed with drug withdrawal and returned back to Brandywine.

On November 28, 2012, a psychiatric consultation was completed by a staff psychiatrist at Brandywine. At this time, Plaintiff was unable to stand on his own, and was not eating or drinking, so the consult was performed in his room. Later that evening, Plaintiff's blood pressure and heart rate were again elevated. However,nonew treatment orders were issued and Plaintiff was not transferred to the emergency room. The next morning, Plaintiff was found dead in his room.

Plaintiff's estate filed a complaint raising medical malpractice, wrongful death and survival claims alleging that he died of a cardiac arrhythmia due to the combination of medications prescribed during treatment at Brandywine, and that his death was the result of medical negligence including the failure to properly examine, diagnose, appreciate, and treat his medical condition.

The case was tried before a jury in November of 2016. After Plaintiffs presented their case, all defendants moved for nonsuit, claiming Plaintiffs failed to present evidence of willful misconduct or gross negligence and defendants were therefore immune from suit under the Mental Health Procedures Act (MHPA). The trial court granted the nonsuit for all Defendants and the Superior Court affirmed the non-suit with regard to the drug treatment facility and its physicians.

The Pennsylvania Supreme Court granted allowance of appeal to determine whether the lower courts had properly applied the provisions of the MHPA in granting a non-suit based upon the limited immunity provision at Section 114, which insulates individuals and institutions providing treatment to mentally ill patients from civil and criminal liability. Specifically, Section 114 states:

> The Supreme Court observed that, by its own terms, the MHPA does not automatically apply in every situation involving a patient with a history of mental illness.However, the Court also observed that the MHPA did apply to treatment decisions, which "supplement" and "aid" or "promote" relief and recovery from "mental illness." As such, the Court found that Section 114 immunity might apply to treatment that does not specifically pertain to "mental illness" if the treatment "facilitates the recovery" from mental illness.

Applying this standard to the present case, the Supreme Court concluded that immunity under Section 114 did not apply to the defendant drug treatment facility and its physicians because: (1) the patient was admitted for and primarily received drug detoxification treatment; and (2) the patient did not receive treatment to "facilitate recovery from a mental illness". In so holding, the Supreme Court was mindful that allowing MHPA protection under these types of circumstances would improperly expand immunity to all physicians and facilities that treat patients with any history of mental illness, however remote or unrelated to the current treatment. The expansive application suggested by the Superior Court would essentially immunize all providers that adopt a routine practice of ordering a "psychiatric consult" for every patient, regardless *(Continued on Page 13)*

of presentation. Consequently, the Court reversed the decision of the Superior Court and remanded the matter for further proceedings.

Jones v. Plumer, 2020 PA Super 7 - Pa. Superior Court 2020

Superior Court affirms Defendant's summary judgment in a premises liability action based upon the Pennsylvania Dead Man's Act.

Plaintiff, Jessica Jones ("Plaintiff") was a tenant at a property owned by James Stover. Plaintiff claimed that she tripped on the premise's poorly maintained steps, which led down from a porch on the side of the building. The steps had no railing, and when Plaintiff was about to walk down the steps, she claimed that her shoe caught the top of the riser, which improperly projected beyond the top-step nosing. Plaintiff fell and broke several bones in her arm.

Mr. Stover, the landlord, died about a year post-accident, before Plaintiff filed her lawsuit. As such Plaintiff sued the administratrix of Mr. Stover's estate ("Defendant") to recover for her injuries. In her Complaint, Plaintiff alleged that Mr. Stover knew his front steps were unsafe but neglected to repair them in a reasonable and timely manner. The Defendant administratrix moved for summary judgment claiming that the Plaintiff lacked sufficient evidence of causation. Specifically, Defendant claimed that the only witness to the fall was the Plaintiff, who was incompetent to testify regarding causation under the Dead Man's Act. The trial court agreed and granted summary judgment.

On appeal, the Superior Court affirmed the grant of summary judgment in favor of the Defendant based upon the Dead Man's Act. The Court first determined that the language of the Dead Man's Act set forth at 42 Pa. C.S.A 5930, directly applied to the facts of this case. Specifically the Court held that: 1) the event of Plaintiff falling down the steps at Mr. Stover's property is "a thing" for purposes of 42 Pa. C.S.A. § 5930; 2) Mr. Stover was dead; and 3) his rights had passed to a party who represented his interest (the administratrix of his estate). The Court held that pursuant to the clear language of the Dead Man's Act, Plaintiff as a surviving or remaining party to the occurrence was not a competent witness to any matter occurring before the death of said party.

