THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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SNAP REMOVAL AND THE EROSION OF THE FORUM DEFENDANT RULE

Recently, the United States Court of Appeals for the Third Circuit in *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018), upheld the use of "snap" removal of cases from state court to federal court by defendants. This article discusses some of the implications of this decision and highlights some considerations practitioners should evaluate when confronted with a matter that could be subject to snap removal.

What is "snap" removal?

Snap removal exists in the nexus between 28 U.S.C. § 1441(a), which acts in concert with 28 U.S.C. § 1332 to permit removal of cases from state to federal court so long as the monetary jurisdictional condition for the controversy exceeding $75,000.00 is met and the parties are adequately "diverse" as contemplated by the statute, and the forum defendant rule which is found at 28 U.S.C. § 1441(b)(2). The forum defendant rule states that: "A civil action otherwise removeable solely on the basis of the jurisdiction under section 1332(a) [diversity of citizenship] of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Typically, the forum defendant rule operates to prohibit removal to federal court of any case which would have been removable based upon diversity of citizenship per 28 U.S.C. § 1441(a). Pursuant to the forum defendant rule, if *any* defendant is a citizen of the state in which the plaintiff originally filed the complaint in state court and the defendant has been properly joined and served, then a defendant cannot remove the case to federal court. *See Breitwiser v. Chesapeake Energy Corp.*, 2015 WL 6322625 at *2 (N.D. Tex. Oct. 20, 2015).

The forum-defendant rule "exists in part to prevent favoritism for in-state litigants...and discrimination against out-of-state litigants." *Encompass Ins. Co.*, 902 F.3d at 153. This is sensible considering the purpose of removal: to protect non-forum litigants from possible state court bias in favor of forum-state litigants. Removal serves this purpose by allowing a non-forum defendant to seek the protection of the federal courts against potential bias in the state court in which the plaintiff elected to file suit. The rationale supporting removal doesn't exist when the removal-seeking defendant is a citizen of the forum state.

Nevertheless, defendants, through snap removal, have found a way to circumvent the forum- defendant rule by exploiting the "*properly joined and served*" language in the rule. *(Continued on Page 2)*

The forum-defendant rule "exists in part to prevent favoritism for in-state litigants ... and discrimination against out-of-state litigants."

An example of this exploitation follows: Plaintiff X, who is a resident of Ohio, files a complaint alleging civil claims in the Court of Common Pleas of Allegheny County, Pennsylvania, against Defendant Y, who is a citizen of Allegheny County, Pennsylvania. Since the Allegheny County Department of Court Records maintains an electronic docket, Defendant Y, through a subscription docket monitoring service, learns of the lawsuit before being served with the complaint by the Allegheny County Sheriff's Office. Upon learning of the lawsuit, Defendant Y immediately contacts defense counsel and instructs counsel to remove the case to the United States District Court for the Western District of Pennsylvania. What is the basis for the removal? Since Plaintiff X did not yet *serve* the complaint on Defendant Y before removal, Defendant Y argues that removal is permissible under the plain language of 28 U.S.C. § 1441(b)(2), as it had not been served.

As you can see, "[t]he hallmark of a snap removal is its timing: a snap removal occurs (1) just after the state court case has been filed, and (2) just before the plaintiff has the opportunity to serve any forum defendants." *Breitwiser*, 2015 WL 6322625 at *3.

Until the Third Circuit's decision in *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, no United States Court of Appeals had directly addressed the propriety of snap removals. The federal district courts who did address snap removals split on whether it was a proper way to remove a case to federal court.

Federal district courts permitting snap removal have generally found that the plain language of the removal doctrine set forth in 28 U.S.C. § 1441(a) & (b)(2) permits removal unless the forum defendant was "properly joined and served,"[1] that the language is clear and unambiguous, and that there is no clear indication that application of the plain meaning would result in an outcome demonstrably at odds with the policy behind the removal doctrine. *See Frick v. Novartis Pharm. Corp.*, 2006 WL 454360 at *2-3 (D.N.J. Feb. 23, 2006).[2]

Federal district courts disapproving of snap removals generally find that snap removal undermines the purpose of the forum defendant rule. *See Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1221-24 (N.D. Ill. 2017) (listing cases disapproving of snap removal and finding that "permitting snap removals when a forum defendant is sued runs counter to the reasons underlying the forum defendant rule and is not a result that Congress could have envisioned, let alone countenanced, when it enacted the rule to protect out-of-state defendants from local juries").

The Third Circuit's Decision in *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*

In *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, Encompass Ins. Co. ("Encompass"), an Illinois citizen, filed a complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking contribution from Stone Mansion Restaurant Inc. ("Stone Mansion"), a Pennsylvania citizen. Stone Mansion's counsel agreed to accept electronic service of process stating, "[i]n the event your client chooses to file suit in this matter, I will be authorized to accept service of process" and "if and when you do file, provide your Complaint to me along with an Acceptance form." [3] *Encompass Ins. Co.*, 902 F.3d at 150. After receiving the filed complaint and service of acceptance form, rather than complete and return the service of acceptance form, Stone Mansion's counsel emailed Encompass' counsel stating, among other things, that Stone Mansion would file a notice of removal. *Id.* Stone Mansion then removed the lawsuit to the United States District Court for the Western District of Pennsylvania. *Id.*

The District Court denied Encompass' motion to remand in which Encompass argued removal was improper pursuant to the forum defendant rule. *Id.*

On appeal to the Third Circuit Court of Appeals, the Third Circuit concluded that: "the language of the forum defendant rule in section 1441(b)(2) is unambiguous. It's plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served." *Id.* at 152. The Third Circuit further found "this result may be peculiar in that it allows Stone Mansion to use pre-service machinations to remove a case that it otherwise could not; however, the outcome is not so outlandish as to constitute an absurd or bizarre result." *Id.* at 153-54.

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[1] While the removal doctrine has been part of federal procedural law since the Judiciary Act of 1789, it is noteworthy that the "properly joined and served" limitation found in 28 U.S.C. § 1441(b)(2) was added in 1948. Some courts have suggested that this limitation was added to prevent a plaintiff from defeating removal through improper joinder of a forum defendant without ever intending to properly effectuate service. See e.g. Gentile v. BioGen IDEC, Inc., 934 F. Supp. 2d 313, 319 (D. Mass. 2013); Sullivan v. Novartis Pharms. Corp., 575 F. Supp. 2d 640, 645 (D.N.J. 2008) ("The purpose of the 'properly joined and served' language is to prevent the abuse of the forum defendant rule by improper joinder").

In dicta, the Third Circuit briefly addressed the situation where a forum-defendant induces delayed service and whether the same could result in preclusion stating, "We are mindful, as Encompass points out in its briefs, that the Pennsylvania Rules of Professional Conduct prohibit lawyers from 'engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation,' Pa. Rules of Prof. Conduct 8.4; however, we need not pass judgment on whether Stone Mansion violated this rule, because Encompass has failed to provide any support for the proposition that Stone Mansion's conduct carried preclusive effect... we are unconvinced that Stone Mansion's conduct — even if unsavory — precludes it from arguing that incomplete service permits removal."

(Continued on Page 3)

As such, snap removals are now permitted in all district courts within the Third Circuit.

Moving Forward

With some counties, such as Allegheny County, having electronic dockets and **many defendants and their counsel using docket monitoring subscription services**, some defendants and their insurers will receive notice of the lawsuit long before the sheriff can serve a complaint or writ of summons on a forum defendant. By way of an example, recently, one of the authors of this article filed a complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging claims against a large company. Before the sheriff served the complaint on the company, the author received a call from the company's insurer asking for background on the lawsuit.

