THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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THE WHITMOYER DECISION OFFERS LESSONS

The *Whitmoyer* Decision Offers Lessons on Negotiating workers Compensation Liens/Credits and Addressing Subrogation Issues

The Pennsylvania Supreme Court recently announced a groundbreaking decision in *Whitmoyer v. Workers' Comp. Appeal Bd.*, 186 A.3d 947 (Pa. 2018). *Whitmoyer's* immediate significance is its handling of the future credit afforded upon the settlement of a tort action where there is an underlying workers' compensation claim. More specifically, *Whitmoyer* holds that a worker's compensation carrier is not entitled to a future credit to be applied against future medical expenses where the claimant has obtained a tort recovery.

Background of the *Whitmoyer* Decision

In 1993, Craig Whitmoyer sustained a worker injury that resulted in the amputation of part of his arm due to a defective product. Although Workers Compensation benefits were granted, the parties entered into a Supplemental Agreement and thereafter a Commutation that left open future medical payments. Whitmoyer went on to obtain a $300,000.00 settlement. Thereafter, a form 380 was completed providing for repayment of a net subrogation lien of $81,000.00 and determining a balance of recovery of $190,000.00. Whitmoyer's counsel then wrote to the workers compensation carrier advising that it would remain responsible for medical expenses and that it was not entitled to a future credit. In support of his position, Whitmoyer's counsel pointed out that Section 319 or the Workers' Compensation Act, 77 P.S. 671, provided only for a credit as to "future installments of compensation."

The compensation carrier initially continued to pay in full for medical benefits for thirteen years. Thereafter, the workers compensation carrier filed a modification petition seeking to be relieved of the payment of medical expenses based upon a credit from the third party settlement.

The Supreme Court holds that there is no credit as to future medical expenses.

Although the Workers Compensation Judge, the Appeals Board and the Commonwealth Court found in favor of the Workers Compensation carrier, the Pennsylvania Supreme Court reversed, holding that the term "future installment of compensation" does not include medical benefits. The holding is based upon a close (*Continued on Page 2)*

Whitmoyer holds that a worker's compensation carrier is not entitled to a future credit to be applied against future medical expenses where the claimant has obtained a tort recovery

reading of the language of Section 319.[1] The key is that the statute provides for subrogation for past benefits "to the extent of compensation" but provides for a future credit only as to "future installments of compensation." The Court thereafter looked to the definition of installment and determined that because the payment of medical benefits does not occur at set intervals, they are not installments. Hence, the plain meaning of the statute leads to the conclusion that an employer is not entitled to take a future credit as to medical bills.

The *Whitmoyer* decision is important to understand what your client is entitled to when negotiating a compromise and release and in advising a client as to the consequences of a settlement as to future compensation benefits. When both the plaintiff's counsel and the workers' compensation carrier's attorney recognize that no credit is allowed as to future medical benefits, a more favorable agreement should result for the plaintiff/employee.

Whitmoyer is also important for other subrogation issues

Many courts have been sympathetic to insurance carriers claiming a right to subrogation. They also do so on the incorrect premise that if subrogation is not allowed, the plaintiff will receive a windfall. Such a position is not justified in light of the fact that subrogation is usually based upon the often false assumption that a plaintiff is always fully compensated by a settlement. As you are probably already aware, such a proposition does not hold true where there is inadequate insurance. Similarly, the full compensation hypothesis also fails short where a settlement is based upon a discount for liability, comparative negligence or the risk of litigation. It is also possible that a settlement may be driven by the desire to avoid the future costs associated with litigation. Insurers subject to subrogation also often have the audacity to suggest that subrogation results in lower insurance premiums. This ignores the reality that the true effect of subrogation is often increased profits for insurance companies.

Moreover, with respect to future medical costs, the actual cost of such services is often unknown and a prudent plaintiff could be required to set aside the entire settlement in order to assure that future medical costs will be paid for. The alternative is the possible denial of future services due to the inability to pay.

Therefore, the *Whitmoyer* decision is refreshing that the Whitmoyer Court observed, "Finally, it bears emphasizing that the conclusion we reach today is wholly consistent with the remedial nature of the WCA, which should be interpreted for the benefit of the worker and liberally construed to effectuate its humanitarian objectives *Whitmoyer v. Workers' Comp. Appeal Bd.*, 186 A.3d 947, 958 (Pa. 2018).

It is worth noting that when addressing tough subrogation issues on appeal, Amicus support is available, as it was to Whitmoyer through the Pennsylvania Association for Justice. There are also past Amicus Briefs available on the American Association for Justice's website which offer great analysis debunking insurers' economic justifications for subrogation.

By: Mark Milsop, Esq., of Berger and Green

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[1] *Subrogation of employer to rights of employee against third persons; subrogation of employer or insurer to amount paid prior to award*

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employee, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation.

PRESIDENT'S MESSAGE

"Stay focused, go after your dreams and keep moving toward your goals." LL Cool J

When in doubt, I always look to the sage words of LL Cool J for inspiration. Okay, maybe not - but there is wisdom in that quote. Where would we be without goals - in our personal lives, in our professional lives, in the organizations that we are involved in? If we aren't setting goals for ourselves, how do we know what we're working toward? How do we know when we get there? When we're setting these goals, it is also imperative to understand what forms and drives them - the WHY. And if we want to achieve our goals, we must remain focused.

In my first board meeting as President of the Western Pennsylvania Trial Lawyers, one of the first things we discussed were the goals for this year. All of the specific goals that were established center around our membership.

First, we want to encourage growth in our membership. The old adage "many hands make light work" still rings true. The more members we have, the more we can accomplish. Growth is important to any organization. We also need to make a concerted effort of bringing young lawyers into WPTLA – not only as members, but as leaders. Any organization that does not have youth is a dying organization. So, how do we encourage growth in WPTLA and how do we encourage younger attorneys to become members? I believe WPTLA should sell itself. The benefits of membership in our organization are phenomenal. First, WPTLA has a Plaintiff's only database that contains a wealth of forms, briefs, transcripts and so on. Next, we offer networking opportunities with both our members and with our business partners whose businesses are essential to our civil practices. Additionally, WPTLA offers CLE's taught by our own members and business partners. By the time this article is published, we will already have held a two hour CLE on "Lessons Learned" from trial experiences which was presented by three of our own Past Presidents - John Gismondi, Veronica Richards and Tim Riley. Additionally, our President-Elect, David Landay, has already taught a CLE on estate and trust issues for personal injury attorneys. We have more exciting and relevant CLE's planned for the remainder of this year! Next, our quarterly publication, The Advocate, which you are currently reading, is another amazing benefit of membership. Features such as Hot Off The Wire are "must read" articles for any trial attorney. With all of these benefits of membership, I truly don't understand why anyone who calls them self a trial lawyer wouldn't be a member of WPTLA.