Next, the Court determined that the Defendant Adminstratrix had not waived the Dead Man's Act. The Court explained that the taking of a party's deposition or the sending of interrogatories by the Defendant, Adminstratrix waives the Act, because he or she would have used discovery to make the adverse party his own witness. However, in the instant case, the Superior Court found that the Defendant Adminstratrix did not conduct any discovery. Thus, she could not be found to have waived the Act.

> *"Defendant claimed that the only witness to the fall was the Plaintiff, who was incompetent to testify regarding causation under the Dead Man's Act.*

Finally, Plaintiff-appellant argued that statements made within her medical records described the mechanics of her fall as well as the lack of a handrail and that this information was admissible evidence on the issue of causation sufficient to survive summary judgment. The Superior Court rejected Plaintiff's position on two grounds. First, Plaintiff's reliance upon the absence of a railing to prove causation of her injuries was misplaced as it contradicted Supreme Court precedent stating that the lack of a handrailing, without more, was not sufficient to establish fault on the part of a landowner. Second, the Court found that nothing in Plaintiff's medical records showed that her heel caught on the negligently maintained riser of the top step. On the contrary, Plaintiff's medical records were either silent on what caused her to fall, or they attributed it to a different source.

Based on the foregoing, the Superior Court affirmed the grant of summary judgment in favor of the Defendant based upon the Dead Man's Act.

Avery v. Cercone, 2019 Pa. Super. 366 (Pa. Super. Dec. 23, 2019)

Pennsylvania Superior Court issues opinion containing guidance on the proper procedure for handling a "zero verdict."

On February 1, 2012, Defendant, Harry Spadafora ("Defendant") rear-ended Plaintiff, Andrea Avery ("Plaintiff") and propelled her car into the vehicle in front of her, causing Plaintiff injuries and damages. At trial, the jury found Defendant negligent. The jury initially returned a verdict against him of $8,500 for lost wages and $0 for pain and suffering. However, all parties had contended at trial that the Plaintiff deserved some compensation for pain and suffering and they were simply disputing *(Continued on Page 14)*

the dollar figure amount.

Following the verdict, Defense counsel asked the trial court to send the jury back to reconsider its pain-and-suffering award. Plaintiff's counsel responded that returning the jury to the deliberation room was improper. The trial court agreed with defense counsel and directed the jury to resume deliberations and to award something for pain and suffering. The jury returned a second verdict adding $10,000 for pain and suffering. Thus, the new verdict totaled $18,500.

> *"[A] jury is always free to award $0 for pain and suffering. The question then becomes whether such a verdict is against the weight of the evidence such that is shocks the conscience of the trial court."*

Plaintiff filed post-trial motions, which were denied by the trial court. Thereafter, Plaintiff filed an appeal with the Superior Court raising a number of issues including: whether the trial court erred by returning the jury to deliberations with instructions to award some amount of compensation for pain and suffering?

To put this issue into perspective, the Superior Court differentiated between an inconsistent verdict and a verdict that is against the weight of the evidence. Specifically, the Court held:

> An inconsistent, irrational, or problematic verdict is a verdict that does not clearly report the jury's factual findings on its face. The inconsistency or problem of such a verdict appears within the four corners of the verdict slip. When this occurs, a trial court should — if a party objects before the jury is dismissed — return that jury to the deliberation room and instruct it to clarify (not reconsider) the verdict. By contrast, a verdict that is against the weight of the evidence is a verdict that shocks the conscience of the trial court in light of the evidence presented. When this occurs, the trial court should — if a party timely raises the issue in post-trial motions — order a new trial.

The Superior Court found that in light of the wide latitude afforded juries on the pain-and-suffering question, a jury is always free to award $0 for pain and suffering. The question then becomes whether such a verdict is against the weight of the evidence such that it shocks the conscience of the trial court.