If you intend to file a lawsuit in state court where the forum defendant rule is implicated, you need to be mindful that the defendant may receive notice of the state court lawsuit and remove the case before service of the original process. Some important considerations before filing the complaint are set forth in the following sections.

I. Do you have diversity of citizenship? Removal is not a concern in this context unless you have complete diversity of citizenship between the plaintiffs and defendants. Moreover, snap removal is not implicated unless you have a forum-defendant. In the event you are representing a plaintiff who is a citizen of a non-forum state and you have a defendant who is a citizen of the forum state, you need to consider whether, or to what extent, removal to the federal district court could affect the litigation.

II. Does the state court in which the pleading is being filed have an electronic docket or some other method by which a forum-defendant could learn of the filing of an initiating pleading prior to effectuating proper service? While there are methods other than the electronic docket by which a defendant could learn of a filed complaint, the electronic docket is undoubtedly the most prolific and precarious. Consider whether the forum-defendant is the type of defendant that might monitor an electronic docket. This knowledge could be useful in determining whether that defendant is crucial to your cause of action. By way of example, if you are pursuing a medical malpractice action and the potential defendants are a large and powerful hospital system and an independent physician, you may want to consider whether the hospital is a defendant worth including. Also, while we always want to be cordial to opposing counsel, providing a courtesy copy of a filed complaint to said counsel prior to effectuating service on the defendant could be a critical misstep.

III. Is service proper? Proper service is crucial if you want to avoid removal! Snap removal typically occurs when a forum-defendant files to remove a cause of action *prior to* service. However, it could also happen if you do not effectuate proper service. If the service of process is improper for any reason, a forum-defendant could still remove the matter to a federal district court. Keep in mind that service of a complaint in Pennsylvania prior to the same being filed does *not* count as proper service!

IV. How long will it take to effectuate service of original process and how can I close the gap? If you are confronted with the specter of removal by a forum-defendant, reducing the gap in time between filing and service is crucial. In some counties, for example Philadelphia County, it is permissible to effectuate service with a private process server. In other counties, for example Allegheny County, the local rules require use of the Sheriff for in-state defendants. This is a significant difference since you can control when and how a private process server does his job; not so for the Sheriff. By way of example, if you were to learn that a forum-defendant monitors the electronic docket in the venue where you intend to file, in Allegheny County, it may not be possible for you to avoid removal to the federal district court. However, in Philadelphia County, you could, theoretically, have a process server waiting directly outside of the location where your initiating pleadings are to be served and, immediately after you file your complaint, you could contact the process server and have them serve said documents.

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PRESIDENT'S MESSAGE

My first "Message from the President" discussed our four goals for WPTLA to focus on in the coming year and how we could take meaningful steps towards accomplishing them. I would like to use this message as a State of the Union of sorts in regard to where we are in relation to achieving those goals.

WPTLA's four goals during my term as President are: 1) to encourage growth in our membership; 2) to invigorate our existing membership; 3) to foster pride in our organization and our membership; and, 4) to make these goals the core goals of our Officers.

I am excited to announce that our membership is strong. This year marks the first time in the past ten years that our membership numbers have grown! In the past, we have been "comforted" by the knowledge that our membership was declining less precipitously than that of many other associations. However, this growth didn't happen overnight. Instead, it was the result of the work of the Membership Committee whose members were willing to pick up the telephone and call past members who had not yet renewed. It is also the result of our Executive Committee who came together and brainstormed for a number of different methods of reaching attorneys, such as solo practitioners, who could really benefit from being members of WPTLA. It is also the result of the efforts of our Past President, Elizabeth Chiappetta, and our Executive Director, Laurie Lacher, who undertook the enormous task of conducting a comprehensive survey directed to both current and former members to learn what people like and dislike about our organization. By using the results of that survey, we have been able to tailor our events to suit those responses.

Based upon our excellent turnout for our events, as well as feedback from members, I am excited to report that the existing membership is invigorated. All of our events have been extremely well attended this year. For instance, based upon feedback from the survey, we decided to try a new venue, Wigle Whiskey, for our Kick Off event. We followed that with a trip to Revel n' Roost – a first for WPTLA - for this year's Legislative Meet n' Greet. Both of these events exceeded my expectations in terms of turnout from our members. Next, we returned to the Wooden Angel, a longstanding venue for our annual Beaver county meeting. Over 50 people turned out for that event and gained insight from Judges from Beaver and Lawrence Counties who were kind enough to present an interactive CLE on local practices in those counties. Additionally, our members and business partners have offered to teach the many CLE programs that WPTLA offers. So far, we have already hosted or co-hosted four separate CLE programs by the Judges that I just mentioned, by several of our Past Presidents, by our President-Elect and by our Business Partners. All of these CLE's have been extremely informative and well attended.

In my last Message I stated that "WPTLA is not that gym membership that you pay for and never use!" Apparently, those words rang true to some of our members because this year's President's Challenge 5K Run/Walk/Wheel Event which was held on Saturday, October 20, 2018 at the Boat House in North Park was also an enormous success. Although the weather was overcast and cold, we had a tremendous turnout and raised $31,400 for the Pittsburgh Steelwheelers. This too is an increase over the amount raised over each of the past several years. Of course, this would not be possible without the efforts of 5K Chair Sean Carmody, Laurie Lacher, Lorraine Eyler and the entire 5K Committee.

I believe that my third goal – fostering pride in our organization – is also being attained this year. This is evident in the number of people attending our events and in the success

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PRESIDENT'S MESSAGE ... FROM PAGE 4

of the President's Challenge 5K. It is also evident in the number of new volunteers that we have had for our outreach programs such as the Wills Project which provides legal assistance to low income families in preparing essential personal documents such as wills, advance directives and durable powers of attorney. This year, our members have already prepared these essential documents for 13 people. Each and every member that I have talked to about their participation in the Wills Clinic has told me that they were proud that they were able to use their legal talents to help someone prepare these important documents. We will also be participating in a Habitat for Humanity project in January and our members are already generously volunteering their time for this project.

Also, on November, 28, 2018 we held our annual Comeback Award Dinner at the 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, re-center my focus, and remind me why I do what I do for a living. This year was no different as this year's honoree, Karen Scuilli, shared her experiences in overcoming depression, the loss of a career, tremendous physical pain and permanent disfigurement as a result of medical negligence by starting her own non-profit business that strives to inspire and help others who are going through similar experiences. After attending the Comeback Award, I can't help but be proud of this organization and all of its members because we are truly changing lives.

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. My fourth goal as President is to make these goals the core goals of our Officers. As I said in my last Message, 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 and our members' goals. Involving EVERYONE in the goals of the organization provides more cohesion and makes achieving our goals much easier to accomplish. The excellent turnout that we have had for our events, the number of newer faces that I am seeing at many of our events and the number of our members that are volunteering to serve on committees or serve in our outreach program gives me great confidence in the future of the WPTLA.

PRESIDENT'S MESSAGE

I can already see that the labors of those who came before me are bearing fruit. So, to those who came before me, to those who are volunteering to serve on Committees, to those who are supporting our business partners and to those who are striving to attend more of our events or become involved in our outreach programs – Thank You! Because of you our organization is strong and because we are strong, we are able to help others.