Second, we want to invigorate our current membership. Our organization has purpose! We need to get back to the basics and remember why we exist. WPTLA is not that gym membership that you pay for and never use! WE need to exercise our collective muscles and make a difference in the lives of others. Like my predecessor, Liz Chiappetta, stated in her own Message from the President, "We are called counselors at law for a reason. We are serving others who do not necessarily have a voice, or those who do not have a voice loud enough to stick up to a large corporate bully." We need to stand together if we are going to make a difference.

Through your membership in WPTLA you have an opportunity to stand up for the principles of justice that we fight for in courtrooms across western Pennsylvania every day. We have many events planned throughout the end of 2018 and the early part of 2019 that will give all of members a chance to reinvigorate their interest and involvement in WPTLA and bring a guest - a former member or a potential member - to show what it is we do. On May 3, 2019, we will be hosting the Annual Judiciary Dinner at *(Continued on page 5)*

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PRESIDENT'S MESSAGE ... FROM PAGE 5

Heinz Field. This is another opportunity to showcase the passion for people that lies at the heart of the Plaintiffs' bar. During that dinner, we will present a donation to the Pittsburgh Steelwheelers from the President's Challenge 5K Run/Walk/Wheel Event, which is scheduled for Saturday, October 20, 2018 at the Boat House in North Park. We will also present scholarships to the winners of our annual essay contest. Finally, we will make a donation to the recipient of the Daniel M. Berger Community Service Award. This is one of my favorite events! On November, 28, 2018 we will be holding the Comeback Award Dinner at Cambria Hotel & Suites in Pittsburgh. This dinner recognizes and celebrates a current or former client of one our own members who has made a courageous comeback from a devastating set of circumstances. Every year, this dinner serves to recharge my batteries and remind me why it is that I do what I do for a living. It is a very inspiring and motivational evening. This year's winner has a great story that you will want to hear.

Third, we need to foster pride in our organization and our membership. I am proud to say that WPTLA offers many opportunities for us to give back and make a difference in our communities. Did you know that WPTLA is a partner in collaboration with the Pittsburgh Pro Bono Partnership for a Wills Project that provides legal assistance to low income families in preparing essential personal documents such as wills, advanced directives and durable powers of attorney? Did you know that WPTLA also participates in Habitat for Humanity? We also host the Annual President's Challenge 5K Run/Walk/Wheel which benefits the Pittsburgh Steelwheelers. I am very proud to say I am the President of this great organization and its giving members.

Of course, the first three goals of encouraging growth in our membership, invigorating our current membership and fostering pride in our organization are all interconnected. It is easy to have pride in an organization if it has an invigorated and growing member base. So, how do we accomplish these goals? That is where we need focus (LL Cool J really is wise). My fourth goal as President is to make these goals the core goals of our Officers, Board Members and general membership. Nothing that is difficult is accomplished quickly. Growing an organization, invigorating its membership and fostering pride all take time, energy and focus. That's why I would like these "President's Goals" to be seen as our Officers' goals if not our members' goals. Involving the officers in the plans and goals of the organization provides more cohesion and ensures that those moving into different positions of responsibility within WPTLA are invested in achieving these goals and achieving long term stability.

The Western Pennsylvania Trial Lawyers Association, as an organization, has accomplished much for our profession and for our community. However, it is not enough to simply pay your dues and become a member. Get involved, improve your practice, grow your network, advocate for our cause and give back. In short, I encourage everyone to become more involved in WPTLA.

By: Bryan Neiderhiser, Esq., of Marcus & Mack

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WPTLA offers many opportunities for us to give back and make a difference in our communities

UPCOMING EVENTS

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL

Sat, Oct 20, 2018

North Park Boat House, Pittsburgh

BEAVER DINNER & CLE

Mon, Oct 29, 2018

Wooden Angel, Beaver

COMEBACK AWARD DINNER

Wed, Nov 28, 2018

Cambria Hotel, Pittsburgh

LUNCH 'N LEARN CLE

Fri, Dec 7, 2018

Gulf Tower, Pittsburgh

ANNUAL JUDICIARY DINNER

Fri, May 3, 2019

Heinz Field, Pittsburgh

26TH ETHICS & GOLF OUTING

Fri, May 24, 2019

Shannopin Country Club, Pittsburgh

GUARDIANSHIP FOR AN INCAPACITATED PERSONAL INJURY VICTIM

Introduction

This is the first in a series of articles addressing estates, wills and related issues for personal injury attorneys. Below is a basic outline of the steps needed to obtain a guardianship. For more comprehensive information, you need to review 1) Chapter 55, Incapacitated Persons of the Probate, Estates and Fiduciaries Code, 20 Pa. C.S.§5501, et seq., 2) Rule 14 of the Pennsylvania Orphans' Court Rules, and 3) any local rules such as Rule 14 of Allegheny County's Orphans' Court Rules. Some of the necessary forms can be found on- line at www.pacourts.us/forms/for-the-public/orphans-court-forms and www.alleghenycourts.us/orphans/guardianship.aspx or attached as appendices to the Rules.

Sample Factual Scenario

A husband and wife are involved in a serious motor vehicle crash caused by a drunk driver. The husband has moderate injuries. The wife, however, has a brain injury, is still in the hospital and is expected to be transferred to a nursing facility for rehabilitation. The husband asks you to handle their case against the drunk driver, his auto insurer and any other potentially responsible party such as a restaurant or bar.

You realize that the wife will not, at least in the foreseeable future, be able to file a lawsuit, sign legal documents or even sign a power of attorney.

Step-by-Step Procedure

Step 1 Determine if You Need a Guardianship.

Under the statute, an incapacitated person is an adult whose "ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety." 20 Pa.C.S. §5501. In most cases, such as a factual scenario above, you will know at the outset whether or not your potential client most likely fits within this definition. There may be situations, however, where the client becomes incapacitated because of an unrelated event after the incident in question, such as from a stroke, other accident or even dementia.

Step 2 Consider Alternatives to Guardianship.

In the personal injury context, there are two possible alternatives to appointing a guardian. Neither of these alternatives, however, may be sufficient for long-term management of the injury victim's affairs.

First, a valid durable power of attorney can permit the designated agent to sign a fee agreement, obtain medical records, and even file a lawsuit. The power of attorney must be properly signed and witnessed and must either grant complete authority to the agent or, at least, grant authority to pursue claims and litigation. Some powers of attorney become immediately effective on signature while others only become effective upon a triggering event, usually incapacity, which may further require a doctor's verification.

The other alternative to a guardianship is the appointment of a guardian ad litem. *See*, Pa.R.C.P. 2059. The guardian ad litem, as the name suggests, is a guardian only for the purposes of a lawsuit. It is not an adequate substitute for management of the incapacitated person's long-term affairs.

Step 3 Obtain a Medical Opinion of Incapacity.

Let's assume you decide that you need a guardianship. To appoint a guardian, you will need medical testimony. You must identify the appropriate doctor who can provide this opinion. It can be an internist, family practitioner, psychiatrist, psychologist, or any other medical professional with recent contact with this patient. I suggest that you send the doctor a form affidavit with the language of incapacity quoted above and have him fill in the blanks as to the details. The doctor will eventually have to testify, as explained below.

Step 4 Identify the Type of Guardianship Needed.