The Superior Court determined that the trial court in the instant case should not have given the jury a corrective instruction to award some pain-and-suffering damages and returned it to deliberate because the jury was under no legal obligation to do so. The jurors could have concluded that the Plaintiff had not suffered any compensable pain and suffering, because it could reject all of the evidence supporting a pain-and-suffering award.

The Superior Court held that the the trial court should have let the verdict stand and waited to see if the Plaintiff filed post-trial motions challenging the weight of the evidence. Assuming the plaintiff had filed such a motion, the trial court would then have been obligated to determine whether the verdict in this case was shockingly unjust in light of all the evidence presented. The case was remanded back to the trial court, where the Plaintiff was permitted to renew her post-trial motions for a new trial on the grounds that the jury's original award of $0 for pain and suffering was against the weight of the evidence.

Evans v. Travelers Insurance Company, 2019 PA Super 353 (Pa. Superior Court 2019)

Pennsylvania Superior Court reverses summary judgment and holds that a diagnosis of PTSD may, in certain circumstances, constitute a "bodily injury" under a claim for First Party Benefits

On September 17, 2014, Plaintiff, Carol Evans ("Plaintiff") was traveling southbound in the left passing lane of I-476. At that time, Rodolfo Hudson was traveling southbound in a tractor-trailer in the right lane when he attempted to move his tractor-trailer into the left passing lane and violently collided with Plaintiff's vehicle.

Plaintiff subsequently sought treatment at a local hospital reporting various symptoms including persistent headaches, neck pain, dizziness, balance issues, fogginess of her mental processes, extreme exhaustion, nightmares, flashbacks, and panic attacks.Thereafter, Plaintiff submitted to extensive medical testing, received injections, underwent physical therapy and rehabilitation and was prescribed multiple medications for pain, dizziness, and emotional distress. Four (4) months after the crash, Plaintiff was evaluated and treated by psychiatrist Dr. Matthew Berger for PTSD.

Plaintiff submitted an application *(Continued on Page 15)*

to her insurer, Travelers, for first party benefits coverage under her automobile policy. While Travelers initially paid for Dr. Berger's treatment of PTSD, it subsequently denied coverage for future treatment. Plaintiff's counsel sent Travelers a letter from Dr. Berger, who indicated he was treating Plaintiff for PTSD related to the motor vehicle accident and that continued treatment of the PTSD was "medically necessary."Travelers responded that PTSD did not constitute "bodily injury" as defined by the endorsement. Travelers further asserted that the endorsement's definition of bodily injury was identical to the policy language in *Zerr v. Erie Ins. Exchange*, 667 A.2d 237 (Pa.Super. 1995) (where the Superior Court determined that emotional or mental injuries were not covered under that definition of bodily injury, unless they were caused by a physical injury).

Plaintiff filed suit against Travelers arguing that it breached the parties' insurance contract. Travelers filed a Motion for Summary Judgment, claiming Plaintiff was not entitled to receive coverage PTSD treatment, which did not result from the physical injuries she sustained in the collision as required by policy language. The trial court granted summary judgment in favor of Travelers and dismissed Evans' complaint with prejudice. The trial court found that Travelers was entitled to summary judgment because Plaintiff failed to produce evidence that her mental injuries resulted from her physical injuries, which was essential to the cause of action.

On appeal, the Superior Court noted that it was bound by the prior precedent in *Zerr* which provided that physical manifestations of emotional distress cannot constitute "bodily harm". However, the Court also found that *Zerr* was distinguishable as the claim for coverage in that case was based solely on emotional injury without any accompanying physical injury. By contrast, it was undisputed that the Plaintiff in this case suffered both physical injuries and emotional distress (including PTSD). Therefore, the Court held that the Plaintiff was entitled to benefits under her policy if the physical harm she sustained in the accident resulted in an illness. After reviewing the records, the Superior Court found that the trial court had erred in granting Travelers' Motion for Summary Judgment because Plaintiff had presented sufficient evidence to support her claim that her PTSD resulted from not only experiencing the traumatic collision but also from her physical injuries, which caused her continuous physical pain, affected her physical and emotional well-being, and required extensive medical testing, treatment, and rehabilitation over a period of several years.