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

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UPCOMING EVENTS

BUSINESS PARTNER SPEED NETWORKING EVENT

Tues, Jan 22, 2019

The Duquesne Club, Pittsburgh

LUNCH 'N LEARN CLE

Tues, Feb 5, 2019

Gulf Tower, Pittsburgh

JUNIOR MEMBER MEET & GREET

Tues, Feb 19, 2019

Distrikt Hotel, Pittsburgh

WESTMORELAND COUNTY DINNER & CLE

Wed, Mar 20, 2019

Rizzo's Malabar Inn, Crabtree

MEMBERSHIP DINNER

Apr, 2019

Willow, Pittsburgh

ANNUAL JUDICIARY DINNER

Fri, May 3, 2019

Heinz Field, Pittsburgh

26TH ETHICS & GOLF OUTING

Fri, May 24, 2019

Shannopin Country Club, Pittsburgh

BEAVER DINNER & CLE RECAP

The WPTLA October dinner and CLE was again held in Beaver with 54 present to enjoy the Wooden Angel's offerings. There were 7 judges in attendance including:

- Judge Dale M. Fouse, Court of Common Pleas of Beaver County
- Judge Deborah A. Kunselman, Superior Court of Pennsylvania
- Judge C. Gus Kwidis, Court of Common Pleas of Beaver County
- Judge Richard Mancini, Court of Common Pleas of Beaver County
- Judge Dominick Motto, Court of Common Pleas of Lawrence County
- Judge Thomas M. Piccione, Court of Common Pleas of Lawrence County
- Judge James J. Ross, Court of Common Pleas of Beaver County

We were also joined by Business Partners Johnathan Garlow and George Hargenrader, of Ford Business Machines, Andy Getz, of Thrivest, Dave Kassekert, of Keystone Engineering Consultants, and Rodney Troupe, of Finley Consulting & Investigations

"New Developments and Pointers in Civil Practice in Beaver and Lawrence Counties" was presented by Judges Ross, Piccone and Fouse for 1 substantive CLE credit. WPTLA member Chris Miller's generous donation of Penguins tickets and Lexus club passes raised $525.00 in raffle ticket sales, with proceeds benefitting the Pittsburgh Steelwheelers as an addition to contributions raised at our recent 5K Run/Walk/Wheel event.

By: Kelly Tocci, Esq., of McMillen Urick Tocci & Jones

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JUNIOR MEMBER MEET 'n GREET

Tuesday, Feb 19, 2019

Distrikt Hotel, Pittsburgh

5:30-7:30 p.m.

Drinks and Hors D'oeuvres

MEMBER PICTURES & PROFILES

Name: John P. Goodrich

Firm: Goodrich & Associates, P.C.

Law School: Duquesne University

Year Graduated: 1987

Special area of practice/interest, if any: Politics, Personal Injury, Dram Shops

Tell us something about your practice that we might not know: I have the best staff ever – really!

Most memorable court moment: We find in the favor of the Plaintiff…

Most embarrassing (but printable) court moment: Judge impaneled the jury and started testimony even though my client was stuck in traffic on September 12, 2001.

Most memorable WPTLA moment: Annual Golf outing which I started with Rick Schubert

Happiest/Proudest moment as a lawyer: The day my daughter told me she was proud of me for protecting those that needed protected

Best Virtue: My sincerity to those I serve

Secret Vice: Ice Cream

People might be surprised to know that: I like "most" Defense Attorneys

Favorite movie: The Quiet Man

Last book read for pleasure, not as research for a brief or opening/closing: Go Set a Watchman by Harper Lee

My refrigerator always contains: Hot Sauce, Gatorade and Beer

My favorite beverage is: Hot Sauce, Gatorade and Beer

My favorite restaurant is: LeMont

If I wasn't a lawyer, I'd be: Bar Owner/Carpenter

Let Me Confirm Your Dysfunction

As trial lawyers, we are wise to contemplate the words of Sir Francis Bacon,

"Once a human intellect has adopted an opinion (either as something it likes or as something generally accepted), it draws everything else in to confirm and support it. Even if there are more and stronger instances against it than there are in its favor, the intellect either overlooks these or treats them as negligible or does some line-drawing that lets it shift them out of the way and reject them. This involves a great and pernicious prejudgment by means of which the intellect's former conclusions remain inviolate."

Bacon was describing the human cognitive dysfunction of confirmation bias. Confirmation bias is exactly what it sounds like – the propensity for people to look for what confirms their beliefs and ignore what contradicts their beliefs while not being concerned for the truth. It is our tendency to cherry-pick information that confirms our existing beliefs or ideas. This powerful bias explains why two people with opposing views on a topic can see the same evidence and come away feeling validated by it. This cognitive bias is most pronounced in the case of ingrained, ideological, or emotionally charged views.

If you take a moment to look, you will see confirmation bias everywhere. For example, who of us has not taken on a wart-covered case and focused only on its positive features to justify our decision? For those of us who regularly handle medical malpractice lawsuits – confirmation bias almost always explains a patient's misdiagnosis. Doctors frequently fail to utilize a differential diagnosis in lieu of jumping to a conclusion and then searching for the data to support it, while ignoring those clues which point to the correct diagnosis.

We fall victim to confirmation bias in order to avoid the psychic pain of cognitive dissonance. Cognitive dissonance is the state of tension that occurs whenever a person holds two cognitions that are psychologically inconsistent. Imagine those infrequent times in your life when you realized a strongly held belief might be wrong ("Santa Clause is not real?!") – it hurts.

So, what does this have to do with trying a better case? Jurors are just as prone to confirmation bias as any other human being. By understanding this bias, we can use the heuristic to better persuade juries and in turn do a better job of representing our clients.

Can we use confirmation bias to our advantage in the workup of our cases and at trial? Absolutely, and I want to focus on two key related points.

First, we need to realize that we, the lawyers, fall victim to confirmation bias as bad as anyone (and maybe worse). Once we admit this to ourselves (cognitive dissonance may make that hard to do) then we need to fix the problem. I know of no better way to combat our own detrimental confirmation bias then through the use of focus groups. When we take on a case and then dig into discovery it is normal and part of our job to have a theory about why our side should win. Resultantly, we spend a lot of time seeking out, through discovery, facts to support and confirm our beliefs about the case. This can be a real problem, however, if the theory we have been focused on is not consistent with the jury's beliefs. To fix the problem, listen to what a focus group has to say about the facts of your case. What do regular people want to know about your case? What do regular people think is important? Ask them about your theory. You will learn if you are on the right track or whether you have been seeking to confirm a losing theory. By seeking the input of a focus group, you help insure that confirmation bias is not sabotaging your case.

Second, and on a very related note, focus groups will help you identify the theories that give you the best chance of winning. In addition to testing your own theory, push the group to reveal the consensus concepts of what is important in your case. Once you know that, then you can seek out the facts and evidence to hopefully confirm what the jury needs to find in your favor. You craft your discovery and then your trial presentation around the issue(s) that the majority of focus groupers have told you matter most.

If you can focus your trial story and presentation in voir dire and opening statement in line with what the jury already believes, then your jury is more likely, as a result of their own confirmation bias, to spend the rest of trial seeking out the evidence that supports their view (your view) and ignoring what does not (the defense contentions).

And you can take this all to the bank because everything I have read confirms this to be true!

By: Brendan Lupetin, Esq., of Meyes Evans Lupetin & Unatin

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We fall victim to confirmation bias in order to avoid the psychic pain of cognitive dissonance.

2018 COMEBACK AWARDEE

What does it mean to comeback? To return to baseline? For Karen Scuilli it meant more. Much more. Karen didn't just comeback, she roared back! And through her journey, she has gathered many others like her to help them comeback, as well. Karen's story is about facial deformity. Our face is how we see each other, and how we identify each other. Facial disfigurement is a devastating injury and affects thousands of cancer patients, burn patients and trauma patients, daily. Karen has given these folks hope that their disfigurement will not define them.