There is a guardian of the person (someone to make medical, living and other personal decisions) and a guardian of the estate (someone to make financial decisions, including presenting a legal claim and lawsuit). The guardian may be an individual or an institution and may or may not be the same entity. In the factual scenario above, the most logical choice for guardian is the husband. An institution may be a better choice for the guardian of the estate, however. An institution is usually better equipped to handle large sums of money and also presents a better picture to the jury if the case goes to trial. Unfortunately, most institutions will not get involved early on unless there are other assets or funds to pay the guardian's fees while the lawsuit is pending.

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GUARDIANSHIP FOR AN INCAPACITATED PERSONAL INJURY VICTIM ...

FROM PAGE 6

There is also a plenary guardian of the estate or person and a limited guardian of the estate or person. The plenary guardian is in charge of everything while the law limited guardian is in charge of specific limited aspects. In most lawsuits, and particularly in the factual scenario above, you need a plenary guardian appointed, not a limited guardian.

Step 5 Prepare a Petition for Appointment of the Guardian.

Filing a petition with the Orphan's Court starts the guardianship process. Rule 14, Section 1 of the Allegheny County Orphan's Court Rules sets forth a detailed list of the petition's contents, which include, among other items:

a) The identity of the proposed guardian with a signed consent;

b) The type of guardian being sought, e.g., limited or plenary, guardian of the person or the estate;

c) The current status of the alleged incapacitated person, including his location;

d) The gross value of the estate and the net income of the alleged incapacitated person;

e) Whether the alleged incapacitated person's physical and mental condition would be harmed by his presence at the hearing. (This information should be included in the physician's affidavit, which is attached as an exhibit to the petition).

f) A prayer for relief: a citation directed to the alleged incapacitated person to show cause why he should not be found incapacitated and why a guardian should not be appointed. The citation is the legal writ over which the Orphan's Court obtains jurisdiction of someone to adjudicate his rights. It's similar to a rule to show cause under Pa.R.C.P. §206.1, et seq.

Step 6 Notify the Necessary Parties and Serve the Petition and Citation.

If everything is in order, the Court will enter a preliminary order awarding the citation. A hearing date and time will be stated in the order, usually at least 30 to 45 days later. A statutory written notice along with the petition, preliminary order and citation must be served on the alleged incapacitated person at least twenty (20) days before the hearing. Even if this person is unable to understand the contents of these documents, it must be read and explained to him by a competent adult. If the person is institutionalized, someone at the facility may be willing to read and explain the petition. A certificate of service must be filed with the Orphan's Court

Notice of the petition and hearing must also be given to the intestate heirs, any institution providing residential services, and anyone else the Court directs.

Step 7 Verify Appointment of Counsel.

Sometimes, if the alleged incapacitated person has an understanding of what is going on, he may hire his own attorney to represent him in these proceedings. Other times, the Court appoints an attorney to represent the alleged incapacitated person. If there is no attorney, then the Court must be notified at least seven (7) days before the hearing.

Step 8 Obtain Medical Testimony.

Medical/psychological testimony must be presented to establish incapacity. A doctor can appear at the hearing in person, but this is typically done by deposition. If the alleged incapacitated person is not represented by an attorney, then an essentially ex-parte phone deposition can be scheduled. The necessary testimony can be elicited in less than thirty minutes. If the doctor decides to charge regular medical deposition rates, this can be expensive. In many instances, however, the doctor understands that his patient needs a guardian and will either waive the fee or charge a minimal fee.

The deposition transcript is offered into evidence at the time of the hearing.

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Under the statute, an incapacitated person is an adult whose "ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety." 20 Pa.C.S. §5501.

Step 9 Attend the Hearing and Present Evidence.

The proposed guardian must be present at the hearing and testify. He can comment on why a guardian is needed. Other family members who have similar knowledge and information can also testify. Typically, the alleged incapacitated person does not come to the hearing and is not heard from.

If everything goes as planned, the Court signs the order adjudicating incapacity and appointing the proposed guardian.

Step 10 Post-Petition Tasks.

These tasks include:

1. Filing a bond for the guardian of the estate, if required by the Court.

2. Notifying all necessary people and entities of the appointment of the guardian.

3. Marshalling the incapacitated person's individual assets and open a guardianship banking account, if necessary.

4. Filing an inventory with the Court within three (3) months after the guardian obtains any of the incapacitated person's real or personal property.

5. Filing a guardian's report with the Court annually.

6. Having the guardian sign a fee agreement appointing you as the incapacitated person's attorney for the personal injury claim.

Conclusion

The appointment of a guardian for an incapacitated person is a detailed, form-driven procedure. This is just the basic framework of appointing a guardian of an alleged incapacitated. As noted above, the details can be found in the statute and court rules.

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MEMBER PICTURES & PROFILES

Name: Thomas A. Will

Firm: Thomas A. Will & Associates

Law School: Ohio Northern University

Year Graduated: 1994

Special area of practice/interest, if any: Criminal Defense/Auto Accidents (Personal Injury)

Tell us something about your practice that we might not know: I have tried cases in Criminal Court, Civil Court, Family Court, Orphan's Court, and Municipal Court

Most memorable court moment: Jury Trial acquittal after three (3) day Trial on Aggravated Assault charges.

Most embarrassing (but printable) court moment: Cell phone rang during Workers' Compensation hearing at loudest possible setting. Judge walked off the bench. (Only time it has happened in almost twenty-four (24) years of practice)

Most memorable WPTLA moment: Steelwheelers 5K event attended by my whole family

Happiest/Proudest moment as a lawyer: Resolving case for older couple so they could go on their last great vacation together. An Alaskan cruise.

Best Virtue: Humility

Secret Vice: BBQ

People might be surprised to know that: I cook dinner more often than my wife

Favorite movie: Good Will Hunting – Pun intended

Last book read for pleasure, not as research for a brief or opening/closing: Descent – Tim Johnston

My refrigerator always contains: Cilantro

My favorite beverage is: Killer Diller IPA – Spoonwood Brewing

My favorite restaurant is: Gianna Via

If I wasn't a lawyer, I'd be: A restaurant owner

WIRX PHARMACY

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WIRX Pharmacy is owned and operated in Pennsylvania and specializes in the home delivery of prescription medications to injured workers. WIRX offers your clients the ease and convenience of concierge service right to their front door.

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Expert Testimony

The Pennsylvania Superior Court recently rejected a spurious attempt to exclude expert testimony concerning pesticide exposure and cancer. In so doing, the Court reinforced this Commonwealth's faith in juries to properly weigh the evidence based upon that which has general acceptance in the scientific community. The case is not significant for the standard it employed, but rather in finding error in the manner in which the trial court conducted its *Frye* inquiry.

In *Walsh v. BASF Corp.,* 2018 PA Super 174, the plaintiff appealed from an order which granted summary judgment after barring the plaintiff's expert testimony in a product liability wrongful death action against the manufacturers of pesticides. The decedent in question had worked forty years as a grounds keeper and golf course superintendent where he regularly came into contact with the subject products.