The Superior Court held that the record did not conclusively show that Plaintiff's PTSD and mental injury were solely caused by the accident as there was also evidence that her emotional trauma was intertwined with or related to her physical injuries. As such, the Superior Court found there was a genuine issue of a material fact regarding a necessary element of the cause of action: whether Plaintiff's PTSD and other mental injury were caused by her bodily harm sustained in the accident. Accordingly, the trial court's entry of summary judgment in favor of Travelers was reversed and the case was remanded for further proceedings.

By: Shawn Kressley, Esq.,

of DelVecchio & Miller

shawn@dmlawpgh.com

Comeback Award Nominees Needed!

Do you have a client that you believe is deserving of being honored by the WPTLA as our 2020 Comeback Award winner? Next year's Comeback Award will be presented during dinner at the Duquesne Club on Thursday, November 19, 2020.

Nominations will be accepted in the near future to be considered by the selection committee in advance of the 2020 dinner.

Look for information on our website and in the upcoming edition of *The Advocate* for instructions on how to nominate a deserving client.

PROJECT HEALING WATERS FLY FISHING

December 19, 2019

Western Pennsylvania Trial Lawyers Association
909 Mount Royal Blvd Ste 102
Pittsburgh, PA 15223-1088

Dear Sir or Madam,

On behalf of the wounded and injured military service members and disabled veterans who are involved in Project Healing Waters Fly Fishing (PHWFF) activities, we thank you for your generous $1,250.00 contribution received on 11/25/2019. Your gift is an inspiration to us all and helps us give back to individuals who have given so much.

We use the restorative activities of fly fishing and fly tying to help the rehabilitation of those struggling with Post-Traumatic Stress, Traumatic Brain Injury, and physical limitations. Our program also provides participants with the camaraderie of fellow veterans; those who understand. Combine that with the peace of clean, fishable water and you have the recipe to change lives! Participation in our program is *free* for participants; so, gifts of money and in-kind donations are highly valued assets and provide us with the vital resources needed to sustain our programs. Your gift will help us purchase the fly fishing equipment and supplies we require to support fly tying instruction, fly casting workshops, and rod building classes, as well as fund activities beyond the classroom, like fishing trips. Please know that you are helping us make a difference and we will put your donation to good use. We invite you to learn more about PHWFF on our web site, www.projecthealingwaters.org or follow us on social media to read about the extraordinary participants, volunteers, trips and activities across the nation.

Again, thank you for your charitable gift. Your support and encouragement is deeply appreciated, and needed as we carry out our mission to improve the health and well-being of our program participants.

Respectfully,

Robert Fitch, Board Chairman

Todd Desgrosseilliers, CEO & President

Please note: *PHWFF is a 501(c) (3) nonprofit organization and donations are tax-deductible to the full extent of the law. Our Federal EIN is 61-1518154. PHWFF did not provide you with any goods or services in consideration for your donation. Section 170 of the Internal Revenue Code, enacted in August of 1993, requires you to keep written substantiation of gifts of $250 or greater in order to claim a deduction for your contribution. This letter hereby serves as a receipt for the above gift.*

CFC #82526

TRIVIA CONTEST

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

Trivia Question #22

What Super Bowl occurred between two NFL teams that do not field a cheerleading squad, making it the first Super Bowl with no cheerleaders?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by May 30, 2020. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of May 31, 2020. The correct answer to Trivia Question #22 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 #21 – **What Pittsburgh location is recognized by a plaque that reads, in part, "Yankees by a score of 10-9"? Answer: The spot where Bill Mazeroski's home run ball cleared the left center field wall of Forbes Field in the ninth inning of the seventh game of the World Series, leading to a 10-9 Pirates' victory over the Yankees.**

Congratulations to contest #21 winner Bernie Caputo, of the Caputo Law Firm. Bernie received a $100 Visa gift card.