In August 2011, Karen began to experience right-sided facial pain. Multiple CT and MRI scans of the head were performed from September 2011 through March 2012. Each scan had been reported as normal. In May 2012, new images of Karen's head were obtained where it was discovered that the source of Karen's unrelenting right-sided facial pain was a salivary gland tumor. Sadly, by May of 2012, the tumor had grown and invaded her skull base and many of the muscles and tissues of the right side of her face. Karen underwent an extensive operation that left her severely disfigured. The cancer surgery had not only left her severely disfigured, but it had also left her without hearing on her right side; without a working jaw bone causing her to be unable to chew her food; without facial sensation causing her to be unable to drink a cup of coffee or hot soup; without the ability to close her eye, leaving her with chronic dry eye and eye strain; because bone from her hip was used to fashion a jaw bone, she was left with chronic hip and knee pain; and, because lymph nodes were removed and skin was taken from her arm for facial grafting, Karen was left with chronic shoulder restriction. Lastly, the medicines Karen needed to take and the radiation she received kept her from her work as a nurse.

Before her injury, Karen was a nurse. Caring for others was at the core of Karen's values. The severe disfigurement left her isolated, depressed and unable to do the very thing that made her who she was—a caretaker. For years after her injury, Karen was unable to face her family, her son and her former life. When we first met, Karen was struggling. She was battling her cancer, her physical injuries, and, most of all, the loss of the most personal part of her physical and emotional being—her face. Like most of us, Karen spent all of her years looking into the mirror and seeing herself as the face in the mirror. Then came the cancer and the surgeries. She was no longer the face in the mirror. She was a stranger to herself. No longer would her friends and family recognize the familiar facial expressions. She felt the cold stares of those who did not recognize her. She was scared and afraid to be seen. She became isolated. She felt alone. But, then, the nurse inside of her called to her and said, *how can I help*?

Karen, a single mother, decided that she would not spend the rest of her life turning her son and family into caretakers. Karen looked for help. When she realized that there was nothing for the severely disfigured like herself, Karen felt that she could make a difference. Karen created, from her caretaker heart, an organization called Face2Face Healing. The organization that Karen created has and continues to help the severely disfigured. Karen has done numerous newspaper and television interviews for her organization. Recently, Karen won the Jefferson Award and went to Washington, D.C. as a finalist for the Kennedy Award. The Jefferson Award Foundation's mission is "To power others to have maximum impact on the things they care about most." The Foundation was founded in 1972 by Jacqueline Kennedy Onassis, Senator Robert Taft Jr., and Sam Beard.

As Karen would put it, "life is so short, I don't want people to hide." Karen wrote a poem that she gave me many years ago and it sits on my desk. I read it regularly.

Here is Karen's poem:

What do you see when you look at me? Do you see the pain I have endured or do you just see my disability?

What do you see when you look at me? Do you see my heart, my faith or inner beauty or do you stare or pretend to be kind and walk past me?

What do you see when you look at me? Do you see who I have become or who I used to be?

What do you see when you look at me? Do you see my eyes full of hope and love or do you see my facial deformity?

What do you see when you look at me? I am much more than my face just take the time and you will see.

What do you see when you look at me? I often I wished and prayed that I could be normal but now I realize this is the new me.

What do you see when you look at me? I am stronger now and your words or looks don't matter cause I know that my family, friends and God loves me unconditionally.

By: Rudy Massa, Esq., of Massa Butler Giglione

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2018 COMEBACK AWARD DINNER PHOTOS

1

2018 Comeback Award Dinner

Nov 28, 2018

Cambria Hotel and Suites, Pittsburgh


2

Pictured from L to R in #1: 2018 Comeback Awardee Karen Scuilli, Comeback Chair Dave Landay.

In #2: 2018 Awardee Karen Scuilli, 2006 Awardee Dave Fleming, 2002 Awardee Phil Macri, 2007/2008 Awardee Carrie Lee Coyer, 2012 Awardee Davanna Feyrer, 2001 Awardee Beckie Herzig.

In #3: Caroline Fleming, Past President Josh Geist, Susan Geist, 2006 Awardee Dave Fleming.

In #4: Board of Governors Member Shawn Kressley, Past President Chris Miller, Board of Governors Member Max Petrunya.

In #5: Past President Bill Goodrich, Harry Cohen.

In #6: 2018 Awardee Karen Scuilli, Rudy Massa, 2012 Awardee Davanna Feyer (both clients of Rudy Massa).

In #7: Katie Monbaron, Kevin Peck, Secretary Mark Milsop, Treasurer Erin Rudert.


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IMPORTANT RULING ON JURISDICTION PENDING

A Pennsylvania Superior Court panel recently issued an important ruling concerning jurisdiction in *Murray v. Am. LaFrance, LLC*, 2018 PA Super 267 on September 25, 2018. Specifically, the Court held that personal jurisdiction was proper where the defendant had registered as a foreign corporation in Pennsylvania. More recently, the Court entered an Order dated December 7, 2018 granting reconsideration *en banc* and withdrawing its prior opinion.

Accordingly, *Murray* will be an interesting case to watch to see how the issue of jurisdiction plays out in that Court and possibly at the next level.

In *Murray*, the plaintiffs were members of the New York Fire Department who suffered hearing loss as the result of excessive sound exposure from fire engine sirens. The actions in question were based on strict liability and negligence. The Defendant was the manufacturer of the sirens.

The defendant manufacturers filed preliminary objections on the basis of jurisdiction which were granted by the trial court. The Superior Court reversed on appeal despite the Defendant's assertion that

· its principal place of business is in Illinois;

· it does not have corporate offices in Pennsylvania;

· it is not a Pennsylvania domestic company;

· it does not own or lease real property in Pennsylvania;

· it does not have bank accounts in Pennsylvania;

· it does not design or manufacture any products in Pennsylvania; and

· its contacts with Pennsylvania are minimal.

Murray v. Am. LaFrance, LLC, 2018 PA Super 267

After determining that this was an issue of first impression for the Superior Court, Judge Platt turned his analysis to the jurisdiction statute which provides, in pertinent part:

> 2) Corporations.—
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
>
> (ii) Consent, to the extent authorized by the consent.
>
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.C.S.A. § 5301(a)(2).

The Court thereafter concluded that by registering to do business, the Defendant had consented to jurisdiction. Judge Bowes filed a dissenting opinion.

THESE RULES APPLY TO THE RELUCTANT PHYSICIAN

I recently had a case where a treating doctor was reluctant to testify and less than cooperative with scheduling a deposition for use at trial. As a result, I thought that the applicable ethical rules may be helpful to others. In cases such as these, it is helpful to gently remind the physician of his or her ethical duties. These duties are clearly laid out by the American Medical Association in Code of Medical Ethics Opinion 9.7.1. That opinion states:

> Medical evidence is critical in a variety of legal and administrative proceedings. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.
>
> Whenever physicians serve as witnesses they must:
>
> (a) Accurately represent their qualifications.
>
> (b) Testify honestly.
>
> (c) Not allow their testimony to be influenced by financial compensation. Physicians must not accept compensation that is contingent on the outcome of litigation.

The Code further addresses situations in which the physician's testimony could be adverse to the patient and provides:

> (f) Declining to testify if the matters could adversely affect their patients' medical interests unless the patient consents or unless ordered to do so by legally constituted authority.

The foregoing provision may seem to be a mere technicality unless it is remembered that opinion testimony cannot generally be compelled.

The foregoing opinion is available online at https://www.ama-assn.org/delivering-care/medical-testimony.