Eventually defendants filed a motion based upon *Frye v. United States*, 293 F. 1013 (DC Cir. 1923). Following depositions and arguments, the trial court entered an order precluding the plaintiff's experts from testifying. Thereafter, summary judgment was entered.

On appeal, the panel opinion authored by Judge Bowes recited the familiar *Frye* formulation, that "the thing from which the [expert's] deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Walsh*, 2018 PA Super at 6 citing *Frye*, 293 F. at 1014. Thereafter the court explained *Frye's* relationship to Pa.R.E. 702.[1]

After reviewing the relevant legal authority the Court turned to the trial court's analysis which it found fault and noted that:

> The court viewed its role as that of a gatekeeper, charged with "review[ing] the studies that Dr. Brautbar relies upon to determine whether they support Dr. Brautbar's reliance[,]" and "to make sure that the articles stood for what Dr. Brautbar said that they did." Supplemental Memorandum, 12/27/16, at 5. That is not the proper role of the trial court in a ***Frye*** inquiry.
>
> *Walsh v. BASF Corp.*, 2018 PA Super 174

The Court further observed that in forming their opinions, the plaintiff's experts utilized the differential diagnosis (also referred to as the "differential etiology method")[2] as their methodology and relied upon the 9 Bradford Hill factors.[3]

Hence, the Court found that the trial court erred, vacated the orders excluding the expert testimony and granting summary judgment and remanded the case.

Work Product

In *McIlmail v. Archdiocese of Phila.*, 2018 PA Super 157, the Superior Court in an opinion by Judge Panella addressed whether or not "notes and memoranda of witness interviews by a private investigator, acting at the express direction of defense counsel, are protected by the work-product doctrine" *McIlmail v. Archdiocese of Phila.,* 2018 PA Super 157. The Court held that the notes and memoranda were discoverable.

The *Mclimail* decision arises out of a sexual abuse case. The issue arose out of subpoenas issued to a private investigation firm retained by defense counsel. In addressing the issue, the Court turned to Pa. R.C.P. No, 4003.3 which provides:

Rule 4003.3. Scope of Discovery. Trial Preparation Material Generally

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.
>
> Pa. R.C.P. No. 4003.3

[1] *Rule 702 provides:*

Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;

(b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and

(c) the expert's methodology is generally accepted in the relevant field.

Pa.R.E. 702

[2] *The differential etiology method involved "ruling in all identifiable causes of (and risk factors for) acute myelogenous leukemia and then ruling out those for which there is inadequate evidence. "*

Walsh v. BASF Corp., 2018 PA Super 174 n.5

[3] *The Bradford Hill factors include the consistency, strength, specificity, and temporal relationship of the observed association; the biological plausibility of the exposure-response relationship, as well as the biological plausibility as viewed from data; coherence; experimental evidence; and analogy.*

Walsh v. BASF Corp., 2018 PA Super 174 n.3

(Continued on Page 11 in the block)

2018 WPTLA EVENT KICK-OFF WRAP UP

The kick-off to the 2018-19 WPTLA Year was such a lovely event! It had a little bit of everything – delicious drinks and food, a tour of a true hidden gem in Pittsburgh's Troy Hill neighborhood, our first Board of Governors' meeting and a very well-attended CLE with some of our esteemed Past Presidents.

The two-day, kick-off event started at Wigle Whiskey's Ciderhouse, Threadbare. Located in Pittsburgh's historic Troy Hill neighborhood, it is such a little hidden gem. It's a state of the art facility owned and operated by the Wigle Whiskey company, which is owned by a former WPTLA member, Mark Meyer, and his family. We started with dinner and drinks. Mark then spoke to us in great detail about Western Pennsylvania's role in the Whiskey Rebellion, while we tasted a variety of their whiskeys. Mark then took us down into the Cider Cellar where the magic happens and the cider is made. Threadbare, Wigle's sister company, has many delicious ciders, which we all tasted and shared during Mark's tour. So fascinating and delicious!

The following morning, the Board of Governors held the first meeting of the 2018-19 WPTLA year. There are many new faces on our Board this year, which is always good to see! President Bryan Neiderhiser brings such an enthusiasm to the group and we look forward to his leadership.

After the meeting, we moved into a CLE, "Jury Verdicts – Win or Lose – Lessons Learned" with the esteemed Past Presidents: John Gismondi, Veronica Richards and Tim Riley. With John Gismondi moderating and participating, the panel provided great war stories, trial tactics and tips. It's so great to hear from them and share in their successes and experiences throughout the years. Those in attendance asked a lot of questions; there was a lot of participation from the audience, which always makes for a more robust experience for all.

Our 2018-19 WPTLA Year is off to a good start! Hope to see everyone soon!

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BY THE RULES ... *(Continued from Page 10)*

The Court noted:

> The information requested does not even relate to the interviewer's "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics" as referenced in Rule 4003.3, let alone the mental processes of the attorneys involved.

McIlmail v. Archdiocese of Phila., 2018 PA Super 157

By: Mark Milsop, Esq., of Berger and Green

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Monday, Oct 29, 2018 is our annual Beaver Dinner & CLE. We'll return to the famed Wooden Angel Restaurant for dinner, followed by a 1-hour CLE presentation featuring:

The Honorable Dale Fouse of the Court of Common Pleas of Beaver County,

The Honorable Dominick Motto, of the Court of Common Pleas of Lawrence County,

The Honorable Thomas M. Piccione, of the Court of Common Pleas of Lawrence County, and

The Honorable James Ross of the Court of Common Pleas of Beaver County.

Cocktails begin at 5:30 p.m. We'll move into the dining room at 6:15 for dinner, followed by the CLE program.

We'll also have 2 Pens tickets to raffle, with the proceeds going to the Pittsburgh Steelwheelers. Bring extra cash!

Register now at www.wptla.org/event/

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Commonwealth Court Reiterates Responsibilities of the Workers' Compensation Appeal Board in Disfigurement Cases

A Three-Judge Panel has determined the Worker's Compensation Appeal Board inadequately explained its decision that changed a Workers' Compensation Judge's decision in a disfigurement case in *Keister Miller Investments, LLC v. WCAB* (*Hoch)* No. 1303 C.D. 2017. In this decision, the Commonwealth Court reiterated prior precedent faulting the Board's approach *in* decision-making on review of disfigurement awards from Workers' Compensation Judges.

Claimant Hoch suffered an injury on December 12, 2015 involving a broken nose and a laceration. He also had a piece of glass puncture the right side of his nose. The Workers' Compensation Judge noted a linear scar on the right side on the Claimant's face. The scar ran from the eye toward the cheek and was approximately 1-1/4" long and 1/8" to 1/16" wide. The upper part of the scar was darker red and lower part was more white than the surrounding skin. The upper section of the scar was visible from a distance of 3 feet according to the Workers' Compensation Judge's decision. Further, the Judge found a visible indentation to the Claimant's nose approximately 1/4" to 3/8" inch in diameter. A right curvature of the Claimant's nose was also noted.