**Please Support our Business Partners,
as they support WPTLA.**

AccentuRate
Dee Sherry
412-334-5465
dee@accenturate.com

Alliance Medical Legal Consulting
Varsha Desai
267-644-1000
vdesai@alliancemedicallegal.com

FindLaw
Charlie Georgi or Mark Melago
charles.georgi@tr.com
mark.melago@thomsonreuters.com

Finley Consulting & Investigations
Chris Finley
412-364-8034
cfinley@finleyinvestigations.com

Ford Business Machines
John Roseto
724-707-4885
jroseto@buyfbm.com
Johnathan Garlow
jgarlow@buyfbm.com

Forensic Human Resources
Matt Hanak
412-720-1158
matt@forensichr.net

Keystone Engineering
Dave Kassekert
866-344-7606
dwkassekert@forensicexp.com

NFP Structured Settlements
Bill Goodman
412-263-2228
WGoodman@nfp.com

Planet Depos
Cindy Miklos
888-433-3767
cindy.miklos@planetdepos.com

Thrivest Link
George Hargenrader
412-513-7919
ghargenrader@thrivest.com

Please remember that our Business Partners are not "sponsors" of our organization – they are our Partners! It is our duty as members of WPTLA to be good partners to our Business Partners, as they have been good partners to us. Our Business Partners do not expect exclusivity – but they appreciate and value the business we give them. If you have a professional need in an area covered by a Business Partner, please give them your business whenever possible. If you have any experiences with a Business Partner, good or bad, please share your experiences with Chairs Larry Kelly (724-658-8535) or Eric Purchase (814-833-7100) so that we can work to make the program as beneficial as possible to our membership and to the Business Partners.

Nominated Officers and Board of Governors

Fiscal Year 2020 – 2021 *

Officers:

President	Eric J. Purchase
Immediate Past President	David M. Landay
President-Elect	Mark E. Milsop
Vice President	Erin K. Rudert
Secretary	Gregory R. Unatin
Treasurer	Katie A. Killion

Board of Governors:

Allegheny County

Steven M. Barth	Elizabeth A. Chiappetta	Gianni Floro
Joseph R. Froetschel	Brittani R. Hassen	Nicholas C. Katko
G. Clinton Kelley	Shawn D. Kressley	Matthew T. Logue
Brendan B. Lupetin	Karesa M. Rovnan	Benjamin W. Schweers
James T. Tallman	Jennifer L. Webster	David C. Zimmaro

Beaver County

Charles F. Bowers III	Chad F. McMillen	Curt W. McMillen

Blair County

Nathaniel B. Smith

Erie County

Craig Murphey

Indiana County

Russell J. Bopp Bryan S. Neiderhiser

Lawrence County

Charles W. Garbett

Mercer County

Richard W. Epstein

Washington County

Laura D. Phillips

Westmoreland County

Michael D. Ferguson

LAWPAC Trustee: Steven E. (Tim) Riley, Jr.

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

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.

***Madison v. Alabama* and the Application of the Eighth Amendment**

The Eighth Amendment of the United States Constitution is among the shortest, most concise amendments in the Bill of Rights: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (*U.S. Constitution* Amend. VIII). However, no founding father could foresee that 228 years later, a man's life would be debated because of thses sixteen words.

Vernon Madison, age sixty-five, is currently awaiting an execution in the state of Alabama for a crime he can no longer remember. A series of strokes caused the sever brain damage and blindness that Madison now experiences, which, in turn, account for his inability to understand and remember his crime, committed over thirty years ago ("Madison v. Alabama"). As Chief Justice Roberts simply stated in Madison's oral argument on October 2nd, 2018: "He knows what capital punishment is, he knows what's going to happen; he just doesn't remember what -- what he did." (*Madison v. Alabama*). After a long process of awaiting habeas corpus relief, Madison's execution has been postponed from its original date, May 12, 2016 (Stein). Madison is currently waiting on a Supreme Court ruling to answer the question his unusual case poses: is it a violation of the Eights Amendment to execute someone who is unable to understand the punishment?

In order to understand *Madison v. Alabama* in full context, case law, or the prior court cases that set the precedent about comparable issues, must be considered in addition to the background of the case. Though this case is unique it its *(Continued on Page 23)*

impact, there are cases that define the Eighth Amendment in the context of mental illness and instability. There are two distinct cases that support and refine Madison's situation: Atkins v. Virginia defines the Eighth Amendment's application to mental disability, while Ford v. Wainwright defines the Eighth Amendment's application to unawareness of the crime committed.