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

mmilsop@bargerandgreen.com

As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

New IRE Law Considerations

As most readers will know, the Legislature passed and the governor signed a bill reinstating the use of Impairment Rating Evaluations as a tool to end Temporary Total Disability Benefits. The essentials of the law are that once an injured worker has received 104 weeks of benefits, the worker can be compelled to submit to a rating evaluation. If the impairment rating is 35% or more, the Claimant remains on total disability. Below that, the Claimant comes partially disabled and the 500 weeks begins to run.

The Legislature chose the 6th Edition under which the evaluations are to be made. The Legislature also crafted what is essentially a retroactivity clause. In section 3 of the bill, the Legislature provided that an employer is given credit for weeks of total disability compensation paid prior to the effective date of the paragraph. Furthermore, the Legislature, in the same section, determined that any weeks of partial disability that had been paid prior to the effective date of the Act were also a credit against the 500 weeks. This retroactive application will be the subject of constitutional challenges to this variance of a substantive right.

Many practitioners have been confronted with scheduling of Impairment Rating Evaluations as of this writing. Many of them are taking the position that since 104 weeks have passed from the date the Act became effective, that the exam is not timely. Therefore, practitioners are refusing examinations and litigation is commencing. The question going forward will be what was the status of the Claimant and, therefore, the status of the law prior to the effective date of the Act. Given the arguments that the Supreme Court rendered the prior Impairment Rating Evaluation portion of the statute unconstitutional, the argument follows that the Act was void ab initio. If that argument prevails, then there should have been no partial disability paid under the Act. Furthermore, if the prior Act was void ab initio, the status of the law at the time was that all Claimants were on total disability. Therefore, the argument becomes that employers must wait 104 weeks from the effective date of the new Act to get an Impairment Rating Evaluation.

Arguably, the new impairment rating bill delegates authority to the AMA. There is a school of jurisprudential thought that the Legislature can adopt, as its own standard, that of a private entity. However, the language of the Supreme Court in the Protz Decision calls that into question. The Commonwealth Court had found that a delegation to a private entity in and of itself was unconstitutional. The Supreme Court did not go that far, but noted that private entities are "shielded from political accountability." It noted that its "precedents have long expressed hostility toward delegations of governmental authority to private actors." It ultimately concluded that its holding in Protz "should not be read as an endorsement or rejection of the Commonwealth Court's view that the delegation of authority to a private actor is ***per se*** unconstitutional. Nor do we disclose the distinct possibility that a more exacting form of judicial scrutiny is warranted when the General Assembly vests private actors with regulatory or administrative powers. " Therefore, the potential challenge to delegation to the AMA remains viable.

There will be numerous battles regarding status of law and constitutional issues. The Amicus Committee of the Pennsylvania Association for Justice is involved in cases of this nature already. The Committee welcomes anyone who would like assistance in these matters.

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

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Tuesday, Feb 5, 2019

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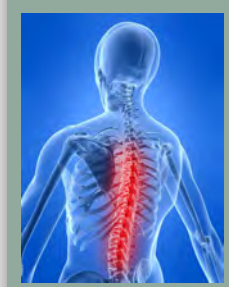

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***The Hartford Insurance Group on behalf of Chunli Chen v. Kafumba Kamara, et. al.,* No. 24 EAP 2017 (November 21, 2018, Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2018).**

Pa. Supreme Court holds that the right of action against the tortfeasor remains in the injured employee and unless the injured employee assigns his or her cause of action or voluntarily joins the litigation as a party plaintiff, a workers' compensation insurer may not enforce its statutory right to subrogation by filing an action directly against the tortfeasor.

On October 10, 2013, Chunli Chen was standing in the parking lot of a Thrifty Rental Car when she was struck by a rental vehicle driven by Kafumba Kamara (Kamara and Thrifty Car Rental collectively referred to as "tortfeasors"). At the time of this incident, Ms. Chen was in the course and scope of her employment with Reliance Sourcing Inc. She suffered injuries to her head, back and neck. Reliance Sourcing's insurer, Hartford Insurance Group ("Hartford"), paid $59,424.71 in medical and wage benefits to Ms. Chen pursuant to her workers compensation insurance policy.

Ms. Chen did not seek to recover damages for her injuries by filing a third-party action against the Kamara, or Thrifty Rental Car. On September 15, 2015, just before the two-year statute of limitations was about to expire on Chen's cause of action, Hartford sought to effectuate its subrogation right under the Workers' Compensation Act ("WCA"), by filing a praecipe for a writ of summons against the tortfeasors. Thereafter, Hartford filed a Complaint in Civil Action against the tortfeasors, which captioned the plaintiff as "The Hartford Group on behalf of Chunli Chen" and contained two negligence counts, each asserting that the tortfeasors were liable to Hartford and to Chen for her injuries. The complaint was not verified by Chen, but rather Jaime Young, a Workers Compensation Subrogation Specialist for The Hartford.

The tortfeasors filed preliminary objections in the nature of a demurrer, claiming that the complaint should be dismissed because: 1) Hartford's attempt to enforce its subrogation rights in an action filed directly against the alleged third-party tortfeasors was prohibited by the Supreme Court's previous decision in *Liberty Mutual Insurance Co. v. Domtar Paper Co.*,113 A.3d 1230 (Pa. 2015), which required Chen to actually be a party to the action; and 2) the verification was not signed by Chen but, rather, a representative of Hartford who had no first-hand knowledge of the accident. The trial court issued an order sustaining the preliminary objections and dismissed the insurer's complaint with prejudice.

On appeal to the Pennsylvania Superior Court the trial court's ruling was vacated and remanded for further proceedings. The Superior Court held that Hartford's Complaint was not precluded by *Domtar Paper* because Hartford was not pursuing a subrogation claim directly against the tortfeasors. Instead, Hartford had filed an action to establish the liability of the tortfeasors to Chen.

The Supreme Court granted allowance of appeal to examine whether their decision in *Domtar Paper* permitted a workers' compensation insurance carrier to enforce its subrogation rights under Section 319 of the WCA by filing an action against the alleged third-party tortfeasors "on behalf of" the injured employee when that employee has not assigned her cause of action or voluntarily joined the litigation as a party plaintiff.

During its analysis, the Court noted that Hartford was attempting to proffer a more literal interpretation of *Domtar Paper* by suggesting that because its action was commenced "on behalf of" Chen, Hartford had filed the action "in the name of" Chen, thereby utilizing an accepted method to enforce its subrogation rights. Noting that the WCA is to be interpreted for the benefit of the worker, the Court declined Hartford's invitation to facilitate an insurer's ability to recoup workers' compensation benefits at the expense of placing the injured worker's independent cause of action in peril. The Court observed that a workers' compensation insurance carrier would have every incentive to limit its focus of the litigation against a third-party tortfeasor to the subrogation amount and would have no incentive or obligation to pursue the injured employee's independent claims, such as those seeking compensation for pain and suffering. Consequently, an insurer could swiftly file a lawsuit on behalf of the injured employee without his or her knowledge and obtain a settlement from the third-party tortfeasor before the employee had even decided whether to pursue an action to recover sums for noneconomic damages, thereby extinguishing the injured injured worker's independent claims.

In a 5-2 majority opinion by Justice Baer, the Supreme Court re-affirmed the well-settled proposition that the right of action against the tortfeasor remains in the employee and unless the

(Continued on Page 16)

injured employee assigns his or her cause of action or voluntarily joins the litigation as a party plaintiff, the insurer may not enforce its statutory right to subrogation by filing an action directly against the tortfeasor. The Court found that sanctioning a workers' compensation carrier to pursue litigation of the injured employee by captioning the complaint as "on behalf of" the employee and including bald assertions seeking any recovery due the employee, contravenes the jurisprudence establishing that it is the injured worker who retains the cause of action against the tortfeasor.