The Judge concluded that the Claimant experienced disfigurement as defined under the Act. An award was entered of 40 weeks of disfigurement at the rate of $951 per week.

The Claimant appealed to the Worker's Compensation Appeal Board alleging that the award was outside the range most Workers' Compensation Judges would find. The Board viewed the Claimant's face in person and increased the disfigurement award to 70 weeks of compensation. From that, the Employer appealed alleging the Board "abused its discretion in modifying the Judge's disfigurement award since the Board failed to provide any evidence that proved that the Judge's award was significantly outside the range normally awarded for disfigurements."

Initially, the Commonwealth Court cited to the Supreme Court decision in *Hastings industries v. WCAB (Hyatt)* 611 A.2d 1187 (Pa. 1992) wherein it was determined that the amount of the disfigurement award is "a mixed question of fact and law" subject to appellate review by the Workers' Compensation Appeal Board.

The Court noted in the instant case that the Board essentially adopted the description of injury noted by the Workers' Compensation Judge. It increased the award by finding the Judge's award outside of the range most Workers' Compensation Judges would award for a similar disfigurement. However, the Board did not provide any particular information regarding how it reached that conclusion.

The Commonwealth Court vacated and remanded the decision to the Board. It noted that the record in the appeal was "devoid of any evidence regarding precisely what information the Board relied upon in concluding that the WCJ's award was significantly outside the range normally awarded for "disfigurement" similar to Claimant's scar. The Court went on with a recitation of similar cases over the year where it had essentially reprimanded the Appeal Board for failing to explain adequately its conclusions that particular scar claims fell outside the normal range of the Workers' Compensation Judges. These cases include *City of Pittsburgh v. WCAB* (*McFarren*), 950 A.2d 358 (Pa. Cmwlth. 2008*), Dart Container Corporation v. WCAB* (*Lien*), 959 A.2d 985 (Pa. Cmwlth. 2008), *Dart Container I* and *City of Philadelphia v. Workers' Compensation Appeal Board* (*Doherty*), 716 A.2d 704 (Pa. Cmwlth. 1998).

Query: Will be Workers' Compensation Appeal Board become more reticent in changing disfigurement awards?

The Court in its decision seeks "substantial and competent evidence" that an award is outside of the norm.

Query: What would that require the Appeal Board to produce?

Query: Will the Board be required to maintain a repository for disfigurement decisions to be viewed in conjunction with appeals?

Query: In light of the uncertain landscape based on serial Commonwealth Court decision, are Claimants better served by reaching a settlement on the value of a disfigurement claim?

Legislative Update

As of the dictation of this column, there has been no final legislative action regarding overturning the *Protz* decision. There are a limited number of legislative days on the calendar remaining in 2018 which could prevent any Bill from being adopted this year. Your organization's lobbyists have done yeoman's work regarding this issue. Similarly, it has sought a *(Continued on Page 14)*

permanent funding solution to the problems of the Uninsured Employers Guaranty Fund. That also appears unlikely to pass in 2018. If you are not a member of the LawPac, please consider joining.

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

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Attn: Junior Members

If you have a scholarly article germane to our members, submit it to Editor Erin Rudert at er@ainsmanlevine.com for publication in a future issue of The Advocate.

Comeback Award Dinner

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 31, 2018-2019

	ARTICLE DEADLINE	TARGET PUBLICATION DATE
Vol 31, No. 2	Nov 30, 2018	Dec 14, 2018
Vol 31, No. 3	Mar 8, 2019	Mar 22, 2019
Vol 31, No. 4	May 31, 2019	June 14, 2019

TRIVIA CONTEST

TRIVIA CONTEST

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Trivia Question #16

The Keops Pyramid (or Great Pyramid of Giza) is the only remaining structure of the Seven Wonders of the Ancient World. Of the six destroyed structures, which was destroyed the most recently and how was it destroyed?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by December 14, 2018. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of December 17, 2018. The correct answer to Trivia Question #16 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 #15 – **This creature's namesake comic strip may have ended publication in 1975, but he lives on as the official 'possum of the state of Georgia. Pogo the Possum**

Congratulations to Question #15 winner Nat Smith, of Goldstein Heslop Steele Clapper Oswalt & Smith, of Blair County.

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Balentine v. Chester Water Authority, - A.3d ---- (Pa. 2018); 2018 WL 3980097

Pennsylvania Supreme Court established a new, more encompassing definition of "operation" of a motor vehicle for purposes of the vehicle liability exception to governmental immunity, which no longer requires voluntary motion as a prerequisite.

Edwin Medina-Flores ("Medina-Flores") was an employee of an independent contractor hired by Chester Water Authority ("CWA") to rehabilitate a water distribution system. On August 15, 2012, Medina-Flores was working just off to the side of a two-lane road inside a ditch. During this time, an inspector for CWA drove up to the work site and parked his vehicle approximately 10-15 feet from the ditch. There was competing testimony on exactly how far into the roadway the CWA vehicle was parked, which ranged from "10 to 12 inches" to "completely in the road". Approximately 5 minutes later, a vehicle operated by another motorist struck the parked CWA vehicle, causing it to move forward and strike Medina-Flores as he stood in the ditch. Medina-Flores sustained fatal injuries as a result of the incident.

The decedent's estate ("Balentine") filed a lawsuit against various Defendants, including CWA and the inspector who operated the parked vehicle. CWA and the inspector were granted summary judgment by the trial court, which found that the motor vehicle exception to governmental immunity set forth in the Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa. C.S.A. §8542(b)(1), did not apply. On appeal to the Commonwealth Court of Pennsylvania, a divided panel affirmed the decision. Relying on the fact that the CWA vehicle was parked at the time of the incident, the majority concluded that it was constrained to find that the vehicle was no longer in "operation" when the accident occurred and therefore the motor vehicle exception did not apply.

The Pennsylvania Supreme Court granted discretionary review to consider the issue of whether the involuntary movement of a vehicle constitutes "operation" of a motor vehicle for purposes of the vehicle liability exception to government immunity. After reviewing the PSTCA, the Court confirmed that the word "operation" was not defined by the Act. The Court also emphasized that the vehicle liability exception to governmental immunity only referred to "operation," and not to "motion". In fact, it was the Court's previous decision in *Love v. City of Philadelphia*, 543 A.2d 531, 533 (Pa. 1988) rather than the PSTCA, which first defined "to operate something" as "to actually put it into motion" for purposes of the vehicle liability exception. The Court concluded that for 30 years the definition of "to operate something" as set forth in *Love* had impeded the development of consistent and logical case law on this issue.

The *Balentine* Court chose to adopt a new definition of "operation", which had been previously voiced by Justice Newman in her Dissenting Opinion in the case of *Warrick v. Pro Cor Ambulance, Inc.,* 739 A.2d 127, 128-129 (Pa. 1999) (Newman, J. dissenting). In that opinion, Justice Newman recognized that the operation of a vehicle "reflects a continuum of activity", which entails a "series of decisions and actions, taken together, which transport the individual from one place to another". Justice Newman further observed that the "decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, were all part of the 'operation' of a vehicle". The Court found that Justice Newman's definition, represented a reasonable standard that comported with the intent of the legislature behind the PSTCA and avoided the illogical results that flowed from the prior emphasis on the need for motion in previous cases. (*See e.g.*, *Love* cited *supra*).