In 2002, Daryl Renard Atkins was in a very similar situation as Vernon Madison. He was to be put to death after his conviction, but was confirmed by a forensic psychologist to be mentally disabled ("Atkins v. Virginia"). The case posed a question about the use of the death penalty on people deemed mentally disabled. In a 6-3 court ruling, the Rehnquist Court held that executing mentally disabled criminals is in violation of the Eighth Amendment ("Atkins v. Virginia"). The opinion made note of the "evolving standards of decency" in society, as stated by Justice Stevens. Such changes to the way society views mental illness opened the door for the decision made in *Atkins v. Virginia*, as mentally disabled criminals are now viewed as "less culpable" because of their conditions ("Atkins v. Virginia"). The decision may seem to support Vernon Madison's case. However, there is one distinct issue that arises with this case: Madison was not mentally disabled at the time of his crime.

Sixteen years prior to the decision made in *Atkins v. Virginia*, Alvin Bernard Ford was in an event more similar situation as Vernon Madison. Ford was a criminal being charged with capital murder who was fully competent and mentally sound at the time of his crime. However, just as Madison, Ford's mental health deteriorated during his twelve years in jail. and he could no longer recall details about his crime. In 1986, *Ford v. Wainwright* was argued in the Supreme Court, questioning whether it was constitution to give Ford the death penalty in regards to his condition. In a 5-4 decision, the Burger Court ruled that it was, in fact, a violation of the Eighth Amendment to execute Ford. As Justice Powell stated in his concurring opinion, "The Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it" ("Ford v. Wainwright"). Ford could not comprehend what punishment was being given, so Justice Powell considered Ford's sentence a "cruel and unusual" punishment.

Atkins v. Virginia and *Ford v. Wainwright* both give significant insight into the interpretation of the Eighth Amendment in modern times. the rulings for these two cases strongly support Vernon Madison in his current situation. Because of the "cruel and unusual punishment" clause in the Eighth Amendment, as well as the cases which apply the Eighth Amendment to mental disability, Madison's death sentence is in violation of the Eighth Amendment. Just as Ford, Madison is unaware of his crimes and unaware of the consequences of his actions. As Madison's lawyer argued during the trial, the Eighth Amendment simply does not "allow any defendant to be declared competent to be executive over these kinds of clear, medically verifiable disorders" (Madison v. Alabama). Madison is clearly disabled after h is series of strokes, therefore, he falls under the case law of *Atkins v. Virginia* and *Ford v. Wainwright*.

A man who cannot remember past the letter G while reciting the alphabet currently has his life in the hands of the Supreme Court (Stein). Madison is not competent to be executed under the decisions of *Atkins v. Virginia* and *Ford v. Wainwright*, which both support that giving the death penalty to mentally disabled criminals serves as "cruel and unusual punishment." There is absolutely no value or justice in giving a punishment to a man who cannot remember the reason why he is being punished in the first place. This punishment is not only pointless, but unconstitutional. Vernon Madison honestly believe that his crime never happened, so putting him to death neither brings justice to his actions, nor is an effective punishment for the individual himself.

Madison's attorney argued that the Eighth Amendment needs to be considered within the context of modern society because standards and culture in the United States changed constantly. In his closing argument, he described the application of the Eighth Amendment eloquently: "The Court always looks at facts and circumstances through the lens of the Constitution, through the window of the constitution ... But the Eighth Amendment isn't just a window. It's a mirror. And what the court has said is that our norms, our values are implicated, when we do things to really fragile, really vulnerable people" *(Madison v. Alabama)*.

Submitted by: Arabella Hunt

Carlynton Junior/Senior High School

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

Through the Grapevine....

Cory Young can now be reached via Bassi Vreeland & Associates, 111 Fallowfield Ave, PO Box 144, Charleroi 15022.
P: 724-705-0146
Email: cyoung@bmvlaw.com

Congratulations to **Past President and President's Club Member Larry Kelly**, who has been named Shenango Area High School baseball coach.

Stephen Yakopec has a new email address: steve@syakopeclaw.com

Congratulations to **Robert Peirce** for receiving Duquesne University's McAnulty Service Award.

President's Club Members Michael Calder, Renee Metal, Jon Perry, Neil Rosen and **Andrew Rothey** have changed their firm's name to Rosen & Perry P.C. All other info remains the same.

Get well wishes to **Board of Governors Member Joe Froetschel** and **Stephen Yakopec**, who are both recovering from leg surgery.