***Murray et. al. v. American LaFrance et. al.*, 2018 Pa. Super. 267 (Pa. Super. Sept. 25, 2018)**

As a matter of first impression, the Superior Court held that a foreign corporation being registered to do business in Pennsylvania under 42 Pa. C.S.A. §5301(a)(2) amounted to consent by that foreign corporation to personal jurisdiction within the Commonwealth.

Plaintiffs filed complaints in the Philadelphia County Court of Common Pleas alleging that they suffered hearing loss as a result of excessive sound exposure from fire engine sirens while working for a fire department. Specifically, they asserted claims of strict liability and negligence against Defendant, Federal Signal Corporation ("Federal"), a manufacturer of sirens. Federal filed preliminary objections to the Complaint arguing that the court lacked personal jurisdiction over it because: its principal place of business was in Illinois; it did note have corporate offices in Pennsylvania; it was not a Pennsylvania domestic company; it did not own or lease real property in Pennsylvania; it did not have corporate offices in Pennsylvania; it did not have bank accounts in Pennsylvania; it did not design or manufacture any products in Pennsylvania; and its contacts in Pennsylvania were minimal. The trial court sustained the preliminary objections of Federal finding that it was not "at home" in Pennsylvania and therefore Plaintiffs Complaint was dismissed for lack of personal jurisdiction.

On appeal to the Superior Court of Pennsylvania, the Plaintiff-Appellees claimed that Federal had consented to jurisdiction in Pennsylvania when it registered as a foreign corporation under the Pennsylvania Registration Statute, 42 Pa. C.S.A. 5301(a)(2). The Superior Court began it analysis by noting that the issue of whether a foreign corporation had consented to general personal jurisdiction in Pennsylvania by registering to do business in the Commonwealth was a matter of first impression. In fact, neither the Superior Court nor the Supreme Court had the occasion to determine whether registering to do business as a foreign corporation in the Commonwealth established consent for purposes of exercising personal jurisdiction since the United States Supreme Court's decision in *Daimler AG v. Bauman* (134 S. Ct. 746 (2014)[1] .

In its analysis, the Superior Court relied upon and cited with approval, the recent federal district court decision in *Bors v. Johnson & Johnson*, which considered whether *Daimler* eliminated consent by registration under section 5301 as a basis for jurisdiction in Pennsylvania. 208 F. Supp. 3d. 648 (E.D. Pa. 2016). The Superior Court found that section 5301 specifically advised the registrant of the jurisdictional effect of registering to do business. Therefore, the Court concluded that registering to do business under section 5301 remained a valid form of establishing personal jurisdiction in Pennsylvania, even after the *Daimler* decision. Because Federal had registered as a foreign corporation to do business in Pennsylvania under the registration statute, the Superior Court held that it had consented to general jurisdiction in Pennsylvania. The ruling of the trial court was reversed and the Plaintiffs' Complaint was reinstated.

**** Editor's Note: Following the submission of Hot Off The Wire, the Superior Court retracted its opinion and issued an order permitting reargument en banc in the Murray case. Please see By The Rules for additional discussion of this issue.***

Newhook v. Erie Ins. Exch., 1917 EDA 2017 (Pa. Super. April 25, 2018, Memorandum)

Pa. Superior Court holds that a new rejection of stacking waiver is required when a car is added to an existing policy via endorsement and/or amended declarations page.

In August of 2007, Kenneth Newhook ("Newhook") purchased a three-car automobile insurance policy with Erie. Newhook purchased $100,000.00 in UM/UIM coverage, but he signed waivers rejecting stacked coverage. Thus, the policy provided for $100,000.00 in unstacked benefits.

From 2007 to 2013, Newhook added and removed several vehicles from this policy. On August 21, 2012, Newhook renewed the policy. In October of 2012, Newhook added a new vehicle to the policy. He added a second new vehicle to the policy in July of 2013. Both of these vehicles were listed on the policy by the issuance of an amended declarations page at the time they were purchased. Newhook neither received nor

(Continued on Page 17)

[1]*Daimler held that due process did not permit exercise of general personal jurisdiction over a corporation in a state where that Defendant was not "at home".*

executed a new stacking waiver form for either of these automobiles.

On August 21, 2013, Newhook's Erie policy was again renewed. On August 22, 2013, Newhook was injured in an automobile accident with an uninsured motorist. He suffered severe and debilitating injuries, including a traumatic brain injury requiring surgery to place a shunt in his brain. Due to the extent of his inquiries, Newhook was unable to return to any type of gainful employment. As a result of the injuries he sustained in the motor vehicle crash, Newhook sought $400,000.00 in UM coverage from Erie, arguing that he had stacked coverage because the insurer had failed to obtain new, signed rejection of stacking forms when the new cars were added in October of 2012 and July of 2013. Erie denied the claim and, instead paid Newhook $100,000.00, in unstacked UM benefits.

Newhook filed a Complaint in the Court of Common Pleas of Monroe County setting forth claims for declaratory relief, breach of contract, bad faith and unfair trade practices. Newhook and Erie filed cross-motions for summary judgment. The trial court granted Newhook's motion for summary judgement on the claim for declaratory relief, finding he was entitled to stacked UM benefits in the amount of $400,000.00. Erie filed an appeal to the Superior Court of Pennsylvania.

The Superior Court found that the case was controlled by its previous decision in *Bumbarger v. Peerless Indem. Ins. Co.,* 93 A.3d 872 (Pa. Super. 2014) (*en banc*). In *Bumbarger*, the Superior Court held that where additional vehicles were added to an existing multi-vehicle insurance policy pursuant to the policy's endorsement provision, the after-acquired vehicle clause in the policy was irrelevant and the insurer was required to present the insured with a new opportunity to waive stacked coverage.

In the instant case, Newhook's vehicles were added to his existing policy via endorsement, i.e. the issuance of an amended declarations page. The Court held that in such a circumstance, the newly acquired clause is not invoked and plays no role in adding the new vehicle to the policy. Accordingly, under the principles announced in *Bumbarger,* Erie was required to provide Newhook with a new stacking waiver form when he added two new vehicles to the policy in October 2012 and again in July 2013. Because Erie failed to comply with this mandate, the trial court properly entered summary judgment in favor of Newhook on his declaratory judgment action finding that he was entitled to $400,000.00 in stacked UM benefits under the policy.

Fisher v. Erie Ins. Exch. No. 2016 GN 298 (Blair C.P. May 9, 2018)

Trial court denies auto insurer's motion to severe UIM and bad faith claims.

On July 19, 2013, Helen Fisher ("Fisher") was injured in a motor vehicle accident with an underinsured motorist. After amicably resolving the third-party case against the tortfeasor, Fisher then pursued a UIM case with her auto insurance company, Erie. A lawsuit was subsequently filed by Fisher against Erie, which contained claims for breach of contact and bad faith.

During the course of litigation, Erie filed a Motion for Protective Order and to Sever and Stay Bad Faith Discovery. Therein, Erie contended that severing the claims would promote judicial efficiency and that denying the motion to sever would lead to delays in adjudication as the result of unnecessary discovery disputes. In an Opinion and Order, the trial court denied Erie's Motion.

The trial court's analysis found that although a breach of contract claim and a bad faith claim are distinct causes of action, they are not dissimilar. *Jones-Silverman v. Allstate Fire & Cas. Ins. Co.,* WL 3262453 at *3 (E.D. Pa. July 2017). Further, the potential for discovery disputes alone does not warrant staying a bad faith claim. The trial court also found merit in Fisher's argument that discovery sought in the case would be reasonably calculated to lead to the discovery of admissible evidence for all viable claims and that whether discovery is related to one claim or another is not a bright-line determination. The Court found that the similarity and overlap between the breach of contact and bad faith claims and the discovery sought weighed in favor of denying a severance of the claims. Any potential conservation of judicial resources that could result from bifurcation would be outweighed by the uncertainty that bifurcation would actually cause the bad faith claim to be moot.