Applying this new definition of "operate" to the facts of the case, the Court held that the vehicle liability exception to government immunity applied because the CWA vehicle was in "operation" at the time of the incident and that *Balentine* had established sufficient *prima facie* evidence, specifically the improper parking of the CWA vehicle, to survive summary judgment.

Bielec v. American International Group, et. al. Nos. 336 and 418 EDA (Pa. Superior Court, December 26, 2017), Memorandum Opinion

Superior Court holds that rejection of UIM coverage was invalid where no signature existed on the line directly below the paragraph waiving UIM coverage as required by 75 Pa. C.S. 1731(c) and (c.1).

John Bielec ("Bielec"), a Verizon employee, was seriously injured in a motor vehicle crash while driving a vehicle owned by Verizon during the course of his employment. The negligent driver who caused the crash only carried state-minimum bodily injury limits of $15,000.00. After settling the 3rd party claim for the policy limits, Bielec made an underinsured motorist ("UIM") claim to Verizon's

(Continued on page 17)

The Court concluded that for 30 years the definition of "to operate something" as set forth in *Love* had impeded the development of consistent and logical case law on this issue.

insurer, American International Group. The UIM claim was denied by the insurer on the grounds that Verizon had rejected UIM coverage.

In response to the denial, Bielec commenced a declaratory judgment action in the Court of Common Pleas of Philadelphia County. The trial court granted Bielec's motion for summary judgment on the Dec Action concluding that Verizon's alleged rejection of UIM coverage was defective as a matter of law and therefore Bielec was entitled to UIM benefits. The trial court's decision was appealed to the Superior Court of Pennsylvania.

On appeal, the Superior Court found that although the rejection form at issue did track the language of the Motor Vehicle Financial Responsibility Law ("MVFRL"), it also contained a number of additions and difference not required by the statute. Specifically, the insurer's rejection form inserted a "tick-box" next to the UIM rejection paragraph and "tick-boxes" entitled "Selection of Limits" and "Underinsured Coverage Limits". The form also had additional paragraphs, signatures lines, and date lines.

The Verizon representative who completed the waiver form had marked the "tick-box" beside the paragraph entitled "Rejection of Underinsured Motorist Protection" but she did not sign or date immediately following the rejection paragraph, which is required by 75 Pa. C.S. §1731(c). Instead, the Verizon representative signed page 2 of the coverage form following an untitled paragraph, stating in relevant part that "I understand the protection afforded by Underinsured Motorist Coverage and the selection(s) I have made on this Notice regarding Underinsured Motorist Coverage".

The Superior Court observed that while the waiver of UIM coverage is effectuated by specific compliance with the mandates of §1731(c.1), Pennsylvania courts interpreting this statute have concluded that *de minimis* or hyper technical defects in a UIM coverage waiver will not serve to defeat an otherwise valid rejection of UIM benefits. *See e.g. Ford v. AM. States Ins. Co.,* 154 A.3d 237, 245 (Pa. 2017). However, the Superior Court was not convinced that the Verizon representative's placement of an "X" in the "tick-box" next to the UIM coverage waiver paragraph, together with the signature on page 2 of the form were sufficient to effectuate Verizon's waiver of UIM coverage.

The Court observed that the express terms of §1731 (c) and (c.1) emphasized the importance of the proximal relationship between the waiver language and the insured's signature and also explicitly required that the insured sign on the line directly below the waiver paragraph in order to effectuate a valid rejection of UIM. Relying upon the Court's previous decision in *Jones v. Unitrin Auto & Home Ins. Co.,* 40 A.3d 125 (Pa. Super. 2012), the *Beilec* Court held that because §1731(c) required a signature on the signature line directly below the required waiver language, the proximity of the signature line to the text of the waiver itself were significant. Accordingly, the Court held that the location of the execution line could not be *de minimis* and the requirement of a signature on that line was not hyper technical.

Accordingly, the Superior Court affirmed the trial court's decision holding that by failing to sign on the line below the UIM waiver option paragraph, Verizon failed to select the waiver of UIM coverage and Bielec was entitled to those benefits.

Elizaire v. Travelers Cos., 2017 WL 6406457 (Tucker, J. E.D. Pa. Dec. 14, 2017) Memorandum.

District Court finds a waiver of UIM coverage form valid, which was signed and dated by the insured but where the insurance company added two explanatory paragraphs about UIM coverage before setting forth the verbatim waiver language required by 75 Pa. C.S. §1731 (c.1).

Naomie Elizaire was injured in a car accident caused by a negligent driver who carried only state-minimum bodily injury limits of $15,000.00. After settling the 3rd Party claim for the policy limits, Mrs. Elizaire, made a UIM claim in the amount of $300,000.00 to her and her husband, Francknel Elizaire's (hereinafter "Elizaires") insurance company, Travelers. The Elizaires' UIM claim was denied by Travelers because the Elizaires had rejected UIM coverage on their auto policy.

The Elizaires' filed suit in the Court of Common Pleas of Philadelphia County and Travelers removed the case to the United States District Court for the Eastern District of Pennsylvania. Once in Federal Court, Travelers filed a motion to dismiss the Complaint based on the executed waiver of UIM coverage. Although they admitted that Mr. Elizaire had signed a UIM rejection form, the Elizaires argued that the rejection was not valid because the form itself did not specifically comply with the mandates of §1731 of the MVFRL. Specifically, the Elizaries maintained that the rejection form added 2 additional paragraphs before the statutorily mandated waiver language.

The District Court reviewed previous caselaw on the issue, paying special attention to the Pennsylvania Supreme Court's decision in *Ford v. Am. States Insurance. Co.,* 154 A.3d

(Continued on page 18)

327 (Pa. 2017). In that decision, the Supreme Court held that when a UIM rejection form differs from the statutory form in an inconsequential manner, the form must be construed to specifically comply with Section 1731, so long as that form does not modify coverage or inject ambiguity into the statutory form and an insured's signature on the slightly altered form demonstrates that the insurer offered UIM coverage to the insured and that the insured understood what he/she was doing when declining coverage.

The District Court found that the additional language in the Travelers Rejection Form was an inconsequential deviation that: (1) did not create ambiguity, (2) did not modify the scope of coverage under the Policy, and (3) did not contravene either the Elizaires' or Travelers' understanding of what coverage was provided under the Policy nor did it contravene the Elizaires' understanding of the consequences of signing the waiver. The court found that the language in first additional paragraph merely explained what UIM protection was and tracked the language of §1731 but was not verbatim. The language in the second additional paragraph did not invalidate a rejection of coverage form because, rather than injecting ambiguity into the form, the language "serve[d] to clarify and emphasize the gravity of the decision to reject UIM coverage."