The trial court also held that this issue should always be decided on a case by case basis. The court was not persuaded by Erie's argument that denying this motion would create a split of authority within Blair County based on a prior decision. The trial court noted that the decisions were different because they involved factually distinct cases. The trial court also pointed to other decisions in Blair County which had denied motions to sever and stay bad faith proceedings that were similar to the facts in the instance case. *See Swan v. Moorfield*, No. 2014 GN 2606 (C.P. Blair Co., Nov. 9, 2017).

(Continued on Page 18)

HOT OFF THE WIRE *(Continued from Page 17)*

Eberhard v. Pettis, No. 2014-CV-74818 CV (Dauphin C.P. January 31, 2018)

Plaintiff's counsel, or other representative, only permitted to attend and record the interview portion of defense expert's neuropsychological examination of the Plaintiff; not the standardized testing phase.

At a status conference, a dispute ensued between the parties over whether Plaintiff's counsel or a representative could attend the defense expert's neuropsychological examination of the Plaintiff. The trial court issued an order stating the Plaintiff was permitted to have his counsel, or other representative, present during the interview portion of the neuropsychological evaluation. However, the Plaintiff was not permitted to have his counsel, or other representative, present during the standardized testing of the evaluation. The Plaintiff was also not permitted to record the standardized testing portion of the evaluation.

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

shawn@dmlawpgh.com

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 31, 2018-2019

	ARTICLE DEADLINE	TARGET PUBLICATION DATE
Vol 31, No. 3	Mar 8, 2019	Mar 22, 2019
Vol 31, No. 4	May 31, 2019	June 14, 2019

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Trivia Question #17

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Please submit all responses to Laurie at laurie@wptla.org with "Trivia Question" in the subject line. Responses must be received by March 1, 2019. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of March 4, 2019. The correct answer to Trivia Question #17 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 #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? The Mausoleum at Halicarnassus, which was believed to be destroyed by an earthquake, although it was likely falling into ruins before its "destruction."**

Congratulations to Question #16 winner Doug Price, of Harry S. Cohen & Associates.

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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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It should come as no surprise that Thomas Jefferson, the first man to officially declare American freedom from Britain and the first to criticize large federal government, was a proponent of religious freedom. In the contentious time following the birth of his country, Jefferson penned a letter to the Danbury Baptist Association in which he referred to a "wall of separation between Church & State" that, in order to preserve the liberties of his fledgling nation, could not be torn down (Jefferson). While much has changed since Jefferson's day, this pillar of American freedom has not. In fact, we still use Jefferson's very words today-in America, we enjoy a separation of church and state as detailed in the Establishment Clause. Our government owes it to both the memory of our founding fathers and the rights of our citizens to maintain that separation. When it is breached, the government bears responsibility to correct the mistake.

Bremerton School District did precisely this when it placed football coach Joseph Kennedy on administrative leave for exercising his religious beliefs on the field and, in doing so, did not violate his First Amendment rights to freedom of speech. The speech in question could not have occurred had he not been a public employee; furthermore, it swayed the minds of his impressionable young students. Kennedy's actions place him squarely in the crosshairs of the Establishment Clause.

In order to prove that his First Amendment rights were violated, Kennedy had to *(Continued on Page 22)*

follow the framework laid out in *Eng v. Cooley* that addresses the First Amendment concerns of public employees. While the speech in question was certainly a "substantial or motivating factor in the adverse employment action," in this case, the administrative leave, and definitely was "a matter of public concern," it did not fulfill the other important aspect of this framework. In addition to those requirements, Kennedy also had to prove that he spoke "as a private citizen" (*Eng v. Cooley* 523). In his capacity as a football coach, Kennedy ceased to be a private citizen. Rather, he represented the Bremerton School District, which in turn represented the educational arm of the state government. Perhaps nothing illustrates this problem more plainly than the fact that Kennedy conducted these prayers while wearing "a shirt or jacket bearing the BHS logo" *(Kennedy v. Bremerton School District* 6). While his religious affairs may be completely separate from his work as a coach, any reasonable viewer could infer the school district's-and therefore, the state's-tacit approval of a religious practice. The school district attempted reasonable negotiation with Kennedy prior to placing him on administrative leave. They offered Kennedy a private place to pray directly following the game, so as to comply with his religious beliefs, as well as the opportunity to return to the fifty yard line after the stadium emptied. Kennedy's refusal to comply with these accommodations indicates that he felt these prayers needed, in some way, to be public. Furthermore, *Garcetti v. Ceballos* found that speech such as Kennedy's, which owes its very existence to his position, can be restricted without infringing upon "any liberties the employee might have enjoyed as a private citizen" (10). Without his coaching job, Kennedy would have never had the opportunity to magnify his voice in this fashion. For example, Kennedy's intentions to continue praying on the field post-reprimand were "widely broadcast" due to Kennedy's multiple media appearances *(Kennedy* 9). These media appearances only occurred because he was a prominent and decidedly public figure. All of this caused a substantial risk for Bremerton School District, which justifiably feared it was facing violation of the separation of church and state by allowing Kennedy to continue.

Furthermore, whether or not he intended for the speech to influence his students, Kennedy took advantage of a captive audience by praying immediately after games. As per his contract with the Bremerton School District, Kennedy was meant to be a "role model" for students in his care *(Kennedy* 5). By continuing his conduct on the field, Kennedy demonstrated, whether intentionally or not, that students should be emulating his religious behavior. While Kennedy claims that he did not "request, encourage, nor discourage" students from participating, he did have a noticeable impact on their behavior *(Kennedy* 9). Players chose to pray "only at the games where Kennedy elected to do so" *(Kennedy* 14). This indicates that these students were not voluntarily choosing to participate in prayer. Rather, they only participated when they felt that it was necessary to do so--whether to gain Kennedy's approval or the approval of their peers. Kennedy, as an assistant coach, had the ability to restrict a student's playing time if they chose not to participate. Furthermore, they may have felt ostracized from their peers if they elected not to pray. Though Bremerton School District is "religiously diverse," Christianity remains the dominant religion in the United States *(Kennedy* 4). 70.6% of the nation identifies as some sort of Christian ("Religions in America"). It is logical to assume, therefore, that non-Christian students would feel a significant amount of pressure to conform, particularly because a prominent figure in their lives like a coach seemed to encourage the behavior. Regardless of Kennedy's intentions, students saw both him and their peers engage in the activity, which seemed to promote it. Furthermore, Kennedy's status as a role model for students solidifies the case for his speech being considered public rather than private. In order to determine whether speech is public, "a factual determination must be made as to the scope and content of a plaintiff 's job responsibilities" *(Johnson v. Poway Unified School District* 17343). Kennedy's job responsibilities included being a positive role model for his students. His religious speech factored into this responsibility, as Kennedy saw himself as improving his students' lives, which confirms that this speech was in fact part of his job and therefore public.