Accordingly, the District Court concluded that the Travelers' Rejection Form was a valid and effective waiver of the Elizaires' UIM coverage under the Policy and granted the Motion to Dismiss the Complaint. Despite this conclusion, the District Court noted that it is "undoubtedly a better practice for insurance companies not to supplement the required language of §1731.

Fertig v. Kelley, No. 16-CV-4801 (C.P. Lackawanna, Dec. 29, 2017) Memorandum Opinion

Trial Court denies motion to sever liability, UIM and bad faith claims arising from same motor vehicle crash but does bifurcate the trial of bad faith claims from the liability and UIM claims.

Destiny Fertig ("Fertig") sustained injuries in a motor vehicle crash and filed a lawsuit against the 3rd party tortfeasor and her own auto insurer, Horace Mann, for UIM coverage. Fertig also made a claim against her insurer for bad faith due to its handling of the UIM claim.

During the course of litigation, the insurer filed a motion with the trial court to sever the UIM and bad faith claims and to stay all bad faith discovery until the disposition of the UIM claim had concluded. The trial court issued a thorough Opinion outlining the plethora of Pennsylvania state and federal courts decisions on the issue of bifurcating and staying a bad faith claim in a Post-Koken lawsuit that also contained third party negligence and UIM breach of contract claims.

The trial court held that it would not sever any of the claims for pre-trial purposes, finding that a stay of discovery would cause needless delay, additional expense, and inconvenience. However, the trial court also held that it would bifurcate the trial of the bad faith claims from the liability and UIM claims, adopting the procedure originally set forth by Judge R. Stanton Wettick (ret.), of the Allegheny Court of Common Pleas.

Under that procedure, the trial of the 3rd party negligence claim and the UIM claim would proceed first before a jury. The jury trial would then be immediately followed by a bench trial on the bad faith claims. Furthermore, once the jury retired to the deliberation room on the third party and UIM claims, the UIM defendant would be required to turn over additional unredacted discoverable materials from the carrier's file that may have been properly withheld during the pendency of the UIM claim (e.g., work product, mental impressions and evaluation of the UIM claim by the insurer). Plaintiff's counsel would then have the option of proceeding directly to the bench trial on the bad faith claims or requesting a continuance to prepare for the bad faith trial based on the new information.

By: Shawn David Kressley, Esq., of Delvecchio & Miller, LLC

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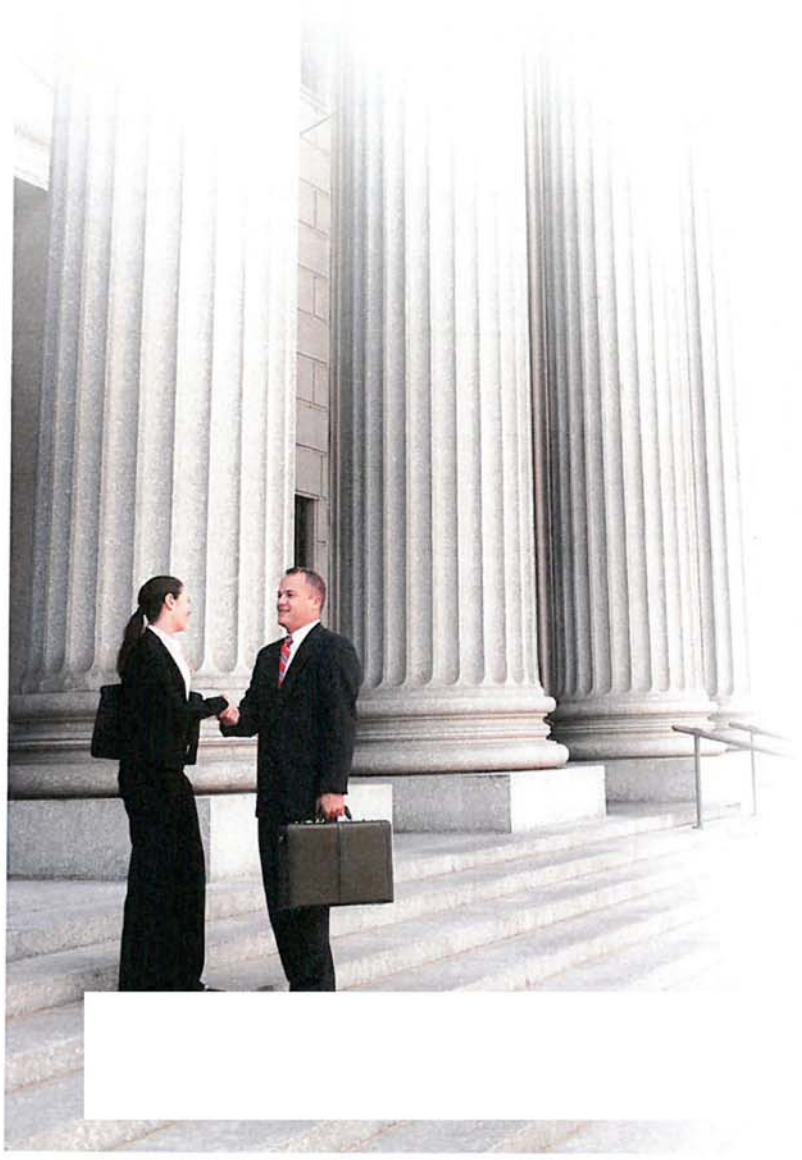

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Every year our organization sponsors several outreach programs designed to highlight the impact of the Rule of Law on our daily lives. One of our finest outreach programs is the annual Essay Contest. Each school district in our area is invited to submit an essay addressing a specific legal problem. Our Essay Committee endeavors to present an issue which is both current and illustrative of the tense interplay between our rights and our social responsibilities.

This year's problem arose from an actual case which is still pending in the 9th Circuit.

FACTUAL BACKGROUND

Kennedy v. Bremerton School District , 880 F.3d 1097 (9th Cir. 2018)

Plaintiff was employed as a football coach by the Defendant School District. Plaintiff is a practicing Christian. The school district is religiously diverse to include families practicing Judaism, Islam, Buddhism, Hinduism and Zoroastrianism.

Kennedy's religious beliefs require him to give thanks through prayer at the end of every game. Since he is giving thanks for the efforts made by his football team, his beliefs require him to give thanks on the football field where the competition took place. Thus, after the game had concluded and the coaches and players had met at midfield and shaken hands, Plaintiff felt compelled to "take a knee" at the 50 yard line and offer a brief prayer of thanksgiving. This was done in full view of his players as well as players, coaches and fans of the opposing team. Eventually, these "silent prayers" developed into "short motivational speeches" given to the players. These messages contained religious content. During this time, the Plaintiff was wearing clothing bearing the school colors and logo.

After learning of this, the School District warned against continuing this. The District offered Kennedy a series of accommodations which included allowing the Plaintiff to offer a short prayer at the 50 yard line after the stadium had emptied. After initially agreeing, Kennedy insisted on praying at midfield immediately following the game.

Warnings were followed by repeated violations. Kennedy was then placed on administrative leave. He filed suit against the School District seeking injunctive relief.