Even if Kennedy's speech had been not both public and influential to his students in some capacity, his actions as a government employee still violated the Establishment Clause and therefore warranted administrative leave. The fourth factor outlined in *Eng v. Cooley* is that the school district must prove that it "had an adequate justification for treating the employee differently from other members of the general public" in order to

(Continued on Page 23)

claim Kennedy's First Amendment rights were not violated (535). Fortunately for Bremerton School District, it is able to do so. The Establishment Clause forbids the state-and by extension, state-run public schools such as Bremerton School District-from "conveying or attempting to convey that religion or a particular religious belief is favored" *(Lee v. Weisman* 604-605). *Wallace v. Jaffree* established that this occurs when an "objective observer...would perceive it as a state endorsement of prayer in public schools" (472). In his capacity as coach, Kennedy appeared to endorse religion, so a student observer at a Bremerton High School football game would understandably take his behavior as Bremerton School District's "endorsement of religion or encouragement of prayer" *(Kennedy* 41). Both the timing and circumstances of Kennedy's prayer support this assumption. Despite an invitation to pray in a less obvious place or at a less obvious time, Kennedy repeatedly chose to pray in the most prominent place on the field-the fifty yard line-before the stadium had emptied. Furthermore, his attire, which sported the Bremerton School District logo, suggested that BSD had given his presence a stamp of approval. The school district, therefore, was justifiably concerned that they were headed for a violation of the Establishment Clause by allowing Kennedy to continue. When he refused the opportunity to make his prayer less prominent, he forced the district's hand. At that point, the administration's best course of action was administrative leave.

Clearly, Bremerton School District was justified in placing Mr. Kennedy on administrative leave. Although they attempted to accommodate his beliefs, he chose not to take those accommodations, leaving them with little recourse. His speech was conducted as a public figure representing the state, due to his positioning on the field and the clothes he wore at the time. Additionally, this speech had a direct influence on the impressionable young minds that Kennedy had the opportunity to shape every day; as a public school employee, this shaping cannot include religious activity without violating the Establishment Clause. In the same vein, the Bremerton School District was justifiably concerned that Kennedy would prove to be a legal concern for the district because of that clause. When Thomas Jefferson sat down to pen a letter in 1802, he certainly was not imagining a coach kneeling on the fifty yard after a football game. Regardless, his sentiment would remain the same in today's world-the state has a responsibility to its citizens to allow their children to form their own opinions regarding religion. A high school football coach cannot make such a momentous decision for them.

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Essay written by Riley Smith of North Allegheny Senior High School, Pittsburgh, PA

ANNUAL JUDICIARY DINNER

Friday, May 3, 2019

Heinz Field, Pittsburgh

Look for your invitation in the Spring!

STEELWHEELERS 5K RECAP

On Saturday, October 20, 2018, the Western Pennsylvania Trial Lawyers held its 18th annual President's Challenge 5K Race/Walk/Wheel benefitting the Pittsburgh Steelwheelers. The family friendly event began at the North Park Boathouse which provided on-site parking, changing rooms and a recreational area for children. Over 200 people registered to race, walk or wheel the 3.1-mile course through scenic areas around Lake Shore Drive. The race recognized place winners in the Wheeler, men's, women's, youth and WPTLA categories with an award and all youth participants received medals.

The Steelwheelers are a non-profit organization formed in the late-1970's by athletes who turned a dream of creating a wheelchair basketball team into reality. This Pittsburgh-based organization provides wheelchair sports opportunities to athletes in the Western Pennsylvania area and fields teams for wheelchair basketball, rugby, track and road racing. The annual 5K event is the primary funding source for the club's activities.

I would like to thank all of the sponsors, participants and volunteers, particularly Laurie Lacher, Bob and Lorraine Eyler, Chad McMillen, Dave Zimmaro and Katie Kenyon. A special thanks to all those Western Pennsylvania Trial Lawyer members who came out with family and friends to support the event which raised over $31,400.00 for the Steelwheelers. Four-time defending Team Champion Edgar Snyder once again locked up the Past President's Cup awarded to the WPTLA team with the best overall time.

With continued support from our membership, partners and sponsors, we hope to build upon the success of the event and will be returning to North Park next year on October 12, 2019. Please help us support the Steelwheelers at next year's event.

Photos on p.25

By: Sean Carmody, Esq., of Carmody & Ging

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WILLS CLINIC CALL TO ACTION

If your New Year's Resolution involves an effort to give back to your community through legal service, please consider donating a small amount of time to serve through WPTLA's Wills Clinic.

OPERATION BETTER BLOCK

Contact our Executive Director Laurie Lacher for more information on how to volunteer. Contact Chair Greg Unatin (gunatin@meyersmedmal.com) to find out what is involved.

The time commitment is minimal and no prior experience with wills or estate planning is required. All necessary forms are provided, as is work space in which to meet the clients.

Jacqueline Conyers, a Wills Project Client, says the experience has made her life better because her will is "something I don't have to worry about."

Lorraine Mills, who "did not have the money for an attorney ... can rest now that an important part of dying is taken care of."

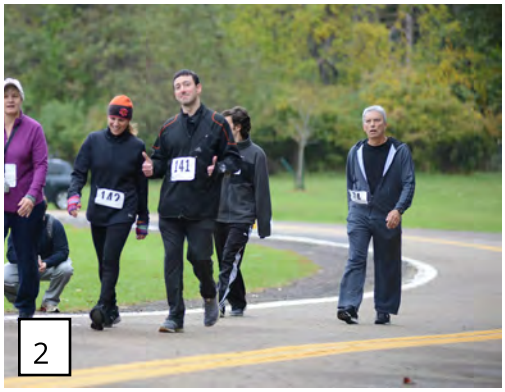
Darrel Strong, who "had been thinking about if for some time now", acted "when the opportunity came about" and "can sleep much better" now.

STEELWHEELERS 5K PHOTOS

5K Run/Walk/Wheel

Oct 20, 2018

North Park, PA



Pictured above, from L to R, in #1: The official start of the 5K Run/Walk

In #2: Sydne Unatin, Board of Governors Member Greg Unatin, Vice President Dave Landay

In #3: Pete Giglione

In #4: Past President and Board of Governors Member Chad Bowers and Board of Governors Member and 5K Committee Member Chad McMillan

In #5: Participating members of the Pittsburgh Steelwheelers, along with President Bryan Neiderhiser, Executive Director Laurie Lacher, 5K Race Chair Sean Carmody

In #6; 2 of the 4 Members of the 5K Cup Challenge winning team - Ma'Kin Cornick and Guido Gurrera, of Edgar Snyder & Associates

Photo credit to Chuck Tipton

In #7, Members of the Pittsburgh Steelwheelers Rugby Team, at their Oct 2018 tournament at Slippery Rock. (Photo provided by the Steelwheelers)

WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
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Through the Grapevine....

Speedy recovery to **Emeritus Member Warren Ferry**, who is convalescing from a broken foot.

Young Lawyer Carolyn Boucek is now working at Eckert Seamans, 600 Grant St, 44th Fl, Pittsburgh 15219. P: 412-566-6122 email: cboucek@eckertseamans.com

President's Club Members Russell Bopp and Bradley Holuta have joined the firm of Marcus & Mack as associate attorneys. P: 724-349-5602 rbopp@marcusandmack.com bholuta@marcusandmack.com

Kudos to **Past President Chris Mille**r on being appointed by the PA Supreme Court to the PA Disciplinary Board for a 3 year term, effective Sept, 2018.

Congratulations to **Board of Governors Members Brittani Hassen and Katie Killion**, on becoming partners at the firm of Kontos Mengine Killion & Hassen.

Happy retirement to **Diane Zack Buchanan**, of Strassburger, McKenna, Gutnick, & Gefsky, effective Jan, 2019.

Our most sincere condolences to the co-workers, friends and acquaintances of member **Rolf Patberg**, on his untimely passing.

Member Darrell Kuntz has joined Sebald & Hackwelder, and can be reached at 2503 W 26th St, Erie 16506 P: 814-833-1987 d.kuntz@sebaldhackwelder.com