TOPIC QUESTION: WAS THE SCHOOL DISTRICT JUSTIFIED IN PLACING KENNEDY ON ADMINISTRATIVE LEAVE FOR EXERCISING WHAT HE CLAIMED WERE HIS SINCERE RELIGIOUS BELIEFS?

By: Charles W. Garbett, Esq., of Luxenberg Garbett Kelly & George, P.C.

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While many Americans accept the First Amendment as gospel, there are limits on the constitutional right of the individual to freedom of speech, press, and religion. Freedom of religion, especially in schools or other public spaces, is a highly contested topic. Through legislation and former Supreme Court cases, there is precedent that confirms that the Bremerton School District was justified in placing Coach Kennedy on administrative leave for continuing to pray on the field directly after football games despite repeated warnings from the School District asking him to stop. Kennedy's words and actions violate the Lemon Test and the Establishment Clause of the First Amendment. Kennedy's right to exercise his religion was not unconstitutionally violated due to the limitations on the First Amendment that apply to schools and their faculty.

In the Supreme Court Case *Lemon v. Kurtzman,* the Supreme Court created the Lemon Test to determine whether or not a specific statute violated the Establishment Clause in the First Amendment. The three requirements of the Lemon Test are that the statute must have a secular purpose, it can neither advance nor prohibit religion, and it cannot create excessive government entanglement with religion. Starting as a silent prayer, the purpose behind what developed into "short motivational speeches" given to the football players was religious in nature. Since the purpose for Kennedy's actions was religious, it violates the first condition of the Lemon Test. Kennedy's motivational speeches were of a religious nature and,

since he was in a position of authority over his students, his words could have been viewed as a promotion of Christianity, thus failing the second requirement of the Lemon Test. Kennedy was wearing school colors, a school logo, and acting as an ambassador of the school when he spoke these religious messages. Inadvertently, Kennedy entangled the school with his religious beliefs in a very public setting, violating the third condition of the Lemon Test.

Due to Bremerton being a public school district, there are strict limits on what the school faculty are allowed to do with regards to religion. Kennedy, acting as a representative of that school district, must adhere to these strict regulations. Some may argue that the players were voluntarily listening to the religious messages of Coach Kennedy and that he should not be placed on administrative leave due to the fact that his players were not being forced to listen to him.However, in *Engel v. Vitale,* the Supreme Court ruled that schools ate not allowed to have voluntary, nondenominational prayer because that is indicative of the school approving of religion. *Engel v. Vitale* was the first of several Supreme Court decisions in which the Establishment Clause was used to exclude all types of religious activities that had previously been a part of public ceremonies.

The First Amendment rights of teachers in schools are even more restricted than the rights of students in schools. The Pickering Test, devised from the Supreme Court Case *Pickering v. Board of Education,* "recognizes that the government may impose restraints on the First Amendment activities of its employees that arejob-related even when such restraints would be unconstitutional if applied to the public at large." The warnings that the school gave to Kennedy and his placement on administrative leave for failing to comply are constitutional as found under the Pickering Test. The Free Exercise Clause of the First Amendment does not apply to teachers, and therefore to coaches, when they are acting as ambassadors of the school district because it is seen as an implication of school sponsorship. The reasoning behind this is that, since teachers and coaches are in positions of authority, it may lead students to assume that the viewpoint of Coach Kennedy is representative of the school at large. Any implication of school sponsorship would violate the Establishment Clause of the First Amendment, which states that Congress shall make no law respecting an establishment of religion, because it would mean that a government institution is associating with a religion.

The Bremerton School District put Kennedy on administrative. leave only after he had disregarded the warnings of the school telling him to stop including religious content in his motivational speeches and to stop praying on the field. The accommodations that the school gave to Kennedy allowed him to exercise his religious beliefs without entangling the school with religion. Kennedy praying on the field after the stadium had emptied protected the school from violating the Establishment Clause since Kennedy could not promote his religion if there was no audience to his prayers. The Restoration Act of 1993 protects individuals from government interference in the practice of their faith; the Bremerton School District did not violate this because they provided accommodations that still allowed him to give thanks through prayer at the end of each football game.

Initially agreeing to these accommodations, Kennedy subsequently insisted on reverting to his original practice of praying midfield directly after each game. Itwas a deliberate choice on Kennedy's part to refuse to heed the warnings of the school district and adhere to the given accommodations. The Bremerton School District's decision to place Kennedy on administrative

leave is justified as a result of Kennedy refusing to follow their instructions and therefore placing the school district at risk of a lawsuit from a student or parent claiming that Kennedy was using his authority as a coach to promote Christianity. Kennedy's actions clearly violated the Lemon Test and the Establishment Clause, while the actions of the Bremerton School District adhered to the Pickering Test, the limits of the Free Exercise Clause, and previous Supreme Court decisions.

Essay written by Molly Forrest, of Quaker Valley High School,

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Through the Grapevine....

Warmest congratulations to new mom, **Board of Governors Member Laura Phillips**, on the birth of her son, William Neil Mills, born September 25, and to new dad, **Daniel Sammel,** on the birth of his daughter, Ava Marie, born July 11.

Cheers to **Holly Deihl**, **Cori Kapusta**, and **Ben Schweers** on the creation of their new firm, Kapusta Deihl & Schweers, LLC. They are located at 445 Fort Pitt Blvd, Ste 500, Pittsburgh 15219. P: 412-904-5080 deihl@kds.legal kapusta@kdslegal.com schweers@kds.legal

Congratulation to **President's Club Member Troy Frederick** on the formation of his new firm, Frederick Law Group, PLLC. Located at 836 Philadelphia St, Indiana 15701, he shares the practice with his wife, Beth. P: 724-801-8555 F: 724-801-8358 tmf@fredericklg.com

President's Club Member Tom Talarico has moved his office, Talarico & Associates, to 230 West 6th St, Ste 202, Erie 16507.

Bill Bresnahan's firm, Breshanan Nixon & Finnegan, has moved their office to 310 Seven Fields Blvd, Ste 325, Seven Fields 16046 P: 412-355-7070 F: 412-281-6099

SPK-The Law Firm of Swensen & Perer has moved their offices. You can now find **C.J. Engel**, **President's Club Member Alan Perer**, and **Board of Governors Member Jennifer Webster** at 310 Grant Street, Suite 1400, Pittsburgh 15219.

Congratulations to **Eric Abes**, of Abes Baumann, on being appointed to a three-year term with the Neighborhood Legal Services Association Board.

Bob Isacke has moved his office to 1660 Murray Ave, #41, Pittsburgh 15217.

Kudos to **President's Club Member and Past President Mark Homyak**, who is plaintiff's counsel in *Cagey v. Commonwealth*, a landmark Supreme Court decision, determining injured parties' right to recover for injuries caused by dangerous conditions on Commonwealth land.

Marcus & Mack has 2 new associates in their Indiana practice, **President's Club Members Rusty Bopp** and **Brad Holuta**. rbopp@marcusandmack.com bholuta@marcusandmack.com

Condolences to **President's Club Member and Past President Rich Schubert**, on the passing of his mother-in-law in July.